

STATE HIGHWAY COMMISSION: May not abandon voluntarily a constitutionally established road.

March 10, 1941

3-12 ✓



Honorable Louis V. Stigall
Chief Counsel
Missouri State Highway Department
Jefferson City, Missouri

Dear Mr. Stigall:

We acknowledge your recent request for an opinion wherein you state as follows:

"At the suggestion of the War Department we are requesting your opinion upon the powers and duties of the State Highway Commission in relation to a state highway which must be permanently abandoned and closed because located in the Seventh Corps Area Training center adjacent to Fort Leonard Wood. This area is principally in Pulaski County but extends into parts of Maclade and Texas Counties.

"In acquiring the area it has been necessary for the War Department to purchase and condemn thousands of acres in these three counties. There are to be no public roads in the area. State Highway No. 17 now runs south from a point on U. S. Route 66, through Bloodland and Palace in Pulaski County to the Pulaski-Texas County line, thence south to Roby in Texas County. About three miles south of U. S. Route 66 it enters the government reservation

and continues through the reservation to the reservation's southern boundary, about two miles south of the Pulaski-Texas County line, a distance of approximately fifteen miles. As a result of the location of the government area, this mileage on Route 17 within the area will have to be abandoned as a state highway.

"This portion of Route 17 is a part of the Centennial road system laid out in 1921 (Laws of 1921, 1st Ex. Sess. pp. 131-167; Section 8120, R. S. Mo. 1929). The act provides for the road in Pulaski County beginning at Waynesville, thence south via Bloodland to the Pulaski-Texas County line" and the road in Texas County 'beginning at Houston, thence in a northwesterly direction via Plato to the Pulaski-Texas County line.'

"The legislative road designations of the 1921 act were given a constitutional basis in the 1928 road amendment (Section 44a, Article IV, p. 90, Vol. 1, R. S. 1929). This amendment provided for the completion, construction and maintenance of 'the state system of primary and secondary highways as designated and laid out under existing law', which included, of course, the descriptions of the portions of Route 17 set out above, and Section 8134, R. S. 1929, expressly provides that 'when the roads included in the state highway system have been constructed by the Commission, or acquired as provided for herein, they shall be maintained by the Commission and kept in a good state of repair at whatever cost may be required.'

"Incidentally, the Commission cannot relocate within Pulaski County, that

portion of Route 17 now lying between the north boundary of the area and the Pulaski-Texas County line. Any relocation of this portion outside the area in Pulaski County would necessarily have to be either in Phelps County (if to the east) or to the Pulaski-Laclede County line and southward in Laclede County, and not Texas County (if to the east). Either such relocation would involve the construction of a new secondary road other than that prescribed in the Centennial Road Law.

"The War Department has requested the Commission to abandon this part of Route 17 and to convey the State's interest therein to the United States. The Commission concedes the power of the War Department to appropriate and close the highway and is requesting the government to take the proper condemnation proceedings to this end. However, it is the opinion of the Commission that the Commission is without authority to abandon voluntarily the constitutionally established road and that the War Department should exercise its unquestioned right of eminent domain to extinguish the rights of the State in this highway. We will indeed appreciate your advice in this matter, and an answer to the specific question:

"In a case where the government has the right to condemn a state road within an area acquired by the United States for military purposes, has the Commission authority to agree upon the compensation to be paid and to release the State's interest in such road without requiring the government to institute condemnation proceedings."

In determining the question presented, we will first of all examine the power of the State Highway Commission as it relates to the control over the highways and bridges of this State.

In the case of Christeson v. State Highway Commission (1931), 40 S. W. 615, 1. c. 616, the Supreme Court of Missouri said:

"Such commission 'is not the state, but a mere entity created by the state for the purpose of contracting for the building of state highways and bridges and the maintenance of the same and doing all other things pertaining thereto.' State ex rel. Highway Commission v. Bates, 317 Mo. 696, 701, 296 S. W. 418, 421."

And in the case of Burow v. St. Louis Public Service Co., (1936), 339 Mo. 1092, 100 S. W. (2d) 269, 1. c. 270, the Supreme Court of Missouri said:

"On the other hand, the State Highway Commission controls the state highways as a governmental agency. Its control is fixed by the Constitution as follows: 'All the highways and bridges to be constructed and improved with the funds herein provided, shall be constructed, improved and maintained under the direction and supervision of the State Highway Commission, which shall determine the width of right-of-way and surface, and the type and character of construction, improvement, and maintenance.' Section 44a, art. 4, const."

