

THE RESOLUTION EXPERTS®

JUDGE ANN KOUGH (Ret.)
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TO: Roderick J. Wood
City Manager, City of Indian Wells

RE: Opinion on the Mayoral Rotation Ordinance
JAMS Ref: 1220045372

DATE: November 26, 2012

I have been asked by the City for an opinion on the appropriate interpretation and application of the Mayoral Rotation Ordinance (“the Ordinance”) adopted by the voters of the City in the November municipal election. In connection therewith I was provided the following: Mr. Wood’s letters of November 16, 2012 and November 19, 2012 setting forth the assignment and giving certain background information; a copy of the Ordinance; the City Attorney’s Impartial Analysis of Measure “Q”; the Staff Report and all attachments concerning a Ballot Measure pertaining to Annual Rotation of Mayor and Mayor Pro Tempore presented at the June 21, 2012 City Council meeting; the Staff Report and all attachments concerning a Proposed Ordinance Pertaining to Annual Rotation of Mayor and Mayor Pro Tempore presented at the February 16, 2012 City Council meeting; the Staff Report and all attachments concerning Council Consideration of Adopting a Resolution to Amend the Policy Manual to Establish a Rotation System of Mayor, or Other Options presented at the November 17, 2011 City Council meeting; and access to video of the City Council meetings of November 17, 2011, February 16, 2012 and June 21, 2012. I was asked to respond specifically to six questions posed by the City regarding application of the Ordinance to various factual scenarios.

As a preliminary matter, I was asked to research and consider whether in rendering my opinion I could consider anything other than the Ordinance itself and the City Attorney’s Impartial Analysis, given that the Ordinance, while placed on the ballot as an initiative of the City Council, was adopted by the voters rather than the Council. Statutory interpretation requires a three-step process: first, courts should examine the actual language of the statute, giving the words their ordinary, everyday meaning, and if the meaning is without ambiguity, doubt or uncertainty, then the language controls and there is nothing to interpret or construe; if the meaning of the words is not clear, courts must take a second step and refer to the legislative

history of the statute; and third, courts must then apply reason, practicality and common sense to the language of the statute if the first two steps have not revealed a clear meaning. *See Maricela C. v. Superior Court* (1998) 66 Cal. App. 4th 1138. This rule applies to ordinances as well as statutes. *See Chaffee v. San Francisco Public Library Com.* (2005) 134 Cal. App. 4th 109. Just as with legislatively enacted statutes, courts first look to the words of a voter-adopted enactment, since the words used are generally the most reliable indicator of the intent of the electorate. *See People v. Spark* (2004) 121 Cal. App. 4th 259. Voters are presumed to have adopted and incorporated accepted judicial constructions when they use the construed terms in enactments adopted by initiative. *See Wilson v. John Crane, Inc.* (2000) 81 Cal. App. 4th 847. In ascertaining the voters' intent, courts must look to the language of the initiative and accord words their usual, ordinary and common sense meaning based upon the language used and the evident purpose for which the statute or ordinance was adopted; generally courts will interpret measures adopted by vote of the people in such manner to give effect to the intent of the voters adopting it. *See People v. Davis* (1996) 42 Cal. App. 4th 806; *accord, Burger v. Employees' Retirement System* ((1951) 101 Cal. App. 2d 847. When the language used in a voter initiative is ambiguous, courts refer to other indicia of the voters' intent, particularly the analysis and arguments contained in the official voter pamphlet. *See People v. Rizo* (2000) 22 Cal. 4th 681.

The court's overriding purpose in construing a statute or ordinance is to ascertain the intent of its enactors and to give the statute or ordinance a reasonable construction conforming to that intent. *Massey v. Workers' Comp. Appeals Bd.* (1993) 5 Cal. 4th 674, 681; *accord, Home Depot v. Contractors' State License Bd.* (1996) 41 Cal. App. 4th 1592; *MacIsaac v. Waste Management Collection and Recycling* (2005) 134 Cal. App. 4th 1076. Statutes must be given a fair and reasonable interpretation, with due regard to the language used and the purpose sought to be accomplished. *Cedars of Lebanon Hosp. v. County of L.A.* (1950) 35 Cal. 2d 729, 734-735; *Home Depot, supra*. The "plain meaning" ruling of statutory construction does not prevent courts from determining whether the literal meaning of a statute comports with its purpose. *California School Employees Assn. v. Governing Board* (1994) 8 Cal. 4th 333, 340; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal. App. 4th 47, 54. Thus, although the words of the measure are the most useful guide in determining intent, the language should not be viewed in isolation, but rather in context, keeping in mind the statutory purpose. *Delaney v. Superior Court* (1990) 50 Cal. 3d 785, 798; *MacIsaac, supra*.

Based upon the above-cited case law, I find that I may consider all of the information provided in order to determine the purpose of the Ordinance and if, but only if, I find the language of the Ordinance to be ambiguous, to determine the meaning of the Ordinance. *See Kaufman & Broad Communities v. Performance Plastering* (2005) 133 Cal. App. 4th 26.

