

November 18, 1970

OPINION LETTER NO. 424

Answered by Letter - Mansur

Mr. Lee E. Norbury
Executive Secretary
Missouri State Soil and Water
Districts Commission
705 Hitt - University of Missouri
Columbia, Missouri 65201



Dear Mr. Norbury:

This is in response to your request for an opinion from this office as follows:

"Does a County Court have the authority to grant an easement for the temporary flooding of a county road?

"In the past such an easement has been granted by some County Courts to Watershed Subdistricts where it appears that a flood detention impoundment will cause flooding over a road for a short period of time. The authority to do this has been questioned by the Counsel for the U. S. Department of Agriculture."

You inquire whether an easement can be granted by a county court to a watershed subdistrict where it appears that a flood detention impoundment will cause flooding over a public road for a short period of time.

County courts or township boards, in counties under town-

Mr. Lee E. Norbury

ship organization, have control over all public roads in the county; except state highways, county highways, and roads in special road districts which have exclusive control over the road within their respective jurisdiction. This opinion is restricted to public roads under the jurisdiction of a county court.

Counties, like other public corporations, can exercise only powers granted them by statute in express words, those necessarily and fairly implied in regard to the powers expressly granted. Any act done or contracted in excess of their authority is null and void. Their rights and powers and liabilities are specifically limited by the statute. Article VI, Section 7 Constitution of Missouri. Lancaster v. Atchinson County, 180 S.W.2d 706, 352 Mo. 1039; Thompson v. City of Malden, 118 S.W.2d 1059; Ballard's Estate v. Clay County, 355 S.W.2d 894.

In State ex rel Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, the issue before the court was the use of the city streets by a public utility for their pole and line wires. In discussing the authority to use the streets, the court stated l. c. 397:

"The rule must be considered settled, that no person can acquire a right to make a special or exceptional use of a public highway, not common to all the citizens of the state, except by grant from the sovereign power.' Jersey City Gas Co. v. Dwight, 29 N.J. Eq. 242, cited with approval in McQuillin on Municipal Corporations (2d Ed.) § 1745, note 59, vol. 4 pp. 643, 644. The power to grant franchises resides in the state, and a city, in granting a franchise, acts as agent for the state. In an effort to prevent usurpation of such delegated power, it is not improper for a municipality to be relator in a quo warranto proceeding. State ex inf. Jones v. Light & Development Co., 246 Mo. 618, 637, 152 S. W. 67."

In 40 C.J.S. Highway §220, the general rule of law in regard to obstructing public highways is stated as follows:

"Obstructions in a highway may be authorized by act of legislature, or by the municipality in which the road lies. Such authority, however, must be strictly construed and cannot lawfully be exercised in such a manner

Mr. Lee E. Norbury

as to constitute a source of danger to the public, or prevent the ordinary use of the highway.

"Highway officers have no power to surrender the use of the highway for private purposes, or to authorize a nuisance on the highway. If the public authorities, in authorizing an obstruction, exceed their powers, such obstruction will be illegal; nor can an illegal obstruction be justified by matters occurring thereafter and subsequent to the commencement of a prosecution therefor. Although a dam authorized by the legislature is not a public nuisance for which indictment or injunction will lie, a county whose highway is flooded may nevertheless sue for damages."

We are unable to find any statute authorizing a county court to grant an easement to permit the flooding of a public road by Watershed Subdistricts.

It is the view of this office that a county court does not have authority to grant an easement to permit the flooding of a public road under its jurisdiction by watershed protection and flood prevention subdistrict.

Very truly yours,

JOHN C. DANFORTH
Attorney General