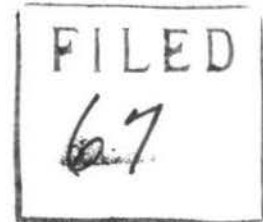


HIGHWAY COMMISSION: Legislature may not limit expenditure from state road fund.

January 18, 1949



Hon. John W. Noble
Kennett, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Article 4, section 29, Missouri Constitution, 1945, provides that the Highway Commission 'shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitation and conditions imposed by law as to the manner and means of exercising such authority,' etc.

"Please furnish me with your opinion whether this or any other provision of the Constitution authorizes the legislature to earmark any additional gas tax increase specifying that a part of such increase shall be used for farm road improvement or supplementary road building.

"It has been somewhat accepted belief that the highway funds are to be spent solely within the discretion of the Highway Commission. The purpose of this request is to determine what, if any, statutory directions can be placed by the legislature on the Commission, as to any proportion of funds to be expended on primary and secondary systems."

The Missouri State Highway Commission was originally established by an act of the Legislature in 1921 (Laws 1921, First Extra Session, page 131), following the adoption of Section 44a of Article IV of the Constitution of 1875 at the November, 1920, election (Laws 1921, page 707). That amendment authorized a sixty million dollar bond issue for the construction of hard surfaced roads. The 1920 amendment specifically authorized the Legislature to enact such laws as might be necessary to carry the amendment into effect. The constitutional provision was amended in 1928 (Laws 1929, page 453), at which time an additional seventy-five million dollar bond issue was authorized and provision made for the supplementary highway system. The amendment adopted at that time again authorized the Legislature to enact such laws as might be necessary to carry the amendment into effect.

Section 29 of Article IV, Constitution of 1945, established the Highway Commission as a constitutional agency. That section reads as follows:

"The department of highways shall be in charge of a highway commission. The number, qualifications, compensation and terms of the members of the commission shall be fixed by law, and not more than one-half of its members shall be of the same political party. The selection and removal of all employees shall be without regard to political affiliation. It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law."

Section 30 of Article IV, Constitution of 1945, relates to the funds of the Department of Highways, and reads as follows:

"For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue

derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes,) less the cost, (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:

"First, to the payment of the principal and interest on any outstanding state road bonds.

"Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes:

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

(2) To reimburse the various counties and other political subdivisions of the state, except incorporated cities and towns, for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the state as permanent parts of the system of state highways, to the extent of the value to the state of such roads and bridges

at the time taken over, not exceeding in any case the amount expended by such counties and subdivisions in the construction or acquisition of such roads and bridges, except that the commission may, in its discretion, repay, or agree to repay, any cash advanced by a county or subdivision to expedite state road construction or improvement;

(3) In the discretion of the commission to locate, re-locate, establish, acquire, construct and maintain the following:

(a) supplementary state highways and bridges in each county of the state as hereinafter provided:

(b) state highways and bridges in, to and through state parks, public areas and reservations, and state institutions now or hereafter established, and connect the same with the state highways; and also national, state or local parkways, travelways, or tourways, with coordinated facilities;

(c) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states;

(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;

(e) any highway in any city or town which is found necessary as a continuation of any state or federal highway, or any connection therewith, into and through such city or town; and

(f) additional state highways, bridges and tunnels, outside the corporate limits of cities having a population in excess of

150,000, either in the congested traffic areas of the state or where needed to facilitate and expedite the movement of through traffic.

(4) To acquire materials, equipment and buildings necessary for the purposes herein described; and

(5) 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 question of the extent of the Legislature's control over the Highway Commission has been the subject of considerable discussion, particularly with reference to the matter of requiring a certain portion of state funds available for road purposes to be spent in the construction of rural roads, supplementary to the State Highway system.

