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## MEMORANDUM

**TO:** Steve Owen, Council Member

**FROM:** F. Charles Dunlay, City Attorney

**CC:** Mayor Steven Ellis  
City Council

**DATE:** January 3, 2022

**SUBJECT:** Request for Legal Opinion; Whether Current President of the Council or President of the Council Elected at Regular City Council Meeting on the Second Monday of January following Election Fills Mayoral Vacancy Created upon Tyler Graves Failure to Qualify or Disqualification for Office and Subsequent Vacancy upon Qualification of Successor

### Introduction

Councilmember Steve Owen contacted me and requested that I prepare a legal opinion regarding whether and why he, as current president of the council, should not be qualified and sworn as Mayor of the City of Spring Hill, Kansas on January 10, 2022, rather than a newly elected president of the council. Mr. Owen questioned my legal opinion issued to the City Council on November 18, 2021, that the newly elected councilmembers must be seated and elect a president of the council, who will fill the vacancy created on January 10, 2022 when Mayor-Elect Tyler Graves fails to qualify for office. Councilmember Owen asserted, relying in part, upon his review of previous City Council Meetings' minutes and agendas held upon the second Monday in January, that as current President of the Council, he would be entitled to fill the prospective vacancy which will be created on January 10, 2022 when Mr. Graves fails to qualify for office.

As I understand it, Councilmember Owen, who may be seeking legal guidance more than contending, further maintained that, because the position of President of the Council possesses no "term limit," he should retain the position of president of the council on January 10, 2022 and fill the vacancy created by Mr. Graves. Thus, Councilmember Owen contends, he should be sworn in as Mayor at the beginning of the City Council's regular meeting on January 10, 2022. I perceived

Councilmember Owen's question as seeking guidance and legal counsel rather than a legal argument that he is entitled to fill Mr. Graves' anticipated disqualification or failure to qualify.<sup>1</sup>

Pursuant to Charter Ordinance Nos. 36 and 26, and subsequently incorporated in SHMC §1-102. B. and C., the City of Spring Hill's mayor's term of office is for four years or until his or her successor is qualified. Mayor Ellis' term continues until his successor is qualified. Under the City's Charter Ordinances as described below, in the first instance, Mayor Ellis' term will end on the second Monday in January, but his term will not end until the newly elected councilmembers are seated and select a President of the Council. Charter Ordinance Nos. 36, 30, and 28 require the City Council to elect from amongst its members a President of the Council at the regular meeting of the City Council on January 10, 2022. The councilmember elected President of the Council by his or her fellows will then, upon acceptance and completion of the oath of office, become mayor of the City of Spring Hill, fill the vacancy created by Mr. Graves, and succeed Mayor Ellis.

### **Applicable Legal Principles**

Pursuant to Charter Ordinance Nos. 28 and 36, and SHMC §1-112. *President of Council: Election; Powers and Duties.*<sup>2</sup>, in part, state the newly seated, "City Council shall, at its regular meeting following any city election, elect one of its members as 'President of the Council.'" Notably, SHMC lists the primary authority for the provision as K.S.A. 15-310 and 15-311 – statutes applicable to Cities of the Third Class<sup>3</sup>, but the City adopted Charter Ordinance Nos. 28 and 36 to exempt itself from the provisions K.S.A. 14-204, which would otherwise be applicable. President of the Council is not an appointed or elected "office"; indeed, it is not an office of any sort and has no "term of office." Kan. Att'y Gen. Op. No. 2000-5 (Feb. 3, 2000) \*2. "The person elected to such position, therefore, holds such position at the pleasure of the city council." *Id.*<sup>4</sup>

The Spring Hill President of the Council possesses no "term of office," because the position is not an office whatsoever. The legal meaning phrase "term of office" is entirely distinct from "term limit" and from the amount of time a person holds a "position." Spring Hill Charter Ordinance Nos. 28 and 36 clearly establish, however, that the position has a beginning and end date – at the first meeting of a new City Council following election. See Charter Ordinance Nos. 28 and 36; the Council may, of course, choose to elect the councilmember previously chosen to serve. The City Council can also remove the President of the Council at any time and replace him or her with any of their fellows; the person serving as President of the Council has no vested interest in the position. See Kan. Att'y Gen. Op. No. 2000-5 (Feb. 3, 2000) \*2. More importantly, the City's Charter

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<sup>1</sup> Please note, whether my interpretation of Councilmember Owen's request and contention was a request for interpretative legal counsel or an argument did not impact the legal analysis presented in this legal opinion memorandum. Councilmember Owen may raise the question properly in either context.

