

OPINION NO. 73-096**Syllabus:**

R.C. 5579.04 does not require the use of herbicides in destroying weeds along county and township roads, and R.C. 5589.11 imposes no liability upon local officials for cutting such weeds instead of spraying them with herbicides.

To: Michael Nolan, Athens County Pros. Atty., Athens, Ohio
By: William J. Brown, Attorney General, September 26, 1973

I have before me your request for my opinion regarding the following questions:

1. Does the requirement of Section 5579.04 of the Revised Code that Boards of County Commissioners and County Engineers "destroy * * * all brush * * * or other noxious weeds * * * growing within the limits of a county or township road" contemplate more complete destruction (as by the

application of herbicides) than that achieved by cutting such brush and weeds pursuant to Section 5579.08 of the Revised Code?

2. If the Board of County Commissioners does not approve the use of herbicides to destroy weeds and brush, is the county engineer relieved from the liability of Section 5589.11 of the Revised Code if he merely cuts the weeds and brush?

The relevant statutes involved are R.C. 5579.04, 5579.08 and 5589.11. R.C. 5579.04 provides that:

A board of county commissioners, board of township trustees, or street commissioners of a municipal corporation, having control of and being charged with the duty of repairing macadamized, graveled, or improved roads, and county engineers, township road superintendents, and the street commissioners of each municipal corporation, between the first and twentieth days of June, the first and twentieth days of August, and, if necessary, between the first and twentieth days of September of each year, shall destroy all brush, briars, burrs, vines, Russian, Canadian, or common thistles, or other noxious weeds, growing within the limits of a county or township road, or improved, graveled, or macadamized road, street, or alley within their jurisdiction. (Emphasis added.)

R.C. 5579.08 provides:

All brush, burrs, vines, and Russian, Canadian, or common thistles, or other noxious weeds growing along the public highway shall be cut between the first and twentieth days of June, the first and twentieth days of August, and, if necessary, between the first and twentieth days of September of each year. This work shall be done by the board of township trustees in its respective township, or by the township highway superintendent, who may employ the necessary labor to carry out this section. All expenses incurred shall, when approved by the board, be paid from the township road fund by the township clerk, upon his warrant. (Emphasis added.)

R.C. 5589.11 provides:

No person, charged with the duty of cutting, destroying, or removing any weeds, briars, or bushes upon or along a public highway shall willfully fail, neglect, or refuse to cut, destroy, or remove such weeds, briars, or bushes within the time fixed by sections 5579.04 and 5579.08 of the Revised Code or on the order of the proper officials.

Your question is based upon the difference between the terms used in R.C. 5579.04 and 5579.08. The latter requires boards of township

trustees to "cut" weeds along certain roads, while the former requires boards of county commissioners, among others, to "destroy" weeds along certain roads. It is thought that "destroy" is a more general term than "cut", and therefore that R.C. 5579.04 may impose a duty to do more than merely cut the weeds, possibly a duty to poison and kill them by spraying herbicides. The penalty statute, R.C. 5589.11, uses the language "cut, destroy, or remove * * *."

A difference in terms of two related statutes ordinarily indicates that a different meaning is intended. However, if such is the case here the meaning is not that suggested in your letter. While cutting and spraying are the two common methods of dealing with weeds today, the statutory language in question had its origin almost 100 years ago. A statute enacted in 1875, 72 Ohio Laws 112, provided as follows:

[I]t is hereby made the duty of the supervisors of road districts in this state to cut down, or cause to be cut down all weeds and burrs, and to cut down or cause to be cut down and destroyed upon county and township roads, all bushes and briars growing within the public highways * * *.
(Emphasis added.)

Subsequent enactments of that Section (codified in 1879 as R.S. 4730) consistently employed the words "cut" and "destroy." See 81 Ohio Laws 22 (1884); 93 Ohio Laws 49 (1898). In 1900, R.S. 4730 was amended to provide that officials "shall * * * cut and burn or destroy weeds and brush." 94 Ohio Laws 300.

It appears, then, that the word "destroy" was originally used by the General Assembly to indicate that the trimmings which resulted from cutting weeds and other brush were to be further disposed of after such cutting (as by burning).

Subsequently, the terms "cut" and "destroy" were carried over into G.C. 7146, 7195, and 3374-2, and finally to the statutes under consideration. The language was reformulated many times in a complicated statutory history. No clear definition of the terms "cut" and "destroy" can be inferred from all the statutes. It appears that the two terms were used interchangeably in most cases. My predecessors, although not directly faced with the question, have mentioned that they thought the terms synonymous. See Opinion No. 3678, Opinions of the Attorney General for 1931; Opinion No. 1037, Opinions of the Attorney General for 1927.

From the foregoing it can be seen that the word "destroy" was not originally intended to refer to the poisoning of weeds by spraying herbicides. At first, it meant the destruction of weeds which had been cut and collected. In subsequent enactments its meaning became unclear. When herbicides became available, local authorities apparently considered the term "destroy" general enough to encompass their use. The legality of this practice has not been directly questioned in reported court cases or the Opinions of my predecessors. However, Opinion No. 5839, Opinions of the Attorney General for 1955, does discuss the possible liability of boards of township trustees for the death of domestic animals which have eaten weeds sprayed with herbicides. In discussing R.C. 5579.04 and 5579.03, the then Attorney General stated at 521 as follows:

I would further call attention to the fact that the statute nowhere commands or authorizes

the trustees to use poison, but merely requires them to "cut" or "destroy" the weeds. If they choose the dangerous agency of poison, they must certainly assume the risk.

I deem it proper to call attention to Section 3719.30 of the Revised Code, which reads:

"No person shall leave or deposit poison or a substance containing poison in a common, street, alley, lane, or thoroughfare, or a yard or enclosure occupied by another.

"Whoever violates this section shall be liable to the person injured for all damages sustained thereby."

I cite this statute only as indicating the policy of the state in reference to the promiscuous use of poison. But for the immunity from liability for torts which townships enjoy, it would appear possible for the township trustees to be held liable in appropriate judicial proceedings under this statute, as well as under the statute quoted in reference to road maintenance [R.C. 5571.10], for injuries to stock caused by the negligent use of poison in the highway.

See also Opinion No. 1695, Opinions of the Attorney General for 1958; Opinion No. 3678, Opinions of the Attorney General for 1931.

The reasoning quoted above is even more relevant today, because of the increasing concern at both federal and state levels with the indiscriminate use of herbicides and other "economic poisons". See the Federal Environmental Pesticide Control Act of 1972, Pub. L. 92-516, 85 Stat. 972, amending 7 U.S.C. Section 135 et seq. (1972); and R.C. Chapter 921.

I conclude, therefore, that the use of the term "destroy" in R.C. 5579.04 in no way compels the use of herbicides. Local authorities may choose the method they think best for removing weeds. Thus, if a board of county commissioners chooses to avoid the dangerous practice of spraying herbicides, neither they nor the county engineer can be liable for any omission under R.C. 5589.11.

In specific answer to your question, it is my opinion and you are so advised that R.C. 5579.04 does not require the use of herbicides in destroying weeds along county and township roads, and R.C. 5589.11 imposes no liability upon local officials for cutting such weeds instead of spraying them with herbicides.