

COUNTY COURTS: The county court may in its discretion allow or deny
TOWNSHIP ORGANI- petition for incorporation of special road district.
ZATION: County court's exercise of discretion is exercise
SPECIAL ROAD of legislative instead of judicial power. Not
DISTRICTS: necessary to divide entire county into special road
districts. Special road district entitled to
receive only those tools and machinery regularly
used heretofore in maintaining roads now in the
district.

July 17, 1951



7-18-51

Mr. Don Kennedy
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Dear Sir:

We have before us your letter of May 24, 1951, which has been assigned the writer for an opinion. Your request contains four separate questions and the pertinent parts are as follows:

"This procedure is prescribed by Section 233.320, R.S. Mo. 1949 et seq. So far as I am able to determine, the petition is in due form and has been signed by the requisite number of resident land owners, and will come up for hearing in the August term of the Vernon County court. This has never been attempted in Vernon County before, to my knowledge. I have this question, under Section 233.325, R.S. Mo. 1949, as to the power of the county court: first, whether the court could, at its discretion, deny the petition altogether, even though it might be in proper form and signed by the requisite number of land owners?

"I anticipate that remonstrances will be filed by other owners of land within the proposed district who reside within the district. The reasons for the remonstrances will probably be that it would be impractical to divide what is now Clear Creek township into two separate units for road administration; that if the township is divided into two units, neither unit will be able financially to maintain sufficient equipment for the maintenance of roads; and that there is no logical geographical reason for such division.

"Some parts of the cited statute indicate to me that, upon presentation to it of a petition in form complying with the statute, signed by the

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requisite number of resident land owners, of which proper notice has been given in the prescribed manner, the court's only discretion is to make any change in the boundaries of such proposed district as the public good may require and make necessary, and after making such changes, the court must make an order incorporating the road district.

"Other parts of the same statute indicate that the court might, in its discretion, sustain the remonstrances and refuse to incorporate the road district.

"There is another question that occurs to me. If the court has the power to refuse to incorporate the district, as prayed, or to grant it in its discretion, would such power be judicial, thereby rendering Section 233.325, R.S. Mo. 1949, unconstitutional under Article 5, Section 1 of the 1945 Constitution of Missouri?

"Under Section 233.320, must the entire county be divided into special road districts, in order for any special road district to be incorporated? Assuming that the court does incorporate this special road district, how is the road machinery and equipment to be divided between the commissioners of the road district and the board of trustees of Clear Creek township?

"Section 233.340, R.S. Mo. 1949, apparently contemplates that the road district shall include all of one or more townships, for it provides in Paragraph 1 that the township board shall cause all tools and machinery used for working roads belonging to the districts formerly existing, and composed of territory impressed within the incorporated district, to be delivered to said commissioners. It seems unfair to me to follow that statute to the letter in this case, but I am unable to find any other statute prescribing how the tools and machinery should be divided in a case of this kind."

Section 233.325, RSMo 1949, provides as follows:

"Whenever a petition, signed by the owners of a majority of the acres of land owned by residents of the county residing within

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the district proposed to be organized, and setting forth the proposed name of the district, and giving the boundaries thereof and the number of acres owned by each signer and the names of other owners of land residing within such boundaries so far as known, and the number of acres owned by each so far as known, and praying for the organization of a special road district in accordance with sections 233.320 to 233.445, shall be filed in the office of the clerk of the county court thirty days before the beginning of the next regular term of said court, the said clerk shall give notice by at least three publications in some weekly newspaper printed in the county, or by at least five handbills put up at public places within the district, of the presentation of said petition, and of the date of the beginning of the next regular term of the county court at which the same may be heard. Said notices shall contain the names of at least three signers of said petition and set out the boundaries of said proposed district, and shall notify all resident owners of land in said proposed district, who may desire to oppose the formation thereof to appear on the first day of such regular term of court and file their written remonstrance thereto.

"2. All resident landowners owning land within the proposed district may join in one remonstrance, or each such owner may file his separate remonstrance, and each remonstrance shall be in writing and shall state specifically and separately the objection or objections of the remonstrators to the formation of such proposed road district, and shall be filed in said court with the clerk thereof on or before the first day of said regular term.

"3. On the first day of said term of court, or as soon thereafter as its business will permit, the court shall hear such petition and remonstrance, and may make any change in the boundaries of such proposed district as the public good may require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land owned by residents of the county residing

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within the district as so changed, the court shall make an order incorporating such public road district, and such order shall set out the boundaries of such district as established.

"4. If no remonstrance shall have been filed, or all remonstrances filed are overruled by the court, the court shall determine whether such petition has been signed by the owners of a majority of the acres of land owned by residents of the county residing within the district, and if so, shall make an order incorporating the district with the boundaries given in the petition, or such boundaries as may be set forth in an amended petition signed by the owners of a majority of the acres of land owned by residents of the county residing within the district, affected thereby; and such amended petition may be filed at any time before the making of the order establishing a road district, but the boundaries proposed for the district shall not be so changed as to embrace any land not included in the notice given by the clerk unless the owner thereof shall in writing consent thereto, or shall appear at the hearing, and is notified in open court of such fact and given an opportunity to file or join in a remonstrance.