<sup>2</sup> SHMC §1-112 does not appear to have been properly updated upon adoption of Charter Ordinance Nos. 36 and 26 – particularly not following the adoption of Charter Ordinance No. 36, effective on December 27, 2016.

<sup>3</sup> Therefore, the underlying authority listed as that cited as the basis for upon for SHMC §§1-112 and 1-113 is no longer applicable to the City, and the City chartered out of the similar provisions of K.S.A. Chapter 14 applicable to cities of the second class.

<sup>4</sup> Notably, Kan. Att'y Gen. Op. No. 2000-5 is entitled in full: "Frank H. Jenkins, Jr., Kan. Att'y Gen. Op. No. 2000-5," and it was requested by the former Spring Hill City Attorney to determine whether the City Council could simply remove and replace a President of the Council without hearing or cause.

Ordinances require the newly assembled City Council to elect a President of the Council at their meeting on the second Monday in January.<sup>5</sup>

The specific provisions of the Charter Ordinances relating to the President of the Council and the statutes which the City exempted by such Charter Ordinances must be fully considered in construing the applicable legal standard. As noted, the City exempted itself from the provisions of K.S.A. 14-204 and adopted the following substitute and additional provisions in Charter Ordinance No. 28, which was affirmed in Charter Ordinance No. 36:

The city council shall, at its regular meeting following any city election, elect one of its members as “President of the Council.” When any vacancy shall happen in the office of mayor, the president of the council the time being shall exercise the office of mayor, and all the rights, privileges and jurisdiction of the mayor, other than the appointment of officers or employees, until such vacancy be filled at the next city election or until such disability be removed, or in the case of temporary absence, until the mayor shall return.

Charter Ordinance No. 28, Section 2; Charter Ordinance No. 36, Section Seven.

K.S.A. 14-204 provides:

Each ward of each city governed by this act shall have two council members, who shall be chosen by the qualified electors of their respective wards. No person shall be eligible for the office of council member who is not at the time of election an actual resident of the ward from which elected. If any council member moves from the ward from which elected, the office shall be deemed vacant. Whenever a vacancy occurs, the governing body shall appoint an elector of the ward where the vacancy occurs to be council member for the balance of the unexpired term.

The council shall elect from its membership a president of the council. The president of the council shall preside in the absence of the mayor. If a vacancy occurs in the office of the mayor by death, resignation, removal from the city, removal from office, refusal to qualify, or otherwise, the president of the council shall become mayor until the next regular city election and the vacancy created in the office of the council member becoming mayor shall be filled by the governing body of the city. Thereupon the council shall elect from its membership a new president of the council.

Id.

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<sup>5</sup> SHMC §1-112. a. contains an anachronism which reflects the failure to fully update the Code upon the City’s transition from a City of the Third Class to a City of the Second Class, and the apparent failure to update SHMC §§1-112 and 1-113 its adoption of Charter Ordinance Nos. 28, 30, and 36 – particularly Charter Ordinance No. 36. The last sentence of SHMC §1-112. a., the entirety of SHMC §1-112. b., and SHMC §1-113. appear to have no basis in either statute or Charter Ordinance.

When construing legislation, be it statutory or home rule charter, one of the fundamental principles of construction requires additions, amendments, omissions, or substitutions in the provisions to be given significant meaning and import. In the case of a charter ordinance through which a City exempts itself from a statute and adopts substitute provisions, the differences and distinctions between the statutory language and the charter ordinance are preeminent. Charter Ordinance No. 36, reaffirming Charter Ordinance 28, in Section Seven, in its first line mandates that, “the City Council shall, at its regular meeting following any city election, elect one of its members as “President of the Council.” K.S.A. 14-204 contains no such clause or requirement. The distinction displays not only the requirement, but it shows the principal purpose of the charter ordinance. While the City Council may remove or replace the president of the council at any time, the period one serves as president of the council, absent replacement, runs with each new City Council.

