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REPORT TO THE CITY COUNCIL

**LEGAL REQUIREMENTS AND CALLING OF A SPECIAL ELECTION AFTER THE
MAYOR RESIGNS FROM OFFICE**

INTRODUCTION

Mayor Bob Filner has signed a letter of resignation dated August 23, 2013, stating that he will resign from office effective August 30, 2013 at 5 p.m.

This Report addresses the City's duties under the San Diego Charter and Municipal Code to fill the vacancy, as certain procedures changed when the City adopted the Strong Mayor form of governance. This Report also addresses the timing of a special election and answers preliminary questions about the Council President's expanded role when the Mayor's Office is vacant. This Office will supplement this opinion as the process unfolds.

QUESTIONS PRESENTED

1. What are the Council's duties after the Mayor resigns and when must a special election be held to fill the vacancy?
2. What are the Council President's duties during the time between the Mayor's resignation and the date a new Mayor is sworn into office?
3. What happens to the pending recall effort after the Mayor has resigned?

SHORT ANSWERS

1. Once the "vacancy" is confirmed by the Mayor in a written letter of resignation, the Council must call a special election to be held within 90 days of the vacancy. If no candidate receives a majority of votes at the special election, a special run-off election is to be held no later than 49 days after the first (primary) special election.

2. The Council President takes on limited executive duties during the time between the Mayor's resignation and the date that a new Mayor is sworn into office. The Council President will have authority to supervise staff remaining in the Office of the Mayor, "direct and exercise control over the City Manager in managing the affairs of the City under the purview of the Mayor," and exercise certain other powers as the Charter provides. Significantly, the Council President will retain his rights as a member of the Council and continue to preside over Council meetings, but is not authorized to exercise the power of veto over Council actions.

3. The pending recall effort becomes moot upon the Mayor's resignation from office.

ANALYSIS

I. THE SAN DIEGO CHARTER AND MUNICIPAL CODE DIRECT THE PROCESS TO BE USED WHEN THE MAYOR RESIGNS FROM OFFICE.

The San Diego Charter (Charter) and Municipal Code provide the procedures the City must follow when the Mayor resigns, as follows:

A. The Date of the "Vacancy" Must Be Determined

The Charter defines a "vacancy" in the office of the Mayor as one that results from "death, resignation, or recall." San Diego Charter § 265(j). If a vacancy occurs by reason of resignation, "the date of the vacancy will be the date specified in the written letter of resignation or, if there is no date certain specified in the letter, upon the date of receipt of the letter by the City Clerk." *Id.*, San Diego Municipal Code (SDMC) § 27.0703(a). The Charter assumes a "written letter of resignation" will be submitted before the process to fill the position may begin. Here, the Mayor's resignation was confirmed in a letter provided as part of the settlement of legal claims.

B. The Charter Directs that the Vacancy in the Mayor's Office Must Be Filled by Special Election

The Mayor's term began on December 3, 2012 and was scheduled to end in December 2016. Charter section 265(e)(2) provides the process to fill a vacancy if the Mayor resigns from office with more than one year remaining in his term:

(e) If a vacancy occurs in the Office of Mayor for any reason other than a successful recall election, and,

....

(2) If the vacancy occurs with more than one year remaining in the term, *the Council shall call a special election to be held within ninety 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.

San Diego Charter § 265(e)(2) (Emphasis added).

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 Office of Mayor. San Diego Charter § 265(e)(2)(A).

If no candidate receives a majority of votes cast in the special election, "a special run-off election shall be held within forty-nine days of the first special election," unless the City can consolidate the run-off with a "regular municipal or statewide election scheduled to be held

within ninety days of the proposed special run-off election date.” San Diego Charter § 265(e)(2)(B).

The timing of the Mayor’s resignation will not allow the City to seek to consolidate the special election, as the next regularly scheduled municipal and statewide election is set for June 3, 2014.

The candidate with the majority of the votes cast will be sworn into office as Mayor after election officials complete their canvass and certification of the election results. The San Diego County Registrar of Voters (ROV) has 28 days to complete the canvass after an election. The City Clerk will then certify the election results, present them to the Council, and the Council will adopt a resolution certifying the results and declaring who has been elected. At that point, the new Mayor may be sworn in. The candidate who assumes the office will serve as Mayor for the remainder of the unexpired term. San Diego Charter § 265(g). In this instance, the partial term will count as a full term for purposes of the term limit provisions of the Charter. San Diego Charter § 270(d).

