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OPINION NUMBER 2004-01

DATE: September 14, 2004

SUBJECT: Issues Related to a Special Election to Fill the Vacancy in Council District 4

REQUESTED BY: Council Member Donna Frye

PREPARED BY: City Attorney

INTRODUCTION

On August 8, 2004, the City Council Member for the 4th Council District, the honorable Charles Lewis, passed away unexpectedly. In light of Mr. Lewis' passing, several questions arose regarding the timing of the necessary special election to fill the resulting vacancy in the District 4 office. In addition, a question has arisen regarding the eligibility of a former City Council Member to hold the District 4 office should that former member seek the office in the special election.

By an e-mail dated August 17, 2004, you asked our office to opine on several of these questions. At about that same time, litigation was filed concerning both the actions of the City Council and City officials in the days following Mr. Lewis' death and the setting of a hearing to consider the date for the special election. We deferred responding to your e-mail in light of the litigation, focusing our efforts on the required response to the lawsuit, but also knowing that the results of the litigation would affect our response to your inquiries. You and the other members of the City Council were provided the memorandum of points and authorities our office filed in the litigation, which set forth our views at that time on the questions posed in your memorandum to us.

As you know, the City Council considered the date for the special election at its regularly scheduled meeting of September 7, 2004, and set the special election for November 16, 2004. The following day the superior court issued a ruling in the litigation which validated the views of our office on a number of the issues (but deferring a ruling on one critical issue, as more fully explained below), and which validated the setting of the special election on November 16, 2004.

Herein, we provide our responses to your inquiries, and address more fully the issue of the eligibility of former City Council Member George Stevens in light of the setting of the special election for November 16, 2004.¹

QUESTIONS PRESENTED

1. What is the legal basis for the decision to wait until September 7, 2004, to declare a vacancy in Council District 4?
2. What is the legal basis for the decision to hold an election on November 30, 2004, rather than on November 2, 2004, to fill the vacancy for Council District 4?²
3. What is the legal basis for the decision that would allow a San Diego City Council Member, Mayor, or City Attorney who has served two consecutive terms to be eligible to run again for the same office?

SHORT ANSWERS

1. The Municipal Code requires that the City Council take up the Declaration of Vacancy at its next regularly scheduled meeting, or at a special meeting called for that purpose. The next regularly scheduled meeting for which notice could be given under the Brown Act, was September 7, 2004. The Mayor was under no legal obligation to call a special meeting to declare the vacancy. Five members of the City Council could have called a special meeting to declare the vacancy, but chose not to do so.
2. There is no legal requirement to consolidate the special election with the regular election. Moreover, consolidation of a special election with the November 2, 2004, election is not legally possible because the eighty-eight day deadline for the submission of election ordinances to the County passed on August 6, 2004. Holding a separate special election on November 2, 2004, would require separate ballots and voting machines, involve specialized training, all within a very short time span, and would run the risk of jeopardizing a fair and trouble-free election in District 4.

¹Our previous views on that matter, publicized in the press, were based upon a proposed date for the special election of November 30, 2004. The views expressed herein are consistent with our previously expressed views, but differ in result because the date of the special election was set for November 16, 2004.

² As indicated in the above footnote, subsequent to the date of your e-mail, the City Council voted to conduct the special election on November 16, 2004, rather than on November 30, 2004. The change in date is irrelevant for this particular question because the question appears to be primarily concerned with November 2, 2004, the date *not* chosen.

3. Charter section 12(f) permits a San Diego City Council Member, Mayor, or City Attorney who has served two consecutive terms to run again for the same office as long as the new term is not a “full term,” or, in other words, does not exceed two years. As a result of the City Council’s decision to hold the special election on November 16, 2004, the results of that election must be declared by the City Council no later than December 3, 2004. The immediately preceding regularly scheduled City Council meeting is on November 29-30, 2004. Therefore, if a candidate gains fifty percent plus one of the votes cast at the November 16, 2004, election, that candidate will assume office no later than November 30, 2004. Because of former Council Member George Stevens’ two prior terms of office, he may not assume office for a term that exceeds two years. Any term that begins prior to December 4, 2004, would exceed two years. For this reason, Mr. Stevens would not be eligible to assume office on November 30, 2004, and accordingly he is not eligible to run for that office in the November 16, 2004, election.

BACKGROUND³

Council Member Charles Lewis passed away on Sunday, August 8, 2004.⁴ The following day the Mayor convened a meeting to discuss the obligations of the City to proceed with a special election to fill the resulting vacancy in District 4. The meeting occurred on Monday, August 9, and included the City Attorney and his Assistant City Attorney, the City Manager, the Assistant City Clerk, and other members of the Mayor’s staff. In addition, the County Registrar of Voters [Registrar] was available for consultation by telephone, and the Chief of Staff for Council Member Lewis eventually joined the meeting.

At the meeting the Mayor was advised by our Office as to the procedure to be followed in calling a special election to fill the seat for District 4. He was advised that the Municipal Code required that the City Council adopt a declaration of vacancy putting into motion the nominating process for candidates seeking the District 4 seat. He was also advised that the City Council must adopt an ordinance calling a special election, requesting the Registrar to perform electoral functions and, if appropriate, asking that the special election be consolidated with the statewide general election called for November 2, but that the Registrar could decline to perform electoral functions for the special election. Our Office also advised that as of that day, the Elections Code would prohibit the consolidation of the special election with the statewide general election because the Elections Code required a minimum of eighty-eight days between the grant of a request for consolidation by the County of San Diego and the election date, and that there was no provision for an exception to that statutory rule. He was further informed that as of August 9, there were only eighty-five days until the statewide general election.

