

SCOTT J. RAFFERTY
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February 3, 2025

Mayor Salvador Melendez Smelendez@montebelloca.gov
Member Georgina Tomayo gtamayo@montebelloca.gov
Member Scarlett Peralta speralta@montebelloca.gov
City of Montebello
1600 W. Beverly Blvd.
Montebello, CA 90640

cc: City Clerk Christopher Jimenez cjimenez@montebelloca.gov
Arnold Glasman, Esq.

Dear Council Members:

I have been retained to take actions necessary to prevent the Council from appointing to the District 5 vacancy except at a noticed meeting on or before February 5, 2025, at which a quorum is present. After that deadline, an election must be held to fill this vacancy, which began on November 8, 2024. I represent voters registered in your city, including electors in District 5, who intend to enforce their right to elect a successor in a special election. I do not, as the city attorney has suggested in the attached email to me, represent any incumbent council members. The city attorney has indicated that he intends to seek guidance from the council. This requires a special meeting, which may be a closed session, but must be noticed 24 hours in advance. A special meeting, in open session and with a quorum, would also be necessary to make an appointment.

At the inquorate meeting attempted on January 29, 2025, the city attorney stated that he had reached out to the Strumwasser Woocher law firm, which advised that two members satisfied a quorum. Therefore, I addressed my initial communication to that firm, which responded that the city had not retained them for this purpose and forwarded my concerns to Mr. Glasman. That email exchange is attached.

Under the current quorum statute, a majority of the membership present is necessary to conduct any business, including any appointment to a council vacancy. Gov. Code, § 36810; AGO 22-101 (California Attorney General Opinions, 2022). Therefore, (1) three of the five members must be present and (2) two of them must vote

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in favor of the same candidate to make an appointment. Given the resignation of Member Torres (with immediate effect) and the unavailability of Mayor Melendez, a quorum was not achieved last Wednesday.

Deadlocks are not unusual when appointing to vacancies. When they occur, the incumbents have two options. As the city attorney observed (video, 1/29/2025, 4:11:40), they can attempt to “reach a consensus.” Typically, this results from excluding candidates that are the most objectionable to each side. The Council can also call a special election. The city attorney also noted (id. 4:11:56) that Mayor Melendez has authority to call such a special meeting to choose one of these options. Unless an effective appointment is made by February 5, 2025, the city must call such a special election. Gov. Code, §36512(b).

It is unambiguous that a quorum is three and is not reduced by any vacancy. Attorney General Harris ruled that a council “may not define a quorum as less than ... a majority of its designated members.” AGO 10-901 (December 28, 2011). Gov. Code, §36501(a) and Ordinance 2462 designate a membership of five. The majority of three is not reduced by vacancies or absences. An incumbent who attends the meeting, but abstains, counts toward this quorum. However, on January 29, 2025, only two members attended the meeting. Therefore, the council was inquorate and incapable of acting.

The statutory prohibition of conducting business with less than three members present is reinforced by Rosenberg’s Rules, the council’s parliamentary authority, which states (at 2):

[I]n a five-member body a quorum is three. When the body has three members present, it can legally transact business. If the body has less than a quorum of members present, it cannot legally transact business. And even if the body has a quorum to begin the meeting, the body can lose the quorum during the meeting when a member departs (or even when a member leaves the dais). When that occurs the body loses its ability to transact business until and unless a quorum is reestablished.

See also [LCC Annual Conference, May 2006, “Voting Requirements”](#) at 1, 4. “A quorum of at least three members, which is a majority of the five members, must be present before the council has legal authority to act...Vacancies... All of the quorum and voting

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requirements set forth in Parts 1 and 2 above continue to apply. The council may hold a legal meeting as long as three members are present.” [emphasis supplied]

At the inquorate meeting on January 29, 2025, the city attorney argued a case involving Arcadia held that vacancies reduced the number constituting a quorum. Nesbitt v. Bolz (1939) 13 Cal.2d 677 was decided before the current quorum provision (Gov. Code, § 36810) and long before the recent change to the local recall statute (Elections Code, §11382), which eliminated the concurrent election of successors in local recall elections. Nesbitt reasoned that the 1931 recall statute required the voters to choose between a special election and delegating any appointment to the remaining council members. This specific scheme superseded the 1881 quorum statute that required three members for certain purposes, specifically the adoption of an ordinance. Nesbitt was distinguished on these bases in Price v. Tennant Community Services Dist. (1987) 194 Cal. App. 3d 493, 498 {"Nesbitt interpreted a statutory scheme which authorized less than a majority of the whole board to fill vacancies under some circumstances. No similar statutory authorization is present here."} . Nesbitt, which has not been cited by any other case, is both obsolete and irrelevant.

Under Rosenberg’s Rules, even if a member needed to establish the quorum attends but leaves the dais prior to the vote, the meeting loses its capacity to act. Section 36810 provides that “less than a majority may adjourn from time to time and compel attendance of absent members in the manner and under the penalties prescribed by ordinance.” However, Montebello has no such ordinance, so an inquorate meeting cannot compel absentees to attend or take any action other than to adjourn.

Working with the city attorney, each of the two incumbents can independently announce assurances that may be sufficient to encourage the mayor to call and attend a special meeting to consider a consensus appointment. Any action must be conducted in open session, in which each member’s continued attendance will be essential. We also ask that you reopen public comment on the finalist candidates and the option of a special election. If no accommodation is possible, we urge the mayor to call a special meeting limited to the calling of a special election. A decision to call such an election could avoid the need to seek judicial intervention, which will be costly to the city.