In Charter Ordinance No. 30, the City exempted itself from the provisions of K.S.A. 14-308 relating to the vacancy in office of Mayor or council members but chose not to enact substitute provisions. Those alternate provisions are found elsewhere. In Charter Ordinance No. 26 and Charter Ordinance No. 36, the City exempted itself from the provisions of K.S.A. 14-103, K.S.A. 14-207, K.S.A. 12-104a, and K.S.A. 14-204. In Charter Ordinance No. 36, the City reaffirmed Charter Ordinance No. 26, in part, regarding vacancies:

Vacancies.

1. Vacancy in Office of Mayor. In case of a vacancy in the office of mayor, the president of the council shall become mayor until the next regular election for that office and a vacancy shall occur in the office of the council member becoming mayor.
2. Vacancy in City Council. In case of a vacancy in the council occurring by reason of resignation, death, or removal from office or from the city, the mayor, by and with the advice and consent of the remaining council members, shall appoint some qualified elector to fill the vacancy until the next election for that office.
3. In case any person elected as a council member neglects or refuses to qualify within 30 days after election, the council member shall be deemed to have refused office and a vacancy shall exist. The mayor may, with the consent of the remaining council members, appoint a suitable elector to fill the vacancy.

Charter Ordinance No. 36, Section Five; Charter Ordinance No. 26, Section 4.

Once again, the differences in the language between the charter ordinances and K.S.A. 14-204 are clear and preeminent. First, the City chose not to define vacancy in the office and excluded any reference to “refusal to qualify”; this distinction, combined with the substitute language in Charter Ordinance No. 36, Section Seven, eliminates any question concerning when or which “president of the council” fills a vacancy upon a mayor-elect’s failure or refusal to qualify – or disqualification – the president of the council elected by the new City Council. Second, the City’s charters provide

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an alternate means for the appointment of vacancies in the council; the mayor appoints council members to fill vacancies upon the advice and consent of the council rather than the governing body filling the vacancy.

Spring Hill Charter Ordinances and Municipal Code both empower and require each new Council to “elect one of its members” at the first meeting of the new City Council. The intent is self-evident; the newly composed Council, including its newly elected members, chooses one amongst themselves who will become mayor should the office become vacant and to act a Council Chair and exercise some of the mayor’s authority when he or she is absent. The term “elect” was selected with purpose; the people’s elected officials elect another on their behalf to serve in the case of absence or vacancy. *See Tucker v. Raney*, 145 Kan. 256, 65 P.2d 329, 331 (1937) (“The ordinary meaning of the word ‘elect’ is ‘chosen, taken by preference from among two or more; selected. Webster’s International Dictionary. The word ‘elect’ when applied to an office is frequently used in the sense of one chosen, or properly chosen, or chosen as provided by law.”) (further citations omitted).

### **Mayor Ellis’ Term of Office**

The terms of office of the mayor of the City of Spring Hill, Kansas are for four years or until his successor is qualified. SHMC §1-102. B. and C.; Charter Ordinance No. 36, Section Two, B. Absent unforeseen circumstances, Mayor Ellis’ term will end on the second Monday in January, but his term will not end until the newly elected councilmembers are seated and select a President of the Council. Mayor-Elect Graves’ failure to qualify, as stated above, means that Mayor Ellis’ term does not end at precisely the same time as the two outgoing Councilmembers – for their successors have qualified. Rather, Mayor Ellis’ term will still end on the second Monday in January following the City Council’s selection of a president of the council as mandated by Charter Ordinance No. 36.

The City Council must elect a president of the council at its first regular meeting following any City election – which means the first meeting at which the new council is seated. As discussed above, the position of “President of the Council” runs concurrent with each new council – even if the person serving as president of the council has no vested interest in the position and serves solely at the pleasure of the City Council. The new council has the vested right to select its president of the council. The prior president of the council, on the other hand, has no vested right in the position whatsoever. See Kan. Att’y Gen. Op. No. 2000-5 \*2.

The current president of the council, Councilmember Owen, can only assume the office of mayor for the term of the current mayor – Mayor Ellis, unless, of course, if he is elected president of the council by the new council. “Vacancy” refers not to the incumbent, but to the term or to the office. 63C Am. Jur. 2d Public Officers and Employees §109. If Councilmember Owen assumes the office of mayor prior to the City Council’s election of a president of the council, he will be assuming Mayor Ellis’ term – as it is not vacant.

