



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

December 11, 2019

Burton M. Harding
Harding Law Firm, LLC
PO Box 216
Mound City, KS 66056

Re: KOMA Complaint – Fort Scott City Commission
Our File Number CV-19-001902

Dear Mr. Harding:

We are writing to you in your capacity as the city attorney and legal representative for the Fort Scott City Commission. If you are no longer legal counsel for the commission, we would appreciate it if you would forward this letter to the commission's current counsel.¹

Michael J. Hoyt has filed a complaint with this office alleging that the commission took actions that may violate the Kansas Open Meetings Act (KOMA).² Specifically, he alleged that the commission violated the KOMA when it prepared and signed a letter objecting to the candidacy of Kevin Allen outside of an open meeting. As a remedy, he seeks the entry of a consent order, admission of a violation, and a \$500.00 fine per commission member.³

We have enclosed a copy of Mr. Hoyt's complaint and supporting documents for your review.

This office has concurrent jurisdiction with the county/district attorney over investigation and enforcement of the KOMA.⁴ We are conducting an inquiry concerning

¹ We are aware that on or about December 3, 2019, the commission determined to "move in a different direction for its legal representation." Jason Silvers, "Law firm hired to replace city attorney," THE FORT SCOTT TRIBUNE, December 3, 2019. However, it is unclear from the article we reviewed when the transition of legal services was to take place.

² K.S.A. 75-4317 *et seq.*

³ Mr. Hoyt prepared and submitted a proposed "Settlement Agreement" along with his complaint. We have not included it with this letter as it is premature and inconsistent with the statutory language governing Consent Orders that may be entered into between this office and a public body.

⁴ See K.S.A. 75-4320(a), 75-4320a(a), 75-4320b, 75-4320d, and 75-4320f.

Mr. Hoyt's complaint. We hope that by working with you we may complete our investigation quickly and without the use of more formal discovery methods authorized by statute, such as subpoenas or testimony under oath.

To assist us in our review of this matter, we would appreciate the commission's written response to the allegations raised in his complaint. Additionally, please answer the following questions and provide the requested information:

1. Have any of the individual commissioners or the commission as a whole ever been found in violation of the KOMA? If so, please describe the circumstances under which the violation was found to have occurred. How was the violation resolved? Provide a copy of any resolution.
2. Have any of the commissioners attended training about the KOMA? If so, when was the training conducted and by whom? Please provide a copy of any handouts or training materials provided to during the training.
3. To your or the commission's knowledge, have there been any formal or informal complaints or concerns regarding binding action taken outside of an open meeting against the commission within the past three years? If so, how was the complaint(s) or concern(s) resolved?
4. When and where did the commission discuss drafting, signing and sending the letter concerning the candidacy of Mr. Allen? Did this occur during an open meeting? If so, provide a copy of the agenda and meeting minutes for each regular or special meeting where this occurred.
5. If the discussion about drafting, signing and sending the letter concerning Mr. Allen's candidacy did not occur in an open meeting, describe in detail when and where this discussion occurred. How long did the discussion last? Did the discussion take place in person, by telephone, via email or by some other means? Did the commission receive or review a draft copy of the letter before it was approved? Provide a copy of any emails or other correspondence sent or received by each commissioner that discussed the letter the commissioners signed concerning Mr. Allen's candidacy.
6. When signing the letter concerning Mr. Allen's candidacy, was each commissioner able to see who else had signed the letter? Were the commissioners all present in the same place at the same time when signing the letter? If not, describe the process followed by each commissioner for signing the letter concerning Mr. Allen's candidacy.

7. Was a public vote by the commission required to give final approval to the drafting, signing and sending of any official correspondence from the commission concerning Mr. Allen's candidacy? If not, explain why, with reference to any available legal support.
8. Who has requested notice⁵ of the commission's meetings? Provide a copy of the notice the clerk or other designee has sent to each individual requesting notice for each commission meeting held from January 1, 2019, through the date of this letter.

Please be sure to provide any other information or documentation that is relevant to the commission's response to the allegations raised in the complaint, or that explains the commission's actions.

In responding to our inquiry, you may submit statements from individual commissioners, or provide a single document with responses from all the commissioners. The response(s) to our request must:

- signify the individual has reviewed and approved the response, or
- in the case of a joint response, signify that all individuals have reviewed and approved the joint response; and
- attest that it is true and correct.

Please also have anyone else who provides information in response to this letter attest that it is true and correct.

