Municipalities: Richmond Heights under 1940 Census entitled to three councilmen. How appointed and term.

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Mr. L. R. Robertson
City Counselor
Richmond Heights, Missouri

Dear Sir:

Your letter of July 1, 1940, presents to us the following facts: Richmond Heights is a city of the third class with alternative form of government. Its legislative body now consists of a Mayor and two Councilmen. According to preliminary reports on the 1940 United States Census, said city now has a population in excess of 12,000.

Upon these facts you ask: Is Richmond Heights now entitled to another Councilman, and, if so, the method by which he is to be selected?

The answer to this question depends upon several points which we now consider.

Section 6909 as amended Laws 1939, P. 541, apportions the number of councilmen cities of this class shall have on population brackets. For a city having a population of 12,000 and less than 20,000 there is provided a Mayor and three Councilmen.

The first point is: May the preliminary Census report be relied upon to authorize the city to have three Councilmen? We are of the opinion it can be.

In Kay v. Moniteau County, 134 S. W. (2d) 81 (Mo. Sup.) the Court said this, concerning the effective date of the 1930 Federal Census, l. c. 83:

> "* * * Clearly the event which terminated the multiplication of votes method as a basis for fixing salaries occurred when the census was available. * * *"

See also Carter County v. Huett, 259 S. W. 1057 (Mo. Sup.).

In Ervin v. State, 44 S. W. (2d) 380 (Tex.) the question involved was whether or not a jury had been properly selected, due to a population change that made other provisions of the law apply. The Court considered the point at length, stating, l. c. 381:

> "There is no specific provision in the Act of Congress June 18, 1929 (13 USCA Sec. 201 et seq.), with reference to the time of final announcement of the census; nor is there any provision as to the time the census shall become effective. Under the terms of the Act of Congress March 6, 1902, Sec. 11 (13 USCA Sec. 4), the Director of the Census is required 'to have printed, published, and distributed, from time to time, bulletins and reports of the preliminary and other results of the various investigations authorized by law.' Substantially to the same effect is Section 13, Act of Congress June 18, 1929 (13 USCA Sec. 213), which imposes on the Director the duty to have printed preliminary and other census bulletins and final reports of the results of the several investigations. Section 205, 13 USCA reads as follows: 'Each supervisor shall perform such duties as may be imposed upon him by the Director of the Census in the enforcement of this chapter,' etc.
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> "In Holcomb et al. v. Spikes, 232 S. W. 891, 894, the Court of Civil Appeals at Amarillo, Tex., in holding that a preliminary announcement of the census by the Director was an official pronouncement of which the

public and all officials may take notice, said: 'It would seem by the act of 1902 duties were imposed upon the Director to publish and distribute bulletins and reports of the preliminary and other results of the various investigations authorized by law. This, in so far as we can ascertain, is the only method to inform the public and of giving it access to the information ascertained and compiled by the enumerators and supervisors. It would seem when bulletin is so published and distributed it then becomes an official pronouncement under the law, of which the public and all officials may take notice. * * * In this case the undisputed facts show the Census Bureau, under the signature of its Director, issued a bulletin showing before the election the population of Lubbock County to be 11,096. This seems to have been official. This information appears to have been given to leading papers of the state. Under the law this information could have been obtained in no other way than through the Director's official act, without violating the law and subjecting the parties to a charge of felony. We think the case of Nelson v. Edwards, 55 Tex. 389, indicates, when the enumerators' list is filed, as required by the law, as it then existed, this made it such evidence as that public officials could and should act upon it. There was no other method provided, or shown requiring a proclamation placing the census in effect.'

"In the case at bar, the preliminary announcement of the census contained a statement that the figures were preliminary and subject to correction. Touching the effect of this statement, we quote further from the opinion in Holcomb et al. v. Spikes, supra, as follows: 'It is insisted that the Director of Census

gave a certificate to the effect that the count for the census was subject to correction. If this certificate was authorized by the act, we do not believe it should be held that this evidenced that the census was not complete under the terms of the law when the Director had officially published and distributed bulletins that the population was over 10,000. It is not a fact that the official count was incomplete or was not correct. In fact, his subsequent certificate shows it was correct, and that his bulletin had been properly issued. The bulletin, we believe, officially announced the population as shown by the list forwarded by the enumerators of Lubbock county and supervisors of the district, and that as filed in the archives of the census office it was open to the public. The statute authorized, if there was an incomplete or erroneous enumeration, that it could be amended or taken anew. The bulletin does not indicate that it was incomplete or negligently done, but rather indicates it may be subject to correction. It does not carry the idea that it was incomplete, but that it was complete. We think, when the bulletin was given to the public, officials who were required to act with reference thereto may take official notice that the enumeration had been made and was then in the archives of that office, subject to the inspection of the public in which the population of Lubbock county had been determined. The fact that it may be corrected does not indicate that the census was not complete and then a public document under the law.'

