**Ruling by the Presiding Officer on a motion, incidental or otherwise, to allow the determination of the City Council President by the drawing of cards (or other form of lot or chance) following a failure to achieve a majority or tie vote.**

**Background:**

At the May 21st meeting of the Superior City Council, after more than a dozen ballots to elect a City Council President over the course of several meetings, all of which failed to produce a victor by majority or a tie vote due to the abstention of one councilor during each ballot, Councilor Brent Fennessey made a motion to proceed to another ballot and if that ballot failed to produce a result, require that the nominees, Ruth Ludwig and Brent Fennessey, would draw cards and that the candidate with the high card would be determined to be the President. I ruled this motion out of order on the premise that it violates a foundational principal of parliamentary law requiring a majority vote to achieve any action or result and that it furthermore violates city ordinance which requires a majority vote to achieve any action. Councilor Fennessey then requested first a verbal and then a formal opinion from City Attorney Frog Prell, who delivered this opinion on June 11th in writing to myself and the City Council.

Wisconsin State Statute requires that the Mayor of a municipality enforce all laws and ordinances of the State and City and act as the presiding officer [Wis. Statutes Sec. 62.09 (8)(a)(b)] and therefore as parliamentarian of the City Council (Conduct of Common Council Meetings, pg 25). As such, it is my duty to rule on the legality and proper order of motions made or proposed for the body and to enforce State law, City ordinance, and good order at meetings of our Common Council.

After receiving the legal opinions of City Attorney Frog Prell, Former City Attorney Toby Marcovich, and in consultation with League of Wisconsin Municipalities attorney Maria Davis as well as my own review of State Statute, City Ordinance, and Robert’s Rules of Order (11th edition), it is my opinion and ruling that such an ordinance described above is a violation of custom, Robert’s Rules, State Law, and City Ordinance and is therefore out of order.

**Mr. Prell’s Opinion (attached):**

Mr Prell’s opinion must be dismissed as lacking authority or sufficient guidance. It is factually false, contradictory, insufficiently researched, and frequently irrelevant. It invents precedent where none exists, ignores obvious precedent, invents custom that it later admits does not exist, and undercuts its own, false logic.

Mr. Prell’s opinion lists a series of “facts” which provide some background to the question he attempts to answer. In the fourth paragraph, he writes, “While the city’s code of ordinances does not provide the rules or procedure through which the council will nominate and select council leadership, the city attorney and city clerk have designed a process, gleaned, in part, from other communities, to guide the council in that endeavor. Included in that process, is a drawing from a deck of cards in the event of a tie vote for president (or vice president) where the mayor opts not to break the tie.” This is false. While some versions of this process have been verbally described at meetings of the council, no such document detailing this invented process appears to exist and the City Council has never formally approved such a process. The code of ordinances does, despite the attorney’s assertion otherwise, provide the rules of procedure for leadership elections. Section 2-51 of the City’s code of ordinances requires the council follow Robert’s Rules of Order for all procedures not otherwise described in ordinance or statute (described as “standing rules”). Robert’s Rules of Order clearly and exhaustively details the rules of procedure for the election of leadership in deliberative assemblies and is, excepting any contrary ordinances or statutes or legitimate alteration of its rules by the body, the prevailing rule on this process.

In the second paragraph of the section titled “Relevant Authority and Analysis”, Mr Prell references Robert’s Rules of Order, which reads “in the absence of a rule establishing the method of voting, the rule that is established by custom, if any, should be followed, unless the assembly, by adoption of an incidental motion or incidental main motion, agrees to do otherwise”. This quote is drawn from the end of the introductory paragraph of the section describing elections for parliamentary officers. Mr. Prell neglects the first sentence of that section, which reads, “In an assembly or organization that does not have a rule or established custom prescribing the method of voting in elections, the voting can be by any of the *accepted methods* (emphasis mine).” The remainder of the section details those accepted methods, and the manner by which the body can select one of these accepted methods, all of which require actual voting and none of which entertain methods of chance. The section concludes with Mr. Prell’s quotation, encouraging the body to adopt that used by custom.

