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REPORT TO THE COMMITTEE ON RULES, OPEN
GOVERNMENT, AND INTERGOVERNMENTAL RELATIONS

DISCUSSION OF CHARTER CHANGES RELATED TO ELECTIONS

INTRODUCTION

Over the last few years, it has come to the City Council's attention that certain provisions in the San Diego Charter [Charter] related to the time-lines for filling City Council District vacancies by election are not practical or workable. Also, the question has been raised about whether write-in candidates should be allowed in the general run-off elections. A term limits issue also arose recently that was the subject of litigation. Accordingly, this Report discusses those Charter sections that should be reviewed for possible placement on the ballot for revision.

DISCUSSION

I. 49-Day Time Period Between the Primary and Run-off Elections to Fill a Vacancy in a Council District Under Charter Section 12.

The most recent time issue was the requirement in Charter section 12 that a special run-off election to fill a Council District vacancy be held within 49 days of the primary unless there is a regular municipal or statewide election scheduled to be held within 90 days. This 49-day time period conflicts with State law requirements that allow the registrar up to 28 days to certify the result of the primary election, and another State law that provides for absentee voting to begin 29 days before an election. These two time periods add up to 57 days and leave no room if there were to be an election contest or other unforeseen problem. The recent elections for Council District 2 and 8 also ran into a problem with the 49th day falling during the December holiday season and on a Tuesday after a holiday, which generally is not a day permitted under State law to hold an election.

There are two suggestions to make the filling of vacancies more practical. First, would be simply to increase the time requirement from 49 days to 60 or more days. The advantage of this would be to allow the San Diego County Registrar of Voters [Registrar] time to complete the certification, declare the results, and print the ballots so that absentee voting can begin. The City Clerk has advised that after talking with the Registrar, at least 90 days would be the recommended time period between the special and run-off elections. It is also proposed that the phrase "regular municipal or statewide election" be changed to "municipal or statewide

election.” The reason for this suggestion is to permit the special election to fill the vacancy be consolidated not only with a “regular” municipal or statewide election, but any “special” municipal or statewide election that might be scheduled within the specified time period. Accordingly, the proposed revisions to Charter section 12(h) are shown below with deletions in brackets and new language underlined:

- (h) If a vacancy occurs for any reason in the office of a Council District, the procedures set forth in Charter section 12(h) shall be followed:
 - (1) If the vacancy occurs for any reason other than a successful recall election, and,
 - (A) If the vacancy occurs with one (1) year or less remaining in the term, the Council shall appoint a person to fill the vacant seat on the City Council. Any person appointed by the Council to fill a vacant Council District seat shall not be eligible to run for that office for the next succeeding term; or,
 - (B) If the vacancy occurs with more than one (1) year remaining in the term, the Council shall call a special election to be held within ninety (90) days of the vacancy, unless there is a [regular] municipal or statewide election scheduled to be held within 180 days of the vacancy. If there is a [regular] municipal or statewide election scheduled to be held within 180 days of the vacancy, the Council may consolidate the special election with that [regular] election.
 - (i) If one candidate receives the majority of votes cast for all candidates in the special election, the candidate receiving the majority of votes cast shall be deemed to be and declared by the Council to be elected to the vacant office.
 - (ii) If no candidate receives a majority of votes cast in the special election, a special run-off election shall be held within [forty-nine (49)] sixty (60) days of the first special election, unless there is a [regular] municipal or statewide election scheduled to be held within (90) days of the proposed special run-off election date, at which time the City Council may consolidate the special run-off election with that [regular] election. The two (2) candidates receiving the highest number of votes cast for the vacant seat in the first special election shall be the only candidates for the vacant Council seat and the names of only those two (2) candidates shall be printed on the ballot for that seat.

Charter section 265 also contains provisions to fill a vacancy in the Office of the Mayor that appear to be modeled after Charter section 12. Accordingly, it may be appropriate to extend the 49-day time period in that section as well.

