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MEMORANDUM

TO: John Arntz, Director of Elections

CC: Hon. Mayor Mark Farrell
Hon. Members, Board of Supervisors
Hon. Members, Elections Commission
Angela Calvillo, Clerk of the Board of Supervisors

FROM: Jon Givner
Deputy City Attorney 

DATE: January 30, 2018

RE: District 2 Vacancy – Election Date and Term Limits

Introduction and Summary

The Office of District 2 Supervisor became vacant on January 23, 2018, when former Supervisor Mark Farrell assumed the Office of Mayor. Under Charter Section 13.101.5, Mayor Farrell must appoint a qualified resident of District 2 to fill the vacancy. We write to confirm our advice addressing questions regarding the date of the election at which the voters will elect a successor to the seat, and whether an appointee's completion of the unexpired term of the office of District 2 Supervisor will constitute a full term of office for the purpose of the Charter's term limits.

As we explain further below, because the regular election for District 2 Supervisor is scheduled to occur on November 6, 2018—less than one year after the vacancy arose—the election will be held on that date. Questions have been raised about whether the City must hold a vacancy election for the District 2 seat in June in addition to the regularly scheduled November election. The Charter does not require a June election here.

The primary purpose of Section 13.101.5 is to require that in most instances an election for the vacant seat occur within a year of the vacancy, and without the need to call a stand-alone special election to fill the vacancy. Section 13.101.5 does so by establishing a general rule and two exceptions to that rule, each tying the election to fill the vacant seat to already scheduled elections to ensure that purpose is fulfilled and reduce the costs of administering elections. Arguably this situation fits into all three: the general rule (which would provide for the June election), the first exception (which looks to next scheduled election for the same seat and would provide for the November election) and the second exception (which looks to the next scheduled election for another seat on the same board and would go back to the June election).

But the voters did not intend to require two elections for the vacated seat within one year under these unusual circumstances. We advised in a 2015 public opinion that the two exceptions to the general rule should be read sequentially—that is, one does not reach the second exception (an election for a different seat on the same board) unless the first exception (an election for the same seat) does not apply. The November election, which is the next regularly scheduled election for the very seat that has been vacated, achieves the goal of having an election to fill the seat within a year. Holding two elections for the seat within five months, especially after the

MEMORANDUM

TO: John Arntz, Director of Elections
DATE: January 30, 2018
PAGE: 2
RE: District 2 Vacancy – Election Date and Term Limits

nomination deadline and initial public campaign financing deadline for the June election have passed, would be inconsistent with the voters' intent. And it would entail an unnecessary expenditure of taxpayer funds, including additional election costs and public funding for campaigns in both elections. Accordingly, the appointee to the office of District 2 Supervisor may serve until the winner of the November 6, 2018 election assumes office, which will be at noon on January 8, 2019.

If the appointee completes former Supervisor Farrell's term and then wins election for a new term in November 2018, the period served completing Supervisor Farrell's term would not count as a full term for the purpose of term limits. The approximately 11-month appointment period is less than two years of Supervisor Farrell's four-year term. The term limits provision of the Charter does not count a period in office for less than two years as a term.

Background

On December 12, 2017, Mayor Edwin M. Lee passed away while in office. On January 23, 2018, the Board of Supervisors appointed District 2 Supervisor Mark Farrell to serve as Mayor under Charter Section 13.101.5(b), until the winner of the June 5, 2018 special election assumes office to complete the late Mayor Lee's term. When Mayor Farrell assumed office, the office of District 2 Supervisor became vacant. The current four-year term of office for District 2 Supervisor will end on January 8, 2019. The regular election to fill the office of District 2 Supervisor is scheduled to occur on November 6, 2018. The City will also hold an election on June 5, 2018, at which a special election for District 8 Supervisor will occur to fill the vacancy created when former Supervisor Scott Wiener assumed the office of State Senator in December 2016.