"5. Whenever an order is so made incorporating a public road district, such district shall thereupon become, by the name mentioned in such order, a political subdivision of the state for governmental purposes with all the powers mentioned in this section and such others as may be conferred by law." (Underscoring ours.)

Under the above sections when a petition is filed requesting the organization of a special road district, if no remonstrances are filed in opposition thereto, the only duty the county court has is to determine whether the petition has been signed by the owners of a majority of the acres of land within the boundaries of the district set forth in the petition. If the court determines that the petition has been signed by the owners of a majority of the acres of land, then it has the absolute duty to issue an order incorporating the road district.

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However, if remonstrances are filed, then it becomes the duty of the county court to determine if the "public good may require and make necessary" any changes in the boundaries proposed in the petition. The purpose of this determination is set forth in State ex inf. Killam v. Colbert, 273 Mo. 198, 201 S.W. 52, as follows:

"Language could not plainer state that in organizing the district the court must determine, after notice and opportunity to landowners to be heard, whether or not lands located within its proposed boundaries would be benefited. * * *In the very nature of a case, when a district is formed it is formed for the purpose of constructing some contemplated road or roads, and in such case the county court probably has information as to the location and extent of the road or roads in contemplation when the petition is presented, otherwise how could it determine that the public good required the formation of the district? * * *"

If the court determines that certain lands in the proposed district would not be benefited by the roads contemplated to be built in the district, then the county court, under the statute, may "change" the boundaries and exclude said lands from the district. It will be noted the statute provides that the county court may only "change" the boundaries, which would appear not to contemplate a finding that none of the lands in the proposed district would be benefited. However, in the Colbert case, supra, it is stated that "it must be decided by the county court that all the land in the district would be benefited by the formation of a district in an amount approximating the probable burdens." Therefore, it would appear that the county court could, after excluding from the proposed district such lands that would not be benefited, come to the conclusion that such lands which remain would not be benefited in the amount approximating the probable burdens. This is a matter which is left by the Legislature entirely to the discretion of the county court.

It is difficult for this office to decide the outcome in every case, and we must content ourselves with giving the rules as laid down by our Supreme Court. Therefore, in answer to your first question it is our view that the county court may determine that none of the property within the proposed district would be benefited by the roads proposed to be built within said district. But, in absence of such absolute determination, the only authority the county court has is to exclude from the proposed district such

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land that would not be benefited and the remaining part should be incorporated as a road district if the petition shows that the signers of the petition own a majority of the land in said changed district.

Under Section 233.325, supra, the county court exercising its discretion in refusing to incorporate the district as prayed would not be an exercise by it of judicial power rendering this section unconstitutional under Article 5, Section 1, Constitution of Missouri, 1945. The county court's action in denying the petition altogether or sustaining it in whole or in part is merely an exercise of administrative discretion which is proper under Article 6, Section 7, of the 1945 Constitution giving the county court exclusive authority to transact all county business. Our Supreme Court in the State ex inf. Attorney General vs. Hughesville Special Road District et al., 6 S.W.(2d) 594, 319 Mo. 1246, l.e. 1252, the court said:

"The proceedings had for the incorporation of the special road district constituted, in their totality, an exercise of legislative and not judicial power. No due-process-of-law requirements were therefore involved. Notice of the filing of the petition in the county court would not have been necessary had the statute not required it. (In re City of Uniondale, 285 Mo. 143, 225 S.W. 985.) The purpose intended to be subserved by the notice, as the statute points out, was to notify all owners of land in the proposed district who might desire to oppose the formation thereof. It was clearly sufficient for that purpose."

Now we arrive at the third question. Section 233.320, R.S. Mo. 1949, provides as follows:

"1. In counties now operating or which may hereafter operate under township organization, whenever it is proposed to form a special road district within the limits of one or more incorporated townships, such proposed district shall be organized in the manner herein prescribed."

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"1. The township board of trustees shall, upon the organization of such commissioners, cause all tools and machinery used for working roads belonging to the districts and parts of districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, for which such commissioners shall give receipt, and such commissioners shall keep and use such tools and machinery for constructing and improving public roads and bridges.

"2. The township boards shall also cause the township treasurer to pay over to the treasurer of the special road district all moneys in his hands belonging to the district or districts that have been merged into the special road district whenever the board of commissioners of such special road district shall make demand therefor.

"3. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts, within the district to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work; provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

We interpret paragraph 1 of the above statute to say: that the special district, carved out of the township territory, is entitled to only that part of the township's machinery and tools as was regularly used in the construction and maintenance of the roads now embraced within the limits of the special road district, and no more.

CONCLUSION

It is the opinion of this department that under Section 233.325,

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supra, the county court can in its discretion deny the petition altogether even though petition is in proper form and contains the requisite number of signatures if remonstrances are filed; that the county court's exercise of discretion in granting or refusing to grant incorporation of the district is an exercise of administrative discretion as it is the exercise of legislative and not judicial power; it is not necessary under Section 233.32, supra, that the entire county be divided into special road districts; the special road district is entitled to only so much of the machinery and tools of the township as was formerly used in working the roads now embraced within the special road district.

Respectfully submitted,

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APPROVED:

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