

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



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PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

MEMORANDUM

TO: Elissa Silverman
Councilmember At-Large

FROM: Brian K. Flowers *BKF/cje*
Deputy Attorney General
Legal Counsel Division

DATE: December 6, 2021

SUBJECT: Legal Analysis – Questions Concerning Members of DCHA’s Board of Commissioners
(AL-21-741)

Under the District of Columbia Housing Authority Act of 1999 (“Establishment Act”),¹ the District of Columbia Housing Authority (“DCHA”) is governed by an 11-member Board of Commissioners (“Board”).² You asked us for expedited advice on two questions about the Board.

- (1) When an elected Commissioner’s term expires, how long are they able to continue serving while awaiting the results of a new election?
- (2) Is a person eligible to serve as a member of the DCHA Board of Commissioners if the District has filed a lien to collect overdue taxes from the person and the person has agreed to pay the outstanding balance in installments (whether or not the person is current on the agreement)? Does the Commissioner have any obligation to keep the Board informed about the status of his or her payments to the payment plan?

¹ Effective May 9, 2000 (D.C. Law 13-105; D.C. Official Code § 6-201 *et seq.*).

² D.C. Official Code § 6-211.

We have concluded that: (1) a Commissioner may continue to serve until the next election's results arrive, so long as the member remains a public housing resident; and (2) a Commissioner is ineligible to serve under these circumstances, and in deciding whether to remove Commissioners, the Board may seek relevant information.

We respond to each question in more detail below.³

Question 1

An elected member of the DCHA Board whose term has expired may continue to serve until the next election's results arrive, so long as the member continues to be a resident of a DCHA housing property.

The elected members of the Board that your question refers to are resident Commissioners elected by their fellow public housing residents,⁴ according to rules and procedures set forth by the Board.⁵ Each election for a new term must "be held no sooner than 5 months and no later than 2 months[,] prior to the expiration of the then current 3-year term."⁶

The Establishment Act specifies what happens if an elected Commissioner's position becomes vacant during a Commissioner's term,⁷ but is silent on what happens if an elected Commissioner's term ends without any new election for the next term. For that, we turn to the common law, which applies in the District where a statute does not supersede it.⁸ Under the common law, "an elected or appointed officer may remain in office at the expiration of his term and is entitled to exercise the powers of his office until his successor qualifies, whether or not the statute creating the office so provides."⁹ The reason for this common-law principle is that "the public interest requires, in the absence of any provisions to the contrary, that public offices should be filled at all times, without interruption."¹⁰

Relying on that principle, this office has opined that, in the absence of contrary statutory authority, members of boards and commissions whose terms expire may continue to serve until their successors are appointed and qualified. For example, in a 1978 formal opinion, this office advised that a member of the Board of Equalization and Review "may properly hold-over as an active member of the Board after the expiration of his term until and unless a successor is

³ Although there are concerns about whether the election and removal processes described in the Establishment Act are consistent with the executive appointment authority that is vested in the Mayor in the Home Rule Act, those concerns lie outside the scope of this memorandum and are not addressed here.

⁴ D.C. Official Code § 6-211(a)(2); *see id.* § 6-211(i) (outlining the residency requirements for these Commissioners).

⁵ *Id.* § 6-211(k)(1).

⁶ *Id.*

⁷ *See id.* § 6-211(k)(2).

⁸ *See id.* § 45-401(a); *Nelson v. Nelson*, 548 A.2d 109, 112 (D.C. 1988) ("The common law and all British statutes in force in Maryland on February 27, 1801, remain in force in the District of Columbia unless they are inconsistent with provisions of our code").

⁹ *Grooms v. LaVale Zoning Bd.*, 340 A.2d 385, 391 (Md. Ct. Spec. App. 1975).

