

CHAPTER 86.

MISCELLANEOUS HIGHWAY PROVISIONS.

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86.01 Removal of highway obstructions. (1) Every highway superintendent, and in the absence of the same, the town board shall immediately upon notice of its existence fill or remove any depression, ditch, hump or embankment which impedes the use of any highway in his district.

(2) It shall be unlawful for any highway superintendent or any other person to leave any materials in the traveled portion of any highway in piles or rows after sunset without placing within one hour after sunset upon such piles or at the end of such rows a lighted lantern containing sufficient oil or fuel to keep the same burning until daylight. Any person violating any of the provisions of this section shall be liable to a fine of not less than ten nor more than one hundred dollars. [1933 c. 106]

Note: A fence existing across a highway for the purpose of impeding travel thereon clearly is an obstruction, not an encroachment. Since no statutory duty is imposed by law upon either the superintendent of highways or the town board in his absence, summarily to remove a fence obstruction, mandamus does not lie to compel the town board to remove it. *State v. Maresch*, 225 W 225, 273 NW 225.

86.02 Injury to highway. Any person who shall injure any highway by obstructing or diverting any creek or watercourse or sluiceway, or by dragging logs or timber thereon, or by any other act, shall be liable in treble damages, to be recovered by the political division chargeable with the maintenance of highway injured, and the amount recovered shall be credited to the highway maintenance fund.

86.03 Removal of fallen trees. (1) If any tree shall be felled by any person from any occupied land into any highway any person may give notice to the occupant of the land to remove the same within twenty-four hours; and if such tree shall not be removed within that time, but shall continue in such highway, such occupant shall forfeit the sum of fifty cents for every day thereafter until such tree shall be removed; but the amount so forfeited shall not exceed ten dollars for one tree. It shall be the duty of every highway patrolman, street commissioner, or other officer in charge of the maintenance of streets or highways, to remove from any highway any fallen tree or trees therein.

(2) In case any person shall cut down or fell any tree on inclosed land not occupied by him so that it shall fall into the highway, unless by the order or consent of the occupant, such person shall pay to the occupant of such land the sum of one dollar for every day the same shall remain in such highway, together with all other damages which such occupant may sustain; but the amount so to be recovered shall not exceed twenty dollars for one tree.

86.04 Removal of highway encroachments. If any highway right of way shall be encroached upon, under or over by any fence, stand, building or any other structure or object of any kind or character, the state highway commission (in case of a state trunk highway), the county highway committee (in case of a county trunk highway), or the city council, village or town board (in case of a street or highway maintained by or under the authority of any city, village or town) may make an order requiring the occupant or owner of the land through or by which such highway runs, and to which such encroachment shall be appurtenant, to remove the same beyond the limits of such highway within thirty days; such order shall specify the extent and location of the encroachment with reasonable certainty; and shall be served upon such occupant, or owner. [1939 c. 519]

Note: This section, as amended by ch. 519, Laws 1939, does not vest authority in the highway commission or various municipalities in relation to roads with respect to which jurisdiction is vested in these respective bodies by said chapter to prohibit mere use of nontraveled portion of highway as encroachment. 28 Atty. Gen. 644.

86.05 Nonremoval of encroachments. If the occupant or owner upon whom such order shall be served shall not deny such encroachment, as provided in the next section,

and the encroachment shall not be removed within thirty days after the service of such order, such occupant or owner shall forfeit one dollar for every day after the expiration of that time during which such encroachment shall continue. In all cases where a judgment shall be rendered for such penalty, the court shall, by such judgment, order that such occupant or owner remove such encroachment within a time to be fixed by the judgment, and if he neglect or refuse to obey such order, the state highway commission, county highway committee, or city council, village or town board, as the case may be, may remove the same and recover from such occupant or owner the cost thereof. [1939 c. 519]

86.06 Denial of encroachment; procedure. (1) If the occupant or owner shall, within thirty days after the service of such order on him, deny such encroachment in writing and deliver such denial to the state highway commission, county highway committee, or city council, village or town board, as the case may be, the commission, committee, council or board shall apply to a justice of the peace of the county or county judge of the county for a summons which he shall issue and direct to any constable or police officer of the county commanding him to summon a jury of six disinterested freeholders thereof to meet at a stated time, not less than four days after the issuing thereof, at the office of such justice or judge to try the issue. And the constable or police officer to whom such summons shall be directed shall give at least three days' notice to the state highway commission, county highway committee, or city council, village or town board, as the case may be, and to the occupant or owner of the land of the time and place such jurors are to meet.

