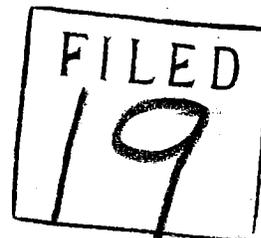


July 5, 1961



Honorable Cornelius Costello
County Counselor
Jackson County Court House
Kansas City, Missouri

Dear Mr. Costello:

This letter of advice is in lieu of a formal opinion requested in your letter of April 14, 1961, in which you submitted a factual background against which you posed the following questions:

"Under Sections 229.040 and 229.050:

"1. May the Court employ contractors for such work?

"2. May the Court employ necessary help and day labor to do such work?

"3. May the County Court accept donations of labor and materials and then employ laborers or contractors to complete said improvements?

"4. May the County Court employ competent engineers to aid and assist the county highway engineer in the supervision and inspection of highways?

"5. May the County Court contract with and employ competent engineers to supervise and direct such work?

"6. May the County Court employ competent engineers to prepare plans, specifications and costs for work to be done and let by contract?

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"7. May the County Court employ competent engineers to prepare plans, specifications, costs, etc., for work to be done by county employees?

"8. If the County Court can employ other competent engineers - may they perform the duties and execute the reports as provided in Section 229.070 and perform the duties under Sections 229.040 and 229.050?

"9. May the County Court advertise the letting of contracts as provided in Section 229.050, if the County Highway Engineer refuses to so do after the plans have been approved?

"10. May the County Court employ other personnel without the approval of the Sewer Engineer in the construction and maintenance of sewers under Chapters 249 and 250 RSMo. 1959?

"11. May the County Court issue permits to applicants who have complied with the Code and regulations under Section 249.560, upon the refusal of the Sewer Engineer to so do?

"12. May the County Court, upon the failure or neglect of the County Highway Engineer, to appear before it when so ordered, compel his attendance, for the purpose of inquiring into and promoting plans for the road program?

"13. If the County Court does not have the power to contract for, or with, other competent engineers to either perform, or assist the county Highway Engineer, or if the County Highway Engineer fails or neglects, or refuses to perform his duties, when so ordered by the County Court, what remedies does it have, and what procedural steps should be taken by the County Court?"

Before commenting in relation to the thirteen questions you have posed, we establish the fact that the office of county highway engineer and surveyor in Jackson County, a county of the First Class, is an elective public office, as evidenced by the following language from Section 61.010 RSMo 1959:

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"In all counties of class one in this state there is hereby created the office of county highway engineer and surveyor, to be known and designated as 'highway engineer', who shall be the chief officer in such county in all matters pertaining to highways, roads, bridges, culverts and surveys. At the general election in the year 1948, and every four years thereafter, the qualified voters of each such county shall elect a highway engineer, who shall hold his office for four years and until his successor is elected, commissioned and qualified." (Underscoring supplied)

At this point we preface further remarks by adopting a statement of law in relation to all public officers as found in the following language from State ex rel. Thrash v. Lamb, 237 Mo. 437, 1.c. 451, 141 S.W. 665:

"The sovereign power of government can only be exercised through its officers. Consequently, to each officer is delegated some of the powers and functions of government. Usually a discretion that is within the power granted to an officer cannot be controlled by other officers."

Notice must be taken of the condition of the official bond required to be given by the highway engineer in Jackson County and as spelled out in the following language from Section 61.040 RSMo 1959:

"* * * The condition of such bond shall be that the said highway engineer will faithfully perform and discharge all the duties of the office of highway engineer, and that he will keep and carefully preserve all books, records, surveys, plats, plans and other papers pertaining to his office, required by law to be kept by the highway engineer or the county surveyor, and that he will account for and deliver the same, together with all tools, machinery, material and equipment to which he has come into possession by reason of his office, to his successor in office. * * *"

Authority to employ technical and professional help and assistants is given to the county highway engineer in Jackson County in the following language from Section 61.060 RSMo 1959:

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"The county highway engineer is authorized to employ such technical and professional help and assistants at such salaries or under such terms as may be approved by the county court. Payments to other help necessary in construction, reconstruction, maintenance and repair of public highways, roads, bridges, and culverts, or necessary in executing surveys as surveyor may be either on a monthly or daily basis."

Section 61.060, quoted supra, vests in the county highway engineer the authority to employ technical and professional help and assistants, but the salaries and terms of employment of such persons must be approved by the county court.

Section 61.070 RSMo 1959 treats of supervisory duties of the Jackson County highway engineer in the following language:

"The highway engineer shall have direct supervision over the construction, maintenance, repair and reconstruction of all public highways, roads, bridges and culverts in the county. The expenditure of all county road and bridge funds, special or otherwise, shall be approved by the county court. The county court shall not order a road established, changed or vacated until said proposed establishment, change or vacation has been examined and approved by the highway engineer in a written report filed with the county court; provided, however, that if the highway engineer shall not have filed a written report on such proposal within thirty days after being notified thereof by the county court, the court may proceed to make any orders respecting such proposal without such report."

