

CITIES, TOWNS AND VILLAGES:

MUNICIPAL CORPORATIONS:

Municipal corporation of Vienna
legally reactivated on Nov. 13, 1951;
tax levy made in Dec., 1951, by bd.
of trustees not made in conformity
with law, invalid levy, uncollectible.

XXXXXXXXXXXX

April 20, 1953

JOHN M. DALTON



J.C. Johnsen

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Honorable Harold S. Hutchison
Prosecuting Attorney
Maries County
Vienna, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"The town or village of Vienna was incorporated, I think, in 1906 and continued as an acting corporation until about 1916, at which time, the corporation became dormant for lack of election of officers, assessment of taxes and police supervision.

"It remained in this state until about November of 1951, at which time, a few citizens got together and advertised that there would be an election of officers; held said election and said officers so elected started meeting and functioning as the Town Government. In no way did they conform to Sections 72.060 R. S. 1949.

"Upon organizing it is my understanding that they designated one of the trustees as City Collector; had him go to the County Collector's Office and make up an assessment list for the town of Vienna which they levied in December of 1951 for the year of 1951 even though that they had not been in existence for practically eleven months of said year; had exercised no police power or protection and had in no way conformed to Section 80.460 R. S. 1949 relative to their assessment list.

"Approximately one year later they bring the 1951 delinquent tax list made out as above stated to the County Collector and ask him

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to enforce that list of delinquent taxes under his power as collector and under Section 80.480 R.S. 1949.

"Under the above circumstances is the Town of Vienna legally reactivated or is it still dormant?"

"Under the above circumstances would the tax assessments be properly made and levied?"

"Under the above circumstances if the town was not legally reactivated; the taxes legally assessed or levied; would it be incumbent upon the County Collector to prosecute legal action or defend legal action as part of his duties in connection with such collection?"

From your letter it appears that the town of Vienna was incorporated about 1906; that it functioned as a municipal corporation until about 1916; that from about 1916 until 1951, a period of approximately thirty-five years, it did not so function; that in or near the month of November, 1951, certain acts were done in an attempt to reactivate the municipal corporation of Vienna, and that after these acts certain municipal corporation functions were performed, to wit, the assessment of taxes. Your inquiry goes to the legality of these assessments.

In our consideration of this matter we would first point out that, upon the basis of the facts submitted by you to us, it is our opinion that the municipal corporation of the town of Vienna did not at any time become extinct, or cease to exist. In the case of *State v. Crismon*, 188 S.W. 2d 937, at l.c. 939, the Missouri Supreme Court stated:

"We think respondents' contentions overlook certain fundamental principles of the law relating to the municipal corporations. 'The power to create or establish municipal corporations, or to enlarge or diminish their area, to reorganize their governments, or to dis-

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solve or abolish them al together is a political function which rests solely in the legislative branch of the government, and in the absence of constitutional restrictions, the power is practically unlimited.' 37 Am. Jur., Municipal Corporations, Sec. 7, p. 626. In this connection this court has said: 'It has long been the rule in this state, and generally throughout the country, that the power of the legislature in the creation of public corporations * * * is absolute except where limited by the constitution. The legislature may also change, divide, consolidate and abolish them as the public welfare demands.' State ex rel. Consolidated School District No. 8 of Pemiscot County et al., v. Smith, State Auditor, 343 Mo. 288, 121 S.W. 2d 160, 162, and cases therein cited."

* * * *

"In 1 Dillon's Municipal Corporations, 5th Ed., Sec. 338, p. 591, it is said: 'The doctrine of a forfeiture of the right to be a corporation has also, it is believed by the author, no just or proper application to our municipal corporations. * * * In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the legislature, or pursuant to legislative enactment. They may become inert or dormant, or their functions may be suspended, for want of officers or of inhabitants; but dissolved, when created by an act of the legislature, and once in existence, they cannot be, by reason of any default or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative

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consent or pursuant to legislative provision.'

"To the same effect is 1 McQuillin's Municipal Corporations, 2d Ed., Sec. 317, pp. 380, 381: 'A municipal corporation can only be dissolved in the manner prescribed by law * * *. Thus a municipal corporation is not ipso facto dissolved or destroyed by a non-user of its powers, in whole or in part, or failure of a term of years to exercise the functions of a municipality, since a judicial sentence or legislative act is necessary to effect a dissolution. In such case the municipal corporation would be suspended for the time, but not civilly dead, since its dormant functions could be revived without action on the part of the sovereignty, the sources from which, in theory of law, corporate life originally came. The result would be the same should all of the inhabitants remove without the corporate limits. The remedy for failure to exercise municipal powers or for illegal acts or misconduct of the officers or agents of the corporation is not dissolution or forfeiture of the charter.'