The June 2018 election is more than 120 days after the District 2 seat became vacant. The nomination period for Board of Supervisors races for the June 5 election ended on January 9, 2018. The initial public financing deadline for the June election also passed on the same date. And the period to challenge candidates' ballot materials concluded on January 22. Those deadlines are established by the City's Municipal Elections Code and Campaign and Governmental Conduct Code.

Analysis**I. CHARTER SECTION 13.101.5(c) REQUIRES THE CITY TO HOLD THE NEXT ELECTION FOR DISTRICT 2 SUPERVISOR ON NOVEMBER 6, 2018.**

When a vacancy occurs in an elective office other than the Office of Mayor, the Charter empowers the Mayor to fill the vacancy until the voters can elect a person to take the seat. *See* Charter Section 13.101.5(a). In 2001, the voters amended the Charter to set rules for when elections following vacancies must take place. Section 13.101.5(c) states:

Any person filling a vacancy pursuant to subsection (a) or (b) of this Section shall serve until a successor is selected at the next election occurring not less than 120 days after the vacancy, at which time an election shall be held to fill the unexpired term, provided that (1) if an election for the vacated office is scheduled to occur less than one year after the vacancy, the appointee shall serve until a successor is selected at that election or (2) if an election for any seat on the same board as the vacated seat is scheduled to occur less than one year but at least 120 days after the

MEMORANDUM

TO: John Arntz, Director of Elections
DATE: January 30, 2018
PAGE: 3
RE: District 2 Vacancy – Election Date and Term Limits

vacancy, the appointee shall serve until a successor is selected at that election to fill the unexpired term.

Under the plain language of Section 13.101.5(c), the general rule is that the election for the vacated office would occur at the next election more than 120 days following the vacancy. This rule is subject to two exceptions.

- First, if the regular election for the vacated office is scheduled to occur less than one year from the vacancy, the City will not hold a new vacancy election to fill the seat. Rather, the City will hold an election for the vacated seat as scheduled, and the appointee may serve in the vacated seat until the end of the term.
- Second, if an election for a seat on the same board will occur more than 120 days but less than one year from the date of the vacancy, then the City will hold a special election to coincide with that election to fill the vacated seat.

Here, a plain reading suggests that both of the exceptions could apply. The first exception could apply because there is a regularly scheduled election for District 2 Supervisor in November 2018, less than one year from the vacancy, so subsection 13.101.5(c)(1) provides that no vacancy election would occur. The second exception could apply because there is an election for another seat on the Board of Supervisors—District 8 Supervisor—in June 2018, more than 120 days from the date of the vacancy, so subsection 13.101.5(c)(2) provides for a vacancy election for the District 2 seat in June. The question, then, is whether the election for District 2 Supervisor should occur at the regular election in November 2018 or whether the Charter requires the election to fill the District 2 vacancy to occur in June 2018 followed by the regular election for the same seat in November 2018.

Section 13.101.5 does not state that the earliest possible election date should control. Section 13.101.5 provides that as a general rule the City must hold an election at the next scheduled election more than 120 days away—effectively the earliest possible date—in many instances, but *not* when one of the two exceptions applies. Indeed, both exceptions *extend* the election to fill the vacant seat past the date of the election that would be set forth under the general rule, as long as that scheduled election in the exception will occur within one year of the vacancy.

Section 13.101.5 also does not state which of the two exceptions takes priority if they both could apply standing alone. But this Office has previously described the two exceptions in Section 13.101.5 as sequential. That means that here the second exception (requiring a June election and tied to the election for a different seat on the Board) applies only if the first exception (requiring a November election and tied to the same seat on the Board) does not. As we explained in a public memorandum issued in 2015: “If an election for the vacated seat is scheduled to occur less than one year after the vacancy occurs, then the appointee may hold the seat until that election, at which point the voters would elect a person to serve the next term. . . . If there is no regularly scheduled election for the vacated seat on the Board within a year, but an election for any other seat on the Board is scheduled to occur between 120 days and one year after the vacancy, then the appointee may serve until a successor is selected at that election.” See “Swearing-in Dates Following Vacancy Elections,” November 4, 2015, available at <https://www.sfcityattorney.org/wp-content/uploads/2015/07/OP-2015-11-04-BOSD3.pdf>.

