CITY OF NAPERVILLE
MANAGER'S MEMORANDUM

DATE: November 21, 2014

TO: Doug Krieger, City Manager

FROM: Jill Pelka-Wilger, Acting City Attorney

SUBJECT: Ineligibility for Elective Municipal Office

PURPOSE:

The purpose of this memorandum is to provide information regarding eligibility for elective municipal office if a council member was at any time during his term in office in arrears in a payment of debt due to the City.

BACKGROUND:

On October 2, 2014, John Kraft submitted a Freedom of Information Act ("FOIA") request to the City seeking the utility bills for all City Council members for the time period from January 1, 2012 through September 30, 2014. The City complied with Mr. Kraft's FOIA request on October 22, 2014. Mr. Kraft addressed City Council during the Public Forum portion of the November 18, 2014, City Council meeting. Mr. Kraft stated that he received the past utility bills of City Council and that these past utility bills reflect that Councilmen Wentz and McElroy had been past due in payments to the City.[1] Mr. Kraft asserts that due to the past outstanding utility balances of Councilmen Wentz and McElroy, these councilmen are disqualified from office and City Council should declare these seats vacant. Alternatively, Mr. Kraft suggests that Councilmen Wentz and McElroy should resign. City Council requested that City Legal research and provide a review as to the proper process for addressing current council members who may have had past outstanding utility bill balances, as well as, what ramifications may exist as to the status of their previously performed duties.

DISCUSSION:

Prior to its amendment by Public Act 98-115, 65 ILCS 5/3.1-10-5(b) provided:

> "A person is not eligible to hold a municipal office if that person is in arrears in the payment of a tax or other indebtedness due to the municipality or has been convicted in any court located in the United States of any infamous crime, bribery, perjury, or other felony."

[1] Councilmen Wentz and McElroy have paid their utility bills and are now current in their payments.

As amended, effective July 29, 2013, section (b-5) now states:

"A person is not eligible to hold a municipal office, *if that person is, at any time during the term of office,* in arrears in the payment of a tax or other indebtedness due to the municipality or has been convicted in any court located in the United States of any infamous crime, briber, perjury, or other felony."

Two legal obstacles are evident in section (b-5). First, a review of the new law reveals no definition of "arrears" or "other indebtedness" under section (b-5) and no judicial interpretation exists as to these terms in its application to late utility bill payments. Second, section (b-5) does not expressly provide for a legal process to address instances where a person who holds a municipal office is in arrears in a payment of indebtedness due to the municipality.

Yet without this legal clarification and without legal precedent, Mr. Kraft attempts to assert that a vacancy is created by arrearage and the corporate authorities have the authority to determine whether a vacancy exists. (*See attached email from Mr. Kraft dated November 19, 2014).* This assertion lacks legal support for two reasons. First, the section relied on by Mr. Kraft in support of his argument is found in a separate and unrelated section of the Illinois Municipal Code (*See 65 ILCS 5/3.1-10-50).* There is no legal precedent supporting that a declaration of vacancy under section 5/3.1-10-50 is equally applicable to section (b-5). Second, long standing legal precedent provides that holders of public office have a property interest in the office in which they were elected and because elected officials have this property right, due process is afforded to them *prior* to their removal from office. *East St. Louis Federation of Teachers Local 1220, et. al., v. East St. Louis School District No. 189 Financial Oversight Panel, 178 Ill. 2d 399 (1997).*

Section (b-5) is silent as to the required due process an elected official is afforded prior to their removal from office. However, 735 ILCS 5/18-101 provides that a proceeding in quo warranto may be brought in cases where a person unlawfully holds any office in any corporation created by authority of this state. (*See People ex rel. Reed v. Thomas, 356 N.E.2d 1372 (1976), where a quo warranto was the appropriate remedy to determine eligibility to hold office of village trustee and People ex rel. City of Kankakee v. Morris, 467 N.E.2d 589 (1984) where quo warranto was found to be the appropriate remedy to remove an incumbent officeholder who becomes ineligible due to a conviction of an infamous crime).* It is, therefore; reasonable to conclude that a quo warranto action may be applicable in this context should a court *first* conclude that a late utility payment, which has subsequently been paid, is an arrearage in indebtedness due to the municipality.