³ The facts set forth in this section are taken from the pleadings filed in the court case. References to various declarations and exhibits have been omitted.

⁴ Unless otherwise indicated, all dates are in calendar year 2004.

The Mayor was further advised that the Brown Act (the California open meeting law) required seventy-two hours notice for a matter to appear on the agenda of a regularly scheduled City Council meeting. He was further advised that, while the Municipal Code vests in the Mayor the authority to determine the agenda for a City Council meeting, for the matter of declaring a vacancy in District 4 and calling a special election to appear on the agenda of the regularly scheduled City Council meeting of August 9-10, the matter must have been noticed no later than 2:00 p.m. Friday, August 6. Accordingly, the matter could not have been taken up by the City Council at the regularly scheduled City Council meeting of August 9-10.

The Registrar was then consulted on the practical ability to have a simultaneous, but non-consolidated, election on November 2. Upon consultation with her staff and the County's voting equipment vendor, the Registrar advised that, because of the voting equipment to be used at the November election (new equipment for which the November 2 election will be the first use), such an election would require separate staffing, separate training, separate ballots, separate voting equipment, and separate tabulation in the District 4 precincts. The Registrar recommended against such a procedure because of the logistical difficulties presented by such a dual election and the possibility of voter confusion. The Registrar also advised that, due to the process of tabulating and certifying the election results for November 2, a separate special election should be scheduled as many days as possible after November 2.

In consideration of the advice he received on these issues, the Mayor determined that the matter of declaring the vacancy in District 4 could not appear on the agenda for the regularly scheduled Council meeting of August 9-10. Exercising the authority vested in him by the Charter and Municipal Code, and in consideration of the death of Council Member Lewis, the Mayor trailed all items on the City Council agenda for Monday, August 9, to Tuesday, August 10. In further consideration of the advice he received, and in deference to Council Member Lewis and his family, the Mayor declined to exercise the discretion vested in him by the Brown Act, City Charter, and Municipal Code to call a special meeting to consider the matter of the vacancy in District 4, because the matter could be taken up at the next regularly scheduled meeting of the City Council on September 7.⁵ At no time was any decision made in consideration of potential candidates for the office. The Mayor announced his decision and intentions that day, indicating that he would recommend that the special election be held on November 30, a date which appeared to be the most convenient for the Registrar in light of her duties with respect to the statewide election on November 2.

⁵ Every year in January, the City Council adopts a legislative calendar setting forth the schedule of regular meetings of the City Council. That legislative calendar usually sets forth a number of "legislative recesses" during which the City Council does not meet. Typically the legislative recesses are called during holiday seasons and in August to accommodate vacations for City Council members. The legislative calendar for 2004 called for a three week legislative recess following the regularly scheduled meeting of August 9-10. The next regularly scheduled meeting of the City Council following this recess was Tuesday, September 7.

Historically, the Registrar has performed electoral functions for the City upon request, as provided in Elections Code section 10002, although that action is discretionary by the Registrar and the County of San Diego. The City Clerk's Office currently has neither the resources nor the expertise to perform electoral functions for the City in the event the Registrar and the County decline to perform those electoral functions.

A statewide general election has been called for November 2. August 9 was eighty-five days prior to November 2; eighty-one days prior to November 2 was August 13; sixty-seven days prior to November 2 was August 27; and sixty days prior to November 2 was September 3.

A complaint regarding these issues was filed on August 19. On August 23, the City received notice of an ex-parte hearing to be held on August 24 for the purpose of setting a hearing on the issues in the complaint. Other individuals appeared through counsel at the ex-parte hearing and sought permission to intervene. The court set a schedule which called for a hearing on the case on Wednesday, September 8.

On Tuesday, September 7, the City Council met at its next regularly scheduled meeting and set the date of the special election for November 16. The next day, the superior court found that the City Council properly considered the matter of the Declaration of Vacancy on September 7, and that there was no mandatory duty to consider the matter either on August 10, or at a special meeting prior to September 7. Furthermore, the court found that state law prohibited the consolidation of the special election with the statewide general election on November 2, and declined to create a judicial exception to the law. Finally, the court declined to rule on the term limits issue as it pertains to Mr. Stevens.

