

COUNTY HIGHWAY COMMISSION: Power and duties under Article 2,  
Chapter 42, R. S. of Mo. 1919

7858-7863 K3 2/11/33

July 1st, 1933



Hon. Frank K. Ashby,  
Prosecuting Attorney,  
Charleston, Missouri.

My dear Mr. Ashby:

Your request of June 27th to General McKittrick for an opinion of this Office respecting the County Highway Commission and its powers and duties has been referred to me for reply. For the purposes of this opinion, I have consolidated your questions into the following form.

1. Is the actual construction of county highways, located, laid out and designated under the provisions of Article 2 of Chapter 42 of the Revised Statutes of Missouri 1929 under the supervision and control of the County Highway Commission subject to the approval of the State Highway Commission?
2. Does the Commission have a right to any money in said District derived either from bond issues or from any other source to spend on the proposed highway, such highways not exceeding one hundred miles as provided in said Article 2?
3. Is the refund money set up on the books of the Highway Department as a Refund Account, the sole fund of Mississippi County or do the special road districts or other political subdivisions have an interest therein?
4. Does the County Highway Commission have the right to let the contracts and supervise the spending of this money?
5. Can the County Highway Commission expend this refund money in building new roads which are not in the same part of the county or the same districts as were the roads which were taken over

by the State Highway Commission and were the consideration for the refund?.

6. Can the County Court of Mississippi County use the refund money to buy office furniture for the Court House or disinfectant for the jail?
7. Does the County Court have the power to use this refund money and supervise the building of other roads in the County to be taken over by the State Highway Commission under the provisions of Article 2 of Chapter 42?
8. If the County Court expects to use this refund money in the building of additional roads by day labor, is it required to follow Section 7946 R. S. Mo. 1929 in respect to the purchase of machinery and the drawing of plans, specifications and estimates of the cost of the new road?
9. If the County Court expects to use this refund money in the building of additional roads by contracts, are they required to follow Section 7947 of R. S. of Mo. 1929?

The powers and duties of the County Highway Commission are set out in Sections 7858 and 7863, portions of which read as follows:

"SECTION 7858-Power and duty of County Highway Commission--It shall be the duty of the County Highway Commission and said Commission shall have the power to locate, lay out, designate, construct and maintain, subject to approval of the State Highway Commission, a system of county highways not exceeding in the aggregate one hundred miles in any county, \* \* \* "

SECTION 7863-Commission empowered to employ technical and other help. The county highway commission is hereby authorized and empowered \* \* \* to use and employ whatever means, methods, or power that may be necessary in the construction and maintenance of said county highways, \* \* \* and is hereby empowered to employ such technical and other help as may be deemed necessary for the administration and enforcement of this Article."

From reading the foregoing portions of these Sections it seems that the County Highway Commission is given broad powers in performing its duties under this Article. At the time these Sections were enacted in 1927, the State Highway primary and secondary systems were already well under way and it was undoubtedly the intent to prepare for a further system of highways to be known as "County Highways" which would in reality supplement the primary and secondary state highway system. To insure that these highways be up to a high standard of quality and design, it was provided that the location, design and construction of these roads be done with the approval of the Highway Commission. Further Sections of this Article place certain requirements upon the width of the right-of-way and the design of the road so as to insure the building of first class highways.

As to the powers and duties of the County Highway Commission, the Supreme Court in the case of State ex rel. State Highway Commission vs. Huff et al, 51 S. W. (2d) 40 said:

" The powers of that commission are found in an act passed by the Legislature in 1927, a year prior to the adoption of said section 44a. That act (now article 2, chapter 42, R. S. 1929 (section 7856 et seq.) ) created and established in the several counties of the state a county highway commission. It empowered each such commission to locate, lay out, designate, construct, and maintain, subject to the approval of the state highway commission, a system of county highways, not exceeding in the aggregate 100 miles, so connecting the centers of population in the county with state highways that the inhabitants of the county generally should have and enjoy 'a system of highly improved farm-to-market roads'. The act provided that the 'roads constituting the county highway system shall be known and designated as 'county highways'. It further provided that 'the county highway commission shall have absolute jurisdiction and control over all highways constituting a part of the county highway system.' "

While the "approval" of the State Highway Commission is a requirement of this Act, we do not interpret the approval to mean the power to build or to contract for the building of the highway. So long as the location, design and methods of construction are such as are approved

by the State Highway Commission, the requirements of the Act are met. While it is apparent that the Act contemplates a transferring of these county highways to the State Highway Commission at some further date, the County Highways are not to be confused with the supplementary State Highways as the same are separate and distinct systems. See State ex rel. State Highway Commission vs. Huff, supra, l.c. 42.