In order for an individual to file a quo warranto complaint, generally the individual must establish an individual interest that is not common to the public. Although a quo warranto action may be brought by either the Attorney General or State's Attorney, these offices have absolute discretion to decline initiating the action. Should these offices decline to bring a quo warranto action, an individual must state that these offices decline or refused to initiate the action, and then be granted leave of court to proceed by quo warranto action.

Further inquiry was made by Councilman Fieseler regarding the status of any action taken by City Council in the unlikely event that it is determined that Councilmen Wentz and McElroy are found to be ineligible to hold office. Section (b-5) provides no direction as to the status of prior City Council action should municipal officers be found ineligible to hold office, however; guidance is found in the case of *Lavin v. Board of Commissioners of Cook County, 92 N.E.291 (1910).* In *Lavin,* the court defined a "de facto officer" as one who holds by some color of right or title to such office. The "de facto officer" is a person who is elected or appointed to office, but who later becomes disqualified to exercise the duties of office. Actions of "de facto" officers are valid and bind the municipality to the extent they would have been binding if performed by a de jure officer (*i.e. one who is legally appointed to exercise the functions of the office).*

Also attached to this memorandum for your consideration is a letter drafted by Keri-Lyn Krafthefer of the lawfirm Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., at the request of Councilmen Wentz and McElroy.

RECOMMENDATION

I recommend this information be shared with the Mayor and City Council through the Manager's Memorandum.

Pelka-Wilger, Jill

From: John Kraft [redacted]
Sent: Wednesday, November 19, 2014 9:42 AM
To: Pradel, George; Fieseler, Robert; Hinterlong, Paul; Krause, Doug; Pelka-Wilger, Jill
Cc: Kirk Allen
Subject: Disqualification for Office

First, let me start with: arrears in property tax is not a disqualification - the Illinois Supreme Court has already determined that property taxes are a debt to the County, not the the Municipality.

What the city can do:

The Illinois Municipal Code, 65 ILCS 5/3.1-10-5, Sec. 3.1-10-5. Qualifications; elective office.:

(b-5) A person is not eligible to hold a municipal office, if that person is, at any time during the term of office, in arrears in the payment of a tax or other indebtedness due to the municipality or has been convicted in any court located in the United States of any infamous crime, bribery, perjury, or other felony.

(c) Vacancy by other causes.
(1) Abandonment and other causes. A vacancy occurs in an office by reason of abandonment of office; removal from office; ***or failure to qualify****; .... The* ***corporate authorities have the authority to determine whether a vacancy under this subsection has occurred****. If the corporate authorities determine that a vacancy exists, the office is deemed vacant as of the date of that determination for all purposes including the calculation under subsections (e), (f), and (g).*

The evidence leading to disqualification can be found in the FOIA responses I received from the City.
If you would like copies of them please let me know.

Ideally, McElroy and Wentz should simply resign - absent that, the city should place "determine if vacancies in office have occurred and declare seats vacant" on the next council agenda, look at the evidence, and declare the seats vacant.

Thanks,
John Kraft
[redacted]

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November 20, 2014

Hon. Joe McElroy
1164 George
Naperville, IL 60540

Hon. David Wentz
720 Clovetree Court
Naperville, IL 60540

Re: Removal from office for late payment of utility bill

Dear Gentlemen:

You have asked our opinion regarding a recent request submitted to the City of Naperville by Mr. John Kraft which seeks to have the City Council remove you from office because you have paid utility bills, with late fees, to the City. You have asked our opinion because our law firm represents more than 40 Illinois municipalities and, as authors the Illinois Municipal Handbook, we occasionally provide opinions to public officials on topics addressed in our publication that may impact Illinois municipal entities and officials.

The first law involved is Section 3.1-10-5(b-5) of the Illinois Municipal Code, 65 ILCS 5/3.1-10-5(b-5), which states that:

> A person is not eligible to hold a municipal office, if that person is, at any time during the term of office, in arrears in the payment of a tax or other indebtedness due to the municipality or has been convicted in any court located in the United State of any infamous crime, bribery, perjury, or other felony.

You have both paid utility bills to the City of Naperville late, with late fees, as do many residents of the City of Naperville. The question is whether the City Council has the ability to remove you from office for the inadvertent late payment of utility bills. The bills were paid in the past and you do not have any current overdue amounts owed to the City.

