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October 6, 1992

FILE NO. 92-020

ELECTIONS:
In-Person Absentee Voting
at Office of Municipal Clerk

Honorable Philip J. Rock
President
Illinois State Senate
State House, Room 327
Springfield, Illinois 62706

Dear Senator Rock:

I have your letter wherein you inquire whether municipal clerks, in municipalities which are not under the jurisdiction of a board of election commissioners, are required to conduct in-person absentee voting in their offices immediately prior to an election. In addition, you inquire whether, in the event that a municipal clerk refuses to conduct such voting, the county clerk may designate an alternate location to accommodate voters. For the reasons hereinafter stated, it is my opinion that section 19-2.1 of the Election Code (Ill. Rev. Stat.

1991, ch. 46, par. 19-2.1) imposes a mandatory duty upon municipal clerks to conduct in-person absentee voting unless they have filed written waivers, as permitted by statute, or do not maintain regularly scheduled working hours at a designated office other than a residence.

Section 19-2.1 of the Election Code provides, in part:

"At the consolidated primary, general primary, consolidated, general and nonpartisan elections, electors entitled to vote by absentee ballot under the provisions of Section 19-1 may vote in person at the office of the municipal clerk, if the elector is a resident of a municipality not having a board of election commissioners, or at the office of the township clerk or, in counties not under township organization, at the office of the road district clerk if the elector is not a resident of a municipality; provided, in each case that the municipal, township or road district clerk, as the case may be, is authorized to conduct in-person absentee voting pursuant to this Section. Absentee voting in such municipal and township clerk's offices under this Section shall be conducted from the 22nd day through the day before the election.

Municipal and township clerks (or road district clerks) who have regularly scheduled working hours at regularly designated offices other than a place of residence and whose offices are open for business during the same hours as the office of the election authority shall conduct in-person absentee voting for said elections. Municipal and township clerks (or road district clerks) who have no regularly scheduled working hours but who have regularly designated offices other than a place of residence shall conduct in-person absentee voting for said elections during the hours of 8:30 a.m. to 4:30 p.m. or 9:00 a.m. to 5:00 p.m., weekdays, and 9:00 a.m. to 12:00 noon on Saturdays, but not during such hours as the office of the election authority is closed, unless the clerk files a written waiver with the election authority not later than July 1

of each year stating that he or she is unable to conduct such voting and the reasons therefor. Such clerks who conduct in-person absentee voting may extend their hours for that purpose to include any hours in which the election authority's office is open. Municipal and township clerks (or road district clerks) who have no regularly scheduled office hours and no regularly designated offices other than a place of residence may not conduct in-person absentee voting for said elections. The election authority may devise alternative methods for in-person absentee voting before said elections for those precincts located within the territorial area of a municipality or township (or road district) wherein the clerk of such municipality or township (or road district) has waived or is not entitled to conduct such voting. In addition, electors may vote by absentee ballot under the provisions of Section 19-1 at the office of the election authority having jurisdiction over their residence.

* * *

(Emphasis added.)

The balance of section 19-2.1 sets out the procedures to be followed in conducting such absentee voting.

Section 19-2.1 divides municipal and township clerks (or road district clerks) into three classes: those who maintain regularly scheduled working hours at a regularly designated office; those who do not maintain regularly scheduled working hours but who do have a regularly designated office; and those who have neither regularly scheduled working hours nor any regularly designated office other than a place of residence. Under the plain language of section 19-2.1, those in the first class "shall conduct" in-person absentee voting during the 22 days immediately preceding an election; those in

the second class "shall conduct" in-person absentee voting unless they file a waiver with the election authority by July 1, of the pertinent year; and those in the third class "may not conduct" in-person absentee voting.

The word "shall" is generally regarded as mandatory, but it does not have a fixed or inflexible meaning, and it can be given a directory meaning, depending upon the legislative intent. (Andrews v. Foxworthy (1978), 71 Ill. 2d 13, 21.) The rule of statutory construction employed in determining whether to construe a statute providing that a public officer "shall" act as mandatory or directory was stated in People v. Jennings (1954), 3 Ill. 2d 125, 127, quoting French v. Edwards (1871), 80 U.S. (131 Wall.) 506, 20 L. Ed. 702, as follows:

" * * *

* * * 'There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importting [sic] that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer

in all such cases is limited by the manner and conditions prescribed for its exercise.'

* * *

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The word "shall" in a statute will be construed as mandatory rather than permissive where a right or benefit depends upon giving a mandatory meaning to the word. (Newkirk v. Bigard (1985), 109 Ill. 2d 28.) Thus, in People v. Jennings, it was held that a statute requiring the publication of assessment lists was mandatory because it affected the rights of taxpayers. See also Andrews v. Foxworthy (1978), 71 Ill. 2d 13, wherein the supreme court held that timely publication of assessment lists was a prerequisite to the validity of increased assessments.

Provisions allowing absentee voting protect the right to vote of persons who, because of specified circumstances, cannot be present at the polls on election day. (Ill. Rev. Stat. 1991, ch. 46, par. 19-1.) The right to vote is a basic, fundamental right. (McDonald v. Bd. of Election Comm'rs (1969), 394 U.S. 802, 807, 89 S. Ct. 1404, 1407, 22 L. Ed. 2d 739; Reynolds v. Sims (1964), 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506.) Although the Election Code permits alternatives to in-person absentee voting at the office of the municipal clerk (e.g., by mail or at the office of the election authority), section 19-2.1 nevertheless protects an important right which may, for at least some voters, be injuriously affected if that section is not given a mandatory construction.

A further indication of the mandatory nature of the duty to conduct in-person absentee voting is found in the provision permitting clerks who do not maintain regularly scheduled office hours to waive the requirement. The expression of one mode of action in a statute is generally construed to exclude any other mode of action, even though not expressly prohibited by negative words. (City Sav. Ass'n v. International Guaranty & Ins. Co. (1959), 17 Ill. 2d 609.) In this case, if the provision of in-person absentee voting was not mandatory, the waiver provision would be superfluous. Because the statute provides a method for certain clerks to be excepted from its requirements, it may be inferred that no other means is permitted.

A mandatory construction of section 19-2.1 allows the election authority to assume that municipal clerks will carry out their duty to conduct in-person absentee voting unless a waiver, where permitted, is filed by July 1. The filing of a waiver by the date specified further allows the election authority adequate time to exercise its discretion, pursuant to the second paragraph of section 19-2.1, to devise alternative methods for in-person absentee voting in those jurisdictions in which a waiver is filed or in which a clerk is not entitled to conduct such voting.

Therefore, for the reasons stated, it is my opinion that, in municipalities which do not have a board of election commissioners, municipal clerks who maintain regularly sched-

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uled office hours in regularly designated offices are required to conduct in-person absentee voting during the 22 days immediately preceding an election. Municipal clerks who have regularly designated offices, but who do not maintain regularly scheduled office hours, are required to conduct in-person absentee voting during the hours specified in section 19-2.1 unless they have filed waivers with the appropriate election authorities by July 1. Because these provisions are mandatory and enforceable, there should be no occasion for determining whether a county clerk may conduct in-person absentee voting at alternative locations in the event that a municipal clerk, who is under duty to conduct such voting, fails to do so.

Respectfully yours,

A handwritten signature in cursive script, appearing to read "Roland W. Burris".

ROLAND W. BURRIS
ATTORNEY GENERAL