

COUNTY COURTS: The county court has no authority under Chapter
ROADS AND STREETS: 228, RSMo, to open as a county road a proposed
ROADS: street which is entirely within the boundaries
STREETS: of a fourth class city and is not part of a con-
ROADS AND BRIDGES: tinuous county road.

OPINION NO. 253

September 22, 1965



Honorable James G. Lauderdale ✓
Prosecuting Attorney
Lafayette County Court House
Lexington, Missouri

Dear Mr. Lauderdale:

This is in answer to your request for an opinion on an interpretation of Section 228.040, RSMo 1959. Your question reads as follows:

"Is the County Court without discretion to open a city street which is entirely within the corporate limits of a Fourth Class City and which street connects with an already established and existing county road, and where all other provisions of Chapter 228 have been complied with.

"In other words, the Court is asking if there is a difference between a 'road' and a 'street' and is there an exception to the duties imposed on the County Court under Section 228.040 or must the County Court without discretion, open and maintain the proposed new city street, which includes the building of a bridge entirely within the corporate limits of a Fourth Class City."

Subsequently you advised us by phone that although the street will connect with an established county road, the street is not part of an overall county plan. That is, the street is not a continuation of a county road running through the city to another destination but the street will run only to some point in the city.

Chapter 228, RSMo, provides a means for the establishment and vacation of public and private roads.

Section 228.040, RSMo 1959, the statute in question, reads as follows:

"When the petition required by section 228.020 is presented, and upon proof of notice having been given as required in section 228.030, if

Honorable James G. Lauderdale

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 landowners 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."

Your letter says that all sections of Chapter 228, supra, have been complied with. If this were so then indeed the county court would have no discretion. The question, then, is whether the petition presented was authorized by Section 228.020, RSMo 1959.

Section 228.020, supra, in part reads as follows:

"Applications for the establishment of all public roads, except state roads, shall be made by petition to the county court. * * *"

The question is whether "all public roads" means only county roads or whether it includes all streets within cities.

The court in *Odom v. Hook*, Mo. App., 177 SW 2d 165, was dealing with the vacation of a public road and said, l.c. 170, 171:

"That portion of Main Street in question was excluded in 1888, and obviously thereafter the character of the public right, vested in the county, was that of an easement to use that part of Main Street as a public road or highway. It was no longer a city street."

And, in speaking of the predecessor of Section 228.190, RSMo 1959, the court said, l.c. 171:

"* * * and Sec. 8485 thereof provides that 'nonuser by the public for ten years continuously of any public road shall be deemed an abandonment and vacation of the same.' The above quoted clause has been accorded independent meaning and effect and it is said to apply to any public road. *Johnson v. Rasmus*, 237 Mo. 586, 141 S.W. 590. * * * The law as there declared applies to the loss of an easement in any public highway other than city streets, * * *"

Section 88.670, RSMo 1959, grants certain powers to fourth class cities and says in part:

Honorable James G. Lauderdale

"1. The cities coming under the provisions of sections 88.667 to 88.773, in their corporate capacities are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law:

* * *

"(2) To open and improve streets, avenues, alleys and other highways, * * *

"3. Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city."

Thus, streets are the business of the cities and roads are the business of the counties. However, that does not say that all public thoroughfares within cities are in all respects streets.

The court in State ex rel. Clay County v. Hackmann, 270 Mo. 658, 195 SW 706, said this, l.c. 709:

"Was the purpose and intent of the constitutional amendment and subsequent legislative enactments, in enabling the raising of such large funds for the purpose of building an improved county system of connected modern roads, to provide only for improving rural roads, and to make no provision for providing funds for insuring an equally good improvement upon those small connecting links of road lying within the incorporated towns or cities along the routes of those cross-county roads? Or was it the intention that provision should be made for raising funds for a uniform connected system of improved highways so that the same might (if conditions required) be made free from small stretches of mudholes or unimproved roadways where the same passed through such towns and cities? That the latter intention is certainly consistent with the purposes sought to be subserved is, we think, very apparent. * * *"

The continuous road concept expressed in the Hackmann case, supra, is now set out in Section 108.120, RSMo 1959, which reads in part as follows:

"* * * Such funds may be used in the construction, reconstruction, improvement, maintenance and repair of any street, avenue, road or alley in any incorporated city, town or village if such street, avenue, road or alley or any part thereof shall form a part of a continuous road, highway, bridge or culvert of said county leading into or through such city, town or village."

Honorable James G. Lauderdale

The predecessor of Section 108.120, supra, and the Hackmann case, supra, were discussed in *Kroeger v. St. Louis County*, 358 Mo. 929, 218 SW 2d 118, where the court said, l.c. 120:

"There can be no doubt that a county does have the power in the construction or improvement of any road between two given points in the county to make a street in an incorporated city, when such street is a part of the county highway system under section 8608, supra."

In the case at hand the proposed street is just that, a street. It will serve a municipal purpose and is not part of a continuous county road plan.

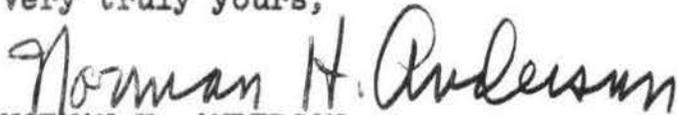
Therefore, it is our opinion that the proposed street is not a public road as intended by Section 228.020, supra. This being so, it is not a question of the county court having discretion under Section 228.040, supra, but simply that the county court has no authority to open the proposed street.

CONCLUSION

It is the opinion of this office that the county court has no authority under Chapter 228, RSMo, to open as a county road a proposed street which is entirely within the boundaries of a fourth class city and is not part of a continuous county road.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Very truly yours,


NORMAN H. ANDERSON
Attorney General