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MEMORANDUM

TO: Hon. London Breed, President of the Board of Supervisors and Acting Mayor
Hon. Members, Board of Supervisors

CC: Angela Calvillo, Clerk of the Board of Supervisors
Jason Elliott, Mayor's Chief of Staff

FROM: Jon Givner *JG*
Buck Delventhal *BSW*
Deputy City Attorneys
Jesse Capin Smith *JCS*
Chief Assistant City Attorney

DATE: January 12, 2018

RE: Board President's Duties as Acting Mayor

At the request of Board of Supervisors President and Acting Mayor London Breed, and in response to a number of questions that have been raised, we write to confirm our advice, consistent with the public memorandum about Mayoral succession we issued on December 12, 2017, that Supervisor Breed's role as Acting Mayor does not present a legal conflict with her role as President of the Board of Supervisors. She may continue to serve as Acting Mayor until the Board appoints a Mayor or the voters elect a Mayor at the June 5, 2018 election and that person takes office.

Summary

The Charter establishes the City government's structure and explicitly requires the Board President to serve as Acting Mayor when there is a vacancy in the Office of Mayor, to help ensure continuity in the City's government. While the Acting Mayor has all the powers and responsibilities of the Office of Mayor, the Board President does not actually hold that Office. For these reasons, there is no legal prohibition on Supervisor Breed serving in her current roles. To the contrary, the Charter requires the Board President to serve as Acting Mayor in the event of a Mayoral vacancy.

Accordingly, as we explain further below:

- Supervisor Breed's service as Acting Mayor does not violate the separation of powers between the legislative and executive branches as set forth in the City Charter.
- Supervisor Breed's service as Acting Mayor is not legally incompatible with her service as Board President, such that she cannot serve in both roles.
- Supervisor Breed's service as Acting Mayor and Board President does not conflict with the Charter requirement that the person holding the Office of Mayor "serve full time in that capacity."

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Background

Briefly, by way of background, upon Mayor Edwin M. Lee's death, Supervisor Breed became Acting Mayor by operation of law under Charter Section 13.101.5. Supervisor Breed did not take an oath of office to assume the role, nor did she need to do so because when she became the Acting Mayor she did not enter upon a new office. The City will hold a special election on June 5, 2018 to elect a Mayor to complete Mayor Lee's term. *See* Charter § 13.101.5(c). The Board of Supervisors can, by motion adopted by at least six of its members, appoint any qualified elector of San Francisco to serve as Mayor until the individual elected as Mayor at the special election takes the oath of office. Until a new Mayor assumes office—following either appointment by the Board of Supervisors or the June 5 election—Supervisor Breed will continue to serve as Acting Mayor by virtue of her position as President of the Board of Supervisors. *See* Charter § 13.101.5(b). And during that period, she will also continue to hold the Office of District 5 Supervisor.

Analysis

Below we confirm our advice regarding three specific questions recently raised in public discussion about the ability of the Board President to continue serving as Acting Mayor.

1. Separation of Powers.

The San Francisco Charter is the "the city's constitution," and it establishes the structure of City government. *Woo v. Superior Court*, 83 Cal.App.4th 967, 974 (2000) (citations omitted). The Charter establishes the Board of Supervisors as the City's legislative body, and establishes the Mayor as the City's chief executive. In general, the Charter is based on the principle of separation of powers between the Board, as the legislative branch, and the executive branch under the Mayor, the City Administrator, and the various City boards, commissions, and executive officers.

But the Charter also provides that this usual separation between the two branches of City government does not apply to the same extent when the Mayor's Office becomes vacant or when the Mayor is "absent from the state or temporarily disabled" without designating another person as Acting Mayor. Charter §§ 3.102, 13.101.5(b). In each of those situations, the Charter requires the President of the Board of Supervisors to assume the role of Acting Mayor, serving as the presiding member of the legislative branch while also overseeing the executive branch. *Id.*

Under the Charter, the Acting Mayor has all the duties and powers of the Office of Mayor. After the murder of Mayor Moscone, this Office advised in a public published opinion that upon the death of the Mayor, "the powers of the Mayor immediately and automatically shift to the President of the Board of Supervisors," who becomes the Acting Mayor and "assumes all the functions, powers, and duties of the Mayor." City Attorney Opinion 78-91, at 3, 4. We provided similar advice on the morning of Mayor Lee's death, and in other public opinions over several decades. *See* City Attorney Opinion 2003-05 ("Here, Supervisor Daly, while serving as acting Mayor, assumed all of the duties and powers of the Office of Mayor."); City Attorney Opinion 1953-662 ("[T]he member of the Board of Supervisors designated to act as Mayor during the Mayor's absence, has, in general, the same powers and duties as the Mayor.").

