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February 27, 1987

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ATTORNEY GENERAL OPINION NO. 87-40

Michael P. Howe
City of Lenexa, Staff Attorney
12350 West Eighty-Seventh
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P.O. Box 14888
Lenexa, Kansas 66215-0888

Re: Cities and Municipalities--Planning and Zoning;
City Planning and Subdivision Regulations--City
Planning Commission; Membership

Synopsis: When a city annexes property in which a nonresident
planning commissioner resides, that member's
position becomes vacant. While the commission may
continue to transact business so long as a quorum
is present, the vacancy created by the annexation
must be filled in accordance with local law and
without unnecessary delay. Cited herein: K.S.A.
12-701; 12-702; 12-703.

* * *

Dear Mr. Howe:

As attorney for the City of Lenexa, Kansas, you have
requested our opinion regarding membership of a city planning
commission, as determined by K.S.A. 12-702. Specifically, you
inquire whether a member who ceases to be qualified for
membership on the basis of residency may continue to hold his
position pending the selection of a new nonresident member;
whether the planning commission may continue to conduct
business without the nonresident position being filled; and
whether a four month period following annexation of the area

in which the member resides is a reasonable period in which to appoint a new member.

Planning commissions may be established pursuant to K.S.A. 12-701. The membership, terms of office, and filling of vacancies is governed by K.S.A. 12-702, which states in relevant part:

"Such commission shall consist of not less than seven (7) or more than fifteen (15) electors of which number two (2) members shall reside outside of but within three (3) miles of the corporate limits of said city, but the remaining members shall be residents of such city, to be appointed by the mayor by and with the consent of the council or board of commissioners."

The city of Lenexa has established a planning commission pursuant to K.S.A. 12-702. In accordance with the statute, the ordinance provides for a nine member commission, of which two members reside outside, but within three miles of the corporate city limits. Lenexa, Kan., Code 19-102 (1984).

You indicate that in the latter part of November, 1986, certain parcels of property were annexed by the city of Lenexa. Mr. Hedeem, one of the two nonresident members of the planning commission, resides in the newly annexed area. You also indicate that the time for challenging the annexation through the appeals process expired on or about December 27, 1986.

You first ask whether Mr. Hedeem can continue his service on the commission pending the selection of a new nonresident member. We have found few cases which directly deal with this question. While the rule may vary between jurisdictions, it appears settled in Kansas that Mr. Hedeem's office became vacant when the annexation became final. In School District v. Wolf, 78 Kan. 805 (1908), the Kansas Supreme Court held that when the territory within which a school district officer resided became detached from the school district, the office immediately became vacant ipso facto. 78 Kan., at 811. In Frazer v. Miller, 12 Kan. *459 (1874), the court held that when a township was divided, one of the two justices was removed from the township by the partition, and his office became vacant. 12 Kan., at *461-62. We believe that these cases state a rule that, where qualification for office is determined by residency in, or outside of, governmental

boundaries, and the boundary changes to exclude the residency of the individual, that individual's office is vacated immediately upon the boundary change.

A distinction must be made between Mr. Hedeem's qualification for office and the vacancy of his office. It is our opinion that his office is vacant. He is not a nonresident, so by application of the statute, he may not hold the nonresident position. Obviously, he is not completely disqualified to serve on the commission in the capacity of a resident member. He may be a member of the commission as a resident member if, in the determination of the city in governing its local affairs, it wishes to appoint him to a vacant resident's position.

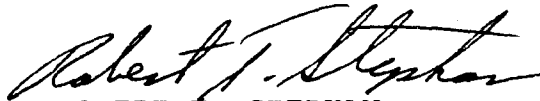
You next ask whether the planning commission can continue to conduct its business when there is a vacancy in the nonresident position. We believe that this question is answered in Dent v. City of Kansas City, 214 Kan. 257 (1974). In Dent, a member of the 15 member planning commission resigned from his position. The court held that since the remaining 14 members constituted a quorum in light of K.S.A. 12-703, acts performed by the commission subsequent to one member's resignation were not without authority. 214 Kan. at 267-68. The vacancy created by Mr. Hedeem's absence does not by itself destroy a quorum. Since K.S.A. 12-703 does not address the question of how many nonresident members must be present to transact business, it is our opinion state law requirements do not make void a decision made by the commission while the filling of the vacancy is pending.

Finally, you ask whether a four-month period following the annexation decision is a reasonable time in which to appoint a new member. As noted above, when the annexation became local law, Mr. Hedeem's position became vacant. By ordinance, the mayor is to recommend persons for appointment to the council within 30 days of the effective date of the vacancy. Lenexa, Kan., Code §19-102 (1984). It would appear that the application of the local ordinance would preclude calculated and unnecessary delay. While convenience may lend itself to waiting for the date on which other terms of office expire (April 30), it is our opinion that the vacancy must be filled with all deliberate speed. Our opinion is, by inference, supported by K.S.A. 12-702, which states that vacancies are to be filled for the duration of the unexpired term. This suggests that appointments are in fact to be made,

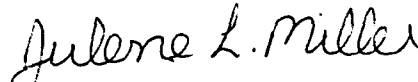
and that the unexpired term is to be separated from the subsequent term.

In conclusion, it is our opinion that when a city annexes property in which a nonresident planning commission member resides, that member's position becomes vacant. While the commission may continue to transact business so long as a quorum is present, the vacancy created by the annexation must be filled in accordance with local law and without unnecessary delay.

Very truly yours,



ROBERT T. STEPHAN
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RTS:JLM:jm