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June 10, 1947

Honorable John E. Brooks  
Associate Judge  
Franklin County Court  
Union, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"The County Court has requested that you furnish them with a written opinion as to what authority the County Highway Engineer has with reference to the following paragraphs:

- "1. Designating, locating and relocating roads and bridges without the approval of the County Court.
- "2. Expending and contracting for supplies and equipment without first having approval of the County Court.
- "3. Employing and discharging employees of the Highway department without the approval of the County Court.
- "4. The fixing of hourly rates and salaries of County employees without the approval of the County Court.
- "5. Refusing to carry out orders of the Court pertaining to use of equipment and designating whereabouts employees shall perform duties without approval of the Court."

The five questions which you have proposed will be considered separately under appropriately numbered paragraphs corresponding with the numbering which you have accorded your questions. However, before doing so, it may be advisable to make certain general observations relating to the respective duties of the county court and the county highway engineer in the administration of the road laws of this state.

Generally speaking, the county court, as fiscal agent of the county, is charged with the disbursement of all moneys expended upon the public highways of the county. Furthermore, the General Assembly has seen fit to place upon that same body jurisdiction to establish and vacate public highways, establish ways of necessity, determine the necessity of the construction of bridges and culverts, and similar related duties.

Similarly, the General Assembly has seen fit to establish in all counties of this state, except where dispensed with by a vote of the people, the office of county highway engineer. Generally, his duties are those relating to the supervision of the construction of roads, bridges and culverts, the laying out of new locations for public roads, auditing the accounts of minor officials charged with disbursement of county moneys on roads, and other duties similar in nature. It, therefore, becomes apparent that the General Assembly has contemplated a close working relationship between the county court and the county highway engineer. The duties of the county court are more general in nature, while those of the county highway engineer are more specific.

It may be well, at the outset, to consider the effect of recent constitutional and statutory provisions affecting the office of county highway engineer. We note from the classification of counties adopted by the 63rd General Assembly that Franklin County is now of the third class and that it has some 33,868 inhabitants. Under the provisions of Section 8660, R. S. Mo. 1939, the county surveyor of counties of that size is also ex officio the county highway engineer, as appears from the following proviso found in the statute:

" \* \* \* Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less

than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

This proviso was held constitutional and valid in State ex rel. v. Johnson, 173 S. W. (2d) 411, 351 Mo. 293, and in the same case it was held that the county court in such counties was without authority to abolish the office of county highway engineer.

However, the 63rd General Assembly passed House Committee Substitute for House Bill No. 792, which repealed Section 8660, R. S. Mo. 1939, in its entirety. The reenactment of the statute reads as follows:

"The county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, and such fees as are allowed by law for his services as county surveyor: Provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

You will note that the enactment of this statute terminated the previous condition under which the county surveyor in counties of the size of Franklin County was ex officio county highway engineer.

It might be thought that the further provisions of the bill with regard to its effective date would render this portion inoperative until January 1, 1949. The statutory provision mentioned is found as Section 8659 of House Committee Substitute for House Bill No. 792, reading as follows:

"The provisions of this act shall be and become effective January 1, 1949: Provided that any part of this act which shall be necessary to remove any inconsistency with

the constitution of this state shall be and become effective July 1, 1946."

You will note that any portions of the new statute which should become effective on July 1, 1946, in order to remove any inconsistency with the Constitution of 1945, were declared to be effective on that date.

We believe that Section 8660 did become effective on July 1, 1946, by reason of the constitutional requirement found as Section 8 of Article VI, reading as follows:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

We, therefore, believe that in counties now in Class 3 which had previously been affected by Section 8660, R. S. Mo. 1939, quoted supra, the county surveyor is no longer ex officio county highway engineer, and that before he can act as such he must be appointed by the county court under the provisions of Section 8660, as reenacted in H.C.S.H.B. No. 792, quoted supra. Also, it is not mandatory that in such counties the county surveyor be appointed to such office, as Section 8655, as reenacted in H.C.S.H.B. No. 792, provides as follows:

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court at a compensation to be fixed by the court. The provisions of this article shall apply only to counties of classes two, three and four."

In this opinion we have assumed that there now exists a regularly appointed and qualified county highway engineer in Franklin County.

I.

Your first question deals with the authority of the county highway engineer with reference to the designation, location and relocation of roads and bridges.

Under the provisions of Section 8473, R. S. Mo. 1939, the jurisdiction has been placed upon the county court to establish all public roads except state roads. This section reads, in part, as follows:

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

The following sections relate to the method of giving notice, the form of the petition, and similar matters.