In the third paragraph of the same section, Mr. Prell cites city ordinance but does so only in part “Unless otherwise provided, all laws, rules, resolutions and motions shall be adopted upon an affirmative vote of a majority of all members of the common council…” but he neglects to complete the sentence, which by virtue of the semicolon that connects, must be read as directly connected to the original purpose of the sentence. The remainder of that sentence reads, “; provided, however, that whenever there is a vacancy on the common council, the number of members of the common council shall be deemed reduced by the number of vacant seats for the limited purpose of filling any such vacancy. When the common council sets as a committee, actions shall be deemed approved upon the vote of a simple majority of the members present and voting.” The ordinance gives its own provision within the same sentence. Mr. Prell incorrectly assumes that the introductory clause allows any other “provision” to preempt this foundational principal despite the fact that the ordinance immediately provides for its own qualification. Logic and common sense dictate that this ordinance is meant to require a majority vote from the council on all matters in the same way Robert’s Rules of Order requires a majority vote in all matters [RONR (11th ed.) p.4] but that it provides for the possibility that vacancies may cause confusion as to the definition of a majority. It cannot be read to presume that the council is allowed to deviate from the requirement of a majority vote at will. The mandate for a majority vote is further supported in State Law, which cannot be preempted by city councils or their ordinances. A manual on public meetings published by the State Bar of Wisconsin, describes votes in general: “A governmental body, as a practical matter, may conduct business—i.e., take action or make a recommendation—only by the votes of its members.” [Melanie R Swank, *The Wisconsin Public Records and Open Meetings Handbook (3rd ed. 2008).]*

Mr. Prell follows his citation of City Ordinance with the false statement that “Our council has historically provided for a cutting of the cards in the event of a tie that remains unbroken by the mayor. This informal but repeated process, generally utilized since at least 2009, certainly arises to a ‘custom’. The process, including the potential for utilizing a card-draw as tie-breaker, was explained, or ‘otherwise provided’, in detail at the beginning of the April 16 reorganizational meeting. And the ‘chance’ element of the process was, in fact, used to break a tie for council president in 2009 between current Councilor Olson and former Councilor Bridge.” These statements are problematic for a number of reasons. It is false to state that the council has historically provided for a cutting of the cards. No motion has ever been made or passed to “provide” or otherwise allow for the cutting of the cards. The example he uses was done at the suggestion of Mr. Prell himself with the agreement of the candidates at the time. Mr. Prell states that this process occurred repeatedly but cites no other examples. Most troubling, he implies that his own explanation for the process he invented himself in 2009 meets the ordinance’s obligation for “otherwise provided” implying that he can unilaterally allow any alternative to the majority vote simply though suggestion and explanation, which is, of course, well outside his authority.

Mr. Prell follows with the assertion that the statute permitting the council to “be the judge in the election and qualification of its members,” somehow applies to the selection of the council’s leadership despite the fact that state statute and city ordinance detail that election in other references.

