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MEMORANDUM

TO: Members, Redistricting Task Force

CC: John Arntz, Director of Elections
Angela Calvillo, Clerk of the Board of Supervisors

FROM: Jon Givner *JG*
Andrew Shen *AS*
Mollie Lee *ML*
Deputy City Attorneys

DATE: January 9, 2012

RE: Impact of Redistricting on Supervisors' Residency Requirements and Term Limits

In this memorandum, we address three questions regarding the potential impact of redistricting on current members of the Board of Supervisors ("Board"). First, we address whether the Redistricting Task Force ("Task Force") must consider where current Board members reside when it redraws supervisorial district boundaries. Second, we address whether a member of the Board may remain in office if new district boundaries place the Supervisor's residence outside the district that the Supervisor represents. Third, we address the application of term limits to a Supervisor who has served one or more terms in a district and then chooses to run for election as Supervisor for another district.

Summary of Advice

1. The law does not require the Task Force, when redrawing district boundaries, to consider the locations of current Board members' residences. But in its discretion, the Task Force *may* consider incumbents' residency when doing so.
2. Redistricting will not affect the term or tenure of any current Supervisor. The City's Charter provides that if, as a result of the new district boundaries, any Supervisor no longer resides in the district that the Supervisor represents, the Supervisor may serve the remainder of the term without establishing a new residence. But if the Supervisor wishes to run for a subsequent term as the representative of the district, the Supervisor must establish residency within the revised district boundaries.
3. The Charter restricts Supervisors from serving more than two successive four-year terms as a member of the Board. That two-term limit applies regardless of which district the Supervisor represents on the Board. A Supervisor who has served two consecutive four-year terms as a representative of one district may not serve as the Board member representing a different district until four years have elapsed since the end of the Supervisor's second term. Similarly, a Supervisor who has served one four-year term as a representative of a district and who then is elected to a four-year term as the representative of a different district may not serve a third term as a Board member until four years after the end of the Supervisor's second term.

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Background

The Task Force is responsible for redrawing supervisorial district boundaries in accordance with criteria defined in the Charter and other legal requirements. *See* S.F. Charter § 13.110(d). The Task Force must complete the redrawing of district lines before April 15, 2012. *Id.*

Each member of the Board must reside "in the district in which he or she [was] elected" during his or her incumbency. *See* Charter § 13.110(e). And the Charter requires Supervisors to establish their residency at least 30 days before the date that they declare their candidacy for their offices. *Id.*

The Task Force may redraw the district boundaries placing one or more current Supervisors outside of the boundaries for the districts they represent. For instance, a hypothetical Supervisor elected from District A could reside in a redrawn District B as a result of the new district boundaries.

Analysis**I. CONSIDERATION OF INCUMBENTS' RESIDENCY**

The Charter does not require the Task Force, when it drafts new district lines, to consider the current residences of incumbents. As discussed in this Office's memorandum to the Task Force on August 16, 2011, the Charter sets forth certain criteria that the Task Force must consider in redrawing district boundaries.¹ The Charter does not list incumbents' residency as one of those mandatory criteria. Since the Charter does not explicitly preclude the consideration of other criteria, the Task Force may make a policy decision to account for Board members' residency, if it wishes to do so. For example, the United States Supreme Court has "recognized incumbency protection, at least in the limited form of avoiding contests between incumbents, as a legitimate state goal." *Bush v. Vera*, 517 U.S. 952, 964 (1996) (citations and internal punctuation omitted).

By contrast, the California Constitution specifically prohibits the State Citizens Redistricting Commission from using incumbents' residency as a factor in State redistricting. *See* Cal. Const. Art. 21, § 2 (e) ("The place of residence of any incumbent or political candidate shall not be considered in the creation of a map."). California voters added this provision to the state Constitution in November 2008, through Proposition 11. Proposition 11 included this prohibition because the measure sought to eliminate safe districts for legislators, in which they "are virtually guaranteed reelection," and disregarding the residences of incumbents was one way to achieve that goal.² Even though Charter section 13.110(d) does not have the same aim, the Task Force may adopt a similar rule for its own redistricting effort, but neither the Charter nor the California Constitution requires it to do so.

¹ The City Attorney's August 16, 2011 memorandum is available at: <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=878>.

² The ballot arguments for Proposition 11 are available at: <http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt11.htm>.

