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ATTORNEY GENERAL OPINION NO. 90- 27

Leon Stricker, Trustee  
Lincoln Township  
R.R. #1  
Russell, Kansas 67665

Re: Roads and Bridges; Roads--County and Township  
Roads--Maintenance of Waterway Along Township Road

Synopsis Under K.S.A. 68-115, townships are responsible for keeping open road drainage ditches they construct on private property. The statute gives the township trustee broad discretion in determining when ditch clearing operations are "necessary." Nevertheless, the courts have granted injunctive relief in cases where inaction by local road officials resulted in a nuisance to private landowners. The question of whether or not trees and brush in a drainage ditch constitute a nuisance to abutting landowners is one of fact for a court to decide if the landowner's bring a cause of action against the township. Cited herein: K.S.A. 68-115; 75-6103; 75-6104.

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Dear Mr. Stricker:

As trustee of Lincoln township in Russell county, you request our opinion concerning the township's responsibility for maintaining road drainage ditches constructed by the township on private property. Specifically, you ask whether the township is responsible for clearing brush and trees from such

ditches and whether the township may be liable for damages to the landowner's property if it fails to do so.

Your request arises from a particular situation involving a drainage ditch constructed by the township in 1965. Based on the information you have provided, the facts appear to be as follows:

1. In 1965, the township decided to widen an existing road; for this purpose, the right of way had to be increased from 60 to 80 feet.
2. The township purchased an additional 10 foot easement from the property owners on either side of the existing right of way.
3. To provide for proper drainage of the widened road, the township constructed a ditch on the property of two landowners abutting the township's right of way.
4. The two landowners have complained about the accumulation of trees in the ditch, which they claim is unsightly and prevents the proper drainage of water from their property.
5. The township is concerned about the cost of clearing the ditch and disposing of the debris. It desires to know the extent to which it is legally required to undertake such clearing operations.

We have reviewed the "right of way agreement" entered into by the landowners in this case. The agreement indicates that the landowners agreed to accept two times the assessed value of the condemned land "[in] full compensation for [the] actual land taken and all damage done" to their property. This language would appear to include any damage caused by the construction of the drainage ditch on their land. As the court discussed in Marts v. Freeman, 91 Kan. 106, Syl. ¶ 5 (1913), it must be presumed that any damage caused by opening and maintaining the drainage ditch was paid for when the right of way was appropriated. However, the agreement is silent regarding the township's obligation to keep open or otherwise maintain the drainage ditch. In the absence of such a contractual obligation, any duty to clear the ditch must arise under statutory law.

The construction and maintenance of road drainage ditches is governed by K.S.A. 68-115. The statute provides in part:

"[T]he township trustee and the county engineer are hereby authorized to . . . enter upon any land adjoining or lying near to said road, to make such drains or ditches . . . as the county engineer or township trustee may deem necessary for the benefit of the roads, doing as little damage to said lands as the nature of the case and the public good will permit; and the drains and ditches thus made shall be kept open if necessary by the township trustee or county engineer. . . ."  
(Emphasis added).

It is clear from the statute that the township is responsible for keeping open the drainage ditches it constructs. However, the statute requires this work to be done only when "necessary." The statute does not define the circumstances under which the clearing of drainage ditches becomes "necessary." Apparently the legislature intended this determination to be left within the discretion of the township trustee.

The amount of discretion vested in local authorities responsible for road drainage is very broad. The Kansas Supreme Court has held that this discretion will not be interfered with by the Courts "in the absence of fraud or some manifest or gross injustice which would constitute an abuse of discretion." Shanks v. Pearson, 66 Kan. 168, 170 (1903); see also Breedlove v. Wyandotte County Comm'rs, 127 Kan. 754, 756 (1929). In this case, therefore, the township has wide latitude in determining whether and to what extent it is "necessary" to clear trees and brush from the ditch.

Nevertheless, the courts will take steps to protect private citizens when the action or inaction of road officials results in a nuisance to their property. In Murphy v. Fairmount Township, 89 Kan. 760 (1913), the township installed a drainage culvert that was too small to handle the flow of water during heavy rains. A landowner, whose property was being flooded due to the inadequate drainage, sued for damages and for an injunction requiring the township to enlarge the culvert. The court denied the landowner's claim for damages under the principle of sovereign immunity, but granted the injunction, holding that:

"[W]hile the courts may not control the judgment and discretion of the highway commissioners in planning and constructing a culvert, nevertheless, when time demonstrates its utter insufficiency and its certainty of causing continuous or repeated damage to the abutting landowner, and notice of such condition is brought home to such officers, it then becomes their duty to abate such nuisance, and upon failure they will be required to do so by judicial action; that for such officers knowingly to permit such nuisance to continue is not an exercise of official duty but a disregard thereof amounting to bad faith." Id., at 767.

It is not appropriate for this office to advise you regarding whether or not the trees and brush in the ditch constitute a nuisance in this case. That is a factual determination which would have to be made by a court if either of the two landowners decided to bring an action against the township. The most we can do is suggest the possible consequences if a court found that the trees and brush did constitute a nuisance. In that event it appears the township could be required to clear the ditch, but could not be held liable for damages. This conclusion is based on our interpretation of the "discretionary function" exception under the Kansas tort claims act.

The tort claims act abolishes the doctrine of sovereign immunity and provides that governmental entities, including townships, will be liable for damages to the same extreme as private individuals. See K.S.A. 75-6103(a). The Act contains an exception for damages resulting from the "exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion is abused. . . ." K.S.A. 75-6104(e). The Kansas Supreme Court has defined "discretionary functions" as acts of a type the legislature intended to shield from liability. Robertson v. City of Topeka, 231 Kan. 358, 362 (1982). Considering the broad discretion the courts have recognized regarding local road drainage operations, we believe the decision whether or not to clear the ditch in this case would fall within the "discretionary function" exception. If so, the landowners would not be able to sue for damages. However, as the Murphy, case illustrates, the court could still grant injunctive relief and require the township to clear the ditch.

In conclusion, it is clear that the township is responsible for keeping the ditch open, but it is not clear how far the township is legally required to go in clearing the ditch to satisfy the abutting landowners. State law gives the township broad discretion to decide when clearing operations are "necessary." However, a court could require the township to clear the ditch if it finds that the trees and brush constitute a nuisance to the abutting landowners' property. This would be a factual determination for the court to make after reviewing all of the surrounding circumstances.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Julene L. Miller  
Deputy Attorney General

RTS:JLM:jm