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MEMORANDUM

To: Loyalton City Council
From: Steven C. Gross, City Attorney
Date: April 24, 2018
Subject: City Council

I have prepared this memorandum at the request of Mayor Marin in response to his question concerning the effect of Council member Rogers' resignation and the status of the City Council.

I. Background

At the April 17, 2018, City Council meeting Council member Rogers announced that she was resigning from the Council effective at the end of that meeting and handed a written note of resignation to the Deputy City Clerk. At the time of that meeting, there were only three City Council members holding office, Mayor Marin and Council members Markham and Rogers. Mayor Marin was elected. Council member Markham was appointed and Council member Rogers was elected. The resignation would leave two Council members holding office, one elected and one appointed.

On Monday April 23, 2018, Ms. Rogers handed the City Clerk a letter withdrawing (rescinding) her April 17, 2018, resignation from the Council. The letter states that she feels this is her right to withdraw her resignation and still serve on the City Council. In effect, she is asserting that she continues to hold the office of a Council member.

II. Law

The City of Loyalton is a general law city. The government of a general law city is vested in a city council of at least five members. (Govt C §36501) A majority of the council constitutes a quorum for the transaction of business. (Govt C §36810) Therefore, a quorum of at least three members, which is a majority of five members, must be present before the council has legal authority to act. Conversely, without the presence of a quorum, the council cannot transact business, except for adjourning a meeting or compelling attendance of absent members. (Govt C §36810)

A vacancy on the council is created by resignation upon the delivery of a letter of resignation to the city clerk. (Govt C §1770(c)(2)¹ and Govt C §1750(f)) An office may also be vacated by acts or words of the officeholder indicating intent to relinquish the office. This form of abandonment may be used to give effect to an otherwise technically imperfect resignation. Although a resignation can be withdrawn before it becomes effective, once effective, it may not be withdrawn. (*American Fed'n of Teachers v Board of Educ.* (1980) 107 CA3d 829, 840.)

Within 60 days of a vacancy on the council, the remaining council members must fill the vacancy either by appointment or by calling a special election. (Govt C §36512(b)) *However, an appointment shall not be made to fill a vacancy on the city council if the appointment would result in a majority of the members serving on the council having been appointed.* (Govt C §36512(d)(1)) If an appointment would result in a majority of council members having been appointed, the vacancy shall be filled by the council calling an election to be held on the next regularly established election date not less than 114 days after the call. (Govt C §36512(d)(2)) If an election is not called, the vacancy will be filled at the next regularly established election date. (Govt C §36512(d)(3))

III. Analysis

The City is in a troublesome situation. The two remaining Council members do not constitute a quorum for the transaction of business and therefore can't make an appointment or call a special election to fill the vacancy. If the City were to wait for the next regular election to fill the vacancy as provided for in Govt C §36512(d)(3), then the vacancy would not be filled until the November 2018, election. From now until through the November election and the time when a new council member has been qualified and takes office, the City council would not be able to act and the City's ability to provide essential services, such as water and wastewater services, would be jeopardized. The public health, safety and welfare of the City would be at-risk.

It appears as though this is an issue of first impression. I can find no case law or Attorney General opinion that has addressed the same facts. I've made inquiry to several city attorneys throughout the state. None have seen this situation or could point me to any applicable, controlling law.

A. Limited Authority for Two Council Members to Appoint a Third

There is some legal authority for the proposition that two council members constitute a quorum for the purposes of filling a vacancy. (*Nesbitt v Bolz* (1939) 13 Cal.2d 677.) In *Nesbitt*, two members of the five-member city council of the City Arcadia were recalled and before the remaining three council members could take action to appoint a third, one of them resigned

¹ Govt C § 1770 sets forth thirteen separate circumstances in which a public office becomes vacant, such as death, absence from jurisdiction, removal from office, conviction of a felony, mental incapacity, resignation, failure to perform official duties and electoral irregularities. For vacancies, see also Govt C §36502(a) (vacancy on non-residence) and §36512 (vacancy for absence.)

leaving only two. The two refused to meet and appoint a new council member on the ground that they did not constitute a quorum. The city clerk filed a lawsuit to have the court order the two remaining council members to appoint a third. The California Supreme Court determined that while certain actions, such as the enactment of ordinances, requires at least three council members, the filling of vacancies did not and that two constitutes a quorum for the purpose of filling the vacancy.

