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To: The City of McCook, Nebraska
Dennis Berry: Mayor
Mike Gonzales: Vice President of City Council
Aaron Kircher City Council Member
Jerry Calvin: City Council Member
Shane Hilker: City Council Member
J. Jeff Hancock: City Manager
Nathan Schneider: City Attorney

Gentlemen:

We have been asked to advise the City of McCook as to the appropriate action in light of the convictions of Council Member Kircher for disturbing the peace, and of Council Member Hilker for harboring a vicious dog.

PRELIMINARY OBSERVATIONS

We preface our conclusions with a few comments on the nature of an attorney's opinion and this one in particular.

In this particular case we have been asked to advise the city what to do about facts which already exist and are not subject to being changed. We see our job as to advise the city how to respond to these facts in such a manner as to protect the interests of the city and its citizens. In giving that advice, we acknowledge at the outset that the courts and statutes of Nebraska do not give a definitive answer. We find no Supreme Court decision interpreting the applicable statute. All we can do, all any lawyer can do, is to study the judicial decisions which we believe to be relevant, to analyze the matter as we think a court would analyze it, and to express our opinion as to how a court would decide this matter if it should come to that. Our recommendations are based on the belief that if we are right, and if this matter is not properly addressed, the consequences to the City of McCook could be serious.

OPINIONS AND RECOMMENDATIONS

Our opinions are as follows:

1. Council Members Kircher and Hilker have been convicted of "crimes" within the meaning of the relevant Nebraska statute.
2. As a result of those convictions, Council Members Kircher and Hilker have forfeited their offices.
3. The applicable statute is self-executing. By this we mean that at the moment of conviction, they ceased to be lawful members of the McCook City Council.

Needless to say, the consequences of these facts threaten to be quite severe. Any action by the City Council could be subject to challenge. Even if the challenge could be defeated, the city would incur significant legal expense. The legal expense, however significant it might be, is as nothing when compared to the consequences of city actions, particularly tax and budget actions, being determined to be invalid because of the presence of people on the council who were not lawfully there. In light of this fact, we recommend:

1. Council Members Kircher and Hilker should resign immediately.
2. If they, or either of them, refuse to do so, written notice should be given to the County Attorney asking him to undertake the appropriate suit to remove them from the McCook City Council.
3. This gets a "clock" moving so that after the expiration of ten days someone else can file the suit if the County Attorney refuses to do so.
4. When and if Council Members Kircher and Hilker resign or are removed, the council should ratify all actions taken since the date of the earlier conviction.

We will now describe the reasoning and legal authorities that led us to these conclusions.

DISCUSSION OF OUR OPINIONS

THE APPLICABLE STATUTE

The applicable statute is Neb. Rev.Stat. 19-613, which is part of a group of statutes pertaining to cities having a city manager form of government. The statute says:

> Any council member who ceases to possess any of the qualifications required by this section or who has been convicted of a crime while in office shall forthwith forfeit such office.

The word "convict" refers to the act of a court in pronouncing a person guilty. When a court accepts a plea of guilty or makes a finding of guilty, the person has been "convicted."

The relevant questions are what is a "crime" within the meaning of this statute, and what is the meaning of the term "shall forthwith forfeit such office." We turn first to the question of what is a crime within the meaning of Section 19-613.

WHAT IS A "CRIME" WITHIN THE MEANING OF SECTION 19-613?

A "crime" is an act or omission for which one is subject to punishment by public authority.

As one might imagine, all kinds of rules have evolved to aid in the interpretation of statutes, a process called "statutory construction." One of those rules is that where a statute does not contain a specific definition of a word–and this one does not–then the word is to be given "its plain and ordinary meaning." The Nebraska Supreme Court used this rule to reach the definition of "crime" noted immediately above in bold:

> ...in the absence of anything indicating the contrary, statutory language is to be given its plain and ordinary meaning. *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986). By that standard a "crime" is an act or omission for which one is subject to punishment by public authority. See Webster's Third New International Dictionary, Unabridged 536 (1981). *State v. Palmer*, 224 Neb. 282, 292, 399 N.W.2d 706, 717 (1986).

