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OPINION NO. 2011-01

TO: Stephen M. Kemp, City Attorney
FROM: Fredda J. Bisman, Esq.
Mariscal, Weeks, McIntyre & Friedlander, P.A.
Special Counsel
DATE: May 19, 2011
SUBJECT: Application of Arizona Resign-to-Run Law

QUESTION: Does the Arizona Resign-to-Run law apply in the following hypothetical situation:

An incumbent member of the City Council (“Councilmember”) was elected to represent District A, for a term expiring in 2015. As a result of redistricting, Councilmember’s residence will no longer be within District A, and will be included in District C, which will elect a new representative in the 2012 election, for a term commencing in 2013. Councilmember intends to run for the District C seat in the 2012 election. Under the applicable statutes, Councilmember would be required to file nomination papers in 2012 to run for District C.

Since Councilmember will not be in the last year of his term of office in 2012, does the Arizona Resign-to-Run law compel Councilmember to resign the seat in District A, in order to run in District B?¹

OPINION:

We have not located any cases dealing with the applicability of a resign-to-run law under the circumstances presented by the hypothetical facts addressed here. While resign-to-run laws have been upheld in a variety of other circumstances, a good argument can be made that the Arizona law was not intended to apply, and should not apply, to this hypothetical.

¹ We assume for purposes of this memo that Councilmember may serve out his existing term in District A, but will not be eligible to run again to represent that district when the current term expires. Although we have not separately researched, and have not been requested to address, this issue, we understand that this assumption is consistent with case law from several jurisdictions with similar statutory provisions.

As discussed in more detail below, resign-to-run laws have generally been upheld by the courts. However, none of the cases that we have located dealt with the situation reflected in the hypothetical at issue here, and it does not appear that the present situation presents the problems that the resign-to-run laws were intended to prevent. In fact, the legislative history and at least one opinion suggest that the Arizona constitutional provision was intended to prevent office-holders from running for different offices than the one currently held. In the hypothetical, Councilmember is put into the situation by circumstances beyond his control and would be running for essentially the same position, albeit for a new term.²

A. Resign-to-run laws have, in general, been upheld by the courts.

Neither the Arizona state courts nor the federal courts in Arizona have addressed the application of the resign-to-run laws in the circumstances you describe. Our current research has not revealed any case law from other jurisdictions that addresses facts similar to the hypothetical. However, we note that in most of the cases we have reviewed, the resign-to-run provision has been upheld.

The Arizona Resign-to-Run law was upheld by the Ninth Circuit Court of Appeals, in a lawsuit alleging that it violates the Qualifications Clause of the United States Constitution, with respect to candidates for Congress. *Joyner v. Mofford*, 706 F.2d 1523, 1528 (9th Cir. 1983) (Article 22, Section 18 (of the Arizona Constitution) “does not add to the qualifications for federal office, but is an exercise of Arizona’s plenary power to regulate the conduct of its own elected officials.”) *Id.* at 1528. The Circuit Court recognized that Article 22, Section 18 of the Arizona Constitution “advances substantial and important state interests while placing a minimal burden on potential candidates for federal office.” *Id.* at 1532. See also, *Oklahoma State Election Board v. Coats*, 610 P.2d 776, 781, 1980 Okla. 65 (1980) (state statute making district attorney ineligible to be a candidate for U.S. Senate term which overlaps term for which elected, did not violate Qualifications Clause).

In *Clements v. Fashing*, 457 U.S. 957, 102 S. Ct. 2836 (1982), the United States Supreme Court held that a resign-to-run clause in the Texas Constitution did not violate free speech rights under the first amendment to the federal constitution, or equal protection under the fourteenth amendment. See also *Fasi v. Hawaii*, 752 F.Supp. 942 (D. Hawaii 1990)(upholding state constitutional provision which required public officials to resign from office before becoming

² We note in this regard, that although councilmembers are elected by district, once elected they serve the entire City.

candidate for another public office, if term of office sought would begin before end of the term held).

As noted, there are very few reported decisions on the validity and effect of the Arizona resign-to-run laws. However, in 1987 the Arizona Attorney General opined that a city councilman who had been selected to serve as mayor by his fellow council members, was required to resign before running in the city's first direct election for mayor. The A.G. reasoned that the critical term of office was the one to which the councilman had been elected by the voters. He was not serving the last year of his term on the council (as opposed to his term as mayor) and "[a]ny other member of the city council not serving the last year of his term as a member of the council would be compelled to resign if he decided to run for mayor." Op. Ariz. Att'y.Gen. 187-141.

B. The policies behind the resign-to-run laws are not relevant in the present circumstances.

The court in *Joyner* quoted with approval from the analysis of resign-to-run laws by the Arizona Legislative Council for the 1980 election, which resulted in the amendment of the state constitution: 1) they encourage elected officials to devote themselves exclusively to the duties of their offices; 2) they reduce the possibility of public subsidies for officials who are merely using public office as a 'stepping stone;' 3) they prevent abuse of office before and after an election; and 4) they protects the expectations of the electorate in voting a candidate into state office. *Id.* at 1532.