Before we go further, it is very important to know the history of how this language became adopted into the Illinois Municipal Code, because it will help to understand the General Assembly's intent in adopting this language. The current language was adopted on July 29, 2013, as a part of a massive Election Omnibus Bill of 2013, which sought numerous changes to election laws. Prior to the passage of this law, Section 5/3.1-10-5(b-5) did not exist.

The initial language in the Municipal Code establishing qualifications of municipal officers was adopted through Public Act 87-1119, §2, eff. May 13, 1993. Prior to the 2013 amendment, the language of Section 5/3.1-10-5 read as follows:

§ 3.1–10–5. Qualifications; elective office.

> (b) A person is not eligible for an elective municipal office if that person is in arrears in the payment of a tax or other indebtedness due to the municipality or has been convicted in any court located in the United States of any infamous crime, bribery, perjury or other felony.

This section, establishing qualifications for municipal officers, was starting to be used in election cases to disqualify candidates from office. When candidates for municipal office were taking the oaths contained in their statements of candidacy swearing that they were "legally qualified to hold such office," opponents would challenge the veracity of those attestations by saying candidates were not qualified because, at the time they took the oath of office, they were in arrears in the payment of a tax or other indebtedness due to the municipality, even if they cured the indebtedness the day after they filed their nomination papers, well before the election. A few court cases upheld the candidate's removal from office – not because of the indebtedness, but because the attestation in the statement of candidacy was false at the time it was filed.

Because the General Assembly did not intend for Section 3.1-10-5 to serve as a bar from running for municipal office, they passed an amendment as a legislative reaction to the courts' perceived misinterpretation of the laws. The bill was rushed through the General Assembly and passed in the last 24 hours of the legislative session and the new language was a very small part of much larger legislation. The new language contained the following changes:

~~(b)~~ **A person is not eligible to take the oath of office for a municipal office if that person is, at the time required for taking the oath of office, in arrears in the payment of a tax or other indebtedness due to the municipality or** ~~A person is not eligible for an elective municipal office if that person is in arrears in the payment of a tax or other indebtedness due to the municipality or~~has been convicted in any court located in the United States of any infamous crime, bribery, perjury, or other felony.
(b–5) A person is not eligible to hold a municipal office, if that person is, at any time during the term of office, in arrears in the payment of a tax or other indebtedness due to the municipality or has been convicted in any court located in the United States of any infamous crime, bribery, perjury, or other felony.

In the transcript of the House Debate on the Omnibus Election Bill on May 31, 2013, the following discussion ensued between State Representative/House Majority Leader Barbara Flynn Currie, who was advancing the bill, and State Representative Dwight Kay:

> Kay: "Leader Currie, with respect to municipal officers, my analysis says a person is not eligible to take the oath of office for a municipal office if owing a tax debt or debt to the municipality or convicted of an infamous crime, perjury or felony. My question is this, what if a person simply can't pay their taxes for a short period of time and their property is sold at a tax sale with the understanding, as I…I believe it to be, that they can purchase that back within 6 or 12 months?"
>
> Currie: "Yeah. And…and apparently there had been a court case that ruled that the language only applied to candidates for office. That was not everybody else's understanding. This restores language that we thought the…the provision meant. But I did talk with the Municipal League and with members of the …the Executive Committee and I think we may want to consider drafting slightly tighter language so as to avoid an inadvertent discovery that someone is in arrears, somebody who didn't realize that their property tax was due and didn't pay it for 2 weeks. So I have agreed to work on that language in a trailer bill."
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> Kay: "Well, that's part of…that was part of my question, but the other part is supposing the person, simply like many of us in this room do, we have a need for a credit card from time to time, and from time to time somebody may not be able to pay their tax bill and their property goes on an …on an auction – a reverse auction. And I guess my question is, we know those – those reverse auctions happen and people have the ability to come back in and repurchase their property. Is that person ineligible from being a municipal officer?"
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> Currie: "Well, I think that would depend on a court to decide. But my view is that this language drafted is not as clear as I would like it to be so that someone who is not deliberately defaulting on payments, whether it's

> the water bill or the property tax, should not therefore be bounced from office."

Further debate ensued as to whether the entire Omnibus bill should be delayed to fix this issue, but because the House was voting on Amendments from the Senate, the House could not amend the bill further, and Representative Currie did not want to delay the rest of the "good stuff" in the Omnibus Bill, according to the transcript, so it passed with the intention of clarifying this language later.