Mr. Prell then moves on to defend the validity of the use of cards or any method other than voting. He points out that it has been suggested (by me) that the use of cards, or any method other than voting, is out of order when deciding a question that is before the council. He claims that this conclusion is not supported by state or local law, or in relevant case law. However, he cites no relevant case law at all relating to this point in his opinion. His first reference is a citation of state law that does not relate to business before deliberative bodies but to decisions of the electorate, which are entirely separate in state and local law. Mr. Prell states, “Wisconsin law, particularly as directs the council to ‘be the judge in the election and qualification of its members,’ does not appear to qualify that discretion”. This is patently false. State statute contains multiple chapters on the election and qualification of city officers, including city councilors. Referencing the election of city councilors by the electorate might appear irrelevant to a question regarding the election of officers within that body except Mr. Prell references these laws in his opinion. He writes that “The State of Wisconsin actually mandates the use of a game of ‘chance’ to resolve certain election impasses”. This is drawn from Wisconsin Statute 5. If Mr. Prell suggests that this statute, which soles governs elections to public office, can be applied to the election of council leadership, then we must apply the entire section, which includes the mandate which immediately precedes Mr. Prell’s citation: “in every election to choose any officer, each elector has one vote for each office unless clearly indicated otherwise. The person receiving the greatest number of legal votes for the office shall be declared elected, and the canvassers shall so determine and certify.” Wis. Stat. Sec. 5.01(3)(a). The use of this statute would require that the councilor with the most votes be declared the President. This has not happened due to the fact that rules governing the conduct of our meetings are set by the council, which has chosen Robert’s Rules of Order and also used City Ordinance to establish the requirement for a majority for any decision. Obviously Mr. Prell was presuming that I had meant to suggest that lots could never be used in any election of any kind and he uses this statute to refute it. I have never suggested that they cannot be used in any election but that they cannot be used to subvert the requirement that the Council act as a body. His citation of Section 5 is therefore wholly irrelevant.

For further references relating to the use of decisions by chance, he relies on two municipalities, the City of St. Francis, and the City of Lacrosse, both of which have, unlike the City of Superior, specific ordinances that allow such a procedure. In the case of the City of St. Francis, which he cites first, their ordinance first requires an Alderman to achieve a majority of the votes, much like Superior, but after 25 ballots with no majority awards the presidency to the Alderman with a *plurality.* If the vote is tied, and remains tied at the 50th ballot, only then is the President selected by lot. City of St. Francis, Code of Ordinances, sec. 32-4. In the case of the City of Lacrosse, Mr. Prell shows that this city also uses a game of chance to elect its president but only in the event of a tie and only if the Mayor declines to break the tie. In both cases, these exceptions to the requirement for a decision by a majority of the Council are specifically described in City Ordinance, this is untrue in Superior. These references are therefore irrelevant.

 He also cites a recent leadership election between Douglas County Board Supervisors in which the nominees mutually agreed to the use of a coin toss and both they and the Board accepted the result unanimously (or at least did not oppose it). In each of his examples, Mr. Prell describes systems either expressly allowed or required by law or in which there is no opposition by the relevant parties or governing bodies. None of these municipal or county procedures have been tested by the courts and their existence does not prove their legality.

Most importantly, however, in each example cited by Mr. Prell, he describes a legitimately tied election. This was not the question to which Mr. Fennessey sought an answer. The election for the 2019 Superior City Council President has never tied. While Mr. Prell has made a compelling case for the use of drawing lots or cards in the event the Mayor declined to vote, that is not the scenario at hand. The question is whether the majority of the body has the power to decline to choose the City Council President by ballot and instead determine the winner by chance.

In the final paragraph before his conclusion, Mr. Prell falsely asserts again that the City of Superior has no ordinance to control the process through which the council elects a president and falsely asserts that the Council’s process has no mechanism (customary, informal, or otherwise) for resolving a 5-4 impasse. The prescribed, and now well repeated custom, practice, ordinance mandated, and procedurally correct mechanism is for the Chair to declare that vote failed and for the body to proceed to another vote and to repeat this process ad infinitum until a winner has been declared or the meeting or session adjourned. This is described in Robert’s Rules of Order under in the chapter detailing elections of officers: “If any office remains unfilled after the first ballot… the balloting is repeated for that office as many times as necessary” RONR (11th ed) p. 441. This method of voting is practiced in other parliamentary systems as well. The United States Presidential election of 1800, after a tie in the Electoral College, was decided by the House of Representatives after 36 ballots when the first 35 failed to produce a majority. Similarly, the 1855 election of the Speaker of the House of Representatives was only decided on the 133rd ballot after repeated failed votes and even then only after the adoption of a new rule allowed Nathaniel Banks to win with a plurality rather than a majority. While some systems exist allowing direct election by chance, called “sortition” these systems are all expressly described in law. Neither I, nor Mr. Prell, nor any of the other attorneys that have reviewed this situation can find any example anywhere in Wisconsin history or law in which a failed, non-tied election was decided by chance. Examples abound, however, of votes in which the plurality prevailed including in recent elections by city councilors Graham Garfield, who won his election with a plurality in 2017 and Bob Browne, who won with a plurality in 2011. This is only relevant because Mr. Prell seeks to establish a custom for deciding elections by chance by citing examples of public elections that have been decided that way. But this custom only applies to tied votes. If custom can be said to exist in this case, in which each ballot has resulted in a plurality but not a majority for one candidate, the custom either dictates that the election has failed to produce a winner or that the winner is the candidate with the plurality.

