

MUNICIPAL CORPORATIONS: In cities of the third class the mayor
CONFLICT OF LAWS: only has the power of appointment of
non-elective officers. City ordinance
conflicting with state law absolutely
void.

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Mr. Arthur Rogers
City Attorney
Richmond, Missouri

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Dear Sir:

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

"Mr. Robert S. Lyon, Mayor of the
City of Richmond, has requested
that I write your office for an
opinion on the interpretation of
Section 6733, R. S. Mo., 1929,
which Section reads as follows:

"May Appoint What Officers.--
The Mayor, with the consent and
approval of a majority of the mem-
bers elected to the city council,
shall have power to appoint a street
commissioner and such other officers
as he may be authorized by ordinance
to appoint.

"The Council of the City of Richmond,
being of the opinion that the above
section reserves to the Council the
authority to appoint all city of-
ficers (except those elective) except
the street commissioner, repealed an
ordinance granting such power to the
mayor and took away the mayor's
authority to appoint any such officer ex-
cept the street commissioner.

"The mayor is of the opinion that this
section is not a limitation on the
mayor's right and authority to appoint
and is intended to mean that the mayor
shall appoint a street commissioner and
all other officers to fill departments

which the council may set up and provide.

"Would you, at your earliest convenience, give us your opinion on this question."

The section above set out, 6733, R. S. Missouri 1929, is now Section 6879, R. S. Missouri 1939. This section reads as follows:

"The mayor, with the consent and approval of a majority of the members elected to the city council, shall have power to appoint a street commissioner and such other officers as he may be authorized by ordinance to appoint."

It will be noticed in the above section that these words are used, "The mayor, * * shall have power to appoint * *" The part omitted by the asterisks is as follows: "* * with the consent and approval of a majority of the members elected to the city council, * *" In other words, in construing this section it specifically states that the mayor shall have power to appoint and does not give that power to a majority of the members elected to the city council. "Shall" has been construed as being mandatory. It was so held in 119 S. W. (2d) 941, where the court said, par. 7:

"It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory."

Under our interpretation and the interpretation of many holdings of the Supreme Court by the use of the word "shall" in Section 6879, supra, it is mandatory that the mayor make the appointment but the majority of the members elected to the city council shall consent and approve his appointment.

Section 6879, supra, was partially construed in *Beonville ex rel. v. Stephens*, 238 Mo. 339, l. c. 356, where the court said:

"It is claimed that Capt. Ravenel was not city engineer; for the reason that no ordinance was shown in evidence

creating such office, and that there can be no officer de facto where there is no de jure office. We cannot unqualifiedly agree to that proposition. The statute does not create the office of city engineer. Section 5765, Revised Statutes 1899, gives the mayor power, with the consent of the council, to appoint 'a street commissioner and such other officers as he may be authorized by ordinance to appoint.'

"Subdivision 8 of section 5858 required the city engineer or other proper officer to make the estimate. There can be no doubt then that the city council had the power to create the office of city engineer. Capt. Ravenel had acted as such city engineer for the period of eight or ten years. He was recognized as such officer by the city council in the ordinances concerning this improvement. Every one connected with the city government for that long period, and every one concerned in city matters wherein the engineer's services were necessary, was evidently under the impression not only that there was an office of city engineer, but that Ravenel was such officer.

"Now the objection is made that because no ordinance is shown creating such office, the foundation has fallen from under these taxbills. Such a result is a non sequitur."

The above holding was to the effect that the mayor should appoint "a street commissioner and such other officers as he may be authorized by ordinance to appoint."

In reading the above quotation, and in reading the statutes, it is very clear that the Legislature intended that the mayor should appoint for the reason that it specifically states "as authorized by ordinance to appoint."

