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The Honorable Michael Mauro
Secretary of State
State Capitol
L-O-C-A-L

Dear Secretary Mauro:

You have brought to our attention a ruling from the Scott County District Court that addresses when a vacancy on the City of Bettendorf Park Board should be placed on the ballot. In Scott County a city park commissioner was elected to the city council and resigned his position on the Bettendorf Park Board. The city council appointed a person to fill the vacancy in a term of office that will expire in December, 2011. When the Scott County Auditor contacted municipalities in Scott County and expressed her view that city vacancies should be filled at the general election in 2010, the City of Bettendorf filed suit seeking a declaratory judgment that the vacancy remain filled by an appointee until the next city election. The Scott County District Court, the Honorable Hobart Darbyshire, ruled that the appointee may hold office on the Bettendorf Park Board until the next city election in November, 2011, and the vacancy should not be placed on the general election ballot in November, 2010, even though city voters would be going to the polls at that time. It is our understanding that an appeal will be filed.

You ask for our legal advice because numerous other cities currently have vacancies in city offices and are faced with the same question. In your capacity as the State Commissioner of Elections, you supervise county auditors who are the county commissioners of elections. See Iowa Code § 47.1(2009) ("The secretary of state is designated as the state commissioner of elections and shall supervise the activities of the county commissioners of elections."). It has been your practice consistent with our previous legal advice to direct county auditors to place city vacancies on the general election ballot in these circumstances. In light of the recent district court ruling and while an appeal is pending, you ask whether you should direct county auditors that city vacancies should not be filled by the voters until the city election in November, 2011, or whether you should continue the past practice of directing county auditors to place city vacancies on the general election ballot in these circumstances. Until there is a final resolution of this issue by an appellate court, we continue to advise that your office should direct county auditors to treat the general election this November as the "next pending election" for purposes of filling city

vacancies under these circumstances. The Scott County Auditor should follow the district court ruling unless a stay of this decision is obtained.

The vacancy on the Bettendorf Park Board was filled by appointment pursuant to Iowa Code section 372.13(2)(a) which states that “[a] vacancy in an elective city office during a term of office shall be filled . . . [b]y appointment by the remaining members of the council . . . The appointment shall be for the period *until the next pending election as defined in section 69.12. . .*” Iowa Code § 372.13(2)(a) (emphasis added). This dispute turns on construction of the term “next pending election” in Iowa Code section 69.12 which provides in relevant part:

When a vacancy occurs in any nonpartisan elective office of a political subdivision of this state, and the statutes governing the office in which the vacancy occurs require that it be filled by election or are silent as to the method of filling the vacancy, it shall be filled pursuant to this section. As used in this section, “*pending election*” means any election at which there will be on the ballot either the office in which the vacancy exists, or any other office to be filled or any public question to be decided by the voters of the same political subdivision in which the vacancy exists.

Iowa Code § 69.12 (first unnumbered paragraph) (emphasis added). Under the balance of this section, the “next pending election” may be a general election, a city election, a school election, or a special election. Iowa Code § 69.12(1)(a).

The district court stated the issue as whether the phrase “any other office to be filled” is modified by “the voters of the same political subdivision in which the vacancy exists” and ruled that the “next pending election” in section 69.12 means “an election for which Bettendorf citizens are the exclusive voters for an office.” Ruling 6/15/10 at p. 5. Accordingly, the court concluded the “next pending election” for filling this vacancy is the city election in November, 2011.

The city’s arguments for waiting until the next city election to fill the vacancy included the benefit of focusing the public’s attention on city matters in separate city elections. Filling a city vacancy at an election at which only city voters participate may, indeed, focus the attention of voters on city matters; however, this benefit should be considered in light of the legislative purpose of the statute. The text of the statute suggests a legislative intent to allow voters to elect nonpartisan officials at the earliest opportunity rather than extending the period of time for which a city official holds an elective office by appointment. City voters will go to the polls at the general election in November, 2010 – one year earlier than the next city election in November, 2011.

When confronted with the task of statutory interpretation, this office – like a court – looks to legislative intent. Legislative intent, in turn, is drawn “from the words chosen by the legislature, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used.” *State v. Wiederien*, 709 N.W.2d 538, 541 (Iowa 2006) (citations omitted).

Viewing the statute as a whole, section 69.12 is intended as a mechanism to fill vacancies in nonpartisan elective offices in an expeditious manner. Subsections 69.12(1)(a)(1)-(4) set out the minimum period of time a vacancy can occur before the “next pending election” and still be required to be placed on the ballot. This time period is relatively short and never as long as three months. Rather, the time period ranges from seventy-four days before a general election to as few as forty-five days before a regularly scheduled school election. Iowa Code § 69.12(1)(a)(1)-(4) (“A vacancy shall be filled at the next pending election if it occurs . . . (1) Seventy-four or more days before the election, if it is a general election. (2) Fifty-two or more days before the election, if it is a regularly scheduled or special city election. However, for those cities which may be required to hold a primary election, the vacancy shall be filled at the next pending election if it occurs seventy-three or more days before a regularly scheduled city election or fifty-nine or more days before a special city election. (3) Forty-five or more days before the election, if it is a regularly scheduled school election. (4) Sixty or more days before the election, if it is a special election.”). Accordingly, an appointee filling a vacancy in a nonpartisan elective office who wishes to continue in that position could be required to stand for election less than three months after the vacancy occurs.

