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December 22, 2015

Randall M. Skigen, President
Board of Representatives
City of Stamford

Dear President Skigen:

I am forwarding two opinions concerning Charter Section C6-00-4 (Expiration of Terms of Office) written by Assistant Corporation Counsel Dana Lee in June 2015. There is no substantive difference between the two opinions. Rather, one addresses the subject in more detail and is, consequently, somewhat longer.

The shorter version was provided to the Appointments Committee of the Board of Representatives in response to a Review item placed on the agenda of the Appointments Committee by Representative Cynthia Reeder and was reviewed by the Committee at the June 30, 2015 meeting with Attorney Lee in attendance.

Both opinions reflect the conclusions ACC Lee reached, with my concurrence, in February 2014 when he was first tasked with providing guidance on the status of "holdover" board members under C6-00-4 as it was revised in the most recent Charter Revision process.

I will be out of town from December 27, 2015 through January 11, 2016 and, therefore, unable to attend the BOR Appointments Committee meetings at which these opinions may be discussed. Attorney Lee will be attending the December 28th and January 4th meetings to answer any questions the Board members may have. I am available remotely, if needed.

Please let me know if you or the Board members require any additional information.

Thank you very much,

Kathryn Emmett
Corporation Counsel & Director of Legal Affairs

KE/jid

LAW DEPARTMENT

CITY OF STAMFORD, CONNECTICUT

INTER-OFFICE CORRESPONDENCE

To: Kathy Emmett

From: Dana B. Lee

Copy:

Date: June 25, 2015

Re: A14-0126 - Holdover Issue

I. First Issue: Does Charter Section C6-00-04 prohibit a committee member from "holding over" longer than six months after the expiration of the member's term?

Answer: No. Over 100 years ago, the Connecticut Supreme Court held that when the term of an officer has expired but no successor has been appointed, the incumbent officer has not only the "right" to hold over, but the "duty" to do so. *State ex rel. Eberle v. Clark*, 87 Conn. 537, 89 A. 172, 175 (1913) (Acknowledging that officer's claim "that it was his right and his duty to hold over and exercise the duties and functions of the office after the expiration of his term until his successor should be appointed may be conceded.") The Supreme Court explained that, "the public interest requires that such officers shall hold over when no successor is ready and qualified to fill the office, otherwise important public offices might remain vacant to the public detriment in the absence of statutes providing for the filling of the vacancies or through the neglect of the appointing authorities to fill them. The rule has grown out of the necessities of the case, so that there may be no time when such offices shall be without an incumbent." (emphasis added). *Id.* After a comprehensive review of this issue, we did not find any case where a court held that a law (be it a state statute or municipal ordinance) permitted an office to remain vacant without any incumbent.

Second Issue: So, if the Charter Section does not prohibit a member from holding over longer than six months, what is the effect of the language of Charter Section C6-00-04?

Answer: The language of Charter Section C6-00-04 essentially defines the period of time when a member has "de jure" status and "de facto" status. A "de jure" officer is one regularly and properly elected or appointed and qualified, and holding his or her office during a constituted term. See *Town of Plymouth v. Painter*, 17 Conn. 585, 588 (1846); See also, *State ex rel. McCarthy v. Watson*, 132 Conn. 518, 524-28; 45 A.2d 716 (1946); 3 McQuillin, Municipal Corporations §12.102 (3rd ed. 1973). An officer "de facto," is one who exercises the duties of an office, under color of an appointment or election to that office. *Id.* The officer de facto differs, "from a mere usurper of an office, who undertakes to act as an officer without any colour of right." *Id.*

The interpretation of this Section is governed by a general rule also established by the Connecticut Supreme Court over a century ago. See e.g., *McCarthy*, supra; *State ex rel. Hendrick v. Keating*, 120 Conn. 427, 433, 181 A. 340 (1935); *State ex rel. Lyons v. Watkins*, 87 Conn. 594, 89 A. 178, 180 (1913); *State ex rel. Eberle v. Clark*, 87 Conn. 537, 89 A. 172, 175 (1913) . Essentially, the rule is this. If a law sets a definite term for an office but does not state that the incumbent can continue in office after the expiration of the term, the incumbent who holds over is considered a "de facto" officer. *McCarthy v. Watson*, 132 Conn., at 527-528. However, if the law sets a definite term of office and also states that the term will continue until a successor is appointed and qualified, the incumbent is considered a "de jure" officer. *Id.*

Here, Charter Section C6-00-04 automatically extends each term "for a period of six months or until a successor has been approved by the Board of Representatives, whichever occurs first." Id. Consequently, under the rule discussed, during the conditional six month period the member is properly considered "de jure." After the conditional six month period has run, the hold over member is properly considered "de facto."

