S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 00-072

Obstructions on the right-of-way.

QUESTIONS

1. Do brick and/or masonry mailbox and driveway entrance structures constitute an obstruction upon the right-of-way of county roads?

2. If these structures do constitute an obstruction, is it the mandatory duty of the chief administrative officer or Department to remove or cause these structures to be removed from the right-of-way?

3. If removal is mandatory and the Department requires the owner of the structure to remove it, is an ad in the paper sufficient notice of required removal or is there a more legal notice required and is there a minimum time after notice to allow for removal before the owner is guilty of a misdemeanor?

4. If there is not a mandatory duty to remove or cause these structures to be removed from the right-of-way, is there liability assumed by the county if these structures are not removed?

5. If these structures do not constitute an obstruction, is the county relieved of liability should one of these structures be involved in an accident?

6. If the county removes these structures from the right-of-way, is there any legally required compensation that must be paid to the person who owns or built these structures?

7. By law is a brick and/or masonry structure containing a mailbox in part or as a whole the property of the federal government and if it is as a whole the property of the federal government, does this not render the county's jurisdiction over and liability for them a non-issue as far as the county's concerns?

OPINIONS

1. The determination of whether a mailbox or other objects are "obstructions" in the county right of way must be performed by the chief administrative officer on a case by case basis. Tenn. Code Ann. § 54-7-201 provides the chief administrative officer with authority to determine whether an object constitutes an "obstruction" based on the chief administrative officer's expertise, training and knowledge of local road conditions. This office, however, cannot make such factual findings.

2. If the chief administrative officer determines that an object is an "obstruction," Tenn. Code Ann. § 54-7-201 does not impose a duty on the chief administrative officer to remove the "obstruction." However, the decision to remove an obstruction should be carefully considered in light of possible liability pursuant to the Governmental Tort Liability Act (Tenn. Code Ann. § 29-20-101 *et seq.*).

3. Unless the owner cannot be located, notice by newspaper is insufficient to notify the object's owner of the chief administrative officer's decision to remove the object. Since the Uniform County Highway Law does not recognize constructive notice as a sufficient substitute for actual notice, notice by mail is required if the owner's address is known. Of course, in an emergency or extreme circumstances notice before the obstruction is removed may not be required.

4. Although Tenn. Code Ann. § 54-7-201 does not impose a mandatory duty on the county's chief administrative officer to remove "obstructions," if the county is aware of a potentially dangerous "obstruction," the county may be subject to liability under the Governmental Tort Liability Act.

5. Whether an object is an "obstruction" is a factual determination made on a case by case basis. The county may incur liability for injuries caused by the obstruction if the object is considered a dangerous condition and the county had constructive notice of its existence.

6. If the county determines that an object within county right-of-way is an "obstruction," the county may remove the "obstruction" without compensating the owner pursuant to the lawful exercise of its police power.

7. Mailboxes are not the property of the federal government. The Postal Service, however, does have rules and regulations concerning the height and placement of mailboxes if mail service is desired.

ANALYSIS

1. Pursuant to the County Uniform Highway Law (Tenn. Code Ann. § 57-7-101 *et seq.*), the legislature has provided the chief administrative officer with authority to determine whether brick and/or masonry mailbox and driveway entrance structures constitute "obstructions" within the right-of-way of county roads. Tenn. Code Ann. § 54-7-201(a) states that "The chief administrative officer **is authorized to remove or cause to be removed any fence, gate, or other obstruction** from the roads, bridges and ditches of the county and to clean out and clear all fences and ditches along or adjacent to county roads." (Emphasis added). In granting the chief administrative officer authority to remove any "obstruction" from the county right-of-way, the legislature has provided the chief administrative officer with discretion to determine what constitutes an "obstruction" based on the officer's expertise, training and knowledge of local road conditions. Op. Att'y Gen. No. U92-12 (1992); *see also, Baker v. Seal*, 694 S.W.2d 948 (Tenn. Ct. App. 1984). This office, however, cannot answer such factual questions.

2. Should the chief administrative officer determine that an object is an "obstruction," Tenn. Code Ann. § 54-7-201 does not impose a duty on the chief administrative officer to remove the object. The statute's language provides the chief administrative officer with the authority and discretion to determine: 1) whether an object in the county's right-of-way is an "obstruction" and, 2) whether the "obstruction" should be removed or "cause[d] to be removed." *See* Tenn Code Ann. § 54-7-201.

