



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

October 31, 1988

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88-155

Michael P. Howe
Staff Attorney
City of Lenexa
1250 West Eighty-Seventh Street Parkway
P.O. Box 14888
Lenexa, Kansas 66215-0888

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

Synopsis: A city planning commission member whose term has
expired may hold over in office until a successor
has been appointed. An officer so holding over
should be regarded as a de facto officer and his
acts regarded as valid. Cited herein: K.S.A.
12-701; 12-702.

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Dear Mr. Howe:

On behalf of the Mayor of the city of Lenexa, you request
our opinion regarding the ability of a city planning
commission member to hold over in office after the expiration
of his term until a successor has been appointed and has
qualified.

The planning commission for the city of Lenexa is organized
pursuant to K.S.A. 12-701 et seq. See City of
Lenexa Code Section 19-101 et seq. K.S.A. 12-702 sets
forth the number and qualifications of members and states
further:

"The members of the commission first appointed shall serve respectively for terms of one year, two years, and three years, divided equally or as near equal as possible between these terms. Thereafter members shall be appointed for terms of three years each. Vacancies shall be filled by appointment for the unexpired term only. . . ."

All members of the city planning commission are to be appointed by the mayor with the consent of the city council. K.S.A. 12-702; Code §19-101.

The Kansas Supreme Court has interpreted a provision similar to that quoted above:

"The prevailing rule in the United States is that in the absence of constitutional or statutory provision to the contrary, express or implied, an officer is entitled to hold until his successor is chosen and has qualified. (46 C.J. 968, §110.) . . . [T]he language of the statute is that 'thereafter all commissioners elected shall hold their offices for a term of four years.' There is no implication here that the legislature thought anything about holding over, much less that it intentionally added another specialty to the act, abrogated the rule relating to public officers generally, and prohibited holding over in Kansas City." Murray v. Payne, 137 Kan. 685, 690 (1933).


See also 3 McQuillin, Municipal Corporations §12.105 (1988). (It has been held that in the absence of any provisions to the contrary, the public interest requires that public offices should be filled at all times without interruption. Pursuant to this policy, an elected or appointed officer may remain in office after the expiration of his term until a successor qualifies, whether or not this is provided for by the statute creating the office.); 67 C.J.S. Officers §71 (1978).

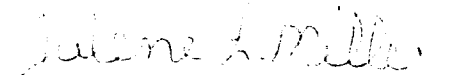
As a general rule, an officer who holds over after the expiration of his term, no successor having been appointed, and continues to exercise the functions of the office is

regarded as a de facto officer [(Hale v. Bischoff, 53 Kan. 301, 307 (1894); McQuillin, §12.105; 67 C.J.S. Officers §71)] and hence any actions taken as such are valid "so far as they concern the public or third persons who have an interest in the thing done." Hale, supra at 307; McQuillin, §12.106.

Based on these authorities, it is our opinion that a city planning commission member whose term has expired may hold over in office until his successor is appointed and qualifies. Though the office is "occupied," we believe this situation should be treated as a vacancy and thus the subsequent appointment will be for the unexpired term only. K.S.A. 12-702. See Hale, supra at 306, 67 C.J.S. Officers §71 (1978); State v. Amos, 133 So. 623, 625 (Fla. 1931). In this way, the staggering of terms will not be disrupted. In any event, the successor should be appointed without unnecessary delay.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General

RTS:JLM:jm