ANALYSIS

I

APPLICABLE LEGAL PRINCIPLES AND RULES OF STATUTORY CONSTRUCTION

A. Rules Of Statutory Construction.

Numerous principles of statutory construction must be applied in this matter. A statute "must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." *DeYoung v. City of San Diego*, 147 Cal. App. 3d 11, 18 (1983). Where there are several provisions, the statute should be interpreted to give effect to all. *Id.*; Cal. Code Civ. Proc. § 1858. Significance should be given every word and phrase in pursuit of the legislative intent. *DeYoung*, 147 Cal. App. 3d at 18. If the words of the statute are clear, no construction is necessary and the plain language should be followed. *Rossi v. Brown*, 9 Cal. 4th at 695; *Solberg v. Superior Court*, 19 Cal. 3d 182, 198

(1977). Statutes should be construed to harmonize rather than to raise conflicts. *Woodward v. Southern Cal. Permanente Medical Group*, 161 Cal. App. 3d 656, 664 (1985). “An interpretation which gives effect is preferred to one which makes void.” Cal. Civil Code. §3541. “[M]atters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction” all must be taken into account. *San Diego Union v. City Council*, 146 Cal. App. 3d 947, 954 (1983), quoting *Cossack v. City of Los Angeles*, 11 Cal. 3d 726, 733 (1974). The contemporaneous construction or interpretation of the law by those charged with its implementation is indicative of the law’s meaning and entitled to great weight. *DeYoung*, 147 Cal. App. 3d at 18. Where there has been a change in the law, the prior state must be considered when interpreting the statutes at issue. *People v. Horn*, 158 Cal. App. 3d 1014, 1031 (1984). The electorate is presumed to “be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended [charter provisions] ‘in the light of such decisions as have a direct bearing upon them.’” *People v. Overstreet*, 42 Cal. 3d 891, 897 (1986) (citations omitted).

B. Applicable Legal Principles.

San Diego is a charter city. The charter is the supreme law of a charter city, subject only to conflicting provisions of preemptive state law. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1995). Article XI, §§ 3 and 5 of the state constitution set forth the governing principles for a charter city. Section 5 sets forth a list of “core” municipal affairs (*Johnson v. Bradley*, 4 Cal. 4th 389, 398 (1992)), and provides in relevant part:

(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (3) conduct of city elections

C. City Election Statutes.

Pursuant to the authority vested in it by the state constitution, the City has adopted a comprehensive set of regulations relating to the conduct of municipal elections, and specifically as they relate to the filling of vacancies and to term limits. First, Charter section 8, entitled “Election Code”, provides:

[T]he Council shall adopt an election code ordinance, providing an adequate and complete procedure to govern municipal elections, including the nomination of candidates for all elective offices. All elections provided for by this charter; whether for choice of officers or submission of questions to the voters, shall be conducted in the manner prescribed by said election ordinance.

Charter section 12 (e) provides:

Except as provided in this Section, Council members, shall hold office for the term of four (4) years from and after 10 a.m. the first Monday after the first day of December next succeeding their election and until their successors are elected and qualified.

Charter section 12 (f) provides in relevant part:

Notwithstanding any other provision of this Charter . . . , 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 Councilmember 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.

Charter section (h) provides in relevant part:

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,

. . . .

(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 state-wide election scheduled to be held within 180 days of the vacancy. If there is a regular municipal or state-wide election scheduled to be held within 180 days of the vacancy, the Council may consolidate the special election with that regular election.

Pursuant to the authority and direction provided in Charter section 8, the City has adopted a comprehensive elections code setting forth procedures for the conduct of elections, which is set forth in Article 7 of the Municipal Code entitled "Elections, Campaign Finance and Lobbying." Division 1 of the Article contains general provisions. Section 27.0106 (d) provides that all elections shall be conducted pursuant the Charter and Article 7, although the City Clerk and City Council may rely upon state law where the Code provides no specific guidance. Section 27.0107 provides that the City Council must call all elections, including special elections, by ordinance.

Division 7 of the Article provides for filling vacancies in the elective offices of the City. Section 27.0701, entitled "Purpose and Intent", provides in relevant part:

The Charter provides that if a vacancy occurs in the office of a City Council District and there is one year or less remaining in the term, the City Council shall appoint an individual to fill the vacant seat. If the vacancy occurs with more than one year remaining in the term, the Charter requires the City Council to call a special election to fill such vacancy. The purpose and intent of this division is to establish uniform provisions for filling a vacancy in any elective office.

Section 27.0703 provides in relevant part: "(b) If a vacancy occurs by reason of death or un-excused absences, the date of the vacancy will be the date of adoption of the City Council's Declaration of Vacancy." Section 27.0704 provides: "As soon as it is known that a vacancy exists in any elective office by reason of death . . . , the City Council shall adopt a Declaration of Vacancy at its next regularly scheduled meeting, or at a special meeting called for that purpose." Section 27.0707 provides that the procedure set forth in Division 9 of the Article shall be followed for any special election called to fill a vacancy. Finally, section 27.0709 relating to "Term of Office" provides:

(a) The term of office for an individual elected to fill a vacancy in the office of a City Council district pursuant to Division 9 of this article shall commence at the time the City Council adopts the resolution declaring the results of such election to the vacant office, and shall expire at 10 a.m. on the first Monday after the first calendar day in December following the next District of City-wide General Election to fill that office, at the same time that the terms of other elective officers expire.

The Code, however, does not provide for when the declaration of results must take place, although section 27.0411 provides: "Immediately after an election, the City Clerk shall cause a canvass of the election returns to be made, and shall certify the results of such canvass to the City Council. . . ."

