

ROADS & BRIDGES:  
STATE HIGHWAYS:  
OUTDOOR ADVERTISING:  
CONSTITUTIONAL LAW:

1. The State Highway Commission may not utilize state road or highway fund moneys to defray the cost of the administration of a system of permits for the regulation of outdoor advertising. 2. The adoption of the permit system by the State Highway Commission is mandatory under Section 226.550, RSMo Supp. 1971. 3. Regulations for a permit system for outdoor advertising need not be adopted by the State Highway Commission and filed with the Secretary of State prior to such system's becoming effective. 4. Section 226.550, RSMo Supp. 1971, provides that permits be issued on a one-time basis. 5. Permits are specifically required only for the outdoor advertising specified in Section 226.520(5), RSMo 1969. Pre-existing signs that come within this provision are subject to permit regulation. Other pre-existing and non-conforming signs, subject to removal under Sections 226.560 and 226.580, RSMo 1969, need not obtain permits. 6. Section 226.550, RSMo Supp. 1971, refers to subparagraph (5) of Section 226.520, RSMo 1969. Therefore, outdoor advertising located in unzoned commercial or industrial areas, as defined and determined pursuant to Sections 226.500 to 226.600, RSMo 1969, is required to have a permit.

OPINION NO. 23

February 1, 1972

Honorable Thomas D. Graham  
Representative, District No. 12  
Room 317, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Graham:

Recently you requested an opinion from this office that asked the following questions:

"a. May the State Highway Commission in view of Section 226.590, RSMo., utilize state road or highway fund monies to defray the costs of the administration of a system of permits for outdoor advertising under Section 226.550, RSMo? If not, may such a system of permits be maintained without a special appropriation?

"b. May state road fund monies be used to defray the expenses in administering a system of permits for outdoor advertising or any other expenses in connection with the administration of the provisions of Sections

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226.500 through 226.600, RSMo., even though Section 226.590, RSMo., might be amended to purport to permit the use of road fund moneys for such purposes?

"c. Is the adoption of a permit system by the State Highway Commission mandatory or permissive under Section 226.550, RSMo.? If such system is permissive, what action must the State Highway Commission take to legally adopt such a system?

"d. Must regulations for a permit system for outdoor advertising be adopted by the State Highway Commission and filed with the Secretary of State prior to such system's becoming effective? In this respect, your attention is directed particularly to Sections 226.500 and 226.530, RSMo., and Section 536.020, RSMo.

"e. Does Section 226.550, RSMo., provide for a one-time permit or provide for permits to be renewed periodically? If such provides for permits to be renewed periodically, for what length of time does a permit or a renewal permit run?

"f. Are permits required under Section 226.559, RSMo., for signs erected prior to January 1, 1968, and in particular, prior nonconforming signs?

"g. Taking into consideration the reference in Section 226.550, RSMo., to outdoor advertising 'permitted by sub-paragraph d of paragraph (b) of Section 226.520', what signs may be required to have a permit under the provisions of Section 226.550, RSMo.?"

Your first two questions:

"a. May the State Highway Commission in view of Section 226.590, RSMo., utilize state road or highway fund monies to defray the costs of the administration of a system of permits for outdoor advertising under Section 226.550, RSMo.? If not, may such a system of permits be maintained without a special appropriation?

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"b. May state road fund monies be used to defray the expenses in administering a system of permits for outdoor advertising or any other expenses in connection with the administration of the provisions of Sections 226.500 through 226.600, RSMo., even though Section 226.590, RSMo., might be amended to purport to permit the use of road fund moneys for such purposes?"

compel an examination of Chapter 226 of the Missouri Revised Statutes.

Section 226.590, RSMo 1969, states:

"The state highway commission is authorized to use any funds, appropriated to it or received by it from other than the state road fund for matching federal funds or for other lawful purposes of sections 226.500 to 226.600."

This provision specifically prohibits the use of state road funds to defray the cost of administering an outdoor advertising system. The alternative remaining for the funding of such an administrative system is an appropriation by the legislature.

The silence of the legislature on the source of funds to administer the program should not be construed to indicate that the act would not be administered. If the legislature deemed it necessary, it could make a special appropriation for the administration of the outdoor advertising program. Section 226.590 authorizes the Highway Commission to use funds appropriated to it. Since the act directs permit fees to be deposited in the general revenue fund, the legislature probably intended to appropriate funds specially for the administration of the permit system.

