SPECIAL ROAD DISTRICT: Construction of Section 233.320 and 233.325
COUNTY COURT: RSMo. 1949 relative to the formation of
STATUTES: special road districts.

FILED
15

December 4, 1953

Honorable William J. Cason
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

> "I would like an opinion on certain portions of Section 233.320 and 233.325 of Missouri Revised Statutes of 1949 with reference to the formation of a special road district.
>
> "The first question is as to the meaning of the word 'owners' as used in sub-section one of Section 233.325. Specifically, does a tenant in common holding a one-third interest in approximately 180 acres have a right to sign the petition mentioned in the statute as 'owners' for the full 180 acres, 60 acres, or for any acres?
>
> "Does one who holds land as one of two tenants by the entirety have a right to sign as owner of the full acreage owned by both, one-half, or of any of the acres?
>
> "Again with reference to Section 233.325: assuming there to be 640 acres included in the purposed district and that 40 acres is public land and that 200 acres are owned by persons who are non-residents of the purposed district, is it only necessary to have a majority of the acres owned by residents of the purposed district or in the above hypothetical 201 acres?
>
> "Assuming all requirments have been met and the petition to be in proper form does the County Court have the power in its discretion to refuse to form the special road district under the above statutes.

"Sub-section three of Section 233.320 states that the purposed district shall include at least 640 acres of contiguous territory, if public land is included within the purposed district does it count as a portion of the 640 acres of contiguous territory?

"There is at present a petition for the formation of a special road district pending in the Henry County Court, for this reason, your prompt attention will be sincerely appreciated."

This request contains some five questions of law construing sections 233.320 and 233.325 RSMo. 1949. We shall answer these questions in order in which they appear in your request for an opinion.

You first inquire if a tenant in common holding a one-third interest in approximately 180 acres has a right to sign the petition mentioned in Section 233.325, supra, as owner for the full 180 acres.

Section 233.325 reads in part:

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

"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 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.

"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 district, affected thereby; * * *"

Owner has been defined in many different ways depending upon its particular use in a statute. As stated in volume 42 Am.J.P. Section 39, page 217 which reads in part:

> "* * *The term 'owner' is frequently used in statutes relating particularly to matters which form the subject of specific articles in this work, and its meaning in such cases is discussed in the particular article, as illustrated by the references below."

We are unable to find any decisions in this State construing the word "owner" as used in Sections 233.320 and 233.325 RSMo. 1949. However, we do find such decisions of courts in other states which under rules of statutory construction are not conclusive but are persuasive. In Merritt vs. City of Kewanee, 51 N.E. 867, 870 and 872 the court in construing a statute concerning local elections for improvements, one of the prerequisites for said improvement being that a majority of the owners of the abutting property must petition for such local improvement, held that a tenant in common could not sign a petition in behalf of co-tenants and in so holding the court said:

> " * * So far as the tenants in common are concerned, there is no claim that they had any authority, either oral or written, to sign the names of the other tenants in common of each lot which they represented. Neither is it claimed that there was any ratification by the tenants in common not signing of the acts of those who did sign. It must, therefore, of necessity be true that the signature of one tenant in common of a lot was not the signature of the owners of the other undivided interests in the lot. It follows that each tenant in common who signed the petition only signed for the individual part of the lot which he owned, and not for the undivided portions thereof which he did not own. * *"
>
> "The word 'owner' as here used in the statute, means owner in fee. Cases cited."

In Warren v. Borawski, 37 Atlantic 2d, 364 Local Cite 366, 130 Conn. 676 the Court held that a tenant in common of an undivided one-half interest in a lot affected by a proposal and

amendment to a zoning ordinance, was not an owner within the provisions of an ordinance requiring three-fourth vote of the common council to change an ordinance if the owner of twenty per cent of the property affected protested against the change, it being necessary for those owning the entire interest in said lot to join in order to make his valid protest. In so holding the Court said:

> "On the other hand, in holding that one tenant in common could not sign a petition for an improvement, the court, in 21, 73 A. 984, 985, said: 'The position of the appellee in regard to this matter (that the part of the frontage proportionate to the interest of a signing tenant in common should be counted) cannot be sustained upon any theory either of law or common sense. The law requires the petition (for street paving) to be signed by the owners of the property. This means by all of the owners in any given piece of property. To hold otherwise would be to hold that, if all the property on any block were owned by tenants in common, the holder of an undivided 1/100th interest in the same might cause the block to be paved and the lien, therefore, to attach to the property, although the owners of the other 99/100th interest were opposed to it. The position that the proportionate part of the frontage representing the proportion of the co-tenant's interest may be counted upon his signature is equally untenable. The petitioner in this case does not own 25 feet of this property. His interest an undivided interest in every foot of it, and no particular foot frontage may be set aside for him, because in every foot so set aside his co-tenant would be an equal owner.' To the same effect are California Borough v. Powell, 50 Pa. Super. 521, 523; Marcus v. Board of Street Commissioners, 252 Mass. 331, 335, 147 N.E. 866; Mulligan v. Smith, 59 Cal. 206, 225; People ex rel. Brownell v. Board of Assessors, Sup., 109 N.Y.S. 991, 994; Merritt v. Kewanee, 175 Ill. 537, 544, 51 N.E. 867.
>
> "The purpose of the statute in requiring a three-fourths vote of the council if a protest is filed by owners of 20 per cent of the property affected is to give some protection to those owners against changes to which they object. A petition for an improvement is positive and a protest against a change in zone, negative, but both involve changes in existing conditions and the reasoning of the Pennsylvania court applies, in substance, to both situations. It is more practical and logical to give the same meaning to the word 'owner' in both cases. As shown above, the cases are nearly unanimous in holding that a cotenant is not an 'owner' when a petition for improvement is involved, and we hold that, as well, within the meaning of the ordinance in question those owning the entire interest in the property must join in order to make a valid protest.