In performing my analysis, I have assumed the following given facts: Council Members-Elect Mertens and Peabody were elected to the Council in the November 6, 2012 municipal election; Council Member Hanson was re-elected in the same election, he was first elected in 2008, and he served as Mayor during the calendar year 2012; Council Member Roche was elected in 2010 and has not served as Mayor in her current term; Council Member Mullany was initially elected in 2006, was re-elected in 2010, and served as Mayor in calendar year 2011; the current Mayor Pro Tem, Council Member Powers, was not re-elected in the November election and his term now expires. In the November election, Council Member-Elect Mertens received

more votes than Council Member Hanson, and Council Member Hanson received more votes than Council Member-Elect Peabody (based on uncertified election results). I have further assumed that currently, and for the timeframe anticipated by the City's questions, none of the five council members would be subject to disqualification under section (c) of the Ordinance (for unexcused absences, resignation or decision not to assume appointment, death or physical incapacity, mental incapacity, censure, or arrest for a felony or crime of moral turpitude). Finally, I have assumed that the City is a general law city as opposed to a charter city (as no documents referencing the City as a charter city and any effect such a status might have on these issues was provided).

Government Code section 36801 provides that a city council is to select one of its number as Mayor and one as Mayor Pro Tem at the council meeting where the declaration of election results is made pursuant to Elections Code sections 10262-10263; nowhere in the Government Code, however, is there a requirement that such selection occur in any particular manner. The stated purpose of the Ordinance, as set forth in Section 1, adding Section 2.08.160 to the Indian Wells Municipal Code, is to provide for an automatic annual rotation of council members who occupy the positions of Mayor and Mayor Pro Tem, so as to permit as many council members as possible to have an opportunity to be Mayor and Mayor Pro Tem. The legislative history of the Ordinance, and the comments of both council members and the public in council meetings where the proposed ordinance was discussed, indicate that from 2004 to 2010 the Mayor and Mayor Pro Tem were chosen on the basis of an annual rotation but that, for some reason, the Council changed to an annual majority vote selection in 2010. Both council members and constituents voiced the opinion that the change to majority vote caused politics to enter in to the selection and, as one council member termed it, caused "rule by clique." From the legislative history, and especially from the comments of members of the public at council meetings, I find that the purpose of the Ordinance, as enacted by the voters, is to take politics out of the selection of Mayor and Mayor Pro Tem and provide for a fair opportunity for all council members to occupy these positions on a rotating basis.

With that purpose in mind, I address the six questions posed by the City:

1. Under the Ordinance, who [by name] should be seated as Mayor and as Mayor Pro Tempore once the newly constituted City Council reorganizes for calendar year 2013 at the December, 6 2012 City Council meeting?

Mayor: Council Member Roche. She is the council member having the longest current continuous membership on the City Council without serving as Mayor [see Section 2.08.160(b)(1)]. Both Council Members Mullany and Hanson have been continuously on the Council longer, but both have previously served as Mayor. Council Members-Elect Mertens and Peabody are not eligible for appointment as Mayor under (b)(5) because they have not yet completed at least one year and other council members are available to assume the position.

Mayor Pro Tem: Council Member-Elect Mertens. After Council Member Roche, Council Members-Elect Mertens and Peabody are the council members with the second longest current continuous membership on the City Council without serving as Mayor[see Section 2.08.160(b)(2)], even though that membership may have been for mere minutes. Again, Council

Members Mullany and Hanson have been on the council longer, but both have served as Mayor. And while (b)(5) says Council Members-Elect Mertens and Peabody may not be appointed as Mayor, it does not indicate that they may not be selected as Mayor Pro Tem. The Ordinance discusses the positions of Mayor and Mayor Pro Tem numerous times, sometimes jointly and sometimes singly; had the intent been to include the position of Mayor Pro Tem in the prohibition of (b)(5), the subsection would have so indicated. As between Council Members-Elect Mertens and Peabody, who qualify equally since both were elected in the November election, (b)(4) provides that the council member who received the most votes shall be appointed as Mayor Pro Tem. Council Member-Elect Mertens received more votes than Council Member-Elect Peabody.

2. Does the person seated as Mayor Pro Tempore during calendar year 2013 automatically have priority to become Mayor for calendar year 2014?

Yes. First, by definition under Section 2.08.160(b)(1) and (b)(2): the council member with the longest continuous membership without service as Mayor ("the First") is to be appointed as Mayor and the member with the second longest continuous membership without service as Mayor ("the Second") is to be appointed Mayor Pro Tem; once the First has been Mayor, the Second automatically becomes the member with the longest membership without being Mayor (since the First has now been Mayor). Second, (b)(7) provides that if the position of Mayor becomes vacant due to the inability to fulfill the responsibilities of that position, the Mayor Pro Tem shall be appointed to finish out the term and then shall be reappointed as Mayor for the next full term. If there is no priority for the Mayor Pro Tem to become the Mayor, then there is no logical reason for (b)(7) to specify a subsequent automatic full term as Mayor. Finally, the purpose of the Ordinance is to provide an automatic rotation into the positions of Mayor and Mayor Pro Tem; the only mechanism the Ordinance establishes is the qualifications for Mayor and Mayor Pro Tem. There is no "rotation" unless council members move from member to Mayor Pro Tem to Mayor and back to member.