"The same author says in Sec. 318: 'A municipal corporation is not dissolved by the mere failure to elect or appoint officers and agents to conduct its government, for its continuance as a legal entity does not depend on the existence of officers.'"

Since there is no showing that any positive act of disincorporation was ever taken in regard to the municipal corporation of the town of Vienna, we hold, as we stated above, that the municipal corporation of the town of Vienna had a continued existence and was never extinct. It did, for a long period of time, cease to function.

The matter which we have generally to determine is what was necessary to be done in order for the municipal corporation of the town of Vienna to start functioning, and specifically,

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whether the action taken in or near the month of November, 1951, was sufficient in this respect.

In this regard we would again direct attention to the case of State v. Crismon, supra. This case relates to the town of Bagnell, in Miller County, Missouri. The record shows that this town was duly incorporated in 1926, and that it functioned as a municipal corporation until 1933, but that from 1933 to 1943, a ten year period, no town trustees were elected, no taxes were levied, and no municipal functions were performed. Thus, in this respect, the history of Bagnell parallels that of Vienna.

The opinion in the Crismon case reveals that in the early part of 1944 there were about a dozen residences within the corporate limits of Bagnell. How many qualified voters resided therein is not revealed, but the number was doubtless small. The opinion, at l.c. 939, states:

"But in the spring of 1944, in an attempt to revive and qualify Bagnell as a town for the formation of the proposed road district a board of trustees was elected from the few adult inhabitants of the incorporated area."

Apparently the election of this board of trustees in Bagnell was held in the same informal manner as was the election of the board of trustees in Vienna, although doubtless many more persons participated in the latter inasmuch as Vienna has a population of some 471 people.

In regard to this election in the town of Bagnell, the Crismon opinion observes, at l.c. 939:

"The officers do not constitute "the" corporation, nor does the council even constitute "a" corporation. The inhabitants of the designated locality, are the incorporators. The officers are the mere servants or agents of the corporation.' Welch v. St. Genevieve, Fed. Cas. No. 17,372, 1 Dill, U.S., 130. Such is the effect of Sec. 7242 resulting from the express provision that the 'inhabitants of any town or village * * * may be incorporated under a police established for their local government.' And said section

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further provides that 'they and their successors * * * shall have perpetual succession, unless disincorporated * * *.' Secs. 7295, 7296 declare the reasons, and prescribe the procedure for, disincorporating."

In view of the fact, as we have observed above, that the history of Bagnell and Vienna, in respect to incorporation, a lapse of municipal corporation functions, and reactivation, is nearly identical; and in view of the further fact that in the Crismon case, supra, the court held that the acts done to effect reactivation did effect a reactivation, we hold that the acts done in Vienna in or near the month of November, 1951, did reactivate the municipal corporation of the town of Vienna.

We note your reference to Section 72.060, RSMo 1949. That section reads:

"Any city, town or village within this state, now incorporated under the provisions of this chapter, or under any special or local law, as a village, town or city, either of the second, third or fourth classes, as classified in said chapter, and in which the citizens thereof desire incorporation as a village, town or city of a higher class, and believe that since the taking of the last census, state or national, there has been sufficient increase in population to entitle it to such desired incorporation, may, by authority of an ordinance, and at the expense of such village, town or city, cause to be taken a census of its population, and should such census, when so taken, show that the village, town or city taking the same, has the requisite population to entitle it to the right to become incorporated as a village, town or city of a higher class, then such village, town or city may proceed to secure such incorporation as its population may then entitle it to, under and by authority of the provisions of this chapter; provided, that cities or towns that have permitted their organization to become dormant or ineffective, through a failure to elect corporate officers or levy a corporate tax for the two years

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immediately preceding, may, by a petition of the majority of the taxpayers of such city or town to the county court, have an enumeration taken and be assigned to its proper class; and thereupon the county court shall appoint the proper officers for such city or town, who shall hold their office until the next annual election thereafter and until their successors are elected and qualified."

We do not believe that the above section is applicable in the instant situation. That section is found in Chapter 72, RSMo 1949, and is entitled "Classification and Consolidation of Cities". Section 72.060, supra, relates wholly to the changing of the classification of a city, and indicates the manner in which this change may be made when the municipal corporation is active, and also when it is inactive or dormant. We feel that this construction of the meaning of Section 72.060, supra, is further strengthened by the title of the Section when it was originally enacted, as found in Laws of Missouri 1883, page 33. The title of the Section is:

"AN ACT to authorize villages, towns or cities of the second, third or fourth class to provide for taking a census of their population to ascertain if they have the requisite population to authorize them to become incorporated as villages, towns or cities of the class of which the result of such census shows them to be."