The *Nesbitt* case does not stand for the general proposition that the remaining members of the governing board are always authorized, regardless of their number or governing statutes, to fill vacancies on the governing body. (*Price v Tennant Cmty. Servs. Dist.* (1987) 194 Cal.App. 3d 491, 498.) In *Price*, the court considered *Nesbitt*, reviewed the law that governs community service districts and the manner for the board of such districts to exercise authority as prescribed by statute. The law provides that, “The board shall only act by ordinance, resolution, or motion.” (Govt C §61223) Further, “No ordinance, resolution, or motion shall be passed or become effective without the affirmative votes of at least a majority of the members of the board.” (Govt C §61225) The *Price* court made it clear that the fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature and to do so the court must first look to the words of the statute. The court then determined that the words of the statute were clear and that the one remaining board member on the Tennant Community Services District board did not have the power to fill vacancies. The power to fill the vacancies by appointment or to call for an election fell to the board of supervisors pursuant to Govt C §1780(b).²

If the Council were to meet and make an appointment under the authority of *Nesbitt*, the result would be that two of the three Council members would have been appointed and one elected. This would violate the prohibition set forth in Govt C §36512(d)(1) that an appointment shall not result in a majority of the members serving having been appointed. Therefore, under Govt C §36512(d)(1) and *Price*, the remaining two council members may not make an appointment to fill the vacancy.³

B. Rule of Necessity

A rule of necessity was developed at common law which allowed public officials to take actions they would otherwise be disqualified from taking by operation of conflict of interest rules if their disqualification would make it impossible for the public agency to fulfill one of its vital public duties. (*Finnegan v. Schrader* (2001) 91 Cal.App. 4th 572; *Kunec v. Brea Redevelopment*

² Govt C §1780(b) applies to special districts, but not to cities. The Sierra County Board of Supervisors does not have the authority to fill the vacancy on the Portola City Council or to call an election.

³ In a Memorandum to the Sierra County Board of Supervisors dated April 19, 2018, County Counsel cites *Nesbitt* for the proposition that the two remaining Council members can constitute a quorum for the purpose of appointing someone to fill the vacancy. However, the memorandum also cites Govt C §34902 (which is applicable to elected mayors, not council members in general) for the process for filling a vacancy. Govt C §34902 does not contain the same prohibition as set forth in Govt C §36512(d)(1) against appointing when the result is to have a majority serving having been appointed. Thus, it appears that County Counsel did not consider the effect of Govt C §36512(d)(1) or of Ms. Rogers’ possible withdrawal of her resignation, as such withdrawal had not been delivered to the City Clerk at the time.

Agency (1997) 55 Cal.App. 4th 511, 520) The common law rule of necessity has been applied by California courts and the California Attorney General in a number of situations involving conflicts of interest under Govt C §1090. A statutory version of the rule of necessity was enacted as part of the Political Reform Act of 1974 in Govt C §87101 to address conflicts of interest arising under that law.

The rule of necessity was applied by the California Supreme Court to determine that judges who were otherwise disqualified could act in order to avoid a failure of justice. (*Mosk v. Superior Court* (1979) 25 Cal. 3d 474.) Similarly, the rule of necessity has been applied by the United States Supreme Court to determine that although judges are not allowed to take part in a decision in which they have a personal interest, they can participate if the case cannot otherwise be heard. (*United States v. Will* (1980) 449 U.S. 200.)

In the present case, if the Council or a member of the public challenges the right of Ms. Rogers to hold office or the Council does not attempt to appoint a third council member, the City's ability to provide essential services and to perform vital public duties would be jeopardized. This could not have been the intent of the Legislature. This situation appears to justify application of a rule of necessity for a very limited purpose, similar to the way that the common law rule of necessity has been used in the past to ensure that vital public duties are performed and to ensure that the only body that has the legal authority to act could act. I have found no law that directly addresses operation of the rule of necessity to overcome the legal effect of a public official's resignation or to overcome the prohibition of making an appointment to fill a vacancy on a city council where the result is that a majority of those serving have been appointed rather than elected. However, I believe an argument can be made in good-faith to extend the law.

