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February 28, 2014

**REPORT TO THE CITY COUNCIL**

**APPOINTMENT OF NEW COUNCILMEMBER TO FILL DISTRICT 2 VACANCY**

**INTRODUCTION**

Councilmember Kevin Faulconer will soon resign his District 2 Council seat to be sworn in as the City of San Diego's next Mayor, filling the remainder of the term vacated by Bob Filner. After the San Diego City Council (Council) certifies the election results, the Councilmember resigns his Council seat, and he is sworn in as Mayor, the District 2 Council seat will officially be vacant.

The District 2 vacancy will trigger a process under the San Diego Charter (Charter) and San Diego Municipal Code (Municipal Code or SDMC) in which the Council will have thirty business days to fill the seat by appointment. San Diego Charter §§ 12, 14; SDMC §§ 27.0701-27.0709, 27.0801-27.0809. The person appointed by the Council to fill the District 2 seat will hold that office until the current term ends in December 2014.

The City Clerk will issue a report detailing the procedures the Council must use to fill the vacancy. This Report addresses two related legal issues: (1) the residency and voter registration requirements of those seeking appointment to the District 2 Council seat, and (2) whether the Mayor may veto the Council's appointment of a Councilmember.

**QUESTIONS PRESENTED**

1. What residency and voter registration requirements apply to those seeking appointment to fill the vacancy in the District 2 Council seat?
2. Can the Mayor veto the Council's appointment of a new Councilmember to fill the District 2 vacancy?

**SHORT ANSWERS**

1. Anyone seeking appointment to fill the remainder of Councilmember Faulconer's term must be a resident and registered voter of District 2 as the district's boundaries existed in 2010, when Councilmember Faulconer was elected to his current term. SDMC § 27.0708. The potential appointees also must gather their nominating signatures from at least fifty qualified voters registered within those 2010 boundaries. SDMC §§ 27.0804(c), 27.0708. The Final

Redistricting Plan for Council district boundaries enacted in 2011 does not affect this appointment.

2. No, the Charter does not give the Mayor the power to exercise a veto over the Council's appointment of a new member of the legislative body. The Council's appointment of one of its members is required by Charter section 12(h)(1)(A), is a matter of the election and qualification of its members reserved to the Council by Charter section 14, and is not subject to veto as a matter "exclusively within the purview of the Council," under Charter section 280(a)(1).

## ANALYSIS

### I. THE CHARTER AND MUNICIPAL CODE DIRECT THAT THE DISTRICT 2 BOUNDARIES THAT EXISTED BEFORE REDISTRICTING MUST BE APPLIED TO FILL THE DISTRICT 2 SEAT FOR THE REMAINDER OF COUNCILMEMBER FAULCONER'S TERM.

The Charter and Municipal Code provide the procedures the City must follow when there is a vacancy on the Council. Councilmember Faulconer was elected to his current four-year term in 2010 and the term expires in December 2014.

In August 2011, a Final Redistricting Plan was enacted, providing new boundaries for District 2 that would apply to the next regularly scheduled election to fill that seat – an election that will occur later in 2014. Thus, candidates seeking to fill the seat in this year's election for a District 2 Councilmember must reside and be registered to vote within the "new" boundaries. However, as the "old" boundaries were used when Councilmember Faulconer was elected to his current term, the Council must use those boundaries for its appointment of his replacement.

Municipal Code section 27.0708 makes this clear:

#### **§27.0708 Effect of Redistricting on Filling a Vacancy in Council Office**

If a vacancy occurs for any reason, and if redistricting has occurred between the date of the *election* of the officeholder and the date of the vacancy, the redistricting will have no effect on the boundaries used to determine who is eligible to fill the vacancy, either by appointment or *special election*. **The boundaries used to fill the vacancy will be the same as those used in the original *election*, and all the following requirements shall be met:**

- (a) A candidate for appointment or *election* will be a resident and voter from within the district boundaries as they existed prior to redistricting.**

**(b) In order to be counted as valid, nominating signatures must come from voters registered within the district boundaries as they existed prior to redistricting.**

SDMC § 27.0708 (emphasis added); *See also* SDMC § 27.0804(c), requiring applicants to fill the vacancy to submit “A petition with the signatures of fifty registered voters in form and content similar to that required by the nomination procedures in this article.”

Municipal Code section 27.0708 tracks state law, the California Elections Code, California case law and federal constitutional law, confirming that the constitutional rights of the voters in the “old” boundary lines are affected by this appointment. These are the voters who selected Councilmember Faulconer for the current four-year term, and these are the voters entitled to choose his successor when a vacancy occurs. The Municipal Code makes clear that this rule applies not only to an election of his successor, but to an appointment (“A candidate for appointment or election . . .”).

