TOWNSHIPS: Township has no authority to use township machinery to do work for private individuals for hire.

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February 16, 1954

Honorable Garner L. Moody
Prosecuting Attorney
Wright County
Hartville, Missouri

Dear Mr. Moody:

This is in response to your request for opinion dated January 30, 1954, which reads, in part, as follows:

> "Is it lawful for a Township, in a county under township organization, to use township machinery to do work for private individuals for hire?"

At the outset, in the determination of this question we are confronted with the provisions of Section 65.270, RSMo 1949, which reads as follows:

> "No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

It is significant to note that absent such a statutory provision this same principle of law has been applied to other public corporations, such as counties and municipalities. The following excerpt from the case of Lancaster v. County of Atchison, 180 S.W. (2d) 706, l.c. 708, is particularly worthy of note:

> "Both parties to this suit agree that counties, like other public corporations, 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly

> implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation - not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' Dillon on Municipal Corporations, 3rd Ed., Section 89. We have repeatedly approved this quotation. See State ex rel. City of Blue Springs v. McWilliams et al., 335 Mo. 816, 74 S.W. (2d) 363; State ex rel. City of Hannibal v. Smith, State Auditor, 335 Mo. 825, 74 S.W. (2d) 367, 372."

See also Snip v. City of Lamar, 201 S.W. (2d) 790, l.c. 796, and Taylor et al. v. Dimmitt, Mayor, et al., 78 S.W. (2d) 841, l.c. 843.

More specifically, it has been held that the same principle that applies to counties with regard to powers which may be exercised is also applicable to townships. For instance, in Jensen v. Wilson Tp., Gentry County, 145 S.W. (2d) 372, l.c. 374, it was said:

> " * * * A township board functions not as a court of broad jurisdiction but as the agent of the township with limited authority. Consequently, it is even more essential that its authority be exercised in strict compliance with the powers granted to it. Such a board comes under the same rule as a county court. A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co. v. Harris, 96 Mo. 29, 8 S.W. 794. * * *"

Bearing in mind this principle and the similarity between the rule as applied to counties and municipalities and Section 65.270, supra, we now proceed to examine some of the cases construing the corporate powers of municipalities and counties.

In Kennedy v. City of Nevada, 281 S.W. 56, the city had purchased land for the purpose of maintaining, and so maintained, a tourist camp for the benefit of transients. It was held in that case that the city had exceeded its authority, and the court made this statement, l.c. 60:

> "Of course, a municipality has no implied power to engage in a private business. 19 R.C.L. p. 788, Sec. 95. * * *"

The case of Heimerl et al. v. Ozaukee County et al., 256 Wisc. 151, 40 N.W. (2d) 564, was an action brought to determine the constitutionality of a Wisconsin statute which purported to authorize cities, towns and villages to enter into contracts to build, grade, drain, surface and gravel private roads and driveways. It further provided that any county could enter into agreements with a municipality to perform for it any such work. The court, in holding this statute unconstitutional, distinguished between this type of activity and other projects in which counties and municipalities might engage by virtue of other statutes, such as removing snow from private driveways, the manufacture, sale and distribution of agricultural lime, the soil conservation statute, etc., on the ground that the latter are natural governmental functions and are necessary to the health, safety and welfare of the community as a whole, whereas under the statute in question the public received no benefit either directly or indirectly. Only the private landowner benefited, and it was not therefore a proper governmental function. The court quoted from State ex rel. Wisconsin Dev. Authority v. Dammann, 228 Wisc. 147, 180, 277 N.W. 278, 280 N.W. 698, 708, as follows:

> "'The course or usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, and the objects and purposes which have been considered necessary for the support and proper use of the government are all material considerations as well as the rule that to sustain a public purpose the advantage to the public must be direct and not merely indirect or remote.'"

Taylor v. Dimmitt, supra, was an injunction proceeding brought to enjoin the erection or operation of a proposed electric transmission line by which the City of Shelbina proposed to furnish electricity, of which it had a surplus, to an unincorporated village located outside the City of Shelbina. It was not contended that the city had no authority to sell or supply

a utility service to nonresidents but merely that the statute did not give the city authority to construct, maintain and operate an electric transmission line for this purpose. The court considered the statutes authorizing a municipal corporation to acquire, maintain and operate power plants, etc., and to supply nonresidents but concluded that the statute did not authorize the construction, maintenance and operation of an electric transmission line for the purpose of furnishing service to consumers outside its corporate boundaries. Although a constitutional issue was raised, the court concluded by saying that, since the statutes were not broad enough to authorize the construction, maintenance and operation of the proposed electric transmission line, it was unnecessary to discuss the constitutional issues presented.

In the question before us submitted by your request, we are not put to the task that the Wisconsin Supreme Court was in the Heimerl case, supra, in that we are not faced with a statute specifically purporting to authorize the practice about which you inquire so as to give rise to the presumption of constitutionality. On the contrary, in order to uphold this practice not only must we find that this will inure to the benefit of the public generally so as to make it a proper governmental function but we must first find statutory authorization therefor.

Considering all the powers granted to townships in Sections 65.010 through 65.610 and Sections 231.150 through 231.330, RSMo 1949, we are unable to find any power from which it could reasonably be implied that townships have the authority to use township machinery to do work for private individuals for hire. Such a practice, although perhaps in some cases convenient, is certainly not essential to the declared objects and purposes of the township government and is not necessary to the exercise of powers expressly enumerated or granted. Paraphrasing the quoted portion of the Kennedy case, supra, it can with pertinence by analogical reasoning be said that a township has no implied power to engage in a private business. We therefore conclude that the power to use township machinery to do work for private individuals for hire has not been granted by the Legislature.

The holding herein is consonant with the opinion of this office to Honorable W. Oliver Rasch dated June 3, 1943, in which it was held that a county court has no authority to rent road machinery to an individual, etc., and with the opinion of this office to Honorable James E. Curry dated February 13, 1951, in

which it was held that a county court has no authority to lease part of the courthouse to a private individual, copies of which we are enclosing.

CONCLUSION

It is the opinion of this office that a township has no authority to use township machinery to do work for private individuals for hire.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Very truly yours,

JOHN M. DALTON
Attorney General

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