September 14, 2001

Dear City Recorder:

You have the following question: Was the recent appointment of a gentleman to the office of alderman legal?

In my opinion, and under the facts related to me, the answer is probably yes. Up to the point of the completion of my first draft of this opinion, I thought the answer was no. But my additional research into the case law regarding what powers accrue to mayors pro tempore upon the absence of the mayor, and what the term "absence" of the mayor means with respect to *regular meetings* changed my mind.

I am not going to repeat all the facts related to me, because the essential ones are these: Under Sections 3 and 5 of your City Charter, there is a board of mayor and aldermen consisting of a mayor and four aldermen. Under Section 3, that board "...shall constitute the Town Council and [be] known as the "Board of Mayor and Aldermen," a majority of whom shall constitute a quorum for the transaction of business." The gentleman was appointed at a regular meeting at which the mayor was absent, and only two aldermen were present, both of whom voted aye on the appointment. Obviously the two members that met and voted aye on the appointment constituted less than a majority of the board. For that reason, there are two fundamental questions:

1. Was there a quorum at the meeting at which the appointment of the gentleman occurred?

The answer is yes.

2. Is an aye vote of only two aldermen sufficient to appoint the gentleman?

The answer is yes.

Analysis of Question 1

The allegation that there was a quorum stems from the fact that due to the absence of the mayor at that meeting, the recorder in her capacity as mayor pro tempore under Section 7 of the charter was for the purposes of that meeting the third member of the board of mayor and aldermen. If that is true, there was a quorum. The city charter is silent on the question of how many members of the board constitute a quorum. In such a case the common law prevails. Under the common law, a quorum is a majority of the board. [Collins v. Janey, 147 Tenn. 478 (1922)]. Whether a majority of the board means a majority of the whole authorized number of the board or a majority of the board after taking vacancies into account, the number in both cases in the case of the City board is three. If the recorder in the capacity of mayor pro tempore is counted towards a quorum, there was a quorum at the meeting at which the gentleman was appointed.

The difficulty in addressing this question arises from the tension between Sections 3 and 7 of the charter:

- Section 3 provides that a mayor and four aldermen shall constitute the board of mayor and aldermen "a majority of whom shall constitute a quorum for the transaction of business."

- Section 7 provides that, "In the case of absence, sickness, or other disability of the Mayor, the Recorder shall be, for the time being, Mayor pro tempore, with all the powers and duties as given to the mayor."

There are no cases in Tennessee dealing with the powers and duties of the mayor pro tempore in the absence of the mayor. A fairly significant number of such cases have arisen in other states, but unfortunately, all of them involve mayors' pro tempore who are members of the city council; I can find none where the mayor pro tempore is a recorder or any other non-elected official. But there are two related reasons why I think the City recorder in her capacity as mayor pro tempore is counted in the calculation of a quorum in the absence of a mayor at a regular meeting:

First, Section 7 actually says two things: (1) Where the mayor is absent, "the Recorder shall be, for the time being, Mayor pro tempore..."; (2) Where the mayor is absent, the recorder is vested with "all the powers and duties as given to the mayor." Taking those two things out of order, it can be argued that the mayor pro tempore is not counted towards the existence of a quorum under (2), because that is not a "power" or a "duty" of the mayor. Under Section 6, the mayor is a member of the city council, but under Sections 6 and 7, his *legislative* powers are confined to the power to veto ordinances, to preside at city council meetings, to vote in cases of a tie, and to call special meetings. The argument would go that none of those powers has anything to do with counting the mayor for the purposes of a quorum, that a quorum of the board is achieved simply by any combination of three of the mayor and aldermen showing up at a meeting. Indeed, while the mayor may have a general duty to attend meetings of the board, he has no duty to attend any specific meeting. In fact, it has been repeatedly held that the failure or refusal of a member of a local governing body to attend meetings is by itself not grounds to declare the office abandoned. [McQuillin, Municipal Corporations, ' 12.123; People v. Bradford, 18 N.E. 732 (Ill. 1915); Reid v. Smith, 244 N.W. 353 (S.D. 1932).]