Again in the case of State v. Allen (1937), 100 S. W. (2d) 869, 1. c. 872, the Supreme Court of Missouri said:

"Hitherto our court has substantially held (State ex rel. State Highway

Commission v. Bates, 317 Mo. 696, 296 S. W. 418; State ex rel. McDowell, Inc., v. Smith, 334 Mo. 653, 67 S. W. (2d) 50) that while the State Highway Commission is a quasi corporation--that is to say, it partakes of the nature and has some of the attributes of a corporation--it is essentially an agency of the State and as such exercises broad administrative powers in the public interest. Among such powers, provided by the Legislature, are these: Sections 8115 and 8134 (Mo. St. Ann. Secs. 8115 and 8134, pp. 6899 and 6929) provide that the state highways shall be under the jurisdiction and control of the commission, and the commission 'shall maintain such roads * * * keep them in a good state of repair.'

It is evident after a reading of the above decisions that the State Highway Commission is not the state but an agency created by it and authorized to construct and maintain the highways and bridges of this state.

25 Am. Jur., Section 19, page 350, declares generally that:

"The establishment of highways is embraced within the police power of the state and is a matter which is primarily under the jurisdiction and control of the legislature. Such power may be exercised by the state directly or delegated to municipalities and other subordinate agencies, subject to constitutional limitations and restrictions."

In considering whether there are any constitutional limitations or restrictions on the power of the Legislature or its delegated agency over the control of the highways in this state, we must look to Section 44a of

Article IV of the Missouri Constitution.

Said section provides in part that:

"In addition to the exceptions made and created in section 44, the General Assembly shall, for the purpose of locating, establishing, acquiring, constructing, widening and improving hard-surfaced public highways in the State and in each county thereof, and of acquiring materials therefor and for the purpose of locating and constructing bridges across the rivers and waters of the State and of participating in the construction of toll-free, interstate bridges, have the power to contract or authorize to contracting of a debt or liability on behalf of the State * * *..

"The proceeds of the sale of the seventy-five million dollars (\$75,000,000) of additional bonds herein authorized shall be expended under the direction and supervision of the State Highway Commission for the following purposes: To complete and widen or otherwise improve the state system of primary and secondary highways as designated and laid out under existing law; * * *.

* * * * *

"All the highways and bridges to be constructed and improved with the funds herein provided, shall be constructed, improved and maintained under the direction and supervision of the State Highway Commission, which shall determine the width of right-of-way and surface, and the type and character of construction, improvement, and maintenance.

* * * * *

"Nothing herein contained shall be construed to retard or delay in anywise the completion of the state highway system as designated and laid out under existing law, the construction of which shall proceed concurrently with, or take precedence over, the construction of all other highways provided for herein, as may be determined from time to time by the State Highway Commission.

* * * * *

"

There is nothing in the above constitutional provision which attempts to deprive the General Assembly of its power over roads and highways. The State Highway Commission is merely designated as the agency to expend the funds provided for the completion, construction and maintenance of "the state system of primary and secondary highways as designated and laid out under existing law."

The existing law referred to (Section 8768, R. S. Mo., 1939) provides in part that:

"There is hereby created and established a state wide connected system of hard surfaced public roads extending into each county of the state, which shall be located, acquired, constructed, reconstructed, and improved and ever after maintained as public roads, and the necessary grading, hard surfacing, bridges and culverts therefor shall be constructed by the state of Missouri. Such state wide connected system of hard surfaced roads shall be known as the 'state highway system,' and shall consist of highways along the following described routes:

* * * * *

"Pulaski county.-- * * * * *
Beginning at Waynesville, thence south via Bloodland to the Pulaski-Texas county line.

* * * * *

"Texas county.-- * * * * *
Beginning at Houston, thence in a
northwesterly direction via Plato
to the Pulaski-Texas county line.