Also, in passing upon Section 6879, supra, the court, in *Menefee v. Taubman*, 159 Mo. App. 318, l. c. 320, in passing upon the above section, said:

"* * * The elective officers of cities of the third class do not include the office of city engineer (R. S. 1909, sec. 9147) and no successor to Duncan was elected. But the statutes provide (sec. 9157) that 'the mayor with the consent and approval of a majority of the members elected to the city council shall have power to appoint a street commissioner and such other officers as he may be authorized by ordinance to appoint.' Pursuant to this statute an ordinance was enacted June 23, 1904, entitled 'An ordinance appointing a city engineer of the city of Lexington and fixing his compensation,' and Wilson succeeded Duncan by appointment under this ordinance. "

Also, in the case of *Weesner v. Bank*, 106 Mo. App. 668, l. c. 671, the court, in passing upon the same matter, said:

"The act governing cities of the third class does not in specific terms provide for a city engineer. Section 5765, R. S. 1899, provides: 'The mayor, with the consent and approval of a majority of the members elected to the city council, shall have power to appoint a street commissioner and such other officers as he may be authorized by ordinance to appoint.' But as section 5848 provides that certain duties shall be performed by a city engineer, or other officer, there can be no doubt but what the city may, under said section 5765, appoint a city engineer. But under said section 5848 an officer other than the city engineer may perform the duties required in regard to

sewers. Under said section the language used is the 'city engineer or other officer.' By the act of May 9, 1899, amending section 5858, the words used are: 'The city engineer or other proper officer.' We take it that the word proper is a limitation upon the word officer requiring that he have proper qualifications for the work.

"But it is contended that the duties imposed by the statute must be performed either by the city engineer or by an officer of the city, and as Grieb was neither, his acts were void. Section 5777 construes the term officer as follows: 'The term officer whenever used in this article shall include any person holding any situation under the city government or any of its departments with an annual salary or for a definite term of office.' As Grieb's appointment did not provide for an annual salary for his services, nor for a definite term of office, he was not an officer within the meaning of said section.

"Appointive officers--other than that of street commissioner--as provided by said section 6765 can only be appointed in cases where there is an ordinance authorizing such appointment. No evidence of such an ordinance is found in the record. There was, then, no such an officer as a city engineer. And it is clear that the statute contemplates that the city engineer be an officer. The language, 'the city engineer or other officer' implies at least that he must be an officer."

In none of the quotations as set out in the above cases does the court doubt the fact that the mayor should make the appointment of all officers under an ordinance passed by the city council. The city council in cities

of the third class passes the ordinances and the mayor has no power to vote upon an ordinance except in a tie. Section 6871, R. S. Missouri 1939, specifically states that the mayor shall have no power to vote on ordinances except in case of a tie vote in the city council. This section should be used in construing Section 6879, supra, upon which section this opinion is based.

The word "appoint" as used in Section 6879, supra, is not ambiguous and is not subject to construction as it is a word that has an ordinary meaning, but the above section sets out that the appointment must be considered by a majority of the city council and approved by them. In the case of *Better Built Homes & Mortgage Co. v. Nolte*, 211 Mo. App. 601, l. c. 608, the court, in construing the word "approve" which approval was made by one person in a case where the appointment was made by another person, said:

"* * * * Counsel for respondents also argue that from the very language of the statute itself it appears that the duty of the Board of Aldermen is not ministerial but involves the exercise of a discretion; that the word 'approve' is used, and therefore it necessarily follows that a discretion is involved. The word 'approve' does not necessarily indicate that a discretion is contemplated. The word must be considered in connection with the subject matter to which it is applied, and the connection in which same is found. * * "

Also, to the same effect is the case of *Cunio v. Franklin County*, 285 S. W. 1005, l. c. 1008, where the court said:

"The statutes say 'the circuit judge shall designate or appoint * * * * ' a probation officer.

"The word "designate," when used by the appointing power in making an appointment to office, is equivalent to the word "appoint." Words and Phrases, vol. 3, p. 2027, citing Peo-

ple v. Fitzsimmons, 68 N. y. 514, 519.

"The word "appointed" means named or designated for or assigned to an office.' Words and Phrases, vol. 1, p. 458, citing Brown v. O'Connell, 36 Conn. 432, 447, 4 Am. Rep. 89."

Also, in the case of State v. Caulfield, 62 S. W. (2d) 818, 1. c. 823, the court, in construing the word "approval" where a certain act or thing was done by another, said:

"Among the decisions involving matters cognate to those instanced above and bearing on the question now under consideration, the power of approval, reference will be made to two, these being typical of a number of others.

"In the case of State v. Rhein, Treas., 149 Iowa, 76, loc. cit. 80, 127 N. W. 1079, 1081, a statute was under construction which authorized the county treasurer to select depositories 'to be approved by supervisors,' and the court held that the supervisors had no power of selection, saying: 'Had it been the purpose of the Legislature to empower the board to designate the depository, the easy and the obvious thing was to say so in plain unambiguous terms. * * * To "approve" or give "approval" is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another.'

