



BOARD OF TRUSTEES REGULAR MEETING FEBRUARY 2024

**February 08, 2024 at 5:00 PM
0110 Whispering Pines Circle, Blue River, CO**

MINUTES

The public is welcome to attend the meeting either in person or via Zoom.

The Zoom link is available on the Town website:

<https://townofblueriver.colorado.gov/board-of-trustees>

Please note that seating at Town Hall is limited.

5:00 PM WORK SESSION:

Mayor Babich called the work session to order at 5:05 p.m.

Priority roads

Maintenance plan- timing, strategy, additional needs

Communications to residents

Products to be applied

Mid summer touch ups

Mayor Babich reviewed the reason for the discussion and the development of a maintenance plan and understanding of what is planned, the approach and process. Town Manager Eddy and Roads

Contractor Kacey Grosskreuz presented the Trustees information on process and work performed in 2023 and what is planned for 2024.

Kacey reviewed the map including in the packet outlining 2023; 2024 and 2025. Blue is 2023; pink 2024 and yellow 2025. He noted the earth bind worked well and recommended closing the road for a few hours after application to allow for it to cure. He recommended adding the project to Blue River Road or on a flatter road where it makes sense in 2024 as well.

Manager Eddy noted there's been a lot of coordination and planning. A digital map outlining the culverts throughout town. There was discussion on maintenance requests and process.

It was recommended when applications are applied to provide notice and recommend slower speeds while it's curing.

Discussion of dust mitigation during the summer. It was noted that lighter applications during the summer will be applied to reduce the dust. In addition, maintenance crews will evaluate the roads and address small maintenance areas as needed.

Discussion of Spruce Creek Road and high traffic roads to receive grading and application of mag earlier in the first grading or wait to do any touchups until a full grading and application can be conducted. Discussion of timing to conduct grading, mag and maintenance.

April/May-Touch ups

June-Begin grading and full maintenance (base, mag, earth bind)

July-September-Touch ups

September/October-Fall/winter prep and major maintenance projects

6:00 PM REGULAR MEETING:

I. CALL TO ORDER, ROLL CALL

Mayor Babich called the regular meeting to order at 6:00 p.m.

PRESENT

Mayor Toby Babich

Trustee Joel Dixon

Trustee Kelly Finley via Zoom

Trustee Noah Hopkins

Trustee Ted Pilling

Trustee Ted Slaughter

EXCUSED

Trustee Mark Fossett

Also present: Town Manager Eddy; Town Attorney Bob Widner via Zoom

II. APPROVAL OF CONSENT AGENDA

Motion made by Trustee Hopkins, Seconded by Trustee Dixon to approve the consent agenda.

Voting Yea: Mayor Babich, Trustee Dixon, Trustee Finley, Trustee Hopkins, Trustee Pilling,

Trustee Slaughter. Motion passed unanimously.

A. Minutes for January 11, 2024

B. Approval of Bills-\$23,576.07

III. COMMUNICATIONS TO TRUSTEES

Citizen Comments (Non-Agenda Items Only- 3-minute limit please). Any written communications are included in the packet.

No written communications to the Trustees were received.

Paul Semmer-Blue Grouse- provided comments on roads and road maintenance report provided during the work session. He also remarked on Citizen Advisory report and the surveys conducted and the town mapping project.

Paul LeMaster-Fairplay-remarked a proposed asphalt plant in Park County noting concerns and impacts to the Town of Blue River along Hwy 9 if approved. He asked for the Town of Blue River to submit a letter of opposition to Park County.

Dan Cleary-Rustic Terrace-Provided an update on the Upper Blue Planning Commission. He also provided handouts pertaining to his public comments being provided. The information handed out included his questions asked and an email he sent the Town Manager and Board of Trustees on January 25, 2024. The email and comments pertained to the eligibility of the current Mayor to run for another term. He asked for his handouts to be entered into the record.

Mayor Babich referred to Attorney Widner. Attorney Widner reviewed the information presented noting any advice would need to be provided under legal advice in an executive session.

IV. RESOLUTIONS

C. INTERGOVERNMENTAL AGREEMENT FOR AID IN HAZARDOUS SUBSTANCE INCIDENTS

Mayor Babich noted this is an updated IGA for HazMat and is signed by all municipalities, County and Fire Districts for HazMat response.

Motion made by Trustee Slaughter, Seconded by Trustee Pilling to approve Resolution 2024-01 Intergovernmental Agreement for Aid in Hazardous Substance Incidents. Voting Yea: Mayor Babich, Trustee Dixon, Trustee Finley, Trustee Hopkins, Trustee Pilling, Trustee

Slaughter. Motion passed unanimously.

V. NEW BUSINESS

D. Approval/Recommendation of application for Dan Cleary

Mayor Babich noted one application for the position on the Upper Blue Planning Commission as Blue River's representative was received, Dan Cleary.

Motion made by Trustee Dixon, Seconded by Trustee Hopkins to recommend approval of appointment to the Upper Blue Planning Commission as the Blue River representative. Voting Yea: Mayor Babich, Trustee Dixon, Trustee Finley, Trustee Hopkins, Trustee Pilling, Trustee Slaughter. Motion passed unanimously.

VI. REPORTS

E. Mayor

Mayor Babich reported on the increased incidents of mountain lions north in the county and communications provided to residents. He remarked on the county wide communication effort around incidents and coordination. Manager Eddy provided additional information beyond what is provided in the staff report.

Trustee Slaughter noted a need to develop a delegation to address the issues with CDOT.

Trustee Finley noted staff did what they could noting that with communications out, it was an issue for all. Noting a need for cell service to be addressed.

Discussion on the incident and plans moving forward.

Mayor Babich reported on FIRC's report and the food needs in the community and their request to the communities for funding.

F.

Trustee Dixon asked about the status of the digital map. Manager Eddy noted the internal map is done and they are working on the public facing piece.

