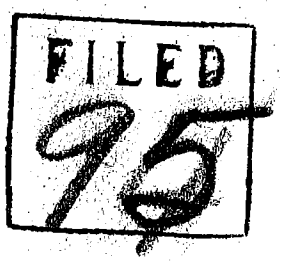
COUNTY COURTS:
COUNTY HOSPITALS:
BOND ISSUES:

County court does not possess the authority to call for an election upon a bond issue for the erection of a county hospital; such an election must be by petition of the taxpayers of the county as set forth in Section 108.040, RSMo 1949. When such an election is held and such bond issue is carried that the county court must proceed with the erection of the hospital.



May 2, 1957

Honorable Edward C. Westhouse
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

Your recent request for an official opinion reads:

> "I would appreciate it very much if you could render me an opinion on several problems which concern the erection of a county hospital.
>
> "Several of the citizens of Madison County desire to have a county hospital erected in this county, but the county court doesn't know as yet whether the tax burden would be too heavy on the citizens if the bond issue passed. (1) Can the county court decide on their own whether a bond issue should be submitted to the people and in what amount or can the citizens that desire the hospital force the county court to have a bond issue submitted to the voters in any certain amount? (2) If a bond issue was submitted to the voters and it passes, would the county be obligated to sell the bonds and begin the erection of a hospital? Or could the county court decide not to issue or sell the bonds on the ground that it would be prohibitive for the citizens of Madison County?"

Your first question is whether a county court can initiate and call for a bond issue election for the pur-

pose of erecting a county hospital, or whether such an election must be initiated by petition of a certain number of taxpaying citizens of the county.

All references to statutes will be to RSMo 1949, unless otherwise indicated.

Section 205.160 reads:

> "The county courts of the several counties of this state are hereby authorized, as provided in sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties." (Emphasis ours.)

It will be noted that the above section gives the county court the power to"establish" a public hospital. The question which we must first consider, therefore, is whether by conferring upon county courts the power to "establish" county hospitals the court has the implied power to do all things necessary to effect this establishment. We do not believe such to be the case.

In the second place county courts do not possess implied powers, but only such powers as are conferred by statute. In the case of State v. Philpot, 266 S.W. 2d 704, at l.c. 710, the Missouri Supreme Court stated:

> "County Courts are not now named among the 'constitutional courts' in which the judicial power of the state is vested, Article V, Constitution of Missouri 1945, V.A.M.S., but such courts are recognized in the Article treating with 'Local Government,' and they are given authority to 'manage all county business as prescribed by law'. Section 7, Article VI, Constitution of Missouri 1945, V.A.M.S. The authorities are uniform to the effect that, out-

> side of the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute. Rippeto v. Thompson, 358 Mo. 721, 216 S.W. 2d 505, 508; Bradford v. Phelps Co., 357 Mo. 830, 210 S.W. 2d 996,999; Lancaster v. Atchison Co., 352 Mo. 1039, 180 S.W. 2d 706, 708; State ex rel Walther v. Johnson, 351 Mo. 293, 173 S.W. 2d 411, 413."

Nowhere in the statutes is this power to call for a bond election conferred upon the county court and we must, therefore, in the light of the Philpot opinion, supra, conclude that it does not possess this power.

In this case we refer again to Section 205.160 and to the underscored portion of that section which reads: "* * * and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties."

The general law covering the incurring of indebtedness by counties is found in Section 108.010 which reads:

> "Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years; provided such indebtedness shall not exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

Also, in Section 108.020, which reads:

> "Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness for county purposes in addition to that authorized

> in section 108.010 not to exceed five per cent of the taxable tangible property shown as provided in said section."

And in Section 108.040, which reads:

> "Whenever it may become necessary for any county in this state to incur an indebtedness as authorized in section 108.010 or 108.020, it shall be lawful for any number of qualified electors of such county who are taxpayers, but not less than one per cent or three hundred, whichever is greater, as determined by the vote for governor in the county in last election at which a governor was elected to present to the county court of such county a petition in writing setting forth the object and purpose for which the indebtedness is desired to be incurred and asking that an election be held to authorize the incurring of such indebtedness. Upon the presentation of such petition it shall be the duty of the county court of such county to order that an election be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election, or it may be held on the day of any primary or general election authorized to be held by the laws of this state."

In view of the above, therefore, it is our belief that the answer to your first question is that the county court cannot initiate and call for a bond issue election, but that this has to be done by petition in the manner set forth in Section 108.040, supra.

Your second question is, "If a bond issue was submitted to the voters and it passes would the county be obligated to sell the bonds and begin the erection of a hospital?"

It is our belief that if the election is held and the bond issue passes it shall be the duty of the county court to proceed with the erection of the hospital. This, we believe, is made plain by Section 108.070, which reads:

> "If it appears from the results of the examination and casting up of the returns of the said election as certified to the county court that two-thirds or more of the qualified voters of such county voting on the proposition submitted, were in favor of incurring such indebtedness, the court shall make an order reciting the holding of such election and the result thereof, both for and against the proposition. If the result of the election as certified shall be in favor of the issuing of bonds, said bonds shall be sold at such time and in such amounts as the court may from time to time order and direct. The county court shall provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to create a sinking fund for the payment of the principal thereof within twenty years from the date of contracting the same."

It will be noted that the above section states that: "If the result of the election as certified shall be in favor of the issuing of bonds, said bonds shall be sold at such time and in such amounts as the court may from time to time order and direct."

It will be noted that the language of the statute is that the court "shall" proceed to issue the bonds. It is well-established that the word "shall" when used in a statute is mandatory and not discretionary.

In the case of State v. Wurdeman, 246 S.W. 189, at l.c. 194, the Missouri Supreme Court stated:

> "* * * Usually the use of the word 'shall' indicated a mandate, and unless there are other things in a

statute it indicates a mandatory statute. * * **

CONCLUSION

It is the opinion of this department that a county court does not possess the authority to call for an election upon a bond issue for the erection of a county hospital, but that such an election must be by petition of the taxpayers of the county as set forth in Section 108.040, RSMo 1949.

It is the further opinion of this department that when such an election is held and such bond issue is carried, that the county court must proceed with the erection of the hospital.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:vlw:lc