"In Thaw v. Ritchie, 5 Mackey (16 D. C.) 200, 225, it was held that, as used in the act of 1798, providing that the chancellor should 'approve' a decree of the orphans' court for the sale of the lands of a ward, 'approve' implies a revisory proceeding, as the term is only appropriate

to such an act, and the statute clearly contemplates a previous decree by the orphans' court to receive the approbation of the chancellor."

In view of the quotations set out in the three above cases and in construing Section 6879, supra, the fact that the appointment by the mayor should be consented to and approved by a majority of the members of the city council does not mean that the members of the city council should have the power of appointment. The question of approval was also passed upon in *Baynes v. Bank of Caruthersville*, 118 S. W. (2d) 1051, 1. c. 1053, where the court said:

"But we do not believe that ends the matter or that the determination of the case, so far as the court is concerned, turns alone on the use of the word 'fix' in the statute. One section authorizes the Commissioner to employ deputies and counsel but provides that no salaries or fees shall be paid 'unless approved' by the Circuit Court. The other section provides that the Commissioner shall pay his deputies and counsel from the funds in his hands subject to the 'approval' of the Circuit Court. This is the section which says that the Commissioner shall 'fix' the fees of his deputies and counsel.

"As used in the statute the words 'approved' and 'approval' must be considered in at least two connections--first, with the duty of the court and second, in connection with the word 'fix.' There are instances when the words 'approve' and 'approval' as used in the statute contemplate the doing of a purely ministerial act. *Better Built Homes & Mortgage Co. v. Nolte et al.*, 211 Mo. App. 601, 249 S. W. 743. But as applied to a court whose duty it is to supervise, in a large measure, the liquidation of a state bank within

its jurisdiction the words do not contemplate the court's approval as a purely ministerial act or duty. The words as here used call for the exercise of judicial discretion and determination, a hearing and judgment by the court passing on the matter before it. 6 C. J. S., Approve, p. 129."

In the request it states that the city council repealed an ordinance granting such power of appointment to the mayor and took away the mayor's authority to appoint any other officer except the street commissioner. In reading the authorities set out heretofore in this opinion, it has been the unanimous opinion of the different courts that the mayor has the power to appoint, under Section 6879, supra, the street commissioner and any other officer authorized by ordinance to appoint. Some of the cases even go so far that they authorize the mayor to appoint a city engineer where no such office had ever been authorized by an ordinance of the city council.

Section 7442, R. S. Missouri 1939, reads as follows:

"Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

Under the above section any ordinance passed by a city council which would nullify the state law would be absolutely void. It was so held in the case of John Bardenheier Wine & Liquor Co. v. City of St. Louis, 135 S. W. (2d) 345, par. 2, where the court said:

"We examine first the assignment that the section of the ordinance mentioned is invalid because in conflict with the provisions of the state liquor control act, and particularly sections 21 and 25 thereof, Mo. St. Ann. sections 4525g--23, 4525g--29, p. 4689. The rule that municipal ordinances regulating subjects, matters and things upon which there is a general law of the state, must be in harmony with the state law (Sec. 7289, R. S. '29, Mo. St. Ann. section 7289, p. 5874; Ex parte Tarling, Mo. Sup., 241 S. W. 929) is not controverted by respondents. * * * * *

Also, the same holding was held in State ex rel. Nigro v. Kansas City, 27 S. W. (2d) 1030, 325 Mo. 95.

CONCLUSION

In view of the above authorities it is the opinion of this department that under Section 6733, R. S. Missouri 1929, which is now Section 6879, R. S. Missouri 1939, the mayor only has the power of appointment and the majority of the members elected to the city council can only consent and approve his appointment.

It is further the opinion of this department, in view of the cases herein set out, that the mayor only can appoint, not only the street commissioner but also any other officer as he may be authorized by ordinance to appoint.

It is further the opinion of this department that the ordinance passed by the city council which repealed an ordinance which granted the mayor the power to appoint non-elective city officers other than the street commissioner, is absolutely void for the reason that it cannot be harmonized with the state law as set out in Section 6879, supra.

Respectfully submitted

APPROVED:

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