Trustee Pilling reported on the micro transit study. He noted Eric Mamula is not the County Commissioner for the Transit Authority.

Trustee Finley met in January and discussed 2024 plans and surveys.

Trustee Slaughter noted the Wildfire Council meets on February 15th. He recommended not to mark trees without owner permission. He remarked on the need for a cell phone tower.

Trustee Hopkins reported the PZ Commission approved an application on Rivershore. He noted there was a review of the process by the Building Official for the Commission on

applications. Additionally, the Building Official brought forward information and recommendation for changes on snow loads. This will be brought forward in the future after more information is obtained.

G. Attorney

No report.

H. Staff Reports

Nothing additional from staff.

VII. EXECUTIVE SESSION

No executive session was held.

VIII. ADJOURN

Motion made by Trustee Slaughter, Seconded by Trustee Hopkins to adjourn at 7:00 p.m. Voting Yea: Mayor Babich, Trustee Dixon, Trustee Finley, Trustee Hopkins, Trustee Pilling, Trustee Slaughter. Motion passed unanimously.

NEXT MEETING - March 14, 2024

March 14, 2024

Respectfully Submitted:

Michelle Eddy, MMC

Town Clerk

Reports from the Town Manager, Mayor and Trustees; Scheduled Meetings and other matters are topics listed on the Regular Trustees Agenda. If time permits at the work session, the Mayor and Trustees may discuss these items. The Board of Trustees may make a Final Decision on any item listed on the agenda, regardless of whether it is listed as an action item.



Dan Cleary <dcleary.cdcmgmt@gmail.com>

Election Information

Dan Cleary <dcleary.cdcmgmt@gmail.com>

Thu, Jan 25, 2024 at 9:42 PM

To: Michelle Eddy <michelle@townofblueriver.org>, rwidner@lawwj.com, ttabich@townofblueriver.org, jdixon@townofblueriver.org, kfinley@townofblueriver.org, mfossett@townofblueriver.org, nhopkins@townofblueriver.org, Ted Pilling <tpilling@townofblueriver.org>, tslaughter@townofblueriver.org

Clerk / Manager Eddy et al,

I am forwarding the string of our recent correspondence for your reference. I have copied the town attorney and board of trustees in this email.

I want to start out by saying that I appreciate you sending me the initial unsolicited correspondence on 1/18 regarding my ineligibility to run due to term limits, based on Attorney Wider's position. Thank you for also sending your opinion on why the incumbent mayor is eligible through the sequence of events and the (4) election certifications showing the terms.

I'd like to take this opportunity to point out that there appears to be an error on page (1) of the attached 2020 certification you had sent. The certification indicates the mayor was elected to a (2) year term. However on page (2) the term is stated to be a (4) year term, wasn't the 2020 mayor's seat a (4) year term? Also, none of these certifications are signed, so I am not sure if they are the official documents or drafts? Were the elections certified and notarized?

I do not write this email to point out what might be a clerical error on the election certifications, nor do I write this with malicious intent to disrupt the free and fair elections within the Town of Blue River. I want to let the town know that as I've submitted my petition, I have been under the impression that the office of mayor was different from the office of trustee. I think that if we asked almost all residents the question, they'd respond that the offices are different. However, after reading Attorney Widner's position, it raises the question as to whether the (2) positions are substantively different enough for the purposes of term limits. As I highly value the attorney's wealth of knowledge in municipal law and hold the town attorney in the highest esteem, I respect his opinion and have been compelled to analyze my eligibility, and the question of term limits as they apply to trustees & mayor.

When I picked up my petition on 1/17, the deputy clerk called the town clerk / manager. The town manager got on speaker phone to notify me that I was unable to run for mayor due to term limits, that the office of trustee and mayor are the same, and she offered to send me a letter that the attorney had drafted (see below) outlining this. I assume this letter was drafted in the event that someone who was termed out tried to run. I declined the offer of the email and asked just for a petition. I questioned if I were unable to run, then how could the incumbent mayor run for reelection? She opted to provide a timeline of elections through a sequence of events (see thread below).

On 1/18 I received the unsolicited email (thread below). Within the contents, I noted the attorney's case against my eligibility, but I was still unconvinced. I also saw no real substantive content as to why the clerk's opinion was such that the mayor could run for reelection. Through some additional correspondence, the clerk forwarded the attached correspondence between the attorney and Trustee Pilling. After further consideration, it's my opinion that I may not be eligible to run, though questions still remain. That said, through review of the Colorado Constitution, Article XVIII, Section 11 I began to further question the mayor's ability to run.

As I collected signatures on my petition I continued researching Colorado term limits. When I turned in my petition on 1/22, I asked the clerk if she would be determining candidate eligibility and the answer was no. The clerk informed me that if elected, my eligibility could be challenged or contested by a resident and I may find myself in court. It's my perception that there was some bias against me running. I ask, who at the town is legally responsible to determine the eligibility of candidates? If the town does not determine eligibility, will the town face unnecessary expenses for holding an invalid election or worse yet, having to defend an elected official that was not eligible to run. Will the town be responsible to defend whoever is elected if the results are contested?

I've received no information supporting why the clerk believes that the incumbent mayor is eligible for reelection, while I am told that I am not eligible. I am compelled to ask whether a partial elected term is a full term for purposes of determining term limits? I believe partial elected terms count toward term limits to dissuade elected officials from trying to defeat term limits. The mayor has been in office since 4/2016 which will be (2) consecutive terms including his time as trustee.

