

HIGHWAYS: Construction through municipalities having population of more than 2,500 according to last decennial census.

June 19, 1939

Honorable Howard Elliott
State Representative
St. Louis County
Jefferson City, Missouri



Dear Sir:

We are in receipt of your letter of June 17, 1939, in regard to the building of State Highway No. 40 through the cities of Ladue, Brentwood, Clayton and Richmond Heights, all in St. Louis County, wherein you request an opinion concerning the interpretation of Section 8133, R. S. Mo. 1929.

Your first question is as follows: "Does the Section contemplate that the entire highway strip be measured and divided by the number of buildings actually existing at the time of the measurement so as to get a result in excess of 200 feet before the roadway can be placed in that locality?"

The only mention of Section 8133 which we are able to find in the case is in State vs. State Highway Commission 42 S. W. (2nd), at pages 204-205 wherein it is said:

"If this law is applicable to the state highway system, what becomes of section 8133, which has provided ever since its enactment in 1921 that any state highway routed through a municipality of less than 2,500 population may be constructed by the commission, and in municipalities of greater population may likewise be built where the abutting houses are not less than 200 feet apart on the

average?"

At the conclusion of the opinion in the above case, we find the following:

"We are not to be understood, however, as holding even with reference to new construction that any of the present state highways do enter Kansas City so that they can be 'connected' by new roads built inside the city, or that, in any event, state highways under the '300 mile' provision may be built in violation of the provisions of section 8133, R. S. 1929, limiting such construction in municipalities of over 2500 population to places where the abutting houses average less than 200 feet apart."

The word "not" was apparently omitted between the words "average" and "less" in the last sentence by mistake. Any reference to Section 8133 in the above opinion was by way of dictum, and denotes only the apparent approval of the court as to the validity of the section. Section 8133 is apparently derived from the federal statute found in U.S.C.A., Title 23, Section 2, which defines a highway as follows:

"The term 'highway' shall not include any highway or street in a municipality having a population of 2,500 or more as shown by the last available census, except that portion of any such highway or street along which, within a distance of one mile, the houses average more than 200 feet apart."

It will be seen that the Missouri and federal statutes are quite similar except that the distance of one mile is set as a standard in the federal statute and was omitted

in the Missouri statute, which was apparently intentional on the part of the legislature, and left us without a fixed distance for computing the average. Our Section 8133 reads as follows:

"Any state highway which passes through a municipality having a population of less than twenty-five hundred according to the last United States census preceding such construction, shall be constructed through such municipality, and any highway which passes through a municipality having more than twenty-five hundred population, according to such census, shall be constructed through the portions of the municipality where the houses abutting such roadway are not less than two hundred feet apart on the average; provided, however, that in either case the state shall not pay for road surfacing wider or of a higher type of construction than the road as constructed up to the boundary of such municipality."

This section apparently applies only to cases in which a highway shall pass "through" a municipality having more than 2,500 population. The word "through" is defined in Webster's International Dictionary as follows:

"From end to end of, or from side to side of; from one surface or limit to the opposite."

Since the standard measure of one mile was omitted, it seems plain that the entire length of the highway to be constructed, which lies within the city limits of the municipality, is a standard upon which the average number of houses is to be computed. As a practical matter, we can readily see that in thickly populated communities, the average in the business district would be so high as to require the building of the highway somewhat in the suburbs.

It is our conclusion, therefore, that the entire highway strip lying within the city limits shall be measured and divided by the number of buildings abutting the right-of-way.

As to your second question, we believe it is answered by the conclusion of the above in which we pointed out that the average along the entire length of the highway must govern, and that the Commission would not be required to detour any thickly settled area if the average was within the statute.

Your third question is as follows:

"Does the subdividing and platting of the ground abutting the whole or any portion of the highway into building lots less than 200 feet apart comply sufficiently with the terms of the statute as to prohibiting the building of the roadway in view of the fact that there are being constructed and it is contemplated immediately to construct houses less than 200 feet apart, many or most of which would be in existence immediately prior to or immediately after conclusion of the building of the highway."

We do not believe that the subdividing and platting of the ground abutting a portion of the highway into building lots less than 200 feet apart would comply with the words of the statute "where the houses abutting such roadway are not less than 200 feet apart on the average."

We believe that the survey and purchase of the right-of-way constitute the beginning of "construction" as set out in the statute and that subsequent development would be the logical sequence of such construction. In fixing the number of houses, all occupied buildings on both sides of the street, which face the street and the occupants of which would naturally use the proposed highway, should be counted.

It is also apparent that a short portion of a highway

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which did not go through a municipality would not be affected by Section 8133.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH:RT