The word "established," used in the statute quoted, has been defined by the General Assembly in Section 8487, R. S. Mo. 1939, which reads as follows:

"The words 'established' and 'establishing,' as used in this article in relation to public roads, shall be held to embrace the locating, relocating, changing or widening of roads, and the word 'road' shall include bridges and culverts."

From the foregoing, it is apparent that in so far as the establishment of public roads is concerned, the duty rests upon the county court. However, such new road or change of old road must be approved by the county highway engineer, as appears from the following portion of Section 8662, R. S. Mo. 1939:

" \* \* \* 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.  
\* \* \* "

This provision has been held mandatory, and failure to observe it renders all proceedings relating to the establishment of roads void. In *Morris v. Karr*, 114 S. W. (2d) 962,

342 Mo. 179, the court said:

"The statute says that no county court shall make an order changing a road without first obtaining the approval of the county highway engineer, and unless we are willing to allow this provision of the law to perish by construction, it must be upheld."

Similar provisions are found with respect to the location of bridges. Section 8534, R. S. Mo. 1939, reads as follows:

"Each county court shall determine what bridges shall be built and maintained at the expense of the county and what by the road districts: Provided, that no road district shall be compelled to build a bridge which costs fifty dollars or more."

Subsequent provisions provide that such construction shall be under the supervision of the county highway engineer or, in the event the county court elects to do so, under the supervision of some other competent person.

From the foregoing, it appears that the primary duty of designating, locating and relocating roads and bridges rests upon the county court, and the duties of the county highway engineer are only ancillary to the exercise of the county court's jurisdiction in these matters.

## II.

Your second, third and fourth questions deal with the authority of the county highway engineer to contract for the disbursement of county money for road purposes, the employment and discharge of employees, and the fixing of hourly rates and salaries.

In so far as the disbursement of road moneys is concerned, the county court, as fiscal agent of the county, has the power to make all purchases of necessary supplies and equipment for road work. It is true that actual disbursements may be made through road overseers, who must account to the county court for the county money received by them for such purposes, and whose settlements may not be approved by the county court until approval has first been had from the county highway engineer.

We quote from Section 8662, R. S. Mo. 1939, reading, in part, as follows:

" \* \* \* No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

However, we do not believe that these provisions authorize the county highway engineer to contract for supplies and equipment for road work, as his duties relate only to the approval of the expenditures. There are exceptional circumstances under which the county highway engineer is authorized to enter into contracts for certain specified purposes. For instance, under Section 8523, R. S. Mo. 1939, he is authorized to contract with any owner of land adjacent to a public road for the purpose of opening ditches for drainage, or to procure necessary material for road purposes, and to pay a reasonable compensation therefor. Similarly, under the provisions of Section 8552, R. S. Mo. 1939, the county highway engineer is authorized, with the consent of one or more of the county judges, to contract with some competent person to have damaged bridges repaired. These are "cost plus" contracts and are designed to take care of emergency conditions.

With these exceptions noted, the disbursement of moneys for road building supplies and equipment rests with the county court.

We do not find that the county highway engineer has any statutory authority to employ any persons, and therefore any such hiring would not be binding upon the county court.

What has been said with respect to the hiring and discharge of employees is equally applicable to the authority of the county highway engineer to fix rates and salaries for purported employees. In the absence of statutory authorization, we do not believe that such authority exists.

### III.

Your fifth question relates to the authority of the county highway engineer to disregard orders of the county court pertaining to the use of equipment and the places upon the public

roads where work and labor are to be performed.

We believe that the duty has been placed upon the county highway engineer to make this determination. Your attention is directed to Sections 8661, 8662, 8663 and 8666, R. S. Mo. 1939. You will note that these statutes, respectively, make the county highway engineer custodian of all road tools and equipment, place upon him the duty of direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds, require him to make personal inspection of the various roads, incidentally requiring him to place roads found to be dangerous or impassable in good condition, and require road overseers to follow the plans and instructions of the county highway engineer.

These statutes, we believe, indicate that the methods to be followed, and the times and places of working public roads are to be determined by the county highway engineer. We do not find any statute authorizing the county court to make such determination.

#### CONCLUSION

In the premises, we are of the opinion that:

(1) The county highway engineer has no authority to designate, locate or relocate public roads and bridges, and such is to be done by the county court subject only to the approval of the county highway engineer.

(2) The county highway engineer has no authority to contract for supplies and equipment, to employ or discharge employees, or to fix hourly rates and salaries, except under the particular emergency conditions mentioned relating to dangerous and impassable roads and damaged or dangerous bridges.

(3) The county highway engineer has the authority to designate the time and place and method to be followed by the respective road overseers in the maintenance of public roads.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.  
Assistant Attorney General

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J. E. TAYLOR  
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