" In State ex rel. Russell v. State Highway Commission, supra, loc. cit. 199 of 42 S.W. (2d), the supplementary state highways provided for in said section 44a were referred to as 'being what are generally called 'farm-to-market' roads.' In so describing them, the court was merely making use of the nomenclature which had been employed in the press and on the hustings in the campaign to popularize and secure the adoption of the proposed constitutional amendment, then known as proposition No. 3. It certainly had no thought of identifying the 'supplementary state highways' provided for in the amendment with the 'county highways' constituting 'the county highway system', created and put under the jurisdiction of the county highway commission by said article 2."

In reply to your second inquiry, I beg to advise that the funds at the disposal of the County Highway Commission are provided for in Sections 7861, 7863 and 7864, R. S. of Mo. 1929.

Section 7861 provides that in the event any highways that are taken over by the County Highway System, which are laid through any special road district or in counties under township organization, through any township, the Commissioner of the Road District or the Treasurer of the Township shall pay to the County Highway Commission a proportion of the Special Road Tax levied and collected in the District of Township. Section 7863 authorizes the County Highway Commission to accept and expend any appropriation or donation from any municipal corporation, special road district, township or private individuals and Section 7864 authorizes the County to make such appropriations or contributions as the County Court in its judgment may deem necessary to attain the result contemplated by the Act. It is accordingly apparent that the Commission has no right to any fund money unless appropriated, donated or contributed under one of the foregoing Statutes. While the County Court does not have the actual supervision and control over the construction of the highways contemplated by this Article, it nevertheless holds the pursestrings. The County Highway Commission's sources of revenue are the foregoing Sections, and it has no interest in any ree fund except by virtue of the aforementioned laws.

In answer to the third interrogatory, we refer to the Section authorizing these refunds, which reads as follows:

"SECTION 8127-State Highway Commission may reimburse counties or other civil subdivisions \* \* \*. Counties or other civil subdivisions shall be reimbursed for work done in constructing such part of a road or roads including bridges, \* \* \* which may become a part of the state highway system \* \* \*. Where two or more counties or minor subdivisions or minor subdivisions in two or more counties have constructed a road which is taken over as a part of the state highway system and reimbursement is to be made under the provisions of this section, reimbursement shall be made to each county or minor subdivision in proportion to the funds contributed by each in the construction of the roads taken over, and those constructed therewith in each county or in the territory of the minor subdivision of each county.

It is therefore apparent that if both the County and the civil subdivision or special road district has contributed to the construction of a certain road taken over by the State Highway Commission, the refund granted under this Section shall be divided between the County and special road district or civil subdivision in proportion to the amount which was contributed by each toward the construction of such road. It is to be noted that this Section closely follows the provisions of Section 44a of Article IV of the Constitution and that both of these expressions provide that the refund shall be made to a county or civil subdivision which is entitled to receive the same.

The Supreme Court of this State has several times considered a similar proposition. The laws which provide for the levying of a special road and bridge tax, state that such levy shall be collected and paid into the County Treasury to the credit of the road district in which said tax was collected. At times County Courts have collected this special road and bridge tax and refused to pay the money to the road districts entitled thereto. Road districts have thereupon sued the County for the tax which it collected in the road district under this levy. The controlling case on this issue is that of Road District vs. Ross, reported in 270 Mo. p. 76. The Court in considering these Sections of the Statutes stated as follows on page 82:

"It was not only declared in the section which authorized its levy that it be placed to the credit of the road district from which it was collected and paid to the overseer of such district on warrants of the county court and expended by the overseer, but also declared that it should constitute the road fund of the several road districts. In these provisions we can see no evidence of any intention that the county court might devote it at will to other uses."

And on page 84,

"This particular fund (referring to the minimum ten cent tax for road and bridge purposes devoted to the special road districts) has plainly been removed from its control and entrusted to other hands to be expended by other agents, while leaving ample resources at its command for application to any road and bridge purpose, which may still remain within the range of its duties."