But that argument appears to be a weak one. Under Sections 3, 6 and 7, it seems clear that the mayor does have the "power" if not more than a general duty, to attend meetings, and his attendance at meetings counts toward a quorum. His ability to count towards a quorum by attending meetings (or to not count towards a quorum by not attending a meeting) is a legislative attribute of the mayor, and seems itself a sort of legislative function or "power."

It also appears that the mayor pro tempore counts towards a quorum under (1). Under (1) the recorder *becomes* during the absence of the mayor, the temporary mayor. I pointed out above that under Section 3, the mayor counts towards a quorum, and that under Section 7, the mayor has certain legislative powers, among them the power to preside at all meetings of the city council, to vote on all questions in the case of a tie vote, and the power to call special meetings.

The heavy weight of the case law is that all of both the legislative and administrative powers of the mayor devolve upon the mayor pro tempore in the absence of the mayor, unless a charter or statute provides. In the recent Georgia case of League of Women Voters of Atlanta-Fulton County v. City of Atlanta, 264 S.E.2d 859 (1980), it is said that:

> As a general matter, we tend to agree that the president pro tempore of the city council, while acting on behalf of the council president, exercises all of the powers and duties of the president, at least in the absence of legal restrictions. Cf. Thompson v. Lang, 220 Ga. 812, 141 S.E.2d 907 (1965). See generally 2A Antieau, Municipal Corporation Law, ' 2206 (1979); 3 McQuillin, Municipal Corporations, ' 12.42 (3rd Ed. 1973). [At 862]

In that case the Court held in that case that the president pro tempore of the council did not have the power to make certain committee appointments during the absence of the mayor, but only because under the applicable statute governing such appointments, the council president did not have that power. It is similarly said in City of Tucson v. Arizona Mortuary, 272 P. 923 (1928), that:

> The general rule of law unquestionably is that a mayor pro tempore, made such by the charter, has all the powers of the mayor himself during the period in which he may act, unless some special exceptions appear in the charter. [At 930]

In that case, the Court upheld the action of the mayor pro tempore in approving an ordinance in the absence of the mayor because the mayor had the power to approve the ordinance. That case is particularly instructive in that the *mayor pro tempore approved the ordinance at a regular meeting at which the mayor was absent*. We will shortly have more to say about the powers of a mayor pro tempore in the absence of the mayor at regular meetings.

Nagel v. Martin, 200 N.W. 946 (1924), a Michigan case, says that:

> We are asked by plaintiff to limit the powers of the acting mayor to a carrying out of the policies of the mayor, as it is claimed that such a holding will prevent confusion, disruption, and disorganization. The charter places no such limitation upon the powers of the acting mayor. The charter speaks in plain language, and vests the acting mayor with all the powers of the mayor... [At 946]

In that case the mayor pro tempore made an appointment during a protracted absence of the mayor.

The mayor pro tempore called a special meeting at which certain appointments were made in State v. Brown, 274 S.W. 965 (1925). In upholding the legality of the meetings and

appointments, the Court said:

> Considering, first, the point that Graves was without authority to call a special meeting of the council to make these appointments, under the agreed statement of facts it is admitted that Graves was chosen by his fellow members of the council as president pro tem. of that body, and as such he was acting mayor while the regularly elected mayor was absent from the city. His authority to act is derived from the provisions of section 8221 'R.S. 1919...providing
>
> "In the case of the temporary absence or disability of the mayor or disability to perform the duties of his office, the president pro tem. of the council shall perform the duties of mayor until the mayor shall return or such disability be removed."
>
> Section 494, Revised Ordinances of the City of Columbia, also provides that:
>
> "He may, on extraordinary occasions, convene the city council, stating to them, when assembled, the object for which they are convened."
>
> It is evident from a reading of the statute and the ordinance that no limitations as to the duties of the mayor are set forth which the president of the council may not perform in such absence or disability. The right to call an extra session is given the president pro tem. under the ordinance. Whether or not there existed an extraordinary occasion for calling an extra session of the council will not be inquired into by this court... [At 967]

In all of those cases the statute or charter provision governing the powers of the mayor pro tempore in the absence of the mayor were almost identical to the one at issue in Section 7 of the City Charter; they contained no limiting power with respect to either legislative or administrative powers. Immediately below we will see that State v. Brown is an exception to the heavy weight of authority that the courts *will* inquire into the question of whether an extraordinary event required the mayor pro tempore to act, but the principal of all those cases, State v. Brown included, is: unless a statute or charter provides otherwise, a mayor pro tempore has all of the legislative and administrative powers of the mayor during the mayor's absence.