Absent an appropriation, may the Highway Department fund be used to meet the cost of administering the system? Section 226.200 establishes a State Highway Department fund implementing Article IV, Section 30(b) of the Missouri Constitution. This fund permits payments, among other uses, for the maintenance of the State Highway Commission. Can this be construed to allow the Commission to administer the system with these funds?

Application of the principles expressed in certain recent decisions interpreting constitutional provisions dealing with the expenditure of highway moneys compels this question to be answered in the negative.

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The relationship of the subsections of the constitutional provision cited previously to the regulation of outdoor advertising can be better understood by the application of principles stated in certain recent Missouri decisions. The recent decision of Pohl v. State Highway Commission, 431 S.W.2d 99 (Mo. banc 1968), dealing with toll road legislation, espouses the principle that a narrow interpretation should be placed on these constitutional provisions dealing with the expenditure of highway moneys. In the Pohl case, the court interpreted the scope of subsection (5), the subsection that arguably might provide the basis for such an expenditure. Subsection (5) permits highway fund expenditures:

"For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper."

The court stated that:

". . . this subsection must be considered along with what immediately precedes it in subsections (1) through (4) of § 30(b). When so read and considered, it is plain that any authority or power conferred by subsection (5) is clearly limited to the accomplishing of additional discretionary matters in connection with the highways and bridges specified in subsections (1) through (4), which do not include toll roads. . . ." (Pohl, supra, at 105)

The St. Louis Court of Appeals, in State ex rel. State Highway Commission v. Pinkley (unreported decision issued September 28, 1971), rejected the contention of the State Highway Commission that Article IV, Section 30(b) (5) authorizes the Commission to provide a rest area abutting a state route, holding that subsection (5) did not grant any new or unspecified power.

Subsection (1) permits expenditures:

"To complete and widen or otherwise improve and maintain the state system of highways heretofore designated and laid out under existing laws;"

The language used in this subsection clearly envisages use of funds for construction and maintenance of the roadway itself and adjacent roadway maintenance. The stated purpose of the Highway Beautification Act and the concept of billboard regulation are not directly related to the purposes stated by this constitutional provision.

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The result and principles expressed by the Pohl decision must be contrasted with another line of cases that permit a flexible, expansive interpretation of legislation in order to meet federal objectives. The Missouri Highway Beautification Act was passed in response to federal controls on outdoor advertising (23 U.S.C. 131 et seq). Unless a state provides an effective means of billboard control, federal aid highway fund payments to the state will be reduced by ten percent. When a state enacts legislation to secure federal aid, the statutes enacted to effectuate the purpose to be served by the legislation must be construed together with the federal statutes so that the purposes of the legislation will not be thwarted. Davis Construction Co. v. State Highway Commission, 141 S.W.2d 214 (K.C.Ct.App. 1940); Woolley v. State Highway Commission, 387 P.2d 667 (Wyo. 1963).

Subsection (3) of Article IV, Section 30(b) of the Missouri Constitution permits the State Highway Commission to "locate, re-locate, establish, acquire, construct and maintain," "(d) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;". Either this subsection or subsection (5), or the subsections in conjunction, would provide the only basis for legal expenditures from the state road fund for the regulation of outdoor advertising. To arrive at this conclusion, the term "maintain" would have to be given an expansive definition. In construing words and phrases, Section 1.090, RSMo 1969, directs that words and phrases shall be taken in their plain and ordinary and usual sense. Therefore, the conclusion is inescapable that the word "maintain," as used in the constitutional provision previously referred to, is synonymous with the term "repair." Such a conclusion was reached in the decision of Barber Asphalt-Pav. Co. v. Hezel, 56 S.W. 449, 451 (Mo. banc 1900).

In a related decision, the Supreme Court of Idaho held that where, as here, a constitutional provision and statute when read together, specifically permit the use of moneys for particular purposes, such funds cannot be used for any other purpose, although such purpose bears some relation to highway matters. State v. Jonasson, 299 P.2d 755 (Ida. 1956).

The principles stated in response to question "a" are applicable to question "b" also. To determine whether state road fund moneys may be used to administer a system regulating outdoor advertising, one is referred by Section 226.220, RSMo 1969, to the constitutional limitations specified by Article IV, Section 30(b) of the Constitution of Missouri. Despite the obvious need to comply with federal standards, specific Missouri constitutional and statutory provisions cannot be disregarded. Thus, Article IV, Section 30(b) of the Missouri Constitution prohibits the use of state road fund moneys for the administration of a system of billboard regulation.

