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MEMORANDUM OF LAW

DATE: September 26, 2005

TO: Honorable Deputy Mayor and City Council

FROM: City Attorney

SUBJECT: Compliance with Charter Section 12 Requirements in the District 2 and 8 Special Run-off Election

INTRODUCTION

On November 8, 2005, the City will hold an election to fill the vacancies in the office of Council Member for District 2 and for District 8. If one candidate for either office receives the majority of votes cast at that election, the candidate will be declared the winner. However, if no candidate receives a majority of the votes cast, a special run-off election will take place between the two candidates receiving the highest number of votes. The City Clerk has proposed that any run-off election be held on January 10, 2006. This memorandum addresses the legal issues surrounding a special run-off election on that date.

QUESTION PRESENTED

May the City hold a special run-off election to fill the two vacancies in the Council district offices, despite the fact that more than 49 days will have passed after the primary election when no municipal or statewide election is scheduled within 90 days of the proposed run-off date?

SHORT ANSWER

Yes. Under the circumstances and timing in this election, strict compliance with Charter section 12 is not possible due to State laws governing the conduct of elections and prohibiting elections from being held on the day after a State holiday. The proposed date of the election, January 10, 2006, is earliest date that the election could be held and therefore would be in substantial compliance with the Charter.

ANALYSIS

Effective July 25, 2005, Michael Zucchet and Ralph Inzunza, holding the office of Council Member for Districts 2 and 8, respectively, resigned from their offices. On August 1, 2005, the City Council called a special election for November 8, 2005, to elect candidates to fill these vacancies and ordered that such election be consolidated with the special statewide election on that same date.

If one candidate receives the majority of votes cast at the November 8, 2005, special election, the Council will declare that candidate to be elected to the vacant office. However, if no candidate receives a majority of the votes cast, a special run-off election will be held between the two candidates receiving the highest number of votes.

A. City Charter Requirements.

Charter section 12(h)(1)(B)(ii) sets forth the procedures to follow in the event that no one candidate obtains a majority of the votes cast in an election to fill a vacancy on the City Council:

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) days of the first special election, unless there is regular municipal or statewide election scheduled to be held within ninety (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.

June 6, 2006, is the date of the first regular municipal or statewide election scheduled to be held following the proposed November 8, 2005, primary election and is well past the 90-day period for consolidation. Thus, pursuant to the Charter, any run-off election must take place within 49 days of November 8, 2005. Forty-nine days after November 8, 2005, is December 27, 2005.

B. State Law Restrictions on Holding an Election the Day After a Holiday.

California Elections Code section 1000 identifies the “established election dates” for regular elections held in the State. Elections Code section 1002 generally provides that: “all state, county, municipal, district, and school district elections shall be held on an established election date.” However, section 1003 provides that the dates in section 1000 and 1002 do not apply to “[e]lections held in chartered cities or chartered counties in which the charter provisions are inconsistent with this chapter.” Cal. Elec. Code § 1003(b).

The Elections Code also provides for the dates of special elections: “Each special election shall be held on one of the established election dates set by this division or on the date of any statewide special election except as provided in Section 1003.” Cal. Elec. Code § 1400.

Therefore, pursuant to the plain language of section 1400, State law does not seek to compel charter cities to hold special elections on any of the State's "established election dates."

However, the Elections Code does provide that "[n]o election shall be held on any day other than a Tuesday, nor shall any election be held on the day before, the day of, *or the day after, a state holiday.*" Cal. Elec. Code § 1100 (emphasis added). The "charter city" exception set forth in Elections Code section 1003 does not apply to section 1100--i.e., the chapter containing section 1003, by its plain language, applies only to "charter provisions . . . inconsistent with *this chapter.*" Cal. Elec. Code § 1003(b) (emphasis added). California Elections Code section 1100 is not located within the same chapter as section 1003. Accordingly, State law requires that all elections be held on a Tuesday, except when the proposed election date is the day before, the day of, or the day after, a State holiday.