At the last session of the Legislature some approaches to the problem were suggested. The Butler Bill (House Bill No. 306, 64th General Assembly), which failed to receive committee approval, would have increased the gasoline tax to four cents per gallon. No attempt was made in the bill as originally introduced to require the Highway Commission to use any portion of additional revenue to be received from the increased tax for rural roads. At least two amendments relating to some such requirement were suggested to the committee considering the bill. One would have expressly required and directed the Commission to spend the revenue received by virtue of the increased tax upon supplementary highways. Another would have expressed the purpose of the Legislature in levying additional tax to provide additional revenue for construction of supplementary highways and would have recommended to the Commission that the proceeds equivalent to that derived from a one cent per gallon tax be allocated by the Commission for the construction of supplementary highways.

The Curry Resolution (Laws of Missouri, 1947, Volume II, page 450), which was passed by both Houses of the Legislature but which was rejected by the voters at the last general election, approached the problem by way of constitutional amendment. The revenue from the one and one-half cents per gallon additional tax proposed by the amendment would have been appropriated without legislative action to a "Local, Street and Road Fund," to be apportioned to municipalities

and counties of the state for use in construction and maintenance of local roads.

In your letter you suggest that the Legislature may have authority to direct the Highway Commission to spend a portion of the funds available to it for supplementary highways by reason of the provision of Section 30 of Article IV, that the authority of the Commission to "construct and reconstruct state highways" shall be "subject to limitations imposed by law as the manner and means of exercising such authority."

It will be noted that in Section 30 of Article IV the State Highway Commission is given "authority over and power to locate, relocate, design and maintain all state highways." No limitation is placed by the Constitution upon the Commission's exercise of its authority in these matters, the limitations which may be imposed by law being confined to the manner and means of the Commission's exercising its authority to construct and reconstruct highways.

Examination of the transcript of the proceedings of the Constitutional Convention of 1945 reveals that the section originally proposed for the establishment of the Highway Commission contained no reference whatever to any limitation upon the Commission's authority. The section as originally proposed read as follows (Transcript of Debates of Constitutional Convention, page 4392):

"There shall be a state highway commission, the number, selection, compensation and tenure of whose members shall be provided by law, except that not more than one-half of its members shall belong to the same political party, which commission shall have authority over the operation of the state highway department including the selection and removal of employees, which shall be without regard to political affiliations. Said commission shall also have authority over and power to locate, relocate, design, construct, reconstruct and maintain all state highways, and regulate access to, from and across state highways where the public interest and safety may require."

An amendment was proposed to change the last sentence of the section to read as follows:

"Said commission also shall have authority over and power to locate, relocate, design and maintain all state highways. Said commission shall also have authority as provided by law, to construct, reconstruct and regulate access to, from and across state highways."

Speaking on the proposed amendment, Judge Mayer stated (page 4393):

"The lines which I strike out give the highway commission absolute authority, absolute authority, without any legislation or anything else, to locate, relocate, construct, reconstruct and maintain all said highways and regulate access to, from and across state highways where the public interest and safety may require. Now my amendment, if adopted, would do this, it would give them absolute power to locate, relocate, design and maintain all state highways. Thus far, they have the absolute power without any legislation or anybody to interfere with them."

Judge Mayer reiterated several times that his purpose in proposing the amendment was to enable the Legislature to prevent the Highway Commission from departing, without the approval of the Legislature, from the previously established method of constructing highways through competitive bidding.

Thus, it appears that the Constitutional Convention intended to permit the Highway Commission to exercise the powers granted to it free of any restriction by legislative action, except as to the means of constructing and reconstructing state highways and the regulation of access thereto.

However, as pointed out by the Supreme Court in the case of Household Finance Corporation v. Shaffner, 203 S.W.(2d) 734, 737:

"* * * while it is proper to consider the debates, 'the question in interpreting the Constitution is not so much how it was understood by its framers as how it was understood by the people adopting it, since the Constitution derives its force as a fundamental law,

not from the action of the Convention, but from the people who have ratified and adopted it * * *.' 11 Am. Jur. 707. The only way we can determine what meaning was conveyed by the provision is to determine what it means to us, giving the words their ordinary and usual meaning."