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II. BOARD MEMBERS DRAWN OUT OF THEIR DISTRICTS

The second question involves the immediate impact of redistricting on any Supervisors who, as a result of the revised boundaries, no longer reside in the districts they represent on the Board. As a general rule, the Charter requires that each member of the Board reside "in the district in which he or she is elected" at least 30 days before filing a declaration of candidacy and throughout his or her tenure as Supervisor. *See* Charter § 13.110(e). If a Supervisor at any time ceases to be a resident of the district, the Supervisor "shall be removed from office." *Id.* But the Charter sets forth a specific exception to the residency rule for Supervisors whom the Task Force has drawn out of their districts. Section 13.110(b) provides:

No change in the boundary or location of any district shall operate to abolish or terminate the term of office of any member of the board of supervisors prior to the expiration of the term of office for which such member was elected or appointed.

Under this rule, Supervisors who hold office under the existing district boundaries may complete their terms even though they no longer reside in their original districts after the Task Force completes its work.

Accordingly, a Supervisor elected in District A but whose home is in the newly-drawn District B may remain in office for the remainder of the term as the Supervisor representing District A. The Charter does not require the Supervisor to establish residency in the "new" District A to remain in office. But if the Supervisor seeks to run for re-election in District A at the end of the term, the Supervisor must move and become a resident of the new District A at least 30 days before filing a declaration of candidacy for the office. *See* Charter § 13.110(e).

If the Supervisor seeks to run for re-election in the newly-drawn District B, the Supervisor may maintain his or her current residence and run for the District B seat while remaining in office as the District A supervisor. But if elected to the District B seat, the Supervisor would forfeit the District A seat upon assuming office as the District B Supervisor. *See* S.F. Campaign & Gov'tal Conduct Code § 3.230; Cal. Gov. Code § 1099.

III. TERM LIMITS

The third question involves the application of the Charter's term limits provision for Supervisors. Charter section 2.101 generally prohibits any individual from serving more than two successive four-year terms in the office of Supervisor. The question presented here is whether each seat on the Board is a separate office for the purpose of the two-term limit. We conclude that, under the Charter, no person can serve on the Board—in any seat—for more than two consecutive four-year terms. And after serving on the Board for two successive four-year terms, the Supervisor must wait another four years before again taking office as a member of the Board representing *any* district.

The "fundamental task" of statutory construction of a Charter provision such as section 2.101 "is to ascertain the intent of the electorate so as to effectuate the purpose of the law." *People v. Martinez*, 116 Cal. App. 4th 753, 760 (2004). While some courts have stated that term limits laws cannot curtail the right to hold public office "except by a clear declaration of law," *Pope v. Superior Court*, 136 Cal. App. 4th 871, 876 (2006), the Supreme Court has instructed that voter intent "*is the paramount consideration.*" *Legislature v. Eu*, 54 Cal.3d 492, 505 (1991) (emphasis in original; quoting *In re Lance W.*, 37 Cal.3d 873, 889 (1985)). To determine that

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intent, a court would first examine the language of the measure, giving its words their ordinary, everyday meaning. *See Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1238-39 (1992). If the language is ambiguous or uncertain, the court would consider the provision's legislative history, including ballot arguments and other materials presented to the voters. *See Hodges v. Superior Court*, 21 Cal.4th 109, 113-115 (1999).

A. Plain Language Of Section 2.101

The plain language of section 2.101 limits the number of years an official can serve as a member of the Board, not just as a representative of a particular district. The voters enacted this provision through a ballot measure, Proposition N, adopted in June 1990. In relevant part, section 2.101 provides:

No person elected or appointed as a Supervisor may serve as such for more than two successive four-year terms. Any person appointed to the office of Supervisor to complete in excess of two years of a four-year term shall be deemed, for the purpose of this section, to have served one full term. 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.

Section 2.101 makes no distinction between seats on the Board—the Charter refers only to individuals serving "as a Supervisor" or in "the office of Supervisor." Charter section 2.100 also refers to "the office of Board of Supervisors member" as a single office, even though the Board has 11 members. And as set forth in Article II of the Charter, all Board members exercise similar legislative authority.³

Under section 2.101, if a hypothetical Board member serves two successive four-year terms as the representative of District A, that person may not serve *as a Supervisor* again—representing any district—until four years have elapsed since the end of the Supervisor's second term. Similarly, if a Board member serves one four-year term as the representative of District A and then immediately serves a second four-year term as the representative of District B, the Board member has served two consecutive four-year terms *as a Supervisor* and may not serve a third term on the Board representing any district.