Mr. Prell’s conclusion, based on legal rulings respecting the broad authority of the council and language in City ordinance which he interprets to allow any method whatsoever for determining the council leadership at the whim of a simple majority and multiple irrelevant practices relating to an entirely different set of circumstances, is that the council may allow a cutting of the cards to determine the president between two nominated candidates. Mr. Prell claims that Mr. Fennessey may make an “incidental” motion to accomplish his goal but the attorney neglects to name which incidental motion would be appropriate.

**Mr. Marcovich’s Opinion (attached)**

Finding several logical concerns in Mr. Prell’s opinion, I forwarded his opinion to former Superior City Attorney Toby Marcovich and asked him to draft an opinion. In it he cites as a critical weakness in Mr. Prell’s opinion the frequent citation of situations in which decisions by the electorate or public bodies were decided by a tie and that no tie exists in this case. Mr. Marcovich argues that the council is attempting to create a tie and that they lack the power to do so. He also argues that in order for the council to determine its president by the drawing of cards, a tie must first exist.

**Other relevant facts relating to my decision:**

In determining my decision, I considered several authorities which guide council procedure and action as well as the intent and effect of the motion.

**State Law**

State law permits any member to demand a roll call vote which is recorded. Wis. Stat. Sec. 62.11 (3)(d). The statute permitting the council to determine its rules of procedure reads “In all *other* respects determine its rules and procedure” and therefore only permits rules that do not violate this law. Wis. Stat. Sec. 62.11 (3)(e). The only permissible deviation from this rule is to allow the use of secret ballots in leadership elections. Wis. Stat. Sec. 19.88(1)(2).

State law is silent on the use of methods of chance in leadership elections but requires them in tied elections for public office. Elections that are not tied are awarded to the winner of a plurality.

**City Ordinance**

City Ordinance requires a majority vote of all members of the body, clarifying only that vacant seats on the council do not count towards the total number of members (2-44).

City Ordinance is silent on the use of games of chance.

City Ordinance requires the use of Robert’s Rules of Order for all of its proceedings not otherwise determined by State law or city ordinance (2-51)

**Parliamentary Procedure**

Robert’s Rules of Order requires at least a majority vote for any action. RONR (11th ed) p.4

Robert’s Rules requires that a failed vote for the leadership of a body be repeated until a candidate achieves a majority. RONR (11th ed) p. 441

**Custom and tradition**

While multiple examples exist for the resolution of a tie vote in parliamentary bodies, I cannot find any precedent, custom, or tradition for resolving a vote that failed to achieve a tie or a defined majority in any other way than to abandon the question or vote again.

Multiple precedents exist for repeating votes following the failure of a majority.

Some tradition and precedents exist for the permitting of a winner by plurality, but these exist in proscribed law.

**Intent of the motion**

The motion likely violates state law in its intent and effect. While no tie has never been achieved by the council in any of its votes, every councilor has voted in multiple elections for president of the current term. While some councilors have voted for other nominees, when Mr. Fennessey and Ms. Ludwig have been the only two candidates, their voters have never changed. Five councilors have voted several times for Mr. Fennessey and have never voted for Ms Ludwig and the other five councilors have voted several times for Ms. Ludwig and have never voted for Mr. Fennessey. The council is, in effect, tied in their decision. Due to the abstention of one councilor in each of the votes, however, no actual tie has been achieved. Councilors Olson, Kern, Fennessey, and Sutherland have each stated, either publicly or directly to me, that they do not believe the Mayor should break the tie and their abstention was therefore to prevent the tie-breaking vote from taking place. No abstaining councilor has offered any other public or private reason for their abstention.

