

July 26, 1966

OPINION NO. 295
Answered by Letter
Chitwood

Honorable Fielding Potashnick
Prosecuting Attorney for
Scott County
P. O. Box 459
310 East Center
Sikeston, Missouri



Dear Mr. Potashnick:

This office is in receipt of your request for a legal opinion, which reads as follows:

"A village has been incorporated in Scott County by appropriate order of the County Court and a first Board of Aldermen was appointed by the court. This was sometime prior to 1961.

"No elections for the Board of Aldermen have ever been held in the village. Would it now be in order for the village to hold a special election for aldermen and if so, for what terms would each be elected?"

Section 80.020 RSMo., 1959, relates to the procedure for incorporation of villages, and Section 80.040 RSMo. Cum. Supp. 1965, provides the corporate powers and duties of every village so incorporated shall vest in a board of trustees. Said section 80.040, reads as follows:

"The corporate powers and duties of every village so incorporated shall be vested in a board of trustees, to consist of five members, unless such town shall contain more than twenty-five hundred inhabitants, in which case such board shall consist of nine members. The first board of trustees shall be appointed by the county court at the time of declaring such town incorporated. If the board consists of five members the county court shall designate two members who shall serve for terms of two years and three members who shall serve for terms of one year. If the board consists of

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nine members the county court shall designate four members who shall serve for terms of two years and five members who shall serve for terms of one year. Thereafter all members shall serve for terms of two years. The successors for those whose terms have expired shall be chosen by the qualified electors residing in the village on the first Tuesday of April in every year in the manner provided in sections 80.500 to 80.560."

If incorporation proceedings provided by Section 80.020 RSMo., 1959, have been followed, then the village legally came into existence as a municipal corporation. The fact that its organization as such municipal corporation has not been used, its functions unexercised and dormant for several years is of no consequence. If it was once legally incorporated, it will continue as such, as non-user of its franchise is insufficient to end its existence. This principle was held in our opinion to Harold S. Hutchison, dated April 20, 1953. (Copy enclosed).

If the village was legally incorporated, its existence continues, until disincorporated under Sections 80.570 to 80.670 RSMo., 1959. We have no evidence of disincorporation.

As stated, we have assumed the regularity of all the incorporation proceedings. If so, some of the trustees originally appointed, were for one-year terms and others for two-year terms, however, the terms of the entire membership of the board has now expired. Under these conditions it is necessary to choose successors for all the trustees. Section 80.040 supra, requires an election to be held on the first Tuesday of April in each year, and that successor trustees shall serve terms of two years each.

Under said Section 80.040 supra, the terms of office of the first board of trustees did expire long ago, regardless of whether they were appointed for one or two year terms. While it is true no elections have ever been held to choose successors, it does not follow that the village has been without trustees all these past years. In fact the contrary is true, the village has had trustees from the time of its incorporation, to and including the present time.

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The situation referred to in the opinion request regarding failure to elect trustees of the village is out of the ordinary and is believed to be covered by Section 12, Article VII, Constitution of Missouri. Said Section reads as follows:

"Except as provided in this constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

We find no other constitutional provision contrary to this section. It does not appear that any of the village trustees have resigned. Section 12, supra, is applicable to the present situation, and the entire board of trustees appointed by the county court are still in office and will remain therein until their successors will have been duly elected and qualified.

This brings us to that point in our discussion where it is necessary to consider when an election for successors to the first trustees can be held and for what terms those elected trustees shall serve.

Section 80.040 supra, requires an election to be held annually on the first Tuesday in April, for the election of at least two trustees, and covers usual or ordinary circumstances only. The section has no application to unusual, or out of the ordinary circumstances, when for some reason no annual election was held. It is noted that said section neither expressly or by necessary implication prohibits elections of trustees to be held on other days than as set out therein.

It is believed that Section 80.560 RSMo., 1959 is applicable to unusual, or out of the ordinary circumstances only, when an election was not held (as provided in) in Section 80.040. Section 80.560 RSMo., 1959, reads as follows:

"In case of the failure of any election of trustees or other officers, a majority of the trustees then in office, or any magistrate of the county in which said town or village is situated, may cause the election to be held on any other day."

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This section is applicable to the factual situation herein, and the board of trustees are authorized by the section to cause an election to be held on any date they may set, giving due consideration to sections 80.500 to 80.560 RSMo., 1959, relating to the holding of elections in villages.

If such an election is called by the board, trustees are to be elected at such election to succeed those originally appointed by the county court for one and two-year terms. Successor trustees of the one-year term trustees, shall serve until the first Tuesday of April following their election and until their successors are duly elected and qualified and successor trustees of the two-year term trustees, shall serve until the first Tuesday of the second April following their election and until their successors are duly elected and qualified.

After such initial election, future elections should be held according to law, that is annually on the first Tuesday of April at which elections trustees will be elected for two-year terms.

Therefore, it is the opinion of this office, that if a village is legally incorporated, a board of trustees appointed under Sections 80.020 RSMo., 1959, and 80.040 RSMo. Cum. Supp. 1965, absent disincorporation proceedings, it will continue to exist as a municipal corporation, and its first board of trustees remain in office until their successors have been duly elected and qualified, although the village organization and functions have remained dormant since incorporation. Under Section 80.560 RSMo., 1959, where elections have not been held as provided by law, said board may cause an election for successor trustees to be held on any day it chooses. When regular elections have not been held as provided by law since the incorporation of the town and the appointment of the first board of trustees, trustees to succeed those originally appointed for one-year terms shall serve until the first Tuesday of April following their election and trustees to succeed those originally appointed for two-year terms shall serve until the first Tuesday of the second April following their election.

Subsequent elections for trustees for two-year terms shall be held on the first Tuesday in April of each year.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

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