

November 18, 1975

OPINION LETTER NO. 153
Answer by letter-Mansur

Honorable Robert A. Young
State Senator, District 24
3500 Adie Road
St. Ann, Missouri 63074



Dear Senator Young:

This is in response to your request for an opinion from this office as follows:

"In regard to 4th Class Cities (RS Mo 79.100 and 79.120)

Questions involved are three-fold:

1. Is the acting President of the Board of Aldermen to be counted as a Board member for purposes of establishing a quorum at the meeting?
2. Does he have the right to vote along with the other members of the Board on all resolutions and ordinances?
3. Does he have the power of the veto?

"Mayor absent from meeting of Board of Aldermen, and the vote of the President of the Board can pass or defeat a resolution."

We understand your question applies to a fourth class city with four aldermen with only three aldermen present at the meeting with the mayor being absent.

Government of cities of the fourth class is provided for in Chapter 79, RSMo.

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Section 79.050, RSMo, provides for the election of a mayor and a board of aldermen. Section 79.060, RSMo, provides that a city of the fourth class shall by ordinance be divided into not less than two wards and two aldermen shall be elected from each ward. Section 79.090, RSMo, provides that in the absence of the mayor the board of aldermen shall elect one of their own number to occupy the place temporarily, who shall be styled "acting president of the board of aldermen."

Section 79.100, RSMo, provides in part that the acting president of the board of aldermen shall for the time being, perform the duties of mayor, with all the rights, privileges, powers, and jurisdiction of the mayor, until the mayor's return. Section 79.120, RSMo, provides in part that the mayor shall preside over the board of aldermen but shall not vote on any question except in case of a tie. Section 79.130, RSMo, provides that no ordinance shall be passed unless the majority of the members elected to the board of aldermen vote for it and the ayes and nays be entered on the journal.

In Doughtery v. City of Excelsior Springs, 85 S.W. 112 (K.C.Mo. App. 1904), the court held that in a city of the fourth class with the board of aldermen consisting of four members and with three members together with the mayor present at the board meeting, the three members present being a majority of the whole body, a quorum is present for the transaction of business of the council.

In answer to your question whether the acting president of the board of aldermen is to be counted as a board member for purposes of establishing a quorum at the meeting and whether he has a right to vote along with other members of the board on all resolutions and ordinances, we have been unable to find any appellate court decision in this state on these precise questions.

In McQuillin on Municipal Corporations, Volume 4, § 13.25 (1968) regarding the right of the presiding officer of a municipal body to vote, it is stated as follows:

"A councilman chosen to preside in the absence of the mayor or other presiding officer does not lose his right, while serving as such, to vote as a member, even though the mayor is entitled only to a casting vote upon a tie; but if serving as mayor pro tempore he cannot also vote as mayor."

Appellate court decisions in five states are cited in support of this rule including Shugars v. Hamilton, 92 S.W. 564, 565 (Ky. 1906) where the following statement is made:

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"At a regular meeting of the council assembled at the place designated, four members of the council, being a majority of the whole board, constitute a quorum for the transaction of business, although the mayor may not be present. Under the statute (section 3634) it is the duty of the mayor to preside at meetings of the council, and he may only vote in case of a tie. In his absence, a member of the council may be chosen as mayor pro tem.; but this does not deny him the right to vote as a member of the council. Of course, he cannot also vote as mayor. The mere fact that he is discharging temporarily the duties of the office of mayor does not interfere with the performance of his duties as councilman, and he may be counted as a councilman for the purpose of a quorum, to constitute which the presence of four members of the council is necessary. *City of Somerset v. Smith*, 49 S. W. 456, 20 Ky. Law Rep. 1488; *Bybee v. Smith*, 61 S. W. 15, 22 Ky. Law Rep. 1684."

Harris v. People ex rel. Squires, 70 P. 699 (Colo. 1902), involved a regular meeting of the board of trustees of the town, four trustees present, one presiding as mayor pro tem, and the court stated, l.c. 699-700:

". . . The material question here, and the one decisive below, is the right of the trustee, when sitting as mayor pro tem., to vote in the absence of a tie. The statute prescribes the number of votes requisite to elect. 2 Mills' Ann. St. § 4445. This necessary number relator received, provided the vote cast by the trustee sitting as mayor pro tem. was properly counted. This officer was a member of the board of trustees before his election as mayor pro tem., and entitled to vote. By such election he did not lose his character or status as a member. This being true, he retained his right to vote. Am. & Eng. Enc. Law, 1034; 1 Beach, Pub. Corp. § 292. The same rule obtains in this body as in our state or in the national house of representatives, with reference to the speaker. In the two bodies last mentioned, a member of the house is elected as the speaker; he does not cease to be a member by such election. Among his rights

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as a member is that of voting. He does not lose it by becoming speaker. In re Speakership, 15 Colo. 520, 526, 25 Pac. 707, 11 L. R. A. 241; Whitney v. Village of Hudson, 69 Mich. 189, 198, 37 N. W. 184. The mayor pro tem. in the case before us was a voting member of the body,-- entitled to vote on any question as a member thereof. This true, his vote was legally counted for relator."

It is, therefore, our view that the acting president of the board of aldermen of a fourth class city is to be counted as a board member for the purpose of establishing the existence of a quorum and he has the right to vote along with the other members of the board on resolutions and ordinances.

