

**FORMAL OPINION
2003-F-02**

DATE ISSUED: May 9, 2003

REQUESTED BY: Robin Thompson-Gordon¹, Kidder County State's Attorney

QUESTION PRESENTED

Whether the statutory duty imposed by N.D.C.C. § 63-05-01 on landowners or operators of land adjoining county and township highways to cut weeds and grasses in the public right of way bordering the highways applies where the county or township has fee ownership of the highway right of way.

ATTORNEY GENERAL'S OPINION

It is my opinion that N.D.C.C. § 63-05-01 creates a duty on landowners or operators of land adjoining regularly traveled county or township highways to cut weeds and grasses in the public right of way without regard to whether the land underlying the highway is owned in fee by the adjoining landowner or by the county or township.

ANALYSIS

Persons owning or renting land adjoining county and township highways have a legal duty to cut weeds and grasses growing along the highways adjoining their land pursuant to N.D.C.C. § 63-05-01, which states:

It is the duty of landowners or operators with land adjoining regularly traveled county and township highways, as designated by the township board of supervisors in organized townships, the board of county commissioners in unorganized townships, and the board of county commissioners in the case of county highways, to cut all weeds and grasses along the regularly traveled highways adjoining their lands, including weeds and grasses growing within the public right of way bordering the highways and their lands. The cutting shall be completed not

¹ This opinion was requested by the current officeholder's predecessor.

later than September fifteenth or October first, as prescribed by the board of county commissioners.

If the landowner or operator fails to cut weeds or grasses as required by N.D.C.C. § 63-05-01, the township or county may have this work done and charge the actual expense against the land as part of the taxes levied for the ensuing year. N.D.C.C. § 63-05-03.²

The land underlying a road or highway may be owned by the adjoining landowners with an easement allowing the government to construct the highway over the land, or the land underlying the road or highway may be owned in fee simple by the government. N.D.C.C. §§ 24-01-18, 24-01-32, 32-15-03, 32-15-03.2.³

The Supreme Court has provided guidance when interpreting statutes. Statutes must be construed as a whole in order to ascertain and give effect to the Legislature's intent, and when determining legislative intent, a court may consider the objects sought to be obtained, the statute's connection to other related statutes, and the consequences of a particular construction. State v. Moen, 441 N.W.2d 643, 644 (N.D. 1989). When construing statutes, courts endeavor to effectuate the legislative purposes which prompted a law's enactment. State v. Rubey, 611 N.W.2d 888, 891 (N.D. 2000). The cardinal rule of statutory interpretation is that the interpretation must be consistent with legislative intent and done in a manner which will accomplish the policy goals and objectives contained in the statutes. Olson v. University of North Dakota, 488 N.W.2d 386, 390 (N.D. 1992).

Chapter 63-05, N.D.C.C., concerning cutting weeds and grasses along highways, was created as part of 1981 Senate Bill 2046. 1981 N.D. Sess. Laws ch. 638. The essential substance of chapter 63-05, however, was in pre-existing law. See N.D.A.G. Letter to Hildebrant (Apr. 25, 1975). The legislation was extensive, dealing with noxious weeds and numerous provisions calling for county weed boards to expend funds to control noxious weeds. The bill also amended N.D.C.C. § 63-01.1-01 to state: "It shall be the

² A "party with an interest in land adjacent to a township road" also has a limited duty to clean road ditches if that party's activities have adversely affected the ditch. N.D.C.C. § 24-06-26.2. If so, then the procedures in chapter 63-05 that are applicable to the duty to cut weeds will be applied regarding cleaning the ditch. Id.

³ Although N.D.C.C. § 32-15-03.2 appears to be a general prohibition against the state or its political subdivisions obtaining an interest greater than an easement in land used for highway purposes, that statute was originally passed during the same session as other statutes which provide for, or in the case of N.D.C.C. § 24-01-32 requires, the government to take land in fee simple. Compare 1953 N.D. Sess. Laws ch. 177 and 1953 N.D. Sess. Laws ch. 212. The conflict has been recognized by the courts and by this office. See N.D.A.G. 86-18; Feiler v. Wanner, 340 N.W.2d 168 (N.D. 1983).

duty of every person in charge of or in possession of land in this state, whether as landowner, lessee, renter, or tenant, under statutory authority or otherwise, to eradicate or to control the spread of noxious weeds on those lands.” 1981 N.D. Sess. Laws ch. 638, § 1.

Although the duty imposed on the adjoining landowners and operators to cut weeds and grasses along highways was moved from the chapter concerning control of noxious weeds, N.D.C.C. ch. 63-01.1, to its own chapter by 1981 Senate Bill 2046, that move was one part of a comprehensive approach to weed control developed under a legislative interim study.⁴ The 1981 legislation required all land in North Dakota to be included within the applicable county weed board’s jurisdiction. 1981 N.D. Sess. Laws ch. 638, § 4 (codified at N.D.C.C. § 63-01.1-09).⁵ The Legislature also created and funded a leafy spurge control program. 1981 N.D. Sess. Laws ch. 638, §§ 15, 16, 17. Each county’s weed board was authorized to quarantine farm products from areas infested with noxious weeds when the transportation of farm products from that area would be liable to spread the noxious weeds into other areas. 1981 N.D. Sess. Laws ch. 638, § 18. Further, the Legislature created and funded a cannabis control program. 1981 N.D. Sess. Laws ch. 638, §§ 19, 20. Testimony before the Interim Agriculture Committee, which produced 1981 Senate Bill 2046, and testimony before the Legislature during the 1981 session, revealed a strong concern that leafy spurge and other noxious weeds were destroying the productivity of farm and ranch land in North Dakota. Testimony further expressed the view that this problem could only be addressed by requiring all persons to cooperate to control or destroy noxious weeds wherever they might happen to be growing, in order to prevent their spread to land that was uninfested.⁶ Construing N.D.C.C. § 63-05-01 to require adjacent landowners to cut

⁴ There have been subsequent revisions to weed control statutes. The only one that affected ch. 63-05 was in 1993 and it made minor changes to N.D.C.C. § 63-05-02. 1993 N.D. Sess. Laws ch. 611. See 1993 N.D. Sess. Laws ch. 610 for extensive changes made to weed control laws in that year.