Second, the mayor was probably "absent" within the meaning of Section 7 of the city charter when he missed the meeting at which the gentleman was appointed.

There are no cases in Tennessee that address the question of what the terms "absent" or "absence" mean within the context of a charter provision identical or similar to the one in Section

7. However, that question involving such charter or statutory provisions has arisen in several other states, including Kentucky. I point below to only the most prominent of all of them because all support the proposition that where the charter or statute does not define those terms, they are not interpreted literally, but are construed in light of circumstances, the most important of which is whether the absence prohibits the mayor from performing the act in question. Nagel v. Martin, cited above, also says the same thing. All of the cases involve instances in which the mayor pro tempore himself took some action in the absence of the mayor, often in a conspiracy with other members of the city's governing body. But the terms are interpreted literally where the meeting in question is a regular meeting.

The Kentucky case, Watkins v. Mooney, 71 S.W. 623 (1903), involves the appointment of a city official by the board of mayor and aldermen while the mayor of the City of Lexington was on business in Frankfort, a distance of about 25 miles, from one afternoon until the next afternoon. During his absence the president of the board of aldermen, acting as mayor pro tempore, called a meeting of the board, during which the board filled a vacancy on the board of police and fire commissioners. The Court overturned the appointment, looking at earlier cases, and reasoning that:

> Many words in common use in our language have two or more meanings. It is not infrequent that a word having one meaning in its ordinary employment has a materially different or modified meaning in its legal use. This word "absence" is a fair example...In some states their statutes provides [sic] that the chairman of the board of aldermen or other officer holding the position of vice mayor shall act in case of the absence of the mayor from the city....We think that the soundest reasoning, under the authorities cited and examined, gives the word "absence" the meaning of that absence which would make it impossible for the official to perform the act in question. [At 623]

The term absence must be "construed reasonably," and the right of the mayor pro tempore to act hinges upon the "effective" absence of the mayor, declares State ex rel. Olson v. Lahiff, 131 N.W. 824 (1911). Whether there is an effective absence depends upon the circumstances. It is a very short period when there is a riot or other emergency, but longer when the mayor is able to perform the power or duty in question. In that case the mayor had the power to appoint certain officers, and the mayor pro tempore made the appointments during the mayor's absence. Said the Court:

> Can it be possible that it was intended that, if the mayor is called from the city for a few hours during this period, the president of the council can step in during his absence and make an appointment, or veto an ordinance while the mayor's time for consideration thereof is still unexpired and perhaps only just begun? Few would contend, we think, that the statute was intended by the Legislature to

> accomplish such results, nor do we think that its wording compels such results. It seems to us that it may properly and logically be said in such a case that with reference to the particular duty in question there has been no absence from the city on the part of the mayor; i.e. no absence which renders him unable to perform that particular duty. [At 825]

Citing both Mooney and Lahiff and other cases for support, Gelinas v. Fugere, 180 A.346 (1935), held that the mayor pro tempore could not call a special meeting during a short absence of the mayor, at which the board of mayor and aldermen appointed a certain person to a city office. The acting mayor argued that Mooney and Lahiff did not apply, claiming that:

> ...the facts in the above cases make them distinguishable from the instant case, and render the language used by these courts inapplicable. In these cases it appeared that the acting mayor, in the absence of the mayor, took some positive action, such as the appointment or removal of an official, or performed a duty with a fixed period of time during which the mayor was authorized to act but had not yet done so. In the case before us, the acting mayor called a special meeting of the board of aldermen so that a commissioner of public works could be elected. After the meeting had been convened, all the aldermen attending, including the acting mayor, used their right to vote for a candidate for that office. [At 351]

That was a distinction without a difference, declared the Rhode Island Supreme Court. It reasoned that:

> The exercise of the power to call the meeting together was the important factor. Without a meeting no commissioner of public works could have been elected. The difference between the act performed by the acting mayor in the present cases and those performed in the cases cited is one of degree. The same underlying principles apply in each instance and the cases are in point on the question now before us....The acting mayor should undertake the exercise of the powers and duties of the mayor in good faith only and for the welfare of the municipality and its inhabitants, and not with any factional or partisan advantage in view. He should not seize an opportunity to exercise these powers regardless of existing conditions and without justifiable cause. In discussing the absence of the Governor of Louisiana from that state, the court in State ex rel. Warmoth, 26 La. Ann, 568, 21 Am. Rep. 551, said: "We do not think it was ever contemplated that the movements of the Governor should be watched, with the view that the Lieutenant Governor or

> Speaker of the House of Representatives should slip into his seat the moment he stepped across the borders of the State." [At 351]

But in your City's case, appointments to the board were within the power of the council rather than within the power of the mayor, and the recorder in her capacity of mayor pro tempore took no actions that were within the power of the mayor and that the mayor could have performed during his absence at the meeting in question. Her mere *presence* at the meeting is what counted towards a quorum, a function that is within the attributes of the mayor under Section 3, and obviously some*thing that he could not do in his absence*. Her *conduct* was limited to presiding at the meetings, a function that is within the powers of the mayor under Section 7, *and that he could not in his absence perform.*

That brings us to the rule that apparently applies in cases where the mayor is absent from a *regular meeting*. Watkins says that:

> Where the mayor is to preside personally at a meeting of the board of which he is ex officio a member, *absence in that case would probably mean an absence from the place of the meeting*. But for the matter of making an appointment, signing a contract which he was permitted by law to sign for the city, or to issue a proclamation, or to issue a notice citing an official to appear for a violation of the statute, which he was authorized to try, the mayor might perform any of these action, though beyond the corporate limits of the city. [At 624]

Gelinas says:

> Furthermore, if the mayor is absent when regular meetings of the board are to be held, the provisions authorizing the president of said board *to preside and perform the duties of the mayor* are unaffected by this decision. Such express authority granted to thepresident of the board to so act does not depend for its proper exercise upon any theory of emergency or necessity, as herein set forth. [At 352]

Those cases distinguish between the acts the mayor pro tempore cannot do absent some emergency or other special circumstance, and the acts of the mayor pro tempore can do with respect to a regular meeting where a statute or charter provision gives him that power and duty. Watkins spoke of the regular meetings at which the mayor is an ex officio member of the board. Arguably, the City mayor is not an ex officio member of the board because his presence counts towards a quorum, and he can vote in the case of a tie. But in Reeder v. Trotter; 142 Tenn. 37, it is said that:

> The question of whether the mayor of a city shall be regarded as a member of the council is one of legislative intent. It is within the power of the legislature to confer upon him the functions of a

> member of the council in every respect, and if the legislation on the subject calls for that construction he will be so regarded. But in American jurisprudence the mayor is not necessarily a constituent part of the legislative power of the municipality. His functions are intended to be, and usually are, of an executive or administrative character, and whatever power he may at any time exercise in the legislative functions of a municipal government is never to be implied, but must find its authority in some positive statute. *In this view, in the absence of a statute necessarily implying that he has the same standing in the council, as any other member, and particularly when his powers are expressly stated to be to preside at meetings and to give a casting vote in case of a tie, he is only a member of the council, sub moto, and to the extent of the powers specially committed to him*. [At 42] [Emphasis is mine.]

Under Sections 3 and 7 of the Tracy City Charter, the mayor, with respect to his legislative powers, counts toward a quorum, has the right to vote in case of a tie, has the right to preside at meetings, has the right to veto ordinances, and the right to call special meetings. If he is not an ex officio member of the council, he is a member of the council only for limited purposes. The difference between being an ex officio member of the council and a member of the council for those limited purposes does not appear to me significant for the purposes of <u>Gelinas</u>.

The City recorder merely showed up at a regular meeting. But under Sections 3 and 7, and <u>Watkins</u> and <u>Gelinas</u>, it appears that in the absence of the mayor at a regular meeting, the recorder becomes the mayor pro tempore for all legislative purposes, and in that capacity contributed her presence toward the making of a quorum because the presence of the mayor contributes toward the making of a quorum. With respect to her function as presiding officer, that power and duty devolved on the mayor pro tempore under Section 7 because the mayor had that power under Section 7.