In review of the clerk's email from Attorney Widner, the case of Kulmann v. Salazar appears to attempt to answer the question of whether the positions are the same. However the case did not consider term limits, from reading the case the Justices did not need to take up the 2nd issue in the case. In my opinion, the facts in the case are not identical to my question regarding the mayor's eligibility for reelection. There have been a number of cases since the passing of Amendment 17 regarding term limits, and while Article XVIII, Section 11 does not delve into partial or appointed terms, the attached formal opinion 05-04 would appear to support that a partial elected term is a full term for purposes of term limits. And while the Attorney General's formal opinion may not be binding legal precedent, I would expect the town would be obliged to give careful and close consideration to this when considering the incumbent mayor's eligibility. It is my opinion, there is no doubt, that 05-04 answers the question that a nonjudicial elected official cannot leave their seat and end their term (1) month or even 3.66 years prior to the end of the term to defeat term limits. It is my opinion that this too could easily be challenged by a resident if the incumbent mayor were to be reelected.

Based on the town clerk / manager's sequence of events (see thread below), I ask the board and staff, what term did the mayor serve between 4/2016 and 4/2020, and do you believe that these (4) years do not count for the purposes of term limits? There's no question the mayor served as trustee between 4/2016 and 12/2016, prior to his appointment as mayor. And at a minimum a (2) year elected term was served in addition to the partial elected term as trustee between 4/2018 and 4/2020. And though I questioned the clerk when I was picking up my petition, I see nothing from the clerk to support why the incumbent mayor is eligible while I would be ineligible if we assume the positions of trustee and mayor are the same for the purposes of term limits.

To be clear, when I pulled my petition to run, I had not even contemplated the mayor's eligibility as I believed the mayor had only served 1+ terms, and not having read anything prior regarding term limits I really hadn't considered who was eligible for what position. In my mind, I am a past trustee interested in running for mayor and the (2) positions are different.

I choose to believe that we are all equal under the law. And I believe the law is clear, and the spirit of the law within the language of Amendment 17 regarding term limits in the State of Colorado is clear. The purpose of term limits is to broaden the opportunities for public service, and that terms are consecutive unless they are (4) years apart.

It is not my intention to try and defeat term limits or circumvent the law by running if I am deemed ineligible. I don't know why any candidate would search for and exploit perceived loopholes in the language of the Constitution. The end does not justify the means. I can see no reason why a candidate would undermine the foundation of the Colorado Constitution. If I were to be deemed ineligible I would be compelled to withdraw my nomination for mayor in the 2024 election. Having sworn to uphold the Constitution of the State of Colorado during my time as trustee, I would not knowingly violate the law. But if the clerk is correct, that it is not for the town to determine eligibility, how or who will make that determination, and at what cost?

While I am compelled to accept the attorney's position that the two positions of trustee and mayor may not be substantively different, I would be remiss if I did not ask whether the clerk or board ever asked the attorney whether the incumbent mayor was eligible to run for reelection? There is nothing of substance in the clerk's position regarding the mayor's eligibility aside from election timelines. Has the town concluded as a board that the mayor is eligible for reelection? I would ask the trustees in consultation with the attorney and clerk to contemplate the issue of eligibility of the incumbent mayor, keeping in mind the withdrawal deadline of 1/29/24 if practicable.

I am disappointed by what I perceive to be bias when considering the town's interpretation of the law as it applies to my eligibility, while it would appear that no consideration had been made regarding the eligibility of the incumbent mayor. I believe that if the town attorney's opinion regarding the office of mayor and trustee is correct, then neither I nor the incumbent mayor are eligible to run. If this is true, I am concerned that if either I or the incumbent mayor were to be elected and the results were contested, that the town would have spent valuable tax revenue for an illegitimate election. Or worse yet, the town might be defending an ineligible elected official and spending tax money unnecessarily.

Respectfully,

--
Dan L. Cleary

Forwarded Conversation

Subject: Election Information

From: **Michelle Eddy** <michelle@townofblueriver.org>
Date: Thu, Jan 18, 2024 at 7:16 AM
To: Dan Ceary <dcleary.cdcm@gmail.com>

Dan

Please see Bob's comments below concerning your eligibility.

Also, you inquired about Toby's eligibility so below is the sequence of events that makes him eligible for one more full four-year term.

- 2016

Seats open: Mayor, Four-year Term; (3) Trustee seats, Four-year Terms. (results attached)

- Mitch Weiss was elected Mayor: Toby Babich, Joel Dixon, and Tyler Brook were elected as Trustees.
- December 2016 Mitch Weiss resigned as Mayor and moved. The Board of Trustees appointed Toby as Mayor. Keep in mind the Trustees could've appointed anyone and they would've followed this same path for the election cycle. As it is an appointment, the person appointed to that seat is required to run at the very the next election to fulfill the TERM for that seat.
- Laurel Wehrman was then appointed to fill Toby's Trustee seat. She too would have to run again in 2018 to finish that TERM.
- Terry Feret then resigned from the Board of Trustees and his term was set to expire in 2018.
- Ted Pilling was appointed to fill his seat in 2017.

- 2018

Seats Open: Mayor, Two-year Term; (3) Trustee seats Four-year Terms; (1) Trustee seat, Two-Year Term (results attached)

- Because Toby was appointed into his position/seat as Mayor, he had to run again for the final two years of that TERM. He was elected to complete that two years.
- Laurel decided not to run for the final two years so this opened up a two-year TERM seat as a Trustee.
- The TERM that Ted Pilling was filling was up. Ted then ran in the 2018 Election for his first four-year Term.
- You, Ted Pilling and Ken Robertson won the two open four-year TERMS as the top three vote getters. Mark Fossett was elected as the fourth-place finisher to the Two-year Term. This was yours and Ken's second Term with you terming out in 2022.

- 2020

Seats Open: Mayor, Four-Year Term; (3) Trustee seats, Four-Year Terms (results attached)

- As the TERM that Toby was fulling was completed, he then ran and was elected to his first FULL four-year TERM in 2020.
- Mark had be elected to the short term that was expiring (2 years) in 2018. He ran for his first FULL four-year TERM in 2020 and was elected.
- Kelly Finley and Joel Dixon won the other (2) Four-year terms.

