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"Never Give Up, Never Give In"

January 4, 2010

Warren Wilson
Deputy City Attorney
City Hall
Coeur d'Alene, Idaho 83814
Via Fax: 769-2349
RE: Jim Brannon Election Contest

Dear Warren:

I write in follow-up to our recent discussions regarding the possibility of resolving the need for a Temporary Restraining Order/Injunction on the issue of whether or not the City of Coeur d'Alene should proceed to "install" Ms. Bloem, Ms. Goodlander, Mr. McEvers, and Mr. Kennedy at the City Council Meeting to be held on January 5, 2010. As of this afternoon it is my understanding that the City intends to proceed with the installation.

As you know the background of this matter is as follows:

After the Election, the canvass of votes was "accepted" at the City Council meeting of November 9, 2009.

The canvass of votes "accepted" reflects that Ms. Bloem, Ms. Goodlander, Mr. McEvers, and Mr. Kennedy received the most votes for their respective offices. Each of them is a current "incumbent."

After the canvass had been accepted, Jim Brannon filed a timely election contest which is and will still be pending on January 5, 2010.

The Amended Complaint requests an Injunction (Temporary Restraining Order) to stay the “installation” of Ms. Bloem, Ms. Goodlander, Mr. McEvers, and Mr. Kennedy pending resolution of the election contest. I suggested that to amicably avoid litigating whether or not Ms. Bloem, Ms. Goodlander, Mr. McEvers, and Mr. Kennedy should be “installed” on January 5, 2010, under section 50-702 the mayor and the three council persons should merely continue in their respective official capacities until the election contest is resolved and the winner(s) determined.

Under this suggestion, since all of the persons who would be “installed” on January 5, 2010, are current “incumbents,” no person would be seated who is not already holding his respective office, and no office would be vacant. The business of the City would continue uninterrupted until the election contest is determined by stipulation or Court Order.

The City responded to this suggestion by providing two statutes. I have reviewed I.C. 34-2021 and 34-2023 which the City’s legal department believes “allow(s) a court to seat the ultimate winner of a contested municipal election at any time.”

In response, I provided my analysis that I.C. 34-2021 refers to Title 59 Chapter 9. Section 59-905, of Title 59, provides for city officials to continue to serve in their respective official capacities (until their successor is “elected”) by “appointment” by the mayor and city council.

Under this suggestion it would be a mere formality for Ms. Bloem, Ms. Goodlander, Mr. McEvers, and Mr. Kennedy, to be “appointed” to their current respective official positions. The business of the City would continue without interruption until the election contest is determined either by stipulation or Court Order.

The City’s response to my suggestions was that the City “must install the winners at the first City Council meeting in January...(and) once the vote is canvassed, the winners are 'elected'...candidates receiving the highest number of votes...shall be declared elected.” The City also suggests that since there is no allegation that Ms. Bloem, Ms. Goodlander, Mr. McEvers, or Mr. Kennedy are not “qualified” there is “no lawful way for the incumbents to hold over and there is no vacancy for the mayor and the city council to fill as you have suggested.”

The essence of this back and forth analysis process and discussion regarding “installation” is that at the moment, it is apparently your and Mr. Gridley’s

intent to advise the City Council and Mayor to proceed with the “installation” of Ms. Bloem, Ms. Goodlander, Mr. McEvers, and Mr. Kennedy on January 5, 2010.

I believe that the City legal department’s pending recommendation is based on an erroneous fundamental position. *Your whole position is based upon the inaccurate assessment that the “incumbent” Mayor and City Council persons have been “elected.”* I suggest to you, given the pending election contest, that no one has been or will be “elected” as of the January 5, 2010, City Council Meeting. There is no current statute setting forth when “certificates of election” are to be issued in municipal contests. The Idaho Code 50-702 (effective January 1, 2011) provides that “certificates of election” are not provided until after the oath of office is taken. Even this pending law is different than the law applicable to counties (Idaho Code 34-1209) which provides that “certificates of election” are immediately provided after the “canvass.” I contacted the Secretary of State’s office on this issue and was advised that they “didn’t know the answer” to the question of when a person is elected.” I was further advised that their office did not oversee municipal elections under Title 50 but only county and state elections under Title 34. I pursued the matter further with the Attorney General’s office and was informed that there were arguments on both sides as to when a person is elected.

It appears that the current proposed pending advice to the City Council and the Mayor reflects that the City’s legal department has “chosen sides” regarding the election by taking up the banner of the “incumbent” candidates over the challenger candidates. As further evidence of the legal department’s having “chosen sides” I would point to the fact that the legal department appears to have held ongoing and in-depth confidential discussions with Candidate Kennedy’s legal team. Certainly no such discussions have taken place with me, as Mr. Brannon’s attorney. It should be obvious, but apparently it is not, that the rights and interests of *Council Member Kennedy* are significantly different from *Candidate Kennedy’s* and that the City should not be continuing to “compare” notes and jointly “prepare strategy.” Who is declared the “winner” of any election should not be a concern of the City. The City’s sole concern should be focused on being neutral, holding a squeaky clean election, and doing what is in the best interest of all of the

citizens of Coeur d'Alene.