Opinion Letter No. 138 issued August 15, 1967, to Jack E. Gant, which held that the president of the board of aldermen cannot vote except in case of a tie vote, is hereby withdrawn.

In answer to your question whether the acting president of the board of aldermen has the power to veto, we have been unable to find any appellate court decision in this state on this precise point.

In the case of Hunter v. City of Louisville, 208 Ky. 562 (1925), the Kentucky Court of Appeals was presented the question of the power to approve an ordinance by the president of the board of aldermen when the mayor of Louisville was temporarily absent from the city.

The court said, l.c. 563-564:

"Section 2795, supra, provides that except a resolution to adjourn every proposed ordinance or joint resolution which has passed the general council shall be presented to the mayor, and if he approves it he shall sign it and then it shall be obligatory. By the section the mayor is given authority to disapprove all such ordinances and joint resolutions, setting forth his objections in writing. Authority is then given the general council, by two-thirds vote of its two bodies, to pass the proposed ordinance or resolution over the mayor's veto. Section 2789, supra, among other things, provides:

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'Should the mayor be temporarily absent or unable to discharge his duties, his office shall be administered by the president of the board of aldermen, who shall continue to discharge the duties of the office during the continuance of the disability or the absence of the mayor.'

"By a strained process of reasoning, hard to comprehend, appellant insists that the legislature, by the use of the word 'administered' in the statute above, intended that only certain ministerial duties of the mayor might be performed in his absence by the president of the board of aldermen. We are unable to agree with him. The statute in question plainly provides that if the mayor be temporarily absent or unable to discharge his duties 'his office shall be administered by the president of the board of aldermen,' and that that official shall 'discharge the duties of the office' during the disability or absence of the mayor. It clearly was intended that during the temporary absence or disability of the mayor the president of the board of aldermen should discharge, not certain of the duties of the office, but that the office with all its functions and prerogatives and all its duties should be administered by the president of the board of aldermen. If appellant's contention should be upheld a state of case easily could arise in which the business of the great city of Louisville would be seriously handicapped for lack of a chief executive. A long, serious illness might disable the mayor and prevent his performing the duties of his office for a considerable length of time. According to appellant's contention, under those conditions, only certain ministerial duties of the office could be performed by the president of the board of aldermen, though he does not point out what duties of the office, as he understands it, the president of the board of aldermen might then perform. He contends that the approval or vetoing of legislative enactments are not included in the ministerial

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duties that may be performed by the president of the board of aldermen in the absence of the mayor. Under his contention, under the circumstances above, the welfare of the city might be seriously impaired for lack of some one to fill the office of mayor. It was that and similar situations that the legislature had in mind when it provided that in the absence or during the disability of the mayor his office should be administered by the president of the board of aldermen, who, by the section of the statute, supra, was given authority to discharge all the duties of the office of mayor during the continuance of the disability or absence of the mayor."

Such case holds that an acting mayor has the power to approve or veto bills under the provisions of a statute giving the president of the board of aldermen the power to discharge all the duties and responsibilities of the mayor during the mayor's absence.

Section 79.100, RSMo, provides as follows:

"When any vacancy shall happen in the office of mayor by death, resignation, removal from the city, removal from office, refusal to qualify, or from any other cause whatever, the acting president of the board of aldermen shall, for the time being, perform the duties of mayor, with all the rights, privileges, powers and jurisdiction of the mayor, until such vacancy be filled or such disability be removed; or, in case of temporary absence, until the mayor's return."

It is our view that the provisions of Section 79.100, giving the president of the board of aldermen the powers of the mayor during the mayor's absence, authorize such officer to veto ordinances passed by the board of aldermen.

Section 79.130, RSMo, provides in part as follows:

". . . No bill shall become an ordinance until it shall have been signed by the mayor or person exercising the duties of the mayor's office, or shall have been passed over the mayor's veto, as herein provided."

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Section 79.140, RSMo, provides in part as follows:

"Every bill duly passed by the board of aldermen and presented to the mayor and by him approved shall become an ordinance, and every bill presented as aforesaid, but returned with the mayor's objections thereto, shall stand reconsidered. . . ."

Under the provisions of Section 79.130, the president of the board of aldermen, that is, the person exercising the duties of the mayor's office, is given specific statutory authority to approve an ordinance but is not given specific statutory authority to veto an ordinance. However, it appears that Section 79.130 also gives the power to the mayor pro tem to veto an ordinance because the provisions of Section 79.140 provides that a bill passed by the board of aldermen and approved by the mayor shall become an ordinance. It is clear, however, that the provisions of Section 79.130, providing for approval by the president of the board of aldermen, have to be read into Section 79.140 insofar as reference is made to "mayor" and therefore it appears that the president of the board of aldermen is included within the term "mayor" as used in Section 79.140 providing for the procedure to be followed when a bill which is passed by the board of aldermen is approved or vetoed. It is, therefore, our view that under the provisions of Sections 79.100 and 79.130, RSMo, the president of the board of aldermen of a fourth class city is authorized to veto ordinances when he is performing the duties of the mayor because of the absence of the mayor.

Yours very truly,

JOHN C. DANFORTH
Attorney General