The City, more particularly, the Governing Body<sup>6</sup> cannot move to fill Mr. Graves' elected office until both his term begins, and he is disqualified. "[A] legislative body may not usurp the rights of its successor by making a prospective appointment to fill an anticipated vacancy in an office where the appointee's term will not begin until after the legislative body's own term has expired." 3 McQuillin Mun. Corp. § 12:155: Vacancies in office (3d ed.) (citing *Mullinax v. Garrison*, 296 S.C. 370, 373 S.E.2d 471, 49 Ed. Law Rep. 1315 (1988) (further citation omitted)). Where a term of office has not expired when a replacement is appointed to fill a vacancy due to resignation, the replacement's appointment is limited to the balance of the unexpired term. 63C Am. Jur. 2d Public Officers and Employees §109.

"The person holding any civil office under the state is entitled by the Constitution to continue to exercise the duties of the office until his successor is duly qualified. There can be no doubt but that the 'successor' is one legally chosen or selected." *State v. Irey*, 116 Kan. 21, 225 P. 1050, 1051 (1924) (quoting *Ballantyne v. Bower*, 17 Wyo. 356, 366, 99 Pac. 869, 872 (17 Ann. Cas. 82)); see also *Smith v. Snell*, 154 Kan. 187, 117 P.2d 567, 567 (1941). If a vacancy occurs in a public office, the authority having the power to fill such vacancy may appoint someone to the office. 63C Am. Jur. 2d Public Officers and Employees §104 (further citations omitted). The power of the executive to make a valid appointment does not arise until there is a vacancy in fact, or, as the rule is sometimes stated, it is a condition precedent to the exercise of the power to fill a vacancy in office that such vacancy in fact exists. *Id.*

### **Hold-Over Doctrine**

The terms of office for both the mayor and city councilmembers for the City of Spring Hill, Kansas are for four years *or until their successors are qualified*. SHMC §1-102. B. and C.; Charter Ordinance No. 36, Section Two, B. Following the election of one of the city councilmembers to the position of "President of the Council" on January 10, 2022, the president of the council elected by the newly seated council will be a qualified successor and the office of mayor will become vacant. The elected president of the council, pursuant the Charter Ordinances referenced above, shall become the mayor of the City of Spring Hill, Kansas, sworn to such office, and a vacancy shall occur in the office of the councilmember becoming mayor. *Id.* Mayor Ellis' term will end upon the qualification of his successor. See SHMC §1-102. The position of president of the council, however, is not subject to and cannot qualify for holding over as the position is not an *office* – either appointed or elected. See Kan. Att'y Gen. Op. No. 2000-5.

Under the City's Charter Ordinance No. 36, the hold-over doctrine should not be required to continue Mayor Ellis' term. The City has provided a manner filling the vacancy in the office of mayor by the operation of law – or more specifically charter ordinance. Any question regarding the authority of Mayor Ellis to exercise his powers as mayor prior to the election of a president of council, however, are unequivocally resolved by either such acts occurring on the second Monday of January prior to qualification of his successor or by the hold-over doctrine. Once the newly comprised City Council elects a president of the council upon being qualified, the councilmember

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<sup>6</sup> A/K/A the City Council, SHMC §1-101, who fills the office not by appointment but rather by operation of law – the provisions of Charter Ordinance No. 36.

elected by his or her fellows will become a qualified successor, and the current mayor's term will be at an end.

If for any reason the regular City Council meeting on January 10, 2022, is delayed, *e.g.*, a severe winter storm or illness amongst Council Members, he would hold-over in office until his successor is qualified. Moreover, while I do not believe that the hold-over doctrine is applicable to determine the order of business or authority of members of the governing to act on January 10, 2022, as described in this memorandum, even if my opinion was mistaken in part, any additional question concerning Mayor Ellis' authority to act would then be addressed pursuant to the doctrine of holding over in public office.