Division 9 of the Article sets forth "Procedures for Filling Vacancies in Elective Offices by Special Election." Section 27.0901 provides that the intent of the division is to establish an orderly procedure for the conduct of special elections to fill a vacant office. Section 27.0902 requires the calling of a special election to fill a vacancy if required, and generally mirrors the provisions of Charter section 12 (h) (1) (B) which require that special election to be held within ninety days unless there is a regular municipal or statewide election scheduled within the next 180 days. The section also provides that the special election may be consolidated with the regular election. Section 27.0903 provides that the regular nomination provision apply to the special

election. Section 27.0905 and 27.0906 provide for outright election at the special election, or the need for a run-off special election in the event no candidate receives a majority of votes in the first special election. The run-off election must occur within forty-nine calendar days of the first special election. Section 27.0907, relating to the "Date to Assume Office," generally provides the same as section 27.0709 in that the elected shall assume office upon adoption of a resolution declaring the results of the election.

Finally, Division 2 provides for the nomination procedure for any municipal election. Section 27.0204 provides that nominating papers for a special election shall be circulated not earlier than seventy-four days prior to the election date, except for consolidated elections in which case the City Council must adopt a schedule consistent with the conduct of statewide elections. More importantly, section 27.0214 provides that for a non-consolidated special election, nomination papers shall be submitted no earlier than sixty-seven days prior to the election and no later than the close of business of the sixtieth day prior to the election. Finally, section 27.0206 provides that the nominating petition submitted by a person seeking to be a candidate at the special election include the following:

Under penalty of perjury, I, _____, say that I reside at _____ in the City of San Diego, County of San Diego, State of California; that I am a resident and registered voter of the political district for which I seek nomination and shall have been such for at least thirty calendar days immediately preceding the submittal of my nominating petition for filing; that I am a candidate for the office of _____ (include district designation, if appropriate) to be voted upon at the municipal primary election to be held _____ (insert date); that I request my name be printed upon the official ballot for nomination by such primary election for such office; that I will accept such nomination; *and that I will serve in such office if elected.* I am a candidate for the full/unexpired term. I desire to have my name printed on the ballot as follows: _____. [Emphasis added.]

D. State Election Statutes.

A couple of state election statutes have relevance to the issues in this case. First, Elections Code section 10002 provides that upon request, the County elections official (here the Registrar) may perform the election functions for a municipal election. Historically, the Registrar has performed those functions for the City, but that decision is discretionary with the Registrar and the County.

Second, Elections Code section 10403 provides for the consolidation of municipal and statewide elections. As set forth in the section, a "consolidated" election has a specific connotation in connection with this matter; there is a single ballot upon which the elective offices

to be filled appear. To be consolidated with the statewide election, however, the City Council must have filed with the County and the Registrar a resolution requesting the consolidation and setting forth the office to be voted upon at the election as it is to appear on the ballot. The section further provides that the resolution requesting consolidation be adopted at the same time as the ordinance calling the election to be consolidated. The names of the candidates to appear on the ballot must be filed with the Registrar no later than eighty-one days prior to the election. No exceptions to these requirements are provided for in the Elections Code.

Third, Elections Code section 10262 provides that “[t]he canvas [of the ballots] shall be completed by the elections official [the Registrar or City Clerk] no later than the third Friday after the election.” Finally, Elections Code section 10263 provides: “The governing body [the City Council] shall meet at its usual place of meeting no later than the third Friday after the election to declare the results and to install the newly elected officers.”⁶

II

THE VACANCY WAS PROPERLY DECLARED ON SEPTEMBER 7, 2004

The Charter does not provide for when the City Council must take up the matter of any vacancy, and does not provide guidance as to the nature of the process to be followed when the City Council needs to address a vacancy caused by death and call a special election. Accordingly, the Municipal Code must be consulted as it implements the Charter’s requirement for a comprehensive set of regulations for the conduct of municipal elections. Charter § 8.

As more fully set forth above, the Municipal Code provides that the date of vacancy is the date the City Council adopts a “Declaration of Vacancy,” which begins the process of filling the vacancy by special election. Municipal Code § 27.0703 (b). Concurrently, the City Council must, by ordinance, call the special election, which begins the nominating process for the special election.

The Municipal Code requires that the City Council take up the Declaration of Vacancy at its “next regularly scheduled meeting, or at a special meeting called for that purpose.” Municipal Code § 27.0704. So the question presented is: What does the Municipal Code mean when it refers to the “next regularly scheduled meeting”?⁷ In answering that question, reference must be made to certain provisions of the Brown Act, California’s open meeting law.

⁶ The timeline for consolidated elections is longer. *See* Cal. Elec. Code §§ 10262 (b) and 10263 (b).

⁷ Quite clearly, the calling of a special meeting is discretionary with either the Mayor or City Council. *See* Government Code § 54956; Municipal Code § 22.0101, Rule 1 (f).

The Brown Act is preemptive state law and governs the calling and conduct of meetings of the City Council. Section 54954.2 (a) provides that no item may appear on the agenda for a City Council meeting unless notice of the item has been posted at least seventy-two hours prior to the meeting. The Act provides for the calling of special meetings upon twenty-four hours notice (section 54956) at which items listed on the agenda for that meeting may be acted upon, but there is no obligation to call special meetings. Here, the matter of the vacancy could not have met the seventy-two hour notice rule, and thus the matter could not have appeared on the regular agenda for the meeting of August 9-10.

