

April 1, 2008

Dear Mayor Pro Temp:

You have the following questions:

1. Can the mayor of your City vote?
2. Can the mayor of your City make motions?

The City Charter is silent on the authority of the mayor to vote and make motions. However, the mayor appears to be a “member” of the board of mayor and aldermen, and on that basis can probably vote and make motions. But that answer is uncertain enough that the city should amend its charter to make the mayor’s authority in those areas more clear. The amendment could simply give the mayor a “voice and a vote” on the board of mayor and aldermen.

I will analyze both questions together.

A Tennessee mayor’s right to vote, or to perform other legislative functions, including making motions, is governed by Reeder v. Trotter, 215 S.W. 400 (1919). In that case, the Tennessee Supreme Court, citing two different authorities, said the following:

Dillard on Municipal Corporations, Vol. 2, section 513:

The question of whether the mayor of a city shall be regarded as a member of the council is one of legislative intent. It is within the power of the legislature to confer upon him the functions of a member of the council in every respect, and if the legislation on that subject calls for that construction he will be so regarded. But in American Jurisprudence the mayor is not necessarily a constituent part of the legislative power of the municipality. His functions are intended to be, and usually are, of an executive or administrative character, and *whatever power he may at any time exercise in the legislative functions of a municipal government is never to be implied, but must find its authority in some positive statute.* [Emphasis is mine.] In this view, in the absence of a statute necessarily implying that he has the same standing in the council, as any other member, *and particularly when his powers are expressly stated to be to preside at meetings and to give a casting vote in case of a tie, he is only a member of the council sub*

modo, and to the extent of the powers specially committed to him.
[Emphasis is mine.] [At 401]

The New Hampshire Supreme Court case of Cate v. Martin, 70 N.H. 135, 46 Atl 54 (1900):

The mayor of a city is not an alderman or councilman of the city in a general or proper sense of those terms...He is not a member of either branch [legislative or administrative] of the city council unless expressly made by such law;...and when this is the case, it is to the extent of such powers as are specially committed to him, and no further that he is a part of the city council. He is not one of its own members in the sense of which an alderman is; ...nor has it been understood that he is to be counted in determining the presence of a quorum... Applying the principles of these authorities (and none have been found to the contrary) to the statutory provisions relating to the mayor and aldermen cited in behalf of the defendants, the result is indubitably to establish the proposition that while the mayor is a constituent part of the...board for some special purposes, he sits and acts in the board not in the capacity of an alderman, but in the capacity of an ex officio presiding officer, and exercises those powers only which have been specially committed to him as the chief executive officer of the city. [At 402]

Reeder v. Trotter must be carefully read, especially the two quotes from *Dillard on Municipal Corporations*, and the New Hampshire case of *Cate v. Martin* because they are subtly different. Under *Dillard on Municipal Corporations*, the question of whether the mayor is a member of the city council is one of legislative intent, and if the legislature intended to make him a member of the city council for all purposes, he will be treated as such, the corollary of which is that the legislature can make him a member of the city council only for some purposes. That quote provides no hard fast rules for determining whether the legislature intended to make a mayor a member of the city council for all purposes, but it does give us some strong hints about when the mayor is *not* a member of the city council. It tells us that the mayor is generally an executive, and that “[W]hatever power he may at any time exercise in the legislative functions of a municipal government is never to be implied, but must find its authority in some positive statute. In this view, in the absence of a statute necessarily implying that he has the same standing in the council as any other member, and if he has the express powers to (1) preside at meetings, and (2) vote to break ties, he is probably not a member of the city council, except to the extent of the powers given to him in the charter..”

The *New Hampshire case of Cate v. Martin*, seems to draw a firmer line about the

powers of the mayor. He is not a member of the city council unless a law expressly so provides. But even where a law provides that he is a member of the city council, "it is to the extent of such powers as are specially committed to him, and no further that he is part of the city council." In fact, the Reeder v. Trotter Court supports that case with the case of Jacobs v. San Francisco, 100 Cal. 121, 34 Pac. 630, in which the California Supreme Court said:

The mayor is not ***necessarily a constituent part of the legislative power of the municipality. His functions are of an executive or administrative character.*** Whatever power he may at any time exercise in the legislative functions of a municipal government is never to be implied, but must find its authority in some positive statute. [At 401]

