

CITIES:  
INCORPORATION OF CITIES:  
COUNTIES, FIRST AND  
SECOND CLASS:

Section 72.085, RSMo Cum. Supp. 1965 provides an alternative method of incorporating cities in First and Second Class Counties having charter form of government.

March 17, 1966

OPINION NO. 74 1966  
443 1965

Honorable Donald J. Gralike  
Missouri House of Representatives  
Capitol Building  
Jefferson City, Missouri



Dear Representative Gralike:

This is in response to your request for an opinion from this office, which request asks - Does the passage of Section 72.085, RSMo Cum. Supp. 1965, provide the only means of incorporation for unincorporated areas of land in any second class county or first class county having a charter form of government.

Section 72.080, RSMo 1959, provides in part:

"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

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in such order the metes and bounds thereof, and thenceforth the inhabitants within such bounds shall be a body politic \* \* \*"

Section 72.085, RSMo Cum. Supp. 1965, subsections 1, 2 and 3 states:

"1. Other provisions of law notwithstanding, any unincorporated area of land in any second class county or first class county having a charter form of government may become a city of the class to which its population would entitle it, as provided in this chapter, and be incorporated in the manner provided by this section.

"2. Incorporation proceeding may be instituted by the filing of a petition with the governing body of such county. The petition shall be signed by ten per cent of the registered voters in the area, shall describe, by metes and bounds, the area to be incorporated and be accompanied by a plat thereof, shall state the approximate population and the assessed valuation of all real and personal property in the area and shall state facts showing whether or not the incorporation is reasonable and necessary to the proper development of the area, the ability of the proposed city to furnish normal municipal services in the area within a reasonable time after its incorporation is to become effective and whether or not the incorporation is in the interest of such county as a whole.

"3. After public hearing and review of the proposed incorporation, the governing body of the county may, by ordinance or order, approve or disapprove the petition in whole or in part, with or without amendment, including, but not limited to, increasing or decreasing the area to be incorporated, and upon such approval shall submit the proposal for incorporation to the qualified voters in the area proposed to be incorporated. The governing body of the county in such ordinance or order shall set the date

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for such election at any special, primary or general election not less than sixty days after the enactment of the ordinance or order. The election official or officials in charge of elections in such county shall submit the proposed incorporation at the election by ballot substantially in the form set forth in the ordinance or order calling the election. If the proposed incorporation is approved by a majority of the voters voting thereon in the area to be incorporated, the city shall thereupon be incorporated. If a majority of those voting thereon vote against the incorporation the proposal shall be defeated and no new petition for incorporation of the same or substantially the same area may be filed until one year after the election. Within sixty days after any election approving an incorporation the governing body of the county shall by ordinance declare that city incorporated, shall designate the metes and bounds, the class and the name thereof and shall designate the officers of the city who shall hold office until the first general election of officers, as provided by law and until their successors shall be duly elected and qualified. Thenceforth such city shall be a body politic and corporate, possessed of all the powers and subject to all laws pertaining to its class. Failure of the governing body of the county to act upon any petition for incorporation within ninety days after it has been filed shall be deemed a denial thereof." (Underscoring supplied)

To give meaning to a statute, "a primary rule of construction is that we attempt to ascertain the intentions of the General Assembly. This is to be found, if possible, by faithfully giving the language of the act its plain and rational meaning, if it can be done. In making that determination, we must consider and give weight to the object sought to be accomplished; the meaningful purpose of the act and we avoid, if possible any construction which will lead to absurd or unreasonable results." State vs. Tuskin, 322 SW 2d 179, 183.

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We must examine the language in Section 72.085, supra, to determine the meaning of this section. Subsection 1, of Section 72.085, supra, contains the following opening phrase: "Other provisions of the law, notwithstanding." "Notwithstanding" has been defined as "Without prevention or obstruction from or by; in spite of." State ex rel Carmean vs. Board of Education of Hardin County, 165 NE 2d 918,923, 170 Ohio St. 415.

By putting the above mentioned definition in place of the word "notwithstanding", we arrive at the following:

In spite of, or without prevention or obstruction by or from other provisions of law, any unincorporated area of land in any second class county or first class county having a charter form of government may become a city of the class to which its population would entitle it as provided in chapter 72 RSMo, and [may] be incorporated in the manner provided by this act. (Underlining and bracketed word added)

"As a general rule, the word 'may', when used in a statute, is permissive only and operates to confer discretion, especially where the word 'shall' appears in close juxtaposition in other parts of the same statute." C.J.S. Statutes, Section 380, p. 877.

