

## OPINION NO. 71-089

## Syllabus:

1. The mayor has the authority to appoint a city solicitor when the office is vacant.
2. The city solicitor, whether elected or appointed, must be an elector of the city.
3. The city council may contract with an attorney, whether resident or non-resident, for ordinary and extraordinary legal services upon terms satisfactory to the council.

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To: John J. Malik, Jr., Belmont County Pros. Atty., St. Clairsville, Ohio  
By: William J. Brown, Attorney General, December 10, 1971

Your request for my opinion reads as follows:

"The position of the City Solicitor [for the City of Bellaire] will be vacant after January 1, 1972. The reason for this is that no attorney living within the corporation limits of Bellaire, Ohio, has filed for said

position. My question is regarding how this position is to be filled. Does the City Council have anything to do with the hiring of a Solicitor, etc.?"

You have also informed me that you would like to know whether a non-resident can be appointed to the office of city solicitor, in case no municipal elector can be found willing to accept an appointment. If the answer to that question is in the negative, you ask to be informed what provision the city can make for legal services.

The office of city solicitor is established by Section 733.49, Revised Code, which provides as follows:

"The city solicitor shall be elected for a term of four years, commencing on the first day of January next after his election. He shall be an elector of such city. (Emphasis added.)

The mayor has the authority to fill a vacancy in the office of the solicitor. Section 733.31, Revised Code, provides in part as follows:

"In case of the death, resignation, removal, or disability of any officer \* \* \* of any municipal corporation, the mayor thereof shall fill the vacancy by appointment, \* \* \*."

The qualifications of all municipal officers, whether elected or appointed, are prescribed by Section 733.68, Revised Code. That Section provides in pertinent part as follows:

"Except as otherwise provided by the Revised Code each officer of a municipal corporation, or of any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector of the municipal corporation, \* \* \*." (Emphasis added.)

It is obvious from the above Sections that no non-resident of the city can be appointed to the office of city solicitor under any circumstances, and one of my predecessors, in answer to a question on the issue, so held in Opinion No. 67-115, Opinions of the Attorney General for 1967. The first branch of the Syllabus in that Opinion reads as follows:

"A city with a statutory form of government cannot appoint a non-resident attorney as city solicitor."

The prosecutor who requested the Opinion had also asked, in the alternative, whether the city could enter into a contract with an attorney for ordinary and extraordinary legal services upon terms to be fixed by the city council. Since my predecessor's answer there provides a complete answer to your final question, I quote him at length:

"The alternative you suggest was discussed in Opinion No. 1658, Opinions of the Attorney General for 1928, page 262. Although this opinion involved employment of legal counsel in villages, I see no reason it could not equally apply to cities under appropriate circumstances. In giving this authority

to villages the general assembly undoubtedly contemplated circumstances such as are involved here. Section 731.05, Revised Code, prohibits the legislative authority of a city from appointing or confirming any officer or employee of the city government except those of its own body unless otherwise provided in Title VII, Revised Code. This section, however, does not preclude employment of legal counsel since he would not be a public officer or employee of the city. Nor would he be required by law to exercise any of the duties devolving upon a city solicitor. The relationship would be purely contractual between the legislative authority and the attorney.

"The right to employ legal counsel in certain limited areas can be seen in Peterman v. Tepe, 87 Ohio App. 487, which held the municipal council had authority to fix the compensation of an attorney retained to perform certain legal services. In Zanesville v. Wilson, 51 Ohio App. 433, Affd. 130 Ohio St. 286, overruled on other grounds in Cincinnati v. Correll, 141 Ohio St. 535, it was held a municipality or its solicitor may be represented by special counsel under certain circumstances. Of course, the city council has no authority to create new or additional officers nor to abolish or change any existing offices when they are organized under the statutory form of government. However, the employment of legal counsel, under circumstances such as these, would not subvert the expressed desires of the general assembly.

"A municipal corporation is given authority to make contracts, to own property, and to incur liabilities and surely this must include the authority to employ legal counsel to conduct and defend suits in which the city has an interest. In the absence of an express or implied restriction, a city has the authority to employ legal counsel whenever and wherever it is necessary to be represented for the preservation and protection of its interests. The city not only has authority but it has a duty to do so in carrying out the trust committed to it. The employment of a nonresident will present no difficulty so long as there is no attempt to designate him city solicitor or to impose upon him the legal duties of that office.

"In contracting with an attorney for legal services the city may provide for a definite fee to be paid for ordinary services. This is made binding when approved by ordinance and accepted by the attorney and such sum would be paid in the manner agreed upon. Concerning the provision for extra allowances, this would have to be determined by the council when the extraordinary services are performed and the parties would then contract for a definite amount. This procedure was suggested by the then Attorney General, in Opinion No. 1658, Opinions of the Attorney General for 1928, pages 262, 267 and I approve."

In specific answer to your question it is my opinion, and you are so advised, that:

1. The mayor has the authority to appoint a city solicitor when the office is vacant.

2. The city solicitor, whether elected or appointed, must be an elector of the city.

3. The city council may contract with an attorney, whether resident or non-resident, for ordinary and extraordinary legal services upon terms satisfactory to the council.