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December 8, 2021

Mayor Steven Ellis
City of Spring Hill, Kansas
401 N. Madison Street
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Transmitted via email to: steven.ellis@springhillks.gov

Re: Contesting an Election; Legal Authority or Action Required to Amend or Revoke Charter Ordinance in Favor of Pre-Existing Non-Uniform Statutory Authority; Related Vacancy and Succession Issues under Kansas Law

Mayor Ellis:

Pursuant to your direction at the November 18, 2021, City Council meeting, please find below a response to the two questions you requested for which you requested a legal opinion. In addition, please find a brief discussion of related legal issues.

I. Questions Presented:

- 1. What are the process and requirements under Kansas law to Contest an Election?**
- 2. Whether the City May Use Its General Ordinance Authority to Amend or Revoke a Charter Ordinance in Favor of Pre-Existing Non-Uniform Statutory Authority?**

II. Introduction

On November 18, 2021, on the afternoon of the last City Council meeting, Council Member and Mayor-Elect Tyler Graves submitted the resignation of his council effective seat effective 7:00pm November 18, 2021. Mr. Graves further informed Mayor Ellis and the City of Spring Hill of his intention to relocate to Florida prior to January 10, 2022 – the date upon which he was to be qualified, sworn, and take office as mayor. I was directed to prepare a legal opinion memorandum setting forth the applicable legal standards for both the immediate vacancy and succession on the City Council for Mr. Graves council seat and for the pending mayoral vacancy upon Mr. Graves’

announced relocation, loss of qualification as an elector of the City of Spring Hill (and subsequent disqualification from the office of mayor).

Following immediate publication and review of my memorandum, and during the City Council meeting, you directed me to prepare another opinion addressing the Questions Presented herein. In addition, the City Council requested that I present a report during the portion of the next Council Meeting related to the City's alternatives, if any, to the City's Charter Ordinances and applicable Kansas law concerning the process and/or succession for vacancies to the present status of applicable legal standards set forth in my opinion dated November 18, 2021. I have researched and analyzed the applicable legal standards for the additional questions posed. Please find my legal opinion and citations of authority below.

III. Applicable Legal Standards and Discussion

A. Questions Presented

1. What are the process and requirements under Kansas law to Contest an Election?

The legal standards for contesting an election in Kansas are established by statute and set forth in K.S.A. Chapter 25. ELECTIONS. Article 14. Contest of Elections. The act concerning the contest of elections in Kansas, K.S.A. 25-1434, *et seq.*, is clear, straightforward, and succinct and remains entirely intact without amendment in any portion from its adoption in 1978. To address your inquiry, I do not need to provide an exposition of the act or review the entirety of the process it creates. To the contrary, for the purposes of your inquiry, K.S.A. 25-1439, resolves the matter:

The notice of contest *shall be filed within five days after the certificate of election* is issued except in the case of question submitted elections. In the case of a question submitted on a statewide basis such notice shall be filed within five days after the publication of the determination of the results of such election and in the case of other question submitted elections such notice shall be filed within five days after the certification by the county board of canvassers of the final abstract of the election returns. Within five (5) days after such filing in the case of election to an office, the clerk of the district court shall cause a copy thereof to be served upon the contestee and upon the secretary of state or the county election officer authorized to issue the certificate of election as the case may be.

Id. (emphasis added).

The election for the office of mayor of the City of Spring Hill, Kansas was conducted on November 2, 2021. The Johnson County Board of Canvassers certified the election on November 9, 2021. The Miami County Board of Canvassers certified most election results on November 10, 2021, but the Miami County Board certified the City of Spring Hill's city elections by separate letter to the Johnson County Election Commissioner and Board of Canvassers on November 9, 2021, consistent with agreement between Johnson County and Miami County for the certification of the

City's election results on the same date and time. In any case, the time for filing an election contest concerning the office of mayor passed no later than November 16, 2021.

While K.S.A. 25-1439 forecloses any issues concerning the ability to contest the election or pursuit of legal action to contest or access to judicial review of the conduct of the election, please note that the grounds for contesting an election in Kansas focus upon the eligibility to hold office *at the time of the election*, deprivation of voters' right to vote, illegal votes received or legal votes rejected, and error, fraud, or bribery *in computing the results or certifying the outcome* of the election. See K.S.A. 25-1436. In summary, the opportunity to contest the mayoral election has passed, and the circumstances the City and its residents face because of Mr. Graves' subsequent relocation outside of the City are not the nature which can be addressed by an election contest in Kansas.

2. Whether the City May Use Its General Ordinance Authority to Amend or Revoke a Charter Ordinance in Favor of Pre-Existing Non-Uniform Statutory Authority?