The *Palmer* case did not involve Section 19-613 and arose in a totally different context. One could argue that it should not apply. In our opinion, such an argument would almost surely fail. The rule of statutory construction applied in *Palmer,* that a words in a statute are given their "plain and ordinary meaning," is a very familiar rule that applies across the board to all kinds of statutes. There is no reason not to apply it to Section 19-613. The "plain and ordinary meaning" of a word is usually found in a dictionary, and that is exactly where the Supreme Court went to reach the definition of "crime" which it used in *Palmer.* That definition would surely be applied to Section 19-613.

On the face of it, the offenses of which Council Members Kircher and Hilker have been convicted are "crimes." Since these things occurred "while in office," the statutory consequences follow.

A traffic offense is also a "crime" within the meaning of this statute.

A traffic offense is not involved here, so this point is not strictly relevant. It arises so naturally, though, that we pause to discuss it. Could the Legislature really have intended that conviction of a traffic offense results in the forfeiture of a public office? Our conclusion appears in bold immediately above.

A violation of the Nebraska Rules of the Road (traffic offenses under state statute) is called

an "infraction." Neb.Rev.Stat. §60-672. It is arguable that an "infraction" is not a "crime" and therefore does not trigger a forfeiture under Section 19-613.

Unfortunately the Supreme Court has strongly indicated otherwise. In *State v Knoles,* 199 Neb. 211, 256 N.W.2d 873 (1977) the Supreme Court held that a traffic infraction is a "crime" within the meaning of the rule that a person cannot be placed twice in jeopardy, that is, that a person cannot be tried more than one time for a crime. The Supreme Court reached this conclusion using the ordinary reasoning that if something looks like a duck, walks like a duck, and quacks like a duck, it must be a duck, and calling it something different does not change that fact.

Again, this decision did not involve Section 19-613, and arose under a different statute and different circumstances. One could attempt an argument that *Knoles* does not apply to Section 19-613. It is our opinion that such an argument would be unlikely to succeed. It would require persuading the court that the word "crime" in one rule means something different than the same word in another rule. The Legislature is free to define its terms, and often does so, but did not in Section 19-613. As noted. the "plain and ordinary" meaning of the word "crime" is "an act or omission for which one is subject to punishment by public authority." A traffic offense comes perfectly within that definition.

More importantly, we think that it would be foolhardy to gamble on persuading a court that *Knoles* does not apply to Section 19-613. The consequences of being wrong are simply too severe.

A court is not free to construe the statute to mean something other than what it says.

Obviously it is a little startling that a minor offense, as is present here, and perhaps even a traffic infraction, could result in the forfeiture of a public office to which an official has been elected. One suspects that there are likely to be city council members in other city manager cities who have been convicted of traffic offenses while in office. However, we are faced with the fact that the Legislature used the word "crime." In somewhat related matters dealing with the consequences of violating the law, the Legislature has used language indicating that the serious consequence, such as the denial or loss of a professional license, does not follow unless the offense is more serious. To accomplish this end, the Legislature sometimes uses the word "felony." It has also limited the disqualifying offense by saying that it must involve "moral turpitude," or "dishonesty." If these words has been used in Section 19-613, our opinion would likely be different. But, again, we are faced with the fact that the statutory word is "crime," a word quite broad enough to include the offenses in question. It is not for us, or for the courts, to say that the Legislature should have used a different word. The Legislature is of course free to change the statute. The Nebraska League of Municipalities is aware of this situation and we understand that efforts to amend the statute will be made. However, we must deal with the statute as it is, not as it may be sometime in the future. We are stuck with the language the Legislature actually used, not the language we think it should have used.

The overriding rule of statutory construction is to ascertain and give effect to the intention of the Legislature. Earlier this year the Supreme Court reiterated this familiar rule:

> Statutory language is to be given its plain and ordinary meaning, and our duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. When possible, an appellate court determines the legislative intent from the language of the statute itself. *Hallam v. L.G. Barcus & Sons, Inc.*, 281 Neb. 516, 524, 798 N.W.2d 109, 116 (2011).