- 2022

Seats Open: (3) Four-year Trustee seats (results attached)

- Ted Pilling was elected to his second Four-year Term and will term out in 2026.
- Ted Slaughter and Noah Hopkins were elected to their first Four-year terms and will be up for re-election in 2026.

- 2024

Seats Open: Mayor, Four-year Term; (3) Trustee Four-year Terms.

- Eligible for re-election: Mayor Toby Babich; Trustees Mark Fossett and Kelly Finley

Michelle:

CC: Board of Trustees

You asked me to provide my opinion – that can be publicly distributed - regarding the following question:

When can a former mayor or former trustee who was "termed out" run for a new position as the mayor or trustee?

The answer is provided by the Colorado Constitution at Article XVIII, Section 11(1) ("Colorado Term Limits"):

Elected government officials - limitation on terms. (1) In order to broaden the opportunities for public service and to assure that elected officials of governments are responsive to the citizens of those governments, no nonjudicial elected official of any ... town ... shall serve more than two consecutive terms in office.... For purposes of this Section 11, terms are considered consecutive unless they are at least four years apart.

As this Constitutional provision applies to Blue River, a person serving as mayor or as trustee can serve only two consecutive, four-year terms. Once those two consecutive four-year terms are concluded, the former trustee or former mayor must wait a full four years before taking any position on the Board of Trustees again.

A question that arises from the language of the Colorado Term Limits provision is whether the reference to the phrase "terms in office" is intended to differentiate between the office of "mayor" and office of "trustee." That is, whether the office of mayor and office of trustee are "different" offices for purposes of term limits. If these offices are different, then a person can hold the office of trustee for two consecutive four-year terms and then immediately run for the office of Mayor. Conversely, if the offices are different, a mayor who serves for two, four-year terms can immediately run for the office of trustee upon the expiration of the office of mayor.

Whether an office is different for purposes of term limits was addressed for the first time by the more recent case of *Kulmann v. Salazar*, 521 P.3d 649 (Colo. 2022). That decision involved the City of Thornton's home rule charter and Thornton's local code of ordinances. As a starting point, the Supreme Court recognized that the proper interpretation of the Colorado Term Limits provision is to limit terms of office to allow others to serve. However, in the *Kulmann* case, the Supreme Court found determinative that the Thornton Charter and the Thornton Municipal Code clearly differentiated between the office of Mayor and the office of City Council in a manner that made the offices distinct or different. Among other factors, the Thornton Mayor was elected at large, whereas the Council members were elected by smaller districts and only a smaller number of electors. Additionally, the Mayor held substantive powers that the other Council members did not hold and which substantive powers were not simply limited to being the ceremonial figure head of the municipality or running the council meeting as the presiding officer. These were just two of the elements or factors that the Supreme Court found determinative in deciding that the office of Thornton Mayor and the office of Thornton City Council member were different for purposes of term limits and the application of the Colorado Term Limits provisions.

Importantly, almost all of the elements of the *Kulmann* case are not present in the Town of Blue River (or present in nearly all other statutory towns). Looking at the Blue River Code and the state statutes that apply to a statutory town, the office of mayor and the office of trustee are not substantively different other than the title given to these offices and some other minor aspects of power. It is my opinion that – for purposes of term limits only – the office of mayor and the office of trustee are the same offices because they are all members of the Board of Trustees. As a result, a person serving on the Board of Trustees (which includes the office of mayor) are serving in the same office. Once a member of the Board of Trustee is "termed out," they must wait a full four years before taking a new position on the Board of Trustees.

I hope this helps answer the question you asked. Again, you should feel free to distribute this email to others who may be interested in my opinion regarding how term limits should be applied in the Town of Blue River.

Please

Robert (Bob) Widner

Town Attorney

Town of Blue River

Michelle Eddy, MMC/CPM

Town Manager/Clerk

970-547-0545 ext. 1 / Cell: 970-406-2430

<https://townofblueriver.colorado.gov>

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From: **Dan Cleary** <dcleary.cdcmgmt@gmail.com>
Date: Thu, Jan 18, 2024 at 8:02 AM
To: Michelle Eddy <michelle@townofblueriver.org>

Michelle,

I appreciate the attorney providing an opinion.

A few follow up questions come to mind. First, what happens if a candidate such as myself were to submit a petition that met the criteria? Is the petition tossed out by the clerk? Can the person run, and if elected what then? If the election results are invalidated by these provisions is there another election? And do the facts that the mayor presides over meetings and is paid twice as much as trustee not constitute a substantive difference in Colorado Term Limits provision?

Thank you,

Dan

From: **Michelle Eddy** <michelle@townofblueriver.org>
Date: Thu, Jan 18, 2024 at 8:16 AM
To: Dan Cleary <dcleary.cdcmgmt@gmail.com>

Dan

Below is further information provided by the Town Attorney to Mr. Pilling who also asked this question. I will check with the Town Attorney on the sequence of events if you were to submit a petition and run.

Ted:

As to your question about the Blue River mayor engaging in some extra actions that may be different than the trustees:

"Are / would those not be sufficient differences in responsibilities to allow a former Trustee to run for the office of Mayor prior to a 4-yr. waiting period?"

My answer is: "absolutely no."

It is clear that the Supreme Court's decision requires substantive and substantial **legally established** differences in both the office of Mayor and that of a member of the governing body to create different offices for purposes of term limits. In the Thornton case, there were charter provisions and municipal code provisions (expressly written and adopted laws) that established that the office of mayor was different than the office of city council member.