Pursuant to the Constitution of the State of Kansas, Article 12, Section 5, cities in the State of Kansas, authorized by and operated under the laws of the State of Kansas, are empowered to determine their local affairs and government – home rule authority. K.S.A. Const. Art. 12, § 5 (c) authorizes cities to exempt themselves from the provisions of Kansas statutes and/or adopt substitute and additional provisions when such provisions are either state legislative enactments or portions of an enactment which are applicable to the City but are not uniformly applicable to all cities in the State of Kansas. For example, K.S.A. 14-103 provides that cities of the second class, such as the City of Spring Hill, Kansas, shall be divided into not less than four generally equally populous wards from which city council members shall be elected for each ward. Using its Constitutional home rule authority, however, the City adopted Charter Ordinance No. 26, exempting the City from division into wards for electing council members and retained its preferred at-large election process. See Charter Ordinance Nos. 26 and 36.

Unlike “ordinary” or “regular” ordinances, charter ordinances as provided for in the Kansas Constitution must be so titled and require additional designation, publication – at least two consecutive weeks, super-majority governing body adoption, are not effective for at least sixty (60) days following final publication. Moreover, charter ordinances are subject to referendum election upon petition of ten (10) percent of the electors who voted in the preceding regular City election. As a practical matter, in Spring Hill, a charter ordinance requires a minimum of 83 days to effectively adopt – if it faces no referendum petition.

K.S.A. Const. Art. 12, § 5 (c) (4) provides: “Each charter ordinance enacted shall control and prevail over any prior or subsequent act of the governing body of the city and may be repealed or amended only by charter ordinance or by enactments of the legislature applicable to all cities.” Thus, the City may not revert to state law by adopting an ordinary ordinance to repeal a charter ordinance even for the very purpose of merely reverting to the underlying statutory provision for which the applicable charter ordinance exempted the City. The significance of the question

presented lies in determining whether the governing body has time to consider reversion out of a past charter providing that a President of the Council assumes the office of mayor for the entirety of the remaining term or revising the manner in which vacancies are filled in either the office of mayor or the office of council member. The City does not have time to adopt a charter ordinance prior to the mayoral succession for the vacancy created by Mayor-Elect Graves' disqualification.

B. Related Legal Issues and Applicable Legal Standards – Removal from of Elected Officials and Retroactive Limitations on Terms of Office

As referenced above, the legal significance of Mayor Ellis' question concerning the revocation of a charter ordinance directly concerns the ability to alter the term of an elected City office once the office is filled and the term initiated. Kansas law provides for six circumstances for the removal of elected officials from City office: 1) voluntary resignation; 2) death; 3) change in residency; 4) acceptance of an incompatible office; 5) recall; and, 6) ouster. Please find a brief discussion of each basis for removal from office below.

An elected official may voluntarily resign his or her office at any time. SHMC 1-102 D. 2. The official's office becomes vacant upon the acknowledgement of the governing body. *See State v. Bd. of Educ. of City of Council Grove*, 106 Kan. 863, 189 P. 915, 915 (1920). The death of an elected official obviously results in an immediate vacancy in his or her office. *See, e.g., SHMC 1-102 D. 2.*

An elected city official who changes his or her residency from the city in which he or she holds office or, in certain circumstances for municipalities divided into wards for election to city council, when an elected city officials moves his or place of residency from the ward or district from which the official was elected to represent, vacates his or her elected office upon relocation of residency. Moreover, as discussed in my Memorandum dated November 18, 2021, Spring Hill Municipal Code (SHMC) §1-103. *Qualifications*. requires the mayor and each of the councilmembers to be qualified electors of the City of Spring Hill, Kansas. *See also K.S.A. 14-109.*

Kansas courts have adopted to the common law doctrine of incompatibility of office, subject only to statutory provisions to the contrary. *See Unified Sch. Dist. No. 501, Shawnee Cty., Kan. v. Baker*, 269 Kan. 239, 247, 6 P.3d 848, 853 (2000) (further citation omitted) ("This court has uniformly turned to the common law in the absence of a specific legislative prohibition on dual office-holding."). The state legislature has ordinarily followed suit; for cities of the second class, the primary governing statute is K.S.A. 14-1302, which has been addressed in more than a dozen Kansas Attorney General's Opinions.

Regarding incompatibility of office, the Kansas Attorney General has stated:

The common law doctrine of **incompatibility of offices** prohibits an individual from holding more than one public office at the same time when there is an incompatibility between the offices. 'Offices are incompatible when the

performance of the duties of one in some way interferes with the performance of the duties of the other.’ The Kansas Supreme Court long has applied the doctrine ‘where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.’

Kan. Atty. Gen. Op. No. 2018-11, 2018 WL 4328497. Kansas has applied the doctrine of incompatibility of office not only to the simultaneous holding of two different offices, but to the holding of an office and public employment – a position rather than an office. *See Dyche v. Davis*, 92 Kan. 971, 977, 142 P. 264 (1914); *See Baker*, 269 Kan. at 249-52 (further citation omitted).