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Also, the Charter does not prescribe any time limit on the Board President's service as Acting Mayor. When there is a vacancy in the Office of Mayor, the City must hold an election to fill the office and the Board of Supervisors may appoint a successor Mayor to hold the office in the interim. *See* Charter § 13.101.5. But the Charter does not require the Board of Supervisors to appoint a successor Mayor within a certain amount of time after the vacancy occurs—or to appoint a successor Mayor at all. Accordingly, even though a term of extended service in the two roles is unprecedented in San Francisco, the Charter, as currently drafted, anticipates that the Board President may serve as Acting Mayor potentially for an extended period.

Since they are in the Charter, none of these rules violates the structure of City government required by the Charter. Rather, they are aspects of that structure.

2. Incompatible Offices.

Holding the position of Board President is not legally incompatible with serving as Acting Mayor. Under California Government Code section 1099, public officials may not hold incompatible offices, so, for example, the same person could not hold the Office of Supervisor and the Office of Mayor. But that rule does not apply here for two reasons.

First, although she exercises the powers and duties of the Mayor, the President of the Board does not hold the Office of Mayor. When the Mayor's Office is vacant, the President of the Board assumes the powers and duties of the Mayor because she is the President—not because she is the Mayor. As Santa Clara County Counsel, standing in the place of this Office, explained in a memorandum dated November 2, 2010 to Clerk of the Board, “[a]n Acting Mayor is holding the Mayor's Office *ex officio*, that is, by virtue of his or her other office which is granted full mayoral power because of the vacancy in the Office of Mayor.” Accordingly, if the Board President resigned as President or as Supervisor, she would no longer have the powers or duties of the Office of Mayor under Charter Section 13.101.5.

This structure in the Charter is why the Board President does not take a new oath of office as Mayor when a vacancy occurs. Under Article XX, Section 3 of the California Constitution, all public officers must take an oath of office “before they enter upon the duties of their respective offices.” “Until an officer-elect or officer-designate takes the oath of office . . ., he is not authorized to discharge the duties of the office” and therefore “is not an incumbent.” *Ensher, Alexander & Barsoom, Inc. v. Ensher*, 238 Cal.App.2d 250, 255-56 (1965) (citation omitted); *see also Smith v. County Engineer of San Diego County*, 266 Cal.App.2d 645, 653 (1968). The Board President does not take an oath as Mayor because she is not assuming the Office of Mayor; instead, she exercises the duties and powers of the Mayor's Office arising out of her role as President of the Board.

Second, even if Acting Mayor were a separate office held by the Board President—which it is not—the holding of the two offices still would be lawful because the Charter authorizes it. The doctrine of incompatible offices does not apply where “simultaneous holding of the particular offices is compelled or expressly authorized by law.” *See* Gov. Code § 1099. Here, as we discuss above, the Charter *requires* the Board President to serve as Acting Mayor when the Mayor's Office is vacant, so there cannot be a legal incompatibility between the two roles.

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3. "Full Time" Requirement.

Finally, Charter Section 3.100 does not prohibit the Board President from serving as Acting Mayor. Section 3.100 provides that the Mayor "shall serve full time in that capacity" and "shall devote his or her entire time and attention to the duties of the office, and shall not devote time or attention to any other occupation or business activity." Members of the public have suggested that the Board President may not serve as Acting Mayor while also serving as a Supervisor because doing so would violate Section 3.100. But that provision does not apply here because, as discussed above, the Board President does not actually hold the Office of Mayor while serving as Acting Mayor and the Charter mandates that the Board President handle the duties of both offices during the vacancy.

To the extent there is any ambiguity in the language of Section 3.100, a court would interpret the Charter in a way that harmonizes all its provisions, giving full effect to each. *Lungren v. Deukmejian*, 45 Cal.3d 727, 735 (1988). "[E]ach sentence must be read not in isolation but in the light of the statutory scheme . . ." *Id.* (citation omitted). Here, there is only one way to harmonize Section 3.100 with Sections 13.101.5 and 3.102: A person holding the Office of Mayor must serve full time in that capacity, but a Supervisor serving as Acting Mayor may also continue to serve as Supervisor. Any other interpretation of Section 3.100 would prohibit the Board President from serving as Acting Mayor in the event of a vacancy, rendering Charter Section 13.101.5(b) meaningless. Indeed, that interpretation would prohibit any City officeholder from serving as Acting Mayor when the Office of Mayor is vacant. A court would not interpret the Charter to reach such an absurd result. *Central Pathology Service Medical Clinic, Inc. v. Superior Court*, 3 Cal.4th 181, 191 (1992) ("In construing legislative intent, it is fundamental that a statute should not be interpreted in a manner that would lead to absurd results.") (citation and quotation marks omitted).

Conclusion

Until a new Mayor assumes office following a Board appointment or the June 5 election, and as long as she is Board President, Supervisor Breed will continue to serve as Acting Mayor. As we explain in this memorandum, there is no legal conflict between these two roles and indeed the Charter requires that for so long as the Mayor's Office may remain vacant under these circumstances, Supervisor Breed must handle both roles.