The prevailing American rule is that in the absence of constitutional or statutory provisions to the contrary, an officer is entitled to hold office until his or her successor is selected and qualified for office. See 63C Am. Jur. 2d, Public Officers and Employees, § 148. "Failure to appoint or elect a successor at the end of a defined period does not usually cause a vacancy where the officer is to hold until a successor is elected or appointed and qualified. Therefore, the time an officer holds over the designated period is as much his or her term of office as that which precedes the date at which the new election or appointment should be held or made." § 12:165. *Offices—Holding over; No Successor*, 3 McQuillin Mun. Corp. § 12:165 (3d ed.). "[A] probate judge, lawfully serving as such officer at the time of death of probate judge-elect, who died before beginning of term for which he was elected and without having qualified for the office, was entitled to hold the office of probate judge during succeeding term until qualification of successor." *Smith v. Snell*, 154 Kan. 187, 117 P.2d 567, 567 (1941).

"The right to hold over exists only in cases where there is no legally elected and qualified successor." *State ex rel. Johnson v. Albert*, 55 Kan. 154, 40 P. 286, 287 (1895). If a mayor-elect is found is disqualified or vacates their seat, there would be no legally elected and qualified successor, and thus the right to hold over would exist – until or unless the City Council complied with the provisions of Charter Ordinance No. 36, Section Seven, reaffirming Charter Ordinance No. 28, Section 2, in consideration of the extension of municipal terms of office required by uniform statutory enactment scheduling elections of city officers in November. The officer required to hold over in office will be considered a *de facto* officer, and his or her acts shall be regarded as valid exercises of the office's authority. See *Hale v. Bischoff*, 53 Kan. 301, 307, 36 F. 752 (1894).

In 1933, when the state changed election laws for cities of the first class from two-year to four-year terms of office, a conflict arose regarding the term of the commissioner of parks. The Supreme Court ultimately ruled that the legislature intended to fill the hiatus between the ending of existing terms in 1933 and the beginning of the next terms in 1935, present incumbents should hold over—"continue in office." *Murray v. Payne*, 137 Kan. 685, 21 P.2d 333, 336 (1933). The Court specifically stated that, although the legislative act contained a hold-over provision, had it not, the hold-over rule would still apply. *Id.* See Att'y Gen. Op. 126 (1980) ("The purpose for the holdover rule is to prevent a hiatus in government service which would be detrimental to the public interest by permitting offices to be filled at all times without interruption."). See also Op. Att'y Gen. 155 (1988), where the Attorney General said that a city planning commission member whose term had expired could hold over in office until a successor was appointed.

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## Custom and Usage

Councilmember Owen suggested that, upon review of past City Council meeting minutes, he discovered that newly elected mayors and council members were sworn and assumed their council seats prior to the election of a president of the council. Councilmember Owen requests determination of why Mr. Graves' mayoral vacancy would not occur prior to the election of the new president of the council, and why he would not assume the office of mayor upon Mr. Graves disqualification or failure to qualify. It has been asserted that "[p]recedence has been set" that the mayor is to be sworn, followed by the newly elected council members, and finally the president of the council is selected.

The contention asserted relies upon the legal theory of "custom and usage" or "prescription." *Prescription* is an English common law concept through which a rule archaically established by the lapse of time so great as to have always been so – an ancient common law custom, "having existed from time immemorial." 25 C.J.S. Customs and Usages § 4; *Prescription*, Black's Law Dictionary (11th ed. 2019). In England, prescription is of consequence in interpreting charter and municipal powers; in the United States, "[p]rescription respecting the existence of municipal powers of but little importance; therefore, usage is but a small factor or element in ascertaining the meaning of charter provisions." § 10:21. Custom or usage as affecting powers, 2A McQuillin Mun. Corp. (3d ed.) (*citing and quoting May v. City of Laramie*, 58 Wyo. 240, 131 P.2d 300 (1942); and Lawson on Usages and Customs, § 224).

