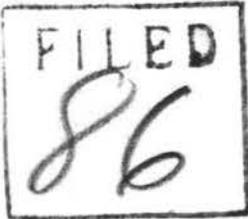


ROADS: County court may establish public road under Section 228.180, RSMo 1949, and need not comply with Sections 228.010 through 228.100, RSMo 1949, if it does so.

JOHN W. DALTON
XXXXXXXXXX



May 26, 1953

John C. Johnsen
XXXXXXXXXX

Honorable H. K. Stumberg
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I would appreciate an official opinion from your office on the following:

"Is a County Court of a County of the third class under Section 228.180 authorized to establish and construct with public road and bridge funds a new road to which the right of way has been donated without going through the procedure of Petition for Establishment, Notice of Application and Hearings as provided for in Sections 228.010 through 228.100 Missouri Revised Statutes, 1949."

Section 228.020, RSMo 1949, provides for a petition, to be signed by twelve freeholders, to be filed with the county court for the establishment of a public road.

Section 228.030, RSMo 1949, requires notice of such intended application to be posted in three or more public places in the township.

Section 228.040, RSMo 1949, provides:

"When the petition required by section 228.020 is presented, and upon proof of

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notice having been given as required in section 228.030, if no remonstrance is filed and if the petitioners give the right of way for the proposed road or pay into the county treasury an amount of money equal to the whole amount of damages claimed by land owners through whose land the proposed road would run, the county court, without discretion to do otherwise, must open said road and thereupon the court shall proceed as in sections 228.010 to 228.190 provided in cases where upon a hearing the court find it necessary to establish a road."

Section 228.050, RSMo 1949, provides for the filing of remonstrances and a hearing before the county court on the question of establishment of the road.

Section 228.060, RSMo 1949, requires a survey to be made by the county engineer if the court finds the establishment of such road necessary.

Section 228.070, RSMo 1949, provides that no road shall be established until it has been examined and approved by the county highway engineer.

Section 228.080, RSMo 1949, provides for the order establishing a road to be entered by the county court when the right of way has been secured.

Section 228.090, RSMo 1949, provides for the filing of deeds and relinquishments for the right of way.

Section 228.100, RSMo 1949, provides for condemnation proceedings.

Section 228.180, RSMo 1949, provides:

"1. 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.

"2. 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 sections 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.

"3. Claims for damages for the taking of any such land or property may 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, within twenty days after the last day of said publication. 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.

"4. If the county court and the land or property owner be unable to agree on the amount of the damages, or if persons owning land or property sought to be taken or the

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guardian or curator of any insane person or minor owning such property shall fail to file a claim for damages, the county court shall make an order reciting such fact, or facts, as the case may be, 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 thirty 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 and the clerk shall cause copies of said orders to be served on owners of the property or material to be taken, and also the guardians and curators of insane persons or minors having any interest in such property or material, not less than ten days before the date of said hearing.

"5. The court, or judge in vacation, shall cause to be impaneled 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 impaneled.

"6. 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."

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In the case of *Petet v. McClanahan*, 297 Mo. 677, 249 S.W. 917, the Supreme Court discussed the afore-mentioned statutory provisions as they appeared in the Revised Statutes of 1919. At that time what are now Sections 228.010 to 228.100 appeared as Sections 10625-10630, and what is now Section 228.180 appeared as Section 10636. In discussing these statutory provisions the court stated (297 Mo. 1.c. 685):

"1. Under this head it is contended that the county court was without jurisdiction to make the findings and order of April 21, 1919, with respect to the relocation of the St. Joseph-Halls-Rushville-Winthrop Road because no application therefor had been filed and notice given in accordance with Sections 10625 and 10626, Revised Statutes 1919. A reading of the entire article (Art. 1, chap. 98) makes it plain, however, that two separate schemes wholly independent of each other are provided for establishing and relocating public roads. Under the first (Secs. 10626-10630) the proceeding must be initiated by the petition of freeholders of the municipal township or townships through which the proposed road will run; under the second (Sec. 10636) the county court may in the first instance act of its own motion. By Section 10636 the power of eminent domain in connection with the establishment of public roads is vested directly in the several counties of the State to be exercised by them in their several capacities as quasi-municipal corporations and the county court is made the agent through which the power is to be exercised. Whenever the county court is of the opinion that a public necessity exists for the establishment of a public road, regardless of the source of its information or of the considerations that may move it thereto, it may by an order of record so declare and direct the county highway engineer to survey, mark out and describe the road, etc. No antecedent or preliminary steps are necessary to give it jurisdiction to take these proceedings. This section of the road law was plainly intended to invest the county court with the power to

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establish and open public roads whenever and wherever public necessity requires it, without waiting upon the tardy and uncertain action of individual land owners or communities." (Emphasis ours.)

Thus it appears from the decision in this case that two alternatives are presented for the establishment of a public road. One is under the procedure outlined in Sections 228.010 to 228.100 and the other under Section 228.180. Under Section 228.180 no petition for establishment is required to be filed, although notice of the establishment of the road must be published in a newspaper in the county. There is no provision under Section 228.180 for remonstrances and hearings as provided in Section 228.050, and therefore such procedure would not be required under that section.

Compliance with the statutory provisions for the establishment of public roads has been held to be jurisdictional. *Mitchell v. Nichols*, 330 Mo. 1233, 52 S.W. (2d) 885. Therefore, if the county court proposes to establish a public road and expend public funds thereon, one of the two statutory methods must be complied with. If the county court sees fit to order the establishment of the road under Section 228.180, it would need only to follow the requirements set forth in that section. If, on the other hand, the establishment is not to be made by the court on its own order, the provisions of Sections 228.010 to 228.100, RSMo 1949, must be followed, with the provision of Section 228.040 to be taken into consideration when, as in the present case, the landowners propose to donate the right of way for the road.

CONCLUSION

Therefore, it is the opinion of this department that under Section 228.180, RSMo 1949, a county court may establish and construct with public funds a public road without complying with the provisions of Sections 228.010 through 228.100, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

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