Yes, in Blue River the mayor may attend a meeting that is called the "Mayor/Manager's meeting," but there is no law that creates a duty to attend such a meeting or reserves only to the mayor the right to attend such a meeting. Heck, there is not even a legal requirement that there actually be a "Mayor/Manager's meeting." Similarly, there is no law that requires the mayor to set a meeting agenda - it is just a common informal practice and sound practical reason to do so (and nearly all towns do so). The mayor does not hold a tie breaking vote in Blue River - the mayor votes along with and the same as the other governing body members. In fact, any Blue River trustee holds just as much power to break a tie vote as the mayor because any trustee can break a tie vote if their vote will break a tie. And, there is no Blue River law or state law that grants a mayor the right to unilaterally make any decisions and would bind the town and, especially as to financial matters, state law expressly prohibits a mayor from unilaterally making a binding decision without a majority vote of the Board of Trustees. The Blue River Town Code provides that the mayor holds the same powers as a trustee, is elected the same as a trustee, and votes the same as a trustee. Other than running a meeting and being the ceremonial head of the town, there is no substantive or substantial difference between the mayor and a trustee.

The fact that the mayor in Blue River runs the meeting and may perform some informal activities that are not delegated by law, these activities do not create a different office. Consider the Supreme Court's point of view that the intent of the citizen-approved Constitutional Colorado Term Limits provision was to limit all local terms of office, period. It was the Supreme Court that decided that, in order to "upset" this Constitutional voter approved limitation on offices, it takes explicit and written legal provisions to demonstrate that the local government intended that the office of mayor would be different than the office of the city council/board of trustees. For Blue River, I firmly believe that the Colorado Supreme Court would not support an argument that the exercise of the very limited power to run a meeting and the exercise of voluntary activities is/are enough to find that the Blue River citizens intended to create a different office that would allow someone to stay on the Board of Trustees indefinitely by moving from trustee to mayor and from mayor to trustee indefinitely. That position or interpretation would be contrary to the Colorado Term Limit provision, in my opinion.

If the Mayor or another member of the Board of Trustees is "termed out" and they did not wait a full 4 years, they would be ineligible to take the oath of office and ineligible to serve in any capacity on the Board of Trustees - even if they were elected. They can run for office, but if the "termed out" member did not wait 4 years, it would be easy (in my opinion) to

convince a court that they cannot lawfully serve under the Colorado Constitutional Term Limits provision. And, the sitting Board of Trustees (or any citizen) can bring that lawsuit to the court to enforce the Colorado Constitution.

Hope this helps explain the purpose of the Term Limits provision and the Supreme Court's view of when the office may be different for purposes of the Colorado Constitution.

Let me know if you have any questions or how I can assist in understanding this issue.

Robert (Bob) Widner

Town Attorney

Town of Blue River

Michelle Eddy, MMC/CPM

Town Manager/Clerk

970 547 0545 ext. 1 / Cell: 970-406-2430

<https://townofblueriver.colorado.gov>

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From: **Dan Cleary** <dcleary.cdcmgmt@gmail.com>
Date: Tue, Jan 23, 2024 at 8:37 AM
To: Michelle Eddy <michelle@townofblueriver.org>

Michelle,

After reading the attorney's comments you sent on 1/18, I'm curious if you could explain why the town clerk's office could or would approve my petition to run (deemed sufficient) and allow me to be placed on the ballot when the town attorney's email implies that I ineligible to serve due to term limits?

When we spoke at town hall yesterday afternoon, you stated that the clerk does not determine eligibility, and that my running would be subject to a challenge in court (contested?). I would think the town clerk would have the final say and authority to determine who is, or is not eligible to run.

Thank you,

Dan Cleary

From: **Michelle Eddy** <michelle@townofblueriver.org>

Date: Tue, Jan 23, 2024 at 9:51 AM
To: Dan Cleary <dcleary.cdcmgmt@gmail.com>

Dan

After consultation with the Town Attorney, the Town Clerk has a very narrow ability and authority to remove someone who is properly nominated from the ballot per State Law.

The Clerk is not authorized to strike someone off the ballot for term limits.

Michelle Eddy, MMC/CPM

Town Manager/Clerk

970-547-0545 ext. 1 / Cell: 970-406-2430






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From: Dan Cleary <dcleary.cdcmgmt@gmail.com>
Sent: Tuesday, January 23, 2024 8:38 AM
To: Michelle Eddy <michelle@townofblueriver.org>
Subject: Re: Election Information

5 attachments

-  **CERTIFIED STATEMENT AND DETERMINATION.pdf**
97K
-  **CERTIFIED STATEMENT AND DETERMINATION 2016.pdf**
84K
-  **CERTIFIED STATEMENT AND DETERMINATION 2018.pdf**
101K
-  **CERTIFIED STATEMENT AND DETERMINATION.pdf**
100K
-  **No.-05-4.pdf**
710K



JOHN W. SUTHERS
Attorney General

CYNTHIA S. HONSSINGER
Chief Deputy Attorney General

ALLISON H. EID
Solicitor General

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FORMAL
OPINION

of

JOHN W. SUTHERS
Attorney General

No. 05-04

AG Alpha No. ST EL AGBBK

August 16, 2005

Various special districts formed pursuant to title 32 of the Colorado Revised Statutes hold elections in which candidates oftentimes run unopposed for the office of director of their respective boards. Special districts are subject to term limits set forth in Colo. Const. art. XVIII, § 11(1).

Questions have arisen concerning the applicability of term limits to persons who are declared elected after an election is cancelled because no challengers are running. This Opinion is issued to provide guidance concerning the application of term limits to special district candidates who are declared elected after the election is cancelled. The Opinion also analyzes the effect of Colo. Const. art. XVIII, § 11(1) upon elected officials of special districts who resign from their offices prior to the expiration of their terms.

QUESTIONS PRESENTED AND CONCLUSIONS

1. Is a person an "elected official" under Colo. Const. art. XVIII, § 11(1) if the person is declared elected after an election is cancelled?

Yes.

2. Is an "elected official" who is subject to the provisions of Colo. Const. art. XVIII, § 11 deemed to have completed a full term of office if the official resigns from office prior to the expiration of his term?

Yes.