3. If all five Council Members remain on the Council after the next general municipal election in 2014, what is the order of rotation of each of those specific Council Members (by name)?

Starting in calendar year 2015 the order of rotation would be 1) Council Member Peabody; 2) Council Member Mullany; 3) Council Member Hanson; 4) Council Member Roche; and 5) Council Member Mertens. Since Council Member Roche will be Mayor in 2013 and then Council Member Mertens will be Mayor in 2014, they would go to the end of the rotation. That would make then Council Member Peabody the member with the longest current continuous membership without serving as Mayor (and also the only council member to have not yet served as Mayor) and, therefore, he would serve as Mayor (after having served as Mayor Pro Tem in 2014). As between Council Members Mullany and Hanson, Council Member Mullany has both been on the Council longer and was Mayor earlier than Council Member Hanson, so Council Member Mullany would have priority.

4. If there is one new Council Member based on the 2014 general municipal election, and the other Council Members remain the same, where is the new Council Member placed in the automatic rotation (please provide resulting rotation list using known names)?

Should there be one new council member, the rotation would be as follows: 1) Council Member Peabody; 2) Council Member-Elect X; 3) Council Member Mullany [if he is still on the Council] or Council Member Hanson [if Council Member Mullany is no longer on the Council]; after Council Member Hanson, then Council Member Roche [if she is still on the Council]; and finally Council Member Mertens. The new council member moves into the second position of the rotation because he/she would have the second longest current continuous membership (again though that membership may have been for mere minutes) without serving as Mayor; Council Member-Elect X would become the Mayor Pro Tem.

5. If there are two new Council Members based on the 2014 general municipal election, and the other Council Members remain the same, where are the two new Council Members placed in the automatic rotation (please provide resulting rotation list using known names)?

Should there be two new council members, the rotation would be as follows: 1) Council Member Peabody; 2) Council Member-Elect X or Y, whoever received more votes in the election [Section 2.08.160(b)(4)]; 3) Council Member-Elect X or Y, whoever received less votes in the election; 4) Council Member Hanson; and 5) Council Member Mertens. Council Members-Elect X and Y move into the second and third positions because, as indicated above, they would have the second longest memberships without serving as Mayor.

6. In the event the named individual determined by the retired judge to serve as Mayor for calendar year 2013 leaves office mid-term for any reason, which named individual would then become Mayor for the remainder of calendar year 2013?

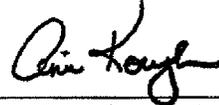
Council Member Mullany. Should Mayor Roche leave office mid-term, under Section 2.08.160(b)(7) the Mayor Pro Tem would be appointed to finish the term. In this scenario, however, the Mayor Pro Tem is Council Member-Elect Mertens, who would not have completed at least one year of his current term on the Council. Unless all other council members who have been on the Council for over a year are ineligible under Section 2.08.160(c) (which I have assumed is not the case for purposes of this opinion), (b)(5) makes Council Member-Elect Mertens ineligible to assume the position of Mayor mid-term. For the same reason, Council Member-Elect Peabody, the next council member in the rotation, would be ineligible to become Mayor mid-term. The first eligible council member in the rotation would be Council Member Mullany, who has priority over the only other eligible council member, Council Member Hanson, due to length of membership and time since service as Mayor.

Although not specifically asked, should Council Member Roche leave office mid-term and Council Member Mullany replace her, Council Member Mullany would finish out the term but would not then become Mayor for the next full term, since he would not have assumed the office of Mayor under (b)(7). The rotation would simply continue as if Council Member Roche had completed her term as Mayor, with Mayor Pro Tem Mertens assuming the office of Mayor and

Council Member Peabody assuming the office of Mayor Pro Tem. Council Member Mullany would retain his position in the rotation after Council Member Peabody.

In rendering this opinion, I found the actual language of the Ordinance, giving the words their ordinary, everyday meaning, to be without ambiguity or uncertainty. Thus the language of the Ordinance controls and no reference to its legislative history was necessary to discern its meaning.

Dated: November 26, 2012



Hon. Ann Kough, (Ret.)

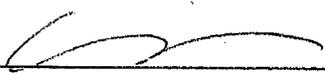
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Re: City of Indian Wells
Reference No. 1220045372

I, Sarah J Siemens, not a party to the within action, hereby declare that on November 26, 2012 I served the attached OPINION ON THE MAYORAL ROTATION ORDINANCE on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Los Angeles, CALIFORNIA, addressed as follows:

Mr. Roderick J. Wood
Ms. Jeanette Lucas
City of Indian Wells
44-950 El Dorado Drive
Indian Wells, CA 92210
NOT AVAILABLE
jlucas@indianwells.com
Parties Represented:
City of Indian Wells

I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CALIFORNIA on November 26, 2012.



Sarah J Siemens
ssiemens@jamsadr.com