

CITY COUNCILMEN: (1) In cities less than ten miles from
SPECIAL ROAD DISTRICT: county court councilmen cannot vote for
road commissioner by proxy. (2) Council-
men and other officers may change vote for
commissioner prior to final appointment by
order of record.

February 8, 1940

Honorable W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

2-8
FILED
73

Dear Sir:

We acknowledge receipt of your letter requesting an
opinion from this department, which reads as follows:

"On February 5, in accordance with
Section 8026 R. S. Mo. 1929, the mayor
and members of the city council of the
City of DeSoto met with the county court
at Hillsboro to elect a commissioner for
the DeSoto Special Road District. The
City of DeSoto is nine miles from Hillsboro,
the county seat.

There were two candidates for the position,
namely Davidson and Lorenz. On the first
ballot the vote was Davidson 6, Lorenz 6.
However, one of the votes for Lorenz was
a vote by proxy. The proxy vote was by a
councilman who was ill and unable to attend.
So you can see that without the proxy the
vote would have been Davidson 6, Lorenz 5.

A second vote was then taken and on the
second ballot the vote was Davidson 5,
Lorenz 7, counting the proxy. Who was
elected? Is the proxy a proper vote in
this case?"

Section 8026, R. S. Mo. 1929, reads in part as follows:

"The mayor and members of the city council of any city or town within any special road district thus organized, together with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed district shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; * * * * * Provided, that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk."

From the above statute, it is plain that the mayor and members of the city council of a city within a special road district, organized under provisions of Article IX, Chapter 42, R. S. Mo. 1929, together with the members of the county court, at a meeting to be held in the county court room in February of each year, shall appoint a commissioner for three years by order of record to be kept by the county clerk. According to your letter at the meeting held at Hillsboro to elect a commissioner for the DeSoto special road district, a Mr. Davidson and a Mr. Lorenz received six votes each on the first ballot, but one of the votes for Lorenz was by proxy for a councilman, who was unable to attend.

46 C. J., Section 291, page 1033, states:

"An officer, to whom a discretion is entrusted, cannot delegate the exercise thereof, * * "

It is plain that the officers in question, in selecting a commissioner, are exercising a discretion vested in them by law. Furthermore, Section 8026, supra, by providing a method for a member of the city council to vote by not being present when the city is located a greater distance than ten miles from the meeting place, clearly evidences a legislative intent that a councilman cannot vote unless he is present under any other circumstances. However, Section 8026, supra, does not provide for the election of a commissioner, but for his appointment by an order of record to be kept by the county clerk. When the judgment or discretion of an executive officer has been completely and finally exercised in the performance of the specific duty, the act performed is beyond his review or recall. 46 C. J. Section 292, page 1033. However, if such discretion is not completely and finally exercised, it necessarily follows that his acts can be reviewed and recalled. That Davidson was not finally appointed after the first ballot is evidenced by the fact that he was not appointed by order of record and entered by the county clerk, and that a second vote was taken.

February 8, 1940

It is evident from your letter on the second ballot one of those present changed his vote, as well as the proxy vote which gave Lorenz a majority without counting the proxy vote which, in our opinion, should not be counted. If the majority so voting for Lorenz caused such appointment to be made of record by the county clerk, then we think action was final and that Lorenz was legally appointed as commissioner. If the appointment has not been finally completed by an order of record as required by Section 8026, supra, we suggest that another meeting could be held to appoint a commissioner within the terms of Section 8026 in the manner outlined above.

CONCLUSION

In view of the above, it is the opinion of this department that a councilman of a city in a special road district, when such city is not located at a greater distance than ten miles from the meeting place of the county court, can not vote for a road commissioner by proxy.

It is our further opinion, under the facts stated in your letter, that Davidson, although he had a majority of those present on the first ballot, was not finally appointed commissioner, within the meaning of Section 8026, unless his appointment was entered of record by the county clerk before the officers there present changed their votes.

It is the further opinion of this office that Lorenz was appointed if a majority of those present voted for him and caused the appointment to be entered of record by the county clerk. If the appointment has not been finally completed by an order of record, then a majority of those present and entitled to appoint may still appoint a commissioner as provided in Section 8026, supra.

Very truly yours,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RT