A public official, including an elected official, loses office upon acceptance of an incompatible office. Kansas law dictates that upon accepting an incompatible office, the appointed or elected official immediately forfeits his or her previously held appointed or elected position in favor of the new office without recourse or opportunity for selection amongst the office or position. *See Moore v. Wesley*, 125 Kan. 22, 262 P. 1035, 1036 (1922); *Gilbert v. Craddock*, 67 Kan. 246, Syl. ¶8, 72 P. 869, Syl. ¶8, 869, 874 (1903); *Abry v. Gray*, 58 Kan. 148, 149 (1897); Atty. Gen. Opp. No. 83-11, 1983 WL 178789, *1, *7.

The right to recall public officials is guaranteed by State Constitution, and procedures and grounds necessary to exercise right are contained in Recall of Elected Officials Act. See K.S.A. Const. Art. 4, § 3; *see Baker v. Gibson*, 22 Kan. App. 2d 36, 913 P.2d 1218 (1995). Kansas established the process for the recall of elected officials. See K.S.A. 25-4301, *et seq.* Under Kansas law all state and local elected public officials, other than judges, are subject to recall by the voters of the respective political division or subdivision. *Id.* Recall in Kansas, however, is not based upon a general referendum; rather, recall requires specific grounds established by law. K.S.A. 25-4302, provides:

(a) Grounds for recall are conviction of a felony, misconduct in office or failure to perform duties prescribed by law. No recall submitted to the voters shall be held void because of the insufficiency of the grounds, application, or petition by which the submission was procured.

(b) As used in this section, the term “misconduct in office” means a violation of law by the officer that impacts the officer's ability to perform the official duties of the office.

K.S.A. 25-4302.

The specific process for the recall of local elected officers, including elected city officials, is set forth in K.S.A. 25-4318, *et seq.* Prior to the circulation of any petition for recall of a local official, a copy of the proposed petition including names and addresses of a recall committee and any sponsors must be filed with the county election office in the manner specified in K.S.A. 25-4322 (a) (which establishes additional requirements upon both the election). Moreover, before the recall

petition may be circulated, pursuant to sub-section (b) of the statute, the county election officer must forward the proposed recall petition to the county or district attorney to determine the sufficiency of the grounds stated in the proposed recall petition. The statute mandates the district attorney determine whether:

- (1) The facts do not support the grounds for recall as stated in the petition for recall;
- (2) the petition is not substantially in the required form;
- (3) the petition was filed during the first 120 days of the term of office of the official sought to be recalled or within less than 180 days of the termination of the term of office of the officer sought to be recalled;
- (4) the person named in the petition is not a local officer;
- (5) there is an insufficient number of required signatures of any kind;
- (6) the local officer sought to be recalled has been or is being subjected to another recall election during such officer's current term of office; or
- (7) the application does not conform to any other requirement of this act.

K.S.A. 25-4322 (b). In summary, Kansas law requires specific grounds generally related to wrongdoing in office for recall. *See, generally, Baker v. Gibson*, 22 Kan. App. 2d 36, 913 P.2d 1218 (1995).

Ouster is a specific and limited civil proceeding brought in the District Courts for the State of Kansas by a district or county attorney, as applicable within the officer's county, or the attorney general. *See* K.S.A. 60-1205, *et seq.* Under Kansas law, ouster is an extraordinary proceeding. *See State v. Morrison*, 302 Kan. 804, 359 P.3d 60 (2015) (only in exceptional circumstances should publicly elected officials be removed prior to the completion of their terms). K.S.A. 60-1205 establishes the grounds for ouster, for which an official shall forfeit his or office and is limited to officials who: "1) willfully engage in misconduct while in office, (2) willfully neglect to perform any duty enjoined upon such person by law, (3) demonstrate mental impairment such that the person lacks the capacity to manage the office held, or (4) who shall commit any act constituting a violation of any penal statute involving moral turpitude,..." K.S.A. 60-1205.

Notably, a city may not enact a retroactive ordinance or charter ordinance to remove, retroactively amend the term of, or require an officer in an elected office to stand election. To permit the effective removal of an elected city official by the act of his or her fellows ameliorates the legislative and constitutional authority for removal of elected officials; there are only six ways in which an elected official may be removed from office. *See* L.K.M., *City Officials Manual*, 1-15. While an elected official generally is not viewed as possessing a property interest in his or her office, the public may not be disenfranchised by the local action. *See Taylor v. Beckham*, 178 U.S. 548, 576-78, 20 S. Ct. 890, 900-01, 44 L. Ed. 1187 (1900); *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944). Moreover, state law, as discussed above, may not be skirted or undermined by a retroactive ordinance or charter ordinance. *See Baker v. Gibson*, 22 Kan. App. 2d 36, 37-46, 913 P.2d 1218, 1220-25 (1995); K.S.A. Const. Art. 12, § 5.

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If you have any questions, please contact me at your convenience. Thank you.

Sincerely,

/s/ F. Charles Dunlay

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