As private citizens, we are free to suspect that the Legislature did not in fact intend that conviction for a minor offense, much less a traffic offense, should result in the forfeiture of a public office. Courts, however, are not free to follow that line of thought, nor should they be. The constitutional doctrine of separation of powers forbids a court to re-write a statute to give it a meaning that the court thinks is more sensible. The intention of the Legislature is to be determined "from the language of the statute itself." A court, therefore, is required to base its decision on the assumption that the Legislature meant what it said:

> It is the Legislature's function through the enactment of statutes to declare what is the law and public policy. The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation. As we have long held:
>
> > A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
>
> Where the Legislature does not enact an exception to a statutory rule, this court "must assume that the Legislature intended to do what it did." *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686 , 694-5, 757 N.W.2d 194, 202 (2008).

If we were arguing against this result we would try to make something out of another rule of statutory construction which is that the Legislature is presumed not to have intended an absurd result:

> Regarding statutory construction, we are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute. *Premium Farms v. County of Holt*, 263 Neb. 415, 423, 640 N.W.2d 633, 640 (2002).

One might argue that the conclusion we have reached is an absurd result. If something so minor as a traffic ticket disqualifies one from public office, who could serve? Surely, the argument would continue, the Legislature could not have intended this. We do not think this argument would be successful. For the reasons described above. The intention of the Legislature is to be ascertained from the language the Legislature used in the statute.

The reported statement of a representative of the Attorney General's office does not change our opinion.

It has been brought to our attention that a *McCook Gazette* story dated December 6, 2011, contains this statement:

> ...According to Shannon Kingery, Director of Communications for Nebraska Attorney General's office, the statute that has councilors and city staff preparing to hire an outside law firm to evaluate, "only deals with state crimes."
>
> Kingery told the Gazette Tuesday morning that the statute wouldn't refer to city ordinance violations, such as the case with Councilman Shane Hilker who was convicted of harboring a potentially vicious dog in May.

We have discussed the matter with Dale Comer, Assistant Attorney General, and find, as suspected that is not what Ms. Kingery said at all. Her statement was a correct assessment of the Nebraska Attorney General's Office on the matter, and that it is a local matter, not a state matter and the Attorney General will not venture an opinion. In any event, refer back to the definition of a crime. **A "crime" is an act or omission for which one is subject to punishment by public authority.** An ordinance violation is therefore a crime.

When we first quoted Section 19-613, we observed that the relevant questions are what is a "crime" within the meaning of this statute, and what it means to "forthwith forfeit such office." We turned first to the question of what is a crime within the meaning of Section 19-613. We have concluded that the ordinance violations for which Council Members Kircher were convicted were crimes within the meaning of the statute. We now turn to the second question.

WHAT DOES THE LANGUAGE TO " SHALL FORTHWITH FORFEIT SUCH OFFICE" MEAN?"

The first step in answering this question is to determine the meaning of the words used in the statute.

"Shall" indicates mandatory action about which there is no discretion.

As noted, the courts have developed rules to assist in the interpretation of statutes. The

Legislature, too, has adopted some rules to help the reader interpret its handiwork. A relevant rule appears in Neb. Rev. Stat.§ 48-801:

> Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statues of Nebraska hereafter enacted shall be as follows: (1) When the word shall appears, mandatory or ministerial action is presumed.

Section 19-613 in its present form was enacted after Section 48-801. That makes Section 19-613 a statute "hereafter enacted" to which Section 48-801 applies. In any event, the Legislature has not purported to change the dictionary meaning of the word. The Supreme Court has said many times, without citing Section 48-801, that "shall" is a mandatory word. See, *Drummond v. State Farm Mut. Auto. Ins. Co.*, 280 Neb. 258, 262, 785 N.W.2d 829, 833 (2010) ("as a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion.").

The mandatory nature of the forfeiture would not "be inconsistent with the manifest intention of the Legislature." Therefore the statute admits of no discretion. The office is forfeited.

"Forthwith" means immediately, at once, without delay.

