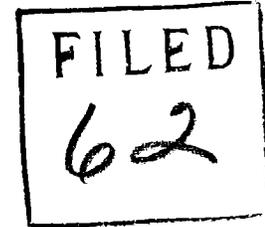


COUNTY COURTS: County court is without authority to appoint  
CONSTITUTIONAL LAW: supervising board of road commissioners and  
ROADS AND BRIDGES: prescribe the duties thereof.

June 26, 1947

Honorable Roy C. Miller  
Prosecuting Attorney  
Webster County  
Marshfield, Missouri



Dear Sir:

This is in response to your letter of recent date wherein you request an opinion from this department on the validity of the following order which has been made by the county court of Webster County:

"In the matter of placing in one Unit all the County Roads in Webster County, except such roads as are included in various special road districts in the County, and except that part of the northeast corner of the County recently designated as County Road District No. 4.

"Pursuant to authority given by the Laws of the State of Missouri to the County Court to act upon any question relating to County Roads in the County, the Court, after careful consideration of the matter, believes that it would be to the best interest of Webster County if all County Roads (not included in the various Special Road Districts still existing) were placed in one unit and constructed, maintained and supervised as hereinafter provided.

"Now, therefore it is ordered by the Court that a Supervising Board of Six County Road Commissioners be appointed, three of which are affiliated with one of the two now existing major political parties, and three which are affiliated with the other of the two major political parties, two of the number (one from each of the two now existing major political parties) for a term of two years, two

(one from each of said major political parties) for a term of four years, and two (one from each of said major political parties) for a term of six years, and upon the expiration of the term of any and all Commissioners, the successor shall be affiliated with the same political party as the one whose term expires, and shall be appointed for a term of six years. No person shall be appointed who is not a bonafide resident of Webster County, who is not of lawful age and who is not an advocate of a system of roads and highways constructed and maintained in a way that is to the best interest of all the inhabitants of the County.

" Said Commissioners are hereby given authority by the Court to supervise all road construction and maintenance in a way that will afford the greatest convenience to all the inhabitants of the County, to the fullest extent possible with the road funds which are, or which may hereafter be available; shall have authority to employ a County Road Supervisor who is qualified to lay out, construct and maintain a system of County Roads in a way that will be of the greatest benefit to all the inhabitants of the County as a unit. Said Supervisor to be at all times under the supervision of the Commissioners who shall have authority to remove him at any time. Said Commissioners shall also employ all road hands, or give authority to the Supervisor to employ, subject to their approval, for the length of time and for the salary they shall designate. The salary paid the Supervisor and the salary paid all road hands to be approved by the Court. Said Road Commissioners shall serve without pay, shall meet and organize by electing a chairman, a vice-chairman, and secretary, shall meet the first Monday in each month, at a place agreed upon, and shall at all times as much as is possible keep posted as to road conditions and needs in all parts of the

County over which they have supervision; shall make an inventory of all road machinery and equipment in that part of the county over which they have supervision, and shall also have supervision of the use and maintenance of same. The purchase or disposal of any machinery or equipment to be submitted to the Court for approval."

County courts, under the 1875 Constitution, were created by Section 36 of Article VI of that Constitution, which reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Under the 1945 Constitution, by Section 7 of Article VI thereof, county courts are provided for in the following language:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

The order referred to in your letter does not reveal whether it was made when the county court was acting under the 1875 Constitution or the 1945 Constitution. However, in either event, both of these sections of the Constitution direct the county court to manage all county business as prescribed by law.

Apparently it was under authority of the foregoing provisions of the Constitution that the county court assumed that it had authority to make the foregoing order. County courts can only exercise such powers as are expressly given

them by statute or those which necessarily or fairly are implied in or incident to the powers granted or those essential to the declared objects and purposes of the corporation not simply convenient, but indispensable. In the case of Lancaster vs. County of Atchison, 180 S.W. (2d) 706, 708, the court, in passing on the validity of an order made by the county court of Atchison County, laid down the following rules which are applicable here:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' \* \* \*"

"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.' \* \* \*"

Following these principles, in order to sustain the validity of the foregoing order, we must find that the authority for the court to make this order has been expressed in a statute or that it is impliedly granted under powers expressly granted the statute or that it is essential to the declared objects and purposes of the county.

Referring to the statutes relating to the subject of roads and highways, road overseers, county highway engineers, we find that Articles 3, 6 and 9 of Chapter 46, R. S. Mo. 1939, and the amendments thereto, contain the laws relating to the duties of the county courts with respect to road overseers, road machinery, county highway engineers, and the construction and maintenance of roads. Section 8516 of said Article 3, as amended, Laws of Missouri 1945, page 1479, provides as follows:

"In all counties of classes 2, 3 and 4 not adopting an alternative form of county government all road overseers shall be appointed by the county court of the county during the month of February."

