

TOWNSHIP: Not authorized to appropriate township funds to make deposit in county treasury of sum fixed by county court as probable amount of damages to landowners in a proceeding on petition of 12 freeholders of township to establish road ordered established at cost of petitioners.

January 10, 1946



1-16

Honorable David E. Impey
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

Receipt of your request for an opinion from this department is hereby acknowledged, which reads as follows:

"I request the opinion of the Attorney General whether the trustees of a township in a county under township organization may appropriate township funds to make the deposit in the county treasury of the sum fixed by the County court as the probable amount of damages to land owners in a proceeding on the petition of at least twelve freeholders of the township to establish a public road ordered established at the cost of the petitioners."

The situation referred to in your letter is covered by Section 8475, R. S. Mo. 1939, which provides:

"When the petition required by section 8474 of this article is presented, upon proof of this notice having been given as required by section 8474, and if no remonstrance, as herein mentioned, is presented, and if the petitioners give the right of way for said proposed road or pay into the county treasury an amount of money equal to the whole amount of damages claimed by landowners through whose land said proposed road would run, the court must, without discretion to do otherwise, open said

road and the court shall thereupon proceed as in this section hereinafter provided in cases where upon a hearing the court finds it necessary to establish a road; and if a remonstrance be, presented, signed by twelve or more freeholders residing in the municipal township or townships through which it is proposed to establish said road, three of whom shall reside in the immediate neighborhood, the court shall hear such witness as the respective parties may produce in regard to the public necessity, practicability and probable damages, if any claimed, to the owner of the land through which it is proposed to establish said road, and the expense of establishing and building same, including bridges and culverts therein; and if the court, upon the hearing, shall find the facts in the case do not justify the establishing of the road at the expense of the county or of the petitioners, the proceedings shall be dismissed; but if the court upon said hearing shall find the facts do justify the establishing of said road, either at the expense of the county or of the petitioners, or both, it shall make an order accordingly. If the court finds it necessary to establish said road at the expense of the county, or if it be found necessary to establish same either wholly or partly at the expense of the petitioners and said petitioners pay into the county treasury, on or before a time to be fixed by the court, the probable amount of damages, ascertained as aforesaid, or a sum to be fixed by the court, to the use of the owners of said lands, then, in either event, the court shall make an order directing the county highway engineer, within sixty days thereafter, to view, mark out and survey such road, take all relinquishments of the right of way of those who will give the same, and take the names of all owners of land, through which said road may run, and who have not given or will not give the right of way,

and the amount of damages claimed by each one separately, together with a description by section and subdivision thereof of the lands of each owner sought to be taken, and also the engineer's estimate of the cost of bridges, culverts and grading that may be necessary upon such road, and shall report his proceeding in the premises, together with his survey and plat of said road, to the court within the time last above provided. If it shall appear from said report that the right of way has been secured, and deeds therefor filed, or that the damages claimed do not exceed the amount offered by the court or deposited by the petitioners as aforesaid, or both, the court shall order the road established. All relinquishments, deeds and plats of said roads shall be by the highway engineer filed in the office of the county clerk and shall be preserved as public records, and all such deeds shall be filed and recorded in the office of the recorder of deeds." (Underscoring ours.)

Upon a thorough reading of this section we can find no provision whereby the trustees of a township are authorized to pay into the county treasury a sum of money estimated as a probable amount of damages to landowners in such a proceeding as is presented by your writing. The section provides rather that the "said petitioners pay into the county treasury, on or before a time to be fixed by the court, the probable amount of damages, ascertained as aforesaid, or a sum to be fixed by the court, to the use of the owners of said lands," which provision is exclusive and falls under the well known rule that "the expression of one thing is the exclusion of another," which rule is found most recently in Missouri in the case of State v. Smith, 111 S. W. (2d) 513, 1. c. 514.

A township board cannot undertake to do that which it is not authorized to do by law. The recent case of Jensen v. Wilson Township, Gentry County, 145 S. W. (2d) 372, 1. c. 374, holds:

"* * * A township board functions not as a court of broad jurisdiction but as the agent of the township with limited authority.

Consequently, it is even more essential that its authority be exercised in strict compliance with the powers granted to it. Such a board comes under the same rule as a county court. A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co. v. Harris, 96 Mo. 29, 8 S. W. 794. * * *"

We can find no constitutional or statutory authority under which a township board may appropriate township funds for the purpose described in your request.

Conclusion

It is, therefore, the opinion of this department that in a proceeding on the petition of at least twelve freeholders of a township to establish a public road ordered established at the cost of the petitioners, the sum fixed by the county court as the probable amount of damages to the landowners should be deposited by said petitioners.

It is our further opinion that the trustees of the township in a county under township organization may not appropriate township funds in the proceeding aforementioned.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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