Third Issue: What is the significance of "de facto" v. "de jure" status?

Answer: Vis-a-vis the public, there is none. In Connecticut, the "the acts of a de facto officer are valid as to third persons and the public until his title to office is judged insufficient and such officer's authority may not be collaterally attacked or inquired into by third persons affected. The practical effect of the rule is that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent a failure of justice." *State v. Carroll*, 38 Conn. 449, 471 (1871); *Furtney v. Zoning Commissioner*, 159 Conn. 585, 597, 271 A.2d 319 (1970); 63 Am.Jur.2d 605.

The distinction becomes important when there is a dispute between individuals over who is entitled to hold the seat or office. A "de jure" officer has the superior claim. See *McCarthy*, at 529-530. So, if an office is held by a "de facto" member, he or she must yield the position to a person who has been properly elected or appointed to the office (the "de jure" officer). *Id.*

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LAW DEPARTMENT

CITY OF STAMFORD, CONNECTICUT

INTER-OFFICE CORRESPONDENCE

To: Kathy Emmett

From: Dana B. Lee

Copy:

Date: June 12, 2015

Re: A14-0126 - Holdover Issue

I. BACKGROUND FACTS

A. Relevant Charter Provision

In accordance with Charter Section C6-00-04, "the term of each appointive Board or Commission member or relevant position shall expire on December first of the final year of the term..." However, this provision of the Charter automatically extends each term "for a period of six months or until a successor has been approved by the Board of Representatives, whichever occurs first." *Id.* Consequently, based on this language of the Charter, the term of each appointive member expires on 12/1 of the final year of their term. The term continues until June 1 of the following year, or until the Board of Representatives has approved a successor, whichever occurs first.

II. DISCUSSION OF ISSUES

A. First Issue: In light of the provisions of Charter Section C6-00-04, what happens if a member's term expires on December 1, then six months passes, and the Board of Representatives has not approved a successor?

1. Brief Answer:

The incumbent may retain his or her position as a "holdover" after the six months passes until a successor is appointed. However, it is probable that the incumbent would be considered a "de jure" official during the first six months at most of the holdover (because the Board of Representatives may have approved a successor first), and a "de facto" official for any period of time after that conditional six months.

2. Analysis:

On several occasions, the Connecticut Supreme Court has considered the effect of provisions for extending the tenure of a public officer upon the expiration of the term fixed for his appointment. See e.g., *Sansone v. Clifford, et al.*, 219 Conn. 217, 226 (1991); *State ex rel. Barnes v. Holbrook*, 136 Conn. 312, 70 A.2d 556 (1949); *State ex rel. Ryan v. Bailey*, 133 Conn. 40, 48 A.2d 229 (1946); *State ex rel. McCarthy v. Watson*, 132 Conn. 518, 45 A.2d 716 (1946); *State ex rel. Hendrick v. Keating*, 120 Conn. 427, 433, 181 A. 340 (1935); *State ex rel. Lyons v. Watkins*, 87 Conn. 594, 89 A. 178, 180 (1913); *State ex rel. Eberle v. Clark*, 87 Conn. 537, 89 A. 172, 175 (1913).

These cases, which extend back over 100 years, establish the following general rule. **"If, by constitutional provision or valid statute, a definite term is established for an office without provision that the incumbent shall continue in office after its expiration, he will, in holding over, be a *de facto* and not a *de jure* officer, and a vacancy will result which may be filled by the appointment, under proper authority, of a successor. If, however, the term of office is not only for a definite time but until a successor is appointed and qualified, an incumbent holding over is a de jure officer and unless, from the particular language of the statute or the particular circumstances of the case, a different legislative intent appears, there is no vacancy in the office within a provision authorizing an appointment in such a contingency."** (internal italicizes added) *McCarthy*, 132 Conn. at 527-528.