The intent of the motion, therefore is to invoke the perfectly legal custom of a decision by chance in the event of an unresolvable tie without actually achieving the tie.

This situation is not an unresolvable tie. I intend to exercise my right and duty to vote in the event of a tie.

The motion, therefore, is an obvious attempt to deny a member of the body (the Mayor) of my right to vote. This right is granted by statute [62.11(1)]. A motion designed to deny a member the right to vote is prohibited by Robert’s Rules of Order (RONR 11th ed. p. 263).

**Decision:**

The motion described above or one having the same or similar effect would be out of order for each of the following reasons:

1. A motion or other action that does not achieve a majority of the entire body fails in every case except a tie. Once the result of a vote has been correctly declared by the chair, it cannot be changed except by proscribed methods such as a motion to rescind or reconsider.
2. No provision, precedent, custom, law, or rule exists to allow the use of methods of chance to make decisions in any case except a tie.
3. Robert’s Rules of Order clearly describes the proper method and procedures for electing leadership of the body and the methods by which the body can select its leader. Methods of chance are not included in these rules.
4. Robert’s Rules of Order may be suspended or altered, but not at the expense of state or local law or the rights of a member or at the expense of fundamental principles of parliamentary law.
5. State law requires the use of the ballot, open or secret, for the election of a Council President and permits no other deviation from this law, even by a council’s right to create its own procedure.
6. To accept the decision of a method used only in the case of a tie has the effect of admitting the provable fact that the council is in fact tied and would therefore be an unlawful denial of the Mayor’s right to vote in the case of a tie.

**Other potential courses of action and motions that would be in order:**

The council may continue to make nominations and vote, by roll call or secret ballot, until one councilor receives a majority vote.

The Council may postpone or table the choice of its president, indefinitely, until a certain time, or until certain, named, conditions have been met.

Until such time as the council chooses its President, Councilor Sutherland, as the Vice-President, would fulfill any duties I am unable to perform.

**Appendix:**

**Opinion of City Attorney Frog Prell**

**FACTS**

 At the April 16 reorganizational meeting of the common council, 8 roll call votes were taken in an attempt to elect a president between nominees Ludwig and Fennessey. In each roll call vote, 5 votes were cast for Councilor Fennessey, 4 for Councilor Ludwig, with one abstention. The same meeting featured five failed motions to vote by way of secret ballot, one failed roll call vote to elect a president from an expanded field of nominees (Councilors Ludwig, Fennessey and Kern) and two failed motions to adjourn.

 The matter of the election of a council president was placed on the council agenda for May 7 and again on May 21, where several more votes were expressed by roll call, each resulting in a slight shift from the April 16 vote but with the same impasse – 5 votes cast for Councilor Ludwig, 4 for Councilor Fennessey and one abstention.

 Shortly before adjournment of the May 21 meeting, Councilor Fennessey made a motion to use a drawing from a deck of cards (between the two nominees) as a mechanism to resolve the impasse for council president, at which time Mayor Paine ruled the motion out of order, stating further that the motion was essentially being made to suspend the rules and that it was improper to do so in a way that would deprive councilors of the right to vote. The meeting ended with a request that the city attorney research the legality of the use of a card draw (or some other game of chance) to resolve the impasse.

 While the city’s code of ordinances does not provide the rules or procedure through which the council will nominate and select council leadership, the city attorney and city clerk have designed a process, gleaned, in part, from other communities, to guide the council in that endeavor. Included in that process, is a drawing from a deck of cards in the event of a tie vote for president (or vice president) where the mayor opts not to break the tie. This process has typically been described to the council by the city attorney at the beginning of the selection process and, excepting the current election, has not elicited objection or a motion to modify. Current custom does not contemplate the drawing from a deck of cards in the event that a vote for council leadership results in an impasse that is not a tie.