(2) At the time and place specified in the summons the jury shall be sworn by such justice or judge well and truly to inquire whether any such encroachment has been made as described in the order, and if so by whom made; and in case any person summoned as a juror shall not appear or shall be incompetent his place may be supplied by a talesman as provided by section 302.10. The issue raised by such order and the written denial thereof shall be docketed and tried before such justice or judge in the same manner as in cases of personal actions of trespass, and the commission, committee, council, or board shall be the plaintiff and said occupant or owner shall be the defendant; the jury may, in the discretion of the justice or judge and in the presence of an officer appointed by him, view the premises. After the question has been submitted to the jury they shall be kept together in charge of an officer until they agree or are discharged; if they fail to agree they may be discharged and a new trial had in like manner until a jury shall agree upon a verdict.

(3) If the jury find that such encroachment exists their verdict shall be for the plaintiff and judgment shall be entered accordingly. And the occupant or owner of the land, whether such encroachment shall have been made by him or by any former occupant or owner, shall remove the encroachment within thirty days after the entry of such judgment under forfeiture of one dollar for each day after the expiration of that time during which such encroachment shall continue. If such occupant or owner shall not so remove the encroachment the plaintiff may remove the same and may recover of him the expense of such removal.

(4) If the jury find that any such encroachment has been made the occupant or owner shall pay the costs and the justice or judge shall tax the costs thereof, including jurors', witnesses', and constables' fees and the expense of viewing the premises, if a view has been had, and enter the same in the judgment in favor of the plaintiff and against the defendant; the justice, constable, jurors and witnesses shall be entitled to the same fees as in other cases in justice court. The judgment may be enforced as in civil cases.

(5) If the jury find that no encroachment has been made their verdict shall be for the defendant, and judgment shall be entered in his favor for costs. Either party may appeal as in civil actions to the circuit court of the county from the judgment, and the case shall be tried as an original action brought in circuit court.

(6) Upon the entry of a final judgment a copy thereof shall be filed in the office of the plaintiff and recorded in the highway record book. [1939 c. 519]

86.07 Trees in highway, ownership of. All trees standing or lying on any land over which any highway shall be laid out shall be for the proper use of the owner of such land or person otherwise entitled thereto, except such of them as may be requisite to make or repair the highways or bridges on the same land or within one mile of the same; but no trees reserved for shade or ornament shall be used for such purpose.

86.08 Planting trees in highway; injury to. Any person owning or occupying land adjoining any highway may plant or set out trees on each side of said highway contiguous to his land, which trees shall not be set in the highway more than ten feet from the margin thereof, and if any person shall cut down, injure or destroy any tree that may have been or shall be so planted or set out or which shall have been left on the side of such highway for shade he shall be liable to treble damages to the owner or occupant of such adjoining lands.

86.09 Highway hedges and protection fences. Any owner or occupant of land, bordering upon any highway, excepting city and village streets and alleys, may plant and cultivate any hedge or live fence on the line of such highway, and also place on the margin of such highway a protection fence, not to occupy more than six feet of the margin or edge of such highway, and such protection fence shall be permitted to remain for the term of seven years; provided, that the supervisors may grant permission in writing to the owner of any hedge or live fence to continue such protection fence any term of time they may deem necessary.

86.10 Bounties for planting trees in highways. Every person along or through whose lands any highway may pass may plant and cultivate on one or both sides thereof, where he shall own land, trees of such varieties as commonly grow at least forty feet in height, set two rods or less apart in a row within eight feet of the outer line of the highway, and when such trees shall reach twelve feet in height the superintendent of highways shall, if the same be growing thriftily, give such owner, on his request, a certificate that he accepts such trees as public shade trees. Thereafter such trees shall be public shade trees and be protected as public property, but the title thereto and to their fruit shall remain in the owner; and such owner, so long as he shall maintain such trees, replacing such as die, shall receive an annual bounty of three cents for each rod of highway along which such trees are planted on one side and six cents if on both sides, to be credited upon his highway taxes. For the protection of such trees while growing such owner may, by leave of the superintendent, inclose the same by a fence.