Since the date the new language passed, the trailer bill Leader Currie spoke of, House Bill 5839, was introduced earlier in 2014 seeking to repeal section 3.1-10-5(b)(5) in its entirety, consistent with the original intent of the General Assembly. The bill is currently in the House Rules Committee. The Illinois Municipal League is hoping for corrective action to be forthcoming and finalized during the veto session.

It is clear, even from the very limited House debate on this issue, that it was not the intention of the General Assembly to have this section used to remove municipal officials from office when they are not "deliberately defaulting on payments," to use the words of the House sponsor of the language.

Further, there is no guidance as to what exactly is considered to be an "arrearage" in the "payment of a tax or indebtedness" due to the municipality. There is no court case interpreting the new statute, or the definition of "indebtedness" under the new language. In addition, there is no precedent for removing an existing municipal office holder from office for the late payment of a utility bill.

If a public official pays a utility bill a day late and pays a late fee for that, they are not receiving any type of special treatment by virtue of holding their elective office. In addition, the statute, as worded, has Constitutional problems because it could be interpreted to find someone ineligible for office even if they have no knowledge of the debt, indebtedness or arrearage in the indebtedness. The federal courts have held that holders of public office have a protected property interest in holding the offices to which they were elected. Removal of an elected official from an office without according the requisite notice would encroach upon the public officer's rights.

The second issue raised by Mr. Kraft's request to the City is whether the City Council possesses the ability to remove you from office for the late payment of a bill. The Illinois Supreme Court has recognized that, because elected officials have property rights in their elective offices, they must be given due process notice and hearing protections prior to being removed from office during their elected terms. East St. Louis Federation of Teachers, Local 1220, et al., v. East St. Louis School District No. 189 Financial Oversight Panel, 178 Ill. 2d 399 (1997). As noted above, no municipality in the State of Illinois has ever removed an official from an elective office for the late payment of a utility bill, as Mr. Kraft urges the City of Naperville to do.

Oddly, while you both are current office holders in the middle of your terms, Mr. Kraft urges the City not to remove you from office, but to declare your seats vacant for "failure to qualify." The indebtedness section cited above does not contain a mechanism for the removal of elective officers. While it defines criteria for eligibility of office, it does not state what happens if an officer becomes ineligible for office while holding it. Consequently, Mr. Kraft cites a different section of the Illinois Municipal Code which addresses what happens when a vacancy is created in a municipal office in an attempt to empower the City to remove you from office. We note that this section is in a totally different section of the Municipal Code from the qualification and eligibility section above regarding indebtedness. Section 3.1-10-50(c)(1) states:

> 3.1-10-50(c) Vacancy by other causes:
>
> (c)(1) Abandonment and other causes. A vacancy occurs in an office by reason of abandonment of office; removal from office; or failure to qualify; or more than temporary removal of residence from the municipality; or in the case of an alderman of a ward or councilman or trustee of a district, more than temporary removal of residence from the ward or district, as the case may be. The corporate authorities have the authority to determine whether a vacancy under this subsection has occurred. If the corporate authorities determine that a vacancy exists, the office is deemed vacant as of the date of that determination for all purpose including the calculation under subsections (e), (f), and (g).

Nothing in the language cited above specifies that the corporate authorities have the ability to remove a sitting Councilman for an indebtedness. The language Mr. Kraft highlights about "failure to qualify," does not apply to sitting councilmen once they have been seated. A "failure to qualify" occurs at the time that a person is elected and about to take his or her oath of office. This statute does not expressly confer the City with the power to remove an elected official from office. Instead, it gives the corporate authorities the power to determine that an office is vacant if somebody has been removed from office, which has not occurred in this instance, because neither of you have been removed from office.

Based upon this, it is my opinion – and my hope - that the City of Naperville will likely decline to be the first municipality in the State of Illinois to remove an elected official from office for the late payment of utility bill, when a) the legislative history makes it clear that the General Assembly never intended for that result with the legislation, b) there is pending legislation to correct this exact issue, c) as elected officials, you have strong protected Constitutional property interests in holding your elective offices, and d) there is no express language or law giving the City the ability to remove you from office under these circumstances. Please do not hesitate to contact us should you have further questions regarding this.

Very truly yours,

Keri-Lyn J. Krafthefer

4814-7297-9232, v. 1