It will be recalled that in the absence of something indicating to the contrary a statutory term will be given its "plain and ordinary meaning." The definition which appears in bold above came right out of *Webster's Third New International Dictionary, Unabridged.* For what it may be worth, this is the same dictionary the Supreme Court used to define "crime"

"Forfeit" means a fine, penalty...to lose or be liable to lose as consequence of a crime, fault, or breach of engagement.

Again, this definition comes right out of *Webster's Third New International Dictionary, Unabridged.* The plain meaning of the word in the context of Section 19-613 is that the right to hold the office is lost.

Section 19-613 is self-executing; that is, at the moment of conviction, Council Members Kircher and Hilker ceased to be lawful members of the McCook City Council.

This conclusion is based on the language of the statute. The mandatory word "shall" means that no discretion is involved. The city does not have the option to ignore the situation. The word "forthwith" means that the result happens "immediately, without delay." There is no language indicating that any action by anybody is necessary to bring about the loss of the office. The forfeiture is automatic. It happened immediately upon the conviction of Council Members Kircher and Hilker.

Their office has already been forfeited, and they are not lawful members of the McCook City Council.

DISCUSSION OF OUR RECOMMENDATIONS

The removal of Council Members Kircher and Hilker, by resignation or court action, is necessary.

To a great extent our recommendations are self-explanatory. We do not believe that Council Members Kircher and Hilker are lawfully on the City Council. The fact that they have abstained from voting is helpful, but it does not necessarily fully protect the city. If we are correct, then every action of the council is subject to challenge. We have not expended the resources that would be necessary to determine the outcome of that challenge. At bottom, what matters is not what we think, but what a court would rule. The simple fact is that we could never reach a degree of certainty that would justify us in advising the City of McCook to take the obvious risk. In our judgment, the only sensible course is to avoid the problem altogether. The way to do that is to remove Council Members Kircher and Hilker

Procedure to be followed if the council members will not resign.

While the Council Members and frankly the undersigned also, will believe this to be an unfortunate result, their decision to immediately resign will be in the best interests of the City of McCook. If not, the proper lawsuit is called *quo warranto.* This term comes from a Latin phrase meaning something like "by what warrant?," or "by what authority?" A *quo warranto* action is a challenge to the right of a person to occupy a public office. Although it had its origin in the common law of England, Nebraska has adopted statutes about it. Neb. Rev. Stat. § 25-21,121 authorizes the suit in the present case:

> An information [the name for the legal paper which must be filed] may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office...

The procedure is described in Neb. Rev.Stat. §25-21,122, which provides in relevant part:

> Such information may be filed by the Attorney General or by the county attorney of the proper county whenever either of such officers deems it his duty so to do... *Provided, however,* that any elector of the proper county may file such information against any person unlawfully holding or exercising the functions of any public office in the state...whenever the county attorney of the proper county shall refuse so to do within ten

> days after he shall have been notified in writing by any elector that any such person is disqualified by the Constitution or the laws of the State of Nebraska to hold the office in question or to exercise the functions thereof....

This is clear enough. To get the ball rolling the County Attorney should be given a written notice by "any elector" that Council Members Kircher and Hilker are "unlawfully holding or exercising the functions...." of members of the McCook City Council. If the County Attorney does not file the suit, "any elector" (but not the city itself) can do so.

Ratification

It is arguable that, even though Council Members Kircher and Hilker abstained from voting, that there mere presence on the Council makes its actions subject to attack. To guard against this possibility, we recommend that, once they are off the council, the council ratify every significant act undertaken after the earlier of the two convictions.

FINAL COMMENT

We are fully aware that Council Members Kircher and Hilker are not the only people who are impacted by this situation. This is a democracy, they were elected, and the people of McCook are entitled to be represented by the council members they have chosen. Unfortunately, all of this must yield to the fact that McCook, like any other city, is a subdivision of the State of Nebraska and as such is subject to the overriding power of the Legislature. The Legislature has complete power to determine who can sit on a city council. The statute that it has enacted says that Council Members Kircher and Hilker have forfeited their office.

If you have questions or concerns, or if we can assist you further in this matter, please do not to hesitate to contact us.

Very truly yours,

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