The chief administrative officer is not required by statute to remove an "obstruction." In *Baker v. Seal*, the Court addressed the issue of whether Tenn. Code Ann. § 54-7-201 imposed a mandatory duty upon the chief administrative officer to remove a large rock from the county right-of-way. *Baker*, 694 S.W.2d at 951. Citing the discretionary authority granted by Tenn. Code Ann. § 54-7-201, the court held that the statute's language does not impose a duty on the chief administrative officer to remove all "obstructions" from the county right-of-way. However, the decision to remove an obstruction should be carefully considered in light of possible liability for the county pursuant to the Governmental Tort Liability Act (Tenn. Code Ann. § 29-20-101 *et seq.*).

3. If the chief administrative officer determines a mailbox and/or driveway entrance to be an "obstruction" and orders its removal, actual notice is required to inform the owner of the chief administrative officer's decision to remove the object. According to Tennessee courts, "actual notice must be given in the absence of a statute providing some means for constructive notice." *Tucker v. American Aviation & Gen. Ins. Co.*, 278 S.W.2d 677, 679 (Tenn. 1955) (citing *Burck v. Taylor*, 152 U.S. 634 (1894)); *see also, Blevins v. Johnson County*, 746 S.W.2d 678, 683 (Tenn. 1988). In addition, notice by publication is insufficient if the owner's name and address are "known or very

easily ascertainable" because "the reasons disappear for resort to means less likely than the mails to apprise" persons whose interests are affected by the county's decisions. *Baggett v. Baggett*, 541 S.W.2d 407 (Tenn. 1976) (quoting *Mullane v. Central Hanover Bank & Trust Co., et al.*, 339 U.S. 306 (1950)).

The County Uniform Highway Law (Tenn. Code Ann. § 57-7-101 *et seq*.) does not recognize constructive notice as a sufficient substitute for actual notice. Therefore, if the address of the object's owner is known, the county must provide actual notice at minimum by mail. However, should the county deem the "obstruction" a threat requiring immediate attention, neither actual nor constructive notice is required before the county removes the "obstruction" pursuant to its police power.

4. & 5. Although Tenn. Code Ann. § 54-7-201 does not impose a mandatory duty on the county's chief administrative officer to remove "obstructions," the county may incur liability under the Governmental Tort Liability Act for failing to remove an "obstruction." If the location of the object is considered "defective, unsafe or dangerous," and the county has actual or constructive notice of the "obstruction," the county may be subject to liability under Tenn. Code Ann. § 29-17-203. *See*, *Helton v. Knox County*, 922 S.W.2d 877, 882 (Tenn. 1996).

The chief administrative officer possesses "control over the location, relocation, construction, reconstruction, repair and maintenance for the county road systems of the county." Tenn. Code Ann. § 54-7-109(a). The chief administrative officer is an agent of the county and the failure of the chief administrative officer to act for the county may form a basis for county liability. *See* Op. Att'y Gen. No. 95-032 (1995). Should an "obstruction" be the proximate cause of injury, Tenn. Code Ann. § 29-20-203(a) removes governmental immunity from suit for injury resulting from "a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity." For purposes of this opinion, it is assumed that the county either owns and/or controls the road in question.

To determine whether a mailbox or driveway entrance creates a "defective, unsafe or dangerous" condition, the standard of care imposed by courts on local governments for building and maintaining roads **is one of reasonableness that is determined on a case by case analysis**. *See Swain v. City of Nashville*, 92 S.W.2d 405, 406 (Tenn. 1936). Whether a highway condition is dangerous and hazardous to an ordinary prudent driver is a factual question in which the court "should consider the physical aspects of the roadway, the frequency of accidents at that place in the highway and the testimony of expert witnesses in arriving at this factual determination." *Helton*, 922 S.W.2d at 882 (quoting *Sweeny v. State*, 768 S.W.2d 253, 255 (Tenn. 1989)). Therefore, the determination of whether a mailbox or driveway entrance constitutes a defective, unsafe or dangerous condition is a factual question decided on a case by case basis. As stated in the response to question number one, this office cannot answer such factual questions.

