

July 1, 1975

OPINION LETTER NO. 134
Answer by letter-Klaffenbach



Honorable Earl L. Schlef
Representative, District 60
1672 Maldon Lane
Dellwood, Missouri 63136

Dear Representative Schlef:

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

"'In a Fourth Class City with an 8-man Board of Aldermen with one alderman absent, when the vote on passage of an ordinance rezoning property from a residential zoning category to a commercial category is three ayes, three nays, and one abstention and the Mayor votes aye to break the tie, does the ordinance pass?'"

You state that your question involves a fourth class city with an eight man board of aldermen.

Section 79.120, RSMo, provides in pertinent part as follows:

"The mayor shall have a seat in and preside over the board of aldermen, but shall not vote on any question except in case of a tie, . . ."

Section 79.130, RSMo, provides as follows:

"The style of the ordinances of the city shall be: 'Be it ordained by the board of aldermen of the city of, as follows:' No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the

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board of aldermen shall vote for it, and the ayes and nays be entered on the journal; and all bills shall be read three times before their passage. No ordinance shall be revived or reenacted by mere reference to the title thereof, but the same shall be set forth at length, as if it were an original ordinance. 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." (Emphasis added)

It is our view that in reaching a decision on this question it is not necessary to interpret the court decisions relating to cases where an additional vote is necessary to break a tie to pass a measure. For those interested in such cases, however, we cite Northwestern Bell Telephone Company v. Board of Commissioners of the City of Fargo, 211 N.W.2d 399, 402 (N.D. 1973) and Mullins v. Eveland, 234 S.W.2d 639, 641 (K.C.Mo.App. 1950).

We reach this conclusion for the following reason. Section 79.130, RSMo, requires a majority vote of the members elected to the board of aldermen to enact an ordinance. A majority of those elected in this case would be five members voting aye. Since only three members have voted aye, the vote of the abstaining member, if counted as aye, would not suffice to pass the measure. If the abstaining member was so counted, there would be no tie and the mayor would not be entitled to vote. If the abstaining member was not so counted, the vote of the mayor, even if proper, would not be sufficient to pass the measure.

There is no authority that we are aware of in these premises which would permit the abstaining member to be counted as an aye vote and also permit an aye vote by the mayor to be counted. For these reasons, an analysis of the cases serves no purpose in this instance since the measure did not pass because there were insufficient votes for passage no matter which legal theory is followed.

We are aware of the holding of the St. Louis Court of Appeals in the case of Krug v. Village of Mary Ridge, 271 S.W.2d 867 (St.L. Ct.App. 1954), in which case the court held that an ordinance was void when the record showed that all five trustees were present at the meeting at which the ordinance was allegedly passed but only

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four aye votes were listed as being cast for the ordinance, but we do not base our holding on your question on the reasoning found in such case.

Yours very truly,

JOHN C. DANFORTH
Attorney General