

ELECTIONS:  
CITIES, TOWNS AND VILLAGES:  
MUNICIPAL CORPORATIONS:  
CONSTITUTIONAL LAW:

No election may be held in the City of Hannibal to name city officials on a partisan basis pursuant to the charter amendment of August 22, 1961, prior to the second Tuesday in April, 1963, the next regular election date.

OPINION NO. 356 (1961) 18 (1962)

March 22, 1962

Honorable Harold L. Volkmer  
Prosecuting Attorney  
Marion County  
Hannibal, Missouri

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Dear Sir:

We are in receipt of your request for an opinion of this office, which request reads as follows:

"On April 30, 1957, the qualified electors of the City of Hannibal, by a majority vote, voted to form a government for the City of Hannibal, Missouri, and adopted the Charter for the City of Hannibal, a copy of which is herewith enclosed. Thereafter on August 22, 1961, the qualified electors of the City of Hannibal adopted certain amendments to said City Charter, copies of which are herewith enclosed. The gist of the amendments to the Charter were that the election of the elected city officials was made on a partisan, political basis rather than on a non-partisan, nonpolitical basis, as under the Charter form. It also has done away with the office of administrative assistant, an appointive office, and the amendments also made the offices of city attorney, municipal judge, and chief of police elective rather than appointive.

"The amendments did not provide for any special election in the event that they were enacted. The only provisions calling for an election are in Section 18.01 (1),

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which provides that primary elections shall be held upon the second Tuesday of April, 1961, and on each odd-numbered year thereafter and 18.01 (9), which provides that there shall be a general municipal election on the first Tuesday in May, 1961, and every two years thereafter.

"Thus, I would like your official opinion as to whether or not under the amendments to the City Charter there must be a special election for the city officials prior to April 1, 1963, or whether the election shall be held on April 1, 1963."

Upon further inquiry we received the following timetable of the events in question:

April 4, 1961 - General municipal election held for the purpose of electing a Mayor, Councilmen at large, and Ward Councilmen on a nonpartisan basis pursuant to Sec. 18.01 of the 1957 Charter.

April 19, 1961 - Petition submitted to City Council calling for amendment of 1957 Charter to provide for election of City officials on a partisan basis.

June 20, 1961 - Ordinance enacted providing for submission of proposed amendment to the electorate.

August 22, 1961 - Special Election held at which proposed amendment was adopted.

As you note in your letter, Section 18.01(1) of the Charter of the City of Hannibal, as amended on August 22, 1961, provides for the nomination of certain city officials at a primary election to be held on the second Tuesday in April, 1961, and on the same day of each odd-numbered year thereafter. That section is as follows:

"Section 18.01 (1) There shall be a primary municipal election for the purpose of nominating a mayor, municipal

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judge, chief of police, city attorney, councilmen and members of the City Central Committees, and for the purpose of deciding any question that may lawfully be submitted to the electors, held upon the 2nd Tuesday in April, 1961, and on each odd numbered year thereafter. There may be special elections called by the city council as provided in the Charter."

Section 18.01(9) of the Charter as amended provides for a general municipal election for the purpose of electing the above-named officials on the first Tuesday of May, 1961, and every two years thereafter.

The question thus presented is whether the decision of the people of Hannibal to change the manner in which their city officials are named is to be given effect as of the effective date of the amendment, or whether it is to be postponed until 1963.

Generally, the amendment of August 22, 1961, does not purport to vacate city offices, with certain exceptions hereinafter noted, prior to the first regular election under the amendment, nor does it specifically provide for a special election to elect these officials on a partisan basis. The only dates set out in the amendment regarding the holding of the elections there provided for are the second Tuesday of April and the first Tuesday of May, 1961, and the corresponding days of subsequent odd-numbered years. It obviously has been impossible to observe the terms of the amendment with respect to the 1961 elections, and therefore any election held pursuant to the amendment prior to the second Tuesday of April, 1963, must be a special election. In *Dysart v. City of St. Louis*, 321 Mo. 514, 11 SW2d 1045, the Supreme Court, en Banc, stated (l.c. 1053):

"The rulings in other states are conflicting upon this subject, but the weight of the authority favors the definition that a special election means one taking place at a time different from that at which an election fixed by law is held."

