

CITIES, TOWNS & VILLAGES: County court cannot incorporate
INCORPORATION OF CITIES: unincorporated area upon petition as
CITY MANAGER ORGANIZATION: third class city with city manager
MUNICIPALITIES: form of government. Upon petition
COUNTY COURT: for incorporation as third class city
with city manager form of government
county court may incorporate as
regular third class city.

Opinion No. 469 (1963)
No. 34 (1964)

May 21, 1964

Honorable Brunson Hollingsworth
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Mr. Hollingsworth:

We have your letter in which you request an opinion of this office regarding the legality of a petition for incorporation submitted to the Jefferson County Court by the residents of a presently unincorporated area who propose to incorporate as the City of Arnold.

It appears from the copy of the petition which you submitted that the incorporators seek to form a third class city to be governed under the City Manager form of government pursuant to Sections 78.430 through 78.640, RSMo.

The specific questions which you ask are as follows:

"Query No. 1. Can the County Court lawfully incorporate the City of Arnold under the style of petition above described as a City Manager form of government under provisions of Sections 78.430 to 78.640.

"Query No. 2. In the event your answer to Query No. 1 is in the negative, may this County Court under the style of petition set out above lawfully incorporate the City of Arnold as a third class under Section 72.080, bearing in mind that the above petition seemingly requests the incorporation of the City of Arnold as a Council Manager form of government."

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Section 72.080, RSMo 1959, to which you advert, provides for the incorporations of cities and towns, not previously incorporated, in accordance with their population and reads as follows:

"Any city or town of the state not incorporated may become a city of the class to which its population would entitle it under this chapter, and be incorporated under the law for the government of cities of that class, in the following manner: Whenever a majority of the inhabitants of any such city or town shall present a petition to the county court of the county in which such city or town is situated, setting forth the metes and bounds of their city or town and commons and praying that they may be incorporated, and a police established for their local government, and for the preservation and regulation of any commons appertaining to such city or town, and if the court shall be satisfied that a majority of the taxable inhabitants of such town have signed such petition, the court shall declare such city or town incorporated, designating, in such order the metes and bounds thereof, and thenceforth the inhabitants within such bounds shall be a body politic and incorporate, by the name and style of 'the city of,', or 'the town of,', and the first officers of such city or town shall be designated by the order of the court, who shall hold their offices until the first general election of officers, as provided by law and until their successors shall be duly elected and qualified."

Special provision is made by Section 72.090 for areas asking to incorporate as cities of the third class to be governed under the optional form of government provided in Sections 78.010 to 78.420, RSMo, the commission form of government. Said Section 72.090 reads as follows:

"Provided, that any city or town of the state of Missouri, not incorporated, having sufficient population to entitle it to become a city of the third class,

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may include in its petition for such incorporation a request that it be authorized to avail itself of the provisions of sections 78.010 to 78.420, RSMo, and the county court, in passing upon such application, shall have power in its order of incorporation to authorize said city to be governed by the provisions of sections 78.010 to 78.420, RSMo, as fully as if the provisions of sections 78.010 to 78.420, RSMo, had been adopted by a formal election of the inhabitants of the territory comprised therein; and thereupon such county court shall appoint the officers of such city provided by sections 78.010 to 78.420, RSMo."

Sections 78.020, et seq., which provide for the organization of a city of the third class with a commission form of government, require that a special election be held for this purpose unless such organization is to be accomplished at the time of the original incorporation. Thus, the usual requirement of an election for the adoption of this optional form of government is expressly waived by statute in order that an area just incorporating may avail itself of the procedures set out in Section 72.090.