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In summary, special appropriations are necessary to defray the cost of administering the system of billboard regulation authorized by Sections 226.500, et seq. State highway and road fund monies may not be used to defray the cost of administering this system.

"c. Is the adoption of a permit system by the State Highway Commission mandatory or permissive under Section 226.550, RSMo.? If such system is permissive, what action must the State Highway Commission take to legally adopt such a system?"

Section 226.550, in relevant part, states:

"On and after January 1, 1968, the state highway commission is hereby authorized to collect fees hereinafter specified for the issuance of permits for outdoor advertising . . ."

To determine whether such a permit system is mandatory or permissive one must also look at Section 226.530, which states in relevant part:

"The state highway commission is authorized to issue permits for the erection and maintenance of outdoor advertising along the interstate and primary highway systems and subject to section 226.540 to promulgate only those rules and regulations of minimal necessity and consistent with customary use to secure to this state any federal aid contingent upon compliance with federal laws, rules and regulations relating to outdoor advertising. . . ."

In interpreting these statutes, one must give meaning to the phrase "is authorized to." The meaning of the term "authority" and its derivatives have been the subject of much litigation. See 4a, Words and Phrases, 601-604. The courts of Missouri have never offered a definitive definition applicable to this situation. However, in the case of Dickensheet v. Chouteau Mining Co., 202 S.W. 624 (Spr.Ct.App. 1918), the court observed:

"We know that an ordinance authorizing and empowering the mayor or marshal of a city to keep and preserve the peace is mandatory, and involves a duty on the part of said officers. On the other hand, an ordinance, authorizing and empowering the officers of a city to own

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and operate public utilities, would not be taken as mandatory, but as merely giving them the right or the permission to do so in their discretion. . . ." (202 S.W. at 626)

Given the principles expressed by the Dickensheet case and the statement of purpose of this legislation (Section 226.500), stating that it is necessary to regulate and control outdoor advertising, the use of the term "is authorized to" has a mandatory meaning in the context of Section 226.550.

"d. Must regulations for a permit system for outdoor advertising be adopted by the State Highway Commission and filed with the Secretary of State prior to such system's becoming effective? In this respect, your attention is directed particularly to Sections 226.500 and 226.530, RSMo., and Section 536.020, RSMo."

The purpose of the act states:

". . . The general assembly further declares it to be the policy of this state that the erection and maintenance of outdoor advertising in areas adjacent to the interstate and primary highway systems be regulated in accordance with sections 226.500 to 226.600 and rules and regulations promulgated by the state highway commission pursuant thereto." (Section 226.500, RSMo 1969)

Section 226.530, RSMo 1969, directs the State Highway Commission:

". . . to promulgate only those rules and regulations of minimal necessity and consistent with customary use to secure to this state any federal aid contingent upon compliance with federal laws, rules and regulations relating to outdoor advertising. . . ."

The act does not state that its effectiveness is to be contingent upon the issuance of regulations by the State Highway Commission. The terms of the act are specific enough to permit the Commission to engage in regulation and gives notice to outdoor advertisers of their legal obligations. For example, Section 226.550 authorizes the State Highway Commission to collect fees for the issuance of permits. It directs that forms for the application of permits shall be furnished by the State Highway Commission. It specifies permit

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fees. Such specificity indicates that it was not mandatory for the Commission to promulgate rules to make the act effective. 73 C.J.S., Public Administrative Bodies, Section 96.

The statutory scheme for regulation of outdoor advertising does not direct that regulations shall be promulgated prior to the effectiveness of the act. As stated above, the act specifically requires that any regulations be only those essential to create a system of regulations consistent with federal legislation and regulations on the subject of outdoor advertising. Pursuant to the authority granted by Section 226.550, the Highway Commission could issue forms necessary for permit application and direct applicants to consider the statutory requirements in applying for their permits. Therefore, the permit system can be administered on the basis of the statutory language without the promulgation of rules and regulations.

"e. Does Section 226.550, RSMo., provide for a one-time permit or provide for permits to be renewed periodically? If such provides for permits to be renewed periodically, for what length of time does a permit or a renewal permit run?"