And accordingly the Court held that the statutory and constitutional provisions vested in the special road district the right to this tax money when collected.

It is the opinion of this Office that the constitutional and statutory provisions authorizing the refund to be made to the "counties or civil subdivisions" gives to the civil subdivision the right to receive its proportionate share of the refund when such refund is available.

In answer to the fourth inquiry, it is our opinion that the County Highway Commission has the right to let the contracts and supervise the location, construction and maintenance of the "county highways" provided for in Article 2. It is certain that the Act confers these powers on the Commission. The only question remaining is the power of the Legislature to divest the County Court of authority over these roads and place control in the Commission. The power of the Legislature in this matter is very exhaustively discussed in the case of Harris vs. Bond Co., 244 Mo. 664. The plaintiff in that case took the following position, l.c. 681, 682:

" His contention is that under the Constitution and policy of Missouri, as expressed in the decisions of this court, the construction and maintenance of public roads is a proper function of the county; that taxes for public roads

are taxes for county purposes, and consequently, under the Constitution as construed and applied by this court, the Legislature has no power or authority to deprive the county courts of their jurisdiction and control of the construction of public roads and highways in any part of the county and transfer the same to a body of commissioners representing a subdivision of the county, such as these special road districts."

The Supreme Court reiterated the well established doctrine that the Constitution is a restriction of powers and not a grant of powers and stated as follows on page 688:

" The Legislature is vested with the whole power of the State in the absence of some such constitutional limitation; and may establish any public or municipal corporation it deems necessary or expedient in the public interest."

It was the holding of the Court that there was no constitutional restriction upon the power of the Legislature to delegate the construction and maintenance of the roads in a special district to road commissioners and that such an act was unconstitutional.

In answer to the fifth interrogatory, it is the opinion of this Office that any part of the refund money which is donated or appropriated to the use of the County Highway Commission and any other funds that are to be used in the building of the one hundred miles of county highways, shall be used by the Commission to connect by the most practical route the several centers of population in the County, in such a manner as to afford a connection with any State Highway and as nearly as possible, to connect with other county highways, the centers of population of the County to the end that all parts of the County shall be connected with the State Highway System and that the inhabitants of the County generally shall have and enjoy a system of highly improved farm-to-market roads. It is therefore evident that the Commission is required to expend the money received by it, on the roads which will connect the various centers of population of the County with each other and with the State Highways. While it is possible that a special road district might make a contribution to this system, conditioned upon the contribution being expended upon a certain designated portion of the County Highway, there is no statutory requirement that the funds shall be expended in any particular district or township. It is the opinion of this Office that although the funds might arise from one part of the county, the Commission would be authorized to expend such funds wherever they were needed to complete the object of the act.

July 1st, 1933

In considering the sixth interrogatory, we should refer to Section 20 of Article X of the State Constitution, which provides as follows:

"The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, \* \* \* and not otherwise."

It should be kept in mind that the funds which were used to construct the highway which was later taken over by the State Highway Commission and formed the basis for the refund, were raised either by bonds issued for road and bridge purposes or by taxation for road and bridge purposes. The fact that the funds have been invested in the improvement which was the purpose of their creation, and have since been refunded or returned, solely because of the nature of the improvement, cannot be held to obliterate their identity. The refund was made for the reason road and bridge improvements had been made. These improvements were made possible by taxes levied on the property in the civil subdivision, Each taxpayer contributing his portion to this fund, whether as a current tax for construction and maintenance or as a tax for the purpose of retiring the bonds. As each of the taxpayers has so contributed his portion, he has a right to some day expect that the county roads will eventually reach him and so long as the county has road and bridge funds with which it can build these roads, it could hardly be stated that the road construction program was completed. Until that time, it would certainly not be proper for the county court to make any order transferring any of the funds of the road and bridge account to any other fund, This would be necessary before these funds could be used for the purchase of office furniture or disinfectant. It is therefore the opinion of this Office that the County Court would be without authority to use this refund money to purchase office furniture or disinfectant.

