



## Road Right of Way Issues

### **Q. How do we determine the width of a road?**

A. There is no uniform standard under state statute to determine how big a road is. The answer to this question ultimately depends on the method that was used in the town's acquisition of the road. If the highway was acquired by deed or written easement, the width of the road should be indicated on the deed or easement. The same is true if the road was acquired by acceptance of a plat. The width should be indicated on the deed or plat filed with the register of deeds.

If the town laid out the road by issuing a highway order, the width should have been specified in that order. If no width was specified in that order, state statute provides that the road is 66 feet wide. See Wis. Stat. § 82.18. However, if the road was acquired by having worked it 10 years or more and there is not a written record laying out the road, the width is presumed to be 66 feet. See Wis. Stat. § 82.18(2).

Towns should be aware that the *presumption* of a 4-rod road (66 feet) can be overcome by evidence of an ancient fence line, trees growing up to the edge of the road, natural barriers such as bluffs, etc. If the facts concerning the width are in dispute, litigation may have to be used to resolve the issue or the town might consider purchasing additional right of way by deed or entertaining a petition (or introducing a resolution) to widen the road and pay damages under Wis. Stat. § 82.10-14.

### **Q. The town has been noticing a lot of vegetation growing within the road right of way. What can the town do?**

A. Under Wis. Stat. § 66.1037(1), towns have the authority to remove, cut, or trim any tree, shrub, or other vegetation (within the road right of way) in order to provide safety to highway users.

### **Q. The town removed some trees in the right of way and is wondering who owns the wood. Who owns the wood cut from trees in the right of way?**

A. The answer to this question depends on the town's acquisition of the highway. If the town owns the highway, having acquired it by deed or plat, the town owns the trees and any resulting wood. If the road was acquired by order or use, the town only has an easement for highway purposes. In these cases, the trees growing in the right of way belong to the adjacent landowner, and any wood resulting from trimming must be offered to the adjacent landowner. See Wis. Stat. § 86.03 (2).

### **Q. During a recent thunderstorm a tree fell onto a town road. Who is responsible for the removal of the tree?**

A. According to Wis. Stat. § 86.03(1), if a tree falls from an adjacent landowner's property into the highway, both the property owner and the municipality share responsibility for removing the tree from the highway. However, towns can face liability for negligently failing to remove such a tree in a prompt manner. So, the town should create a system whereby it is clear which town officer or employee will take

care of having the tree removed as soon as possible if such a situation arises. For example, the chair might be the first contact person on the list, but if the chair is unavailable or out of the area, the next person on the list is contacted, and so on. Don't rely on the adjacent property owner to take care of the problem. In some situations, the town might be able to assess the adjacent property owner a special charge for taking care of a tree that fell from private property into the road right of way. See Wis. Stat. § 66.0627.

**Q. We have a resident who erected a stone wall in the right of way. The town has determined that the wall poses a hazard to the traveling public while it remains in the right of way. How can the town get it removed?**

A. Firstly, the town should determine whether the object remaining in the road right of way could cause unnecessary damage to a car if it were to leave the traveled portion of the road and run into the object. The town may be liable for damages or injuries that may occur if the object is struck. If the town determines that the object is hazardous then it is best to get into contact with the property owner/occupant. Most people do not realize that the right-of-way extends beyond the paved road surface. They may not know a lot about town road management and using this as an opportunity to educate them can avoid potential future problems.

If the property owner/occupant refuses to remove their obstruction, the state statutes provide a process that the town may pursue to remove it. Under Wis. Stat. § 86.04, the town would send a notice to the property owner or occupant seeking removal of the obstruction. A sample is available in the Town Law Forms book here:

[https://docs.legis.wisconsin.gov/statutes/townlaw/forms/order\\_for\\_the\\_removal\\_of\\_obstruction\\_in\\_case\\_of\\_encroachment?view=section](https://docs.legis.wisconsin.gov/statutes/townlaw/forms/order_for_the_removal_of_obstruction_in_case_of_encroachment?view=section)

The property owner/occupant will then have 30 days to remove the object. If they do not remove the object or deny the encroachment, then a forfeiture of \$1 per day will begin to accrue. The town may choose to bring an action in circuit court to recover the penalty, and if the town wins, a judgment ordering the property owner/occupant to remove the item within a specified time period will be issued. If the property owner/occupant does not obey the order, the town may then remove the object and recover the costs from the defendant (which may include putting the cost of removal on the tax bill under Wis. Stat. § 66.0627).

A town should consider the practical application of this process given the circumstances surrounding the obstruction. If there is a known and compelling danger to the public, the town should take immediate steps to limit its risk for liability. Erecting barriers or road closures may be possible actions for the town to pursue if in an emergency. The town might also decide to seek a court order for immediate removal. Finally, if the town has been granted permission to remove an item from the road right of way, do not destroy the item without permission. That item is still the property owner's/occupant's personal property.

**Q. What about individuals who plant in the road right of way?**

A. State statute prohibits individuals from plowing, cultivating, or working within the road right of way that affects drainage. See Wis. Stat. § 86.021. According to Wis. Stat. 86.021(2), anyone who is in violation of this statute is guilty of a misdemeanor. If convicted, the individual could face fines and possible jail time. Offenders would also be expected to pay the entire cost of restoring the ditch and/or highway to their former condition.