¹⁰ *Id.*; *see Reed v. President & Comm'rs of North East*, 172 A.2d 536, 540 (Md. 1961) (same).

appointed.”¹¹ So too here; an elected Commissioner whose successor has not yet been elected may continue to serve,¹² so long as the person continues to reside in public housing.¹³

Question 2

Section 12, subsection (p) of the Establishment Act (D.C. Official Code § 6-211(p)) addresses the issue of whether a Commissioner who owes taxes can serve on the Board. In full, the statute states:

No Commissioner shall have any past due taxes, special assessments, or other charges owing to the District. Failure to timely pay any such amounts due, or to pay overdue taxes, assessments, or other District charges after demand therefor and after a final determination pursuant to the applicable grievance or other procedure, (which shall include notice of the charges against the elected Commissioner and an opportunity to be heard in person or by counsel in his defense), shall be cause for a Commissioner’s removal from the Board.

We interpret this language using ordinary principles of statutory construction. We read it “according to its terms,” *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020), giving “effect, if possible, to every clause and word.” *Roberts v. Sea-Land Servs.*, 566 U.S. 93, 111 (2012). We also reviewed section 12(p) against the background of the Establishment Act, since the “words of a statute must be read in their context and with a view to their place in the statutory scheme.” *Davis v. Mich. Dep’t of the Treasury*, 489 U.S. 803, 809 (1989); *In Re Edmonds*, 96 A.3d 683, 687 (D.C. 2014). Along these lines, we reviewed comparable provisions of the Establishment Act, the Act’s extensive committee report,¹⁴ and other provisions of District law.

The first sentence of the section 12(p) is categorical and states that commissioners cannot have any past due taxes, special assessments, or other charges. Read literally, this would render ineligible any commissioner who owes past due taxes to the District, regardless of whether the commissioner has agreed to make payments.

The second sentence, however, seems to limit removal beyond all failures to pay taxes. It allows removal after the District makes a demand for the amounts owed and after a final determination is made under due process proceedings if the Commissioner does not pay the amounts that are determined to be owed. The removal portion of the statute is silent as to the issue raised here: whether Commissioners who owe past due taxes but who have agreed to payment plans are

¹¹ 3 Op. Corp. Counsel 504 (1978).

¹² There is one ambiguous Establishment Act provision that, if it speaks to this situation at all, agrees with the common law. It provides that “[t]he results of each election shall be retained until the elected Commissioners begin their term pursuant to the next scheduled election.” D.C. Official Code § 6-211(k)(2). If “retaining the results of each election” refers to elected Commissioners continuing to serve beyond their terms – and it is not clear from the face of the language or from the Establishment Act’s committee report whether it does – this language echoes the common-law principle discussed above.

¹³ See D.C. Official Code § 6-211(i) (“Each elected Commissioner shall remain on the Board only if he or she continues to reside in public housing in the District”).

¹⁴ See Comm. on Consumer and Regulatory Affairs, “Report on Bill 13-169, the ‘District of Columbia Housing Authority Act of 1999,’” Nov. 15, 1999 (“Committee Report”).

eligible to serve. That is, the removal statute does not expressly address whether it applies to Commissioners who have effectively conceded that they owe back taxes but have been unable to pay them.

Because the second sentence regarding removal is silent on payment plans,¹⁵ we return to the plain language of the first sentence, which renders ineligible commissioners that owe any past due taxes, which would include the fact pattern presented here.

We do not opine here on the process that must be undertaken before an ineligible Commissioner is removed from the Board. The Board generally has authority to remove Commissioners from the Board. That could be conducted either for the specific causes described in section 12(p) or for the broader causes outlined in section 12(t) (D.C. Official Code § 6-211(t)), which allows the Board to remove a Commissioner for any “official misconduct, conflict of interest violations, neglect of duty, incompetence, or personal misconduct.” While nothing in the Establishment Act requires the Commissioner to keep the Board up to date on payments under an agreement to repay back taxes, the Board may, in the course of deciding whether to seek removal of the Commissioner, seek information from the Commissioner that may be relevant to that decision.

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¹⁵ As discussed above, whether the cause described in section 12(p) reaches a scenario in which Commissioner admits failure to pay taxes owed and is in the process of repaying them is not expressly discussed. We recommend that the Council amend this provision to provide clarity and notice to Commissioners on this issue.