

OPINION NO. 80-071**Syllabus:**

Where a property owner in an unincorporated area places an obstruction within the county's right-of-way, blocking a side ditch to a county highway, and the obstruction interferes with the free flow of water and impairs the functioning of the road, the board of county commissioners may do any of the following:

- a) maintain a suit to prevent, abate or remedy said injury, pursuant to R.C. 305.12;
- b) maintain a suit to recover damages caused by either the existence or the removal of the obstruction, pursuant to R.C. 5591.26; or

- c) direct the person to remove or relocate the obstruction, and if removal or relocation is not begun within five days and completed within a reasonable time, employ the necessary labor to perform the removal or relocation, pursuant to R.C. 5547.03, and collect the expense of removal or relocation as other taxes from the property owner.

In addition, in appropriate circumstances, the county prosecutor may, under R.C. 3767.03 and 3767.17, maintain a suit to abate the nuisance or, under R.C. 3767.99, bring a criminal action for violation of R.C. 3767.17.

To: L. Craig Hallows, Miami County Pros. Atty., Troy, Ohio
By: William J. Brown, Attorney General, November 6, 1980

I have before me your letter which requests my opinion on the following questions:

1. If a property owner of land in an unincorporated area places any obstruction (including an embankment, a culvert pipe, field tile or other foreign material) within the county's right-of-way for road purposes, which obstruction interferes with the free flow of water and impairs the function of the road, what authority does the County have to remove said obstruction?
2. Does any authority to remove exist only [as] to the paved portion, or does it extend to the entire right-of-way including the shoulder and ditch portions of the road?
3. If the County has authority to remove such an obstruction can the County do so at the owner's expense? What procedures are available to the County to recover this expense?

In answering the questions you have raised, it is appropriate to begin by briefly reviewing the rights of an abutting landowner to place items within the county's right-of-way for road purposes. Abutting landowners own the fee of the land to the middle of the road, and may use such land in any way not inconsistent with the public easement. Ohio Bell Telephone Co. v. Watson, 112 Ohio St. 385, 147 N.E. 907 (1925); State v. Williams, 3 Ohio Op. 2d 429, 145 N.E. 373 (C.P. Montgomery County 1957).

My predecessor in 1921 Op. Atty Gen. No. 2480, p. 908, 909 stated the following about the uses an abutting landowner may make of his land within the public's easement for travel:

Proceeding to a brief discussion of the rights of the abutting landowners in the use of the public highways, it may be stated as a general principle of law that every landowner whose lands abuts on a highway is supposed to be the owner of the soil to the middle of the highway in fee, subject to the easement of public travel, and may do in the highway on his side of the middle line anything which the owner in fee of land may do; provided, however, that he does not interfere with that easement, 3 Kent's Commentaries, 432; Newton vs. New York, 72 Conn., 420. Such an abutting landowner has by reason of that ownership some privileges in the highway which are not common to the public generally, and it has been held that he undoubtedly possesses the right of free ingress and egress, and for that purpose might grade the surface of the highway if he did not thereby render the same unfit for public travel. He might construct a sidewalk, set hitching posts, place a stepping stone to enable passengers to enter or

alight from a carriage more readily, or he may set out shade trees, etc.; but equally as well, it is a fundamental principle of the law that in the enjoyment of such proprietary privileges, he must not interfere with that easement of the general public to use the highway free and unobstructed for the purposes of public travel. (Emphasis added.)

In addition, the legislature has passed various acts designed to perpetuate the public's easement for road purposes. See, e.g., R.C. 5501.42 (Director of Transportation has responsibility for the supervision of all trees and shrubs within the limits of the state highways as necessary for the construction or maintenance of the highways or for the safety of the traveling public); R.C. 5515.03 (no person shall place any obstruction within the bounds of any state road without first obtaining the consent and approval of the Director of Transportation); R.C. 5547.02 (an abutting landowner must obtain the approval of the county commissioners in the case of a county road, the Director of Transportation in the case of a state highway, or the township trustees in the case of a township road, before he lays a water line within the bounds of any of those roads); R.C. 5547.04 (no person shall erect any obstruction within the bounds of any road, other than a state highway, without the approval of the county commissioners); R.C. 305.12 and 5591.26 (the county commissioners may sue to prevent an injury to any county road that may be caused by an obstruction within the bounds of such road). In sum, then, an abutting landowner is limited as to the uses he may make of his land within the bounds of the road by the public's easement for road purposes, and by those statutes that place additional limits upon the uses that can be made of land within the public's right-of-way. The action which may be taken by abutting landowners are subject to the limitations discussed above. Clearly, an abutting landowner may not impair the function of a public road by causing it to be flooded.