The Act does provide for the City Council to take up matters not appearing on the agenda, but that ability is limited. Government Code §54954.2 (b). It may be exercised, in relevant part, where two-thirds of those council members present determine that there is a need to take action and that the need to take action arose after the posting of the regular agenda. *Id.* So, did the Municipal Code require the City Council to take action on August 9-10? No. First, there was no motion made to take the matter up, so the question is really moot. However, the Municipal Code only refers to the next “regularly scheduled” meeting, it does not provide that the City Council take up the matter at its “next meeting.” The distinction is important in that the language of the Code implies that the “regular” process be followed, and that an agenda be prepared in the normal course of business. This interpretation is confirmed by the Assistant City Clerk who helped draft the provisions in the Municipal Code dealing with these issues. The Assistant City Clerk has advised that the provisions were drafted with the intent that the City Council take up the matter in the normal course of business, and that the Code would not require the matter to be taken up out of that normal course. This intent is confirmed by the discretionary ability to call a special meeting. If the City Council was required to take up the matter at the next meeting, irrespective of the requirements of the Brown Act, there would be no need to call a special meeting because the matter would be considered in very short order.

The use of the phrase “regularly scheduled” is consistent with an intent to cause the matter to be taken up in the “regular” course of business. Accordingly, there was no need to take the matter up at the meeting of August 9-10, and a motion to take the matter up despite the lack of notice would have been impermissible. There being no legal method for the consideration of the vacancy to occur at the meeting of August 9-10, the matter was properly deferred to the next “regularly scheduled meeting” of the City Council, September 7, 2004.

Because consideration of the Declaration of Vacancy was properly set for September 7, the setting of the special election for November 16 was proper, because that date is within ninety days of September 7.

III

THERE WAS NO DUTY TO CALL A SPECIAL ELECTION FOR NOVEMBER 2

Even if the City Council must have taken up the matter of the Declaration of Vacancy in August, there was no duty to set the special election within ninety days. In addressing the duty to call a special election to fill the vacancy in District 4, consideration of the plain language of the Charter must be given. As set forth above, Charter section 12 (h) (1) (b) states plainly and simply that a special election shall be held within ninety days *unless a regular municipal or statewide election is scheduled within 180 days of the vacancy* and that the City Council *may* consolidate the special election with the regular election. Giving effect to the plain words of the Charter, the primary charge when interpreting statutes, the conclusion must be that if there is a regular statewide election held within 180 days of the vacancy, there is no ministerial duty to call a special election within ninety days. Here, there is a statewide general election called for November 2, and August 9, 2004 (the first day following the death of Council Member Lewis) was only eighty-five days prior to that election. Applying the plain language of the Charter to the facts, no duty existed to call a special election within ninety days.

Turning to the ability to consolidate the special election with the regular election on November 2, the plain language of the Charter is similarly clear; by use of the word *may* in the text, the authority is permissive, not mandatory. There thus is no ministerial duty to consolidate. Even if the duty is considered mandatory, consolidation was legally impossible as of August 9. The state Elections Code is similarly clear; any request for consolidation must be made no later than eighty-eight days prior to the date of the election, and the names of the candidates must be given to the Registrar no later than eighty-one days prior to the election. There are no exceptions to these rules, and even courts are without power to create any. *Rossi v. Brown*, 9 Cal. 4th at 694.⁸

⁸ Some have suggested that the courts be asked to create an exception to the consolidation rules because it would be convenient, voter turnout will be higher, and money would be saved. These may be good reasons to consolidate, but courts are without power to make exceptions to the clear rules laid down by the state legislature. If exception is sought in this case, what would be next? Should the City seek exceptions to the voter approval requirements for taxes in the state constitution and Proposition 218? No voter approval requirement will certainly save money because costly elections will not be necessary. It will also certainly be more convenient. Similarly, should the City seek exceptions to the open meeting requirements of the Brown Act merely because having closed sessions without public speakers could save money and be more convenient? Certainly the courts are without power to create these and other absurd exceptions to the general laws of the state, and it would not be appropriate for the City to seek out a “friendly” court and ask for such a judicially created exception.

Logical questions arise in light of these conclusions: why the exception and how must the City proceed in the absence of direction in the event there is a general election within 180 days? In response to the former question, the answer is evident in light of the circumstances presented here; a special election is necessary to fill a vacancy and consolidation is not possible. One alternative available to the City was to hold a simultaneous but non-consolidated election on November 2. As the Registrar pointed out to the Mayor, and later to the full City Council, however, that election would present significant logistical issues; two ballots would be necessary, two sets of voting equipment, separate training, all mixed in with the significant risk of voter confusion on day when the presidential election will be considered along with a myriad of propositions and other matters. If the Registrar declined to perform the election functions under these circumstances, the City Clerk's Office was not prepared to perform them. In addition, the calling of the special election for November 2 would not permit the City to meet its own requirements for the process of receiving nominations, which takes place between sixty-seven and sixty days prior to the election; as of September 7, the City could no longer comply with those dates. Anticipating these circumstances, the Charter gives to the City Council the discretion to *not* hold a required special election on the same day as a regular general election, but rather at some other time. But if the special election need not be held within ninety days, then when?