Although we are not requiring any response to be given under oath at this time, any statement made will be treated as an admission for purposes of the penalties and enforcement statutes in the KOMA.⁶ Responses may also be open in the event a request is made under the provisions of the Kansas Open Records Act, K.S.A. 45-215 *et seq.*

We would appreciate your response to this complaint on or before **Friday, January 3, 2020**. If you have any questions or need clarification, please do not hesitate to contact me at (785) 368-8063. You may send your response to the address on this letter, or to the attention of the Open Government Enforcement Unit at General@ag.ks.gov.

⁵ See K.S.A. 75-4319(b).

⁶ K.S.A. 75-4320(a); 75-4320a(a); 75-4320d; and 75-4320f.

Letter to Burton M. Harding

December 11, 2019

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Once we receive your response, we will determine the proper course of action. That may include further investigation, closing the matter, or seeking the appropriate remedy for any violation of the KOMA.

Thank you in advance for your cooperation.

Sincerely,

OFFICE OF KANSAS ATTORNEY GENERAL
DEREK SCHMIDT

A handwritten signature in blue ink, reading "Lisa A. Mendoza", with a stylized flourish at the end.

Lisa A. Mendoza
Assistant Attorney General
Director, Open Government Enforcement Unit

Enclosures

General Information

Your Name: Michael J. Hoyt

Address: 1315 Beech Ave
Street Apt.

Fort Scott, KS 66701
City State ZIP

Phone: (602) 405-5202 Alternate Phone: (620) 644-4032

Email: lawyerupva01@yahoo.com

Background Information

Have you complained about this matter to any other office? ☐ Yes ☒ No

Have you filed a private lawsuit related to this matter? ☐ Yes ☒ No

Violation Details

Type of Violation: ☒ Kansas Open Meetings Act ☐ Kansas Open Records Act

Name of public agency/entity/official you are requesting we investigate:
City of Fort Scott, KS City Commission.

Public Agency/Entity/Official Address: 123 Main Street
Fort Scott, KS 66701

Public Agency/Entity/Official Phone Number: (620) 223-0550

Date of Alleged Violation: On or before August 23, 2019

Location of Alleged Violation: Fort Scott, KS City Hall

Received
 OCT 15 2019
 Kansas Attorney General

Please describe the alleged violation in chronological order and identify any supporting documents:
Attach additional pages and supporting documentation, if necessary.

The agendas' and minutes posted by the City of Fort Scott to date, make no mention of the matter where the City of Fort Scott Commissioners served notice to the County Elections Officer of their intent to "represent the citizens of Fort Scott" in an objection of Mr. Kevin Allen as a candidate for Fort Scott City Commission. A review of postings for "Special Meetings" was performed; again, no mention of this matter. Executive sessions were not considered since the subject matter does not meet the criteria for such a session.

The attached "notice of objection" on or about August 23, 2019, was formulated and signed by each member of the Fort Scott City Commission acting as a governmental body, policy and decision maker for the citizens of Fort Scott, together or as an outcome of serial communications, in violation of the Kansas Open Meetings Act. This blatant abuse of power is not shielded by the ordinance or resolution stated in the notice. Along with the notice and settlement agreement, I have included a copy of the local newspaper coverage of the events involving this matter.

Your have already received the supporting documents on 10-1-2019.

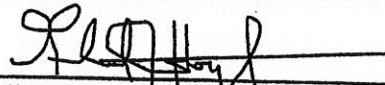
What remedy would you like to see to resolve this matter:

☐ Receive requested records ☐ Receive notice of meetings ☐ Void action

☒ Other: A proposed Remedy/Settlement Agreement provided.

Verification

By signing my name below, I declare under penalty of perjury that the foregoing is true and correct. I further certify that I have read and understand this complaint form.



Signature of Complainant (Required)

10-10-2019
Date

Michael J. Hoyt
Managing Partner



1315 Beech Ave, Fort Scott, KS 66701
(602) 405-5202
Law@trumpet.com

October 1, 2019

Ms. Lisa A. Mendoza
Assistant Attorney General
Director Open Government Enforcement Unit
Memorial Hall, 2nd Floor
120 SW 10th Avenue
Topeka, KS 66612-1594

Delivery by email and First Class Mail

Re: Complaint – City Commission for Fort Scott, KS v. Kevin “Skitch” Allen

Dear Ms. Mendoza:

As a point of order for this complaint, (separate from the complaint submitted by Mr. Allen) I will confine my notice to a single KOMA related matter violation and request as remedy or settlement the attached agreement.