**RELEVANT AUTHORITY and ANALYSIS**

Wis. Statutes Sec. 62.09(8)(e) states that “The council at its first meeting subsequent to the regular election and qualification of new members, shall after organization, choose from its members a president…”. The city’s code of ordinances essentially restates the state statute at Sec. 2-31(c), which provides that “The council at its first meeting subsequent to the regular election and qualification of new members, shall after organization, choose from its members a president, and vice president.”

 Wisconsin statutes give local government uniquely wide discretion in the manner in which it elects council leadership. Specifically, in the context of electing leadership within the governing body, our laws clearly state that “The council shall be the judge of the election and qualification of its members…”. See Wis. Stat. 62.11(3)(a). Robert’s Rules of Order also allows a wide range of process through which elections within an assembly or organization may be made. Specifically, Robert’s Rules state that “in the absence of a rule establishing the method of voting, the rule that is established by custom, if any, should be followed, unless the assembly, by adoption of an incidental motion or incidental main motion, agrees to do otherwise.” Robert's Rules of Order, Newly Revised, 11th ed., pp. 438 - 439.

 The city’s code of ordinances states that “Unless otherwise provided, all laws, rules, resolutions and motions shall be adopted upon an affirmative vote of a majority of all members of the common council…”. (See Superior Code of Ordinances Sec. 2-44). However, the city’s process for electing council leadership deviates from the codified procedure significantly. Unlike any other matter before the council, such as a resolution, ordinance or approval of a contract, our council has historically provided for a cutting of cards in the event of a tie that remains unbroken by the mayor. This informal but repeated process, generally utilized since at least 2009, certainly arises to a “custom”.[[1]](#endnote-1) The process, including the potential for utilizing a card-draw as tie-breaker, was explained, or “otherwise provided,” in detail at the beginning of the April 16 reorganizational meeting.[[2]](#endnote-2) And the “chance” element of the process was, in fact, used to break a tie for council president in 2009 between current Councilor Olson and former Councilor Bridge. Certain councilors now seek to use the card-draw to resolve an impasse for the election of council president that is not a tie. Wisconsin law, particularly as directs the council to “be the judge in the election and qualification of its members,” does not appear to qualify that discretion. In other words, an impasse of this nature is just that – and the council is afforded wide scope in how it chooses to address it.

 Our courts have also shown a strong deference to the manner in which local elected officials choose to govern. When it comes to second-guessing the discretion exercised by local elected officials, our courts are slow to undo the work of the municipality. When a resident taxpayer challenged the City of Milwaukee after the common council passed an ordinance providing for a prevailing minimum wage scale to be paid all city employee engaged on public work and by contractors and their subcontractors to the same, the Supreme Court of Wisconsin ruled squarely in favor of the city, writing that “the common council is but the trustee of the public, yet there is necessarily vested in it a wide field of discretion in the carrying out of its duties, and it, and not the courts, have the power, and the corresponding responsibility, of determining the questions of legitimate general public policy in matters that affect the community as a whole.” Wagner v. City of Milwaukee, 180 Wis. 640, 2, 192 N.W. 994 (1923). When the City of La Crosse sought to enforce a zoning violation against the owner of a funeral home, whose owner argued against the validity of the zoning ordinance in question and insisted that the condition of the immediate neighborhood surrounding his premises warranted a different placing of the boundary between the residential and commercial district, the court stated that “when municipal legislative action proceeds from authority expressly granted and such action is based on apparent reason, the decision of the legislative body is controlling. All presumptions are in favor of its validity, and, when attacked, the burden is on the party alleging its invalidity to establish his claim. City of La Crosse v. Elbertson, 205 Wis. 207, 1, 237 N.W. 99 (1931).

