MEMORANDUM

TO: **President and Board of Trustees**
Craig G. Anderson, Village Manager

FROM: **James A. Rhodes, Village Attorney**

DATE: **March 14, 2008**

RE: **Legal Implications of Conviction of Domestic Battery**

On March 6, 2008, Trustee Humpfer was convicted by the Circuit Court of Kane County of the charge of Domestic Battery. I have been requested to provide my opinion as to the legal implications arising out of that conviction.

Section 3.1-10-5 (b) of the Illinois Municipal Code provides as follows:

> A person is not eligible for an elective municipal office if that person is in arrears in the payment of a tax or other indebtedness due to the municipality or has been convicted in any court located in the United States of any infamous crime, bribery, perjury or other felony.

In addition, the "Officials Convicted of Infamous Crimes Act", 5 ILCS 280/1 provides in pertinent part as follows:

> Any person holding office under the Constitution of the State of Illinois and every elected official of local government or of any school district who is convicted of a felony, bribery, perjury, or other infamous crime, as understood in Section 1 of Article XIII of the Constitution of 1970, shall be, upon conviction, ineligible to continue in such office.

The Illinois Statutes do not currently define "infamous crime". In addition, there are no cases that have reviewed the issue of whether a conviction for domestic battery would constitute the conviction of an infamous crime. Therefore, in order to determine whether a conviction of a particular crime is an "infamous crime", prior statutory authority and the common law (Illinois case law) must be reviewed for guidance. Section 124-1 of the Illinois Code of Criminal Procedure, Ill.Rev.Stat.1957, Chap. 38, Par. 124-1, contained the following provision:

> Infamous crimes are the offenses of arson, bigamy, bribery, burglary, deviate sexual assault, forgery, incest or aggravated incest, indecent liberties with a child, kidnapping, or aggravated kidnapping, murder, perjury, rape, robbery, sale of narcotic drugs, subornation of perjury, and theft if the punishment imposed is imprisonment in the penitentiary.

In *People ex rel. Keenan v. McGuane,* 13 Ill.2d 520, 150 N.E.2d 168 (1958), the Illinois Supreme Court determined that "infamous crimes" were not limited to those set forth in statute by the legislature. Rather, the Supreme Court stated:

> An infamous crime at common law was an act, the commission of which was inconsistent with the commonly accepted principles of honesty and decency or one which involves moral turpitude. Under these circumstances, we conclude that the determination of what constitutes an infamous crime, insofar as it effects a vacancy in office, is not an exclusive legislative function, but is subject to judicial decision in light of the common law as it existed when the constitution was adopted in 1870.

In reaching its decision, the Illinois Supreme Court examined a number of cases where conspiring to operate a wholesale liquor business without paying taxes, use of the United States mails to defraud, and bribery at an election were all held to be crimes that would require a forfeiture of office.

The court went on to conclude that:

> . . . any public officer convicted, in the Federal Court or in the court of any sister State, of a felony which falls within the general classification of being inconsistent with commonly accepted principles of honesty or decency, or which involves moral turpitude stands convicted of an infamous crime . . . and that such conviction creates a vacancy in office.

The following language might lead one to conclude that only felonies would constitute infamous crimes. However, that is not the case. In *People ex rel. Ward v. Tomek,* 54 Ill.App.2d 197, 203 N.E.2d 744 (2nd Dist. 1965), the Second District Appellate Court reviewed that very issue. In *Tomek,* township officials had been convicted of conspiracy to cheat and defraud the township, misdemeanor convictions. The township officials argued that only felonies were to be considered infamous crimes. The Appellate Court stated:

> The appellants argue that only felonies can be infamous crimes. This is clearly not true.

The appellate court, reviewing the decision in *McGuane,* goes on to reiterate the test of an infamous crime and to explain *McGuane,* stating:

> When determining whether there is a vacancy in office due to the conviction of the office-holder of an infamous crime, the test set forth by the Supreme Court is whether or not the act violated the 'commonly accepted principles of honesty and decency.' The strict holding of the case (*McGuane)* deals only with felonies, that is true; but it is true only because a strict holding can deal only

> with the case before the court at the moment. While it is true that *State ex rel. Keenan v. McGuane* has never before been extended to include a misdemeanor, no court has ever been asked to extend it in a way before now.

Thus, the Second District Appellate Court, the District in which the Village of Carpentersville lies, has held that infamous crimes may include misdemeanors.

The *Tomek* case also suggests the facts of the crime may be reviewed to determine whether the acts may be infamous. The court states:

> Without determining whether any conspiracy to defraud will constitute an infamous crime, we hold that in such a case as this, where public officers conspire against the political unit of which they are officials, the crime is infamous for the purposes of determining whether a vacancy has occurred.