The Charter required that the City adopt a comprehensive election code, which it has. Charter § 8. Review of those provisions, however, provides no further guidance in that the Municipal Code provision mirrors the Charter. *Compare* Charter section 12 (h) (1) (B) and Municipal Code section 27.0902. Viewing the statutes using a “common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity” (*DeYoung v. City of San Diego*, 147 Cal. App. at 18), the conclusion should be drawn that the City Council may call the required special election any time within the 180 day period. That conclusion permits the City Council to exercise the appropriate discretion to determine the circumstances that would arise upon the calling of the special election on a variety of dates, and make the appropriate decision.

In sum, there was no duty to call the special election within ninety days of the Declaration of Vacancy; discretion is vested in the City Council to call the election at an appropriate time within the next 180 days because of the pendency of the statewide general election on November 2. The City Council properly exercised that discretion in setting the special election for November 16.

IV**WITH THE SPECIAL ELECTION SET FOR NOVEMBER 16,
MR. STEVENS IS NOT ELIGIBLE TO RUN FOR OR HOLD
THE DISTRICT 4 OFFICE**

Former City Council Member George Stevens has been rumored to be considering a run for the vacant District 4 Council office. Mr. Stevens' last term in office ended on December 2, 2002, and he was prohibited by the term limit provisions of the City Charter from seeking re-election at that time. Mr. Lewis' term was set to expire on December 4, 2006. With the special election to fill the vacancy in District 4 now set for November 16, we answer the question of whether Mr. Stevens may seek or hold the District 4 office.

Charter section 12 (f) provides for term limits. It concisely and clearly states: "Notwithstanding any other provision of this Charter . . . , no person shall serve more than two consecutive four-year terms as a Council member from a particular district. If for any reason a person serves a partial term as Councilmember from a particular district in excess of two years, that partial term shall be considered a full term for purposes of this term limit provision."

We first refer to the plain and clear language of the Charter section. The section provides that no person shall serve more than two "four-year terms" consecutively. If one were to rely solely on that language, the conclusion would be that if any term was less than four years (for example three-and-one half years) the limitation would not apply. The section goes on to clarify, however, that the limitation on a "term" applies where the person serves more than two years; if the person serves more than two years, that period of service constitutes a "full term" for purposes of the term limit provisions. We believe that the converse may clearly be implied from this plain language; if the person serves two years or less, that period of service does not constitute a "full term" for purposes of the term limit provisions.

That the section means exactly what it says is evident not only from the plain language, but from the history of the term limit provisions. Our Office previously addressed this issue in 1997 with respect to the ability of former Council Member Juan Vargas to run for re-election to the Council District seat. That analysis is set forth in a Memorandum of Law enclosed as Attachment 1. The analysis reviews the history of the term limit provisions and concludes that application of the two year exception permitted Mr. Vargas to seek re-election. In addition, other documents in the legislative history of the Charter provision confirm that as drafted it clearly contemplated that the two year exception could operate to permit as little as a two year absence from office to suffice for removing the prohibition on holding consecutive offices. In 1991 this Office addressed a variety of issues concerning ballot measures being pursued for the June 1992 election, and issued a Report enclosed as Attachment 2. One of those issues was the term limit provision now embodied in Charter section 12. The Report pointed out that the City of Redondo Beach had adopted a provision which contained the two year exception (virtually identical to Charter section 12 (f)). Attachment 2 at p. 10. By contrast, the City and County of San Francisco

had adopted a term limit provision which specifically set forth a four year term during which a person would be prohibited from seeking re-election: "No person having served two successive four year terms may serve as a supervisor, either by election or appointment, until at least four years after the expiration of the second successive term in office". *Id.* at p. 11. The choice was thus clear; provide for a two year exception or explicitly provide for a four year absence.

Subsequently, the City Attorney reported to the Mayor and City Council regarding certain questions relating to the term limit provisions. A copy of that Report is enclosed as Attachment 3. In pertinent part the Report answered the question: "Shall a partial term be considered a full term for purposes of applying the two term limit?" *Id.* at p. 2, question 5. The response was unequivocal: "The proposed drafts state that partial terms in excess of two years are to be treated as full terms for purposes of applying the term limit provision." *Id.* Finally, in January of 1992, prior to the 1992 election at which the Charter was amended to include the term limit provisions, the City Attorney reported that no further direction was necessary for the term limit provision, and therefore the provision would proceed to ballot as intended and construed. A copy of that Report is enclosed as Attachment 4.

The plain language and legislative intent of the Charter provision are thus clear; if a person serves more than two years, that service is counted as a full term for purposes of applying the term limit provisions, if two years or less, it does not count as a full term.⁹ The question then becomes: When does the "term" begin? The Municipal Code answers that question. Both sections 27.0709 (a) and 27.0907 (a) provide that the term of office for a person elected at a special election to fill a vacancy begins when the City Council adopts a resolution declaring the results of the election. Those results could be apparent after the first special election (if one person garners a majority of the vote) or after a run-off election if necessary. Thus, application of the term limit provisions is dependant on the declaration of results and not on the date of any election.