That conclusion also leads to another important one pertaining to regular meetings: If the City recorder in her capacity of mayor pro tempore has the duties and powers of the mayor, there is no sound reason that she cannot vote in cases of a tie where the mayor is absent from a meeting. That conclusion initially bothered me because it did not seem to me the intention of the General Assembly that a non-elected recorder in her capacity of mayor pro tempore be able to vote. But as Reeder v. Trotter, cited above, illustrates, the General Assembly can make a mayor an ex officio member of the city council with or without a right to vote, or it can make him a member of the city council for limited purposes, including the right to vote only in case of a tie. There is probably no reason the General Assembly cannot give the mayor pro tempore, whether elected or non-elected, the right to exercise all, or a limited range, of the powers of the mayor in the latter's absence. It can do so through a statute or charter provision that gives the mayor pro tempore the powers and duties of the mayor, without limitation. That is the manner in which the City Mayor's pro tempore's powers are derived.

A Kentucky case of Shugars v. Hamilton, 92 S.W. 564 (1906), at first glance suggests a mayor pro tempore cannot in the mayor's absence exercise the mayor's vote. There the Court actually addressed the question of whether a city council member selected as mayor pro tempore counted towards a quorum, and incidentally touched on his right to vote:

> At a regular meeting of the council assembled at the place designated four members of the council, being a majority of the whole board, constitute a quorum for the transaction of business, although the mayor may not be present. Under the statute (section 3634) it is the duty of the mayor to preside at the meetings of the council, and he may only vote in case of a tie. In his absence, a member of the council may be chosen as mayor pro tem.; but this does not deny him the right to vote as a member of the council. Of course, he cannot also vote as mayor. The mere fact that he is discharging temporarily the duties of the office of mayor does not interfere with the performance of his duties as councilman, and he may be counted as a councilman for the purposes of a quorum, to constitute which the presence of four members of the council is necessary. [At 565-66]

But, at second glance, under the Kentucky statute governing the mayor pro tempore in Shugars, the mayor was not a member of the city council, and for that reason was not counted toward a quorum. In essence, the Court said that even though he had been selected mayor pro tempore, the council member in his capacity of council member was still counted towards a quorum, and voted in his capacity of council member. The Court simply meant that the council member could not vote twice: "Of course, he cannot also vote as mayor." [At 565]

The City recorder by virtue of Section 7 of the city charter is automatically selected mayor pro tempore, but Shugars implies that she should be counted toward a quorum because under Section 3 of the City Charter the mayor would count toward a quorum. There is no question of the City mayor pro tempore voting twice. Had the vote for the gentleman been tied, the mayor pro

tempore could have broken the tie because the mayor could have broken the tie. .

A cautionary note is pertinent here: Watkins, Lahiff, and Gelinas, and many other cases, indicate that the courts will keep their eyes open for situations where the mayor pro tempore and other city officials conspire to do an end run around the mayor. Under the right circumstances, where that has happened with respect to a regular meeting, it is conceivable that the courts might set aside the product of that kind of activity.

Analysis of Question 2

Where no statute or charter provision declares how many votes of a local governing body are required to pass measures, the common law prevails. Under the common law, the number of votes required to pass measures is a majority of those present and voting, and abstentions are considered no vote at all. [Collins v. Janey, 147 Tenn. 477 (1922); State v. Torrence, 310 S.W.2d 425 (1958).] At the meeting at which the gentleman was appointed, two members of the board and the mayor pro tempore were present, creating a quorum. Two of the three members present voted, and both voted aye. For that reason, a majority of those present and voting voted for the gentleman. For that reason, the appointment was valid.

Incidentally, while it is legal to have the city recorder--a non-elected official--be the mayor pro tempore, I wonder if it is wise. I cannot imagine that arrangement is even comfortable for the city recorder. Perhaps some consideration should be given to changing the charter to provide for a vice-mayor from among the members of the board and who serves as mayor pro tempore in the absence of the mayor. A vice-mayor would count towards a quorum in his position as a council member, and vote in the same position.

Sincerely,

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