If the “new” boundaries were to be used, courts have held it would unconstitutionally deprive the original District voters of their ability to place someone in the Council seat. The Courts look back to when the term began and assign rights as of that time. *See Legislature v. Reinecke*, 10 Cal. 3d 396, 404-406 (1973).

Thus, as Councilmember Faulconer was elected in the “old” boundaries, the person appointed to complete his term must meet the same requirements. To assist the public’s understanding of this, the City Clerk will post online the boundaries of the Council District as it existed prior to the 2011 Redistricting. This should assist potential applicants in determining if they are eligible to be considered for the seat and where they may seek to gather nominating signatures.

**II. THE CHARTER PROVIDES THAT THE COUNCIL HAS THE RIGHT TO APPOINT ITS OWN MEMBERS; THE DECISION IS NOT SUBJECT TO MAYORAL VETO.**

As set forth above, the Charter and Municipal Code govern the appointment of a District 2 Councilmember to fill the remainder of Councilmember Faulconer’s term. Charter section 12(h)(1)(A) provides:

- (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.

San Diego Charter § 12(h)(1)(A) (emphasis added). Thus, the Council's action is mandatory. Section 12 also confirms that, "Whether a person is appointed or elected to fill a vacant Council District seat, whatever the reason for the vacancy, that person shall serve as that District's Councilmember for the remainder of the unexpired term." San Diego Charter § 12.

Other Charter sections confirm that this act is within the Council's purview. Charter section 14 provides the following, confirming the Council's exclusive control over its membership on the legislative body:

**The Council shall be the judge of the election and qualification of its members** and in such cases, shall have power to subpoena witnesses and compel the production of all pertinent books, records and papers; but the decision of the Council in any such case shall be subject to review by the courts. The Council shall determine its own rules and order of business. It shall have power to compel the attendance of absent members, and may punish its members for disorderly behavior after notification of the charge and opportunity to be heard in defense.

San Diego Charter §14 (emphasis added).

Charter sections 12 and 14, read together, confirm the legislative body's exclusive control over the qualifications and appointment of the person to fill a vacancy on the Council. Under Charter section 280(a)(1), the Mayor does not have the authority to exercise a veto over matters that are "exclusively within the purview of Council," such as other appointments including the Independent Budget Analyst and the Council's presiding officer, or "not affecting the administrative service of the City." Charter § 280(a)(1). The Charter requires the Council alone to make this appointment, removing it from those matters subject to mayoral veto. As stated in one California case, "The veto power is not an inherent power of the mayor and the terms of the charter define the extent to which it may be exercised by him. Such power exists only to the extent that it is clearly granted and is not to be enlarged by any strained construction." *Belli v. Board of Supervisors of San Francisco*, 123 Cal. App. 44, 47 (1932).

Rules of statutory interpretation are to be applied to charters. *Currieri v. City of Roseville*, 4 Cal. App. 3d 997, 1001 (1970). If the language of the provision is free of ambiguity, it must be given its plain meaning; rules of statutory construction are applied only where there is ambiguity or conflict in the provisions of the charter or statute, or a literal interpretation would lead to absurd consequences. Cal. Civ. Proc. Code § 1858; *Younger v. Superior Court*, 21 Cal. 3d 102, 113 (1978).

The "plain meaning" of the Charter is clear and unambiguous regarding the Council's power to appoint a member to fill a vacancy. To construe the Charter to allow the mayoral veto of the Council's appointment of one of its members would not only defy sections 12 and 14, but would be a legally tenuous interference by the Mayor into the legislative branch of government.

Generally, a mayor-council form of government separates and balances powers between the executive and legislative branches of municipal government. *See e.g. Martindale v. Anderson*, 581 P.2d 1022 (Sup. Ct., Utah, 1978). The role of the two branches under a charter providing for a strong mayor form of governance has been described as parallel to the separation of powers in the federal constitution, making lawmaking a shared power between the executive and legislative branches with the legislative prerogative circumscribed by the executive's limited veto power. *Brown v. Fair Political Practices Commission*, 84 Cal. App. 4th 137, 144-45(2000), citing *Affordable Housing Alliance v. Feinstein*, 179 Cal. App. 3d 484, 491 (1986); *see also, Under 21 v. City of New York*, 65 N.Y. 2d 344, 355-57 (N.Y., 1985).

Thus, while the executive has a "limited veto power" over "lawmaking" by legislators, the executive does not have veto power over the legislative body's governance of its own members. Charter sections 12, 14, and 280(a)(1) confirm the Council's sole authority to make the appointment, without the prospect of a mayoral veto.

### CONCLUSION

Those seeking appointment to the District 2 Council seat must reside and be registered to vote within the geographic boundaries of the district as it was configured in 2010, when Councilmember Faulconer was elected to his current term. The Charter requires the Council to appoint a new member to serve for the remainder of the term. Once the Council has made the appointment, its decision is final and not subject to mayoral veto.

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RC-2014-7  
Doc. No. 722980