CITY OF OAKLAND

OFFICE OF THE CITY ATTORNEY

LEGAL OPINION

TO: MAYOR LIBBY SCHAAF

FROM: BARBARA J. PARKER
CITY ATTORNEY

DATE: JUNE 22, 2015

RE: WHEN IS THE MAYOR ABSENT UNDER CITY CHARTER SECTION 306?

I. INTRODUCTION

City Charter section 306 provides that the Vice Mayor shall perform the Mayor's duties when the Mayor is "absent or temporarily disabled." The Mayor has requested a legal opinion regarding the circumstances in which she would be considered "absent" under City Charter section 306.

II. QUESTION AND BRIEF ANSWER

Question:

When is the Mayor "absent" under City Charter section 306 for purposes of determining when the Vice-Mayor performs the Mayor's duties?

Answer:

The Mayor is absent: (1) when she declares her absence, (2) when she is outside of the City and her physical presence in the City is required to perform her duties, or (3) when she is outside of the City and she is unable to communicate with other City officials as necessary to perform her duties. The Mayor is not "absent" under City Charter section 306 simply because she is physically outside of the City limits.

III. ANALYSIS

A. City Charter Section 306.

Section 306 of the Charter, entitled "Duties of Vice-Mayor," provides:

> In the absence or temporary disability of the Mayor, the Vice-Mayor shall perform the duties of the office.

The Charter does not define "absence" or establish a process to determine whether the Mayor is temporarily absent or disabled. City Charter section 304 provides that the office of the Mayor shall be declared vacant by the Council when (among other things) the Mayor "absents himself/herself continuously from the City for period of more than thirty days without permission from the Council." Again, the Charter does not define when the Mayor "absents...herself...from the City," although it does identify the circumstances in which the Council has the authority and duty to declare a vacancy.[1]

Various state courts have interpreted similar provisions in state constitutions concerning the "absence" of the governor in one of two ways: (1) the governor is absent whenever she is physically out of the state, i.e., the "physical absence" interpretation; or (2) the governor is absent only when her physical absence from the state renders her unable to fulfill her official duties, i.e., the "effective absence" interpretation.[2] We note that, although the language in state constitutions is similar to the City Charter provision, it is not identical. For example, as we discuss below with regard to absence, the City Charter trigger for the Vice-Mayor to perform the Mayor's duties is simply the Mayor's "absence," while the California Constitution provides that the "Lieutenant Governor shall perform the Governor's duties when he/she is "absent from the state."[3]

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[1] Regarding disability, City Charter section 304 provides for a finding of disability by the affirmative vote of at least six Councilmembers "after considering competent medical evidence bearing on the physical or mental capability of the Mayor."

[2] See the discussion of the Missouri Supreme Court in *Ashcroft v. Blunt* (1991), 813 S.W.2d 849, at 852-53. Connecticut, California, Mississippi and Oklahoma courts have adopted the "physical absence" rule for their governors, while Missouri, Nevada, New Jersey, and Nebraska have adopted the "effective absence" rule."

[3] Article 5, Section 10 of the California Constitution provides in pertinent part: "The Lieutenant Governor shall act as Governor during the impeachment, **absence from the State**, or other temporary disability of the Governor or of a Governor-elect who fails to take office." (Emphasis added.)

B. The Mayor's physical absence from the City constitutes an "absence" under City Charter section 306 only if the Mayor's physical presence is required for the Mayor to perform his/her duties, or the Mayor is unable to communicate with other City officials as necessary to perform her duties.

In 1998 this Office applied the "effective absence" interpretation to City Charter section 306 as part of a report and analysis of the respective roles of the Mayor and Vice-Mayor. This conclusion was based on the language of the Charter and modern realities of governance resulting from technological advances and methods of instant communication. Our report was prepared in response to a request that our Office prepare a report and analysis of Measure X, the "strong mayor" initiative that voters passed in 1998, including the respective roles of the Mayor and the Vice-Mayor under this new form of government. We concluded:

> "In the absence or temporary disability of the Mayor, the Vice-Mayor shall perform the "duties" of the Office of Mayor. In this temporary capacity, the Vice-Mayor does not assume "the office" (as is the case when a vacancy is declared) but rather carries out the duties of the Mayor in the Mayor's absence. In this event, the Vice-Mayor can remain on the Council during this temporary period because he/she would not hold dual offices. The Vice-Mayor would continue to be the representative from the District from which he/she was elected and would, at the same time, perform the duties of the Mayor in the Mayor's absence. The Charter does not, however, define what constitutes an "absence" or "temporary disability." In a 1979 decision, the California Supreme Court provided some guidance regarding what constitutes an absence from office. (*In re the Petition of the Commission on the Governorship of California, Edmund G. Brown, Jr., as Governor, et al. v. Mike Curb, as Lieutenant Governor, et. al.* (1979) 26 Cal.3d 110.) The facts of the Brown case can, however, be distinguished from our Charter provisions. The Brown case held that the Lieutenant Governor could act on behalf of the Governor (including the making of judicial appointments) in the absence of the Governor from the state. The controlling California Constitutional provision analyzed in that opinion expressly conferred power to the Lieutenant Governor during the Governor's "absence from the state." (Article V, section 10) Oakland's Charter is not as explicit in this regard. The Charter merely refers to the Mayor's "absence or temporary disability." The Charter does not specify any jurisdictional boundary. **Given modern technology and methods of instant communication, an absence is only created when the Mayor's physical presence is required for him to carry out his duties."** (Emphasis added.)