The word "shall" does appear in the same statute as follows:

"2. Incorporation proceeding may be instituted by the filing of a petition with the governing body of such county. The petition shall be signed by ten per cent of the registered voters in the area, shall describe, by metes and bounds, the area to be incorporated and be accompanied by a plat thereof, shall state the approximate population and the assessed valuation of all real and personal property in the area and shall state facts showing whether or not the incorporation is reasonable and necessary to the proper development of the area, the ability of the proposed city to furnish normal municipal services in the area within a reasonable time after its incorporation is to become effective and whether or not the incorporation is in the interest of such county as a whole." (Underlining added)

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Considering the use of the word "may" in Section 72.085, supra, with the definition of "notwithstanding", supra, the logical conclusion is that the Legislature intended Section 72.085 to be an alternative procedure for incorporation of cities in second class counties and first class counties having a charter form of government.

Sections 72.080 and 72.085 are positioned in the same chapter dealing with incorporation of unincorporated areas, except that Section 72.085 deals specifically with first and second class counties. There is no express language in Section 72.085, repealing Section 72.080. The title of the act which enacted Section 72.085 was "An Act relating to the incorporation of cities in first class counties having a charter form of government and second class counties."

In *Curators of Central College vs. Rose*, 182 SW 2d 145, 150, the Court states:

" ' "All consistent statutes relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively, and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session, or on the same day" *Suth. St. Const* § 283. \* \* \* "Where enactments separately made are read in pari materia, they are treated as having formed, in the minds of the enacting body parts of a connected whole, though considered by such a body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." (*Ib.*, Sec. 288). ' "

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Considering the time sequence, Section 72.080 precedes Section 72.085. Section 72.080 deals with all unincorporated areas wishing to incorporate. Section 72.085 came into law at a later time and provides in spite of or without prevention or destruction from or by other provisions of law, unincorporated areas of land in second class counties or first class counties having a charter form of government, may become a city of the class to which its population would entitle it. And in *In re Dugan*, 309 SW 2d 137,143 the Court states:

"In construing these statutes we must of course attempt to ascertain the intention of the legislature (*Christy v. Petrus*, 365 Mo. 1187, 295 SW 2d 122) and to determine (and promote) the object and purpose of that intention from the words used in the statute (*Browder v. Milla*, Mo. App., 296 SW 2d 502). In so doing we must, if possible, give effect to every word, phrase, clause, and sentence of the section. *Pree v. Board of Trustees*, 363 Mo. 1131, 257 SW 2d 685. And we must also put together and harmonize, if possible, all sections which are related to the same subject. *Bredeck v. Board of Education of City of St. Louis*, Mo. App., 213 SW 2d 889. The entire legislative act must be considered. *McCord v. Missouri Crooked River Backwater Levee Dist.*, Mo., 295 SW 2d 42. In this connection we may consider the historical development of the legislation. *State ex rel. Smith v. Attervury*, 364 Mo. 963, 270 SW 2d 399, 405. For the new legislation must be construed and applied consistently with the construction placed upon the related parts of the general law. See *Fiske v. Buder*, 8 Cir., 125 F. 2d 841, 845. And 'in the construction and application of a statute, we must harmonize the same, if possible, with the established law existing at the time of enactment unless there is a conclusive implication, or an expressed intent to repeal the old and enact a new.' *Mayer v. Mayer*, Mo. App., 104 SW 2d 1019, 1023."

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There is no conclusive implication or expressed intent to repeal the "old" and enact the "new". The term "notwithstanding" as used in Section 72.085 and the words "may" and "shall" although ambiguous, can be interpreted and harmonized with the language of Section 72.080. When this is done the inevitable conclusion is that the General Assembly intended Section 72.085 to be an alternative method of incorporation for those unincorporated areas specifically covered by that language.

CONCLUSION

Therefore it is the opinion of this office that Section 72.085 RSMo Cum. Supp 1965, provides an alternative method for incorporation of unincorporated areas of land in any second class county or first class county having a charter form of government.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General