Section 61.070, quoted supra, leaves no doubt concerning the sole authority and responsibility of the county highway engineer in Jackson County for directly supervising the construction, maintenance, repair and reconstruction of all public highways, roads, bridges and culverts in the county. This statute clearly states that the expenditure of all county road and bridge funds, special or otherwise, shall be approved by the county court. This power of approval of expenditures should not be construed as authorizing the county court to designate in the first instance what expenditures are to be planned by the county highway engineer. This observation just made is further strengthened by the following provision found in this Section 61.070 RSMo 1959:

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"* * * The county court shall not order a road established, changed or vacated until said proposed establishment, change or vacation has been examined and approved by the highway engineer in a written report filed with the county court; provided, however, that if the highway engineer shall not have filed a written report on such proposal within thirty days after being notified thereof by the county court, the court may proceed to make any orders respecting such proposal without such report." (Underscoring supplied)

To emphasize the mandatory nature of language underscored in Section 61.070, supra, reference is made to the case of Morris v. Karr, 342 Mo. 179, 114 S.W. 2d 962, where the Supreme Court of Missouri was construing the following language from Section 8013 RSMo 1929, applicable to counties of classes 2, 3 and 4:

"No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer."

In ruling that the foregoing language in Section 8013 RSMo 1939 was mandatory the Supreme Court spoke as follows at 342 Mo. 179, 1.c. 184, quoting from State ex rel. Tummons v. Cox 313 Mo. 672, 282 S.W. 694:

"It is our conclusion that Section 10789 (R.S.Mo. 1919, now Sec 8013, R.S.Mo. 1929) makes it mandatory that the proposed change or vacation asked for by petitioners in the cause at bar be "examined and approved" by the highway engineer before the county court has any lawful right or jurisdiction to make the order vacating the road. We see no escape from this conclusion."

Section 8013 R.S.Mo. 1929 was repealed and reenacted in 1957 (L. 1957, p. 324) and is now found at Section 61.220 RSMo 1959 without the clause quoted above and discussed in Morris v. Karr, supra, but the revisor's note now appearing under Section 61.220 RSMo 1959 discloses that the clause "was removed from this section in 1957 because duplicating a like provision in section 228.070 RSMo," 1959. The proviso found in Section 61.070 RSMo 1959 guards against inaction of the county highway engineer by providing a reasonable period of thirty days for the county highway engineer to make a written report of his approval or disapproval of any proposed order of the county court to establish, change or vacate a road.

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Consequently, under this Section 61.070 RSMo 1959, we find that the county court may order the establishment, change or vacation of a road only when such action is approved by the county highway engineer, or when he neglects to make a written report as required by the statute. This procedure has commendable basis when we view the qualifications required of the county highway engineer under Section 61.030 RSMo 1959, reading as follows:

"Such highway engineer shall be a resident of the state of Missouri, skilled and experienced in general road, bridge and culvert work, and authorized to practice engineering under the laws of this state providing for and requiring the registration of professional engineers. He shall be active and diligent in the discharge of his duties and personally attend to them. He shall maintain an office at the county seat of the county, and where such county has a courthouse in another city or town, shall also maintain an office therein, all to be provided to him at the expense of the county."

Section 61.080 RSMo 1959 imposes upon the highway engineer duties of inspection, investigation, adjustment and repair of the condition of all public highways, roads, bridges and culverts in the county. Under this statute the county court can order the county highway engineer to investigate a condition of disrepair of any road or highway or of a dangerous or unsafe condition of any highway, road, bridge or culvert in the county, or of the neglect of any contractor performing any work of any character on any public highways, roads, bridges and culverts, and it becomes the duty of the highway engineer to make such investigation and report back to the county court and make such adjustment, repairs or corrections as may be necessary and to make a written record or report of the final disposition of the matter to the county court. The limited scope of the order of the county court which may be directed to the county highway engineer is apparent on the face of the statute, Section 61.080 RSMo 1959.