This general rule guides the analysis of C6-00-04 and the resolution of this issue, but understanding the analysis requires some preliminary explanation of the terminology employed and additional discussion of relevant background law. A "de jure" officer is one regularly and properly elected or appointed and qualified, and holding his or her office during a constituted term. See *Town of Plymouth v. Painter,* 17 Conn. 585, 588 (1846); See also, *McCarthy*, at 524-528; 3 McQuillin, Municipal Corporations s 12.102 (3rd ed. 1973). An officer "de facto," is one who exercises the duties of an office, under color of an appointment or election to that office; *Id.*[1] The officer de facto differs, "from a mere usurper of an office, who undertakes to act as an officer without any colour of right." *Id.*

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[1] Over 140 years ago, the Connecticut Supreme Court adopted a broad rule detailing the circumstances under which an officer not legally qualified will be found to be an officer de facto. *Furtney et al. v. Simsbury Zoning Commission, et al.*, 159 Conn. 585, 595-96 (1970); *State v. Carroll*, 38 Conn. 449, 471 (1871). 'First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.' *Id.*, citing *State v. Carroll*, 38 Conn. 449, 471.

In addition, as used in the general rule, the term "vacancy" has a fairly specialized meaning. A "vacancy" in an office means that the position is not currently being held by an officer "de jure." See *McCarthy*, at 529-530. If the position is held by a "de facto" officer, it is considered by our courts to be "vacant." *Id.* Thus, if another person is properly appointed to an office held by a "de facto" officer, the properly appointed officer—who is "de jure"—is entitled to it. *Id.*

In addition, the following background law is relevant to our analysis. As the general rule indicates, an officer that holds over after the expiration of his or her term is considered to be a "de facto" officer. *Id.*, at 527. In Connecticut, the "de facto" status essentially means that while the officer does not have a superior claim to the position over a de jure appointee, his or her acts are still valid vis a vis the public. That is, "the acts of a de facto officer are valid as to third persons and the public until his title to office is judged insufficient and such officer's authority may not be collaterally attacked or inquired into by third persons affected. The practical effect of the rule is that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent a failure of justice. 63 Am.Jur.2d 605." *Masayda v. Pedroncelli*, Superior Court, judicial district of Waterbury, Docket Number 120878 (June 1, 1995, West, J.); *Picard v. Department of Public Health*, Superior Court judicial district of New Britain, Docket Number CV 99 0498477 S (December 7, 2000, Cohn, J.) [28 Conn. L. Rptr. 337]; *State v. Carroll*, 38 Conn. 449, 471 (1871); *Furtney v. Zoning Commissioner*, 159 Conn. 585, 597, 271 A.2d 319 (1970).

Further, the Connecticut Supreme Court has indicated that when the term of an officer has expired but no successor has been appointed, the incumbent officer has not only the "right" to hold over, but the "duty" to do so. *State v. ex rel Eberle*, 89 A., at 175 (Acknowledging that officer's claim "that it was his right and his duty to hold over and exercise the duties and functions of the office after the expiration of his term until his successor should be appointed may be conceded.") The Supreme Court explained that, **"the public interest requires that such officers shall hold over when no successor is ready and qualified to fill the office, otherwise important public offices might remain vacant to the public detriment in the absence of statutes providing for the filling of the vacancies or through the neglect of the appointing authorities to fill them. The rule has grown out of the necessities of the case, so that there may be no time when such offices shall be without an incumbent."** *Id.*[2]

In light of this background law and the public policy considerations underlying it, we can turn now to Charter Section C6-00-04. As written, the Section contains two distinct provisions that operate to extend the term of an officer beyond its December 1 expiration date. This Section provides that an incumbent member is to hold office "for a period of six

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[2] Consistent with the analysis already discussed, the Court went on to add that "such holdover incumbent is not a de jure officer. He is in for no term, but holds the office only temporarily until the vacancy can be filled by competent authority, and his incumbency does not prevent the filling of the office by the authority duly authorized to fill the vacancy. He merely performs the functions of the office until a duly qualified appointee to it shall appear, and then is bound to yield the office to such appointee." *State ex rel. Eberle v. Clark*, 87 Conn. 537, 89 A. 172, 175 (1913)

months or until a successor has been approved by the Board of Representatives, whichever occurs first."