86.11 Injuring trees. Every person who shall cut down, break, girdle, bruise or mar the bark or in any other manner injure any public or private shade trees growing on the side of or in any highway, or allow any animal under his control to do any injury to any such tree, or hitch any horse or other animal thereto shall pay five dollars damages for every such act, to be collected by the superintendent of highways for the benefit of the highway fund, and such person shall be further liable to the owner of the land in treble damages. Every officer having any charge of a highway who shall cut down, destroy or damage any such shade tree shall forfeit twenty-five dollars, one-half to the use of the person prosecuting therefor, unless his act be done for the improvement of the highway and may be said to conduce thereto.

86.12 Shade trees in Milwaukee county villages. The village board of any village in any county having a population of one hundred fifty thousand or more may direct, regulate and require the planting and preserving of shade trees and shrubs and the caring for the same in and along the public streets and on the public grounds of said village. It may also order shade trees to be set out and cared for along any street or portion thereof at the cost of the property fronting on such street; notice requiring said work to be done shall first be given, and upon the refusal of such owner to do such work, the village board may then cause the same to be done as herein provided, and may levy a tax for the whole or any part of the cost thereof upon the respective pieces of property adjoining said portion of said street, and every tax shall be entered by the clerk and collected, in the manner prescribed in section 61.42 subsections (2) and (3) of the statutes.

86.13 Tunnel under highway by landowner. Any person owning land lying on both sides of any highway is hereby authorized to construct a tunnel under such highway, also the necessary fences for the passage of stock, and other purposes, to and through the same, in such manner as will not interfere with or endanger travel on such highway. All such tunnels shall not be less than twenty-five feet in length and shall be maintained by the person constructing the same, and the owner of such property shall be liable for all damages which may be occasioned by reason of the failure to keep the same in repair; provided, that the electors of any town at an annual town meeting may by vote authorize the construction of any designated tunnel therein of the length of not less than sixteen feet. The chairman of every town shall see that all tunnels in his town are made in accordance with the provisions of this section and that they are kept in good repair.

86.14 Engines upon highways; regulations; damages. (1) The owner of any engine, or any person who propels or causes such an engine to be propelled or otherwise moved or used along or upon any highway in any town, shall be liable for all damages that may be caused thereby to such highway, or any sluiceway, culvert or bridge thereon, or to any person or corporation by reason of the propelling or otherwise moving or using the same upon any such highway in the following cases:

(a) When such engine with its equipments and attachments and whatever it may be moving upon the highway shall weigh more than ten tons.

(b) When any such engine shall be set up or used within the limits of any highway, for any other purpose than to be propelled or otherwise moved along or upon it.

(c) When any such engine shall be left unattended within the limits of any highway.

(d) When any such engine shall be in a highway, whether standing or moving, and the person in charge shall not signal and stop it when it is approached within fifteen rods

in either direction by any team or any person riding or driving any animal, and desiring to pass such engine, or when the person or persons in charge of such engine shall neglect or refuse to render all proper assistance within their power to enable such team or persons to pass in safety.

(e) When the person in charge of any engine shall neglect to span any bridge or culvert having a plank floor before crossing the same, with hardwood planks, at least two inches thick and twelve inches wide, or other sound planks of like width, at least three inches thick, so that the engine wheels shall rest thereon in crossing such bridge or culvert.

(2) The amount recovered by any town under the provisions of this section, shall, when collected, be credited to the town highway fund.

(3) Any person in charge of any engine having mud lugs on the drive wheels thereof, who shall neglect to span any bridge or culvert before crossing the same with planks of the kind and in the manner as provided in paragraph (e) of subsection (1) of this section, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than five nor more than twenty-five dollars, or by imprisonment in the county jail not exceeding twenty days.

