

## **Managing Highway Right of Ways**

By WTA Attorney Lee Turonie

Highway right of ways are the areas outside of the surfaced and vehicle-traveled portion of the highway. Local governments such as towns are responsible and liable for the management of their highways, including right of way maintenance. Wis. Stat. §§ 82.03 & 893.83. Below are several highway right of way issues that you will need to manage.

### **Trees**

The town shall cause the removal, cutting or trimming of any tree, shrub or other vegetation in the highway right of way to provide safety to the users of the highway. § 66.1037(1). The elimination of minor vegetation is usually without issue. However, the logging of trees almost always causes issues because the resulting timber has significant value. What you can do with the timber will depend largely upon which type of public highway you are logging.

If the right of way being logged is a highway by either deed or plat, then the trees are owned by the municipality. This is because deeds and plats are recorded written instruments of land ownership, meaning that towns own these lands in their entirety. Therefore, the town also owns the trees growing on such land. Once cut it is the town board that decides how to dispose of the timber. (But remember that the town cannot sell town property to any current town officer or employee per § 175.10.) No one can cut down or otherwise injure the trees on these highway right of ways except for the town or someone with the town's permission. § 86.03(4).

All other town highways were either created by town board order or are an unrecorded highway by use. These are easement forms of ownership for the town where the adjacent landowners still own out to lot lines at the center of the highway. Although the town's rights and responsibilities to remove these trees are the same as any other highway, the trees themselves are not owned by the town. These trees are owned by those adjacent landowners. The town board cannot decide how to dispose of any resulting timber unless the landowners have granted the town that permission, and the town should seek that in writing if it is being given. Otherwise, any downed trees may be moved out of the way towards the edge of the right of way but ultimately must remain for the landowners' to take possession of them. Landowners could also log timber on these highway rights of way entirely of their own accord since they own the trees.

### **No cultivation within the highway right of way**

Active cultivation within the highway right of way by adjacent owners or occupiers of lands is largely prohibited. They may plant trees, shrubs and hedges within the highway right of way only if the town has given them permission. This type of cultivation is only permissible within the first ten feet of the highway right of way from its outer edge. Any plants so cultivated may still be removed later by either the town or the residents. § 86.03(3).

Farming is also supposed to be excluded from the highway right of ways. No person may plow, cultivate crops or otherwise work the land such that its drainage may be affected. Nor can

any person operate farm or other machinery such that it damages the right of ways. These are misdemeanor violations. § 86.021.

### **No altering of the highway right of way without permission**

It is also a misdemeanor violation to make any ditch, depression or embankment such that it impedes use of a highway, or to place any obstruction in a highway or in a ditch that drains the highway. § 86.022.

In fact, no person may even dig in a highway right of way without first getting a permit from the town. Violators may be fined and the highway authority may return the highway to its original condition. § 86.07.

Finally, anyone wishing to place utility-type lines within the highway right of way with either poles or pipes must make a written request to the town first, with the town required to respond within twenty days while having the option of adding reasonable conditions. § 86.16. Violators of this statute may also be cited for a forfeiture.

### **Encroachments**

You are responsible to keep the highway right of ways free from encroachments such as fences, stands, buildings and other structures or objects. The town provides the offending occupant or owner of land with the encroachment an order specifying the extent and location of the encroachment with reasonable certainty and allowing 30 days for its removal to beyond the highway right of way. § 86.04.

If the encroachment remains the town brings an action in court for a \$1.00 penalty per day that it remains. During such action a landowner might put forth a claim that the land is theirs and not in the highway right of way. A judgment in favor of the town will also order the encroachment removed within a period of time, at the expiration of which, the town may go ahead and remove any remaining encroachment at the expense of the occupant or owner.

Removal of encroachments is very important for two reasons. First, a known dangerous object might lead to liability exposure for the town should there be an accident involving it. Second, highway right of way land can be adversely possessed and lost to the landowner, and this just leaves the town and its taxpayers paying for the very same land a second time in order to maintain the same highway right of way as was had before.

### **A green thumb in public relations**

There is often no matter more controversial with the public than how the highway right of ways are managed, in particular with the logging of trees. There is no legal question about the town's ability to do such things. However, it is yet highly recommended to go the extra mile informing residents about impending right of way maintenance, particularly tree removal, and to work with them on the issue as best as you are able to balance that compared to your necessity to manage your highway right of way maintenance responsibilities and liability exposure.