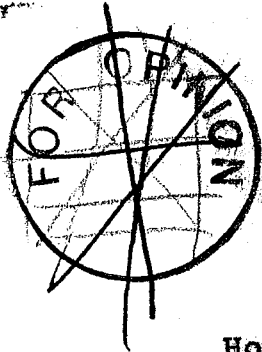


SPECIAL ROAD DISTRICTS: A special road district may employ a private attorney and reimburse him out of its fund to represent the special road district in action brought to dissolve the district.



April 1, 1954

Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Courthouse
Mt. Vernon, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I would like to have the opinion of your department on the following proposition. Does a Special Road District after a petition has been filed in the County Court to change the Special Road District to a Common, have the authority to hire an attorney to defend the Special Road District against said proceedings, and to pay the attorney out of the Special Road District's funds?

"I would appreciate getting an opinion, on this at the earliest possible time, as the County Court has granted the petitioners relief and has changed the road district from Special to Common and the trustees have been appointed to audit the books of the Special Road District and file their report with the County Court, and it is necessary for them to know whether the road district went beyond its discretion in hiring an attorney."

In your above letter you state that "a petition has been filed in the county court to change the Special Road District to a Common (road district)"

We would here observe that there is no provision whatever in Missouri law for the changing of a special road district to a common road district. There are provisions made for the dissolution of each of the three kinds of special road districts which can be established in this state. Apparently what occurred was that after the dissolution of the special road district in the instant case the county court made an

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order dividing the land formerly in such special road district into common road districts. Since Lawrence is not a township organization county, and since, as you inform us, a petition was filed with the county court and the county court dissolved the special road district, we assume that the district to which you refer was a benefit assessment district organized under Section 233.170 RSMo. 1949, et seq.

Such being the case, its dissolution could be effected under Section 233.290, RSMo. 1949, which reads:

"Whenever any owner of land within any road district organized under the provisions of sections 233.170 to 233.315 shall file with the county court of the county in which such district may be located a petition verified by an affidavit stating that such road district has no commissioners and has failed to elect commissioners at any regular election of the district, or has failed to hold a special election to fill any vacancy in the office of commissioner, or that such road district has ceased to perform the functions for which it was created, the county court shall cause five notices to be posted in conspicuous places in said district, giving notice of the filing of such petitions, and that unless cause be shown to the said court on a day to be named in said notices, not less than thirty nor more than sixty days from the time of posting such notices, why the said road district should not be dissolved, that the same will be dissolved; and if on the day named in such notices no party in interest shall appear and show that the said road district is performing the functions for which it was created or that it has commissioners or that good cause exists why the said road districts should not be dissolved, the county court shall, on the next court day make its order of record that such road district be dissolved; provided, that if any party in interest shall appear and show cause as herein provided, the county court shall proceed to hear evidence on the matter, and if it appear to the satisfaction of the court that no

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good cause exists why such road district should not be dissolved, it shall enter its order of record that such road district be dissolved, and if contrary appear, the said petition shall be dismissed; provided further, that nothing in sections 233.170 to 233.315 shall affect the validity of any bonds that may have been issued by such road district or affect the levy or collection of any special taxes that may have levied or assessed against any lands within such district; provided further, after the dissolution of any such special road district the land therein shall be divided into road districts under the provisions of sections 231.010 to 231.030, 231.050 to 231.100 and 137.555 to 137.575, RSMo 1949, and any money that may be on hand to the credit of such special road district that shall not be needed to satisfy any liabilities of such special road district, shall, by order of the county court, be turned over to such new road districts in proportion to the number of acres allotted to each such new district."

Dissolution could also be had under Section 233.295 RSMo 1949 which reads:

"Whenever a petition, signed by the owners of a majority of the acres of land, within a road district organized under the provisions of sections 233.170 to 233.315 shall be filed with the county court of any county in which said district is situated, setting forth the name of the district and the number of acres owned by each signer of such petition and the whole number of acres in said district, the said county court shall have power, if in its opinion the public good will be thereby advanced to disincorporate such road district. No such road district shall be disincorporated until notice be published in some newspaper published in the county where the same is situated for four weeks successively prior to the hearing of said petition."

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In either instance the decision as to whether or not the district is to be dissolved is a matter of discretion with the County Court.

Let us now turn our attention to Section 233.170, RSMo. 1949, under which section, and following sections, we have assumed that the special road district in the instant case was formed. That section reads:

"1. County courts of counties not under township organization may divide the territory of their respective counties into road districts, and every such district organized according to the provisions of sections 233.170 to 233.315 shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled '_____ road district of _____ county,' and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of sections 233.170 to 233.315, or of which it may be rightfully possessed at the time of the passage of sections 233.170 to 233.315, and of contracting and being contracted with as herein provided."

It will be noted that the special road district thus created may sue and may be sued. The conferring of this capacity to sue and to be sued obviously contemplates that in the event of suing or of being sued, the special road district will be represented by an attorney. In the South Carolina case of Paslay v. Brooks, 17 S.E. 2d 865, at l.c. 868 of its opinion, the court stated:

"The capacity to sue and be sued carries with it all powers that are ordinarily incident to the prosecution or defense of an action at law or a suit in equity, including the power to employ counsel."