With this background, I now turn to the questions that you have raised. Counties, being creatures of statute, possess only such powers as are given by statute. See, e.g., Commissioners of Mahoning County v. Railway Co., 45 Ohio St. 401, 15 N.E. 468 (1887); Lake County v. Ashtabula County, 24 Ohio St. 393 (1873). Therefore, in order to answer your questions, it will be necessary to review the chapters of the Revised Code governing the authority of counties over highways and ditches.

There appear to be several bases upon which the county may proceed to remove obstructions from the county's right-of-way for road purposes. R.C. 305.12 provides what may be the most appropriate remedy for the situation you have described. R.C. 305.12 states, in pertinent part:

The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain, and defend all suits in law or in equity, involving an injury to any public, state, or county road, bridge, ditch, drain, or watercourse established by such board in its county, and for the prevention of injury thereto. The board shall be liable, in its official capacity, for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair. . . . (Emphasis added.)

Based on authority granted in R.C. 305.12, the county commissioners¹ may maintain an action in law or equity to prevent, abate, or remedy an injury to a county road. You have advised that the items placed in the ditch beside the road interfere with the free flow of the water and cause the road to be flooded,

¹R.C. 5571.09 gives similar authority to the township trustees with respect to township roads.

resulting in an impairment of its function as a highway. Thus, your situation would appear to be tailor-made for an action under R.C. 305.12 to recover damages for past injury to the road and for injunctive relief to prevent future harm.

In addition to R.C. 305.12, the county commissioners have similar authority to sue for any injury caused to a county road under R.C. 5591.26, which states, in pertinent part:

If a bridge, any state or county road, or any public building, the property of or under the control or supervision of a county, is injured or destroyed, or when any state or county road or public highway has been injured or impaired by placing or continuing therein, without authority, any obstruction, or by the changing of the line, filling up or digging out of the bed thereof, or in any manner rendering it less convenient or useful than it had been previously, by a person or corporation, such person or corporation shall be subject to an action for damages. The board of county commissioners of the proper county may sue for and recover of such person or corporation the damages which have accrued by reason thereof, or such as are necessary to remove the obstruction or repair the injury. (Emphasis added.)

This section also expressly authorizes the board of county commissioners to sue for and recover any amounts "necessary to remove the obstruction."

Additional authority for the county to take action in the situation described in your letter is found in R.C. 5547.04, which provides, in pertinent part:

The owner or occupant of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent.

By first obtaining the consent and approval of the board of county commissioners, obstructions erected prior to July 16, 1925 in highways other than roads and highways on the state highway system or bridges or culverts thereon, may be permitted to remain, upon such conditions as are the officials may impose, provided such obstructions do not interfere with traffic or with the construction or repair of such highways.

No person, partnership, or corporation shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction without first obtaining the approval of the board [of county commissioners] in case of highways other than roads and highways on the state highway system and the bridges and culverts thereon.

. . . .

The board [of county commissioners] shall enforce this section and, in so doing, may avail itself of section 5547.03 of the Revised Code. (Emphasis added.)

R.C. 5547.03 provides, in pertinent part:

If, in the opinion of the [county] engineer, such persons, partnerships, or companies have obstructed any such highway, bridges, or culverts, or if any of their properties are, in his opinion, so located that they do or may interfere with the proposed improvement, maintenance, or repair the board [of county commissioners] shall notify such person, partnership, or corporation directing the removal or relocation of the obstruction or property, and, if they do not within five days proceed to so remove or relocate and complete the removal or relocation within a reasonable time, the board [of county commissioners] may do so by employing the necessary labor. The expense incurred shall be paid in the first instance out of any moneys available for highway purposes, and not

encumbered for any other purpose, and the amount shall be certified to the proper officials to be placed on the tax duplicate against the property of such person, partnership, or corporation, to be collected as other taxes and in one payment, and the proper fund shall be reimbursed out of the money so collected, or the account thereof may be collected from such person, partnership, or corporation by civil action by the state on the relation of the board [of county commissioners]. (Emphasis added.)

While "obstruction" is not defined for the purposes of R.C. Chapter 5547, or in any other chapter in Title 55 that uses the word, I stated in 1980 Op. Att'y Gen. No. 80-043 my interpretation of its meaning:

In putting these parts of R.C. 5547.04 together, it becomes clear that the General Assembly intended that the word "obstruction" have a very broad meaning. In order to give effect to this intention of the General Assembly, it appears that "obstruction" must be defined so as to include virtually any object within the bounds of a highway that has been "placed" or "erected" there. In other words, an "obstruction" is any object that has the potential of interfering with the highway easement. An object could interfere with the easement without hindering the flow or traffic or the construction or maintenance of the highway. Whether an object interferes with the easement will depend upon the nature of the object, its size, and its precise location.