So when must the City Council declare the results of the election? The Municipal Code provides that the City Clerk shall *immediately* canvass the ballots for the special election, and that the City Council must declare the results of the election, but the Code does not provide *when* the City Council must declare the results of the election. That issue is of critical importance to the question posed herein, because if the City Council must declare the results of the election prior to December 4, and Mr. Stevens gained fifty percent plus one of the votes at the special election on November 16, he would be ineligible to hold the District 4 office as a result of the

⁹ At the court hearing on the litigation, the rather absurd argument was made that the Charter provision represented an absolute ban on more than two terms in office, whether consecutive or not. This interpretation must be rejected because it would render meaningless the word "consecutive" in the Charter provision, a result that cannot be countenanced. In addition, as set forth above, the legislative history of the provision makes clear that it was intended to prohibit *consecutive* terms, not be an absolute prohibition.

application of the term limit provisions of the Charter (the end of the unexpired term of office for District 4 being December 4, 2006).

Because the Code does not provide for when the City Council must declare the results of the special election, we may turn to the provisions of state law for guidance. Municipal Code §27.0106 (d). As referenced above, state law provides that the canvass of the ballots shall be completed by the elections official no later than the third Friday after the election, and that “[t]he governing body shall meet at its usual place of meeting no later than the third Friday after the election to declare the results and to install the newly elected officers.” Cal. Elec. Code §§ 10262 (a), 10263 (b). Because the special election is scheduled to take place on November 16, the third Friday after the election falls on Friday, December 3, 2004. The immediately preceding regularly scheduled City Council meeting is on November 29-30, 2004. It is our opinion that the City Council should be required to follow the requirements of state law, in the absence of a controlling Municipal Code provision, and that while the City Clerk must immediately canvass the ballots, the City Council would be required to adopt a resolution declaring the results of the election no later than December 3, and more likely at the regularly scheduled meeting of November 30. For the reasons set forth above, a declaration on this date will have the effect of immediately putting into office the person identified as the winner of the election, if one is determined at the special election. These dates all being prior to December 4, it is apparent that if Mr. Stevens gained fifty percent plus one of the votes cast at the special election on November 16, he would be ineligible to hold the District 4 office.

This conclusion does not fully answer the question of Mr. Stevens’ ability to run for office, however, because if a run-off election is necessary following the November 16 special election, it is evident Mr. Stevens would otherwise be eligible to hold office as any declaration of results would be after December 4 and Mr. Stevens’ term of office would be less than two years. The City is thus faced with a conundrum; is Mr. Stevens eligible to run for office when one set of circumstances would permit him to serve and another not? This question must be considered in the context of the consequences; if Mr. Stevens runs for office, wins outright in the November 16 special election, and is thus ineligible to serve, what is the result? Does the office default to the next highest vote getter? Is the election invalid and a new special election required (at which it would be evident that Mr. Stevens could run and serve)? There is no California statute or case directly on point. In these circumstances we must turn to analogous statutes and cases for guidance in order to render an opinion on this issue. Here, guidance is available in certain state statutes and a series of cases addressing a similar question concerning the eligibility to hold office.

Some guidance on this issue can be found in the California Elections Code, which provides a mechanism for contesting the results of an election. Elections Code section 16100 lists seven criteria under which an election may be contested, including the ineligibility of a candidate: “Any elector of a county, city, or of any political subdivision of either may contest any election held therein, for any of the following causes: . . . (b) That the person who has been

declared elected to an office was not, *at the time of the election*, eligible to that office. (Emphasis added.)” It is clear, based on the facts of this matter as applied to the Charter’s term limit provisions, that Mr. Stevens is not eligible to take office on the date of the November 16 special election. He is likewise not eligible to take office on November 30, the last regularly scheduled City Council meeting date on which the results of the election may be declared, or even December 3, the last date on which the results of the election may be declared. It is our opinion that the statutory framework of the Elections Code clearly requires that the winner of an election actually be eligible for holding office at the time of an election. To find otherwise would present an absurdity; there is no logic to allowing a person ineligible to hold an office to run for that office. Likewise, the candidacy of an ineligible person does not promote a clear presentation of choices before voters. “The fundamental purpose of all election law is to enable the voters to exercise a free, orderly, and intelligent choice.” *Donham v. Gross*, 210 Cal. 190, 192 (1930).

The fact that Mr. Stevens would be eligible to assume office at the time of a potential run-off election is not availing. The November 16 special election is distinct and separate from any run-off election. Primary and general elections have historically been treated as separate elections. The City’s campaign finance laws explicitly provide that “a district or City-wide primary election, a district or City-wide general election, and a special election are single and separate elections.” Municipal Code § 27.2903. The provisions of the Municipal Code applicable to special elections clearly distinguish between a special election and a special run-off election. Municipal Code § 27.0906. For these reasons, Mr. Stevens’ eligibility to assume office is dependent solely on his eligibility to run in the November 16 special election; a potential run-off election has no relevance to his eligibility to run in the earlier election.

Given the unusual circumstances surrounding the timing of Mr. Lewis’ passing, Mr. Stevens’ past City service, and the implication of the Charter’s term limit provisions, it is not surprising to find no case law specifically addressing the type of facts currently before us. However, some parallels exist in case law dealing with candidates seeking multiple offices simultaneously. In such situations, a person running, for example, for Council Member and Mayor simultaneously would clearly be prevented from assuming both offices even if he or she was otherwise qualified to hold each office individually. Such a scenario is not substantively dissimilar to the facts before us, which involve a candidate who is generally qualified to assume office, but, for reasons unrelated to their general qualifications, becomes ineligible. These types of situations are the focus of a number of court cases, although mostly decided outside of California.