"In the case of Herndon v. Excise Board of Garfield County et al., 147 Okl. 126, 295 P. 223, 224, the Supreme Court of Oklahoma had under consideration the question as to whether a preliminary announcement of the census of Enid, Okl., by the supervisor of the district embracing said city was binding upon officials who were required to act with reference to the population of said city. The case of Holcomb et al. v. Spikes, supra, was cited in support of the conclusion that the preliminary announcement was an official pronouncement of which the public and all officials took notice and by which officials who were required to act in reference to the population therein stated should be guided. After citing the statutes relating to the duties of the Director of the Census and his supervisors, the court said: 'Thus it follows that the supervisor was clothed with authority to perform the duties imposed upon him by the Director of the Census, one of which duties was the preliminary announcement of the census involved in the case at bar. So then the preliminary announcement of May 3, 1930, was an official announcement of the census of Enid; moreover, the certificate of the Director of the Census, dated September 22, 1930, showing a population of 26,398, was official even if not final. It follows that the city of Enid fell into the classification contained in section 4691, C. O. S. 1921, providing for said court.'

"It appears that the statutes of Oklahoma provided for a city court in cities having a population of more than 25,000 and less than 55,000, as shown by the

> last federal census. The preliminary announcement of the population of Enid was held to automatically bring said city within the operation of the statute. See, also, State v. Braskamp, 87 Iowa, 588, 54 N. W. 532.
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> "The opinion is expressed that the preliminary announcement of the census of the city of Abilene was an official pronouncement. This announcement was made prior to the time the jury commissioners selected the panel from which the jury was drawn. The announcement of the population in the preliminary report should have been the guide of officials whose duty it was to act with reference thereto. The effect of the preliminary announcement was to place the county of the prosecution under the provisions of article 2094, Revised Statutes 1925, as amended. * * *"

For other cases to the same effect see: Board of Com'rs. of Coal County v. Mathews, 296 P. 481 (Okl.); Elliott v. State ex rel. Kirkpatrick, 1 P. (2d) 370 (Okl.) and Underwood v. Hickman, 39 S. W. (2d) 1034 (Tenn.).

In the last cited case, the Court had before it a question of salary change due to a different population classification arising from the 1930 Federal Census. The Court stated, l. c. 1034:

> "The census of 1930 was taken pursuant to Chapter 28, Acts of Congress of 1929 (13 USCA Secs. 201-219).
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> "By section 1 (13 USCA Sec. 201) it is provided that a census population shall be taken by the Director of the Census in the year 1930 and every ten years thereafter.

"By section 2 (13 USCA Sec. 202) it is provided: 'The period of three years beginning the 1st day of January in the year 1930 and every tenth year thereafter shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed within such period.'

"By section 6 (13 USCA Sec. 206) it is provided that the census of the population shall be taken as of the 1st day of April, and it is made the duty of each enumerator to commence the enumeration of his district on the day following, unless the Director of the Census in his discretion shall change the date of commencement of the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; but in any event, it shall be the duty of each enumerator to prepare the returns and forward same to the supervisor of his district within thirty days from the commencement of the enumeration.

"By section 13 (13 USCA Sec. 213) the Director of the Census is authorized to have printed by the Public Printer, in such editions as he may deem necessary, preliminary and other census bulletins, and final reports of the results of the several investigations authorized by this statute, and to publish and distribute said bulletins and reports.

"By section 18 (13 USCA Sec. 218) the Director of the Census is authorized at his discretion, upon the written request of the Governor of any state or territory or a court of record, to furnish such Governor or court of record

> with certified copies of so much of the population returns as may be requested, upon the payment of the actual cost of making such copies and $1 additional for certification.
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> "From the foregoing, it will be observed that the census shall be taken as of April 1st, that the Director is given three years to complete his report, but is authorized to make preliminary reports from time to time. No specific provision is made for publishing official reports, and the statute does not fix a definite date when the new census becomes effective. The only logical conclusion is that it becomes effective on April 1st, and such, in our opinion, was the intention of Congress. Should we adopt any other date, it would result in irregularity and nonuniformity. For example, two counties could be raised by the same census to another class; the population of one might be officially determined on July 1st and the other on October 1st, so that in the one county the clerk would begin drawing the increased salary three months before the clerk in the other county would be entitled to the additional compensation. Theoretically, at least, they are entitled to the same compensation, and to construe the law as contended by complainants would result in inequality and injustice."

