

Attorney Memorandum¹

To: Garland Doyle, Pontiac City Clerk
From: Nick Curcio, Attorney
Re: Planning Commission Holdovers
Date: March 9, 2021

Approximately two and a half years ago, the Mayor of Pontiac nominated four incumbent Planning Commissioners to be reappointed for additional terms after their terms expired.² The City Council voted in September 2018 to reject all four reappointments. The Mayor has not nominated any additional candidates to replace the incumbent Planning Commissioners,³ and all four have continued to serve on the Planning Commission. You asked for my opinion as to whether they are legally permitted to continue serving and, if so, whether there is any limitation on their ability to do so.

With respect to your first question, the Michigan Planning Enabling Act states that a Planning Commissioner “shall hold office until his or her successor is appointed.”⁴ In light of this provision, the Planning Commissioner’s seat is not automatically vacated at the expiration of the appointed term. Rather, the incumbent Planning Commissioner becomes a “holdover” or “de facto” officer until a successor is appointed, and any actions that he or she takes during the holdover term have the same force and effect as the actions of other Planning Commissioners.⁵ In other words, the decision of a Planning Commission cannot be challenged on the grounds that a member of the Planning Commission was holding over in office after the expiration of his or her appointed term.

¹ This memo is one of several that you asked me to prepare as your privately retained legal counsel. During our initial consultation, you explained to me that you felt pressured to take actions in your role as City Clerk that you believed to be contrary to applicable law. Accordingly, you asked for my opinion on various legal issues to help you decide how to respond to those pressures. Please note that I do not represent or have any relationship with the City of Pontiac. Pursuant to Section 4.202(a) of the Pontiac City Charter, the City Attorney is responsible for “supervising the conduct of all the legal business of the City and its departments.”

² The statements of fact in this opinion are based primarily on your representations to me during our initial consultation. For the most part, I have not independently verified those representations.

³ It appears that the Mayor made an additional attempt to nominate two of the four incumbent Planning Commissioners for reappointment in late 2019, and the City Council again rejected their reappointment in January 2020.

⁴ MCL 125.3815(3).

⁵ See, e.g., 1979 Mich OAG 5606; 3 McQuillin, Municipal Corporations § 12.160 (3rd ed.).

One notable aspect of the scenario that you described is that the Mayor nominated the four incumbent Planning Commissioners for reappointment approximately two and a half years ago, and the City Council rejected their reappointment. In my opinion, the City Council's rejection does not preclude the incumbent Planning Commissioners from continuing to serve as holdover officers. Based on the plain language of the statute, it appears that the term "appointment" is best understood as a two-step process in which the chief elected official (the Mayor) first nominates a candidate, and the legislative body (the City Council) then confirms or rejects the nominee.⁶ Under this understanding of the term, the time at which a Planning Commissioner's "successor is appointed" occurs once the City Council confirms a successor, not when the Mayor unsuccessfully nominates a candidate for appointment or reappointment. This construction follows not only from the common understanding of the appointment power,⁷ but also from the underlying rationale of the common-law holdover rule, which was that "the public interest requires that public offices should be filled at all times without interruption."⁸

With respect to your second question, the incumbent Planning Commissioner's ability to holdover in office is subject to a practical limitation: the Mayor's duty to nominate new candidates for the position. As noted above, the Planning Enabling Act provides for the appointment of Planning Commissioners by the Mayor with the consent of the City Council.⁹ The Michigan Attorney General has opined that when a statute vests the power of appointment in a particular officer, "the duty to provide for an election or to make an appointment within a reasonable amount of time is necessarily implied."¹⁰ While there is no precise formula for determining what amount of delay is "reasonable," a delay of seven months in making an appointment has previously been deemed "unreasonable."¹¹ Accordingly, it appears that the Mayor is likely in breach of her duty to nominate new candidates for the Planning Commission within a reasonable time. A party harmed by that breach of duty – such as the City Council or an applicant

⁶ See MCL 125.3815(1) ("In a municipality, the chief elected official shall appoint members of the planning commission, subject to approval by a majority vote of the members of the legislative body elected and serving.").

⁷ See *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) (explaining that when an appointment requires the consent of the legislative body, the legislative body shares the appointing power.").

⁸ 3 McQuillin, *Municipal Corporations* § 12.160 (3rd ed.).

⁹ MCL 125.3815(1).

¹⁰ 1970 OAG 5613 (1979).

¹¹ *Id.*

for a seat on the Planning Commission – could potentially bring a lawsuit for mandamus seeking to compel the Mayor to nominate new candidates.¹² The Mayor may also be subject to censure or other sanctions, particularly if there is evidence to suggest that she is refusing to nominate new candidates as an end-run around the City Council’s advice-and-consent power.

I hope this memo sufficiently answers your question. Please let me know if there is anything further I can do to assist with this issue.

¹² *Id.* (“In the event that a county board of commissioners neglects to make the appointments to fill vacancies on the county road commission after expiration of a reasonable period of time, an action of mandamus may be instituted to compel the board to make the appointments.”); see also *State ex Rel. Hartman v Thompson*, 627 So 2d 966 (Ala Civ App 1993) (addressing a mandamus petition to compel the Governor of Alabama to make appointments within a reasonable time).