A narrow construction of the term “next pending election” to mean only a city election in these circumstances is at odds with a legislative goal of filling vacancies in elective office expeditiously. Section 69.12 applies only when “the unexpired term in which the vacancy occurs has more than seventy days to run after the date of the next pending election. . . .” Iowa Code § 69.12 (first unnumbered paragraph). In other words, if the term of an appointee who is filling a vacancy in a nonpartisan elective city office would expire *in seventy days or less* after the “next pending election,” the section has no application. Because city elections are held in November of each odd-numbered year, *see* Iowa Code § 376.1, a term that expires in December, 2011, would have *less than seventy days* to run after the next city election in November, 2011, and would not trigger application of section 69.12 at all. This means a vacancy in an elective city office may not be filled by city voters for nearly two years if the vacancy occurs just after the city election is held in 2009 and if the term of office will expire in December, 2011, immediately following the next city election in November, 2011. This is true even though city voters will go to the polls much sooner for a general election in November, 2010.

Of course, city voters can petition for a special election to fill the vacancy if a petition is filed within fourteen days after the vacancy is filled by appointment. A special election must be

called "at the earliest practicable date" unless a special election can be scheduled with a pending election in time to fill the vacancy ninety days after it occurred. Iowa Code § 372.13(2) (a)-(b). Voters might forgo filing a petition for a special election when significant costs for a special election will be incurred by the city; however, the fact that no petition is filed should not be interpreted to mean city voters have no interest in an opportunity to elect a city official earlier than the next city election. There is no additional cost to include a city vacancy on the general election ballot for those precincts which fall within the city boundaries in which the vacancy occurred. Ballots within the city precincts would be printed to include the city office.

Other election statutes suggest city officials and city issues are not intended by the legislature to be presented to city voters exclusively at city elections. The definition of a "general election" is sufficiently broad to allow city officers and public measures to be presented to the voters. General elections are defined as biennial state-wide elections for national and state officers, members of Congress, members of the General Assembly, county and township offices, as well as "other officers" and the "decision of questions as provided by law." Iowa Code § 39.3(7). Election of city officers and voting on city measures fit within the categories of "other officers" and the "decision of questions as provided by law" in this definition. In fact, special elections on public measures for cities are expressly authorized to occur on the day of a general election. Iowa Code § 39.2(4)(b) ("Unless otherwise provided by law, special elections on public measures are limited to the following dates . . . For a city, *on the day of the general election*, on the day of the regular city election, on the date of a special election held to fill a vacancy in the same city, or on the first Tuesday in March, the first Tuesday in May, or the first Tuesday in August of each year.") (emphasis added.). It is inconsistent to conclude that the General Assembly did not intend to allow city voters to fill a vacancy in a city office at the general election when the General Assembly expressly allows public measures to be presented to city voters on the general election ballot.

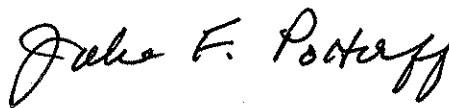
We note that there are two opinions issued by the Attorney General's Office from 1976 that seem at odds with this result. In March, 1976, in response to the question of whether a city council could go into closed session to deliberate on who to appoint to a vacancy in the position of mayor, the Attorney General observed that the "next pending election" for filling the position of mayor was "the next election concerning a city matter." 1976 Op. Atty. Gen. 487, 488. Later, in September of 1976, in response to the question of when a vacancy on a city council must be filled by appointment, the Attorney General cited to the March opinion and repeated the observation that the "next pending election" for purposes of filling a city council vacancy means "that election which fills an office or propounds an issue involving that political subdivision." 1976 Op. Atty. Gen. 730, 731. In neither opinion was the meaning of the term "next pending

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election” posed as a question to the Attorney General. We do not believe observations in opinions that were addressed to different legal questions are controlling.¹

In conclusion, we believe the “next pending election” for purposes of filling vacancies in nonpartisan city offices is not limited to a city election in which city voters are the only voters going to the polls. When a vacancy in a city office occurs “seventy-four or more days before the general election,” the general election may be the “next pending election” for purposes of filling the vacancy. In the absence of a stay of the court’s decision, the Scott County Auditor should follow the district court ruling for the vacancy on the Bettendorf Park Board. We believe the Scott County Auditor should respect the district court ruling and follow the ruling for other cities in Scott County as well. In cities in other counties in Iowa, you should continue to direct county auditors to treat the general election in November, 2010, as the “next pending election” for purposes of filling city vacancies pursuant to Iowa Code section 69.12 until there is a final resolution of this issue by an appellate court or until the legislature acts to clarify the statute.

Sincerely,



JULIE F. POTTORFF
Deputy Attorney General

¹Ordinarily we do not issue opinions on matters that are pending in litigation. *See* 61 Iowa Admin. Code 1.5(3)(a) (“The attorney general may decline to issue an opinion where appropriate, as in the following examples . . . The matter is pending in litigation or litigation is imminent, or other formal proceeding provided by law for resolution of the issue and issuance of the opinion could interfere with the authority of the other forum.”). We are responding to this issue by an informal letter of advice because specific guidance is needed to address this question in counties across Iowa while an appeal is pending. An informal letter of advice is not published as an opinion and is not cited as legal authority.