 It has been suggested that the use of cards, or any method other than voting, is out of order when deciding a question that is before the council. That conclusion is not supported by state or local law, or in relevant case law. The State of Wisconsin actually mandates the use of a game of “chance” to resolve certain election impasses. Wis. Stat. Sec. 5.01(4)(a) “tie vote,” specifically states, in Wisconsin’s laws governing elections, that “if 2 or more candidates for the same office receive the greatest, but an equal number of votes, the winner shall be chose *by lot* in the presence of the board of canvassers charged with the responsibility to determine the election…”. (emphasis added). The resolution of a tie in a primary election is addressed in Wis. Stat. Sec. 5.01(4)(b) which provides that “If, in a primary, 2 or more candidates receive an equal but not the greatest number of votes so that only one of those candidates with equal votes may advance to the final election, *the choice shall similarly be made by drawing lots.”* (emphasis added).

 The matter of “choosing by lot” is certainly recognized and followed in other Wisconsin jurisdictions. In the City of St. Francis, Wisconsin, a tie vote for common council president directs the city clerk to “write the names of the Aldermen who have tied with the greatest number of votes on the 50th ballot and place them in a container. The City Clerk shall then have someone other than the Clerk or Alderman select a name from the container, and that Alderman shall be elected Council President.” City of St. Francis, Code of Ordinances, Sec. 32-4.

 The City of Lacrosse, Wisconsin has adopted an ordinance to address the procedure for filling a vacancy on its common council, wherein applications are solicited for interest in the position, with the common council casting votes for the preferred candidate. La Crosse’s ordinance specifically mandates a game of chance to fill a council seat in the event of a tie vote amongst the council when, “in the case of a tie vote in the final round, Council Members revote at least one time up to a maximum of three times. If after the first revote there is still a tie, the Mayor may choose to break the tie, or submit it back to the Council for another revote. If the Mayor declines to break the tie after the fourth aggregate vote, *the City Clerk flips a coin.”* City of La Crosse, Code of Ordinances, Sec. 2-106(5)(b). (Emphasis added.)

 The City of Baraboo, Wisconsin seated a city councilor for a three-year term in April of 2014 by way of a card-draw (ten of hearts over four of hearts) when the public election between the two candidates resulted in a 137 – 137 tie.

 At the April 17, 2018 reorganizational meeting of the Douglas County Board of Supervisors, a secret ballot vote for county board vice chair between nominees Alan Jaques and Mary Lou Bergman resulted in a 10 – 10 tie. Upon agreement by the nominees, a coin toss was used to break the tie, whereupon Bergman won the position.

 Further examples of the use of “drawing lots” or other method of chance to resolve elections in American jurisdictions are too numerous to count.[[3]](#endnote-3) According to Assistant Political Science Professor Tim Lindberg at the University of Minnesota – Morris, twenty-seven states settle tied elections by lot. While it must certainly be said that it is not always prudent to conclude that one is doing something legally or correctly based solely on the fact that others are doing it the same way, we might certainly take some comfort in the fact that elections for public office, where arguably the stakes for representation within a democracy are significantly higher than in the context of a one-year leadership position within a governing body, are frequently decided by way of chance.

 Wisconsin law specifically mandates “drawing” lots to resolve tie votes for certain public elections. Wisconsin law allows local governing bodies vast discretion in how it selects leadership from among the group. Robert’s Rules of Order urges organizations to follow its own custom in its election process, or to entertain a motion to do otherwise. The City of Superior has no ordinance to control the process through which the council elects a president but has, customarily, followed an informal process that does not include a mechanism for resolving a 5-4 impasse. In this situation, it is precisely the discretion of the common council to which our legislature and our courts have deferred and a motion to modify our custom so as to allow a card-draw to resolve the impasse is in order.

**CONCLUSION**

The common council may, but is not obligated to, utilize the drawing of cards, or some other method of chance, to resolve the 5-4 impasse for council president. If it is the wish of the council to do so, a motion should be made and seconded, at which time affirmative vote of a majority of its members (six) would carry the measure.

