

1984 Ky. Op. Atty. Gen. 2-240, Ky. OAG 84-206,
1984 WL 185608 (Ky.A.G.)

*1 Office of the Attorney General

Commonwealth of Kentucky

OAG

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June 4, 1984

Hon. Harold K. Botner
Madison County Judge/Executive
Courthouse
Richmond, Kentucky 40475

Dear Judge Botner:

Your first question relates to the County Board of Assessment Appeals. Although [KRS 133.020](#) provides that the county judge/executive may appoint the members (there is no mention of Fiscal Court consent), it is our opinion that [KRS 67.710\(7\)](#), which requires the Fiscal Court's consent to appointments to boards by the county judge/executive, controls such appointments. That interpretation was established by the Court of Appeals in [Fiscal Court Com'rs., Etc. v. Jefferson, Ky. App., 614 S.W.2d 954 \(1981\)](#) 959. Thus the appointments to that board require the consent of your Fiscal Court. Your appointments without the Fiscal Court's consent were, unfortunately, invalid.

Since such appointments address the sound discretion of yourself and the Fiscal Court, as a body, under [KRS 67.710\(7\)](#), such discretion is not subject to control by mandamus. [Kaelin v. City of Indian Hills, Ky., 286 S.W.2d 898 \(1956\)](#). Mandamus ordinarily lies to compel performance of a ministerial act only, as distinguished from a discretionary act.

Secondly, your Fiscal Court, you write, has from time to time appointed and voted on a water district commissioner, a solid waste committee, and has attempted to exercise specific executive powers as set forth in [KRS 67.710\(1\) and \(8\)](#). We assume you really referred to subsections (7) and (8) relating to county personnel and boards.

Water district commissioners are appointed by the county judge/executive with the approval of Fiscal Court, pursuant to [KRS 74.020](#). However, the initial appointment or nomination must be made by the county judge/executive, with the approval of the Fiscal Court. Thus [KRS 67.710\(8\)](#) and [KRS 74.020](#) are identical in this situation. Clearly the Fiscal Court has no authority to nominate or initially appoint such commissioners. They can either approve or disapprove of your specific appointments of such commissioners. Mandamus cannot be used to control the Fiscal Court's exercising its consent to your appointments. However, it can be used to compel the Fiscal Court to desist from making the appointments and merely engage in its discretion of consenting or not consenting to your appointments. The exercise of that discretion, of course, is not subject to mandamus control, as we pointed out above. The court held, in [Crawford v. Lewis, 170 Ky. 589, 186 S.W. 492 \(1916\)](#), that mandamus will lie to direct that a discretionary duty be performed, though not to direct the manner of its performance. See also the later cases of [Evans v. Thomas, Ky., 372 S.W.2d 798 \(1963\)](#), and [McKinstry v. Wells, Ky. App., 548 S.W.2d 169 \(1977\)](#), on that point.

You have indicated that the solid waste committee is merely a planning committee looking toward the joint participation of the county with the cities of Richmond and Berea in a solid waste program. Since the creation of the committee and the appointments to the committee were never reduced to a formal basis (no Fiscal Court order or resolution), the formalities of statutory law do not apply. Cf. [KRS 67.710\(8\)](#).

Sincerely,

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