

COUNTY COURTS:
WIDENING OF ROADS:

The County Court shall follow procedure prescribed by Section 7840, R. S. Mo. 1929, for the widening of the right-of-way of a road.

September 9, 1938

Honorable Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date requesting an official opinion from this department based upon the following letter:

"I would like to request an opinion on the following state of facts: The County of Cole has received a W. P. A. grant to be used in building new county roads and improving old roads and one of the requirements thereof is that the roads be not less than 40 feet in width. The County in rebuilding one road which is now 30 feet in width is unable to obtain the additional 10 feet of right of way from two property owners. I would like to know the correct procedure in which the County may acquire this additional right of way. The County has started work on part of this new road, and I would greatly appreciate a reply as soon as possible."

I take it from your request that the road which the county court desires to widen is one which is not included in the county highway system or the state highway system; in other words, it is a road over which the county court has exclusive jurisdiction. It also appears from the statement that a part of the present road is only 30 feet wide and that the county court desires to widen that portion

to the width of 40 feet, and the question is whether or not the county can proceed under the general statute for condemning lands for public roads for the purpose of widening a road.

The Legislature has provided that the minimum width of a public road in this state shall be 30 feet. (Section 7825, R. S. Mo. 1929.)

Section 7840, R. S. Mo. 1929, provides the manner for the taking of private property for road purposes. This section is as follows:

"The right of eminent domain is vested in the several counties of the state to condemn private property for public road purpose, including any land, earth, stone, timber, rock quarries or gravel pits necessary in establishing, building, grading, repairing or draining said roads, or in building any bridges, abutments or fills thereon. If the county court be of the opinion that a public necessity exists for the establishment of a public road, or for the taking of any land or property for the purposes herein mentioned, it shall by an order of record so declare, and shall direct the county highway engineer within fifteen days thereafter to survey, mark out and describe said road, or the land or material to be taken, or both, and to prepare a map thereof, showing the location, courses and distances, and the lands across or upon which said proposed public road will run, or the area, dimensions, description and location of any other property to be taken for the purposes herein, or both, and said highway engineer shall file said map and a report of his proceedings in the premises in the office of the county clerk. Thereupon the county court shall cause to be published in some newspaper of general circulation in the county, once each week for three consecutive weeks, a notice giving the width, beginning, termination, courses and distances and sec-

tions and subdivisions of the land over which the proposed road is to be established, or the location, area, dimensions and descriptions of any other land or property to be taken, or both, and that said land or property is sought to be taken for public use for road or bridge purposes. If within twenty days after the last day of said publication no claim for damages for the taking of any of such land or property be filed in the county clerk's office by the owner of said property, or by the guardians or curators of insane persons or minors owning said property, then the claim of any such owner shall be forever barred, and the county shall be authorized to enter upon and appropriate said lands or other property; and the court shall make an order accordingly. If any claim for damages be filed, the same shall be heard on the first day of any regular or adjourned term of the county court after the expiration of the twenty days last aforesaid. If the county court and the land or property owner be unable to agree on the amount of the damages, the county court shall make an order reciting such fact, and cause a copy of same to be delivered to the judge of the circuit court of that county, and a transcript of the record and the original files in said cause shall be transmitted by the county clerk to the circuit clerk of the county. Upon receipt of the copy of the order of the county court last aforesaid by the circuit judge, the circuit court, or the judge thereof in vacation, shall make an order setting the cause for hearing within fifteen days, and if the order fixing the date of said hearing be made by the judge in vacation, it shall forthwith be filed in the office of the circuit clerk. The court, or judge in vacation, shall cause to be empaneled a jury of six freeholders not interested in the matter or of kin to any member of the county court, or to any landowner in interest. Said jury shall view the land, or other

property, proposed to be taken, and shall hear the evidence and determine the question of damages under the direction of the court or judge. Five of said jury concurring may return a verdict, and in case of a disagreement another jury may be empaneled. The public necessity for taking said property shall in nowise be inquired into by the circuit court, and the judgment of the circuit court, or judge thereof in vacation, in said cause shall not be reviewed on appeal or by writ of error."

Section 7841, R. S. Mo. 1929, also provides:

"The words 'established' and 'establishing,' as used in this article in relation to public roads, shall be held to embrace the locating, relocating, changing or widening of roads, and the word 'road' shall include bridges and culverts."

By this section the lawmakers left no doubt as to the question of whether or not Section 7840, supra, would apply to a case where a road is widened by the proper county authorities. They have included the word "widening" in the definition of the word "establishing." Therefore, the same procedure for widening a road is followed that is used for the purpose of establishing or opening a new road.

The proceedings for the opening, establishing and vacating of public roads are of early origin. In the case of *Wooldridge v. Rentschler*, 62 Mo. App. 591, in which a road had been widened by the county court by authority of statutes similar to Section 7840, supra, the court, in discussing the procedure for the widening, said, l. c. 594:

"It appears from the record that this case originated from a difficulty about a road, which, it appears, some persons in its neighborhood concluded had been encroached upon by plaintiff. How the road was originally acquired by the public, or what its original width was, does not

appear. It does appear, though, that proceedings were instituted, before the county court, to widen it. These proceedings appear to be such as would be proper for widening a road that was found to be too narrow as originally laid out. That process seems to have been invoked, as a means of setting plaintiff's fences off of the road, already of a proper width as a road, but which had been encroached upon by the alleged unwarranted acts of plaintiff. Notice of the presentation of the petition was regularly given, and the county court ordered a survey by the surveyor. The survey was made and duly reported to the county court. Plaintiff was then notified by proper notice to remove his fence to the limit as established by the survey. Having refused to do so, the county court issued an order to defendant, as road overseer, which was duly delivered to him, to proceed to open the road and report his action to the court. It was in executing this order that defendant committed the acts for which the suit was begun."

And at l. c. 595 of said case the court further said:

"The county court has general jurisdiction to open or widen public roads.
* * * *"

The court further said:

"The order of the court delivered to defendant recited that the court had ordered the road widened according to the survey made by the county surveyor, and directed defendant to 'proceed to widen said road within thirty days from the date of this order, as the same was surveyed by the county surveyor and ex officio commissioner of roads and bridges, and report to this court at its next regular term.'"

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CONCLUSION

From the foregoing, it is the opinion of this department that the county court, for the purpose of widening a public road, should follow the procedure prescribed in Section 7840, R. S. Mo. 1929, hereinabove quoted.

Respectfully submitted

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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