Allowing Councilmember to run without resigning in the hypothetical situation, does not appear to lead to the dangers the resign-to-run provision was intended to minimize: 1) Councilmember will be motivated to devote himself to office, in order to show that he is worthy of re-election; 2) the current position is not being used as a stepping stone, in that the incumbent is not trying to "move up" to a more lucrative or prestigious position; 3) there is little possibility of abuse of office; and 4) the expectations of the electorate in voting the incumbent into office are being honored, because the incumbent is seeking only to retain the position to which he was previously elected.

In addition, the courts have indicated that "statutes imposing qualifications upon the right to hold office should receive a liberal construction as [they impair] the right of the people to select officers of their own choosing. Furthermore, disqualifications provided by the legislature are strictly construed and will not be extended to cases not clearly within their scope, and the rule is also that there is a presumption in favor of the eligibility of one who has been elected or appointed to elective office." *Laos v. Arnold*, 141 Ariz. 40, 685 P.2d 115 (App. 1984), quoting *McCarthy v. State of Arizona*, 55 Ariz. 328, 101 P.2d 449 (1940) (refusing to require forfeiture of office by unsuccessful candidate for another office).

- C. The Arizona resign-to-run law appears to be intended to prevent incumbents from running for a new or different position than the one currently held.

The resign-to-run statute, A.R.S. § 38-296, was adopted in 1939. A similar provision was added to the state constitution by initiative in 1980. The ballot language from that election clearly indicates that the intent of the provision was to prevent an incumbent from using his position as a stepping-stone to a new position:

A yes vote shall have the effect of requiring salaried elected office holders to resign their position if they desire to run for a different salaried local, state or federal office, except during the last year of their term.

(Emphasis supplied.)

This was the conclusion reached by the Pima County Attorney in finding that an incumbent state representative who had “unambiguously announced his intention to run for office again before the last year of his term” had not violated the resign-to-run laws “because he has declared himself a candidate for reelection to the *same office*.” Opinion No. 09-02 of the Pima County Attorney (December 17, 2009). The County Attorney also found support for his position in the language of A.R.S. § 38-296(D):

This section shall not be construed to prohibit a person whose resignation from office has become effective from qualifying as a candidate for another office during the unexpired portion of the term affected by the resignation, *nor shall it apply to any incumbent elective officer who seeks re-election to the same office* or to any other public office during the final year of the term to which he has been so elected. (Emphasis supplied in County Attorney’s Opinion.)

The County Attorney observed:

“A comma inserted after the emphasized language would have made this point more clearly, but that this was the intent of Article 22, Section 18 [that the resign-to-run law applies to those seeking a new or different office] is confirmed by the ballot language . . .”

In this case, Councilmember similarly would not be running for a new office, but for the same office he currently holds, albeit for a different term.

D. Councilmember has been put in this situation by circumstances beyond his control.

In virtually all of the cases and opinions regarding resign-to-run laws, the controversy arose because of the action of an office-holder in seeking a new office. See, e.g., *Clements v. Fashing*, supra (challenge brought by office-holders in Texas to resign-to-run law that prevented them from running for legislature or becoming candidates for other elective office); *Joyner*, supra (challenge to the Arizona resign-to-run law by a member of the Pima County Board of Supervisors who wished to run for a seat in Congress); *Laos*, supra (Tucson City councilmember who wished to run for Congress); *Fasi*, supra (suit by Mayor of Honolulu, seeking to require director of elections to put his name on ballot for Republican primary election for governor). The Arizona Attorney General has opined that elected county officials must resign their positions in order to run for state-wide office (Op.Ariz.Att'y.Gen. 78-37) and that a councilmember who was serving the last year of his term as the appointed mayor, must resign-to-run in the first contest for an elected mayor, because he was not in the final year of his term as a councilmember (Op.Ariz.Att'y. Gen. 187-141).

The hypothetical case, on the other hand, involves a councilmember who wishes to run for "another" office, but because of redistricting – a process and result beyond his control. In this case, he is not using his current position as a stepping-stone, but rather wishes to maintain his current position as a member of the City Council.

CONCLUSION:

For all of the reasons discussed herein, in our opinion the Arizona resign-to-run laws do not require Councilmember to resign from office in order to run for the same position, albeit for a different term. However, and as we have discussed, we have not located any cases dealing with this fact situation, and it is impossible to know with certainty how a court would rule in the event of a challenge. It should be noted that in the event an office-holder is found to have violated the resign-to-run law, the penalty is significant. Pursuant to A.R.S. § 38-296(E) a violation constitutes misfeasance in office, and the office of a person found to be in violation is declared vacant.

Should you have any further questions regarding this matter, please do not hesitate to contact this office.