In *Sansone v. Clifford, et al.*, 219 Conn. 217, 226 (1991) the court considered the implications of language similar to the "until a successor has been approved..." contained in Charter Section C6-00-04. Specifically, in that case, the Court analyzed language in the Ansonia Charter that provided that officers for the city "shall hold their respective offices until their successors shall be chosen and shall have duly qualified..." *Id.*, at 227. The court held that, after the expiration of a term, an official who holds over in a position under such circumstances does so with "de jure" status until a successor is actually appointed. See, *Id.*, at 527-28. In reaching its decision, the Court recognized that it has "uniformly held that [i]f ... the term of office is not only for a definite time but until a successor is appointed and qualified, an incumbent holding over is a de jure officer and, unless from the particular language of the statute or the particular circumstances of the case a different legislative intent appears, there is no vacancy in the office within a provision authorizing an appointment in such a contingency." *Sansone*, quoting, *State ex rel. McCarthy v. Watson*, supra, 132 Conn. at 527-28, 45 A.2d 716; See also, State v. Bulkeley, 61 Conn. 287 (1893).

"The purpose of a provision extending a definite term of office until a successor has qualified is 'to prevent a public inconvenience arising from the want of a party authorized for the time being to discharge the duties of a public office.'" *Id.*, quoting, *People v. Tilton*, 37 Cal. 614, 621 (1869) (quoted with approval in *State ex rel. McCarthy v. Watson*, supra, 132 Conn. at 529, 45 A.2d 716). "The provision that an incumbent shall continue in office until his successor shall be appointed and qualified clearly shows that the legislature definitely contemplated the fact that there might be a failure to appoint ... and expresses an intent that in such an event the incumbent is to continue to hold the office." *Sansone*, at 225-26, quoting, *McCarthy v. Watson*, supra, at 533, 45 A.2d 716. "[O]ne continuing in office under such a provision occupies it de jure and not de facto." *Id.*, quoting, McCarthy, at 530, citing, 3 E. McQuillin, Municipal Corporations (3d Ed.Rev.) § 12.110.that extended a term limit until a successor was appointed.

The Charter language that indicates that an incumbent is to hold office until a successor is approved would, as discussed, support the conclusion that during the hold over the incumbent is a de jure official. However, the inclusion of the "six months" language in Section C6-00-04 evinces a different—that is to end the de jure term at that time, whether or not a successor has been appointed. See, *State ex rel. McCarthy v. Watson*, supra, 132 Conn. at 527-28 and cases discussed therein.

However, the "six month" language sets "a definite term is established for an office without provision that the incumbent shall continue in office after its expiration." As a result, in keeping with the general rule, while the officer loses "de jure" status after the expiration of the six months, the incumbent—who, for sound public policy reasons, has a "right" and a "duty" to holdover after the expiration of the term--gains "de facto" status. *State v. ex rel Eberle*, 89 A., at 175.

In light of the general rule, the public policy considerations underlying "de facto" status, and the prior case law, Charter Section C6-00-04 is properly read to mean that an incumbent may retain his or her position as a "holdover" after the six months passes until a successor is appointed. However, the incumbent should be considered a "de jure" official for six months or until the Board of Representatives approves a successor, whichever occurs first.

Officials that holdover beyond six months should be considered "de facto" officials.

B. Second Issue: What is the term length of an official that replaces a "holdover"?

Brief Answer:

In my opinion, the holdover shortens the **tenure** of the succeeding officer.

Analysis:

The general rule is that "(o)ne appointed to fill a vacancy[3] holds office only until the expiration of the term established for the person whose place he takes." *State ex rel. Rundbaken v. Watrous*, 135 Conn. 638, 645 (1949); see *State ex rel. Rylands v. Pinkerman*, 63 Conn. 176, 189, 28 A. 110, 22 L.R.A. 653; *State ex rel. Mathewson v. Dow*, 78 Conn. 53, 56, 60 A. 1063; *Cummings v. Looney*, 89 Conn. 557, 561, 95 A. 19.

