



CITY OF PORTSMOUTH, VIRGINIA

— Established 1752 —

Office of the City Attorney

(757) 393-8731

Fax: (757) 393-5062

G. Timothy Oksman
City Attorney
George M. Willson
Sr. Deputy City Attorney
Alfred W. Bates, III
Deputy City Attorney

June 2, 2010

Assistant City Attorneys
Nancy B. Cherry
Shelia C. Riddick
W. Eugene White

Portsmouth City Council
City Hall, 801 Crawford Street
Portsmouth, Virginia 23704

Re: **Recall and Vacancy**

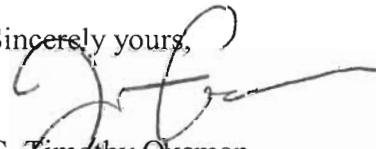
Dear Mayor Holley, Vice Mayor Moody, and Council Members:

I enclose a series of legal questions and answers related to possible recall of the Mayor, and also filling possible vacancies. The answers comprise an official legal opinion of the City Attorney.

Please let me know if there are any further questions.

With kind regards, I am

Sincerely yours,



G. Timothy Oksman
City Attorney

cc: Debra Y. White, City Clerk
Kenneth L. Chandler, City Manager

POSSIBLE RECALL/VACANCY IN OFFICE QUESTIONS AND ANSWERS

QUESTIONS THAT COULD ARISE PRIOR TO JULY 1, 2010

- **How long does the Mayor have to resign?** Portsmouth Circuit Court gave Mayor Holley until this Friday, June 5, to resign. If he does not do so, then the recall election will be scheduled to occur within thirty to forty days - - that is, in early or mid- July.
- **If the Mayor wishes to resign so as to avoid the recall election, must the resignation be effective immediately, or may it be effective at a later date?** There is no clear legal answer to this question. In the absence of controlling legal authority, it is my opinion that a resignation with a delayed effective date, or with conditions, is *not* sufficient to cancel the recall election. The reason is that it would be more in the nature of stating an *intention* to resign at a later time, rather than an actual, irrevocable resignation at a time certain. Hypothetically, what would happen if, before the effective date of the resignation, the Mayor were to withdraw his prior resignation? A recall election would then have to be scheduled, but the tight time period fixed by law for conducting the election could not be complied with - - thus calling into question the validity of the recall election. In short, it is my opinion that in order to cancel the recall election, the resignation would have to be effective before the close of business on Friday, June 5.
- **If the Mayor resigns after June 5, what happens?** Again, there is no clear legal precedent or controlling legal authority. As a practical matter, preparations for the recall election will commence if there is no resignation by June 5, yet there would be no sense in proceeding with it if the Mayor had already resigned . Thus, I expect that the Court would cancel the recall election out of practical necessity, rather than for purely legal reasons. But if this were to occur, there could be a waste of significant public funds, since the City Registrar would already have incurred expenses preparing for the recall (hiring poll workers, printing ballots, publishing public notices, etc.).
- **If the Mayor doesn't step down, does he continue as Mayor?** The Mayor is not required to step down prior to the recall election. If he is recalled in the election, then he forfeits his office, and no resignation is needed. The date at which he forfeits his office would be determined by the Court. If he is not recalled, then he continues as Mayor, with all express and implied powers of office intact.
- **How is a vacancy in the office of Mayor filled before July 1?** Should the Mayor resign prior to July 1, City Council could appoint a person to fill the vacant office of Mayor. The person so appointed would serve *the entire remainder of the unexpired term*, so long as the appointment is made before July 1.

- **What happens if a Council Member is appointed Mayor?** If a Council Member is thus appointed Mayor, then he or she forfeits his or her seat upon assuming the new office. The forfeiture would be by action of law, pursuant to the prohibition on holding dual elected office. No resignation would be required. The remaining Council Members (including the new Mayor) could then appoint someone to serve the entire remainder of that Council Member's unexpired term. It would be legal for Council to take both actions - - appoint a Council Member to be Mayor, and then appoint a person to fill that vacant Council position - - at the same meeting, if Council wishes to do so.
- **If the Mayor resigns, and if an appointment is made to replace him prior to July 1, how many special elections will there be?** None.
- **If there is a recall election, what must a citizen interested in running for Mayor do to get on the ballot?** The ballot to select a new Mayor is *the same ballot by which the voters determine whether or not to recall the Mayor*. This bizarre procedure - - which is contained in our antiquated and dysfunctional City Charter - - has no known precedent. A person wishing to be on the ballot must obtain signatures in the number of at least 30% of the voters who voted in the last gubernatorial election, approximately 6,000 signatures. The signatures must be obtained within a very brief period (as few as twenty days, and in any event not more than thirty days) and filed with the Clerk of Circuit Court. And all these signatures would have to be obtained before it's known whether there will even be a vacancy. Please note that write-in candidates are not authorized.
- **If a Council Member obtains enough signatures to be on the recall ballot, must that Council Member resign from City Council?** Yes. The City Charter requires that once a Council Member becomes a candidate for Mayor, he or she must resign from City Council - - regardless of whether or not he or she is ultimately elected Mayor. Unfortunately, the Charter continues to create uncertainty and confusion: it doesn't say *when* the resignation must occur. Thus, there is no bar to resigning with a delayed date - - even a substantially delayed date.
- **If a Council Member privately tries to obtain support from his/her fellow Council Members to be appointed on an interim basis as Mayor, but that Council Member is not appointed, must he/she resign from office?** No. Laws related to forfeiture of office are to be construed narrowly, and in my opinion a person is not a candidate for the office of Mayor unless and until he or she files a valid petition for election to the office. Merely lobbying fellow Council Members to be appointed does not make someone a "candidate."