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The rule with regard to the holding of a special election is set out in *State ex inf. Mooney ex rel. Stewart v. Consolidated School Dist. No. 3, Mo. App.*, 281 SW2d 511, 513, as follows:

" \* \* \* But it is fundamental that no valid election can be called and held except by authority of the law, and that where the law places the duty of calling or ordering a special election in the hands of some authority or agency an election held without such call is a nullity. \* \* \*"

See also *State ex inf. Rice ex rel. Allman v. Hawk*, 360 Mo. 490, 228 SW2d 785, and *State ex rel. Edwards v. Ellison*, 271 Mo. 123, 196 SW 751.

In *State ex rel. McHenry v. Jenkins*, 43 Mo. 261, the Constitution of 1865 provided for an election to fill the office of county clerk in 1866 and every four years thereafter. No such election was held in 1866, but in 1868 the relator was elected county clerk. His title to the office was challenged and the Court held the 1868 election invalid, saying (l.c. 265):

"In relation to relator's second claim, that the omission to hold an election in 1866 can be supplied by one in 1868, we can only say that it is a valid one if the law provides for any such election. But he has failed to show us any such provision, and it would be difficult to give legal validity to a volunteer election. No election can be had unless provided for by law. As the law makes no provision for the election of clerks in 1868, such election is wholly void and of no effect. This position has never been questioned. In *The State v. Robinson*, 1 Kansas, 17, a question was raised as to the validity of an election for governor, and it was held that the election under consideration was not provided for by law, that the person elected could not take the chair, and that the

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previous governor should hold over until the next general election. No case has been known where a volunteer election has been held valid, even though the term of the incumbent had expired."

Applying the principles enunciated in the foregoing cases to the situation with which the City of Hannibal is presently faced, it can be seen that no election may be held to nominate candidates for mayor, councilman, etc., under the amendment, prior to April, 1963, unless the Constitution or statutes of Missouri, or the city charter, authorizes such election. Sections 19 and 20 of Article VI of the Constitution of Missouri, dealing with the adoption and amendment of home rule charters, contain no provisions authorizing the holding of such election, nor do we find such authority in the Missouri statutes pertaining to constitutional charter cities having a population of less than 300,000. Sections 82.010 thru 82.290, RSMo 1959.

Turning then to the charter itself, Section 18.01 of the original charter prior to amendment provided that, "There may be special elections called by the City Council." However this section has been repealed by the amendment and the comparable amended section, §18.01(1), has been altered to read that, "There may be special elections called by the City Council as provided in the charter." (Emphasis ours.) Thus, any authority for a special election of this nature must be found in some other charter section.

Section 18.12 of the Charter provides as follows:

"Section 18.12. FAILURE TO HOLD ELECTION NOT TO BE DEEMED A LAPSE. If, for any reason, an election shall not be held on the date specified in this charter or in any order of the Council calling for a special election, the election shall not be deemed thereby to have lapsed, but the same shall be held at the earliest possible date to be designated by the Mayor after due notice has been published as may be required by the ordinances of this city."

It might be contended that the amendment of August 22, 1961, specifically directs that a primary election be held on the second Tuesday of April, 1961, and that because that election was not then held the Mayor should direct that it be held

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"at the earliest possible date," particularly since the above section refers to a failure to hold an election on the date specified "for any reason." In order to test the validity of such a contention it is first necessary to determine the effective date of the amendment.

Section 21.01 of the charter states that any amendment to the charter shall become a part of the charter, "at the time and under the conditions fixed in the amendment." Section 20 of Article VI of the Missouri Constitution contains an identical provision. However, the amendment of August 22 is silent as to the effective date. Therefore, we must apply the established rules of construction regarding the operation of amendments.

In *City of Kansas City v. Stegmiller*, 151 Mo. 189, 52 SW 723, the contention was made that an amendment to the Kansas City charter was not effective until thirty days after its approval by the electorate. The amendment itself made no mention of the effective date. The Supreme Court said (l.c. 727):

"Another objection to the extension is that, in violation of section 1885, Rev. St. 1889, territory was annexed to the city within four months next preceding the general city election held in Kansas City April 5, 1898. The facts are, as already stated, that the election at which the proposed amendment was voted on was held December 2, 1897. The next city election was held April 5, 1898. Four months had clearly intervened, unless defendants' further contention that the amendment did not take effect for 30 days after its adoption be true. But there is no such provision of the constitution. Unless otherwise provided, either by the constitution or laws, all laws and amendments take effect from the date of their approval. End. Interp. St. §§ 498, 539."

