

ROADS AND BRIDGES: Road district under township
organization cannot repair roads
TOWNSHIP ORG.: in cities.

March 3, 1942

Hon. Walter C. Hotaling
Prosecuting Attorney
Linn County
Linneus, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
which reads as follows:

"I should like the opinion of your
department as to the following
situation:

"Linn County, Missouri, operates
under township organization. Locust
Creek Township, acting under the pro-
visions of Section 8609, Revised
Statutes of Missouri 1939, and sub-
sequent sections, has heretofore
voted a \$50,000 bond issue for road
purposes.

"The township board now desires to
apply a part of the proceeds derived
from the sale of these township road
bonds to improve certain streets in
the city of Linneus, a city of the
fourth class, located within Locust
Creek Township. The streets to be
improved are necessary to connect
certain township roads with each
other and with state highways. The
city of Linneus had previously voted
a \$25,000 bond issue for street im-
provement, and the streets were
graveled with this money, but they

are now in bad condition.

"Can the township legally apply a part of the proceeds of township road bonds to the improvement of streets within the corporate limits of a city included in the township, and if so must such improvement be confined to roads and streets within the city necessary to connect up the township roads?"

"If township road bond money can not be used for such a purpose, is it the duty of the Prosecuting Attorney to intervene, and if so, what is the proper type of action?"

Section 8609 R. S. Missouri, 1939, empowers the Commissioners of a road district under township organization to issue bonds.

Section 10, Article X of the Constitution of Missouri, reads as follows:

"The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The above section of the Constitution does not prohibit a special road district under township organization from

taxing cities for the payment of bonds issued by the township. It was so held in *Elting v. Hickman*, 172 Mo. 237; *State ex rel v. Burton*, 266 Mo. 711, and *State ex rel v. Gordon*, 268 Mo. 713.

The holding in the above cases was to the effect that although money obtained by a bond issue could not be used for roads in a municipal corporation, the taxation of the property in a municipal corporation was of benefit to the municipal corporation, for the reason that the money was obtained for the establishment and improvement of roads surrounding the municipal corporation.

Section 46, of Article IV of the Constitution of Missouri, reads as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

Section 47, of Article IV, of the Constitution of Missouri, partially reads as follows:

"The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to be-

come a stockholder in such corporation, association or company: * * "

Under the above sections the road district under township organization is prohibited from giving aid to a municipal corporation.

We find no statutory authority empowering a road district, under township organization, to change the prohibition as set out in Section 10, of Article 10, of the Constitution of Missouri, or Sections 46 and 47 of Article 4 of the Constitution. We are aware of Section 8673 R. S. Missouri, 1939, which only applies to special road districts known as the "Eight Mile" special road district.

A taxpayer who has any interest in the subject of any action may bring an action to protect that interest, where the principal is doing an illegal act or refuses to bring an action to protect the taxpayer.

It was so held in St. Paul & Kansas City Short Line R. Co. et al v. United States Fidelity & Guaranty Co., 105 S. W. (2d) 14, 1. c. 20, where the court said:

"Moreover, it must be borne in mind that this is a suit in equity and that the rule in reference to such suits is that every person having any material interest, legal or beneficial, in the subject matter is properly made a party. Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 S. W. 119.

"It is provided by section 700, Revised Statutes of 1929 (Mo. St. Ann. Sec. 700, p. 909): 'All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined

as plaintiffs, except as otherwise provided in this article.'"

Also, in the case of Smith et al v. Hendricks, 136 S. W. (2d) 449, l. c. 453, the court said:

"It is a familiar principle of equity that if A. has a cause of action at law, which he alone can assert, but in which B. has an interest, and A. refuses to bring the suit at law, B., by alleging a proper demand and a refusal of A. to bring the suit, can successfully maintain an action in equity to recover for A., because B. is interested in the recovery and it is A.'s duty to bring the suit."

In that case the court, at page 456, held:

"In State ex rel. Buchanan County v. Fulks, 296 Mo. 614, loc. cit. 635, 247 S. W. 129, loc. cit. 135, it is again said: 'In 7 R. C. L. 965, it is said: "If a county has a plain cause of action for an injury done to it, which should be enforced for the protection of its citizens or taxpayers, and its governing board refuses to assert such cause of action, in some jurisdictions any citizen, by reason of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. And like-

wise where an unjust and illegal burden is being imposed on the taxpayers by a county, or the money or property of the county, to replace which taxation must be levied, is being wasted or squandered, a taxpayer has such a direct interest that a bill to enjoin the threatened burden will lie." *Newmeyer v. Missouri & M. R. Co.*, 52 Mo. 81, 14 Am. Rep. 394; *Carson v. Sullivan*, 284 Mo. 353, 361, 223 S. W. 571; *Harris v. Langford*, 277 Mo. 527, 533, 211 S. W. 19.'

"In *Castilo v. State Highway Commission*, 312 Mo. 244, loc. cit. 262, 279 S. W. 673, loc. cit. 675, en banc, it was held that the plaintiffs, as taxpayers could maintain the suit if the State Highway Commission was acting unlawfully, and, concerning this question, said: '* * * If plaintiffs are resident taxpaying citizens, the cost of constructing highways authorized by law will be paid, not by the entire public, but by the taxpaying class of which plaintiffs are members, and which they here represent. If funds be raised by taxation, and expressly set apart by law for the construction of certain highways designated by statute, are expended upon other and different highways not authorized by law, as plaintiffs specifically plead, the necessary conclusion from the facts pleaded is that the burden of taxation on resident taxpaying citizens will be increased. The roads lawfully designated will have to be constructed and maintained out of additional funds raised to replace money unlawfully di-

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verted. Failure to allege the ultimate fact that plaintiffs' taxes will be increased when this conclusion necessarily arises from facts sufficiently pleaded, is not material. * * * "

CONCLUSION

In view of the above authorities it is the opinion of this department that Locust Creek Township cannot improve certain streets, in the city of Linneus, out of the bond money.

It is also the opinion of this department that it is not the duty of the Prosecuting Attorney of Linn County to file any proceeding, for the reason that any action, if brought, cannot be brought by the county, but must be brought by the township.

It is further the opinion of this department that any taxpayer in Locust Creek Township may file a proceeding to restrain the township board from giving aid to the city of Linneus.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

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