Since under House Bill No. 476 of the 64th General Assembly, Laws of Missouri 1945, page 1801, Webster County is a class 4 county, then that county would be included within the provisions of said Section 8516.

Under Section 8521, Laws of Missouri 1945, page 1479, it is the duty of the road overseer to make detailed reports to the county court of the moneys received and those expended.

Referring to the foregoing order setting up the supervisory board, which order gives that board authority to employ a county road supervisor, it appears that the same duties are imposed on this board and the road supervisor as are conferred by statute on the road overseer of county highway engineer. We will refer to the following statutes which relate to the road overseers or county highway engineers.

Section 8563, R. S. Mo. 1939, gives the road overseer and county highway engineer control over certain streets and alleys in unincorporated towns and villages.

Section 8576, R. S. Mo. 1939, requires the road overseer to protect trees planted along the highways and to file charges against persons for injury to such trees.

Section 8579, R. S. Mo. 1939, requires the county highway engineer and road overseer to protect fruit, shade and ornamental trees along the public roads and to remove signs and advertisements which might be nailed to such trees.

Section 8581, R. S. Mo. 1939, provides that driveways or crossings over ditches connecting highways with private property shall be under the supervision of the road overseer or commissioner of road districts. This section further prescribes duties of the road overseer or highway engineer in case of obstruction of roads or ditches.

Section 8592, R. S. Mo. 1939, provides that copies of road laws shall be delivered to the road overseers.

Section 8593, R. S. Mo. 1939, prohibits the highway engineer or road overseer from acting as a sales agent of road tools, culverts, bridge materials or machinery, or from being interested in contracts for the building of bridges or culverts or the improvement of public roads. Referring to the order made by the county court, there is no provision in that order which would prohibit the members of this supervisory board from being interested in such contracts as are referred to in said Section 8593, supra.

Section 8661, R. S. Mo. 1939, makes the county highway engineer custodian of tools, materials and machinery belonging to the road districts of the county, and when such tools and machinery are delivered to the road overseer, he is required to take from the overseer an inventory and receipt for such tools and machinery and the overseer is responsible for the proper care and handling of such tools. Again referring to the foregoing order, it seems that the county court has attempted to impose these duties on the board of road commissioners.

Section 8662, R. S. Mo. 1939, gives the highway engineer supervision over the public roads of the county and over the road overseer and the expenditure of county and district funds.

Section 8663, R. S. Mo. 1939, requires the county highway engineer to inspect the conditions of the roads, culverts and bridges of each district as often as practicable and to see that the roads are kept in proper condition.

Section 8664, R. S. Mo. 1939, requires the highway engineer to make reports to the county court showing the condition of the roads in the county and the amount of money available for the districts with his recommendations. This is also a duty which the county court, in the foregoing order, has attempted to impose on the supervising board.

Section 8666, R. S. Mo. 1939, requires the overseers to follow the plans and instructions of the county highway engineer in matters concerning the expenditure of funds and improving roads.

Section 8667, R. S. Mo. 1939, requires the county highway engineer to file an annual report with the county court showing the general conditions of the roads and bridges of the county including improvements together with his recommendations, etc.

Your letter does not indicate whether or not Webster County has dispensed with the highway engineer as was authorized by Sections 8668 and 8669, R. S. Mo. 1939, which were repealed and reenacted, Laws of Missouri 1945, page 1493. However, we do not think that that would be material to the question here for the reason that we have referred to these various sections relating to the road overseers and highway engineers to show that the lawmakers have intended that the construction and maintenance of roads and highways be under the county courts, road overseers and county highway engineers, and that there are no provisions in the statutes whereby county courts are authorized expressly or by implication to appoint a supervising board of road commissioners for general road districts. The statutes do provide for commissioners in said special road districts formed under the provisions of such statutes; however, that type of commissioners would not come within the same class as the board of commissioners which the court has attempted to appoint under the foregoing order. The court in the Atchison County case, supra, announced another rule which would be applicable here, l.c. 709:

"\* \* \* Where the statute (Section 8548) 'limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done.' \* \* \* In other words, there can never be an implied power given a county or other public corporation when there is an express power."

Following this principle, the power of the county court to appoint road overseers being expressed by the statute, then we do not think that the court has the implied power to appoint the supervising board of road commissioners and to confer on that board the powers and authority set out in the order.

#### CONCLUSION

From the foregoing, it is the opinion of this department that a county court does not have authority to appoint a supervising board of road commissioners and to confer on

Hon. Roy C. Miller

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that board authority to appoint a county road supervisor and to set up a system of road maintenance and construction.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General