Thus, if it is the opinion of the county engineer that the impairment of the county's right-of-way for road purposes constitutes an obstruction, then, pursuant to R.C. 5547.03, the board of county commissioners shall notify the property owner and direct its removal or relocation. If this removal or relocation is not begun within five days and completed within a reasonable time, then R.C. 5547.03 allows the board of county commissioners to "do so by employing the necessary labor."²

Another possible basis for county action, provided the obstruction in question was placed in a county ditch, is found in R.C. Chapter 3767, which governs statutory nuisances. R.C. 3767.03 empowers the county prosecutor to take action to abate a nuisance:

Whenever a nuisance exists. . .the prosecuting attorney of the county in which such nuisance exists. . .may bring an action in equity in the name of the state, upon the relation of such. . .prosecuting attorney. . .to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof.

The definition of "nuisance" appears at R.C. 3767.01, which provides, in pertinent part: "As used in all sections of the Revised Code relating to nuisances: . . .(C) "Nuisance" means that which is defined and declared by statutes to be such. . . ." To determine whether a nuisance exists in the circumstances described in your letter, we must consider R.C. 3767.17, which provides: "No person shall willfully obstruct a ditch, drain, or watercourse constructed by order of a board of county commissioners or by a board of township trustees, or divert the water therefrom." Although R.C. 3767.17 does not expressly declare the action prohibited therein a nuisance, as apparently contemplated by R.C. 3767.01(C), the Ohio Supreme Court in State ex rel. Brown v. Rockside Reclamation, Inc., 47 Ohio St. 2d 76, 83, 351 N.E. 2d 448, 452 (1976), described R.C. 3767.13 (prohibiting the erection of buildings causing noxious odors, the collection

²While R.C. 5547.03 and 5547.04 give some indication that the authority of the county commissioners, in directing the removal of obstructions, extends to all highways, R.C. 5515.02 clearly gives such power to the Director of Transportation with respect to state highways.

of noxious substances injurious to the public, and the obstruction or corrupting of a navigable watercourse) and R.C. 3767.32 (prohibiting the disposal of garbage and waste in a watercourse), statutes similar to R.C. 3767.17, as general nuisance statutes. See also *White v. Kent*, 11 Ohio St. 550 (1860) (holding that any reasonable or unnecessary interference with the transit of the public over the streets is a nuisance and may be prohibited by ordinance). Hence, provided that the ditch in question is one constructed by order of the county commissioners, it would appear that a statutory nuisance action would be an appropriate response to the situation you have described.

In addition, if you believe the facts warrant, you could bring a criminal action for violation of R.C. 3767.17, as R.C. 3767.99 states that violation of R.C. 3767.17 constitutes a minor misdemeanor.

Your second question asks if the authority to remove exists only as to the paved portion of the highway. Under the above statutes it is not necessary that the obstruction be in the paved portion of the highway in order for the county commissioners to have the obstruction removed. It is sufficient that the obstruction be somewhere within the county's right-of-way.

Your third question asks if the county may remove the obstruction at the owner's expense. If the county prevails in any action under either R.C. 305.12 or R.C. Chapter 3767, the court would presumably require removal by the owner or order removal at the owner's expense. R.C. 5547.03 provides for the expense incurred from removal to be "certified to the proper officials to be placed on the tax duplicate against the property of such person. . . , to be collected as other taxes." Finally, R.C. 5591.26 specifically provides that, in an action under that section, the board of county commissioners "may sue for and recover. . . the damages which have accrued. . . or such as are necessary to remove the destruction or repair the injury."

In light of the foregoing, it is my opinion, and you are hereby advised, that where a property owner in an unincorporated area places an obstruction within the county's right-of-way, blocking a side ditch to a county highway, and the obstruction interferes with the free flow of water and impairs the functioning of the road, the board of county commissioners may do any of the following:

- a) maintain a suit to prevent, abate, or remedy said injury, pursuant to R.C. 305.12;
- b) maintain a suit to recover damages caused by either the existence or the removal of the obstruction, pursuant to R.C. 5591.26; or
- c) direct the person to remove or relocate the obstruction, and if removal or relocation is not begun within five days and completed within a reasonable time, employ the necessary labor to perform the removal or relocation, pursuant to R.C. 5547.03, and collect the expense of removal or relocation as other taxes from the property owner.

In addition, in appropriate circumstances, the county prosecutor may, under R.C. 3767.03 and 3767.17, maintain a suit to abate the nuisance or, under R.C. 3767.99, bring a criminal action for violation of R.C. 3767.17.