If the council opts not to resolve the impasse in such a manner, it may proceed with the services of Councilor Sutherland as acting president and may do so until the council convenes its next reorganizational meeting in ten months. Finally, the council may move their vote to a ballot vote in accord with Wis. Stat. sec. 19.88(1). Ballot voting certainly does not ensure a different outcome, but it may well provide an opportunity for an outcome that represents the judgment of the council members, rather than an act of chance.

 Dated this 10th day of June, 2019.

 By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Frog Prell, City Attorney

1. Custom, noun, a traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time. Source, Google Dictionary. [↑](#endnote-ref-1)
2. Prell: “If there’s a tie, we’ll check with the mayor to see if he wants to exercise his tie-breaking powers under the statutes. If he takes a pass on that, we can take another run at it on a vote … see if anyone can tip the scales. We’ve always got the deck of cards if need be...” Source, City of Superior, Council Archive Videos (www.ci.superior.wi.us) at 7:05 minutes. [↑](#endnote-ref-2)
3. Wycoff, Minnesota broke a tie for a city council position in November of 2018 through a card-draw.

Cedar Hills, Utah broke a tie for a city council position in September of 2015 through a card-draw (the clerk brought a deck of cards and a quarter – the candidates agreed that it would be more fun to draw cards).

 Pelican, Alaska broke a tie for both a city council and school board position in October of 2017 through a card-draw.

 Sweet Home, Oregon broke a tie for a city council position in December of 2014 through a coin toss. Each candidate was assigned a side of the coin. To win the council seat, a candidate had to win four of seven coin tosses.

 Hoxie, Alabama broke a tie for a city council position in December of 2018 when the tied candidates rolled dice. The incumbent kept the position when she rolled a six over her opponent’s four.

**Opinion from Toby Marcovich**

**Marcovich, Cochrane, Milliken, Swanson & Kropid, llp**

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June 12, 2019

Mayor Jim Paine

City of Superior

1314 North 16th Street

Superior, Wisconsin 54880

Dear Mayor Paine:

This is in response to your request of me to review City Attorney Prell’s opinion dated June 10, 2019 with regard to the attempt to resolve the Council’s inability to elect a President.

**Facts:** The Council has voted 5-4 on several occasions with one council member abstaining. Attorney Prell’s opinion suggests that a “tie” exists when there is a 5-4 vote and therefore such a so-called tie can be resolved by lot. Attorney Prell cites several cases which do in fact permit legislative bodies, including municipal corporations, to resolve a tie (emphasis added) however in every one of those cases an actual tie existed (i.e. an equal number of votes on each side of the issue). Obviously, in this case no tie exists because there is not an equal number of votes on each side of the issue. A clear review of all the legal authority available, *see Wisconsin Key Number Digest Municipal Corporations, section 98*, which deals with tie votes and casting votes presumes in each of the cases cited that the actual vote was in fact a tie (i.e. equal votes on each side of the issue). Nowhere in any legal source has it ever been declared to be the law that an unequal number of votes can be converted to a tie by legislative action and I find no authority for the City Council to do so. *See also C.J.S. Municipal Corporation, section 405*.

The search of Roberts Rules of Order does not indicate that a tie is anything but an equal number of votes on each side of the proposition.

As stated previously, in every case cited by City Attorney Prell, the actual facts of each case was that the vote was considered an actual tie (i.e. same number of votes on either side of the proposition). Therefore, it is clear that the Council cannot create a “tie” by drawing lots. The tie must first exist, which obviously in the instant case it does not.

Therefore, it is my opinion that the Council cannot determine the Presidency of the Council by the drawing of cards or any other such matter until an actual tie vote exists.

Respectfully submitted,

Toby E. Marcovich/slw

TOBY E. MARCOVICH

TEM/slw

P.S. If the league of municipality agrees with Frog’s opinion they much have also presume that there was an actual tie. [↑](#endnote-ref-3)