In deciding this question, however, the relevant statutory, or in this case Charter language, is properly considered. In *Rylands v. Pinkerman*, supra, the court considered whether an appointment to fill an unexpired term of a police commissioner was for a full term or for the remainder of the unexpired term. *Id.* The Court reviewed the relevant language of the Bridgeport Charter and found that it established a situation where the terms of the police commissioners overlapped. *Id.* The court held that "complete effect can be given to the provisions of the charter only by construing it as confining appointments to fill vacancies to appointments for the residue of the unexpired term. The evident intent (of the pertinent section of the charter) is to secure to the city at all times, so far as possible, the services of commissioners, half of whom have had the benefit of at least a year's experience in office, and to divide the membership of each half equally between leading political parties." *Id.*

Here, the pertinent Charter provisions evidence a similar intent. The Charter expressly provides for the expiration of terms on December 1 of each year as well as overlapping terms.[4]

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[3] Recall that, "in the primary and technical sense 'vacancy,' as applied to an office or position, signifies a state of being not filled or occupied by a present incumbent. It is not, however, in every case to be taken in this strict sense. It may appear that in order to constitute the vacancy referred to in a constitutional or statutory provision and authorized to be filled in a manner therein prescribed, the office need not be physically vacant but it is enough that it is not occupied by a de jure officer. The term 'vacancy,' when so used, 'applies as well to an office occupied by a usurper or a holdover or de facto officer as to cases when by death or resignation the office is left without any incumbent.'" *Alcorn ex rel. Hendrick v. Keating*, 120 Conn. 427 (1935), quoting, *State ex rel. Eberle v. Clark*, 87 Conn. 537, 547, 89 A. 172, 175, 52 L. R. A. (N. S.) 912.

[4] Sec. C6-00-4. Expiration of Terms of Office.

(a) The term of each appointive Board or Commission member or relevant position shall expire on December first of the final year of the term, subject to continuance in office for a period of six (6) months or until a successor has been approved by the Board of Representatives, whichever occurs first.

(b) The terms of members of Boards and Commissions designated in Sec. C6-00-2(a) shall overlap so that one term ends in the first of three (3) successive years and two (2) terms end in

The evident intent of this provision is to "secure to the city at all times...the services of commissioners" with experience. *Rylands*, supra. Consequently, in order to give "complete effect" to the Stamford Charter provisions, they must be read so that a newly appointed officer holds office only for the length of the remaining term, and not for a full term. See, *Id.*

While the *Rylands* case specifically involved an appointment to fill an "unexpired" term, the principle appears applicable as well to cases involving holdover incumbents. See 3C Am. Jur. 2d Public Officers and Employees § 150 ("(A) holdover does not change the length of the term, but merely shortens the tenure of the succeeding officer.").

C. Third Issue: How should Section C6-00-04, be applied when, "in the books," a member term does not expire on December 1, but expires in the middle of the year?

The answer to this question requires a multi-step analysis. First, based on the language of this charter provision, the member's term should be considered to properly expire on December 1 of the "final year of the term."

With respect to this issue, these two principles that guide my analysis. First, the language of Sec. C6-00-04 is clear and unambiguous. The Charter provides that the "term of each appointive Board or Commission member or relevant position **shall** expire on December first of the final year of the term..." The word "shall" ordinarily "connotes that the performance of the statutory requirements is mandatory rather than permissive." *Caulkins v. Petrillo*, 200 Conn. 713, 717 (1986). Second, "(w)here a charter specifies a mode of appointment, strict compliance is required." *State ex rel. Gaski v. Basile*, supra, 174 Conn. at 39, 381 A.2d 547. More specifically, "[i]f the charter points out a particular way in which any act is to be done or in which an officer is to be elected, then, unless these forms are pursued in the doing of any act or in the electing of the officer, the act or the election is not lawful." *State ex rel. Southey v. Lasher*, 71 Conn. 540, 546, 42 A. 636 (1899); see also State ex rel. *Barlow v. Kaminsky*, 144 Conn. 612, 620, 136 A.2d 792 (1957) ("A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way. An enumeration of powers in a statute is uniformly held to forbid the things not enumerated.").

Consequently, in my opinion, regardless of whether the official's term is set to expire "in the books" at some other time of the year, the term lawfully expires on December 1 of the final year of the term. As a result, Sec. C6-00-04 would be applied from that December 1 date.

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each of the second and third years. The terms of alternate members designated in Sec. C6-00-2(c) shall overlap so that one term ends in each of three (3) successive years.