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August 29, 2017

Eric Dixon, Esq.
P.O. Box 7748
North Bergen, N.J. 07047

Re: "Reporting Impending Dual Candidacies at 2017 General Election for
Freeholder, Hudson County & Mayor, City of Hoboken."

Dear Mr. Dixon:

I have had the opportunity to review your letter dated August 22, 2017 and discuss the same with the County Counsel. For the reasons set forth below, we respectfully disagree with your assertions. However, it should be noted the County Law Department advises only the County Clerk, and only the Clerk of the City of Hoboken - and not the County Clerk- accepts the nominating petition of a candidate for Mayor.

The statutes on which you rely, N.J.S.A. 19:3-5 & -5.1, do not apply to this matter. First, the statutes prohibit *holding* incompatible offices, and not *running* for incompatible offices. Had the Legislature intended to prohibit candidates from running for more than one office, it would have specifically done so. It is likely that the Legislature was aware that there would be times such as this where a candidate would seek two offices at the same time; the situation is not unusual. This possibility is assumed by the Legislature in the provision of law you cite on page three of your letter, N.J.S.A. 19:3-25, which states that if a person is elected to two offices, a choice must be made.

Second, the statute is very specific in its prohibition: "No person shall hold at the same time more than one of the following offices: elector of President and Vice-President of the United States, member of the United States Senate, member of the House of Representatives of the United States, member of the Senate or of the General Assembly of this State, county clerk, register, surrogate or sheriff." N.J.S.A. 19:3-5. Nowhere in the statute does the Legislature address County Freeholder Offices or other Municipal Offices. Therefore, there is no specific prohibition made in the law of a sitting Freeholder running for both Freeholder and Mayor.

While the statutes referenced above appear to answer the question of whether or not any person may run for two offices, it is worth noting the following: the Supreme Court of New Jersey has stated that, "In absence of express constitutional or statutory provisions, the true test of legal incompatibility of two offices is not mere physical inability to render personal discharge of obligations of both offices, but whether the two are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them." De Feo v. Smith, 17 N.J. 183 (1955). The County has been presented with no evidence as to what would make the Office of Mayor incompatible with the Office of Freeholder.

Please be guided accordingly.

Very truly yours,

DONATO J. BATTISTA
HUDSON COUNTY COUNSEL

BY: 

Daniel J. DeSalvo
Deputy County Counsel

DJD/ek

cc: Donato J. Battista, County Counsel
Barbara Netchert, Hudson County Clerk

State Law Prohibits Simultaneous Candidacies For Two Offices To Be Voted Upon At The Same Election. State election law prohibits a candidate from being nominated by petition to two separate offices, as follows.

“No person may accept a nomination by petition in the manner provided by R.S. 19:13-8 or consent to the acceptance of a nomination in a petition for a primary election in the manner provided by R.S. 19:23-7 for more than one office to be filled at the same general election, the *simultaneous holding* of which would be prohibited by the Constitution of the State of New Jersey or R.S. 19:3-5.” NJ Rev Stat § 19:3-5.1 (2016)(emphasis added).

This dual-candidacy prohibition is based on the prohibition of "simultaneous holding" of two public offices, unless the candidate held multiple offices when the statute took effect in 2007 and would be eligible for the "safe harbor" or "grandfather" clause exemption. See NJ Rev Stat § 19:3-5 (2016). However, this candidate in question did not hold both offices when the statute took effect. Therefore, he cannot accept a nomination by petition for Hoboken mayor (or any other public office), having previously been nominated by petition for the Democratic Party primary (which he won) for freeholder.

The Candidate Cannot Lawfully File Petitions For A Second Office. State law provides that “[a] candidate nominated for an office in a petition shall manifest his acceptance of such nomination by a written acceptance thereof, signed by his hand, upon or annexed to such petition . . .” NJ Rev Stat § 19:13-8 (2016).

However, in the instant matter, this candidate cannot be “qualified” to be a candidate for both offices. State law provides as follows:

“At every election the person or persons, to the number to be elected therein, who *shall by law be qualified* for the office or offices to be filled at such election, and for whom the greatest number of votes shall have been given therein for such office or offices, shall be deemed and taken to be elected to such office or offices.”

(Emphasis added.) NJ Rev Stat § 19:3-4 (2016)

A candidate cannot lawfully accept a nomination by petition for a second public office when he knows the dual candidacy is unlawful to begin with. From this it logically follows that the candidate’s “written acceptance” (required by statute) of his nomination by petition would constitute a “false statement” which would nullify and void any such nomination. Again, state election law is instructive, as follows:

“If any candidate for nomination for or election to any public office or party position, or his campaign manager, shall fail to file any statement or oath required by this Title to be filed, at the time, place and in the manner required by this Title, and duly verified as herein required, *or shall file any false statement, the nomination or election of such candidate, if nominated or elected at the primary*

or other election concerning which such statement shall have been filed, shall be null and void.” (Emphasis added.) NJ Rev Stat § 19:3-7 (2016)

Residents Would Go Unrepresented For One Year If The Candidate Wins Both Contests, Because The Law Restricts Him To Accepting Only One Office. State law is clear that when a candidate is elected to two offices at the same time, he can only accept the oath for one office. The law provides:

“When a person shall, at an election, be elected to two or more of such offices, he shall accept but one of the same, and the other or others shall be deemed vacant.” NJ Rev Stat § 19:3-25 (2016).

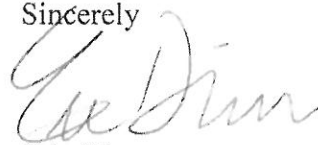
The deemed vacancy would be filled at the next general election, in November 2018. This deprives residents of one jurisdiction of representation for one full year.¹

Lieutenant Governor Candidate’s Dual Candidacy For Assembly Distinguished. The instant matter differs from that of the current Lieutenant Governor candidate, Sheila Oliver, who will also appear on the November general election ballot for Assembly Member. She was nominated by petition for only one office, the Assembly. She was appointed, not nominated by petition, as the Democratic Party candidate for Lieutenant Governor. As such, she would not violate state law providing that:

“No person may accept a *nomination by petition* in the manner provided by R.S. 19:13-8 or consent to the acceptance of a *nomination in a petition* for a primary election in the manner provided by R.S. 19:23-7 for more than one office to be filled at the same general election, the simultaneous holding of which would be prohibited by the Constitution of the State of New Jersey or R.S. 19:3-5.” NJ Rev Stat § 19:3-5.1 (2016)(emphasis added).

Conclusion. The candidate has two lawful options: ending his candidacy for freeholder, or refraining from filing a petition for Hoboken municipal office in this general election. Alternatively, the County Clerk or Attorney General’s Office can declare his nominating petition for Hoboken municipal office *void ab initio* unless he withdraws as a freeholder candidate in this November’s general election.

Sincerely



Eric Dixon

¹ See NJ Rev Stat 19:3-29, stating that “A vacancy happening in a public office other than that of United States Senator, Member of Congress, State Senator, or member of the House of Assembly, shall be filled at the general election next succeeding the happening thereof, unless such vacancy shall happen within 70 days next preceding such election, in which case it shall be filled at the second succeeding general election.”