The alternative interpretation of section 2.101 would disregard at least two tenets of statutory construction. First, such a reading would be inconsistent with the plain language of the Charter because it would require the addition of words that are not in the text. Applying the term limit more narrowly would require interpreting section 2.101's use of the term "as a Supervisor" to mean "as a Supervisor for a particular district." But when the words of the Charter are plain, a court "may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." *Burden v. Snowden*, 2 Cal.4th 556, 562 (1992). Second, the more narrow interpretation would require a conclusion that the voters *implicitly* amended the term limits law when they adopted a system of district elections in 1996. But such

³ The Charter draws a distinction among Board members only for the purpose of implementing district-based elections: section 13.110(e) requires Board members to reside in the districts they represent, and section 13.110(f) establishes a staggered election cycle for Board members representing even- and odd-numbered districts.

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"amendments by implication" are "disfavored and are accepted only in the absence of another rational way to harmonize the statutory provisions." *Cacho v. Boudreau*, 40 Cal.4th 341, 352 (2007). That is not the case here.

B. Voter Intent

Despite the Charter's plain language, one might argue that the term "a Supervisor" in section 2.101 *could* mean "a Supervisor for a particular district." Even if a court were to conclude that the language is ambiguous, a court should reach the same conclusion we discuss above based on the voters' intent in enacting term limits. In interpreting section 2.101, the Court of Appeal explained that "it is the intent of the voters of San Francisco that is the paramount consideration." *Arntz v. Superior Court*, 187 Cal. App. 4th 1082, 1092 (2010) (quotation and citation omitted). Accordingly, if section 2.101 were ambiguous, courts would interpret this provision consistent with its voter-approved purposes, even if that interpretation restricts incumbents' ability to remain in office. *See Eu*, 54 Cal.3d at 504-05 (construing ambiguous provision in Proposition 140 as imposing strict lifetime term limit); *Schweisinger v. Jones*, 68 Cal. App. 4th 1320 (1998) (construing ambiguous term to impose a stricter term limit); *Woo v. Superior Court*, 83 Cal. App. 4th 967, 975 (2000) ("[t]he voters' intent in approving the measure is our paramount concern" when interpreting term limits). To determine voter intent, courts consider ballot arguments and other official materials provided to the voters. *See Lungren v. Deukmejian*, 45 Cal.3d 727, 740 n.14 (1988).

1. Ballot Materials In 1990 Election Adopting Term Limits

When the voters adopted term limits for Board members in 1990, the City elected Supervisors using at-large elections, so the ballot materials did not discuss the impact of section 2.101 on district Supervisors. But the ballot question and accompanying materials clearly state the voters' goal of limiting the number of consecutive terms a person may serve on the Board. The ballot question stated, in part:

Shall persons be prohibited from serving more than two consecutive four-year terms *on the Board of Supervisors*, and be prohibited from serving as a Supervisor again until four years have elapsed. . . ?

See June 1990 Voter Information Pamphlet at 113 (emphasis added).⁴ The Ballot Simplification Committee's ("BSC's") digest similarly described the measure as applying generally to membership on the Board. The BSC explained, "Under Proposition N, no person could serve more than two consecutive four-year terms on the Board of Supervisors," and "[a]fter two consecutive four-year terms on the Board of Supervisors, a person must wait four years before serving again." *See id.* The BSC also explained that a "yes" vote on the measure indicated an intent to prohibit service of "more than two consecutive four-year terms on the Board of Supervisors" and to require a four-year wait before "serving on the Board of Supervisors again." *See id.* Proposition N asked the voters whether they wanted to limit service on the Board to two terms, and the voters indicated that they did.

⁴ The San Francisco Public Library's archive of Voter Information Pamphlets is available at: <http://sfpl4.sfpl.org/index.php?pg=2000126101>.

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The official ballot arguments in favor of Proposition N provided two related reasons for imposing term limits on Supervisors: to blunt the advantages of incumbency for long-term officeholders, and to ensure turnover and new ideas at the Board. *See* Official Argument in Favor of Proposition N ("The current system favors incumbent politicians and denies experienced **newcomers** a fair chance to serve," and "an elected body [will] grow stale without a regular infusion of fresh faces and new ideas.") (emphasis in original); Rebuttal to Official Argument Against Proposition N ("Proposition N also gives experienced and concerned citizens an opportunity to serve without needing to become professional, career politicians.")

