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MEMORANDUM

TO: Washington State Association of Counties

FROM: Pacifica Law Group

DATE: January 25, 2019

SUBJECT: Eligibility of a Sitting County Commissioner or Councilmember for Appointment to a Vacant State Legislative Position

I. Question Presented and Short Answer

The Washington State Association of Counties has asked Pacifica Law Group to assess whether a sitting county commissioner or councilmember is eligible to be appointed to a vacant state legislative position where the appointment is made by the county commission or council on which he or she sits. As explained below, under the Washington Constitution and state law, a sitting county commissioner or councilmember should be eligible to be appointed to a vacant state legislative position. The Constitution sets forth the exclusive eligibility requirements and process for filling a legislative vacancy and does not preclude the appointment of a sitting commissioner or councilmember. Moreover, no statutory provisions prohibit such conduct. Though the Washington Attorney General concluded decades ago that a common law rule would bar such appointments, that conclusion predated Washington Supreme Court decisions confirming that constitutional eligibility requirements for state office are exclusive. In any case, Washington never adopted that common law principle, which has since fallen out of favor, and Washington's development of a comprehensive scheme governing legislative vacancies and the conduct of public officials confirms its decision to not be governed by the corresponding common law rule.

Any sitting county commissioner or councilmember who wishes to be considered for appointment should recuse him or herself from any vote and discussion about filling that legislative vacancy.

II. Discussion

A. The Washington Constitution establishes the exclusive eligibility and process requirements for filling a legislative vacancy.

The Washington Constitution empowers county legislative authorities to appoint replacements for vacant state legislative seats, subject to several specific requirements. Const. art. II, § 15. For vacancies in legislative districts located entirely within a single county, the person appointed must be (i) from the same legislative district, (ii) from the same political party as the prior legislator, and (iii) one of the three persons nominated by the county central committee of that party. *Id.* The same requirements apply for vacancies in legislative districts encompassing part or all of more than one county, except that the state central committee provides the nominations and the county legislative authorities from the associated counties decide the appointment. *Id.* In addition, article II, section 7 of the Washington Constitution establishes the qualifications for state legislative office: such persons must a citizen of the United States and a qualified voter in the district where he or she is selected. No provision of the Constitution prohibits a sitting county commissioner or councilmember from being eligible for appointment nor precludes county commissions or councils from appointing one of their own members.

Two Washington Supreme Court cases decided after the last Attorney General opinion on the subject confirm that the constitutional eligibility requirements and processes are binding and that no law, including the common law ethics principle cited by the Attorney General, can impose limitations on those requirements and processes. In *Gerberding v. Munro*, the Supreme Court struck down an initiative attempting to impose term limits on state legislative offices and certain state executive offices, holding that the Constitution establishes the exclusive qualifications for these offices and may not be added to by statute. 134 Wn.2d 188, 191, 949 P.2d 1366 (1998) (concluding that requirements prescribed in article II, section 7 express "the exclusive qualifications for" state legislative offices). Likewise, in *Parker v. Wyman*, the Supreme Court held that a residency requirement for superior court judges could not be added by statute to the constitutional requirements for that office. 176 Wn.2d 212, 223, 289 P.3d 628 (2012). Here, the Constitution sets forth the only eligibility requirements and process for filling legislative vacancies and does not preclude eligibility or appointment of a sitting commissioner or councilmember. Accordingly, such persons should be eligible for appointment to a legislative vacancy, and their commissions or councils should be able to appoint them.

B. Washington has adopted a comprehensive ethics scheme related to public officials that would not preclude eligibility or appointment.

Washington has enacted a comprehensive statutory scheme that governs the ethical conduct of, inter alia, county commissioners and councilmembers. *See, generally*, chapter 42 RCW. For example, these provisions (i) prohibit use of official positions to secure special privileges or exemptions, (ii) prohibit giving or receiving any form of compensation related to the official's services, and (iii) prohibit certain acts that could lead to the disclosure of confidential

information acquired while an official. RCW 42.23.070. Washington law also addresses dual office-holding and prohibits it in several circumstances. *See, e.g.*, RCW 36.83.100 (prohibiting in certain cases county commissioner or councilmember that created road and bridge district from serving on district board). No provision of this comprehensive scheme prohibits a county commissioner or councilmember from eligibility for appointment to a legislative vacancy nor prohibits county commissions or councils from appointing one of their own members to a legislative vacancy. These ethical rules would require a sitting commissioner or councilmember to recuse him or herself during any discussion or vote on filling a legislative vacancy.