It does not appear to me that Reeder v. Trotter tries to reconcile the two different positions of *Dillard on Municipal Corporations* and of *Cate v. Martin*. But it does appear to me that it adopts the *Dillard on Municipal Corporations* position, declaring:

Where the presiding officer is a member of the body, and, as such member, permitted to vote with the other members, the fact that he was chosen to act as presiding officer would not deprive him of that privilege. For example, in a county were the county court is presided over by a county chairman, he, *being a member of said court, clearly has the right to vote....* In our state legislature, each body chooses one of its members as speaker. The Constitution is silent as to their right to vote, but being members they unquestionably have the right, and have always voted as other members....Not a single case has been brought to our attention in which it has been held that a presiding officer of any organization, in the absence of express authority, has a right to vote where he is not a member of such organization. [At 215 S.W. 401]

Where does the mayor stand with respect to the question of whether he is a member of the board of mayor and aldermen? In Reeder v. Trotter the county judge voted to break a tie on a vote by the justices of the peace to issue bonds. The Court held that the county judge did not have the authority to vote because, the office of county judge was created by Chapter 148 of the Acts of 1887, and:

It is conceded that none of the legislative enactments, pertaining to the office of the county judge, expressly constitute him a justice of the peace, or a member of the county court, or authorize him to vote upon any measure coming before the said court. [At 400]

I have looked at Chapter 148 of the Acts of 1887, and it is interesting that ' 4 of that Act provides:

That all the powers and jurisdictions now vested in and belonging to the Chairmen of the County Courts of this state, be and the same are hereby, conferred upon the County Judge of Knox County, that is hereafter to be elected by the qualified voters of Knox County, and the office of Chairman of Knox County Court is hereby abolished from and after the first Monday in September, 1888.

Apparently, the fact that under Chapter 148, Acts of 1887 vested all the powers and jurisdiction of the chairmen of the county courts (who apparently were members of the county court and as such members had the right to vote) in the Knox County Judge, did not make the county judge a member of the county court, or otherwise authorize him to vote on the county court. That Act certainly did not expressly constitute him a justice of the peace. But if the Act had made him a member of the county court, he could have voted, even in the absence of a statute that expressly gave him the right to vote.

Nowhere in the City Charter is the mayor expressly given the right to vote. For that reason, his right to vote rests upon the question of whether he is a member of the board of mayor and aldermen. Section 3 of the City Charter provides:

That the legislative and supervisory power of the city is vested in the Board of Mayor and Aldermen elected under this charter. The Board of Mayor and Aldermen shall consist of the Mayor and six (6) members, chosen by the qualified voters of the city.

However, it is not likely that denominating the mayor and aldermen as the “Board of mayor and Aldermen” vested with “legislative and supervisory power of the city...,” in Section 3 of the charter is enough by itself to make the mayor a member of the board of mayor and aldermen, or to otherwise necessarily imply the right of the mayor to vote or to make motions. In fact, we will see below in the unreported case of Anderson v. Town of Gainesboro that repeated references in the charter to the collective “board of mayor and aldermen” and similar language was not enough to make the mayor a member of the board. Under Section 7 of the charter, the mayor has the “supervisory power” to “see that all the ordinances of the city are duly enforced, respected and observed...” Under Sections 7 and 8 of the charter, the mayor has either the “supervisory” or “legislative” power to make various appointments and removals from office. As is exhaustively pointed out in Richardson v. Young, 122 Tenn. 471 (1900), appointments to office can be either executive or legislative functions. Under Section 7 of the charter, the mayor is also the presiding officer at meetings of “the Mayor and Aldermen.” All those supervisory and legislative functions can be vested in, and exercised by, the Board of Mayor and Aldermen, through the aldermen and through the mayor, without the mayor being a “member” of that board,

and without the mayor having a vote. The same is true of the other legislative and administrative powers the mayor is given under the charter.

But the remainder of the charter is replete with provisions in which the collective “Board of Mayor and Aldermen” is given the authority to take certain actions which involve voting. I have not listed them, except for the few below that seem to particularly imply that the mayor is a member of the board of mayor and aldermen:

- Section 16B, second Para:

In the event that the city judge...should die during office or should resign during office then a successor shall be selected by the Board of Mayor and Aldermen of the City to fill out the unexpired term, by nomination and election, that ***the nominee polling the largest number of votes by the Board of Mayor and Aldermen of the City*** to be elected to fill said unexpired term.