The paid ballot arguments published in favor of Proposition N echo these two themes. First, the paid arguments make several references to the incumbency advantage: "professional, career politicians," "entrenched incumbents," incumbents "continu[ing] to win re-elections year after year," and "the powers of incumbency [that] virtually preclude incumbents from being defeated at the polls." *See* Paid Arguments In Favor of Proposition N at 116-19. And second, the arguments also suggest that fundamental goal of term limits for Board members is the infusion of new ideas through mandatory turnover: "new blood," "new people, new ideas and new energy," "new political leadership," "fresh approaches to governing," and "a new generation of civic leaders." *See id.*

Allowing Supervisors to avoid Proposition N's two-term limit by running in a different district would not advance either of the goals stated in its ballot materials. First, sitting Board members running in a new district would retain much of the incumbency advantage that Proposition N sought to restrict. As the Supreme Court acknowledged, incumbents "appear to enjoy considerable advantages over other candidates," possibly because of "superior fund raising ability, greater media coverage, larger and more experienced staffs, greater name recognition among the voters, favorably drawn voting districts, or other factors." *Eu*, 54 Cal.3d at 523. There may be fewer benefits for an incumbent Board member running in a new district in the City, but they would still be substantial. Members of the Board may be best known in their current districts, but name recognition extends beyond district boundaries. Similarly, campaign infrastructure may be more developed in a Supervisor's current district, but campaign experience and connections give current Supervisors an advantage in any district. And current Supervisors have other advantages that would benefit them in any race in the City, including City-wide media coverage. *Cf. Legislature v. Reinecke*, 10 Cal.3d 396, 402-03 (1973) (even when redistricting substantially changes a sitting legislator's district, "each incumbent will retain the advantage of running as a sitting congressman or state legislator, as the case may be").

Allowing Supervisors to run for a third term in a new district would also undermine Proposition N's second goal of ensuring turnover at the Board. The official and paid arguments indicate the voters' concern that Supervisors who serve more than two terms become less able to address the City's problems creatively and more prone to the influence of special interests. That concern applies to all long-term Board members, not just those who represent a particular district or those who were elected in a City-wide election before the voters adopted a district system. Permitting Board members to serve more than two terms—in any seat—would contravene the voters' intent when they adopted Proposition N, and would allow long-term Supervisors to seek election to the Board continuously by moving their residences within the City.

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2. Ballot Materials In 1996 Election Adopting District Elections

When the voters approved district elections in 1996, six years after adopting supervisorial term limits, they did not express any intent to change the two-term limit that applied at that time to all Board members. As the Court of Appeal noted in *Arntz*, "[t]here have been four elections since 1990 where the voters of San Francisco considered Charter initiatives affecting the composition and election of the board of supervisors [including the 1996 measure approving district elections], and in none of them was there any hint that term limits would be relaxed." 187 Cal. App. 4th at 1085. The 1996 ballot materials did not suggest any intent to change the existing term limits rule in section 2.101.

While the 1996 measure did not change the language of section 2.101, it did create a limited exception to term limits for Supervisors elected to serve truncated two-year terms during the transition from City-wide to district elections. See Charter § 13.110(f); City Attorney's Memorandum to Hon. Tom Ammiano, Jan. 7, 2004.⁵ That one-time-only exception has no remaining effect today, but it is significant here because it indicates that the voters were considering term limits as they adopted district elections. As the Court of Appeal explained, "when the voters approved the switch to the system of electing supervisors by district in 1996, they knew they were approving a limited exception to the two-term ban, demonstrating that if the drafters of legislation intended to create an exemption to the two-term limit, they knew how to do so—and do so openly." *Arntz*, 187 Cal. App. 4th at 1097. The voters in 1996 adopted a limited amendment to the City's term limits law, but they did not change the existing rule in section 2.101 that a Supervisor may not serve more than two successive four-year terms as a member of the Board.

In sum, the voters in 1990 intended strictly to prohibit anyone from serving more than two consecutive four-year terms on the Board. The plain language of section 2.101 is consistent with that intent. In adopting the subsequent Charter amendment approving district elections, the voters did not evince any intent to change the rule they adopted in 1990. Regardless of how the Task Force changes district boundaries, a Supervisor may not serve more than two consecutive four-year terms as a member of the Board representing any district, and must wait an additional four years following the end of the second term to serve on the Board again.

⁵ The City Attorney's January 7, 2004 memorandum is available at:
<http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=83>.