There has been a suggestion that *People ex rel. City of Kankakee v. Morris,* 126 Ill.App.3d 722, 467 N.E.2d 589 (3th Dist., 1984) suggests that infamous crimes are necessarily felonies. This is not the case. In *Morris,* the official was convicted of felony theft. He argued that since he was not sentenced to the penitentiary, but given probation, he had not been convicted of an infamous crime. This argument was based upon that language of the criminal statute in effect at the time that provided theft was an infamous crime only "if the punishment imposed was imprisonment in the penitentiary." The court noted that the above referenced phrase was used to distinguish felony theft from misdemeanor theft and under the statute the legislature had established only felony theft as an infamous crime. The *Morris* Court does not hold that infamous crimes are only felonies.

There has also been some suggestion that the Federal definition "infamous crime" would apply to this situation. That also is not the case. Federal courts have no jurisdiction to determine the nature of crimes that would give rise to a forfeiture of office under state laws.

For the above-mentioned reasons, it is my opinion that "infamous crimes" are not limited to felonies and may be misdemeanors, and that the test for determining whether a crime is infamous is "whether or not the act violated the commonly accepted principles of honesty and decency or is a crime of moral turpitude."

I have received a proposed resolution which purports to have the President and Board of Trustees determine whether Trustee Humpfer's conviction for domestic battery constituted a conviction of an infamous crime. In *Brown v. Johnson,* 362 Ill.App.3d 413, 839 N.E.2d 634 (1st Dist., 2005) the appellate court found that a school board, who had the authority to fill vacancies on the board, also had the

authority to determine if the vacancy existed. The court noted that Section 25-3(a) of the Election Code provides that:

> whenever it is alleged that a vacancy in office exists, the officer, body or county board who has authority to fill the vacancy by appointment, or to order an election to fill such vacancy, shall have power to determine whether or not the facts occasioning the vacancy exists.

It is my understanding that the Village of Carpentersville is a managerial form of local government pursuant to referendum. As a managerial form of government, the provisions of Article 5 of the Illinois Municipal Code apply. Section 5-2-12 (a) provides:

> If a city or village adopts the managerial form of municipal government, but does not elect to choose aldermen or trustees from ward or districts, then the following provisions of this Section shall be applicable.

Thereafter, subsection (g) of this Section 5-2-12 provides:

> If a vacancy occurs in the office of mayor or councilman, the remaining members of the council, within 60 days after the vacancy occurs, shall fill the vacancy by appointment. . .

Since the President and Board of Trustees have the authority to fill the vacancy, it is my opinion that the President and Board of Trustees have the authority to determine whether a vacancy exits. Therefore, the President and Board of Trustees may decide whether the conviction of Trustee Humpfer constituted the conviction of an infamous crime.

This authority is not exclusive. Section 18-101 of the Code of Civil Procedure provides, in pertinent part:

> A proceeding in quo warranto may be brought in case:
> (1) A person usurps, intrudes into, or unlawfully holds or executes any office, or franchise, or any office in any corporation created by authority of this State;
> (3) Any public officer has done, or allowed any act which by the provisions of law, works a forfeiture of his or her office.

Section 18-103 provides:

> The proceeding shall be brought in the name of the People of the State of Illinois by the Attorney General or State's Attorney of the proper county, either of his or her own accord or at the instance of any individual relator; or by any citizen having an interest in the question on his or her own relation, when he or she has requested

> the Attorney General and State's Attorney to bring the same, and the Attorney General and State's Attorney have refused or failed to do so, and when, after notice to the Attorney General and State's Attorney, and to the adverse party, of the intended application, leave has been granted by the circuit court.

Therefore, the Attorney General or State's Attorney or any citizen of the Village of Carpentersville has the right to a judicial determination of whether an act as been committed which would require a forfeiture of office.

The proposed resolution also states that the "Village President is without authority to initiate or pursue complaints, whether in quo warranto or otherwise, with the Kane County State's Attorney's Office or the Illinois Attorney General's Office, in any way related to Trustee Humpfer or in any way intended to remove Trustee Humpfer from office.

As previously stated, the quo warranto provisions of the Code of Civil Procedure provide that the proceeding may be brought by either the Attorney General or the States Attorney, either of his or her own accord or at the instance of any individual relator. Any citizen of the Village of Carpentersville can request a quo warranto proceeding be brought.

In addition, as the resolution correctly notes, a Village President only has authority to act on behalf of a Village when granted such authority by state statute, Village ordinance, or by a necessary implication thereof. Section 3.1-35-5 of the Illinois Municipal Code sets forth the general duties of a Village President as follows:

> The mayor or president shall perform all the duties which are prescribed by law, including ordinances, and shall take care that the laws and ordinances are faithfully executed.

A Village President's duty to "take care that the laws and ordinances are faithfully executed would give the President the sufficient authority to seek a determination from the States Attorney or Attorney General that the law regarding forfeiture of office is faithfully executed.

If the President and Board of Trustees decides to make this determination they should do so on the basis of the test acknowledged by the Court in *Tomek.* That is, "whether or not the act violated the commonly accepted principles of honesty and decency." The Board should also be aware that he crime of simple Battery has been held not to be an infamous crime. See, *People v. Helms,* 84 Ill.App.2d 322 (3rd Dist., 1967). Aggravated Battery, however, is an infamous crime.