**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

Filed with the office of the City Clerk in accord with Wis. Stat. sec. 62.09(12)(c)

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. [↑](#endnote-ref-3)