

3593.

PETITION—FOR INCORPORATION OF VILLAGE FROM PLATTED AND UNPLATTED LANDS—EFFECT OF SUBSEQUENT WITHDRAWAL BY RESIDENT OF PLATTED TERRITORY DISCUSSED.

SYLLABUS:

When a petition is filed with a board of county commissioners praying for the incorporation of a village from platted and unplatted lands under authority of sections 3517 et seq., General Code, and subsequently another petition is filed with said board by the residents of the platted territory included in the first petition, requesting the annexation of said platted territory to an adjacent municipality, the county commissioners may not, after hearing the first petition, incorporate a village from the unplatted lands only, included in said petition.

COLUMBUS, OHIO, September 23, 1931.

HON. DON ISHAM, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—This acknowledges receipt of your recent communication which reads as follows:

“Your opinion is respectfully requested on the following question:

There has been filed, with the Board of County Commissioners, a petition signed by not less than 30 electors, praying for the incorporation of certain territory as a village. The petitioners have elected to proceed under General Code Sections 3516 to 3523, inclusive. A small part of the territory is allotted, and the allotted portion is adjacent to an already incorporated village. Subsequent to the filing of this petition with the Board of County Commissioners, but before any action had been taken thereon, the residents of a small part of the territory proposed to be incorporated into a village, which small part comprises the allotted lands above referred to, applied to the County Commissioners, by virtue of Ohio General Code Section 3547 and following, for annexation to the adjacent municipality.

May the County Commissioners, after hearing, incorporate a village, excluding therefrom the allotted territory?

It appears to the writer that Sections 3516, and following, are jurisdictional, and it may be that your opinion will be to the effect that the County Commissioners, having once acquired jurisdiction, retain it.”

Provision has been made for the incorporation of villages in Ohio by the Ohio Constitution. Article XIII, Section 6, and Article XVIII, Section 2 of the Constitution read in part as follows:

Art. XIII, Sec. 6. “The general assembly shall provide for the organization of cities, and incorporated villages, by general laws * * *.”

Art. XVIII, Sec. 2. “General laws shall be passed to provide for the incorporation and government of cities and villages * * *.”

Pursuant to the above constitutional mandates, the legislature has passed statutes which provide for two methods of procedure in the incorporation of territory into a village. The one method is that contained in sections 3517 et seq., General Code. The other method is that set forth in sections 3526 et seq., General Code. Briefly, sections 3517 et seq., provide for the incorporation of *platted and adjacent lands* into a village by means of a petition filed with the county commissioners, while sections 3526 et seq., provide for the incorporation of any territory, by means of a petition filed with township trustees and the submission of such petition to the voters at an election. Either method may be pursued as to platted lands, but as to unplatted lands, sections 3526 to 3531 alone apply. See *Libby v. Paul*, 17 N. P. (N. S.) 433, citing the unreported case of *Edwin Scrivens v. Hosea Paul*, Recorder, decided by the Court of Appeals for Cuyahoga County on June 22, 1914.

In the present instance, it appears that a petition was filed with the Summit county board of commissioners requesting the incorporation of platted and unplatted lands into a village, under authority of sections 3517 et seq., General Code. Now section 3517, General Code, provides who may obtain incorporation, and states in part that the inhabitants of any platted territory may obtain incorporation.

Section 3518, General Code, states that application for incorporation shall be made by petition, signed by at least thirty electors, to the county commissioners. Section 3519 provides what the petition shall contain, stating, among other things, that it must include an accurate description of the territory embraced, and may contain adjacent territory not laid off into lots. Section 3520, General Code, provides for the presenting of the petition to the commissioners and the publication of the notice of the time of hearing. Sections 3521 and 3522, General Code, provide for the hearing before the commissioners and order for organization, reading as follows:

Sec. 3521. "The hearing shall be public, and may be adjourned from time to time, and from place to place, according to the discretion of the commissioners. Any person interested may appear, in person or by attorney, and contest the granting of the prayer of the petition, and affidavits presented in support of or against the prayer of the petition shall be considered by the county commissioners, and the petition may be amended by their leave. If any amendment is permitted, whereby territory not before embraced is added, the commissioners shall appoint another time for the hearing, of which notice shall be given, as specified in the last preceding section."

Sec. 3522. "Upon such hearing, if the commissioners find that the petition contains all the matters required, that its statements are true, that the name proposed is appropriate, that the limits of the proposed corporation are accurately described and are not unreasonably large or small, that the map or plat is accurate, that the persons whose names are subscribed to the petition are electors residing on the territory, that notice has been given as required, that there is the requisite population for the proposed corporation, and if it seems to the commissioners right that the prayer of the petition be granted, they shall cause an order to be entered on their journal to the effect that the corporation may be organized."

It will be seen that nowhere in the above sections is there authority granted to the commissioners to decrease, or, for that matter, to increase the territory

contained in the petition. It is true that the petition may be amended by the petitioners on leave of the commissioners and that territory may be added provided another hearing is had. However, there is no authority for the petitioners or commissioners to eliminate all the platted lands as set forth in the petition. If it should be held that the petitioners could, by amendment, omit all the platted lands and incorporate only the unplatted lands, the provisions of sections 3526; General Code, et seq., requiring that when unplatted territory only is to be incorporated, a petition shall be filed with the township trustees and an election held thereon, would be circumvented.

It is my view that the power granted to the petitioners to amend the petition does not give power to eliminate the basic requirements of the petition. In 43 Corpus Juris, 94, 95, it is said:

“General laws relating to the incorporation of municipalities provide that a designated board, court, judge, or officer shall determine to its or his satisfaction whether or not there has been a compliance with the statutory conditions * * *. Except where and as authorized by statute, the court cannot direct that certain territory be taken in or omitted, but is limited to the acceptance or rejection of the application as it stands.

Inasmuch as an amendment by the petitioners eliminating the platted lands could not be allowed by the county commissioners, it follows that the county commissioners may not, after hearing, incorporate a village from the unplatted portion of the lands included in the petition under discussion. The only way such unplatted lands can be incorporated as a village is by the filing of a new petition with the township trustees, under the provisions of section 3526, et seq., General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3594.

CHILDREN—PLACED IN FOSTER HOMES—ENTITLED TO PRIVILEGES OF PUBLIC SCHOOLS IN THAT DISTRICT—ASSESSING OF SUCH EDUCATIONAL EXPENSE—HOUSE BILL NO. 624.

SYLLABUS:

1. *Children who have been permanently committed to the Department of Public Welfare, Division of Charities, and who thereafter, by order of the Division of Charities, are placed in foster homes, are entitled to the privileges of the public schools in the district where the foster home is located, free of charge.*

2. *A child placed by the Division of Charities in a so-called boarding home, must be admitted to the public schools of the school district wherein the boarding home is located. Tuition for such child during its attendance at such school is a proper charge against its legal guardian, the Department of Public Welfare, Division of Charities. Such tuition may be paid by the Division of Charities from funds appropriated by the General Assembly, to the use of the said Division of Charities for that purpose. If no such appropriation exists, payment thereof can not be made, and the only available resource under such circumstances, for the*