QUESTIONS THAT COULD ARISE AFTER JULY 1, 2010

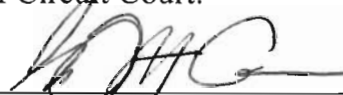
- **A new law will go into effect on July 1. How will it affect the Portsmouth recall/vacancy process?** The new law does not deal with recall. It deals only with

filling vacancies on local governing bodies, regardless of how those vacancies occur. It supercedes all prior laws, including City Charters, that are not consistent with it. It says that if there's any vacancy on a local governing body (e.g., Portsmouth Mayor and/or Portsmouth City Council), then the remaining members of City Council appoint an interim successor (the same as under the Charter), but the appointee serves *only until there is a special election*. At the special election, voters elect someone to fill the unexpired term of the vacant position. The new law does not authorize someone to be elected during the same election that might create the vacancy through a recall - - which is the procedure set forth in our Charter..

- **What happens if the Mayor resigns now, but City Council can't agree on a person to appoint to the Office of Mayor - - or to a vacant Council position - - prior to July 1?** The new law will govern - interim appointment, followed by a special election.
- **If a person obtains enough signatures to be a candidate on the recall ballot, and the person is elected, is he or she the Mayor?** Maybe so , maybe not. There is no clear answer to this question, because the new state law will take effect on July 1, and the recall election, if it occurs, will be after July 1. Again, the new law does not affect the recall election itself - - but it does affect how a vacancy created by a successful recall will be filled. If the *Charter* applies to filling the vacancy, then the person who is on the ballot becomes the Mayor. But if the *new law* about filling a vacancy applies, then the election of the Mayor's successor isn't valid, because the new law requires that the vacancy be filled by interim appointment of City Council, subject to a later special election. If City Council were to appoint the same person who was elected by the voters, then the question would be moot. But if Council were to appoint a *different* person from the person chosen in the recall election, then the Court would have to decide which of the two is the real Mayor.
- **Could Mayor Holley be a candidate for Mayor?** (A) I will first address the hypothetical question of whether Mayor Holley could be a candidate *in the recall election itself*. While the law does not provide an explicit answer to this question, such a situation would make the recall process a sham, and I doubt that the Court would allow it to happen. (B) If Mayor Holley is recalled after July 1 by decision of the voters, and there is a special election next fall to fill the remaining balance of his term, there is no law that disqualifies him from being a candidate in that election. Legally, if he files a valid candidate petition, the Registrar would have no choice but to put him on the ballot. (C) As to any *future* election for a full term as Mayor, Mayor Holley is not disqualified from being re-elected to the post from which he was previously removed - - as we already know.
- **Could Council appoint a non-Council Member to be Mayor until the special election? Could Council require that the appointee not be a Mayoral candidate in the subsequent special election?** A Portsmouth citizen who is not on City

Council is fully eligible to appointed as Mayor on an interim basis. City Council may seek a commitment from the citizen that he/she would not be a candidate at the subsequent special election. However, such a commitment could not be legally enforced.

- **What happens if a Council Member is appointed on an interim basis to fill the vacant office of Mayor after July 1?** By action of law (as discussed above), that Council Member forfeits his or her seat upon assuming the office of Mayor. No resignation is necessary. Council could then appoint someone to fill the Council vacancy - - but only until a special election can be held for the remaining balance of the term.
- **If a Council Member resigns to run for Mayor - - either during the recall election or in the subsequent special election - - and is not elected, may he or she be reappointed to his or her former Council seat?** Yes. However, under the new law, the appointment will only be an interim one until a later special election can be held to fill the remaining balance of the term.
- **If a vacancy in the office of Mayor occurs after July 1, how many special elections could there be?** If the vacancy in the office of Mayor occurs after July 1, then there will be an interim Mayor appointed by Council, followed by a special election for the office of Mayor, presumably next November. If a Council Member becomes a candidate in the November election for Mayor, then he/she must resign his/her Council seat. Once the resignation is effective, then City Council is to make an *interim* appointment to fill it, with a permanent replacement to be determined by a later special election. Thus, there could be two cascading special elections resulting from a post-July 1 vacancy in the office of Mayor - - one in November to elect a permanent Mayor for the balance of the original term, and the second at a later time to elect a permanent Council Member for the balance of that original term.
- **How much does a special election cost, and who pays for it?** The Registrar's Office advises us that a special election costs between \$50,000 and \$60,000, to be paid by the City. Thus, if there are two special elections, the cost would be \$100,000 to \$120,000.
- **What happens if Council can't agree on a person to appoint to fill a vacancy - - either Mayor or Council Member?** Under the new law, if Council doesn't make the appointment within forty-five days of the vacancy occurring, then the successor is appointed by majority vote of the Judges of Circuit Court.



G. Timothy Oksman
City Attorney 6/2/10