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December 21, 1981

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ATTORNEY GENERAL OPINION NO. 81-285

The Honorable Roy M. Wade
Mayor of La Cygne
Box 155
La Cygne, Kansas 66040

Re: Cities, Third Class--Election, Appointment and
Removal of Officers--Filling of Vacancies

Synopsis: In cities of the third class with a mayor-council form of government, the proper authority to accept the resignation of the city clerk, in the absence of a charter ordinance providing otherwise, is the city governing body. Additionally, the city governing body should, pursuant to K.S.A. 15-209, fill any vacancy in the office of city clerk until the next regular time for appointment. Cited herein: K.S.A. 12-104, 15-209.

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Dear Mayor Wade:

You request our opinion as to the procedure to be followed in filling a vacancy in the office of city clerk for the city of La Cygne. You state that the currently serving city clerk has resigned her office, in writing, effective December 15, 1981, and you inquire as to whether the mayor or council has the authority to accept the resignation. Also, you state that some members of the council have demanded that you disclose the name of the person you intend to appoint to the office before the resignation is accepted, and you request our opinion as to whether you may decline to name your appointee until the resignation of the currently serving city clerk has been accepted.

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In response to the first question set forth above, McQuillin, an acknowledged authority on the law of municipal corporations, states the applicable rule as follows:

"In the absence of any special rule prescribing to what authority a resignation should be presented, the proper authority to accept a resignation is that which has power to fill the vacancy."
3 McQuillin, Municipal Corporations (3rd Edition), §12.125

We are unaware of any statutory provision, applicable to cities of the third class, which prescribes the proper authority to accept a resignation, and, in the absence of any city ordinance dealing with the subject, it is our opinion that the above-quoted procedure should be followed with regard to the acceptance of the city clerk's resignation.

In regard to the second question posed, it appears that you have assumed that the mayor has the power to fill a vacancy in the office of city clerk. In our judgment, this assumption is incorrect, since K.S.A. 15-209, which is applicable to cities of the third class, provides, in part, as follows:

"All vacancies in office, except in the offices of mayor and councilman, may be filled until the next regular time for appointment by appointment by the governing body." (Emphasis added.)

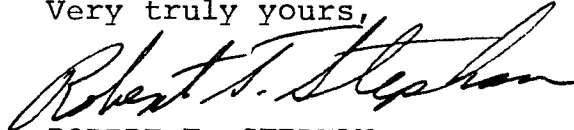
In accordance with the above-quoted statutory authority, the vacancy in the office of La Cygne City Clerk should be filled by appointment by the governing body, in the absence of a charter ordinance providing otherwise. K.S.A. 12-104 defines "governing body" as follows:

"In acts granting or limiting executive or administrative powers to city governments, or prescribing procedure, the designation of the 'the governing body' shall be held to include mayor and council, mayor and commissioners and board of commissioners, as the status of cities affected may require"

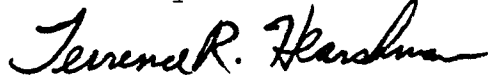
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In accordance with this definition of the term "governing body," it is our opinion that, in the absence of a charter ordinance providing otherwise, a vacancy in the office of La Cygne City Clerk should be filled by the mayor and council. Generally, in order to effectively make an appointment, a majority of the "governing body," as said term is defined above, would have to vote in favor of the appointment.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:BJS:TRH:jm