December 25 is a State holiday. Cal. Gov't Code § 6700. If December 25 falls on a Sunday (which it does in 2005), the following Monday (December 26, 2005, in this case) is a State holiday. Cal. Gov't Code § 6701. Therefore, Tuesday, December 27, 2005, is "the day after, a state holiday." The same problem exists with the following Tuesday, January 3, 2006, because Sunday, January 1 is New Year's Day, and January 2 is a State holiday. Thus, if the City were to hold an election on December 27, 2005, or January 3, 2006, it would violate the plain language of California Elections Code section 1100.¹

C. Other State Laws and San Diego Municipal Codes Affecting the Timing of the Run-off Election.

In order to strictly comply with the requirements of Charter section 12, the run-off election would need to be held sometime prior to December 27, 2005. The next earliest date is Tuesday, December 20, 2005. However, an election on this date is not possible due to other time requirements set forth in State election laws and the San Diego Municipal Code.

First, State law provides that the elections official must prepare a certified statement of the results of an election and submit it to the governing body within 28 days of the election. Cal. Elec. Code § 15372. The 28 day following the November 8, 2005, election is December 6, 2005, only 21 days until December 20, 2005.

Second, applications for an absent voter's ballot must be made in writing to the elections official having jurisdiction over the election between the 29th and the 7th day prior to the election. Cal. Elec. Code § 3001. In practice, the San Diego County Registrar of Voters provides

¹It may be possible for the City to amend the San Diego Municipal Code to permit elections to be held the day after a holiday, under the theory that such a change is not preempted by California Elections Code section 1100. However, in light of the other concerns addressed in this memorandum and the uncertainty in prevailing on a lack of preemption claim, this option is not addressed. If directed to do so, our office will provide an analysis of these issues.

the absent voters' ballots at the time of the application. If the election is held on December 20, 2005, the 29th day prior to the election would be November 21, 2005, which is more than two weeks before the election official is required to certify the results.

Third, after the certification of the results, the ballot materials may list the names of only the two candidates receiving the highest number of votes cast for the vacant seat in the first special election. SDMC § 27.0906. The ballot materials must be available for review by the public 10 days prior to being submitted for printing. SDMC § 27.0402. At least 10 days prior to the election, the City Clerk must cause the sample ballot to be mailed to every voter in the precinct. SDMC § 27.0906. If the results of the first special election are not available until December 6, 2005, and the ballot materials are immediately available for public review through December 16, 2005, printed materials could not be mailed to every voter 10 days prior to December 20, 2005.

D. Intent of the Charter.

Presumably, the intent of the Charter requirement to hold the special run-off election within 49 days of the first special election is to expeditiously fill a vacancy in a council district office. However, Charter section 12 permits the run-off election to be held within 90 days *of the proposed special run-off date* and to be consolidated with a regular municipal or statewide election. Permitting a delay in the election seems to balance the interest in timely filling the vacancy against the benefits of economy and efficiency. In addition, this consolidation with another election increases voter turn-out.

If the special run-off election is held on January 10, 2006, that date is 63 days after the first special election and much sooner than the more than the 90 days permitted if there were an upcoming municipal or statewide election. Even assuming that an election could legally be held within 49 days--e.g., on Tuesday, December 27, 2005--the City Clerk and the San Diego County Registrar of Voters have identified problems with doing so.² The two most important concerns are the recruiting of poll workers during the holiday season and the possibility that voter turn-out might be lower due to holiday distractions and out-of-town travel. In balancing the interest in expeditiously filling the vacancies against the benefits of increased voter turn-out and more time to ensure a successful election, a determination to hold the election on January 10, 2006, will substantially comply with the Charter.³

²See, Report of the City Clerk to the Honorable Mayor and City Council dated September 6, 2005.

³ The San Diego Municipal Code also specifies that any run-off election to fill a Council office vacancy must be held within 49 days of the first special election. SDMC § 27.0906. However, the code provides that: "substantial compliance with the provisions of this article shall be deemed sufficient to hold a valid election." SDMC § 27.0102. See, also, Cal. Elec. Code § 10200 [an election shall not be invalidated if there has been substantial compliance.]

CONCLUSION

The circumstances of this special run-off election compel the conclusion that, in order to ensure a successful election that maximizes the likelihood of voter turn-out and complies with State law timing requirements, Tuesday, January 10, 2006, is the most appropriate date. Further, this date is in substantial compliance with Charter section 12, in that it is only two weeks later than the 49-days, and the Charter permits the election to be held at even a later date if a municipal or statewide election is scheduled within 90 days of the proposed run-off date. Finally, in light of the State law timing requirements for certifying elections and absent voters' ballots, this office recommends amending Charter section 12 to permit more time to ensure a successful election when filling vacancies in Council offices.

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By

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Chief Deputy City Attorney

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cc: Elizabeth Maland, City Clerk
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