



STATE OF KANSAS

## Office of the Attorney General

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**Curt T. Schneider**  
Attorney General

November 14, 1975

ATTORNEY GENERAL OPINION NO. 75- 431

Mr. Nick A. Tomasic  
District Attorney  
Wyandotte County Courthouse  
Kansas City, Kansas 66101

Re: Cities, First Class -- Public Utilities -- Power  
of Remaining Board Members to Fill Vacancies on  
the Board

Synopsis: Vacancies on the board of public utilities should be  
filled by the majority vote of the existing board  
members. A concurrence of a majority of all members  
elected is not required.

\* \* \*

Dear Mr. Tomasic:

You have asked for an opinion as to the authority of the  
members of the board of public utilities to fill vacancies on  
that board upon the happening of certain contingencies. That is,  
in the event the number of board members is reduced by resigna-  
tion or removal so that it is impossible or unlikely for three  
(3) members to meet, you have asked whether the remaining two  
members capable of meeting have the authority to fill the vacancies.

The pertinent provisions of K.S.A. 1974 Supp. 13-1221 provide:

"The board of public utilities shall  
consist of five members to be nominated  
and elected by the city at large for a  
term of four years, beginning with the  
spring election of 1931 in such cities  
and shall hold their office for a term  
of four years, and until their successors  
are elected and qualified.

\* \* \*

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The board shall elect from its own number a president and vice-president and shall appoint a secretary and fill any vacancy occurring in said board by a majority vote of said board, for the remainder of the term of the member whose retirement from the board created the vacancy in the board.  
(Emphasis supplied.)"

The other statute involved in this question, L. 1975 ch. 95 (amending K.S.A. 1974 Supp. 13-1222), provides:

"The board shall hold meetings regularly at least once in each week and shall designate the time and place thereof. It shall adopt its own rules of procedures and keep a record of its proceedings. All meetings, records and accounts of the board shall be public. Three (3) members shall constitute a quorum for the transaction of business. The salary of the members of the board of public utilities shall be one hundred dollars (\$100) per annum. Members of the board of public utilities shall be qualified electors of the city."

The issue then is whether the board is precluded from filling the vacancies because it is unable to have a meeting of the three (3) board members necessary to "constitute a quorum for the transaction of business." We think not. In 13-1221 the legislator has outlined the procedure to be followed in filling vacancies. It requires the board to fill vacancies by a majority vote of the board. We think the most reasonable construction to be given this requirement is that vacancies shall be filled by a majority vote of the "existing" board. If a three (3) member quorum were required for this purpose the statute would not contain the language emphasized above.

Public policy favors officers, boards and tribunals which are free to act in the public interest. Construing these statutes so as to render the board incapable of action would do violence to this policy.

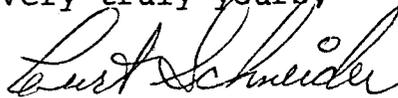
The California Supreme Court in Nesbitt v. Bolz, 13 Cal.2d 677, 91 P.2d 879 (1939), was faced with a case much like the instant one. In that case two of the five members of the city council were recalled at a recall election. The vacancies were

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to be filled by the city council. Before the three remaining councilmen could act upon the vacancies to be filled, one of them resigned. The other two councilmen refused to meet upon the ground that they were without authority to transact any business because they did not constitute a quorum. The court held the two remaining councilmen constituted a quorum for the purpose of filling the vacancies within the statute providing that a majority of the council shall constitute a quorum. The court recognized a distinction between statutes requiring concurrence of "a majority of all the members elected" and those legislative provisions not explicitly requiring the concurrence of a majority of the members elected, citing Pimental v. San Francisco, 21 Cal. 351; and Board of Commissioners of Salem v. Wachovia Loan and Trust Co., 143 N.C. 110, 55 S.E. 442.

An analagous distinction can be drawn in the present situation. L. 1975 ch. 95 requiring a three (3) member quorum for the transaction of business is equivalent to requiring the vote of majority of all members elected. No such explicit language is contained in 13-1221. Vacancies therefore may be filled by majority vote of the members of the board holding positions at the time the vacancy is to be filled.

Very truly yours,



CURT T. SCHNEIDER  
Attorney General

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