In respect to the seventh interrogatory, we advise that the jurisdiction of the County Court under the Constitution to conduct the business of the Court is sufficiently broad to include the power to construct and maintain and supervise the construction and maintenance of the county roads. However, this authority is in the absence of a legislative act conferring this power and authority upon any other agency. In the case of State ex rel. Maes vs. Wehmeyer, 25 S. W. (2d) 456, the Supreme Court stated as follows:

"County Courts have general jurisdiction of the subject-matter of county roads and bridges and of county bond issues for such purposes. Whatever the jurisdiction of the county highway commission may be under the Act of April 6, 1927, until such commission is appointed and the county highway system contemplated by the act is designated, it cannot be said that the county court, in pursuing the activities

above mentioned, has exceeded its jurisdiction."

Accordingly had the County Court failed to appoint any County Highway Commission it would undoubtedly be within their jurisdiction to proceed to let contracts and supervise the building of the roads of the County. However, the Legislature in Article 2 has seen fit to create a Board of Commission known as the County Highway Commission whose specific object and purpose is the construction and maintenance of a system of county highways not to exceed one hundred miles which may later be taken over by the State Highway Commission. As heretofore set out, the Legislature having the power to enact a law creating the County Highway Commission and giving to that Commission the supervision of certain county roads, it is the opinion of this office that upon the appointment of that Commission the County Court is divested of authority to proceed under Article 2 to build or contract for the building of the one hundred mile system of county highways. This is not to be taken as to say or to mean that the County Court is divested of all authority in the construction and maintenance of county roads. By turning to the last Section of Article 2, we find that it was not the intent of the Legislature to divest the County Court of all authority over the county roads, as this Section leaves with the County the right to all taxes derived from levies authorized by Section 7890 R. S. of Mo. 1929 and appropriates said tax to the use of the County Court to be used at its discretion in the construction and maintenance of roads and bridges located within the confines of the county highway system, as well as all other roads and bridges in such county. Accordingly, it is the opinion of this Office that the County Court while having supervision over other county roads has no power to build or contract for the building of the one hundred mile system contemplated by Article 2, Chapter 42 of R. S. of Mo. 1929, after the appointment of the County Highway Commission.

The answers to interrogatories eight and nine must follow the foregoing conclusion, to-wit that as the County Court has no jurisdiction in the designation, location, construction or maintenance of the one hundred mile system provided for under Article 2, any roads built by the County Court must be done under their general authority to lay out, construct and maintain the county roads. Sections 7946 and 7947 R. S. of Mo. 1929 set out certain requirements which must be followed by the County Court in building the County roads, either by day labor or by contract. It should here be noted that the Supreme Court of this State has held that Section 7946 and Section 7947 are exclusive and not merely directional. In the case of Hillside Securities Co. vs. Minter, 254 S. W. 188, the Court was considering a suit to enjoin the payment of warrants issued by Clay County, Missouri for bridge work done by the Topeka Bridge Company under contract with the County Court, The statement of facts admitted that the bid of the

Topeka Company was not submitted upon the plans and specifications submitted by the County Engineer. The Supreme Court held that the requirements of Section 7947 must be complied with before any legal and binding contract can be entered into. The Court stated at page 190 as follows:

"Section 10734 (now Section 7947) provides an exclusive method of letting contracts for the constructions of bridges by the County Court. It requires that all work let by contract of the estimated cost of over \$500, shall be let, after due advertisement, upon bids made upon maps, plans, specifications, and profiles, previously prepared by the highway engineer. That the statute does not contemplate the letting of contracts upon plans other than those submitted by the highway engineer and approved in advance of advertising and acceptance of bids of contractors bidding upon such plans is clear. There accordingly can be no question that the acceptance of the bids made by the bridge company upon plans other than those prepared by the highway engineer was a failure to comply with the statute."

And on page 192 stated as follows:

"Here the contract made by the County Court was void because it had no power whatever to enter into such contract except in compliance with express statutory provisions."

And on page 193 as follows:

"Where the parties have not followed the prescribed procedure leading up to the making of the contract itself, the county court has no power to make such contract."

Hon. Frank Ashby

-11-

July 1st, 1933

And the Supreme Court accordingly affirmed the judgment denying the bridge company payment of the warrant issued for work done under this void contract.

We trust that the foregoing opinion meets your requirements.

Respectfully submitted,

HARRY G. WALINER, Jr.,  
Assistant Attorney-General

HGW/mh