The agendas' and minutes posted by the City of Fort Scott to date, make no mention of the matter where the City of Fort Scott Commissioners served notice to the County Elections Officer of their intent to “represent the citizens of Fort Scott” in an objection of Mr. Kevin Allen as a candidate for Fort Scott City Commission. A review of postings for “Special Meetings” was performed; again, no mention of this matter. Executive sessions were not considered since the subject matter does not meet the criteria for such a session.

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In your investigation, if you have additional questions please do not delay, contact me by phone at (602)-405-5202, and I will be happy to supplement my understanding of the matter.

Best regards,

Michael J. Hoyt

Enclosures

ddd/MJH

August 23, 2019

Ms. Kendell Mason
County Election Officer
210 S. National
Fort Scott KS 66701

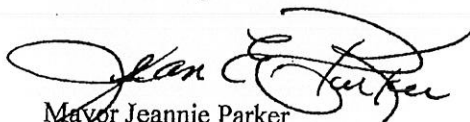
This letter serves as notice of our objection to the candidacy of Kevin Allen as a candidate for Fort Scott City Commission.

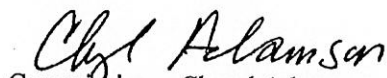
As it is our responsibility to represent the citizens of Ft Scott and based on concerns expressed to us by some citizens, it is our belief that Mr Allen resides outside of the City limits.

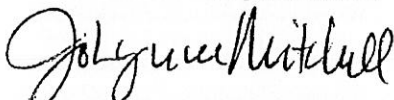
According to Ordinance No. 3289, passed January 4th, 2005, it specifies that each Commissioner shall be a qualified elector under the Constitution of the United States. Also, Resolution No. 9-2011 was passed on January 18th, 2011 which defines the term "qualified elector" stating that said person must reside within the corporate City limits. I have attached both the Ordinance and the Resolution.


Thank you,

Fort Scott City Commission


Mayor Jeannie Parker


Commissioner Cheryl Adamson


Commissioner Jolynne Mitchell


Commissioner Cindy Bartelsmeyer


Commissioner Randy Nichols



Ordinance No. 3289

AN ORDINANCE ESTABLISHING QUALIFICATIONS FOR MEMBERS OF THE FORT SCOTT CITY COMMISSION.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF FORT SCOTT, BOURBON COUNTY, KANSAS.

SECTION 1. City Commission.

The city commission of the City of Fort Scott, Kansas shall be composed of five (5) members elected from the city at large. ~~Each commissioner shall reside in the territorial limits of the City of Fort Scott, Kansas and shall be a qualified elector under the Constitution of the State of Kansas.~~

SECTION 2. This Ordinance shall be effective after its passage and publication in the official City newspaper.

THIS ORDINANCE IS PASSED AND APPROVED by the Governing Body of the City of Fort Scott, Kansas, this 4th day of January, 2005.

THE CITY OF FORT SCOTT, KANSAS

(SEAL)

BY: Garold R. Billinois
GAROLD R. BILLINOIS, MAYOR

ATTEST:

Diane K. Clay
DIANE K. CLAY, CITY CLERK



EMERGENCY REQUEST

I, Garold R. Billionis, Mayor of the City of Fort Scott, Kansas, deeming that a public emergency exists for the passage this date of the foregoing Ordinance No. 3289, do respectfully request that the same be passed at this time.

Dated and signed this 4th day of January, 2005.


GAROLD R. BILLIONIS, Mayor



Resolution No. 9-2011

A RESOLUTION OF THE GOVERNING BODY OF THE CITY OF FORT SCOTT AUTHORIZING AND DEFINING THE TERM "QUALIFIED ELECTOR" FOR THE PURPOSES OF HOLDING A CITY COMMISSION POSITION IN THE CITY OF FORT SCOTT, KANSAS.