If no consensus is reached, Montebello’s status as an “small city” under Elections Code, §4004(a) entitles it to conduct its own all-mail election to fill council vacancies.

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Even if this cost \$5 per ballot, the cost of such an election would be less than \$26,000. Candidates have already been nominated, so the statutory deadline of 114 days would result in leaving District 5 unrepresented for six months. Given the public interest in having the council return to full strength, my clients are willing to join the city in support of a writ petition seeking to shorten that deadline. A similar provision was recently accepted by the Superior Court in Cruz v. City of Santa Clarita.

If no accommodation can be reached before Thursday, my clients will promptly seek to vindicate their independent right to require a special election by seeking an election writ. They will also petition the attorney general to bring an action to prevent the candidate named in the inquorate meeting from unlawfully exercising the powers of council member. Each of these actions will impose costs on the city that the Council can and should avoid by calling a special election.

The Council should also consider the political implications of attempting to defend an appointment made by only two members. It is profoundly undemocratic for two members, representing just 40% of the city's population, to choose the representative of the city's neediest district. This is precisely the outcome that districting was designed to avoid.

Sincerely,

A handwritten signature in dark ink, reading "Scott Rafferty". The signature is written in a cursive, flowing style with a large initial "S".

Scott J. Rafferty



Scott Rafferty <rafferty@gmail.com>

Re: Inquorate City Council Appointment

1 message

Scott Rafferty <rafferty@gmail.com>

Thu, Jan 30, 2025 at 2:05 PM

To: Dale Larson <dlarson@strumwooch.com>

Cc: Fredric Woocher <fwoocher@strumwooch.com>

So you know, Mr Glassman specifically stated on the record that they were acting on your advice. It's on the video.

Sent from My iPhone 1913 Whitecliff Ct Walnut Creek CA 94596 202-380-5525

On Thu, Jan 30, 2025 at 12:06 PM Dale Larson <dlarson@strumwooch.com> wrote:

Hi Scott,

We have not been retained by the City for these purposes nor been authorized to communicate with anybody about this issue on behalf of the City. I have forwarded your email to City Attorney Alvarez-Glasman.

Best regards,

Dale

From: Scott Rafferty <rafferty@gmail.com>**Sent:** Wednesday, January 29, 2025 7:50 PM**To:** Fredric Woocher <fwoocher@strumwooch.com>; Dale Larson <dlarson@strumwooch.com>**Subject:** Inquorate City Council Appointment

Tonight, with only two members present, Montebello's five member council purported to appoint a successor to a recalled official. City Attorney Glasman claims that you agree with his legal analysis authorizing this action. He cited a very old decision involving Arcadia city council for the proposition that two members could appoint successors where one member resigned after two were recalled, presumably referring to Nesbitt v. Bolz (1939) 13 Cal.2d 677. Of course, the statutory quorum requirement in 1939 applied only to ordinances and the former recall scheme expressly authorized less than a majority to appoint successors for recalled officials. At the time, recalled officials served until successors were qualified, so this case is neither about quorum nor vacancies. Price v. Tennant Community Services Dist., 194 Cal.App.3d 491 (Cal. App. 1987) distinguishes Nesbitt on both bases, holding unambiguously that a quorum of a five-member body is always three, without regard vacancies. Although two is a majority of current members, a quorum was not present tonight, precluding the council from conducting business.

Even if state law permitted such a practice, it is inconsistent with Rosenberg's rules, which is the city's parliamentary authority. " in a five-member body a quorum is three. If the body has less

than a quorum of members present, it cannot legally transact business. And even if the body has a quorum to begin the meeting, the body can lose the quorum during the meeting when a member departs (or even when a member leaves the dais)." As you know, the League of Cities is also convinced that a quorum of a 5-member council is always 3, notwithstanding vacancies. https://www.ca-ilg.org/sites/main/files/file-attachments/resources__LEAGUE_OF_CA_CITIES__VOTING_REQUIREMENTS__ABSENCES_VACANCIES_ABSTENTIONS_AND_DISQUALIFICATIONS-1.pdf?1395441985

The absurd result of ignoring this settled case law and universal practice is that yesterday's precipitous resignation would actually have reduced the "quorum" from 3 to 2 even during the adjournment of a meeting at which a successor for a recalled official was being appointed. In this case, 40% of the cities population from two of the most prosperous districts indirectly elect the replacement representative for the traditionally underrepresented area that districting was designed to protect. Indirect selection by a minority of the city is doubly undemocratic. Unless the incumbents cast three votes for a replacement member before Feb. 5, a special election must be called to allow the people of District 5 to choose their own representative.

It is also a matter of concern that the staff report represented the costs of a special election as \$224,100, requiring a budget amendment. This is approximately \$40 per ballot, about 8 times the cost of an all-mail election, for which the city is eligible.

Please let me know if the city clerk would be willing to delay any swearing-in until a court determines the propriety of the purported appointment. At the time AB 2582 was enacted, the Howard Jarvis Taxpayer Association opposed "depriving voters of their right to elect a successor if the incumbent local officer is recalled for misconduct in office," presumably recognizing the undue costs that litigation would impose on the city.

Scott Rafferty
[1913 Whitecliff Ct](#)

[Walnut Creek CA 94596](#)
mobile 202-380-5525

On Wed, Jan 29, 2025 at 6:27 PM Scott Rafferty <rafferty@gmail.com> wrote:

Mr. Glassman just said that you confirm his analysis that 2 members constitute a quorum in the 5-member council. Is this really the case? The League of Cities, Rosenbergs', and case law appear to be to the contrary.

Scott Rafferty
[1913 Whitecliff Ct](#)