As prescription was not adopted by the courts of United States, the applicable consideration is the doctrine of *custom and usage*. "A custom or usage, to be valid and effective, must be actually known, generally known, or notorious." 21A Am. Jur. 2d Customs and Usages § 14 (further citation omitted). Moreover, "usage or custom must be ancient, certain and uniform, compulsory, consistent, general, continued, notorious, reasonable, not in contravention of law, and acquiesced in by persons acting within the scope of its operations." 25 C.J.S. Customs and Usages § 3 (*citing Porter v. Rabinowitz*, 159 F.2d 512 (5<sup>th</sup> Cir. 1947)); *see also Wood v. Melton*, 179 Kan. 128, 132–33, 293 P.2d 252, 255 (1956). Under Kansas law, the purpose for use of the judicial doctrine of usage or custom has been long established as limited, "to explain technical terms in contracts, to which peculiar meanings attach; to make certain that which is indefinite, ambiguous, or obscure; to supply necessary matters upon which the contract itself is silent: and generally to elucidate the intention of the parties when the meaning of the contract cannot be clearly ascertained from the language employed." *McSherry v. Blanchfield*, 68 Kan. 310, 75 P. 121, 121–22, Syl. 3 (1904); *see also City of Leavenworth v. Rankin*, 2 Kan. 357, 370 (1864) (further citation omitted); *Wood*, 179 Kan. at 133.

The general rule is that a common-law custom must be ancient, having existed from time immemorial. 25 C.J.S. Customs and Usages § 4. To be binding, a custom or usage must be certain, definite, fixed, well settled, unvarying, and uniform. 25 C.J.S. Customs and Usages § 6 (further citation omitted). "Neither will an alleged usage or practice that leaves some material element to the discretion of one individual be admissible as a custom or usage." *Id.* A custom may not supersede, abrogate, or prevail against a statute, nor may it justify or excuse its violation or override its express provisions. Customs or usages are also unenforceable when inconsistent with

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the terms of charters or ordinances of municipal corporations. *See Wood*, 179 Kan. at 132-33; *Rankin*, 2 Kan. at 369-70; *see, e.g.*, 25 C.J.S. Customs and Usages §§ 15-16 and cases cited therein.

Here, the contention that custom or usage dictates the City Council's order of business in its regular meeting on January 10, 2022, in the first instance, meets none of the requirements for the application of the proposed legal principle; no legally cognizable custom or usage exists. Secondly, even if custom and usage could be established, the concept cannot prevail to supersede or override the City's charter ordinances or its rules of order. The controlling law – here a charter ordinance – is Charter Ordinance No. 36. The ordinance was effective December 27, 2016; the City has qualified and sworn one mayor on one instance under the charter. The order of business or custom of the City cannot be said to be ancient or unwavering regarding Charter Ordinance No. 36 – containing specific substitute language to K.S.A. 14-204 – which requires the newly formed Council to elect a president of the council from amongst its fellows. Conduct preceding its formal adoption cannot establish custom or usage. As discussed above, the applicable provision set forth in Section Seven of the explicitly requires the new council – to run with its two-year administration at its pleasure – a president of the council.

Moreover, the mayor establishes the City Council's Agenda following preparation of a draft prepared by or at the direction of the city administrator, subject to amendment upon motion approved by a majority of the City Council. See SHMC §§ 1-107, 1-201, 1-420; K.S.A. 14-301, 14-305, 14-306. A loose and variable practice cannot dictate the rights of the parties or the providence of statute or municipal ordinance. See 25 C.J.S. Customs and Usages § 6; *see Wood*, 179 Kan. at 132-33; *Clark v. Allaman*, 71 Kan. 206, 80 P. 571, 70 L.R.A. 971 (“Evidence cannot be received of local customs contrary to established principles of law.”). Neither will an alleged usage or practice that leaves some material element to the discretion of one individual be admissible as a custom or usage. *In re Bowling Green Mill. Co.*, 132 F.2d 279 (6<sup>th</sup> Cir. 1942).

### **Conclusion**

In summary, the requirement that the new City Council elect a president of the council, and that the councilmember so elected will fill the vacancy created by Mr. Graves' disqualification or failure to qualify, depends not upon the order at which various elected officers were qualified or sworn in 2018. Mayor Ellis retains the office of mayor until the president of the council is elected by the newly comprised council. The council member so elected will fill the vacancy created by Mr. Graves. Any president of the council filling a vacancy created by in Mayor Ellis' term – the current term of the mayor's office – if any, would only fulfill Mayor Ellis' remaining term and would lose both his or her council seat and the mayoral term on January 10, 2022.

If you have any questions, please feel free to contact me. Thank you.