WHEREAS, the City will define when a person must be a qualified elector and reside within the City limits as required for a person to hold the office of Commissioner in the City of Fort Scott, Kansas; and

WHEREAS, the Governing Body of the City of Fort Scott, Kansas hereby finds and determines it is necessary to provide a resolution that will be utilized by the County Election Officer for the purpose of establishing the residency qualification of a commissioner for the City of Fort Scott, Kansas;

NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF FORT SCOTT, KANSAS, SITTING IN REGULAR SESSION THIS 18th DAY OF JANUARY, 2011, AS FOLLOWS:

1. In order for a person to be eligible to hold the office of Commissioner in the City of Fort Scott, Kansas, said person must reside within the corporate city limits and thus be a qualified elector prior to assuming the office which is signified by taking the subscribed oath or affirmation administered by the City Clerk for the City of Fort Scott, Kansas.
2. Effective Date: This Resolution shall take effect and be in force from and after its adoption.



THIS RESOLUTION IS PASSED AND APPROVED BY THE GOVERNING
BODY OF THE CITY OF FORT SCOTT, KANSAS, this 18th day of January,
2011.

THE CITY OF FORT SCOTT, KANSAS

By: Richard D. Hedges
RICHARD D. HEDGES, Mayor

(SEAL)

ATTEST:

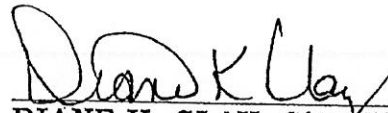
Diane K. Clay
Diane Clay
City Clerk



CERTIFICATE

I hereby certify that the foregoing is a true and correct copy of Resolution No. 9-2011 passed by the governing body of the City of Fort Scott, Kansas held on the date stated therein, and that the official minutes of such proceedings are on file in my office.

(SEAL)



DIANE K. CLAY, City Clerk



Hearing board says candidate lives in city

BY TAMMY HELM
Tribune Managing Editor

A Fort Scott City Commission candidate won a challenge Monday after his residency was called into question.

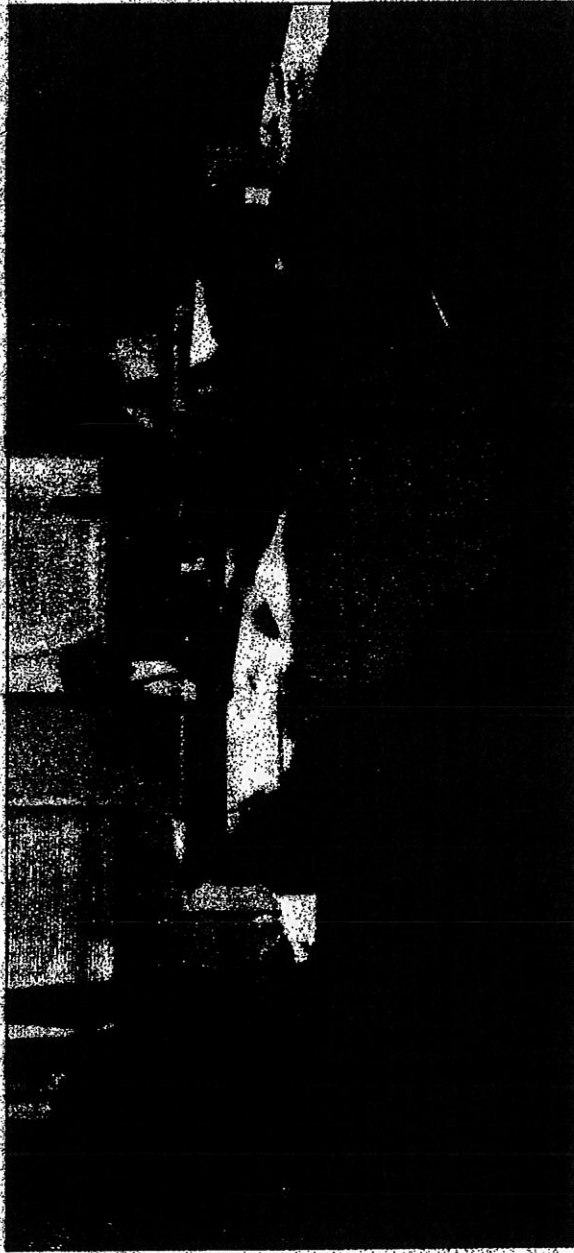
After 10 minutes behind closed doors, the candidate objection hearing board came back with a unanimous decision that Kevin "Skitch" Allen's residence is in the Fort Scott city limits.

Current city commissioners submitted a letter of protest to Bourbon County Clerk Kendell Mason Friday, the deadline for filing a protest of any candidate for the general election.

The protest letter reads: "As it is our responsibility to represent the citizens of Fort Scott and based on concerns expressed to us by some citizens, it is our belief that Mr. (sic) Allen resides outside of the City limits."

