

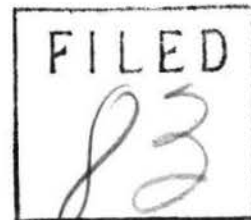
SPECIAL ROAD DISTRICTS: Interpretation of proviso in  
Section 8026, Revised Statutes  
Missouri 1929

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February 5, 1938

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Honorable Wayne V. Slankard  
Prosecuting Attorney  
Newton County  
Neosho, Missouri



Dear Sir:

This will acknowledge receipt of yours of January 29, 1938, which reads as follows:

"I would like your opinion on the following:

"Under Section 8026, Revised Statutes of Missouri, 1929, under the 'provided' apparently the city council of a city located more than ten miles from the county seat may make a written certificate of their choice of commissioner, designating their first, second and third choice and that such certificate shall be given the same consideration as though the Board and Mayor were present at the meeting of the Court. I would like to know what is meant 'given the same consideration.'

"In other words, according to my understanding, if the Mayor and members of the city council meet with the County Court, each member of the council and each member of the Court has a vote,

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however, under the proviso, a situation could arise where a majority of the members of the council might favor one candidate and two members of the council oppose, when yet the certificate would show that this man was the choice of the council. Again, if the council certifies only one choice, what action may the Court take.

"I probably have failed to make myself clear, but what I actually desire is your interpretation of the proviso of this Section 8026."

The proviso you inquire about reads as follows:

"Provided that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such

certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk."

This proviso has been interpreted by the Supreme Court of Missouri in the case of State ex Inf. v. Meyer, 321 Mo. 858, 12 S. W. (2d) 1. c. 490-491, as follows:

"It is clear the lawmakers by this proviso only intended to relieve the mayor and councilmen from attending the meeting if the city was located more than ten miles from the meeting place. By the proviso, the city is not authorized to make a written certificate of its choice, but the mayor and members of the council are authorized to do so. The choice designated in the certificate must be given the same consideration as though the mayor and members of the council were present. We have ruled the statute as originally enacted authorized each member of the meeting to cast a vote; and, if the choice designated in the certificate is to be given the same consideration as though a member was present and voting, then his choice designated in the certificate must be counted as a vote for commissioner. The requirement that the first, second and third

choice be designated has reference to the first meeting after the organization of the district, when three commissioners are to be appointed. Thereafter, at a meeting for the appointment of only one commissioner, the first ballot might not result in an appointment; if so, on the second ballot the absent member's second choice could be voted, and so as to his third choice."

As we read the proviso in the light of the interpretation given to it by the Supreme Court in the foregoing case, it provides a method by which the members of the city council and the mayor can register their votes for commissioner without being personally present at the time of the selection of such commissioner. In other words, it provides a system of "absentee voting," so to speak, for the mayor and councilmen. The proviso provides that "the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court." If the mayor and board were personally present there is no assurance they would all vote the same way nor is there any assurance that any one candidate would receive a majority of the votes of the mayor and board. Therefore, if the choice and selection of the mayor and board is to be given the same consideration as if they were personally present at the time of voting, then the vote of each member of the board and of the mayor must be shown in the certificate. Otherwise, as suggested in your letter, the successful candidate might be selected without receiving the majority of the votes of the combined body selecting him.

As pointed out in the Meyer case, supra, the

city is not authorized to certify its choice for commissioner, but the mayor and members of the council of such city are authorized to certify their choice.

Your next question is,

"What action should the county court take if the mayor and council certify only one choice?"

We might answer this question by asking, "What should the county court do in case the mayor and members of the council were personally present at the time of voting but would all vote on each ballot for the same persons?" In other words, if councilman Jones voted on all ballots for the same man, and, likewise, other members of the council and the mayor only had one choice, what would the county court do? In such a case there might be a deadlock in the voting, resulting in no selection being made. The point we make is that there is no way to make the mayor and members of the council designate first, second and third choices if they are personally present, and if the certificate provided for by the proviso under discussion is to be given the same consideration as though the mayor and members of the council were present, then we can not see how they can be compelled to designate first, second and third choices in their certificate. We think that the votes which they certify would have to be counted as certified whether more than one choice is designated or not.

#### CONCLUSION

It is, therefore, the opinion of this office that under the proviso in Section 8026, Revised Statutes Missouri 1929, the certificate provided to be sent to the county court should contain the separate votes of the mayor and of each member of the council and that such votes should be counted by the county court in the same manner as if the mayor and members of the council

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were present and cast their votes for their choices shown in the certificate, and if only one choice is certified the vote must be counted on each ballot for that choice.

Yours very truly

HARRY H. KAY  
Assistant Attorney General

APPROVED

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J. E. TAYLOR  
(Acting) Attorney General

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