Our examination of the recent amendments to the Federal Census Act (13 USCA 201 et seq.) does not disclose any change that would affect the conclusions reached in the above cases. Further, the argument advanced in Underwood v. Hickman, 39 S. W. (2d) 1034, seems to be sanctioned by the Court in this state in Kay v. Moniteau County, 134 S. W. (2d) 81. It was there contended that the census did not become effective until the county court received an official certification from the Director of Census. In answer to this, the Court said, l. c. 83:

> "* * * If the section were to be interpreted as contended for by plaintiff then one county, by acquiring a certification of the population immediately when available, would be paying salaries on the census basis and another county in the same classification, which had not obtained such certification, would be using the other method. This would destroy the uniformity of the law and such was never intended. * * *"

In our opinion the census for the year 1940 was "available" immediately upon its publication or pronouncement to the public by the Director or his subordinates. That this pronouncement is an official one must be assumed, since to rule otherwise would be to accuse those who made the release of violating the law. Only the Director of Census is authorized to make an announcement (13 USCA 213) and each supervisor can only do that which he is directed to do by the Director (13 USCA 205, 208).

The adoption of this position might at first blush appear to run counter to the uniformity requirement laid down in Kay v. Moniteau County, supra, but it is not so when we consider that the census, relates back to, and is taken so as to reflect the population as of April 1, 1940 (13 USCA 206). It does not even purport to reflect the population as of the date the announcement is made by the Director.

The wording of the particular act with which we are concerned does not limit the application of the new census until "ascertained" by the Director. It provides three councilmen for cities of that class, "having a population of twelve and less than twenty thousand". While the 1940 census does not purport to give the population of Richmond Heights now or in the future, it is the count for the next ten years unless the city desires to take its own census (Section 7256 R. S. Mo. 1929). Certainly Richmond Heights had such a population on April 1, 1940 and was so found to have by the Director of Cen-

sus in an official announcement. Said city is therefore entitled to another Councilman.

The next question: Is there a vacancy existing in the office of Councilman in said city?

In State ex rel. Brown v. McMillan, 108 Mo. 153, 159, it is said:

> "* * * We think that both authority and the spirit of our institutions favor the view that when an office is created, and no restrictions for filling the vacancy are imposed, a vacancy arises ipso facto.
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> "'The word "vacancy" aptly and fitly describes the condition of an office when it is first created, and has been filled by no incumbent.' Walsh v. Commonwealth, 89 Penn. St. 426. In State ex rel. v. Askew, 48 Ark. 89, the supreme court of that state said: 'Vacancy is the state of being empty or unfilled. Vacant lands are unoccupied lands. Vacant house is an untenanted house. A vacant office is an office without an incumbent; and it can make no difference whether the office be a new or an old one. An old office is vacated by death, resignation or removal. An office newly created becomes ipso facto vacant in its creation.' And in State ex rel. v. County Court, 50 Mo. 317, Judge ADAMS speaking for the court said, 'This is a new office created by this act and ipso facto becomes vacant in its creation.' Rhodes v. Hampton, 101 N. C. 629; Stocking v. State, 7 Ind. 326."

See also State ex inf. Hadley v. Burkhead, 187 Mo. 14, 35 and State ex rel. Buskirk v. Boecker, 56 Mo. 17, 21, where it is held that a newly created office ipso facto becomes vacant on its creation.

Section 6909, Laws 1939, p. 541, creates the three offices of Councilmen in certain cities of the required population, therefore, Richmond Heights, meeting the population requirements of the act, now has a vacancy existing in one of these offices.

Section 6909, supra, provides:

> "* * * If any vacancy occurs in such office, the remaining members of said council shall appoint a person to fill such vacancy during the balance of the unexpired term. * * *"

That provision is clear and no comment is needed, however, the act is not so clear as to the length of the unexpired term for which the appointment is made.

Section 6909, supra, provides:

> "In every such city there shall be elected at the first regular municipal election held after the taking effect of this act, and every four years thereafter, a mayor and (the proper number of) councilman * * *."

Section 6721 R. S. Mo. 1929 provides:

> "A general election for the elective officers of each city of the third class shall be held on the first Tuesday in April after the organization of such city under the provisions of this article, and every two years thereafter, * * *"

We are not advised when Richmond Heights was organized and cannot state when the term of this appointee will expire, but due to the further provision of Section 6909, supra, that appointee will only serve until the next regular election in said city. That arises from this provision of the statute:

> "* * * The terms of office of the mayor and councilmen or aldermen in such city in office at the beginning of the terms of office of the mayor and councilmen first elected under the provisions of this section shall then cease and determine * * *."

The term of the Councilman appointed to fill this vacancy will end, like the terms of the Mayor and other two Councilmen, at the commencement of the terms of the Mayor and three councilmen elected at the first election held after the effective date of Section 6909, Laws 1939, p. 541. The effective date of this section was November 1, 1939 (Section 659c, Laws 1939, p. 478).

CONCLUSION.

It therefore is our opinion that Richmond Heights is now entitled to three Councilmen; that there exists a vacancy in one of said offices which vacancy is to be filled by appointment by the remaining member of the Council; and that the person so appointed shall serve until the next regular city election occurring after the effective date of Section 6909, Laws 1939, p. 541.

Respectfully submitted,

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APPROVED:

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