According to Ordinance No. 3289, passed January 4th, 2005, it specifies that each Commissioner shall be a qualified elector under the Constitution of the United States. Also, Resolution No. 9-2011 was passed on January 18th, 2011 which defines the term "qualified elector" stating that said person must reside within the corporate City limits. I have attached both the Ordinance and the Resolution."

The letter is signed by



Tammy Helm/Tribune photo

Bourbon County Attorney Jacque Spradling, center, talks to Fort Scott city commission candidate Kevin "Skitch" Allen during a hearing to determine if Allen is a resident of Fort Scott. Spradling served as the chairman of the hearing board, along with Bourbon County Commission Chairman Lynne Oharah, left, and Bourbon County Clerk Kendell Mason, right. Clerking during the hearing was Deb Shoenberger, human resources officer in the clerk's office.

Mayor Jeannie Parker and commissioners Cheryl Adamson, Jolynne Mitchell, Cindy Bartelsmeyer, and Dr. Randy Nichols.

Allen was one of 14 candidates vying for three seats on the commission. The primary election narrowed the candidates down to six for the Nov. 6 election.

Parker, Adamson and Bartelsmeyer were incumbents in the primary election. Only Bartelsmeyer will continue to the general election after she received 330 votes, the most in the primary election.

Adamson tied with challenger Josh Jones with 220

votes for the sixth spot on the general election ballot. Adamson lost the tiebreaker held Thursday by the board of canvassers.

Parker lost her commission seat during the primary with 205 votes. During the protest hearing held Monday, Allen faced a hearing board made up of Bourbon County Commission Chairman Lynne Oharah, Mason, and Bourbon County Attorney Jacque Spradling.

As the proceedings got underway, Spradling, who was elected chairman, said each side was given five minutes to speak, with an

option for a one-minute rebuttal. The hearing board also had an opportunity to ask questions. After that, the hearing board could provide a written decision within seven days, or after a discussion, come back with a verbal decision that day.

City commissioners attending the hearing were Adamson, Mitchell, Parker and Nichols. Bartelsmeyer attended via teleconference.

"This issue today is whether or not there is a requirement to live within the city to be a city commissioner and if so, whether or not the candidate meets that requirement," Spradling

said. City Attorney Burton Harding said the city wrote the letter on behalf of citizens expressed to it by citizens. He said he represented the commissioners.

He cited Resolution No. 9-2011, dated Jan. 18, 2011, which states "In order for a person to be eligible to hold the office of Commissioner in the City of Fort Scott, Kansas, said person must reside within the corporate city limits and thus be a qualified elector prior to assuming the office..."

**SEE CANDIDATE
RESIDENCY
ON PAGE 12A**

Candidate residency

Continued from Page 1A

He also cited city ordinance No. 3289, dated Jan. 4, 2005, which states "Each commissioner shall reside in the territorial limits of the City of Fort Scott, Kansas and shall be a qualified elector under the constitution of the State of Kansas."

"I think the issue isn't so much whether we've got a commissioner needs to live in Fort Scott, but whether someone running for commissioner needs to live in Fort Scott," Harding said.

Spradling asked Harding what his position is in regards to whether a non-city resident who files for the city commission election if that person moves within the city prior to taking oath.

"I think it is the intention of the drafters of this resolution (9-2011) that in order to be on the ballot (a candidate must) live in Fort Scott," Harding said. "I understand your question. In fact, that is something I had rattling around in my head as I was preparing today. I think the language is not perfect, but I think the intention is clear, and that is, to eligible to hold office, the person must reside within the corporate city limits to be on the ballot."

Spradling also asked Allen what his position is in regards to a candidate being required to live within the city limits.

Allen said until April

9, he lived just outside the city limits on Brown Street. From there, he moved to 324 E. 20th Street, which serves as his shop, but where he also has living quarters.

"My cabin is at the lake, which I know is why everybody is all worked up today," Allen said.

He said he spends time at the lake.

He said his intention is to complete renovation of a house on Judson Street. He said he has no plans to return to his Brown Street residence because his business does not allow him the time to take care of the property.

"I want to concentrate on my business," Allen said. "I'd like to help the city of Fort Scott by possibly being one of their neighbors."

He said he would "hang out" at the lake until after Labor Day. He said he will be moving into his Judson Street residence this winter, then go back to the lake in warmer weather.