Taking the words of Section 30 of Article IV of the Constitution in their usual meaning, we do not believe that the limitations which the legislature is authorized to impose can be extended to require a certain amount of the Highway Department funds to be spent in constructing a particular type of road. The provision, as pointed out above, provides no limitation with regard to the Commission's exercise of its power to locate, relocate, design and maintain highways. The authority to locate would deal with the determination of where a particular road would be situated. The authority to design would deal with the matter of determining what type of road should be constructed on any particular route. The authority to maintain would deal with the keeping in repair of a road after its construction.

In these regards the Constitution makes the Highway Commission subject to no legislative restrictions. However, it does require that, once the location and design of a road has been determined by the Commission, the manner and means of construction be subject to such limitations as the Legislature may impose. We fail to see how such limitations, which must deal solely with the manner and means of construction, could constitutionally be broad enough to prescribe that a certain mileage of supplementary roads be built for each mile of primary highways. Such limitations would deal with the matter of location and design, not the means and manner of construction. We feel that the only interpretation which could reasonably be put on this provision is that which the Constitutional Convention intended, as pointed out above.

A possible basis of legislative control over the funds of the Highway Commission is suggested in Section 30 of Article IV of the Constitution of 1945. That section, which is quoted above, provides that after the deduction of certain expenses the proceeds of the motor vehicle fuel tax "shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other: First, to the payment of the principal and interest on any outstanding state road bonds. Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding

twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes: * * * " It might be contended that the constitutional provision does not appropriate the moneys transferred to the state road fund, but rather appropriates only the balance from the sinking fund and interest fund to the state road fund, and leaves the moneys in that fund subject to appropriation by the Legislature for the purposes set out in the section. However, a study of the history of similar provisions in the amendments of 1921 and 1928 makes doubtful that such theory would be upheld by the courts.

The 1920 amendment (Laws 1921, page 707) contained the following provision:

"Any motor vehicle registration fees or license fees or taxes, authorized by law, except the property tax thereon, less the cost of maintaining any state highway department or commission, authorized by law, shall, after the issuance of such bonds, and so long as any bonds herein authorized are unpaid, be and stand appropriated without legislative action for and to the payment of the principal of the said bonds and shall be credited to a sinking fund to be provided for by law."

The effect of this provision was considered in the case of State v. Hackman, 314 Mo. 33, 282 S.W. 1007. In that case the court said (282 S.W., 1.c. 1013):

"This provision makes no attempt to appropriate, without legislative action, the money to pay the maintenance expense of the highway commission. It does appropriate without further legislative action that portion of the money received from automobile license fees which remains after deducting the cost of collecting the tax and maintaining the highway commission, and it appropriates the remainder to the payment of the principal and interest of certain bonds. It makes no attempt whatever to appropriate without legislative sanction the amount

needed for the expenses of the commission.

* * *

The amendment of 1928 (Laws 1929, page 455) changed the provision regarding application of highway funds to provide that the receipts from certain taxes and fees relating to the use of the highways, after certain numerated deductions, should:

"* * *be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the state road bond interest and sinking fund provided by law. If in any year there should be any balance in the state road bond interest and sinking fund beyond the requirements of the next succeeding calendar year for interest and sinking fund of the said bonds, such balance shall be transferred and credited to the state road fund to be administered and expended under the direction and supervision of the state highway commission for the following purposes: * * *"

The purposes specified were similar to those found in subparagraphs 1 to 5 of Section 30 of Article IV of the Constitution of 1945.

A significant difference may be noted between the amendment of 1928 and Section 30 of Article IV of the Constitution of 1945. The 1928 amendment, quoted above, provided only that the funds in the state road bond interest and sinking fund should stand appropriated without legislative action. The balance which was transferred to the state road fund was not made subject to that provision.