DISCUSSION

1. In 1994, Colorado voters enacted term limits for local government officials. Colo. Const. art. XXVIII, § 11(1) states:

In order to broaden the opportunities for public service and to assure that elected officials of governments are responsive to the citizens of those governments, no nonjudicial elected official of any county, city and county, city, town, school district, service authority, or any other political subdivision of the State of Colorado, no member of the state board of education and no elected member of the governing board of a state institution of higher education shall serve more than two consecutive terms in office, except that with respect to terms of office which are two years or shorter in duration, no such elected official shall serve more than three consecutive terms in office. This limitation on the number of terms shall apply to terms beginning on or after January 1, 1995. For purposes of this Section 11, terms are considered consecutive unless they are at least four years apart.

Special districts are political subdivisions. § 32-1-103(20), C.R.S. (2004). Boards of directors govern special districts. § 32-1-1001, C.R.S. (2004). The directors are generally elected to their office in contested elections. § 32-1-804, C.R.S. (2004). Frequently, however, candidates for directorships do not face opposition. If the only matter before the electorate is the election of candidates to a board, and there are not more candidates than offices to be filled at the election, then the election official, if instructed by the board, must cancel the election and “declare the candidate elected.” § 1-5-208(1), C.R.S. (2004).

Colo. Const. art. XVIII, § 11(1) limits each “elected official” of any political subdivision to two terms of office. The term “elected official” is not defined. Several directors who have been declared elected pursuant to § 1-5-208(1) contend that they are not elected officials, as that term is used in article XVIII, § 11, because they were not selected at an election in which voters cast ballots; therefore, they reason, they are not subject to term limits.

Words and phrases within a constitutional amendment must be given their ordinary and popular meaning. When the language of an initiated amendment is clear and unambiguous, the amendment will be interpreted as written. *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004). If the amendment is ambiguous and subject to more than one interpretation, other rules of construction will be utilized. *Id.* An interpretation of a constitutional amendment must give effect to the electorate’s intent. *Id.* For the following reasons, the phrase “elected official,” as used in Colo. Const. art. XVIII, § 11, must be interpreted to include persons who have been elected by actual votes cast or by a declaration of election upon the cancellation of an election.

There are no Colorado cases interpreting the phrase “elected official” in Colo. Const. art. XVIII, § 11. Courts in other states have adopted a broad interpretation of the word “elected”

when reviewing the question of eligibility of candidates for public office. Two companion California cases provide guidance. In *Barrett v. Hite*, 389 P.2d 944 (Cal. 1964), the plaintiffs sought a declaration that appointed incumbent judges were not qualified to appear on the ballot. The California Constitution provided that election officials shall cancel elections under certain circumstances and must declare the incumbent reelected. The plaintiffs argued that this provision did not apply to judges who were appointed and not elected to their offices.

The Court rejected the plaintiffs' argument. The Court viewed the word "elect" within the context of the applicable constitutional provision. It stated:

Although it is true, as plaintiffs point out, that ordinarily "elect" refers to a determination made by voters, the word also has a broader meaning, namely, "to make a selection of: Choose * * * to choose (a person) for an office * * * (Webster's New Internat. Dict. (3d ed. 1961) p. 731), "to make choice of (a person)* * *" (Funk & Wagnall's New Standard Dict. (1958) p. 798), and "to pick out, choose * * *" (Oxford English Dict. (1933) vol. III, p. E-74). Roget's International Thesaurus (1946) p. 420, gives as synonyms the following: "choose, elect, select, pick * * * : appoint, elect, assign * * * designate * * * place in office, choose for a post or position. * * *" (Italics added.) In accord with these definitions the court in *Odell v. Rihn*, 19 Cal. App. 713, 719, 127 P. 802, 805, after recognizing that "elected" and appointed are not synonymous, stated: "In its broadest sense, however, the word "elected" means merely "selected." When used in that sense the word "elected" is synonymous with the word "appointed."

Barnett, 389 P.2d at 944.

In *Binns v. Hite*, 389 P.2d 947 (Cal. 1964), the plaintiffs argued that incumbent judges could not be declared elected if they had no challengers and the election was subsequently cancelled. Adopting the broad definition of "elect," the California court ruled that the California constitution did "not require that there be an actual balloting and tabulation of votes, provided there is some appropriate procedure by which the selection or choice is made by 'electors'." *Id.* at 949. If an incumbent did not have a challenger, electors, by their inaction, chose to retain the incumbent in office. *Id.*

The Kentucky Supreme Court also adopted a broad interpretation of the word "elect" in *Shields v. Wilkins*, 449 S.W.2d 220 (Ky. 1969). In that case, a person was appointed to fill a vacancy on a school board. The Kentucky Constitution generally provided that a person who was appointed to fill a vacancy could hold office only until the next general election. A provision specifically applicable to school districts stated, "The provisions of sections 145-154, inclusive, shall not apply to the election of school trustees and other common school district elections." *Id.* at 222. A citizen argued that the exemption did not apply to school trustees who had been appointed. The Kentucky court found that the appointment to fill a vacancy in a school district office was equivalent to an "election" as that term was used in Kentucky's constitution.

There was no reasonable ground upon which to distinguish appointed school trustee and elected school trustees. *Id.* at 223.

A broad definition of the word "elected official" is consistent with the intent of article XVIII, section 11(1). The precatory language states that the measure is intended "to broaden the opportunities for public service" and to assure that officials in elective offices are responsive to the citizenry. An interpretation encompassing officials appointed to fill the vacancy in an elected office or officials who are selected at an election that has been cancelled is consistent with the intent to change the identity of persons holding office.

In addition, the arguments presented to Colorado voters did not confine term limits to candidates who participated in an election in which votes were actually cast. Legislative Council of the General Assembly, *An Analysis of 1994 Ballot Proposals*, Research Publication No. 392 (1994). Proponents argued that "[e]xtending term limits to *local officials*" was part of the term limit concept. *Id.* at 55 (emphasis added). Opponents contended:

The proposal unnecessarily imposes term limitations on *all local government offices* rather than simply authorizing local citizens to impose local limits where needed or desired. The statewide mandate imposes uniform term limits on thousands of *elected offices* throughout the state.

