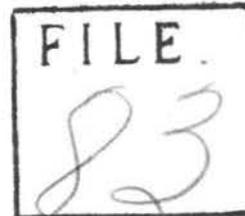


SPECIAL ROAD DISTRICT: Number of commissioners and method of their selection in "eight mile" road district.

April 10, 1942

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Hon. Robert W. Smart
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri



Dear Sir:

Under date of April 8, 1942, you wrote this office requesting an opinion, as follows:

"The Monett Special Road District, being a special district formed under the provisions of Article 9, Chapter 42, R. S. 1939, has been operating with four commissioners whereas the law prescribes that the number shall be three. This situation probably arises from the fact that the greater portion of the district lies in Barry County, the smaller portion lying in Lawrence County and contributing about \$1400 in taxes to the whole district. The City Council of Monett has apparently certified three names to the County Court of Barry County annually for the selection of one new commissioner and has certified the same number of names to the County Court of Lawrence County for the selection of a commissioner. One individual served for a period of twenty three consecutive years as a commissioner from the Lawrence County portion of the district but has died and the three commissioners in the Barry County portion of the district refuse to recognize as a legal commissioner the individual who was appointed as his successor.

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"It is readily apparent that the law makes no provision for four commissioners. I would appreciate your opinion as to the proper procedure in appointing commissioners in such a district when it lies in two counties. I would also appreciate your opinion as to the proper procedure for the County Court to follow in the event the Mayor and Council fail or refuse to certify the three names from which the new commissioner is to be selected annually, as provided in Section 8675, R. S. 1939."

There appears to be some inadvertent typing mistakes in your letter. It states the Monett Special Road District is organized under the provisions of Article 9, Chapter 42, R. S. Mo. 1939. Inasmuch as Chapter 42 relates to brokers and has no Article 9 we are assuming the typist made a mistake and struck a 2 instead of a 6, as Chapter 46 relates to Roads and Bridges; and we are assuming further that a mistake was made in the number of the Article given, for Article 9 of this Chapter pertains to Highway Engineers, while Article 10 relates to Special Road Districts. And this opinion is written on the assumption the Monett Special Road District was organized under the provisions of Article 10, Chapter 46, R. S. Mo. 1939. Section 8675, mentioned in your letter is found in this Article and Chapter, and is 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 dis-

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; all such commissioners shall be resident taxpayers of the district, and shall serve until their successors are appointed and qualified, vacancies to be filled as original appointments are made. Resignations shall be to the county clerk. Removal from the district shall create a vacancy. Such commissioners, before entering upon the discharge of their duties, shall take oath of office, to be administered by the clerk of the county court: 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."

(Underscoring ours.)

This section provides for the appointment of the three commissioners and when the territory of the district is in

more than one county, which is made possible by the provisions of Section 8708 of the same Article and Chapter, then each additional county in which there is territory of the district is authorized by this section to appoint one commissioner to serve with the three commissioners. The following extract is quoted from Section 8708, at l. c. 2288, right hand column:

" * * * If any territory added to any such original district be in any county outside of the county of such original district, each county outside of such original district may appoint one road commissioner to act with the commissioners appointed in the county of the original district. Such commissioners so appointed outside of the county of the original district shall serve for a term of three years from the date of such appointment, and until their successors shall be appointed and qualified. Such commissioners shall be resident taxpayers of such added territory in such county of their appointment. Except as herein provided, such commissioners shall be governed by this article. No change shall be made in the number of commissioners appointed by the county of the original district or in the manner of their appointment. * * * * "

(Underscoring ours.)

The district as originally organized was wholly in Barry County and later the portion of land in Lawrence County was taken into the district. (See case of State ex rel. Monett Special Road District v. Hackmann, 278 Mo. 602.)

The foregoing is the authority for four commissioners in the district.

In the event of a failure or refusal of the Mayor and members of the City Council of any city or town within the

district to attend the meeting for selecting a director, if no meeting was held the holding officer at the time would continue to function. Section 8675, supra.

Section 8675, supra, directs how, by whom and the month the election for Commissioner shall be had in each year after the organization of the district. In the case of *State ex inf. Holt, ex rel. Jones v. Meyer*, 321 Mo. 859, 12 S. W. (2d) 489, this section was before the Supreme Court and it was ruled that the Mayor, Councilmen and members of the County Court are each entitled to one vote when present or when the Mayor and Councilmen certify their selections. The section does not provide how many persons must be present or vote by certificate to constitute a quorum for the purpose of electing a commissioner.

A "quorum" is such a number of the members of a body as is competent to transact business in the absence of other members. *Morton v. Talmadge*, 144 S. E. 111, 166 Ga. 620.

Absent a provision as to what constitutes a quorum a majority of the body is, under the common law, required to constitute a quorum. *Seiler v. O'Malley*, 227 S. W. 141-2, 190 Ky. 190; see also *West v. Stephenson*, 151 S. E. 853-5, 108 W. Va. 545; *Ex parte Willocks*, N. Y. 7 Cow. 402, 17 Am. Dec. 525; *Gumaer v. Cripple Creek T.T. & M. Co.*, 90 Pac. 81, 40 Colo. 81.

This office does not have knowledge as to the number of Councilmen in the City of Monett, but if the Mayor and Councilmen by remaining away or failing to certify their choices for commissioner would cause the meeting to have in it fewer votes than a majority of the whole number, then the meeting could take no valid action and the commissioners then serving would continue to serve.

If a majority of the whole number were present the selection of a commissioner could be proceeded with.

In the event of a continued failure or refusal of the Mayor and Councilmen they could be compelled by mandamus to attend or certify in their preferences.

As to the manner in which the commissioners shall be selected in a road district of this type when it includes

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land in more than one county the three commissioners to be selected from the county where the district was originally organized must be selected in accordance with the manner prescribed in Section 8675 referred to in your letter. The authority for an additional commissioner, or commissioners, if territory from more than one county has been taken into the district, which is found in Section 8708, and herein set out, specifically provides the number of commissioners from the county of original organization and their method of selection shall remain the same. But the Statute is indefinite as to the manner of selection of the commissioner or commissioners from the added county or counties.

Attention is called to the following language from Section 8708:

"* * * *, each county outside of such original district may appoint one road commissioner to act with the commissioners appointed in the county of the original district. * * * * *

(Underscoring ours.)

The three commissioners are appointed not by the county or city or town, but by a group of designated persons and it could be urged this same group should also appoint the additional commissioner or commissioners from the other county or counties. This would appear to be the logical thing to do in connection with the appointment of an additional commissioner, or commissioners.

The primary purpose of statutory construction is to ascertain the intent of the legislature from the language used, if possible. *Cummins v. Kansas City Pub. Serv. Co.*, 66 S. W. (2d) 720, 334 Mo. 672; *Wallace v. Woods*, 102 S. W. (2d) 91, 340 Mo. 452. At no place did the legislature indicate the additional commissioner or commissioners should be appointed in the same manner or by the same group. And the language used, to the mind of the writer, indicates a different intention. As pointed out, the section provides each county may appoint, and it further says except as herein provided the commissioner shall be governed by the Article;

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and further provides there shall be no change in the manner or time of appointing the three commissioners. This would seem to indicate the intention of the legislature to have the additional commissioner or commissioners appointed in a different manner. As the section directs the appointment by the county without prescribing what agency of the county may make the appointment, the duty of making the appointment should fall on the county court, the county court being the managing body of the county.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

WOJ:CP