* * * * * "

The above section was adopted in 1921 and is referred to by the Supreme Court of Missouri, en banc, in the case of State ex rel. v. State Highway Commission (1926), 286 S. W. 1, 1. c. 2, wherein the court said:

"The Commission has not been intrusted with the power to determine the route of any public road. The Legislature itself prescribed the routes of all the roads constituting the state highway system (Section 29, Laws of 1921 (Extra Session) page 145); * * * * *"

In addition to not having the power to determine the route of any public road the State Highway Commission is further restricted as to the circumstances under which it can abandon and relocate public roads.

Sections 8770, 8771 and 8772, R. S. Mo. 1939, provide respectfully as follows:

(Section 8770)

"The state highway commission is hereby authorized to make minor relocations in any state highway or any part thereof when in its opinion such minor relocations are necessary in the interest of safety to the traveling public or in the interest of economy and directness of route: Provided, that no such minor relocations shall deviate from any designated point named in any law which may now or hereafter be in force; Provided, however, the terms, powers and authority herein granted shall apply only

when the conditions exist as enumerated in sections 8771, 8772 and 8515."

(Section 8771)

"Whenever the construction or operation of any water-power, and/or hydro-electric, project results in the inundation of any portion of a state highway, the state highway commission is authorized to abandon said portion of said highway, and, in addition to the relocations mentioned in section 8770 of this article, to relocate, construct and maintain, as in its opinion may be best from considerations of good engineering, safety to the general public, economy and directness of route and service to the locality, so much of said highway as in the judgment of said commission is necessary on account of such inundation, and abandon the portion of the highway in lieu of which the relocation is made, provided that any such relocation shall not deviate from any designated point, if any named in any law, unless such designated point shall itself be inundated: Provided, that when the seat of county government of any county is inundated by virtue of the construction or operation of any water-power, and/or hydro-electric project, rendering necessary the re-establishment and re-location of such seat of county government, such seat of county government having prior to such inundation, been a designated point on any state highway, such relocation and re-established seat of county government shall be considered for all purposes of state road designation and construction, as the original seat of county government of such county."

(Section 8772)

"Whenever the construction or operation by any person, firm, corporation, or association of any water power, and/or hydro-electric project results in the inundation of any land, highway or part of a highway, under the control and supervision of the state highway commission, the state highway commission is hereby empowered to negotiate and agree to a settlement with such person, firm, corporation, or association, their heirs, administrators, executors, assigns, successors, receivers, or trustees, of the damages resulting to any such land, highway or part thereof from any such inundation, provided that all moneys received in any such settlement shall be deposited with the state treasurer to the credit of the state road fund: Provided, however, that sections 8770, 8771 and 8772 shall not operate to deprive any county or other local subdivision of such refund, if any, to which it may otherwise by law be entitled."

(Section 8515, R. S. Mo. 1939, referred to in Section 8770, supra, applies to roads other than state highways.)

It is a well-defined rule of statutory construction that the expression of one thing in a statute is the exclusion of another. Thus, in the very recent case of *Crevisour v. Hendrix* (1939), 136 S. W. (2d) (Mo. App.) 404, l. c. 408, the court again announced the rule:

"It is an elementary rule of almost universal application that the expression of one thing is the exclusion of another. * * * * *"

The statute having authorized the circumstances under which a road may be abandoned, viz., the inundation of a portion of a state highway resulting from the construction or operation of a water power or hydro-electric

project, the abandonment of a state highway for any other purpose would be unauthorized.

Elliott on Roads and Streets, 4th ed., Vol. 1, Section 509, declares that the:

"Power over roads and streets resides in the legislature, and, except in so far as restricted by constitutional provisions, the legislative power is practically unlimited."

And in Section 511, page 576, it further declares that:

"The legislative power rests upon the principle that the ultimate proprietary right in highways is in the state. As long as a highway exists it is owned by the state."

The duty enjoined on the State Highway Commission that the "state wide connected system of hard surfaced public roads (including that portion of Route 17 now sought to be abandoned) * * shall be * * ever after maintained as public roads * *" (Section 8768, supra) "and kept in a good state of repair at whatever cost may be required" (Section 8782, R. S. Mo. 1939), cannot be surrendered "without the explicit consent of the Legislature" (25 Am. Jur., Sec. 258, p. 553).

From the foregoing we are of the opinion that the State Highway Commission has no authority to abandon voluntarily a constitutionally established road upon an agreed consideration, and that if said road is desired by the War Department it should proceed to obtain same by the exercise of its right of eminent domain.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General