However, should a mailbox or driveway entrance constitute a "defective, unsafe or dangerous condition," the county will not be found liable unless it was proven to have actual or constructive notice. Tenn. Code Ann. § 29-20-203(b). The county may have constructive knowledge if the "obstruction" existed for a sufficiently lengthy period of time that the county, in the exercise of reasonable care, should have been aware of its existence. *See Martin v. Washmaster Auto Ctr., U.S.A.*, 946 S.W.2d 314, 318 (Tenn. Ct. App. 1996). Therefore, a chief administrative officer deciding against removal of a dangerous condition could have constructive knowledge of the dangerous condition and subject the county to possible liability.

Additionally, if the court determines that a mailbox or driveway entrance constitutes "a defective, unsafe or dangerous condition" pursuant to Tenn. Code Ann. § 29-20-203(a), the county cannot avoid liability on grounds that the chief administrative officer's decision against removal is a "discretionary function" of the county government as provided by Tenn. Code Ann. § 54-7-201. Although, the court recognizes that Tenn Code Ann. § 54-7-201 provides the chief administrative officer with discretion to remove an obstruction, the court does not recognize the discretionary function exception to the removal of immunity for causes of action predicated upon Tenn. Code Ann. § 29-20-203. *Helton*, 922 S.W.2d at 884. Therefore, the discretionary authority provided by Tenn. Code Ann. § 54-7-201 cannot be relied upon as a means of avoiding liability for causes of action arising under Tenn. Code Ann. § 29-20-203.

Although the court in *Baker v. Seal* held that duties performed by the County Highway Commissioner pursuant to Tenn. Code Ann. § 54-7-201 were discretionary functions, the court held that Tenn. Code Ann. § 54-7-201 merely shielded the Commissioner and his bonding company from liability. The court reversed the lower court's order granting summary judgment to Hancock County because the county's obligation to maintain roads was not a discretionary function. The court stated that "once the road was constructed, the county obligated itself to maintain the road's surface in a reasonably safe condition." *Baker*, 694 S.W.2d at 950. In light of this ruling, the court may consider the removal of "obstructions" that threaten public safety as necessary maintenance to ensure that county roads remain in reasonably safe condition. Therefore, the county may be subject to liability for the negligent decisions of the chief administrative officer if the officer's decisions result in a "defective, unsafe or dangerous condition" pursuant to the Governmental Tort Liability Act (Tenn. Code Ann. § 29-17-203).

6. The county is not required to compensate owners for the removal of mailboxes and/or driveway entrances that are deemed an "obstruction" and considered a threat to the public's safety. The county has authority through the exercise of its police power to reasonably regulate county right of way as a means of enhancing public safety in the use of its highways. *City of Paris v. Paris - Henry County Public Utility District*, 340 S.W.2d 885 (Tenn. 1961); *see also*, Op. Att'y Gen. No. U92-12 (1992). Therefore, if the county removes a mailbox and/or driveway entrance it deems an "obstruction," the county is not required to compensate the owner for the "obstruction."

Should the county decide to lawfully exercise its police power to remove "obstructions" from the right of way, the owner of the "obstruction" is not entitled to compensation because property rights are subject to the lawful and reasonable use of the police power of the state. See *Pack v. Southern Bell Tel. & Tel. Co.*, 387 S.W.2d 789, 793 (Tenn. 1965) (declaring that the State can require the removal of utilities in its right of way at the expense of the utility company).

Inherent in the police power granted to counties by the state, counties retain the power to reasonably regulate their rights of way in an effort to enhance public safety. Accordingly, if a county determines that a mailbox and/or driveway entrance constitutes an "obstruction" that threatens the public's safety, the county can order its removal without compensation if the order for removal is a valid and lawful exercise of the county's police power. Regulations properly promulgated, reasonably designed to meet the public health and safety requirements and uniformly applied are considered a valid and lawful exercise of the county's inherent police power.

7. A brick and/or masonry structure containing a mailbox is not the property of the federal government. There exists no applicable U.S. Postal Service regulation indicating a property interest in mailboxes. However, the Domestic Mail Manual issued by the Postal Service provides in relevant part that the mailbox must be accessible by the carrier without leaving the postal vehicle or accessible from the sidewalk in urban areas. Additionally, rural mailboxes must be between three and one-half and four feet off the ground. Therefore, as a practical matter, this office recommends that county administrators consult with the Office of the Inspector General of the U.S. Postal Service to confirm compliance with U.S. Postal Service requirements when formulating any regulations for mailbox supports and/or deciding to remove objects determined to be obstructions.

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