This sequential description of the two exceptions is consistent with the goals of Charter Section 13.101.5 and avoids consequences that the voters could not have intended. The voters

MEMORANDUM

TO: John Arntz, Director of Elections
DATE: January 30, 2018
PAGE: 4
RE: District 2 Vacancy – Election Date and Term Limits

adopted Section 13.101.5 in Proposition C in 2001. Where the plain language is not clear, to determine the meaning of a Charter section, a court would consider the legislative history of the measure, comprising the ballot argument and other materials presented to the voters at that election. *Hodges v. Superior Court*, 21 Cal.4th 109, 113-115 (1999). Before the voters adopted Section 13.101.5, a person appointed to fill a vacancy on the Board of Supervisors or other City elective offices could serve for up to 29 months without the City holding an election for the seat. In most situations, the effect of Proposition C was to shorten from 29 months to no more than 12 months the time that a person appointed to fill a vacancy could serve before standing for an election.

The central purpose of Proposition C, as explained in the official materials submitted to the voters, was to ensure that in most instances the City will hold an election for a vacant seat within a year of the vacancy. The official ballot digest described the proposal as in most cases “shorten[ing] to no more than one year the length of time an appointee could serve before there is an election for the office,” and explained that “[i]n general, a person appointed to an elective office would serve until an election occurring at least 120 days, and no more than 12 months” and that “[n]o special election would be called to fill the vacancy.” See https://sfpl.org/pdf/main/gic/elections/November6_2001.pdf. The official argument in the ballot pamphlet supporting Proposition C, submitted by the Board of Supervisors, similarly described the purpose of the measure: “In most cases, this Charter Amendment would limit the time to one year that appointees would serve without standing for election. The appointees would face the voters at elections already scheduled, resulting in no additional cost to administer elections.” See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 740 n.14 (to determine voter intent, courts may consider ballot arguments and other official materials provided to the voters). Neither the ballot digest nor the official argument indicate that Proposition C’s purpose was to require the City to hold an election for the vacant seat on the earliest possible date, and, as mentioned above, the measure itself generally provides the opposite.

Interpreting the Charter to require the election in November rather than June is consistent with this voter intent and avoids two incongruous results. First, the alternative interpretation—that the City must hold a vacancy election in June even when the regularly scheduled election for the same seat will be held in November—would require the City to hold two elections for the District 2 seat within five months, that is, the special vacancy election in June and the regular election in November. This situation would unnecessarily increase the burdens on the taxpayers, as well as on the Department of Elections, the candidates, and the voters. The official argument supporting Proposition C explained that one of the goals of the measure was to avoid any “additional costs to administer elections.” But holding two elections for the same seat would create additional election costs. Those costs include not only the costs to add the election to the June ballot, but also the costs of the City funded public campaign financing for an additional election and the City’s expenditure of significant administrative resources to address the passage of critical election deadlines, as discussed below. In construing legislative intent, it is fundamental that a statute should not be interpreted in a manner that would lead to absurd results.” *Central Pathology Service Medical Clinic v. Superior Court* (1992) 3 Cal.4th 181, 191 (quoting *People v. Morris* (1988) 46 Cal.3d 1, 15).

