

ROADS AND BRIDGES: Town board cannot vote by mail in eight-mile road district, when not situated more than ten miles from county seat.

February 11, 1943

Honorable Sears Jayne
Prosecuting Attorney
Clark County
Kahoka, Missouri



Dear Sir:

We are in receipt of your request for an opinion in the matter of the appointment of road commissioner of the Wayland Special Road District.

This request involves solely the construction of Section 8675 R. S. Missouri, 1939. Your request partially reads as follows:

"The commissioner whose term expires this year is Mr. Charles Fore, who happens to be Chairman of the County Democratic Committee. Acting under Section 8675 the Town Board of Wayland met on January 22nd, and made a written certificate of their choice of Mr. Charles Fore for re-election as commissioner in the form of a resolution stating that Mr. Charles Fore was the only nominee and that he was the unanimous choice of all five members of the Town Board. This written certificate bore the signature of the Mayor and was attested by the City Clerk, and was then sealed and transmitted by mail to the County Clerk of Clark County.

"Upon receipt of the above certificate the three members of the County Court failed to act on the matter on the day designated by the statute, but instead wrote a letter to the members of the Town Board asking that the Town Board meet with them. Yesterday some of the members of the Town Board, who could get off from their employment, called upon the County Court and stated orally that their vote as cast by the above mentioned certificate was the vote of the Town Board. In the meantime, however, one of the members of the Town Board had signed some kind of a statement written in long hand, not attested in any manner by the signature of the Mayor or by the City Clerk, stating that he wished to cast his vote for another party. At this point the County Court asked me for an opinion on the matter and I gave them my opinion, verbally, that the vote of the Town Board as shown by the certificate, being substantially in due form, was the vote of the Town Board on the matter and that the three members of the County Court might vote for someone else but that it appeared that Mr. Charles Fore had been re-elected because there were five members of the Town Board and only three members of the County Court. * * * * *

"There might be a point raised as to the distance of the Town of Wayland from the Courthouse in Kahoka, but some of the members of the Town Board tell me that they understood that the distance was sufficient to bring it

under the terms of the proviso paragraph of Section 8675 and having acted under that Section in good faith, it is my opinion that a mistake of fact as to the distance of possibly one-half mile or such a matter would have no effect upon the legality of the certificate of election.

"Objection has been made that the certificate did not designate a second or third choice, but it will be noted above that the resolution signed by the Town Board and signed by each member thereof, stated that no other nominations had been made, therefore the Town Board could not have designated a second or third choice.

"Any opinion you may care to give me regarding the matter will be appreciated very much. In the meantime, the re-elected commissioner is assuming that he has been re-elected to the office because the vote of the three members of the County Court could not change the result in any manner, and said re-elected commissioner will, on March 1st, assume the duties of the office and continue in the office until some action to oust him is taken."

In your request you state that the town of Wayland may be one-half mile less than ten miles from Kahoka, the county seat.

Section 8675 R. S. Missouri, 1939, reads as follows:

"The mayor and members of the city council of any city or town within any special road district thus organized, together with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed district shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; all such commissioners shall be resident taxpayers of the district, and shall serve until their successors are appointed and qualified, vacancies to be filled as original appointments are made. Resignations shall be to the county clerk. Removal from the district shall create a vacancy. Such commissioners, before entering upon the discharge of their duties, shall take oath of office, to be administered by the clerk of the county court: 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." (Underscoring ours.)

Under the above section, it is mandatory that the members of the town board meet with the county court within two weeks after the voters in such a district shall adopt the provisions of Article 10, Chapter 46 of the Revised Statutes of Missouri, 1939. At the meeting in the county court room the presiding judge shall preside, and the county clerk shall keep a record. At this meeting the commissioners for the road district shall be appointed, one for three years, one for two years, and one for one year. The same procedure as for original appointment is followed when vacancies occur.

When the meeting of the county court for the city, town or village officers is called, the city, town or village officers each are entitled to vote.

It was so held in the case of State ex inf. Holt, Pros. Attorney., ex rel. Jones v. Meyer, 12 S. W. (2d) 489, l. c. 490, where the court said:

"Respondent, Meyer, contends that under section 10802, R. S. 1919, the mayor and councilmen are each entitled to cast a vote for commissioner.

"Relator, Jones, contends the mayor and councilmen sit as one member of the county court and together have only one vote, and that, two members of the county court having voted for him, he thereby received a majority of the legal votes cast.

"These contentions call for a construction of section 10802, * * * *

"It will be noted, that, on the assembling of the mayor, the members of the council, and members of the county court, the meeting is declared organized, with the presiding judge as the presiding officer and the county clerk as clerk of the meeting. They do not meet as officers of the city or as officers of the county. They meet as one body, for the sole purpose of appointing the commissioners. Neither the city council nor the county court has any control over the public highways within the district outside of the corporate limits of the city. Such control is lodged exclusively with the board of commissioners. Section 10809, R. S. 1919.

* * * * *

"The statute no more limits the mayor and members of the council to one vote than it limits the members of the county court to one vote. No doubt the lawmakers assumed the members of the meeting would be so interested in the welfare of the district that they would not permit rivalry between the county court and the city council to interfere with the honest performance of their duty. Each member of the meeting is authorized to participate in the appointment, and, absent a word in the statute to the contrary, we must hold each member of the meeting to have a vote. The statute so remained for twenty years and until 1915, when the following proviso was added: '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; the mayor and members of the city council may make a written certificate of their choice of a 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 con-

sideration 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.' Laws of 1915, p. 375.

"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."
(Underscoring ours.)

Section 10802 R. S. Missouri, 1919, is now Section 8675 R. S. Missouri, 1939.

The court in the above case described how the meeting should be held, and that the members of the city were each entitled to a vote, and were not confined to the city casting only one vote. The city in this case is analagous to the town in the case described in your request. The court also, in the above case, in passing on the provision that the town board may send in the vote, properly certified by written certificate, of their choice for road commissioner or road commissioners, specifically stated, "it is clear the lawmakers of 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."

Under your request you state that the town of Wayland is less than one-half mile under ten miles from Kahoka, the county seat where the meeting should be held, and under the holding in the above case the town board of Wayland is not permitted to mail in its choice properly certified, but the members who vote must appear in person at the meeting, which is supposed to be held in February of each year.

CONCLUSION

It is, therefore, the opinion of this department, that since the town of Wayland is less than ten miles from the city of Kahoka, which is the county seat, the town board of Wayland is not permitted to take advantage of the proviso which permits it to send in its choice as to whom should be appointed road commissioners by a written certificate to the county clerk by mail or special messenger.

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It is further the opinion of this department, that each member of the town board is entitled to vote his choice for the road commissioner, or road commissioners, if voting at the meeting in the courthouse, which is properly called and presided over by the presiding judge of the county court and a record of which is made by the county clerk.

It is further our opinion, that the resolution passed by the town board of Wayland, constituting five votes for a certain party for road commissioner, is invalid and the votes must be cast in person at the courthouse at the meeting which must be held in February of each year.

It is further the opinion of this department, that if Charles Fore received a majority of the votes cast by the county court and the members of the town board, on February 8, 1943, at the courthouse in Kahoka, he has been legally appointed commissioner for the Wayland Special Road District.

Respectfully submitted

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Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

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