The only other optional form of government available to a third class city is the City Manager form of government, which, as previously stated, is provided in Sections 78.430 through 78.640. Section 78.430 sets out the procedures to be followed in adopting this particular optional form of government and reads as follows:

"Any city of the third class, or any city with a population entitling it to become a city of the third class, may become organized under the provisions of sections 78.430 to 78.640, by proceeding in the following manner: Upon petition of electors residing in the city equal in number to twenty-five per cent of the votes cast for all candidates for mayor in the last preceding election, the mayor shall by proclamation submit the question of organizing under sections 78.430 to 78.640, at a special election to be held at a time specified, within sixty

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days after the petition is filed. Notice thereof shall be published in at least five issues of a daily newspaper of the city, or if there is no daily newspaper of the city, then in at least two issues of a weekly newspaper of the city. The first publication shall appear at least thirty days prior to the date of the election. At the election the proposition to be voted on shall be submitted in substantially the following form:

"SHALL THE CITY OF (NAME CITY)
ORGANIZE UNDER SECTIONS 78.430
TO 78.640, RSMo, PROVIDING FOR
THE CITY MANAGER FORM OF CITY
GOVERNMENT?

"YES.

"NO.

"(SCRATCH THE ONE YOU DO NOT
WANT.)

"The election thereon shall be conducted, votes canvassed, and results declared in the same manner as provided for by law in respect to other city elections of cities of the third class. If a majority of votes cast at the election is in favor of adopting the optional form of government provided for herein, the city clerk shall transmit to the secretary of state and to the county clerk of the county in which the city is located, duplicate copies of a certificate stating that the proposition was adopted. The city shall then proceed to organize under sections 78.430 to 78.640, by nomination of candidates and election of councilmen as herein provided. The elections shall be held at the first regular municipal election following the date of adoption of sections 78.430 to 78.640; except that, if a regular municipal election is not held within six months after date of adoption of this law, the mayor by proclamation shall call a special

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election to be held within sixty days after the date of adoption, for the purpose of electing councilmen, and notice thereof shall be published in three issues of one or more of the daily newspapers of the city, or, if there is no daily, then in one issue of a weekly newspaper of the city, and the first issue shall appear not less than twenty days before the date of election. If the plan is not adopted, the question of adopting the plan shall not be resubmitted to the voters of the city for adoption for at least one year thereafter, and then the question of adoption may be resubmitted upon a like petition, proclamation and notice as provided above."

From a reading of this statute it is apparent that the law contemplates an existing city prior to organization under the City Manager form of government. Thus, the authorization is granted to "any city of the third class, or any city with a population entitling it to become a city of the third class" In order to determine the requisite number of signatures for the petition, it is necessary that there previously have been an election for mayor in the city. An existing mayor is required in order to proclaim the submission of the question to the electorate. Notice of the election must be given in newspapers "of the city". The statute envisions the prior election of a city clerk, who is to submit the results of the election to the secretary of state and to the county clerk. The statute also presupposes the holding of regular municipal elections prior to the submission of the reorganization question.

Similarly, Section 78.440 is framed in terms which assume the prior existence of a regularly incorporated city having municipal laws, boundaries, officers, etc.

From all of this it can be seen that the only statutory method provided for the adoption of the City Manager form of government contemplates the prior existence of an incorporated city or town. Unlike those statutes relating to the adoption of the other optional form of government for third class cities - the commission form of government - no provision is made for the waiver of a special election in the event the government is to be organized at the time of original incorporation.

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For these reasons, we are forced to the conclusion that Sections 72.080 and 78.430 do not authorize the incorporation of a third class city under the City Manager form of government. While we can certainly understand the desire of the incorporators to avoid the difficulty and expense of holding two separate elections, we are bound by the action of the General Assembly or, as in this case, the failure of the General Assembly to provide for procedures for the adoption of the City Manager form of government similar to those provided for the adoption of the commission form of government.

Turning to your second question, we note that the petition for incorporation of the City of Arnold makes specific reference to Section 72.080 and prays for incorporation pursuant to that section. Further, the petition meets all of the requirements of that section, assuming that it has been signed by the requisite number of inhabitants. This being the case, it is our view that the county court may treat those portions of the petition praying for the organization of the city under the City Manager form of government as surplusage and may proceed to act upon the petition in the normal course.

CONCLUSION

1. An unincorporated area may not incorporate as a city of the third class having the City Manager form of government.
2. The county court may consider a petition for incorporation as a city of the third class presented pursuant to Section 72.080 in the normal course and may ignore such portions of the petition which pray for incorporation under the City Manager form of government.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Very truly yours,


THOMAS F. EAGLETON
Attorney General