By contrast, in rare situations, the Charter unambiguously requires two elections for a single office within a year, as with the election for the vacated District 8 seat this year. But the City must hold these two elections only because there was no scheduled City election within a year of the seat being vacated by Supervisor Wiener in 2016, so the Charter mandated a vacancy

MEMORANDUM

TO: John Arntz, Director of Elections
DATE: January 30, 2018
PAGE: 5
RE: District 2 Vacancy – Election Date and Term Limits

election at the next possible date in June 2018. Nothing in the legislative history of Proposition C indicates that the voters intended to require dual elections in a circumstance like the one presented by the District 2 vacancy where the regularly scheduled election for the vacated seat will occur within a year of the vacancy. In that situation, the voters in Section 13.101.5(c)(1) provided that the regularly scheduled election will occur and the City will hold no vacancy election at all.

The second, related reason that requiring a June election would be unreasonable is that legal deadlines to run in that election have already passed. The nomination period for Board of Supervisors races for the June 5 election began on December 15, 2017 and ended January 9, 2018. *See* Municipal Elections Code § 205(a). The deadline for candidates in the race to submit a statement of intent to participate in the City's public campaign financing program was January 9. *See* Campaign & Gov'tal Conduct Code § 1.142(a). And the public review period to review and challenge candidates' proposed ballot materials including legal names, candidate qualification statements, ballot designations, and translated or transliterated Chinese names began on January 10 and ended January 22. *See* Municipal Elections Code § 590(a). These deadlines are legally binding, enacted by Board ordinance. The calling of a June election would compromise the ability of any candidates to fulfill these deadlines. It is unlikely that the voters in 2001 would have anticipated or wanted to require the City to change its laws suddenly to authorize a quick election when there is already a regularly scheduled election for the seat within a year. Proposition C adopted rules for an orderly and efficient selection process, precisely to avoid one that is rushed, uncertain, or chaotic.

For all these reasons, and consistent with our 2015 public opinion, Section 13.101.5(c) requires the City to hold the regularly scheduled election for the District 2 seat in November 2018 but does not require the City to hold an additional vacancy election in June. The person appointed to fill the vacancy as District 2 Supervisor may hold the seat until the winner of the November election assumes office on January 8, 2019.

II. AN APPOINTEE'S COMPLETION OF THE UNEXPIRED TERM WILL NOT COUNT AS A FULL TERM.

Charter Section 2.101 provides that no person may serve more than two successive terms as Supervisor. Under the Charter's "rounding up" rule, any person "appointed . . . to the office of Supervisor to complete in excess of two years of a four-year term shall be deemed for purpose of this section to have served one full term."

There are approximately 11 months remaining in the current term of office for District 2 Supervisor. Mayor Farrell's appointee to the office will serve until the winner of the November 6, 2018 election assumes office on January 8, 2019. Because the unexpired portion of the term that the appointee may serve does not exceed two years, the appointee's service will not constitute a full term under Section 2.101. If the appointee goes on to win the November 6, 2018 election, then the appointee will be eligible to serve up to two successive four-year terms starting on January 8, 2019.

Attachments:

Ballot digest for Proposition C (2001)

Official argument for Proposition C (2001)

Elective Office Vacancies



PROPOSITION C

Shall the rules for filling vacancies in elective offices be changed to shorten the time that a person appointed to fill a vacant office would serve before there is an election for that office?

YES ←
NO ←

Digest

by Ballot Simplification Committee

THE WAY IT IS NOW: If a vacancy occurs on the Board of Supervisors or in the office of the Assessor-Recorder, City Attorney, District Attorney, Public Defender, Sheriff, or Treasurer, the Mayor appoints a person to fill the vacancy. If the office of Mayor becomes vacant, the President of the Board of Supervisors becomes Acting Mayor and serves until the Board of Supervisors appoints a person to fill the vacancy.

If less than 29 months remain in the term of the vacated office, the person appointed to fill the vacancy serves out the remainder of the term. If more than 29 months remain in the term of office, the person appointed to fill the vacancy serves only until the next scheduled election occurring at least 120 days after the appointment. At that election, the voters elect a candidate to complete the term.

If a vacancy occurs on the Board of Education or Governing Board of the Community College District, the Mayor appoints a person to fill the vacancy. That person completes the term regardless of how much time remains.