⁵ Each county’s weed board is to administer a program for the control of weeds within cities in the county, but the governing body of any city with a population of 3,000 or more may choose to establish and administer its own program for controlling weeds within city limits. N.D.C.C. § 63-01.1-10.1.

⁶ See generally Minutes of the 1979-80 Interim Agriculture Committee, June 27, 1979, Oct. 3-4, 1979, Jan. 23-24, 1980, Apr. 15, 1980, and Aug. 5, 1980; Hearing Before the Joint Senate and House Agriculture Committees, 1981 N.D. Leg. (Jan. 15); Hearing Before the House Agriculture Committee, 1981 N.D. Leg. (Jan. 16); Hearing Before the Senate Appropriations Committee, 1981 N.D. Leg. (Jan. 30); Hearing Before the Senate Agriculture Committee, 1981 N.D. Leg. (Feb. 13); Hearing Before the House Appropriations Committee, 1981 N.D. Leg. (Mar. 13); and Hearing Before the Conference Committee, 1981 N.D. Leg. (Mar. 26).

weeds and grasses in the public right of way regardless of fee ownership is consistent with the legislative intent and goals described above.

Property regulations that require landowners to maintain their property by removing weeds or overgrown grass have been found to be a proper exercise of the government's police power. People v. McKendrick, 468 N.W.2d 903, 908 (Mich. App. 1991). Regulations such as this relate to the duties of a property owner and the uses to which that owner may put his or her property. Id. at 908-09. If the land underlying a road or highway is owned in fee by the adjoining landowners and the government has only an easement to construct the highway, requiring the landowner to remove weeds or overgrown grass within the highway easement would appropriately be considered a property regulation. Id. at 908-09. If the land underlying the highway right of way, however, is not owned by the adjacent landowner, the duty to cut weeds and grasses within the highway easement would not be a property regulation. This statutory duty must instead come under a different lawful authority.

Statutes in other states imposing similar duties on landowners who do not have a property interest in the land have been upheld as a proper exercise of police power under a "public duty" doctrine. The United States Supreme Court has held that a government may define a public duty by statute and may require members of the public to perform that duty without the matter being considered a taking under the Fifth Amendment or involuntary servitude prohibited by the Thirteenth Amendment. Hurtado v. United States, 410 U.S. 578, 586, 588-89 (1973). When a law has established a public duty, any "personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." Id. at 588, quoting Blair v. United States, 250 U.S. 273, 281 (1919). The Supreme Court of Iowa upheld a municipal ordinance with provisions very similar to that found in N.D.C.C. ch. 63-05 requiring adjacent landowners to mow weeds and grasses on city owned land underlying highway rights of way adjacent to the landowner's property. Goodenow v. City Council of Maquoketa, Iowa, 574 N.W.2d 18, 20-21, 24 (Ia. 1998). The Iowa court first made an analogy to laws requiring abutting landowners to remove snow from city-owned sidewalks under the theory "that it is reasonable to impose such a duty on an abutting landowner, in return for the benefits the city provides, and that every citizen has an obligation to render some unpaid service to the state in certain situations." Id. at 24. The Iowa court then examined two earlier cases from other states that upheld laws requiring abutting landowners to cut weeds growing along public highways at the landowner's expense. Id., citing Northern Pacific Railway Co. v. Adams County, 138 P. 307 (Wash. 1914), and Commonwealth v. Watson, 3 S.W.2d 1077 (Ky. 1928). The Iowa court determined that the basis for the duty on abutting landowners to cut or clear away weeds and bushes was to insure an adequate view of and access to the road and to prevent vegetation from becoming unsightly and unsafe to the public. Id. at 24-25.

Property owners have a right of access to abutting highways or streets. Boehm v. Backes, 493 N.W.2d 671, 673 (N.D. 1992). In return for providing the road and access to it, it is reasonable that the government impose a duty on the abutting landowner to cut weeds and grass in an ordinary highway right of way. Such cutting will maintain an adequate view of the road and prevent vegetation from becoming unsightly and unsafe for the public, as found by the Iowa Supreme Court in Goodenow, supra, and it is also a reasonable duty to impose in the fight against noxious weeds so that seeds will not be spread. This is a limited duty to cut the weeds and grass. County weed boards have the duty to eradicate or control noxious weeds or pests along county and township highways at their expense. N.D.C.C. § 63-01.1-09.

Therefore, it is my opinion that N.D.C.C. § 63-05-01 creates a duty on landowners or operators of land adjoining regularly traveled county or township highways to cut weeds and grasses in the public right of way when the owner or operator holds fee title to the right of way subject to the easement for travel and also when the land underlying the highway is owned in fee by the county or township.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.⁷

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⁷ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).