As I recall the back and forth politics in the time leading up to the elections, particularly with regards to the Brannon-Kennedy race, the fundamental essence of rhetoric was that the “incumbents” do what they want to do, (or what their “handlers or employers” want them to do), regardless of what may be right or in the best interest of the “City as a whole.” The pending advice to the Mayor and City Council, if those challenging the “incumbents” were right in their assertions in this regard, is “more of the same” and “business as usual.” For the City to continue to act in direct concert with *Candidate Kennedy* in proceeding forward in the election contest is reminiscent of “Boss Tweed” and “Tammany Hall” politics, at its worst.

The City, at least as regards to who is or who is not “elected” at this point in time, should be unwaveringly neutral. The proposed pending advice to the Mayor and City Council by the legal department takes an adversarial position as opposed to a neutral position. If the City were to be neutral on the issue of who is or isn't “elected, it only makes common sense that it would in essence say, “The election has been contested and until that contest is resolved there can be no determination as to who was “elected. The City is not interested in taking ‘sides’. It is only interested in who is ultimately determined to have been elected, and ensuring that the City is protected from any nature of adverse claims that could arise if the 'incumbents' were to be 'installed' on January 5, 2010.”

I suggest to you that the “pros” and “cons” of the two courses of action open to the City are as follows:

PROCEED WITH INSTALLATION:

Pros:

None.

Cons:

The City would be viewed as having “chosen sides” on who was and who was not elected.

Any action that the City would take or refuse to take after January 5, 2010, could be subject to litigation that could result in damage awards against the City and in favor of the affected persons and entities. These proceedings and

awards would directly impact the citizens of Coeur d'Alene.

Discussion:

The City being viewed as having "chosen sides" would be a certainty. Litigation is a real and significant possibility, if not a probability, and the damages (costs to the citizens of the City) could be substantial.

STAY OVER IN OFFICE, OR BE APPOINTED

Pros:

The City would not be viewed as having "chosen sides."

Any action that the City would take, or refuse to take, would not be subject to litigation based upon who "constituted" the City Council and the Mayor.

The citizens of Coeur d'Alene would not be impacted negatively.

Faith in the City by its citizens would increase.

The "winners" of the election would be decided in a binding manner through stipulation, Court proceedings, or a new election.

Cons:

The City could be sued by any of the "incumbent" candidates, Ms. Bloem, Ms. Goodlander, Mr. McEvers, and Mr. Kennedy for the failure of the City to "install" them. It defies logic that any of the "incumbent" candidates, Ms. Bloem, Ms. Goodlander, Mr. McEvers, and Mr. Kennedy, would sue the city to be "installed" when they would retain the official capacities which they currently hold under the alternate course of proceeding suggested.

Discussion:

The City would be viewed as being "neutral." The City would not be exposed to litigation and the attendant acrimony, costs, and damages. Faith in the City would unquestionably increase.

The "winners" would be "installed" in due course and the City's business would continue on in a normal and legal fashion until the ultimately determined "winners" are decided.

In conclusion, I would ask that you carefully consider my thoughts and

comments regarding not only the law but also, perhaps most importantly, the procedure that is in the best interest of the voters of the City of Coeur d'Alene. They are the true clients of all attorneys involved in this election contest.

I have attempted to reach Judge Simpson's clerk to schedule a tentative time tomorrow if it is decided to pursue a temporary restraining order. I have been advised that he has been assigned the case as a result of Judge Hosack's retirement. I was unable, despite four calls to contact anyone or receive a call back. If it is determined to proceed to seek a temporary injunction I will advise you as soon as I am advised as to a time granted by Judge Simpson to hear the matter.

If the Court denies a request for a temporary restraining order, it is not a final adjudication on the merits of the request or the election contest. Likewise a Court's denial of a temporary restraining order or injunction would not insulate the City from damage claims. You have previously advised me that Mr. Brannon should not concern himself with such matters as potential City liability, and that the City will worry about the potential exposure of "installing" persons. While I appreciate that position, I do believe that Mr. Brannon, as a citizen of the City, has a legitimate concern. Mr. Brannon's request that the City not take this type of action, a needless type of action given the fact that all persons that would be "installed" on the 5th already hold those offices and could easily, and legally, either continue on in office or be appointed, arises from a legitimate concern that such an action by the City could easily come back to haunt it.

I have to wonder, given the fact that any potential damage could be averted by the City taking either of the alternative reasonable and responsible approaches that have been identified, why the City would have any legitimate interest in proceeding otherwise? I have to wonder why the City would force Mr. Brannon to post yet another bond to protect the City's interests if the temporary restraining order is sought, and granted, when the City can protect itself from any risk of resultant litigation, and substantial damage claims, that could result if the "installation" proceeds as currently scheduled. Frankly, the only answer that I can arrive at regarding these questions is that "sides have been chosen" by the City.

If the legal department insists on the current course of advice, the Mayor and the City Council need to be fully informed of legal alternatives available to

them and what could be the potential consequences. They need to be informed that there are reasonable, and legal, alternatives to "installation". As a result I ask that a copy of this letter be provided to the Mayor and each council member prior to their proceeding with such an action.

Very truly yours,


Starr Kelso

C: Jim Brannon