II. 30-Day Time Period to Fill Vacancies by Appointment Under Charter Sections 24 (Mayor) and 40 (City Attorney).

Another issue that arose following the former Mayor's resignation was an ambiguity between the San Diego Municipal Code [Municipal Code] and the City Charter with respect to the 30 days to fill the vacancy by appointment. Charter section 24 provides that the vacancy in the Office of Mayor must be filled "within thirty (30) days after the vacancy" or the Council must immediately call an election. However, the Municipal Code provides that the vacancy filled by appointment must be done within thirty "business" days. SDMC § 27.0701, 27.0801, and 27.0902(b). A similar issue exists with Charter section 40 that provide that a City Attorney vacancy shall be filled by appointment within "thirty (30) days" after the vacancy occurs. There is no time period in Charter section 12 to fill a vacancy in a council district by appointment or in Charter section 265 to fill a vacancy in the Office of the Mayor by appointment.

Charter section 24 provides, in relevant part:

In the event of a vacancy occurring in the Office of the Mayor, existing by reason of any cause, the Council shall have authority to fill such vacancy, provided, however, that if the Council shall fail to fill such vacancy by appointment *within thirty (30) days* after the vacancy, the Council must immediately cause an election to be held to fill such vacancy. Any person appointed to fill such vacancy, shall hold office only until the next regular municipal election, at which date a person shall be elected to serve for the remainder of such unexpired term. (*Emphasis added*).

Similarly, Charter section 40 provides, in relevant part:

In the event of a vacancy occurring in the Office of the City Attorney by reason of any cause, the Council shall have authority to fill such vacancy, with said authority shall be exercised *within thirty (30) days* after the vacancy occurs. Any person appointed to fill such vacancy shall hold office until the next regular municipal election, at which time a person shall be elected to serve the unexpired term. Said appointee shall remain in office until a successor is elected and qualified. (*Emphasis added*).

Assuming that Charter sections 24 and 40 are interpreted to mean 30 "calendar" days, a simple solution would be to revise the Municipal Code to conform to the Charter and require that vacancies filled by appointment be done within 30 "calendar" days. Or if additional time is deemed to be in the best interests on the City, Charter sections 24 and 40 could be amended to specify 30 "business" days, or a lengthier period of time, such as "45 calendar days."

III. Charter Amendments to Allow Write-in Candidates in the General Election.

The issue of allowing write-in candidates in the general run-off elections was discussed at the Committee on Rules, Intergovernmental Relations, and Finance on at least two occasions last year. *See City Att'y Report* Nos. 2005-2 (Feb. 1, 2005) and 2005-3 (Feb. 10, 2005). The Charter has been interpreted to allow write-in candidates in the primary election, but not in the general run-off election.

Charter section 10 currently provides, in relevant part:

All elective officers of the City shall be nominated at the municipal primary election. In the event one candidate receives the majority of votes cast for all candidates for nomination to a particular elective office, the candidate so receiving such majority of votes shall be deemed to be and declared by the Council to be elected to such office. In the event no candidate receives a majority of votes cast as aforesaid, the two candidates receiving the highest number of votes for a particular elective office at said primary shall be the candidates, and only candidates, for such office and the names of only those two candidates shall be printed upon the ballots to be used at the general municipal election. (Emphasis added).

Charter section 10 also provides, in relevant part:

At the general municipal election held for the purpose of electing any other elective officer there shall be chosen by all of the electors of the whole City from among the candidates chosen at the primary one candidate to succeed any other elective officer whose term expires in December succeeding the election. (Emphasis added).

According to the plain language of Charter section 10, all elective officers shall be nominated at the primary election, and only the two candidates receiving the highest number of votes at the primary shall be the candidates for such office. This section emphasizes that these two candidates shall be the *only* candidates for the general run-off election. Based on the language in Charter section 10, this Office has opined that the Charter would appear not to preclude write-ins at primary elections, but that it does preclude write-ins in the general election.

A ballot measure could be prepared for the voters to decide whether to allow write-in candidates in the general election. To accomplish this, Charter section 10 could be amended as follows (new language underlined):

All elective officers of the City shall be nominated at the municipal primary election. In the event one candidate receives the majority of votes cast for all candidates for nomination to a particular elective office, the candidate so

receiving such majority of votes shall be deemed to be and declared by the Council to be elected to such office. In the event no candidate receives a majority of votes cast as aforesaid, the two candidates receiving the highest number of votes for a particular elective office at said primary shall be the candidates, and only candidates, for such office and the names of only those two candidates shall be printed upon the ballots to be used at the general municipal election. Nothing in this paragraph shall be construed to preclude the inclusion of a space for write-in candidates on any municipal election ballot.