I believe that not challenging Ms. Rogers' withdrawal of her resignation and claim to hold the office to be slightly more defensible than having the two remaining council members appoint a third council member. I have arrived at this conclusion based on several factors. Ms. Rogers was elected to the office at the last election. Any person appointed to fill the position would, by definition, have been appointed. Having been elected, Ms. Rogers currently has a basis to claim that she is the rightful holder of that office. A person appointed would not have such a claim to the office.

Also, Ms. Rogers' withdrawal of her resignation and assertion of her right to hold the office indicates her willingness to continue to serve as council member and that she has not abandoned the position. Recognizing that the rule of necessity operates to permit the withdrawal requires that applicable case law regarding the effectiveness of resignations be overridden. However, using the rule of necessity to override the prohibition of having a majority of these serving having been elected would require use of the rule of necessity to override a clear statutory provision expressing the intent of the Legislature. The former seems preferable because it may be slightly more defensible.

Finally, in order to make an appointment at this time, Ms. Roger's assertion of her right to hold office may have to be challenged in court and it is possible that legal action would be

required to force the two remaining council members to appoint someone if they both do not agree to make an appointment. If no challenge to Ms. Rogers' right to hold office is made, then the person appointed to fill the office may have to make such a challenge. Making an appointment at this time, in the face of Ms. Rogers' claim to hold office, may make an already difficult situation extremely complex and that much more difficult. Judicial intervention may be required in order to obtain a resolution. The time for such process to be completed likely would not result in the City being able to function and provide critical services without disruption. Thus, such a course of action is likely less practical than the alternative.

I can envision arguments contrary to the position set forth above. For example, it may be argued that having the two remaining Council members appoint a third is the better, more secure course of action because appointment by two council members was upheld in *Nesbitt*. However, *Nesbitt* was decided in 1939. Subsection d.1 was added to Govt C §36512 in 1992. Therefore, there is no legal authority for the proposition that the prohibition of making an appointment where the result is a majority of those serving having been elected may be overridden by a rule of necessity or otherwise. Accordingly, this argument suffers from the same infirmity as the other position – there is no clear legal precedence for it.

I cannot predict whether a court would uphold a rule of necessity argument in this situation at all or whether it would only uphold its use for an appointment of a council member or for the withdrawal of the resignation. However, if anyone wants to challenge a person's right to hold office, whether due to an allegedly ineffective appointment, an allegedly ineffective rescission of a resignation, or otherwise, the likely course of action is to first obtain permission from the California Attorney General to file a court action seeking a court order to remove that person from office and then filing and prosecuting to conclusion such action.⁴ It is possible that by the time such action has been decided by a court that the November election will have come and gone.

IV. Conclusion

It is untenable to suggest that the City should have only two council members. While the City could likely continue to operate for a very short period of time, no decisions could be made or action taken by the Council outside of whatever authority there is for staff and individual Council members to act. Without a Council to make decisions, authorize warrants, pay employees and set policy, critical City services would likely be disrupted in the near future. The public health, safety and welfare would be at-risk. The Council is the only body for the City that can act and ensure that essential services are provided.

The Council needs a quorum to act. In order to achieve a quorum, a rule of necessity argument would need to be employed to either give effect to Ms. Rogers' withdrawal of her resignation allowing her to continue to hold her office or to override the legal prohibition of the two remaining Council members appointing someone to fill the vacancy, resulting in two of the

⁴ Quo Warranto is the special form of legal action used to determine whether a specific person has the legal right to hold public office that he or she occupies.

three Council members having been appointed. If both Council members did not agree to make an appointment, court action may be required to force them to do so.

I believe that the Council is essentially faced with having to choose between the lesser of two evils. It should determine and pursue the more defensible and practical of the two options if it wants to be able to continue to operate, provide essential services and protect the public health, safety and welfare. Neither choice is perfect or without risk.

For the reasons set forth above, I recommend that the Council recognize that under a rule of necessity argument Ms. Rogers has effectively withdrawn her resignation and continues to hold the office of a City Council member and not challenge the withdrawal of her resignation or right to hold office.