86.15 Donations of highway aid to adjoining municipalities. (1) Any town, city or village to which is or has been bequeathed or donated money or other property for the construction of a proposed highway or the improvement of an existing highway, either or both of the terminals or any part of which highway are outside the limits of such town, city or village, may accept such bequest or donation, and with the consent of the councils of the cities, the boards of the towns and villages and the boards or other bodies in control of any state lands, through or into which such proposed highway may be constructed or such existing highway may be improved, which permission said councils and boards are hereby authorized to grant, may enter such towns, cities, villages, and state land, and may do all other things necessary for the purpose of carrying out the terms and conditions of such bequest or donation.

(2) Any city, of the fourth class, however organized, may appropriate a sum not to exceed one-fourth of one mill on each dollar of the assessed valuation of such city, according to the last preceding assessment therein, for the purpose of aiding any adjoining town, city or village in the construction or improvement of any highway or part thereof in accordance with the terms and conditions of any bequest or donation to such adjoining town, city or village, and any part of such moneys so appropriated may be expended within or without the corporate limits of such city.

86.16 Electric lines on highways; place of poles; penalty. (1) Any person, firm or corporation may, with the written consent of the town board, but subject to the approval of the state highway commission, construct and operate telegraph, telephone or electric lines for the purpose of transmitting messages, light or power along or within the limits of any highway.

(2) All poles used in the construction of such lines shall be set in such manner as not to interfere with the use of such highway by the public nor with the use of the adjoining land by the owner thereof; and all wires shall be not less than eighteen feet above the ground at all crossings, and not less than fourteen feet above the ground at all other places.

(3) No tree shall be cut, trimmed or the branches thereof cut or broken in the construction or maintenance of any such line without the consent of the owner of the tree.

(4) Any person erecting any telephone, telegraph, electric light or other pole or stringing any telephone, telegraph, electric light or other wire in violation of the provisions of this section shall forfeit a sum not less than ten nor more than fifty dollars.

(5) Any person, firm or corporation whose written application for permission to construct such lines within the limits of any highway of any town has been refused, or when such application shall have been on file with the town clerk for twenty days and no action shall have been taken thereon, such applicant may file with such town clerk a notice of appeal to the state highway commission. The town clerk shall thereupon make return of all the papers and action of the board to the state highway commission, and such commission shall proceed to hear and try and determine such appeal on ten days' notice to the town board, and the applicant. The order entered by the commission shall be final.

Note: Official authorization of construction and maintenance of electric power lines along highways does not grant rights in the nature of indeterminate permits in towns. *South Shore U. Co. v. Railroad Commission*, 207 W 95, 240 NW 784.

A city having annexed territory, including a street in a town after a public utility corporation had installed, at considerable cost and without objection by the town, electric cables and conduits in compliance with proper engineering standards under the street, following a written application to the town board for a permit therefor with the verbal

consent of the town chairman accompanied by the statement that consent in writing was not necessary, is estopped to deny the lawful presence thereof and the city on annexation of the territory obtained no greater rights than the town would have had. *Milwaukee E. R. & L. Co. v. Milwaukee*, 209 W 668, 245 NW 860.

Corporations within 180.17 are given right to occupy highways and as to such corporations permits granted by town or by highway commission are police power regulations only and do not confer franchise rights. Permit granted by town board to any other

person or corporation carries with it franchise rights and granting of such permits is legislative function in discretion of town board. In such cases highway commission has power to grant permit if town board refuses to do so. 19 Atty. Gen. 378.

Appeal by corporation to highway commission from determination of town board under (5) need not be determined unless showing is made that certificate has been granted by public service commission. 20 Atty. Gen. 1068.

Where a high voltage line located twelve feet beyond the limits of a highway had a clearance of seventeen feet, there was no violation of the electric code or of this section so as to impose liability on the power company for the death by electrocution of an employe of a telephone company which occurred when telephone wires came in con-

tact with the high voltage wire. Nicolai v. Wisconsin Power & Light Co., 227 W 83, 277 NW 674.

Under (1) permit from town board is condition precedent to issuance of construction of transmission line orders by highway commission, and such town board permit and approval by highway commission are required as to all classes of highways. 28 Atty. Gen. 126.

As town permit is condition precedent to highway commission issuing transmission line order, applicant for such order to commission should furnish commission with best available evidence as to terms of permit issued by town board. If such permit is conditioned, application should show that conditions have been complied with. 29 Atty. Gen. 260.