- Section 16: “There is created the office of city constable and/or chief of police; he shall be *elected by the Board of Mayor and Aldermen* and shall hold office at the will and pleasure of the Board.”

-Section 15: “The office of recorder for the city is hereby created. The recorder shall be elected by the Board of Mayor and Aldermen of the city and shall hold office at the will and pleasure of the board.”

When the whole charter is read together it repeatedly and consistently speaks frequently of the “Board of Mayor and Aldermen” in connection with actions that require a vote of some kind. Section 16B, above seems to me a particularly compelling indication that the Legislature intended that the mayor be a general member of the Board of Mayor and Aldermen.

But that conclusion is not a slam dunk one. Section 7 of the charter lists the powers of the mayor, among which is “*It shall be the duty of the Mayor to preside at all meetings of the Mayor and Aldermen.*” The mayor could obviously perform that legislative function without the right to vote. But the two tests indicated in Reeder v. Trotter, through Dillard on Municipal Corporations, for determining that the mayor is *not* a member of the board of mayor and aldermen is that the charter expressly makes him (1) the presiding officer at city council meetings, and (2) gives him the right to vote only in cases of ties. The mayor meets the first test under the City Charter, but does not meet the second test. Presumably, if he had also met the second test, a very strong argument could be made that, in spite of all the language in the charter speaking of the collective “board of mayor and aldermen” he is not likely a member of the board. The test of whether the charter expressly gives the mayor the right to vote only in cases of ties appears to be a singularly important test. If the charter expressly gives the mayor the right to

vote only in the cases of ties, that strongly implies that the mayor has no general right to vote.

As indicated above, the *Cate v. Martin* position appears to be stricter than the one contained in *Dillard on Municipal Corporations*. *Cate v. Martin* stands for the proposition that even if the legislature makes the mayor a member of the board of mayor and aldermen, it does so only to the extent of the legislative functions expressly assigned to him by statute; he derives no implied power to vote by virtue of being a member of the board.

That brings me to a cautionary note. I can find only one case subsequent to Reeder v. Trotter that has addressed the question of whether the mayor has a right to vote where the charter did not expressly give him that right. In the unreported case of Anderson v. Town of Gainesboro, 1992 WL 33893 (Tenn. Ct. App.), the chancellor held that the mayor derived an implied right to vote for all purposes from the fact that: the charter provided that: there should be a mayor and three aldermen; the charter referred to the governing body as the mayor and board of aldermen or as the board of mayor and aldermen; and the charter made twelve references to the mayor and board of aldermen, and five references to the board of mayor and aldermen. But the chancellor ordered a rehearing in which he reversed himself. Relying on Reeder v. Trotter (which had initially escaped him), he held that the mayor did not have the right to vote, reasoning “that the charter did not expressly authorize the mayor to vote on any matters except in the case of a tie in the election of Mayor or Alderman.” [At 2] The Tennessee Court of Appeals upheld the chancellor, declaring Reeder v. Trotter the controlling case, and quoting the provisions of *Dillard on Municipal Coronations* and of the New Hampshire case of *Cate v. Martin*. That case does not indicate whether the mayor was the presiding officer, but that appears not to have made any difference. The Court simply reasoned that:

If the mayor of a city is to be allowed to vote as member of the board of mayor and aldermen, he must be given that authority expressly and not by implication. There is nothing in the charter of the Town of Gainesboro or any amendment thereto which expressly gives the mayor the authority to vote. [At 3]

That language appears to reflect the *Cate v. Martin* position. It speaks of the mayor being allowed to vote “as a *member* of the board of mayor and aldermen” but only if the charter expressly gives him the authority to vote; even if he is a member of the board of mayor and aldermen (the court made no specific finding on that point) he must derive whatever legislative powers he has from a positive statute. If Anderson v. Gainesboro were to be applied to the mayor, presumably the mayor could be found not to have the right to vote (or to make motions) because those legislative rights are not expressly given to him in the charter.

In theory, unreported cases do not carry the precedential weight of reported cases, but Anderson v. Town of Gainesboro is still an important case because it should give the city cause to reflect on the question of whether it should amend its charter to clear up the questions of

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whether the mayor can vote or make motions.

Sincerely,

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