PUBLIC IMPROVEMENTS:
GASOLINE TAX:
ORDINANCES:
CITIES, TOWNS AND VILLAGES:
STREETS:
HIGHWAYS:

City Councils of third class cities may delegate authority to their street committees to determine which streets are to be repaired with gas tax funds. Substantial public improvements can only be made through the enactment of city ordinances.

OPINION REQUEST NO. 280

November 13, 1962

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Honorable John M. Dalton
Governor of Missouri
Executive Office,
Jefferson City, Missouri

Dear Governor Dalton:

Your recent request for an official opinion from this office is as follows:

> "I would like to have your opinion on a question which has arisen pertaining to funds allocated to cities of this State under the gasoline tax sharing amendment that was recently adopted.
>
> "In a city of the third class, must determination of the specific projects on which the funds are to be expended be made by the city council or can the council approve a delegation of authority to the street committee of the council to determine the streets on which the funds are to be expended and then expend from such funds? If such delegation is not permissible, must specific expenditures be approved by the entire council and mayor, and, if so, may such approval be by way of ordinance or resolution or by both such methods?"

Under the recently enacted gas tax amendment, Article IV, Section 30(a)(2), Missouri Constitution, 1945, certain cities in Missouri are now sharing in the net proceeds of the state gasoline tax. The cities sharing in this program are limited to spending these funds:

> "* * * solely for construction, reconstruction, maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes, * * *."

Although this constitutional amendment limits the purposes for which these funds may be spent, the manner in which gas tax revenues are to be expended is no different than the manner in which other funds of the city are to be spent for similar purposes.

In the case of Proper v. City of Independence, Mo. App., 328 S. W. 2d 55, the Kansas City Court of Appeals states, at pages 57 and 58:

> "The general rule is that the authorization of a public improvement by the municipal authorities must be by an order in some form; and, when the power to make improvements is conferred in general terms, the municipal corporation may exercise the power only by a formal legislative action on the part of the city council, 63 C.J.S. Municipal Corporations §1104, p. 766; Austin Western Road Machinery Co. v. City of New Madrid, Mo. App., 185 S. W. 2d 850; City of Flordell Hills v. Hardekopf, Mo. App., 271 S. W. 2d 256. However, this rule does not prevent temporary or ordinary work and repair of streets being done without specific authority, and cases discussing such repairs are not authority for the question before us.
>
> "The construction of this bridge was a substantial public improvement, not a mere repair or maintenance of a street.
>
> "It is our conclusion that authorization for the construction of the bridge should have been by legislative action of the city council. (citing cases)." (Emphasis supplied).

Thus, if a third class city is to spend gas tax moneys for substantial public improvements, it is required to exercise its power through formal legislative action. This legislative power cannot be delegated by a city council even to committees of itself or to subordinate public officials. State ex rel. Priest et al v. Gunn et al, Mo. Sup., 326 S. W. 2d 314; Automobile Club of Missouri v. City of St. Louis, Mo. Sup., 334 S. W. 2d 355. This basic rule prohibiting the delegation of legislative power is modified in that "the municipal governing body can delegate to committees of that body or to subordinate municipal servants powers judicially labeled 'administrative', 'executive', 'ministerial', or 'quasi judicial'." Antieau, Municipal Corporation Law, Vol. 1, Section 518, pages 273, 274.

From the Proper case it would thus appear that repairs would be classified as ministerial acts. The authorization to determine which streets are to benefit from gas tax moneys, for these ordinary repairs, can be delegated to the street committees by city councils of third class cities. This delegated power, however, must be within certain reasonably adequate standards to guide the officials.

In Rhyne, Municipal Law, Section 4-10, page 74, it is stated:

> "Although it is generally conceded that the state legislature may delegate to its municipalities any powers it deems wise and proper, as an historical exception to the rule against delegation of legislative power, the extent to which a municipality may in turn delegate power in the performance of its functions is controlled by the same principles which usually govern the delegation of powers by the state. Thus, it has been repeatedly held that a municipality may not delegate legislative or judicial power unless expressly authorized by the legislature. On the other hand, it is equally well recognized that a municipal governing body may delegate to subordinate officers or boards powers and functions which are ministerial or administrative, where there is a fixed and certain

> standard or rule which leaves nothing to the judgment or discretion of the subordinate, or at most invests him with some reasonable discretion in administering the standard or rule." (Emphasis supplied).

For those expenditures which can only be made by formal legislative action, such legislative action must be by ordinances and not resolutions. City Trust Company vs. Crockett, 309 Mo. 683, 274 S. W. 802, 810. It is true that Section 78.190, RSMo 1959, V.A.M.S., refers to "every ordinance or resolution appropriating money or ordering any street improvement" and Section 77.280 refers to "any resolution or order of the council which calls for or contemplates the expenditure of the revenue of the city." However, any authorization for street improvements and expenditure of money must be "* * * adopted by the council and approved by the mayor with all the formalities required in the passage of ordinances." City of Springfield to the Use of McEvilly vs. Knott, 49 Mo. App. 612, 617. See also Baker Mfg. Company vs. City of Richmond, Mo. App., 198 S. W. 1128, which equated an "order" of the city council with an "ordinance" over which the mayor had veto power, and held the "order" void because not signed by the mayor or passed over his veto.

The Crockett case involved the question of whether an ordinance was needed subsequent to the passage of a resolution by the city council declaring that certain public improvements were necessary, and specifically held that an ordinance, and not a mere resolution, was required. The present day statutory provisions for the passage of a resolution by the city council of a third class city declaring certain public improvements to be necessary are found at Sections 88.497 through 88.663, RSMo 1959, V.A.M.S. The reference in these sections to the adoption of resolutions is merely to give interested property owners notice of proposed improvements so that they may register any objections with the city council. Once these resolutions are passed, the city council still must exercise its legislative power through an ordinance to effectuate street improvements. The expenditure of gas tax money is like any other expenditure and must be authorized by an ordinance subject to the veto power of the mayor.

## CONCLUSION

1. The authorization to determine which streets are to undergo

repairs with gas tax moneys may be delegated by a city council of third class cities to its street committee.

2. Substantial public improvements with gas tax moneys can only be accomplished by the exercise of formal legislative power. This duty may not be delegated by the city council of third class cities.

3. The exercise of legislative power by third class cities authorizing street improvements and expenditures of money is through the enactment of city ordinances.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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