86.17 Taking water from highway streams. The general public shall have the right to use and take water from any spring, creek or running water that may be found running in or across the limits of any public highway, provided that this section shall not interfere with the tunneling or piping of water for the purpose of draining or improving lands on either side of such highway.

86.18 Milwaukee county highways; location, alteration, maintenance. (1) The county board of any county having a population of two hundred fifty thousand or more, shall have power and authority to acquire, establish, lay out, relocate, widen, enlarge, extend, pave, repave, improve and maintain state and county trunk highways therein, and when requested by resolution adopted by the governing body of any municipality situated therein, any other highway located in such municipality; to construct and lay water pipes, sewers, curbs, gutters and all other public facilities in such highways; to make assessments of benefits and damages, levy assessments, and issue assessment certificates and bonds in the making of and paying for said improvement to the same extent as is given to cities on the same subject matter.

(2) In acquiring property for any purpose covered by subsection (1) the county board shall proceed under the provisions of chapter 32, except that the board shall determine the necessity of the taking, and the county highway commissioner shall perform all the duties of the commissioners in making awards and appraisals under sections 32.08 to 32.10.

(3) Any party to the condemnation proceedings may appeal from the award of the county highway commissioner in the manner provided for appeals from awards of commissioners in chapter 32 and such appeal shall be heard and delivered as are appeals in said chapter.

(4) The county highway commissioner shall have all the powers now given to the city board of public works in making assessments of benefits and damages in highway improvements, and the same proceedings shall be had and taken after his report is filed with the county clerk as by chapter 62 is had and taken in the report of such board of public works in city assessments. Notices of both the preliminary and final reports shall be published for two successive weeks in the official county paper, and the date of hearing in each case shall not be earlier than five days after the last publication. Appeals from the final determination of said highway commissioner may be had, and shall thereafter be heard as provided in section 62.16 and such remedy shall be exclusive.

86.19 Highways, signs, regulation, prohibition. (1) No sign shall be placed within the limits of any public street or highway except such as are necessary for the guidance or warning of travel or as provided by section 66.45. It shall be the duty of the county highway committee in each county to cause the removal of all other signs from the state and county trunk highways, and the duty of the town, village and city officers to cause the removal of such other signs from all other roads and streets within their respective towns, villages and cities. Any sign on any public street or highway in violation of this section after June 30, 1925, shall be removed therefrom by the officers responsible for the maintenance of such street or highway, or by any state highway employe, and disposed of in such manner as they may deem advisable.

(2) The state highway commission shall prescribe regulations with respect to the erection of signs on public highways. Such regulations shall be published in the official state paper and shall have the full force of law within thirty days after such publication. No advertising sign shall use prominently any words, or combination of words, commonly used for the guidance or warning of travel, nor shall any advertising sign be erected or be permitted to remain in any place or manner so as to be a cause of danger to travel on the highways, either by reason of causing an obstruction to the view or otherwise.

(3) Any person who shall erect any sign on any public highway, or elsewhere in violation of any of the provisions of this section, or the regulations of the highway commission, or without the written consent of the state highway commission if the sign is to be erected

on a state trunk highway, the county highway committee in the case of a county trunk highway, or the city council, village or town board in case of a street or highway maintained by a city, village or town, shall be fined not less than ten dollars nor more than one hundred dollars, and for a second or subsequent violation shall be fined not less than ten dollars nor more than five hundred dollars.

(4) This section shall not be construed as prohibiting the erection of such historical monuments or markers within the limits of public streets and highways as shall be approved by the state highway commission. [1937 c. 419]

Note: Campaign material in form of placards and posters, advertising candidacy of individual, are signs and when placed within limits of public street or highway violate this section. 27 Atty. Gen. 808.

86.20 [Repealed by 1935 c. 28]

86.22 **Trucking logs on highways.** (1) It shall be unlawful for any person, firm or corporation to haul any logs by automobile trucks, trailers or semitrailers on any public highway, unless said logs are securely fastened and wrapped by suitable chains to said truck; except where the truck is equipped with stakes which are securely fastened by chains and the load is lower than the top of such stakes.

(2) Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars. [1931 c. 193]