Since this is true, and since judicial notice may be taken of the fact that attorneys make monetary charges for their services, we may further deduce that under circumstances when a special road district may properly institute

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a suit or when a special road district is sued that the special road district may hire an attorney and pay him out of district funds, unless it is the duty of the prosecuting attorney of the county to represent the special road district in such matters. The duties of a prosecuting attorney are set out in Section 56.060, RSMo. 1949, which reads in part:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county"

And in Section 56.070, RSMo. 1949, which reads in part:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor.* * *"

Our specific question is whether it can be said that the state or a county or both is concerned or interested, within the meaning of the above statutes, in a proceeding where it is sought to change a special road district to a common road district?

In this regard we direct attention to the case of State ex rel Wammack and Welborn v. Affolder, 257 S.W. 493. The facts in that case were that Stoddard was a township organization county; that Duck Creek township in Stoddard County desired to vote township road bonds; that the county court of Stoddard County employed plaintiffs to look after the legal phases of this bond issue, and that plaintiffs did so in an admittedly satisfactory manner. The county court then issued a warrant on the treasurer of Duck Creek Township to pay plaintiffs \$160.00, which the treasurer declined to do. In subsequent actions the case came to the Springfield Court of Appeals, which rendered an opinion holding that the plaintiffs should be paid. In the course of its opinion the court stated (l.c. 494 and 495):

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"Was it the duty of the prosecuting attorney to render the services which plaintiffs rendered? Sections 736 and 738 prescribe generally the duties of the prosecuting attorney. There is nothing in these sections which may be said to place upon the prosecuting attorney the duty of looking after this bond issue. There are other sections prescribing duties in particular cases, but the sections, supra, cover the field generally. The bond issue of Duck Creek township was not a matter of county wide concern. It was a matter that affected that township only. The Act of 1917 provided that in a township bond issue thereunder the county court shall act for the township. The only recognition of township organization is that the act provides in section 10750 that the proceeds of the bond sale be turned over 'to the treasurer of the district or the county or township, as the case may be.' In the reference quoted, and in section 10748, it will be seen that, not only was the township organization taken into account, but also special road districts organized under sections 10800 et seq. and sections 10833 et seq., R.S. 1919. Neither the act of 19017, nor the Special Road District Acts, makes it the duty of the prosecuting attorney to advise or render service. There is nothing in the Township Organization Act (section 13164 et seq., R.S. 1919) which makes it the duty of the prosecuting attorney to render the service rendered here by plaintiffs. * * * It stands conceded that it was necessary that some attorney render the services which plaintiffs rendered. The conclusion, therefore, is that the county court had the power, acting for the township, to employ plaintiffs. Since there is no statute directing generally that the prosecuting attorney shall act for the township in

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counties under township organization, it is our conclusion that it was not the official duty of the prosecuting attorney to render the services which plaintiffs rendered."

While we are aware that the above opinion deals with a township organization county, yet we note that it also lays down the general law, applicable to counties not under township organization, that 'neither the act of 1917, nor the Special Road District Acts, make it the duty of the prosecuting attorney to advise or render service.'

Since, therefore, it is not the duty of the prosecuting attorney to represent a special road district, and since it is conceded that, since a special road district has the power to sue and may be sued, it necessarily must at such times be represented by an attorney, it follows that the governing body of a special road district may hire a private attorney and may reimburse him out of district funds. Such we believe to be the law declared by the Affolder case, and we are unable to find any subsequent cases or statutes which are in conflict.

There remains only the question of whether the governing body of the special road district may employ an attorney and defend against such action as was taken in the instant case, which was to dissolve the district.

We do not feel that any restriction exists in the law or the cases regarding the power of a special road district to sue or to defend against a suit. In the absence of such restriction, it would appear that the taking of legal action or defending an action brought was a matter within the discretion of the governing body of the special road district. We further observe that a special road district is a body corporate and that the governing body of a corporation is largely unrestricted in the taking of legal action.

Furthermore, in an action brought to dissolve, a special road district is clearly an "interested party," and has an inherent right to protest against an action which would put a period to its existence. Under each section by which dissolution could be effected in this case (233.290 and 233.295, supra) it is provided that notice of dissolution proceeding must be given. Certainly landowners in the district have

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the right to be heard in the proceedings before the County Court, and naturally the movants in the proceeding to dissolve will be heard. It would seem that the District has an equal right to protest against dissolution, in which case it would seem that the District had the right to be represented by counsel. In an opinion rendered by this Department on August 4, 1953, to Honorable Andrew J. Higgins, Prosecuting Attorney of Platte County, this Department held that an appeal from the decision of a County Court dissolving a special road district would lie. This would appear also to entail the services of an attorney. The opinion recognizes the fact that a proceeding for dissolution is adverse to the district. A copy of this aforesaid opinion is enclosed.

CONCLUSION

It is the opinion of this Department that a special road district may employ a private attorney and reimburse him out of its fund to represent the special road district in action brought to dissolve the district.

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

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:lvd

Enclosure