C. The Charter Requires the Council to Call the Special Election

As set forth above, the Charter directs that a special election must be held “within ninety days of the vacancy.” San Diego Charter § 265(e)(2). The Council thus needs to take the following actions:

- Adopt an ordinance calling a special election, to be held within 90 days of the date of the vacancy. Assuming the Mayor’s resignation is effective August 30, 2013, the first (primary) special election must be held by November 28, 2013 (Thanksgiving).
- Adopt a resolution authorizing the City to contract with the ROV to conduct the election. This Office defers to the City Clerk, as the City’s elections official, to provide information regarding how the election would be run, the potential involvement of the ROV, the timing of candidate requirements, and the costs of a special election.

The Charter does not address how quickly the Council must meet to call the special election.¹ The Council could consider this at its next regularly scheduled meeting of September 9, 2013, or it could call a special meeting for that purpose.

The City Clerk, as the City’s elections official, would advise on the potential schedule for the special election. As set forth above, if the Mayor’s resignation is effective August 30, 2013, the last day to hold the election would fall on Thanksgiving, November 28, 2013. As the last day falls during the week of a national holiday, the election could potentially be held the previous

¹ A section of the Municipal Code that is now outdated, as it includes procedures repealed with the Strong Mayor form of governance, states the Council must “immediately” call a special election (to be held within ninety days of the date the ordinance calling the election is adopted, which is no longer the rule). SDMC § 27.0902(b). A Report issued by this Office in 2005, interpreting section 27.0902(b), said “immediate” meant the Council had a duty to discuss the special election at its next regularly scheduled meeting or at a special meeting called for that purpose.

Tuesday, November 19, 2013. The City Clerk can provide information regarding related deadlines for the nomination of candidates and the filing of candidate papers.

II. THE COUNCIL PRESIDENT TAKES ON LIMITED EXECUTIVE DUTIES UNTIL A NEW MAYOR IS SWORN INTO OFFICE.

This Office has been asked what additional duties are to be assumed by the Council President during the period between the Mayor's resignation and the swearing in of a new Mayor. Charter section 265(i) provides the governing law:

(i) During the period of time when an appointment or election is pending to fill a vacancy in the Office of Mayor, the presiding officer of the Council shall be vested with the authority to supervise the staff remaining employed in the Office of the Mayor, to direct and exercise control over the City Manager in managing the affairs of the City under the purview of the Mayor and to exercise other power and authority vested in the Office of the Mayor when the exercise of such power and authority is required by law. This limited authority would include circumstances where the expeditious approval of a legislative action is necessary to meet a legal requirement imposed by a court or another governmental agency. Such limited authority would not include the exercise of the power of veto or any other discretionary privilege which is enjoyed by a person appointed or elected to the Office of Mayor. The presiding officer, while acting under this section pending the filling of a mayoral vacancy, shall not lose his or her rights as a Member of the Council.

San Diego Charter § 265(i).

This Office will provide additional legal guidance regarding the Council President's role and duties under the Charter as questions arise. Significantly, the Charter provides that the Council President retains his rights as a member of the Council, continues to preside over Council meetings, and is not authorized to exercise the power of veto.

III. THE RECALL EFFORT BECOMES MOOT UPON THE MAYOR'S RESIGNATION.

Given the ongoing effort by organizers of a "Recall Bob Filner" campaign, this Report also confirms that the effort is moot once the Mayor's resignation becomes effective. Once the office is vacant, there is no official to "recall." As this Office previously explained, there were numerous procedural hurdles that needed to be met before a recall election could be called. Even if the recall petitions had been submitted and signatures were sufficient to qualify a recall election for the ballot, the effort would now be moot. A pending recall election would be cancelled upon the Mayor's resignation. The Municipal Code confirms this:

27.2730 Cancellation of Election if Office Becomes Vacant

If from any cause a vacancy in the position occupied by the official whose recall is sought occurs after the filing of the certificate of

sufficiency by the Clerk and prior to the election, the election shall not be held.

SDMC § 27.2730.

Thus, even if the Mayor resigned the day before a scheduled recall election, the City would be required to cancel the election. With his resignation, the recall effort is now moot.

CONCLUSION

Once the Mayor has confirmed his resignation and its effective date, the Council must meet promptly as it must call a special election within 90 days of the vacancy. If no candidate receives a majority of votes at the special election, a special run-off election is to be held no later than 49 days after the first (primary) special election. The Council President will assume limited additional duties during the time between the Mayor's resignation and the date a new Mayor is sworn in to fill the remainder of the term. Pending recall efforts become moot upon the Mayor's resignation.

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