Id. (emphasis added). Both proponents and opponents framed the measure in terms of persons who occupy an elective office. Neither side limited the discussion to persons who were selected at an actual election.

An interpretation that distinguishes between candidates who are declared elected because they have no opponents and candidates who win a contested election leads to an illogical conclusion. In order that officials be subject to term limits, the political subdivision would be required to incur the expense of holding an unnecessary election. The candidates do not face any opposition, either because the candidates are very popular, or the public is disinterested, or for some other reason. Regardless of the reason, holding an election is a waste of taxpayer funds.

A narrow definition also leads to inconsistent results. The decision to hold an election if there is no opposition is left to candidates for the director of the board of the special district. If the special district does not hold an election, then those candidates who are declared elected could run for more than two full terms. Candidates who faced opposition would be limited to two terms. Under the narrow definition, one set of directors would be subject to term limits while the other set of directors could be elected for an unlimited number of terms, even though both sets are serve the same number of terms.

Moreover, the narrow interpretation is contrary to the stated goals of broadening opportunities for public service and assuring that governments are responsive to citizens. Colo. Const. art. XVIII, § 11 is designed to remove or reduce the influence of incumbency on elections. A broader interpretation enhances the stated goals by limiting incumbency.

The term "elected official," as used in Colo. Const. art. XVIII, § 11, includes persons elected to a local office at an actual election or deemed elected as a result of a cancelled election.

2. This office issued an opinion stating that the limits set forth in article XVIII, § 11 do not include appointments to fill vacancies for parts of terms. Op. Att'y Gen. No. 2000-2

(February 9, 2000), pp. 9-10. The exact question presented was whether the provision “applies to terms of office that result from interim appointments made to fill a vacancy.” *Id.* at p. 9.

The opinion concluded that a partial term did not constitute a “term” for purposes of article XVIII, § 11. The opinion did not address the question presented in this opinion, namely the right of a person who resigns from office to seek a third term. Concern has been expressed that local officials may attempt to circumvent term limits by resigning from office prior to the end of the second term.¹

A resignation “is a formal notification of relinquishment of an office or position.” *Mauldin v. Panella*, 17 P.3d 837, 840 (Colo. App. 2000) (quoting *Black’s Law Dictionary* 1311 (Rev. 7th ed. 1999)). However, resignations will not be recognized if the resignation effectively allows the officeholder to avoid compliance with the law. As noted in *People ex rel. Rosenberg v. Keating*, 112 Colo. 26, 30-1, 144 P.2d 992, 994 (1944):

The right of any public official to resign cannot be doubted; but when the resignation is predicated upon the premise, stated, or which his conduct may imply, that it is to avoid performing a specific duty in the interest of a party in whose behalf such official is legally bound to act, his resignation, however formally tendered and accepted, will be regarded as without effect. Otherwise, public officials, persistently and successively resigning their offices, could work the undoing of parties whose rights are dependent upon action by those officials. The law will not be mocked, nor will ministers of justice, to whom appeal is made for relief in such situations, fail to grant relief....

The New Mexico Supreme Court analyzed the validity of a resignation that effectively circumvented term limits for sheriffs in *Stephens v. Myers*, 690 P.2d 444 (N.M. 1984). In that case, the defendant was elected sheriff for the term January 1, 1981 through December 31, 1982. Shortly after assuming office, it was discovered that the defendant had been convicted of a felony and had not been exonerated until after he took office. He resigned his office because he was not qualified for the office at the time he was nominated and elected. He was appointed to fill the vacancy eight minutes after he resigned. He was re-elected Sheriff for the term January 1, 1983 through December 31, 1984. In April 1984 he declared for candidate for Sheriff for the 1985-86 term. The plaintiff claimed that the defendant could not seek another term because New Mexico law limited sheriffs to two consecutive terms of office. The defendant claimed that he had not served two consecutive terms because he resigned after he was elected to his first term and then was appointed to serve the remainder of the term. The New Mexico Supreme Court held that the defendant had indeed served two consecutive terms. “Determining otherwise would allow an incumbent to resign before the end of his second consecutive term and thus contend he has not served the full two terms.” *Id.* at 445.

¹ This opinion does not address multiple resignations within one term of office.

Resignations likely will result in avoidance of the term limits in article XVIII, § 11(1). Therefore, for purposes of this article, a person who resigns from office will be deemed to have served a complete term.

Correspondingly, a person who is appointed or elected to fill the vacancy will not be deemed to have served a term. This conclusion meshes both with the conclusion in Op. Att'y Gen. 2000-02 that a person who is appointed to fill a vacancy under article XVIII, § 11(1) is not deemed to have served a term of office and with the generally accepted meaning of "term of office." See generally, *Denish v. Johnson*, 910 P.2d 914, 920 (N.M. 1996) (term of office is a fixed and definite time); *State ex rel. Racicot v. District Court*, 794 P.2d 1180, 1184 (Mont. 1990) (same); *People ex rel. Callaway v. De Guelle*, 47 Colo. 13, 20, 105 P. 1110, 1112 (1909) (laws set the length of term).

This interpretation is also consistent with other term limits provisions governing state officials. Under Colo. Const. Art. IV, § 1(2), for example, a person who succeeds to the office of governor, or is appointed or elected to fill a vacancy in the office of secretary of state, state treasurer or attorney general, and who serves at least one-half of a term in office, is deemed to have served a full term for term limit purposes. The person being succeeded, who served less than one-half term in one of these offices, and vacates the office, is deemed not to have served a term. The same result occurs under article V, § 3(2). Only one officer can be limited as a result of serving a partial term.²

Likewise, under article XVIII, § 11, only one person is deemed to have served a term for term limit purposes. A person who resigns from office is deemed to have served for the term of the office. For purposes of term limits the person who is appointed and subsequently elected to fill the remainder of the term is deemed not to have served at all.