In view of the foregoing decisions, we conclude that one tenant in common signing said petition cannot be construed as being an owner under the foregoing statutory provisions unless all of the tenants in common owning said property sign said petition.

You next inquire if one who holds land as one of two tenants by the entirety has a right to sign as owner of the full acreage owned by both, one-half, or of any of the acreage.

The law is well established that tenants by the entirety have but one title, each owns the whole and neither without concurrance of the other has the power to convey to any third person and thus sever the tenancy. Furthermore, neither have an interest in an undivided portion thereof, Kennedy v. Rutter, 6 Atlantic 2d 17, 21, 110 V.T. 332. In other words, a tenant by the entirety is the same as tenants in common except that a tenant by the entirety has the right of survivorship, MacFarlane v. State, 29 N.Y. Supp. 2d 996, 997.

In view of the foregoing decision, we hold like in the case of tenants in common the signature of only one owning as tenants by the entirety would be of no effect but it will require signature of both husband and wife since they have the one title, survivor take all, neither have an undivided interest in any particular portion of said property and furthermore, neither can convey any part thereof without the signature and approval of the other party.

Your next request is whether or not public land located in such proposed district, shall be classified as land owned by a non-resident or is it such as might be considered owned by a resident of the county residing within the district. This raises a rather difficult point of law and one which we have been unable to find any decisions in point. We are assuming that by public land you have reference to such land that might be taken in the name of the State of Missouri for the benefit and use of some particular department or agency of the State and that the State of Missouri owns the Fee to said land. So in rendering this decision we shall consider land referred to as public land in your request only land held by the State or the United States of America in Fee Simple.

In view of the particular wording of the statute in organizing such special road districts, requiring the signature of owners of a majority of the acres of land owned by residents of the county residing within the district, we believe that in determining who owns the majority of acreage in said proposed road district, that you need not consider such public land as owned by residents of the county residing within the district. In some instances for certain purposes only, such public land might be considered as being owned

by a resident of the county; however, we cannot conceive of any public entity as being considered residing within the county.

You next inquire if assuming all requirements have been met and the petition is in proper form, does the county court have the power within its discretion to refuse to form the special road district under the foregoing mentioned statutes.

In answer to this particular inquiry, we are enclosing a copy of an opinion rendered by this department under date of July 17, 1951 to Hon. Don Kennedy, Nevada, Missouri, holding that the County Court has some discretion when and if remonstrances are filed in opposition thereto. However, if no remonstrances are filed, then the only duty the County Court has is to determine whether the petition has been signed by the owner of a majority of acres within proposed district. (Page 4 and 5, enclosed opinion.)

You next inquire if public land is included within a proposed district, does it count as a portion of the 640 acres of contiguous territory as provided under section 233.320 RSMo. 1949.

We assume that you make this inquiry by reason of the fact that owners of such public land may not be considered as resident owners residing within the proposed district under section 233.325, supra. Section 233.320, supra, makes no distinction as to the requirement of 640 acres of contiguous territory in said proposed district. This may include land owned by non-residents and public owned land.

CONCLUSION

(1) It is the opinion of this department that one tenant in common is not an owner as provided under section 233.320 and 233.325 RSMo. 1949 and authorized to sign a petition for forming a special road district for the reason he does not have an interest in any undivided portion of the whole. However, such tenant in common may along with all other co-tenants sign said petition for the formation of said road district as provided by statute.

(2) Neither the husband or wife alone owning property by the entirety are authorized to sign such petition for the formation of such a road district, for the same reason that one tenant in common cannot sign said petition and further for the reason that in the case of tenants by the entirety the right of survivorship exists. However, both tenants by the entirety are under the statute as owners authorized to sign such a petition.

Honorable William J. Cason

(3) In determining who owns the majority of acreage in said proposed district, it is not necessary to take into consideration land owned by the State of Missouri or by the United States of America in said proposed district for the reason that if either owns such land it cannot qualify under the law as a resident of the county and residing within said district.

(4) The County Court has some discretion in ordering a proposed district incorporated if remonstrances are filed in opposition thereto. However, if none are filed then the only duty the County Court has is to determine whether the Petition has been signed by the owners of a majority of acres within the proposed district and if it so finds, it has the absolute duty to issue an order incorporating said road district. (See enclosed opinion pages 4 and 5.)

(5) Public land included within a proposed road district may be considered as a portion of the 640 acres of contiguous territory as provided under Section 233.320, supra.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

ARH:lw

Enclosure