In addition, many counties and other municipalities have adopted their own ethics codes and policies to clarify the state statutory restrictions or to establish additional restrictions, including specifically to prohibit commissioners or councilmembers from simultaneously holding a state legislative position. *See, e.g.*, Pierce County Charter Sec. 9.45 (prohibiting councilmember from holding any other elected office except specific political party position); *see also* King County Code Sec. 3.04.030(B)(9) (prohibiting acts in conflict with official duties, including simultaneously holding two public offices that are incompatible)[1]; Clallam County Code Sec. 3.01.030(2) (clarifying prohibition on gifting); Pierce County Code Sec. 3.12.030 (clarifying prohibition on misuse of public positions); Whatcom County Code Sec. 2.104.070(C) (prohibiting in certain situations former elected county official from representing another person before the county); Bainbridge Island Ethics Program Sec. II(F) (establishing nepotism prohibition).[2] Although many counties have exercised their considerable discretion and imposed additional ethics restrictions on county officials, none have barred a sitting commissioner or councilmember from eligibility for appointment to a legislative vacancy nor prohibited legislative authorities from appointing their own members to the state legislature. If a sitting commissioner or councilmember were appointed, that member would likely have to resign from the county commission or council upon being appointed.

C. Washington has not adopted a common law ethics principle.

The Attorney General opinions on the issue have relied on a common law ethics principle for the conclusion that a sitting commissioner or councilmember is not eligible for appointment to a legislative vacancy. Though some jurisdictions have adopted a common law rule that government entities may not appoint their own members to positions over which they have appointment power, no such common law principle has been adopted in Washington.

First, a common law rule must be recognized by a state for it to apply in that jurisdiction. *State ex rel. Clayton v. Bd. of Regents*, 635 So. 2d 937, 937-38 (Fla. 1994). Here, Washington has not adopted by statute or court case an applicable common law rule.

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[1] It is unclear whether simultaneously holding a council or commission position and a state legislative position would violate the established common law doctrine prohibiting the holding of "incompatible public offices." *Kennett v. Levine*, 50 Wn.2d 212, 216, 310 P.2d 244 (1957). Pierce County, for its part, has expressly barred such simultaneous holding.

[2] Any county commissioner or councilmember seeking appointment to a vacant legislative seat should consult the code and internal policies of the relevant counties to determine whether any additional requirements may apply.

Second, a state's development of laws governing an issue confirms a state's decision not to be governed by the corresponding common law. *Id.* *Clayton* is instructive on this point. In *Clayton*, the Florida Board of Regents appointed one of its members to the position of president of one of the universities. *Id.* The appointment was challenged as void "based on the common law rule that a government body with appointment powers may not appoint one of its own to a position." *Id.* at 938. The court denied the petition, holding that no common law rule prohibited such appointments. *Id.* The court noted that Florida's constitutional provisions governed public official conduct, including addressing dual office-holding, financial benefits from office-holding, abuse of public trust, open business, and public records. *Id.* These provisions, the court concluded, were "even more restrictive" than the common law doctrines adopted by other states. *Id.* Similarly, Washington has established a comprehensive scheme governing public official conduct, as examined above. In addition to those provisions, Washington has enacted several important open government requirements like those in *Clayton*, including that all meetings of county legislative authorities be open to the public, that public records be made available to the public, and that certain proceedings comply with the appearance of fairness doctrine. Chapter 42.30, .36, .56 RCW. Washington's decision comprehensively to address the conduct of its public officials and the appointment process confirms that the common law principle should not apply in Washington.

Third, the common law principle cited by the Attorney General in its earlier opinions has fallen out of favor in the intervening years and is now subject to limitation. As expressed in the recent edition of the primary treatise relied upon by the Attorney General: "[i]t is **sometimes** considered to be contrary to public policy to permit an officer having appointing power to use such power to confer an office on him- or herself in the absence of specific legislative authorization, or to permit an appointing body to appoint one of its own members." 63C Am. Jur. 2d Public Officers and Employees § 93 (footnotes omitted) (emphasis added).

III. Conclusion

A sitting county commissioner or councilmember should be eligible for appointment to a vacant state legislative position. The Constitution enumerates the exclusive eligibility requirements and process for filling a legislative vacancy and does not preclude the appointment of a sitting commissioner or councilmember. No statutory provision prohibits such appointment either. The Attorney General's earlier conclusion that a common law rule would bar such appointments is in retrospect mistaken. That conclusion predated Supreme Court decisions confirming that the constitutional eligibility requirements are exclusive. Moreover, Washington has not adopted that common law principle, which has since fallen out of favor, and Washington's development of robust laws governing appointments to the legislature and the conduct of public officials confirms the state's decision not to be governed by this common law ethics principle.