

Board of County Commissioners, Authority of. Road, Authority of Board to Appropriate Money for.

The statute provides for the establishing of a public highway by petition.

Boards of county commissioners are absolutely prohibited from incurring any indebtedness or liability for a single purpose in excess of \$10,000.00, without the approval of a majority of the electors. Such boards are not authorized by any provision of law to pay for work on roads in advance of its being done.

December 8th, 1913.

Honorable Board of County Commissioners,
Hamilton, Montana.

Gentlemen:

I am in receipt of your letter, submitting the following questions:

"1. Can a board of county commissioners legally let a contract for building a wagon road without a petition having been presented and acted on?

"2. Can a board of county commissioners legally let a contract for the building of a piece of road to cost over \$10,000, when the county is to pay only \$5,000 for the amount?"

"3. Can a board of county commissioners legally appropriate and draw a warrant for \$5,000 to apply on road work before the work has been commenced?"

1. Chap. 4 of Chap. 72, Session Laws of 1913, contains provisions for the filing of a petition direct to the board of county commissioners to

"Establish, change or discontinue any common highway therein,"

And it is provided in Sec. 4 of Chap. 1 of said Chap. 72, that:

"Main highways shall be such as are established or improved in the manner provided by Chap. 4 of this act."

If a county board may act independently of the petition in the establishment of a highway, the form and contents of the petition are immaterial. True, the petition may have the effect of coercing the board into action, and still the board has discretionary power to refuse to grant the petition. If, therefore, the board may act on its own initiative, the petition is of little moment. A mere verbal statement that a highway was needed in a certain locality would be sufficient, and still the statute is very specific as to what must be alleged and described in the petition. This would seem to be an idle provision if no petition at all is required.

The provisions of Sec. 3 of Chap. 1 of said Chap. 72, relating to definition of "public highways," cannot have the effect of rendering inoperative the provisions of said Chap. 4. Said Sec. 3 relates to what already exists or to some declaration or action concerning the same, rather than to an act of the county board in establishing, laying out, opening, etc., a public highway in the first instance.

Neither does the power conferred upon county boards by Sec. 2894, Revised Codes, "to lay out, maintain, control," etc., public highways conflict or change the method of procedure indicated by said Chap. 4 of Chap. 72. The Supreme Court of Montana has in several cases had under consideration questions relating to the establishment of public highways, and in no case has it been intimated that a petition is unnecessary, but the intimation has been to the contrary.

Crowley v. Board, 14 Mont. 299.

Currin v. Clark, 14 Mont. 301.

Pagel v. Board, 17 Mont. 586.

Read v. Lincoln County, 46 Mont. 31, 64.

In the Pagel case, *supra*, the court set aside an order of the county board establishing a county road because the petition therefor and subsequent proceedings were too indefinite; and in the Lincoln County case, the court said:

"Sec. 2894, Revised Codes, gives boards of county commissioners general power and authority to establish and maintain highways, ferries and bridges, and Sec. 1390 et seq. point out the methods of procedure."

Sec. 1390 referred to in the above quoted decision relates to and provides for a petition for a highway. In *Becker v. Hovey*, 26 Pac. 585, the Supreme Court of Kansas had under consideration a defective petition relating to the opening or improving of a county road. The court held that the board had no authority under such petition to order the opening of the road, and further stated that:

"The board of county commissioners have no power to establish highways by resolution."

Noffziger v. McAllister, 12 Kan. 315.

Commissioners v. Mullenbecker, 18 Kan. 129.

Shaffer v. Weech, 34 Kan. 595.

9 Pac. 202.

I am not prepared to say that a county board does not have in any case whatsoever authority to establish a public highway without a petition, but the statute seems to provide for establishing it by a petition, and if the petition method is followed there can be no doubt any other method is open to question, and perhaps would not be sustained except under special circumstances, which made it appear plainly to the court that the road was a necessity, and that it could not be established by petition. The mere fact that the land owners may grant a free right of way would perhaps be conclusive as to them and under which they would be estopped from disputing the legality of the highway, but it would not be conclusive as to other electors or taxpayers within the county.

3. The provisions of Sec. 5, Art. XIII of the State Constitution, absolutely prohibited a county board from incurring any indebtedness or liability for any single purpose in excess of ten thousand dollars without first securing the approval of a majority of the electors. I take it, however, that it is somewhat immaterial as to the amount named in the contract for the construction of the road, provided it is emphatically provided therein that the county shall in no event be liable for a greater sum than the limit of its authority, which in this case is, as you stated, five thousand dollars.

3. There is no provision of law authorizing a board of county commissioners to pay for road work in advance of the work being done. Bills against the county should be filed and audited, and if in payment the pledge in advance is made or given, it must be under some business arrangement, and is without direct authority of law, and the officers so paying in advance would be liable personally in case it developed subsequently that the county had been wronged by such payment.

Sec. 2880, Revised Codes.

If the county makes a positive contract, agreeing to pay the five thousand dollars, that contract is just as binding on the county as a county warrant would be. However, if for business reasons a warrant is drawn, the board should guard itself in such a manner that no money is to be paid from the treasury until the work has actually been performed and accepted by the act of the board.

Yours very truly,

D. M. KELLY,
Attorney General.