Report and Analysis of Charter Amendments (Measure X), Report of the City Attorney to the Rules and Legislation Committee, December 10, 1998, at 3-4. (A copy of the report and analysis is attached.)

We cited our 1998 opinion in the briefs we filed in support of the City's 2000 lawsuit challenging the Fair Political Practices Commission's disqualification of then Mayor Jerry Brown from certain redevelopment matters because of conflicts of interest. (See *Jerry Brown v. FPPC* (2000), 84 Cal.App.4th 137.) One issue in that case was whether there are any alternative sources of decision-making on these matters other than the Mayor, such as the Vice-Mayor. In our brief, we argued that "absence is created only when the Mayor's physical presence is required for him to carry out his duties and the Mayor is physically absent." (Petitioner's Petition for Writ of Mandate, Court of Appeals, First Appellate District, 2000, at 29.)

We reaffirm our 1998 analysis and conclusion. We once again distinguish (i.e., decline to apply) the California Supreme Court's rule in the *Curb* case to Oakland for the following reasons: (1) the City of Oakland is not bound by the Court's *Curb* decision since the Court was interpreting a California constitutional provision that applies when the Governor is absent from the state; the issue here is the interpretation of a Charter provision that applies when the Mayor is absent from the City; (2) as we advised in the 1998 opinion, the language in the Constitution is different and distinguishable from the language in the Charter; (3) the circumstance of a state official's absence from a large state like California is far different from the circumstance of a city official's absence from his or her city, a much more commonplace occurrence given the proximity of cities to each other; and (4) the extraordinary and revolutionary advances in communications technology during the 36 years following the 1979 *Curb* decision raise questions about the continued validity of the "physical absence" rule and provide greater support for the "effective absence" interpretation as a more suitable rule for modern governance.

As communication technology advances, the ability of a public official to conduct business for the City from anywhere in the world continues to increase. There is no reason why the Mayor cannot give direction to the City Administrator, for example, from outside the City limits via e-mail, teleconference or cellular phone. The Mayor may in fact be able to perform certain duties more effectively outside of the City; for instance, the best way to fulfill the Mayor's duty "to represent the City in inter-governmental relations" under section 305(g) of the Charter may be to meet with representatives of other governmental entities in their jurisdictions or participate in meetings of multi-governmental bodies as Oakland's representative wherever those meetings take place. Indeed the Brown Act recognizes that a public official may participate effectively from outside the jurisdictional boundaries of the official's agency, by providing for teleconference participation by an official from anywhere outside of the agency's jurisdiction, as long as the agency complies with the Act's noticing and accessibility requirements. (Gov't. Code Section 54953(b).)

Application of the "physical absence" rule to a locality like Oakland, could lead to extreme or absurd results as the Mayor would be deemed "absent" under section 306 whenever she stepped outside of the City limits. For instance, such a rule would empower the Vice-Mayor to exercise the Mayor's tie breaking power under section 200 of the Charter if the Mayor happens to be outside of the Oakland city limits (for instance, in Berkeley or San Francisco) during the Council meeting when the tie vote occurs.

While the word "absent" has several dictionary definitions, including mere lack of presence, some definitions support the interpretation that "absent" implies more than just lack of physical presence. For instance, synonyms for "absent" include "missing", "unavailable", and "AWOL".[4] (merriam-webster.com)

Accordingly, consistent with the language of Charter section 306, our past opinions and modern realities of governance, we conclude that City Charter section 306's reference to the Mayor's "absence" applies in only three situations:

1) **When the Mayor declares her absence from the City and invokes section 306 to transfer temporary power to the Vice-Mayor.**
2) **When the Mayor is physically outside of the City and her physical presence in the City is required to perform her duties.** This is rare; there are very few circumstances in which the Mayor's physical presence is <u>required</u> to perform her duties. Modern technology would allow the Mayor to make appointments, recommend measures to the City Council, and direct the City Administrator via electronic means from anywhere in the world. While section 305 requires the Mayor to "appear" before the Council in October to deliver her State of the City address, it is not clear that this provision requires a live presence, or whether delivery of the address by teleconference would suffice. And her tiebreaking function is an option, not a requirement, and in any event, can be performed via teleconference if the Brown Act teleconference rules are followed.
3) **When the Mayor is outside of the City and she is unable to communicate with other City officials as necessary to perform her duties.** When the Mayor is truly "incommunicado" (this is becoming increasingly rare, given advances in communications technology), she would be "effectively absent." This could happen in cases of natural disasters or other emergencies where immediate communication between City Administrator and the City's chief elective official is vital. However, the Charter does not indicate who has the authority to declare the Mayor temporarily "absent" because she is incommunicado. By contrast, for a permanent vacancy, the

[4] E.g., see the case of former Governor of South Carolina Mark Sanford, who disappeared for six days in 2009 without responding to efforts to contact him by phone or text messages, later claiming that he was "hiking the Appalachian Trail."

Charter allows the Council to declare a vacancy if the Mayor is absent without permission for more than 30 days; but once again, any such declaration must be based on the "effective absence" of the Mayor for this period, not her mere physical absence from Oakland.

IV. CONCLUSION

The Mayor's mere physical absence from the City does not constitute an absence under City Charter section 306. The Mayor is absent: (1) when she declares her absence, (2) when she is outside of the City and her physical presence in the City is required to perform her duties, or (3) when she is outside of the City and she is unable to communicate with other City officials as necessary to perform her duties.

Very truly yours,

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