HIGHWAY COMMISSION: Rights of commission concerning certain gasoline pumps in town of Crothersville.

July 18, 1933.

Hon. James D. Adams,
Chairman, State Highway Commission,
State House Annex,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter supplementing your previous letter of July 14, 1933, wherein you asked for an opinion in reference to the rights of the commission concerning certain gasoline pumps in the town of Crothersville.

The additional facts submitted are as follows:

Some years ago, the commission constructed through the town of Crothersville on Main Street, being the same street referred to in my former letter, an 18 foot concrete road, which was practically in the middle of the street. On each side of this slab, there was an unpaved portion of the street, and on the outer edge on each side was a sidewalk which had been put in by the property owners. On the east side of the street, being the side in question, the sidewalk was approximately eight feet wide.

The commission, with the town's consent, determined to pave the space on each side of the concrete road, a strip nine feet wide. This necessitated the cutting down of the sidewalk on the east side a distance of at least two feet. In this two feet, Mr. Garriott had located three gasoline pumps, which he removed at the request of the commission.

With the nine foot strip, the commission is also constructing a curb and gutter. Mr. Garriott proposes to place his pump on the sidewalk, and on the property side of the curb and gutter.

You submit the following question:

"Has the state highway commission any authority to prevent Mr. Garriott from placing these pumps in the sidewalk in front of his property?"

As so placed, they will be entirely outside of the construction work now being done by the commission.

Section 16 of chapter 18 of the Acts of 1933, provides as follows:
"If any state highway connects at the corporate limits of any city or of any town having a population of more than thirty-five hundred, as shown by the last preceding United States census, with an unimproved street of such city or town, the state highway commission may, in its discretion, improve the same as a part of such state highway; and if any state highway connects at the corporate limits of any town having a population of not to exceed thirty-five hundred, as shown by the last preceding United States census, with an unimproved street of such town, the state highway commission shall select, mark and maintain such street until such time as it may improve the same as a part of such state highway and after such street shall have been improved as a part of a state highway, such street shall thereafter be maintained as a part of such state highway; and if any state highway connects at the corporate limits of any town having a population of not to exceed thirty-five hundred, as shown by the last preceding United States census, with an improved street of such town, the state highway commission shall select, mark and maintain the same as a part of such state highway. If a street of any incorporated city or town is improved under the provisions of this act, and the expense per mile of such improvement is greater than the average expense of improvement of such roads outside of the corporate limits of the city or town, then and in that event the extra expense shall be paid by the city or town to the state highway fund. The common council or board of trustees of such city or town shall levy a tax upon the whole property of the city or town, at such rate as will be sufficient to produce an amount equal to seventy-five per cent of the extra expense to be paid by such city or town, and twenty-five per cent of such extra expense shall be assessed as benefits against the abutting property, in the manner provided by law for such assessments, to pay the amount due to the state for such improvement; Provided, That if in any such town or city in which any street shall be improved by the state highway commission under the provisions of this act, such street is not improved to the full width thereof, the board of trustees of such town
or the common council or board of works of such city shall have the right to improve additional parts thereof under and in accordance with the laws relating to improvements of streets in town(s) and cities by boards of trustees, common councils and boards of works, providing such widening is constructed under plans and specifications approved by the state highway commission."


Under a similar provision of the 1919 state highway commission act, as amended in 1928, the appellate court of Indiana has held that when the commission has taken over a street in a town or city of the size as provided in the act and has made the same a part of the state highway system, the exclusive control over the improvement of such street thereupon becomes vested in the commission. Gardner v. City of Covington, 86 Ind. App. 229, at page 236.

Upon the authority of the above decision, in my opinion, the commission has complete control of such a street so taken over by it and, by virtue of that control, would have the right to require the removal of obstructions from the part so taken over by it. The right of the commission, however, is not so clear as to sidewalks which have been constructed upon the edges of the right-of-way dedicated to the public. I do not think that the state highway commission under the provisions of section 16, supra, would be required to maintain sidewalks under the circumstances set out by you, and yet it is clear that the commission is obliged to maintain the street.

In my opinion, the duty to maintain and the right to control, are correlative and that the boundary of the duty to maintain limits to the same extent, the right to control. It follows from what has been said that, in my opinion, the state highway commission has no right, under the facts stated by you, to require Mr. Garriott to remove the gasoline pumps which are in the sidewalk. That right would rest with the town.

The answer to your question relates simply to the right of the highway commission to require the removal of the pumps and is not concerned with any question which might arise as to the location of tanks under the street proper. Upon that basis, your question is answered in the negative.