



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

September 3, 2021

The Honorable Gary Fratesi
Alderman, City of Indianola
Post Office Box 269
Indianola, Mississippi 38751

Re: Meaning of “Latest Available Federal Census” as Used in Section 21-23-3

Dear Mr. Fratesi:

The Office of the Attorney General has received your request for an official opinion.

Background

The City of Indianola (the “City”) is in the process of appointing a new municipal court judge. According to your request, the official 2010 census showed the City having a population over 10,000, but the 2020 census estimates set that number at less than 10,000. The residency requirements for a municipal court judge under Mississippi Code Annotated Sections 21-23-3 and 21-23-5 vary based on population according to the “latest available federal census.”

Question Presented

Do the 2010 official census results or the 2020 census estimates constitute the “latest available federal census” as contemplated by Section 21-23-3?

Brief Response

Until the preliminary figures of the 2020 census become finalized and official, the official results from the 2010 census constitute the “latest available federal census” as contemplated by Section 21-23-3.

Applicable Law and Discussion

Section 21-23-3 provides, in relevant part:

In all municipalities having a population of ten thousand (10,000) or more, according to the latest available federal census, there shall be a municipal judge

and a prosecuting attorney, who shall be appointed by the governing authorities of the municipality at the time provided for the appointment of other officers. ... Except as otherwise provided in Section 21-23-5, a municipal judge shall be a qualified elector of the county in which the municipality is located and shall be an attorney at law.

...

Provided, however *the governing authorities of any municipality having a population in excess of ten thousand (10,000) persons according to the latest available federal census* and situated in a county having an area in excess of nine hundred thirty-five (935) square miles and having a county court may, in their discretion, follow the provisions as set out in Section 21-23-5 for municipalities having a population of less than ten thousand (10,000).

Miss. Code Ann. § 21-23-3 (emphasis added).

Section 21-23-5 provides:

In any municipality having a population of less than ten thousand (10,000) according to the latest available federal census, it shall be discretionary with the governing authorities of the municipality as to whether or not a municipal judge or a prosecuting attorney, or both, shall be appointed. *If the authorities of any municipality having a population of less than twenty thousand (20,000) according to the latest available federal census* appoint a municipal judge, he shall be an attorney licensed in the State of Mississippi or a justice court judge of the county in which the municipality is located. The mayor or mayor pro tempore shall not serve as a municipal judge.

Miss. Code Ann. § 21-23-5.

In a case of first impression, the Mississippi Supreme Court was faced with a question regarding similar language, “according to the latest federal census,” as it pertained to Section 67-1-14(2)(a), which, at that time, provided that a municipality with a population of “not less than seven thousand (7,000), according to the latest federal census” conduct an election related to whether such municipality could legalize the use, possession, and sale of alcohol within its corporate boundaries. *Kelly v. City of Aberdeen*, 680 So. 2d 208, 208–9 (Miss. 1996). The City of Aberdeen held such an election. The population the city used to justify holding the special election came from the official census figures of 1980 rather than the preliminary figures for the 1990 census.

The supreme court ruled that the 1980 figures were in fact the controlling figures by reason that:

[t]he legislature obviously included the words “according to the latest federal census” in order to avoid confusion and provide a definite benchmark for determining whether a municipality located in a dry county could legally conduct a local option election. As long as the census is subject to possible correction for

miscounts, which would have been the case had Aberdeen relied on [the preliminary figures], then there is the danger that a city would have to later declare the local option election invalid. Future election results based on preliminary numbers would merely be a source of intolerable inconvenience and confusion. To promote stability, uniformity, and the avoidance of confusion and duplicate efforts, municipalities must rely on the official results of the latest federal census

Kelly, 680 So. 2d at 209–10.

Consistent with the court’s reasoning and ruling in *Kelly*, it is our opinion that the official figures from the 2010 census constitute those of the “latest available federal census,” as contemplated by Section 21-3-3 and will remain such until the 2020 figures are finalized and made official by the Federal Census Bureau.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ *Abby Cummings*

Abby Cummings
Special Assistant Attorney General

OFFICIAL OPINION