In *State ex rel. Fair v. Adams*, 139 So.2d 879 (1962), the Florida Secretary of State refused to accept a candidate’s qualification papers for both the office of State Senator and the office of State Representative. The candidate sued, arguing that although he was prevented “from holding more than one of the offices to which he aspires, nevertheless he contends that neither the construction nor the statutory law precludes a man from seeking multiple offices.” *Id.* at 881. In essence, this argument is no different from one suggesting that Mr. Stevens has a right to run

for an office notwithstanding his ineligibility to hold that office. The *Adams* court found this argument to be “contrary to a sound public policy” (*Id.* at 884), and would “create a chaotic condition in, and confuse the election machinery of the state.” *Id.* Ultimately, the *Adams* court held that the candidate could not run for both offices at the same time. *Id.* at 885.

The California Supreme Court looked to the *Adams* decision when ruling on *Moore v. Panish*, 32 Cal. 3d 535 (1982). In *Moore*, the registrar of voters refused to accept nominating papers for a candidate who sought two offices.¹⁰ In analyzing the right of a person to hold two offices, the *Moore* court stated: “Candidates in California also must declare that they meet all qualifications for the office and that, if nominated, they will accept the nomination and not withdraw. Thus, although our courts have not ruled upon the issue, we believe the logic of the cases from other states would apply to prevent candidates from simultaneously running for incompatible offices in California.” *Moore v. Panish*, 32 Cal. 3d at 543 n.9 (1982).¹¹

The findings in these cases strongly supports the notion that the City’s laws must be interpreted in a manner that promotes conducting the upcoming special election such that voters may vote for a candidate who is legally eligible to hold the office being sought. Any other interpretation would produce absurd results, a consequence to be avoided. *DeYoung v. City of San Diego*, 147 Cal. App. 3d at 18. It is abundantly clear that construing local and state election laws to allow Mr. Stevens to run in the November 16 special election would require setting aside the concept that elections should be conducted for legitimate reasons. If Mr. Stevens ran in the November 16 special election and obtained a majority of the votes, the City Attorney would be unable to approve the legality of the results on the basis of a clear violation of the Charter’s term limits provision. Because there is no legal authority under local or state law to declare the runner-up candidate to be the winner in such a situation, the City Council would have no choice but to schedule yet another special election. Moreover, because Mr. Stevens would be eligible to run in a subsequent election (the declaration of results would certainly occur with less than two years remaining in the term of office), the first special election would be rendered pointless. The statutory framework applicable to the City’s elections was clearly not designed for such abuse.

For these reasons, we are of the opinion that Mr. Stevens is ineligible to run for the District 4 office in the special election called for November 16. Although Mr. Stevens would be eligible to hold the office in the event of a run-off election, he would be ineligible to hold office if he won outright on November 16. That result compels a conclusion that he is ineligible to run in any event, to avoid an absurd result and a pointless exercise.

¹⁰ The court allowed the candidate to seek both offices, but only after determining that one of the offices was not truly a public office. *Moore*, 32 Cal. 3d at 548.

¹¹ Similarly here, a candidate for office must declare that if elected, he or she will serve. If Mr. Stevens were elected out right on November 16, however, it is evident that he could not serve.

We should emphasize that this conclusion is consistent with our previously expressed views. Had the special election been set for November 30, as previously proposed and recommended, it is evident that Mr. Stevens would have been eligible to hold office under either circumstance: winning outright in the special election or in a subsequent run-off election. In either case, the City Council would have declared the results with less than two years remaining in the term. Our analysis herein would thus have permitted him to seek the office if the election occurred on November 30.

CONCLUSION

Consideration of the Declaration of Vacancy for the District 4 office was properly set for September 7, the next regularly scheduled meeting of the City Council at which the matter could properly be noticed following the death of Council Member Lewis. There was no duty to consider the matter at the Council meeting of August 9-10, and the Mayor was under no duty to call a special meeting prior to September 7. November 16 was within ninety days of September 7. Even if the matter was required to be considered prior to September 7, the Charter permitted the City Council to set a special election within 180 days because a statewide general election was pending on November 2. The setting of the special election for November 16 was thus proper and complied with all requirements of the Charter and Municipal Code.

Although former City Council Member George Stevens would be eligible to hold the District 4 office if there was a run-off election subsequent to November 16, if he won outright on November 16 the term limit provisions of the Charter would not permit him to serve. Permitting Mr. Stevens to run for the office under these two possible outcomes could lead to an absurd result, rendering the November 16 special election meaningless. Accordingly, to give effect to the special election framework of the Charter and Municipal Code, and to permit the electorate of District 4 to exercise a meaningful right on November 16, we are of the opinion that Mr. Stevens is ineligible to run for the District 4 office. Accordingly, should Mr. Stevens file a nominating petition with the City Clerk seeking to place his name on the ballot as a candidate for the November 16 special election, the City Clerk should inform him in writing that his name cannot be transmitted to the County Registrar for placement on the ballot based on the advice contained herein.

Respectfully submitted,

CASEY GWINN
City Attorney

LJG:SR:ljk:km:ai
Attachments
cc: Mayor & City Council Members
City Manager
City Clerk
LO-2004-01