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Confidential Memorandum
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To Tim Swadley, Mayor
Common Council

From Matthew P. Dregne and Rachel E. Snyder

Date September 14, 2020

Re Timeline for Filling a Vacancy by Special Election

In response to the resignation of a city alderperson, effective September 1, 2020, we provided you with a memorandum that outlines the options and procedure for filling the vacancy.[1] You have now asked whether the Common Council may appoint someone to fill the vacancy in October, 2020, until a special election is held and then formally order the special election in November, 2020, to be held concurrently with the spring election in April, 2021.

Briefly, although state law is not absolutely clear on this point, it is our opinion that the Common Council may act to fill the vacancy by appointment in October and then, in November, order a special election to fill the same seat as long as the motion adopted in October to fill the vacancy by appointment expressly states that the person appointed is to serve only until a special election is held.

DISCUSSION

Under state law, the Common Council may fill a vacancy in the office of alderperson: (1) by appointment for the remainder of the unexpired term; or (2) by appointment until a special election is held, as ordered by the Common Council. Wis. Stat. § 17.23(1). State law does not expressly require that the Common Council order the special election at the same time that it appoints someone to fill a vacancy. Therefore, it appears that the Common Council may call a special election at any time, in compliance with the

[1] See the legal memorandum issued to you on September 6, 2020, titled "Filling a Vacancy in the Office of Alderperson."

timing requirements under Wis. Stat. § 8.50. In other words, the Common Council may wait until November to formally order the special election so that the special election may be held concurrently with the spring election in April.

However, we advise that the Common Council's motion to approve the appointment expressly state that the person appointed will serve only until a special election is held. State law provides that a person who is elected or appointed to fill an elective office, generally, "shall hold office for the residue of the unexpired term unless removed or recalled in accordance with law…." Wis. Stat. § 17.28. This default provision would control if the Common Council's motion to appoint someone to fill the vacancy does not specify whether the appointee is to serve for the remainder of the unexpired term or only until a special election is held.

Moreover, if the Common Council were not required to decide at the time of making an appointment whether the appointee is to serve either for the residue of the unexpired term or until a special election is held, then the Common Council could effectively call a recall election at any time to remove the appointee. This would conflict with state law, which specifies that a person who is elected or appointed to fill an elective office be "removed or recalled in accordance with law." State law provides that a city elected official may be removed by the Common Council for cause or may be recalled pursuant to Wis. Stat. § 9.10. Therefore, it is our conclusion that the Common Council must decide, and expressly state, whether the appointee is to serve for the residue of the unexpired term or only until a special election is held at the time the appointment is made.

We also caution the Common Council against filling the vacancy subject to a nonbinding plan to order a special election at a later date, as proposed, unless it is clear that the Common Council will in fact order a special election. If an appointee is approved to serve until a special election is held and a subsequent vote of the Common Council to order a special election fails, the validity of the appointment itself may be called into question. However, if the Common Council decides to fill the vacancy by appointment in October and then act in November to order a special election to be held concurrently with the spring election in April, we recommend that the Common Council use the following language in its motion to approve an appointee:

> *Pursuant to Wis. Stat. §17.23(1), the Common Council of the City of Stoughton hereby appoints (insert name) to fill the vacant position of alderperson for District 1. (Insert name) shall serve as an alderperson for District 1 until a special election, to be ordered by the Common Council under Wis. Stat. § 8.50, is held and a successor is elected and qualified.*