At the general municipal election held for the purpose of electing Council members other than the Mayor the electors of each Council District shall select from among the candidates chosen at the primary election in that district, and any qualified write-in candidates, one candidate for the office of the Council member whose term expires the succeeding December. At the general municipal election held for the purpose of electing any other elective officer there shall be chosen by all of the electors of the whole City from among the candidates chosen at the primary, and from any qualified write-in candidates, one candidate to succeed any other elective officer whose term expires in December succeeding the election. The qualified candidate who receives the most votes for a particular elective office at the general municipal election shall be deemed to be and declared by the Council to be elected to such office.

This amendment to the Charter would change the present requirement that a candidate receive the majority of the votes to be elected, to a plurality. Depending on the number of qualified candidates, an individual could be elected to office with a relatively small percentage of the vote. If it is determined that the voters should decide whether to allow write-in candidates in the run-off elections, the City Council may also want to consider similar amendments to Charter sections 12 (filling a council district vacancy) and Charter section 265 (filling a Mayoral vacancy). Both of these Charter sections also contain language similar to Charter section 10 limiting the choice of the electorate at the general election to only the two candidates chosen at the primary.

IV. Clarification of Term Limits in Charter Section 12(f).

In August 2004, Councilmember Charles Lewis passed away leaving a vacancy in District 4. Former Councilmember George Stevens, who had been precluded from running in the election where Lewis was chosen due to term limits, declared his candidacy in the special election to serve the remainder of Lewis' term. Litigation was then filed by a citizen, Lou Conde, who contended that the term limits in Charter section 12(f) prevented Stevens from running for the District 4 seat.

Charter section 12(f) provides, in relevant part:

. . . no person shall serve more than two consecutive four-year terms as a Council member from any particular district. If for any reason a person serves a partial term as Council member from a particular district in excess of two (2) years, that partial term shall be considered a full term for purposes of this term limit provision. . .

Conde contended that the term limits in Charter section 12(f) would be violated if Stevens were to be elected because less than four years had elapsed since Stevens last served as a councilmember. However, the Court of Appeals concluded that a four-year break in service is not required, and stated: “The charter and municipal code are silent regarding whether a councilmember must no longer represent a district for an entire four-year term before becoming eligible to run for the seat he or she previously held for two consecutive four-year terms. Accordingly, we decline Conde’s invitation to read into the Charter and Municipal Code a requirement that they do not contain.” *Conde v. City of San Diego*, 134 Cal. App. 4th 346, 351 (2005).

To clarify this issue, Charter section 12(f) could be amended to include a statement that: “No person having served two successive year terms may serve as a Council member, either by election or appointment, until at least four years after the expiration of the second successive term in office.” The electorate could decide whether a four-year break in service is desired, or to leave the Charter as it is, with no specified time period required to pass after a Councilmember serves two consecutive four-year terms. Similar term limit language is found in Charter sections 24 and 265(d) related to the Mayor, and Charter section 40 related to the City Attorney. Accordingly, amendments to those sections may be appropriate.

CONCLUSION

The ballot measures to amend the Charter related to these elections issues are summarized as follows:

1. A ballot measure to extend the 49-day time period problem between a primary special election and run-off special election to fill a vacancy in a council district (Charter section 12) and Office of the Mayor (Charter section 265) and to allow consolidation of the special election to fill the vacancy with any municipal or statewide election, rather than only a “regular” election.
2. A ballot measure to extend the 30-day time period to fill vacancies in the Office of the Mayor (Charter section 24) and Office of the City Attorney (Charter section 40).

3. A ballot measure to allow write-in candidates in the general run-off elections (Charter section 10) and special run-off elections for vacancy in a Council District (Charter section 12) and Office of the Mayor (Charter section 265)
4. A ballot measure to provide that a Councilmember must have a four-year break in service after serving two consecutive terms before being eligible to run for the same Council District office. (Charter section 12(f)). Consider a similar measure for term limits for the Mayor (Charter sections 24 and 265(d)) and the City Attorney (Charter section 40).

The above ballot measures may overlap to some extent, and may effect the new Charter provisions relating to the Mayor under the Mayor-Council form of government. Accordingly, any direction from the Rules Committee to prepare ballots for the City Council's consideration in the next few weeks may require some additional research and coordination of these measures. Any issues that are identified will be reported to the City Council at that time.

Respectfully submitted,

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