The yearly report of the county highway engineer required by Section 61.100 RSMo 1959 to be made to the county court during the month of January is mandatory and, so far as the ensuing year is concerned, requires that the highway engineer:

"* * * estimate balances, revenue and receipts creditable to any county road and bridge fund, special or otherwise, and
* * * submit for approval by the court a plan for construction, reconstruction,

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maintenance and repair of existing established public highways, roads, bridges and culverts proposed to be undertaken and completed during the current year.
(Underscoring supplied)

Section 61.100 RSMo 1959 also contains a final directive in the following mandatory language:

"* * *The highway engineer shall file such other reports from time to time as he may deem necessary or as requested by the county court." (Underscoring supplied)

It is noted at page 3 of your request for an opinion that the annual report called for by Section 61.100 RSMo 1959 was "filed on last day provided by law," and included a list of projects from which the county court could select projects "according to the necessity and amount of money that will be available for the 1961 program." Complaint is made that such annual report did not include "plans or specifications for any of the projects" listed in the report. Section 61.100 RSMo 1959, when directing that the highway engineer's report submit "a plan for construction, reconstruction, maintenance and repair of existing established public highways, roads, bridges and culverts proposed to be undertaken and completed during the current year" does not descend into detail or state that the "plan" is to include "plans or specifications" in relation to any one or more projects contemplated in the over-all plan.

We do know from your inquiry, as disclosed at page 2 thereof, that the highway engineer's plan, as submitted, did anticipate King Road projects totaling \$225,000.00, and twenty-two Pay-as-you-Go, contract projects to cost \$950,000.00. In view of the language of Section 61.100 RSMo 1959, we cannot say that the plan submitted in the highway engineer's report is deficient. However, in view of the responsibility placed upon the county court by Section 61.070 RSMo 1959, to approve "the expenditure of all county road and bridge funds, special or otherwise," and in view of the mandatory duty placed upon the highway engineer by Section 61.100 RSMo 1959 to "file such other reports from time to time * * * as requested by the county court," it may reasonably be concluded that the county court may request the county highway engineer to report specifically on plans and specifications touching those projects which will be undertaken in the current year as disclosed in his yearly report filed as required by Section 61.100 RSMo 1959. Only by such procedure will the county court be able to intelligently perform its duties required

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by Section 61.070 RSMo 1959. In the event the highway engineer refuses or neglects to make such additional reports upon a proper request, we then must search out alternative procedures to be employed by the county court.

Attention is directed to Section 229.040 RSMo 1959, a general statute directed to the construction of all public roads and provides that all such work shall be done under the supervision and direction of the county highway engineer. We here quote the proviso of such statute in its entirety:

"* * *; provided, that all such work shall be done under the supervision and direction of the county highway engineer, or some other competent engineer employed by the county court or other proper authority, at such compensation as may be agreed upon, payable wholly or in part out of the particular fund to be expended on said construction, reconstruction or other improvement."

While the above quoted proviso from Section 229.040 RSMo 1959 places supervisory jurisdiction over road construction in the county highway engineer, we also find in such proviso authority placed in the county court to employ "some other competent engineer." Aside from the importance of such proviso, we find, at paragraph 1 of Section 229.040 RSMo 1959, authority vested in the county court in the following language:

"1. Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and to do such work by day labor."
(Underscoring supplied)

Thus it seems that in the event the county highway engineer of Jackson County fails, refuses, neglects, or is unable to perform his statutory duties in relation to the orderly and timely construction and maintenance of county roads in Jackson County,

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then the county court has the authority to employ necessary professional and other labor deemed essential to accomplish the task. This conclusion is supported by the following language found in *Everett v. County of Clinton, Mo.*, 282 S.W. 2d 30, 1.c. 37:

"While it is true that the law is strict in limiting the authority of county courts, 'it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated and indispensable to their performance may be exercised.' *Blades v. Hawkins, supra*, 240 Mo. 187, 197, 112 S.W. 979, 982."

Of course, in view of the specific statutory authority granted to the highway engineer, he must be afforded ample opportunity and sufficient means to comply with and fulfill his statutorily imposed obligations.

This general letter of advice in relation to the problems outlined in your letter on April 14, 1961, must suffice for the present. It is apparent that a controversy exists between the county court and the county highway engineer, but this office is not fully informed respecting the merits of both sides of the controversy, nor the full reasons why it is alleged that the highway engineer is refusing to cooperate with the county court. In this letter we have outlined the powers of the county highway engineer particularly applicable to him as a duly elected county officer. We have also discussed the general powers vested in the county court in relation to the construction, maintenance, and repair of county roads. Such principles of law must be applied to the existing facts and this office is not in a position to state categorically that the county court may or may not do this or that, or that the county highway engineer may or may not do what he has done, because there is a lack of authoritative court decisions dealing with these particular or analagous statutes. It appears to us that if the highway engineer and the county court cannot effectuate an understanding within the framework of their respective statutory duties, then in such event the only way to settle the issues in controversy would be by a court decision.

We hope that the foregoing information and discussion of our views regarding the various statutes will be of aid and

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assistance to you in the solution of the problems which exist.
This letter was prepared by Julian L. O'Malley, Assistant
Attorney General.

Yours very truly,

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Attorney General

By

J. Gordon Siddens
Assistant Attorney General

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