OFFICE OF THE CITY ATTORNEY

OPINION NO. 91-12

TO: Honorable Mayor and Council

FROM: Stephen M. Kemp, City Attorney

DATE: October 21, 1991

SUBJECT: Legal Issues on Vacancy and Resignation

During the last few days several members of the Council have raised questions regarding Councilman Holland's statement of resignation in the October 8, 1991 Council meeting. In order to answer these issues, I have set forth a series of questions below, together with the legal citations for the answers.

QUESTION 1.

DOES RESIGNATION OF A COUNCIL MEMBER CREATE A VACANCY?

ANSWER:

Yes, resignation creates a vacancy. The Peoria City Charter states[1]:

> C. A vacancy in the office of Mayor or the Council shall exist, . . . when the respective elected official fails to qualify within thirty days after commencement of his term, dies, <u>resigns</u> . . .

QUESTION 2.

DOES RESIGNATION OF A COUNCIL MEMBER HAVE TO BE IN WRITING?

ANSWER:

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[1] Peoria City Charter, Article II, Section 13 C.

Generally, No. For state, county and special district officers, resignations must be in writing.[2] However, the state statute is silent on City Officers. If the state statute applies, then a resignation must be in writing.

In State v. Macias[3], the Court of Appeals held that the Mayor of Nogales was ineligible to serve in the office, as she was not a resident of the City. The Court decided the case on the provisions of the Arizona Constitution and did not address whether Title 38 applied to municipal officers.

The only citation on this issue is an Attorney General opinion[4]. This opinion applied the statutory provisions[5] to removal of city planning commission and board of adjustment members. The Attorney General reasoned that since the City Codes and Ordinances were silent, the provisions of Title 38 applied. In this situation, the provisions of Title 38 would require a written resignation and its acceptance.

Assuming Title 38 does not apply, in the case of the City of Peoria, the Code and Charter are silent on the issue of whether a resignation must be in writing. However, the common law recognized oral resignations, provided that they were lawfully accepted[6]. Therefore, a resignation need not be in writing.

QUESTION 3.

DOES AN ORAL STATEMENT OF RESIGNATION BY ITSELF, ABSENT ANY OTHER ACTION CREATE A VACANCY?

ANSWER:

No. Recently, this issue arose in the Town of Mammoth, Arizona. In that case the Mayor and Vice Mayor resigned in an open Council Meeting. The Town Attorney and the Arizona League of Cities and Towns General Counsel both opined that the oral resignations were not effective. A copy of this concurrence is attached to this memo.

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[2] See, Arizona Revised Statutes §38-291

[3] 162 Ariz. 316, 783 P.2d 255 (App. 1989)

[4] Ariz.Atty.Gen.Op. 86-059

[5] A.R.S. §38-295

[6] See, McQuillian's Municipal Corporation, 3d.ed. v.3, §12.125 at 576

I concur with their opinions for the following reasons. First, at common law a resignation must be presented and accepted in order for it to be effective[7]. The Washington Supreme Court noted the long standing common law rule that "acceptance of a resignation is necessary in order to relieve an officer of responsibility and to create a vacancy."

Second, if Title 38 applies to municipal public officers, then the statute[8] requires a written resignation and acceptance thereof. Finally, the Arizona Courts have continuously indicated that a resignation does not become effective until acceptance[9]. Therefore, an oral statement of resignation by itself, absent any other action does not create a vacancy on the City Council.

QUESTION 4.

DOES THE CITY COUNCIL HAVE TO ACT ON AN ORAL RESIGNATION IN ORDER TO MAKE IT EFFECTIVE?

ANSWER:

Yes. As noted in the League of Cities and Towns opinion and under the common law rule, acceptance of the resignation by the City Council is necessary in order to relieve the current council member of their duties and to create a vacancy. An attached form of resolution (Exhibit "B") is the format by which the City Council would accept the resignation and declare the seat vacant.

QUESTION 5.

HOW LONG DO THE MAYOR AND COUNCIL HAVE TO FILL A COUNCIL VACANCY?

ANSWER:

The Council has thirty days from the date of vacancy to fill the vacancy by appointment[10]. For example, if the Mayor and Council accepted the resignation on November 12, 1991, then the vacancy would have to be filled no later than December 12, 1991, or a special election would have to be called to elect a replacement.

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[7] See, State of Washington ex rel Royse v. Superior Court, 46 Wash. 616, 91 P. 4, (1907)

[8] A.R.S. §38-291

[9] Cragin v. Frohmiller, 43 Ariz. 251, 30 P.2d 247 (1934)

[10] Article II, Section 13, D

QUESTION 6.

WHAT WOULD BE THE TIME FRAME FOR FILLING A COUNCIL VACANCY BY SPECIAL ELECTION?

ANSWER:

Assuming that the vacancy occurs on November 12, 1991, the following schedule would apply:

1. Council adopts call for special election on December 13, 1991.

2. Nominating Petitions may be filed with City Clerk from December 28, 1991 - January 27, 1992.

3. Primary Election -- April 14, 1992.

4. General Election, if necessary -- June 16, 1992.

QUESTION 7.

WHAT ARE THE REMEDIES IN THE EVENT OF A TIE VOTE ON COUNCIL?

ANSWER:

Under Roberts Rules of Order[11], a tie vote acts as a negative vote since a majority of those present and voting are required to adopt a motion, resolution or ordinance. Therefore the following would occur.

1. A tie vote on the issue of accepting a resignation would act as a rejection of the resignation and the council member would continue to hold their office.

2. A tie vote on the issue of a motion to deny a seat to a council member who may have resigned would act as a defeat of the motion and the council member would retain their seat.

3. A tie vote on the issue of the nomination of a candidate to fill a vacancy would result in the defeat of that nomination.

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[11] Roberts Rules of Order, 1990 ed. §43

QUESTION 8.

WHO IS THE JUDGE OF THE QUALIFICATIONS OF COUNCIL AND ITS MEMBERS?

ANSWER:

Pursuant to the City Charter[12], the City Council is the judge of the qualifications of its members to sit upon the Council, subject to review by the Superior Court.

QUESTION 9.

WHAT IS THE REMEDY IF A PARTY IS DISSATISFIED WITH THE COUNCIL DECISION ON THE RESIGNATION AND VACANCY?

ANSWER:

The remedy under the law of Arizona is a Special Action proceeding[13] in the Superior Court. This type of action is handled in an accelerated manner. The Superior Court will ultimately issue a Court Order resolving the matter, subject to the right of appeal.

In conclusion, as indicated by the recent Town of Mammoth case, a resignation is effective only upon presentation and acceptance by the City Council. Should you have any further questions, please do not hesitate to contact me.

Sincerely,

OFFICE OF THE CITY ATTORNEY

Stephen M. Kemp
City Attorney

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[12] Peoria City Charter, Article II, Section 10

[13] This type of action is known in latin as a "Quo Warranto" or asking the court "by whose authority" an act was made.