The answer to your first question, therefore, is that the municipal corporation of the town of Vienna was legally reactivated as of the date of the election of trustees, which you have verbally informed us was on November 13, 1951.

The next question which we must consider is whether the tax assessment levied in December, 1951, by the reactivated municipal corporation of Vienna was a legal assessment.

In regard to the manner of this assessment you state:

"Upon organizing it is my understanding

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that they designated one of the trustees as City Collector; had him go to the County Collector's Office and make up an assessment list for the town of Vienna which they levied in December of 1951 for the year of 1951 even though that they had not been in existence for practically eleven months of said year; had exercised no police power or protection and had in no way conformed to Section 80.460 R.S. 1949 relative to their assessment list."

We will here note that the 1905 Missouri Blue Book reveals that the town of Vienna was incorporated in that year as a "village". There is no record to the effect that this classification was changed prior to the December 1951 tax levy, and you informed us verbally that it was not changed. Therefore, the manner of making the 1951 tax levy was subject to the present law governing "towns and villages."

We would first direct your attention to Section 80.430, RSMo 1949, which relates to taxation of towns and villages. That section states:

"All general and special taxes levied by the board of trustees of any town upon property therein, in conformity to the laws of the state and the ordinances of such town, shall constitute a lien upon the property upon which they are levied, until paid."

From the above it will be noted that the taxing procedure, to be valid, must conform to the applicable law.

In the case of State v. Hamilton, 293 SW 378, 1.c. 379, the court stated:

"We have uniformly held that a valid assessment is essential to a valid tax."

We now direct your attention to Section 80.460, RSMo 1949, which states in part:

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"The chairman of the board of trustees of all towns and villages in this state shall procure from the clerk of the county court in which such town is located, and it shall be the duty of said clerk to deliver to the chairman of the board of trustees within twenty days after the date of the final adjournment of the board of equalization a certified abstract from his assessment books, as corrected by the board of equalization, on all property within such town subject to its taxing power and the assessed value thereof as corrected by the board of equalization, which abstract shall be immediately transmitted to the board of trustees, and it shall be the duty of such board of trustees to establish by ordinance the annual rates of tax levy for the year for municipal purposes upon all subjects and objects of taxation within such town. * * *"

We are informed by the clerk of the county court of Maries County that the county board of equalization of Maries County, in the year of 1951, finally adjourned on July 9th of that year. Section 80.460, supra, directs that within twenty days after the final adjournment of the county board of equalization it shall be the duty of the chairman of the board of trustees of any town or village located within such county to get from the clerk of the county court a certified abstract of his assessment books, as corrected by the board of equalization, on all property within such town or village subject to taxation, and that it shall be the duty of the board of trustees to establish by ordinance the annual rate of tax levy for the year for municipal purposes. Since, in 1951, the board of equalization finally adjourned on July 9, this assessment list should have been secured by the chairman of the board of trustees not later than July 30th, and the board of trustees should have at once proceeded to establish the tax rate and levy. None of this was done at the time and in the manner directed by the statute, for the reason that at that time there was no board of trustees. You inform us that in December 1951, following reactivation the previous November 13th, one of the trustees who had been designated as city collector, went to the office of the county

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collector (not to the clerk of the county court, as the law directs), and made up an assessment list, upon the basis of which a levy was made for the year 1951.

Can it be said that the manner of making the 1951 tax levy was "in conformity to the laws of the state," as Section 80.430, supra, says it must be? We think not for several reasons. First, because the tax list was not procured from the proper source, which was the clerk of the county court, who is required by Section 80.460, supra, to make a certified abstract from his assessment books for the chairman of the board of trustees. The list was, instead, made up by the city collector from the books of the county collector. It was therefore not made by the proper party, was not taken from the proper source, and was not certified by the public official whom the law directs shall certify. Second, because the list which was secured, subject to all of the criticism stated above, was not secured for some four months after the time provided by law. Third, because the levy was not made for some four months after the law contemplates that it should have been made.

It is a generally recognized principle that the tax laws are strictly construed against the taxing authority, and that, as stated above, tax levies must be made in conformity with the law. Clearly, this was not done in the instant case, and we do not believe that the levy made by the town of Vienna in December 1951 was a valid levy.

CONCLUSION

It is the opinion of this department that the municipal corporation of the town of Vienna was legally reactivated on November 13, 1951; that the tax levy made in December, 1951, by the board of trustees of the town of Vienna, was not made in conformity with the law, was an invalid levy, and therefore is uncollectible.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

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