From the foregoing it can be seen that the amendment of August 22 became effective upon the approval of the voters.

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Therefore any construction of Section 18.12 of the charter which would permit a special election prior to April, 1963, must involve the retroactive operation of the amendment, since on the primary election date fixed in the amendment there was no legal authority for that election, and such date could only be arrived at after approval of the amendment.

With regard to the retroactive operation of constitutional provisions, the Supreme Court said in State ex rel. Scott v. Dircks, 211 Mo. 568, 111 SW 1, 3:

" \* \* \* The settled rule of construction in this state, applicable alike to the Constitutional and statutory provisions, is that, unless a different intent is evident beyond reasonable question, they are to be construed as having a prospective operation only." (Citing authorities.)

Nothing in the amendment of August 22 evidences an intent that the amendment shall operate other than prospectively. Therefore, following the principle above quoted, the amendment may not be construed to operate retroactively so as to permit the application of Section 18.12 authorizing an election prior to April, 1963.

Sections 2.04 and 3.07 of the charter provide for a special election to fill a vacancy in the office of councilman and mayor, respectively. The amendment does not, in specific terms, vacate any of the city offices. However, it does operate to abolish the office of administrative assistant to the mayor, to combine the offices of city counselor and city attorney, and to create three new council seats. Since no vacancy in the office of mayor is created by the amendment, Section 3.07 does not provide the necessary authority to hold a special election for that office on a partisan basis.

With regard to Section 2.04, the amendment of August 22 has, in effect, created three vacancies on the city council. The amendment provides for the enlargement of the council from nine to twelve members, as of the effective date of the amendment. Since it does not operate to remove the incumbent council members prior to the first regular election under the amendment, nine of the twelve seats are filled with three

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vacancies remaining. Thus we must determine the possible application of Section 2.04 to authorize a special election for the three vacant positions on the council.

Section 2.01 of the amendment, changing the council membership from nine to twelve, reads as follows:

"Section 2.01: NUMBER AND TERM OF COUNCILMEN. The Council shall consist of twelve members to be known as councilmen, two councilmen to be elected by the qualified voters of each of the six wards for a term of four years. Each councilman shall serve until his successor shall be elected and qualified. Of the first council elected hereunder, the councilman from each ward receiving the highest number of votes shall be elected for a term of four years, the councilman receiving the next highest number of votes shall be elected for a term of two years. Thereafter all councilmen shall be elected for a term of four years."

By this section, a comprehensive scheme is set up for altering the composition of the council, including a system of staggered terms for "the first Council elected hereunder." A special election held under Section 2.04 would necessarily cause the junking of this detailed plan. It would be impossible to allocate the three seats to be filled at such election in a manner consistent with the amendment creating them. The system of staggered terms obviously contemplates that the entire membership of the council will initially be elected at one time.

Both Section 2.04 of the original charter and Section 2.01 of the charter as amended cannot be given effect in these circumstances. Therefore, as the Supreme Court said in *State ex inf. McKittrick v. Bode*, 342 Mo. 162, 113 SW2d 805, 808, "The amendment must prevail because it is the latest expression of the will of the people." We note also that Section 2.04 is not unqualified in prescribing the manner in which council vacancies shall be filled, inasmuch as the application of that section is limited by the phrase, "except as otherwise provided herein." In these circumstances, Section 2.01 of the amendment constitutes the "otherwise" there mentioned. For

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these reasons, it is our opinion that no special election may be held pursuant to Section 2.04 of the charter to fill the three council seats created by the amendment.

We have found no other charter section which might be thought to authorize the special election of which you inquire.

CONCLUSION

It is therefore the opinion of this office that there is no legal authority for the holding of a special election in the City of Hannibal to elect the city officials in the manner designated by the Charter amendment of August 22, 1961, prior to the second Tuesday of April, 1963.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General

JJM:ml