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METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

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DEPARTMENT OF LAW
204 COURTHOUSE
NASHVILLE, TENNESSEE 37201

Legal Opinion 2005-04

To: Councilman Harold White
Council District 14

Date: July 21, 2005

You have requested a legal opinion from the Department of Law on the following question:

Question

For the purposes of a mid-term recall election, how does the term-limit restriction on a Council members' eligibility for office affect incumbent and former councilmembers' eligibility to run in the recall election?

Short Answer

Limitation on eligibility to run for the Metropolitan Council under the term limit provision in the Metropolitan Charter is determined by the number of terms served and not by the number of years. An incumbent council member is eligible for retention in a mid-term recall election. Whether a prior councilmember is eligible to run in the mid-term recall election depends on the facts for that individual. Portions of terms served by a prior councilmember should be considered for purposes of determining whether a former council member has served "more than a single term."

Background

Sections 15.06 of the Metropolitan Charter provides that prior to expiration of the term a member of the Metropolitan Council may be removed from office by the voters of the councilmanic district. The procedure for the recall election is set out in Sections 15.06 through 15.10. Metropolitan Charter § 15.06 through 15.10. Section 1.07 of the Metropolitan Charter limits the eligibility of candidates for that office to those who have not served more than a single term during the previous two terms of the office. Metropolitan Charter § 1.07.¹ Council members' terms of office are four years in duration. Metropolitan Charter § 3.02.

¹ It is assumed for purposes of this opinion that the Charter's term limits on members of the Metropolitan Council are constitutional. *See* Dept. of Law Op. No. 2005-002, note 4.

Analysis

A. Term Limit

The Metropolitan Charter *could* have barred council members based on years of holding the office within a number of years from the present date, or a number of consecutive years, but it did not. Instead, the Charter's limit on eligibility is set based on *terms*. Courts consistently interpret a "term," "when used in reference to an office," as meaning "a fixed and definite period of time and is distinct from the tenure of the officer." State ex rel. Rushford v. Meador, 267 S.E.2d 169, 170-71 (W.Va. 1980). *See also* Spears v. Davis, 398 S.W.2d 921, 926 (Tex. 1966)(emphasizing that "a clear distinction must be made between the phrase, 'term of office' and an individual's tenure of office. The period of time designated as a term of office may not and often does not coincide with an individual's tenure of office"); Sueppel v. City Council of Iowa City, 136 N.W.2d 523, 527 (Iowa 1965)(noting that "'term' in a legal sense means the fixed and definite period of time which the law describes that an officer *may* hold an office)(*emph. added*).

One has served a "term" if one has held office for any part of the term - the actual time spent in office is that person's *tenure*, so that he or she may have a *tenure* longer or shorter than the *term* he or she is serving. *See* Denish v. Johnson, 910 P.2d 914, 920 (N.M. 1996)(distinguishing between term and tenure, in context of appointment); State ex rel. Spaeth, 359 N.W.2d 876, 880-81 (N.D. 1985)(distinguishing between term and tenure, for Governor); Stephens v. Myers, 690 P.2d 444, 444-45 (N.M. 1984)(deciding that Sheriff's serving of part of one term and all of another sufficed to serve "two consecutive terms"); Welty v. McMahon, 316 N.W.2d 836, 839 (Iowa 1982)(holding that State Commissioners "served a complete six-year term despite their late start in office and shortened tenure, they are precluded from re-election"); State ex rel. Van Ledingham v. Cheatum, 175 P.2d 123, 124-26 (Kan. 1946)(holding that a term limit would apply to County Treasurer who served the remainder of an unexpired term and all of another term). *See also* Ark. A.G. Op. No. 2003-099, note 1 (2003 WL 21321751) (noting that terms served should include partial terms). Accordingly, where a term limit barred members of the California legislature from serving "more than 3 terms," "service of any part of a term 'counts' as service of a full term, with a single exception as drafted by the People." Schweisinger v. Jones, 81 Cal.Rptr.2d 183, 184 (Cal.Ct.App. 1998). "Term' is thus identified and defined as a certain and fixed period of four years. ... One or several persons may discharge the duties of the office during this period, but the term is not divided into smaller terms by the number of persons who may fill the office. It remains one and indivisible, and term follows term in successive cycles of four years each." Gerard v. Judd, 331 S.W.2d 119, 120 (Ky.Ct.App. 1959) (*quoting* Mullins v. Jones, 162 S.W.2d 761, 763 (Ky.Ct.App. 1942)).

B. Eligibility of a Former Councilmember

If a recall election is held to complete, for example, the 2003-2007 councilmanic term, eligibility must be based on whether a candidate has served "more than a single term" "during the previous two (2) terms"— those two four-year periods from (1) 1995-1999 and (2) 1999-2003. Further, "more than a single term" will include a councilmember's tenure which was one entire term and only a portion of another term, or portions of two different, successive terms. *See* Schweisinger, 81 Cal.Rptr.2d at 184. A previous council member's eligibility to serve again does not change from

year to year, but only from term to term. Accordingly, a person ineligible to run in the election that filled the office for the current term is still ineligible and may not run in the recall election.

C. Eligibility of Incumbent Council Member


As stated above, a councilmanic term “is not divided into smaller terms. . . It remains one and indivisible, and term follows term in successive cycles of four years each.” Gerard, 331 S.W.2d at 120 (quoting Mullins, 162 S.W.2d at 763). Thus, an incumbent council member’s eligibility does not change in the middle of the term. Moreover, ineligibility is based on service in the previous terms, not the current term. Metropolitan Charter § 1.07. An incumbent council member who is the subject of a recall election is eligible to run, as that councilmember is serving in the current term and not in one of the “previous two terms.”

Additionally, the portion of the Metropolitan Charter setting forth the processes for holding a recall election provides that “any person sought to be removed may be a candidate [at a recall election] to succeed himself,” and complete the term. Metropolitan Charter § 15.08. Accordingly, the Metropolitan Charter’s term limit provision is in harmony with its provisions for mid-term recall elections. An incumbent council member is eligible to be a candidate in a recall election to complete the current term.

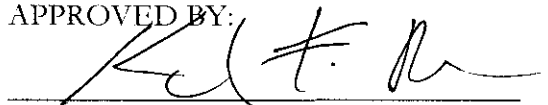
Conclusion

In the event that there is a recall election, the incumbent council member who is sought to be recalled may be a candidate to complete the term of that office. Any past council member will be ineligible to seek that office during the recall election if that former councilperson served more than one councilmanic term, including any portion of a term, during the previous two terms of the office.

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF NASHVILLE
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APPROVED BY:



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cc: The Honorable Bill Purcell, Mayor
The Honorable Howard Gentry Jr., Vice-Mayor