The Charter currently defines the circumstances that result in a vacancy as death, resignation, permanent disability, or the inability to carry out the responsibilities of the office.

THE PROPOSAL: Proposition C is a Charter Amendment that—in most cases—would shorten to no more than one year the length of time an appointee could serve before there is an election for the office. In general, a person appointed to an elective office would serve until an election occurring at least 120 days, and no more than 12 months, after the office becomes vacant. At that election, the voters would elect a candidate to complete the term. No special election would be called to fill the vacancy.

Vacancies occurring on the Board of Supervisors, Board of Education, Governing Board of the Community College District or in the office of the Mayor, Assessor-Recorder, City Attorney, District Attorney, Public Defender, Sheriff, or Treasurer would be subject to these rules.

Proposition C would specify that a vacancy caused by recall of an elected official would be subject to these rules.

A "YES" VOTE MEANS: If you vote yes, you want to make these changes to the election rules for filling a vacated elective office.

A "NO" VOTE MEANS: If you vote no, you do not want to make these changes.

Controller's Statement on "C"

City Controller Edward Harrington has issued the following statement on the fiscal impact of Proposition C:

Should the proposed Charter amendment be adopted, in my opinion, there will be no significant impact on the cost of government.

How Supervisors Voted on "C"

On July 23, 2001 the Board of Supervisors voted 11 to 0 to place Proposition C on the ballot.

The Supervisors voted as follows:

Yes: Ammiano, Daly, Gonzalez, Hall, Leno, Maxwell, McGoldrick, Newsom, Peskin, Sandoval, Yee

THIS MEASURE REQUIRES 50%+1 AFFIRMATIVE VOTES TO PASS.

ARGUMENTS FOR AND AGAINST THIS MEASURE IMMEDIATELY FOLLOW THIS PAGE. THE FULL TEXT BEGINS ON PAGE 46
SOME OF THE WORDS USED IN THE BALLOT DIGEST ARE EXPLAINED ON PAGE 40



Elective Office Vacancies

PROPONENT'S ARGUMENT IN FAVOR OF PROPOSITION C

San Francisco, which prides itself in letting the voters decide issues of importance to the City, is behind the times and out of step when it comes to filling vacancies to local office.

In California, if a vacancy occurs for the U.S. Senate, the Governor's appointee must face the voters within two years. Likewise, if a vacancy occurs for the U.S. Congress or for the California legislature, voters elect the successor within twelve months.

In San Francisco, however, appointees to City-wide office and for Supervisor may serve for up to 29 months, and to the Community College and School Boards for up to 48 months before they must face the voters.

With the exception of a vacancy for Mayor, which is filled by the Board of Supervisors, all other vacancies are filled by the Mayor.

From 1996 to 1999, the Mayor appointed six members to the Board of Supervisors - a majority of the old Board.

This tended to limit open debate at the Board on the issues of great importance to San Francisco, and undermine the independence of the Board as a co-equal branch of government.

The voters last Fall, stated, loud and clear, that they wanted to see balance restored to City government, and to make the Board

more accountable to the voters.

Proposition C would do just that.

In most cases, this Charter Amendment would limit the time to one year that appointees would serve without standing for election. The appointees would face the voters at elections already scheduled, resulting in no additional cost to administer elections.

Proposition C would restore balance to City Government, put San Francisco in step with the rest of the State, and shift power to fill all elective offices back to the voters where it rightfully belongs.

Vote Yes on Proposition C.

Board of Supervisors

How Supervisors Voted to Submit this Argument

The Supervisors voted as follows on August 20, 2001:

Yes: Ammiano, Daly, Gonzalez, Hall, Leno, Maxwell, McGoldrick, Newsom, Peskin, Yee

Absent: Sandoval

REBUTTAL TO PROPONENT'S ARGUMENT IN FAVOR OF PROPOSITION C

NO REBUTTAL TO PROPONENT'S ARGUMENT WAS SUBMITTED