The state road fund was created by an act of the Legislature (Laws 1929, page 87, Sec. 4). That provision establishing that fund read as follows (Sec. 8811, R. S. Mo. 1939, now repealed):

"There is hereby created a state road fund which shall receive all monies from the sale of bonds and all monies given the state by the United States government for road purposes and the balance transferred from the state road bond interest

and sinking fund as provided in section 8810 of this article. Appropriations from this fund shall be made for all purposes of constructing, improving and maintaining the state highway system under the existing laws, laws hereinafter to be enacted, and for carrying into effect the provisions pertaining to same under the Constitution of Missouri."

Thus, it can be seen that the legislature retained the right to appropriate from the state road fund following the 1928 amendment, inasmuch as that fund was not appropriated by the Constitution, and inasmuch as the constitutional amendment specifically authorized, as pointed out above, the Legislature to enact such laws as were necessary in order to effectuate the amendment. However, Section 30 of Article IV of the Constitution of 1945 went farther than the 1928 amendment. By its terms it makes not only the state road bond fund but also the state road fund stand appropriated without legislative action. The Legislature recognized this change by enacting a new section relating to the state road fund. The new section reads as follows (Laws 1945, page 1467):

"There is hereby created and set up the State Road Fund which shall receive all moneys and credits from (1) the sale of state road bonds, (2) the United States government and intended for highway purposes, (3) the State Road Bond and Interest Sinking Fund as provided in Section 8810 of this article, and (4) any other source (a) if they are held for expenditure by or under the Department of Highways or the State Highway Commission and (b) if they are not required by Section 8809 to be transferred to the State Highway Department Fund. The costs and expenses withdrawn from the state treasury (1) for locating, relocating, establishing, acquiring, reimbursing for, constructing, improving and maintaining state highways in the systems specified in Article IV, Section 30, of the Constitution, (2) for acquiring materials, equipment and buildings, and (3) for other purposes and contingencies relating and appertaining

to the construction and maintenance of said highways shall be paid from the State Road Fund upon warrants drawn by the State Auditor, based upon bills of particulars and vouchers preapproved and certified for payment by the State Comptroller and by the State Highway Commission acting through such of their employees as may be designated by them. No payments or transfers shall ever be made from the State Road Fund except for an expenditure made (1) under the supervision and direction of the State Highway Commission and (2) for a purpose set out in subparagraphs (1), (2), (3), (4), or (5) of Section 30, Article IV, of the Constitution."

It will be noted that this new section eliminated any reference to appropriation by the Legislature from the state road fund. The Legislature has continued to appropriate from this fund (See Laws 1947, Volume II, page 88), just as it has continued to appropriate from the state road bond interest and sinking fund (See Laws 1947, Volume II, page 35), but such appropriations are unnecessary in view of the fact that the funds stand appropriated by reason of the constitutional provision.

Thus, it appears that the Constitution of 1945 has removed the State Highway Commission and the expenditures of state road funds from legislative control, except for the matter of means and manner of constructing and reconstructing highways and limitation of access to state highways. It is believed that the authority of the Legislature to impose limitations as to the means and manner of construction is confined to the method employed by the Commission in expending funds for construction and is not intended to apply to the type of roads which the Commission might decide to construct. If such is the case, the Legislature could make no binding requirement that any funds raised from additional gasoline taxes be expended in a certain proportion for primary and secondary highways, in the absence of a constitutional amendment.

Another possible approach to the matter would be along the lines of the amendment proposed to the Butler Bill, which would have recommended to the Highway Commission that a certain portion of the increased tax be spent for supplementary

highways. This was, of course, brought forward solely as a matter of recommendation and with the realization that it would have no binding effect upon the State Highway Commission. Of course, in the event that the Commission should see fit to disregard the Legislature's wishes, the recourse of the Legislature would be to repeal the additional tax.

Conclusion.

Therefore, this department is of the opinion that the state road fund may be expended by the State Highway Commission for the purposes specified in Section 30 of Article IV, Constitution of 1945, and that the Legislature has no authority to prescribe either the type of highways for which said fund is expended or the ratio of expenditure for primary and secondary highways.

Respectfully submitted,

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APPROVED:

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Attorney General

RRW:ml