Section 226.550, establishing fees for permitted outdoor advertising, does not state the period for which a permit would be valid. The State Highway Commission is authorized to collect fees ". . . on or after January 1, 1968 . . ." The intent of the legislature is unclear concerning the length of time a permit would be valid. The low monetary amount required for the issuance of a permit for each type of sign does create an inference that a periodic scheme of regulation was intended.

No regulations were adopted concerning the permit period. To promulgate such a rule, imposing a permit period, the Commission can only act pursuant to authority granted by the legislation. Absent a legislative determination of a specific permit period, one could not be created by rule. State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission, 225 S.W.2d 792 (K.C.Ct.App. 1949).

Although the statutes regulating outdoor advertising are not strictly "in pari materia" (see e.g., Bernhardt v. Long, 209 S.W.2d 112 (Mo. 1948)) with those regulating "junkyards," both statutes were passed by the 1965 General Assembly and adopted contrasting language concerning the duration of permits. Junkyard operators specifically must obtain annual permits. Section 226.670, RSMo 1969. In view of the presence of such a period in that act, its absence in this act indicates that the legislature intended the permit to be issued on a one-time basis.

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"f. Are permits required under Section 226.550, RSMo., for signs erected prior to January 1, 1968, and in particular, prior nonconforming signs?"

To ascertain the answer to this question, initially one must determine what signs are encompassed within the permit plan of Section 226.550. The relevant statutory language is:

"On and after January 1, 1968, the state highway commission is hereby authorized to collect fees hereinafter specified for the issuance of permits for outdoor advertising permitted by subdivision (5) of section 226.520. . . ." (Section 226.550, RSMo Supp. 1971)

Therefore, the terms of Section 226.550 are applicable to outdoor advertising located in unzoned commercial or industrial areas as defined and determined pursuant to Sections 226.500 to 226.600.

Permits are specifically required only for the outdoor advertising specified in Section 226.520(5). Other pre-existing and non-conforming signs, subject to removal under Sections 226.560 and 226.580, need not obtain permits. Since the language of the act encompasses signs in existence in unzoned commercial or industrial areas erected prior to the effective date of the act, permits are required for such outdoor advertising. Section 226.550 refers to outdoor advertising permitted by subparagraph (5) of Section 226.520. Since pre-existing uses would be permitted under this provision, they are subject to the requirement that a permit be obtained.

"g. Taking into consideration the reference in Section 226.550, RSMo., to outdoor advertising 'permitted by sub-paragraph d of paragraph (b) of Section 226.520', what signs may be required to have a permit under the provisions of Section 226.550, RSMo.?"

The answer to this question is stated in the response to the prior question "f." The statutory reference in your question "sub-paragraph d of paragraph (b) of Section 226.520," was a revisor's error. As noted in the response to your preceding question, the correct reference is stated by Section 226.550, RSMo Supp. 1971. Thus, outdoor advertising located in unzoned commercial or industrial areas is governed by the permit system.

#### CONCLUSION

It is the conclusion of this office that:

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1. The State Highway Commission may not utilize state road or highway fund moneys to defray the cost of the administration of a system of permits for the regulation of outdoor advertising.

2. The adoption of the permit system by the State Highway Commission is mandatory under Section 226.550, RSMo Supp. 1971.

3. Regulations for a permit system for outdoor advertising need not be adopted by the State Highway Commission and filed with the Secretary of State prior to such system's becoming effective.

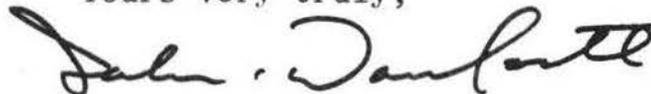
4. Section 226.550, RSMo Supp. 1971, provides that permits be issued on a one-time basis.

5. Permits are specifically required only for the outdoor advertising specified in Section 226.520(5). Pre-existing signs that come within this provision are subject to permit regulation. Other pre-existing and non-conforming signs, subject to removal under Sections 226.560 and 226.580, RSMo 1969, need not obtain permits.

6. Section 226.550, RSMo Supp. 1971, refers to subparagraph (5) of Section 226.520, RSMo 1969. Therefore, outdoor advertising located in unzoned commercial or industrial areas, as defined and determined pursuant to Sections 226.500 to 226.600, RSMo 1969, is required to have a permit.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Peter H. Ruger.

Yours very truly,



JOHN C. DANFORTH  
Attorney General