Two hypotheticals illustrate the application of article XVIII, § 11(1). In the first example, a special district director holds office for four years and is elected to a second four-year term. The director then resigns during the fourth year of his second term and is a candidate for special district director at the next election. The candidate would be ineligible to run for the office, or to hold the office if elected. The director would be deemed to have held the second term for the full four years.

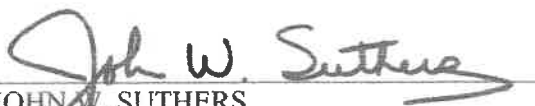
In the second example, a director is elected in 1996 and holds office for four years. The director then runs in 2000 to fill a vacancy in another directorship on the board and is elected, or declared elected, to fill the remainder of the term. After the end of the term, the director runs for a second four year term in 2002 and is elected. The director is eligible to serve the second four-year term. However, the director cannot run for a third four-year term in 2006 because the gap between the two full terms is less than four years.

² This opinion does not address the rare circumstance in which two officers each served exactly one-half term.

SUMMARY

The term "elected officials" in Colo. Const. article XVIII, § 11 applies to officials who are elected by a vote of the people or who are deemed elected after the cancellation of an election. An elected official who resigns from office at any time during the term is deemed to have completed the full term.

Issued this 16th day of August, 2005.


JOHN W. SUTHERS
Colorado Attorney General



**CERTIFIED STATEMENT AND DETERMINATION
OF ELECTION HELD IN BLUE RIVER, COLORADO,
ON TUESDAY, APRIL 7, 2020**

STATE OF COLORADO)
)
COUNTY OF SUMMIT)ss.
)
TOWN OF BLUE RIVER)

TOWN CLERK'S STATE OF VOTES CAST

I, Michelle L. Eddy, Town Clerk of the Town of Blue River, Colorado, state as follows:

1. The returns of votes cast at the Regular Municipal Election of the Town of Blue River, Colorado held on Tuesday, April 7, 2020 have been made to me by the Judges of the Election.
2. From such returns I have made out an abstract of votes cast for each office that was voted upon at the election as required by law.
3. The abstract of votes prepared by me from the returns of votes cast at the election shows as follows:

Name of Candidate	Office (Four Year Term)	Whole Number of Votes Cast
Toby Babich	Mayor (Two Year Term)	152
Mark Fossett	Board of Trustees (Four Year Term)	144
Joel Dixon	Board of Trustees (Four Year Term)	128
Kelly Finley	Board of Trustees (Four Year Term)	81
Martie Semmer		70
Tim West		57

Total Number Voting: 184

Registered Voters: 799

4. There is only one precinct for all regular and special elections conducted by the Town of Blue River, and the abstract of votes cast set forth above is for the Town's one voting precinct.

_____/s/_____
Michelle L. Eddy, Town Clerk

CERTIFICATE AND DETERMINATION OF OUTCOME OF ELECTION

We, Michelle L. Eddy, Town Clerk of the Town of Blue River, and Monica McElyca, Municipal Court Judge of the Town of Blue River:

1. Certify that the Town Clerk's Statement of Votes Cast at the Regular Municipal Election of the Town of Blue River, Colorado held on Tuesday, April 7, 2020 set forth above is a true and correct; and
2. Based upon the foregoing, we make the following determinations of which persons have the greatest number of votes and were duly elected at the Regular Municipal Election of the Town of Blue River, Colorado held on Tuesday, April 7, 2020:
 - a. Toby Babich, having received the highest number of votes, is determined to be elected to fill the Mayor's vacancy on the Board of Trustees for a four year term.
 - b. Mark Fossett, having received the highest amount of votes, is determined to be elected to fill the first of three vacancies on the Board of Trustees for a four year term.
 - c. Joel Dixon, with the second highest amount of votes, is determined to be elected to fill the second of three vacancies on the Board of Trustees for a four year term.
 - d. Kelly Finley, with the third highest number of votes, is determined to be elected to fill the third vacancy on the Board of Trustees for a four year term.
3. The persons duly elected as set forth above are entitled to and shall be issued a certificate of election as provided by law.

Dated: April 17, 2020

_____/s/_____
Michelle L. Eddy
Town Clerk

[SEAL]

_____/s/_____
Monica McElyca, Municipal Court Judge

Dan Cleary

0023 Rustic Terrace, P.O. Box 6871, Breckenridge, CO 80424,
Tel: 970.389.4988, Email: dcleary.cdcmgmt@gmail.com

February 8, 2024

When I met with the mayor on 1/24/24, he stated that he verified his eligibility with the town attorney. I assume since staff does not take direction from one trustee that this request of staff's time was with board approval. So it's my expectation that the board has been advised on the mayor's eligibility and hope they would answer the following summary of questions from my 1/25/24 email:

1. Can the board direct the attorney / staff to explain how the incumbent mayor is eligible to run in 2024?
2. Does the board believe that the mayor is eligible without question?
3. If there is a grey area as it appears, and the mayor were to win and his eligibility were questioned / contested would the town be expected to bear the financial burden of defending the eligibility?
4. Is the board willing to put our tax dollars at risk if there are in fact reasonable questions regarding the mayor's eligibility?
5. Can the board direct the attorney / staff to provide the definition of partial term as it applies to term limits?
6. If the board does believe without question that the incumbent mayor is eligible, would they provide an explanation? Right now I can only assume they are equating that a partial term doesn't count for the purposes of term limits. Is this all partial terms, elected partial terms, or appointed partial terms?
7. The town manager made no mistake in advising me that I could be contested and that it was the attorney's opinion that I was ineligible. Has the same care been taken in advising the incumbent mayor as to his eligibility?