"I'm in town 16 hours a day, sometimes at the minimum, at 324 E. 20th," Allen said. "Do I hang my hat there some days? Oh, yeah. I've got all the amenities I need."

He said he received the certificate of candidacy for the November election at 324 E. 20th on Friday.

"I am Fort Scott," Allen said. "I'm not from Fort Scott. I've been here my whole life - 49 years."

Spradling asked Allen if he had any exhibits he would like to share. Allen

showed each hearing board member photos of his 324 E. 20th living quarters which he has on his cell phone - mailbox, desk, kitchen area with refrigerator and microwave, restroom, closet, heater, office chair and couch. He later showed the photos to Harding.

When asked where he is registered to vote, Allen said he believes it is 324 E. 20th and Mason confirmed that. He said he receives some mail at the address, but bills for his business go to his Brown Street residence, where his ex-girlfriend and active secretary lives. He said he does not have a mailbox at the lake.

The hearing paused while Nichols asked to speak to Harding in the hallway. When the hearing resumed, Spradling said Mason provided her with city resolution 3469, dated Jan. 5, 2016, which outlines the terms and election of the city governing body. The resolution states "the (elected) officers shall reside within the Fort Scott city limits" and "Any resident of the City of Fort Scott, Kansas, desiring to be a candidate for the position of commissioner shall file with the county election officer..."

"Have you seen that resolution, sir?" Spradling asked Harding.

"I don't have a copy of that," he said.

When asked if he had seen a copy of that resolution, Allen said he believed Spradling.

Harding said the city

commission's intention is not personal towards Allen.

"They just want to make sure the rules are followed," Harding said. "That if he lives in the city, that's fine, but if he doesn't, he doesn't. This is not any sort of a personal thing against him."

He said commissioners are concerned Allen's residence does not meet city codes. Harding asked if there is a shower and Allen said there is.

"Apparently it's zoned in such a place you're licensed to have it residential. Do you have a license?" Harding said.

"Is that what we're here to discuss? Zonings?" Allen said.

"No, we're talking about whether you live in Fort Scott," Harding said.

"That's what I thought," Allen said.

Harding asked if Allen would clarify the amount of time he is at his 20th Street address and the lake.

Allen said sometimes he sleeps during the night and sometimes he sleeps during the day, depending on the jobs he has lined up. He said he spends weekends at the lake during the summer.

When the board had the opportunity to ask questions, Oharah asked what the definition is of a legal residence. Spradling said a primary residence is determined by case law as where mail is delivered, where utilities are located and where an individual sleeps most of the time.

Mason asked where Allen sleeps more often than not and he said it is at 324 E. 20th. He said he has not stayed at his Brown Street residence since April 9. He said he has slept at the cabin 10 or 20 percent of the time. The remaining 80 or 90 percent of the time he sleeps at his 20th Street address.

Harding asked what percentage of mail goes to his 20th Street address.

"I've never measured my mail percentage-wise," Allen said.

After the hearing board cast their vote, Spradling said the objectors could file an appeal with the district court.

When asked if the city would appeal the ruling, Harding said, "I imagine not, but that's up to them. I would have to talk to commissioners."

After the hearing, Allen said "The truth always prevails."

He learned Friday from Mason the objection had been filed and there would be a hearing Monday. He said he did not receive the official notice until Monday when he received his mail.

While the board was in the closed-door discussion, Harding told the Tribune he was unsure when the letter of objection was signed by commissioners. Parker, Nichols and Adamson said they each went to city hall to sign.

"As a commissioner, we'd been approached by

many citizens asking the question," Adamson said. "We had to act. It was not a personal attack of any time, it was just a clarification."

She said commissioners would have filed an objection prior to the primary election, but "the state advised us to wait until after the primary was over." She said commissioners did not know they had three days after candidates are certified to file an objection.

She said the League of Municipalities is considering changing the office where candidates file from the county clerk's office to the city clerk's office, which Adamson said it will eliminate confusion in the future.

"We had people at the lake asking, since he's at the lake, why can't they vote?" Adamson said.

She said she signed the letter of objection Friday and none of the commissioners were together when it was signed.

After the hearing, three attending commissioners spoke with Harding in the courthouse hallway. Allen and other candidates stood aside and took photos with their phones until Allen approached the city group. He said three of the five commissioners were present discussing city business, which meant they were in violation of the Kansas Open Meetings Act.

"You, as their attorney, should know better," Allen said to Harding.