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MEMORANDUM

TO: Angela Calvillo, Clerk of the Board of Supervisors
 CC: John Arntz, Director of Elections
 FROM: Dennis J. Herrera *DSH*
 City Attorney
 DATE: November 4, 2015
 RE: Swearing-in Dates Following Vacancy Elections

Summary

Questions have been raised about when the winner of a vacancy election for the District Three seat on the Board of Supervisors may be sworn in for the remainder of the term. Charter Section 13.101.5 sets forth the rules for an election to occur to fill a vacancy in an elective office other than the Office of Mayor—a “vacancy election.” Those rules turn mainly on whether the vacancy occurs more than one year before the next regularly scheduled election for that office. Generally, when the vacancy occurs less than one year before the next regularly scheduled election for the vacated seat, the winner of the election may take office at the start of the next full term, on January 8, as is the case for all non-vacancy elections for seats on the Board of Supervisors. But when the vacancy occurs more than one year from the next regularly scheduled election for the seat, the Charter states that the election is to “fill the unexpired term.” In that situation, the winner of the vacancy election may be sworn in as soon as the election results are final, which occurs when the Director of Elections issues a certificate of election, after the Board of Supervisors adopts a resolution declaring the election results. The winner need not wait until January 8 to take office.

Here, David Chiu vacated his office as the District Three Supervisor and assumed office in the California Assembly on December 1, 2014. On that date, more than one year remained on the term in office for that seat. On January 8, 2015, the Mayor appointed Julie Christensen to serve in Supervisor Chiu’s vacated seat. Charter Section 13.101.5 required that the City hold a vacancy election on November 3, 2015, to “fill the unexpired term.” Accordingly, under the Charter, the winner of the November 3, 2015 election may assume office once the election becomes final. That means the winner may be sworn in upon receiving the certificate of election from the Director of Elections, after the Board of Supervisors declares the election results.

Analysis

As a general rule, each local elective office under the Charter has a four-year term, and the Charter mandates that those terms begin at noon on the eighth day of January. *See* Charter § 13.101(a). A person elected to a full term on the Board of Supervisors may then assume office no sooner than noon on the eighth day of January following the election.

When a vacancy occurs in an elective office other than the Office of Mayor, the Charter empowers the Mayor to fill the vacancy until the voters can elect a person to take the seat. *See* Charter Section 13.101.5(a). In 2001, the voters amended the Charter to set rules for when elections following vacancies must take place. Section 13.101.5(c) states:

Any person filling a vacancy pursuant to subsection (a) or (b) of this Section shall serve until a successor is selected at the next election

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occurring not less than 120 days after the vacancy, at which time an election shall be held to fill the unexpired term, provided that (1) if an election for the vacated office is scheduled to occur less than one year after the vacancy, the appointee shall serve until a successor is selected at that election or (2) if an election for any seat on the same board as the vacated seat is scheduled to occur less than one year but at least 120 days after the vacancy, the appointee shall serve until a successor is selected at that election to fill the unexpired term.

Section 13.101.5(c) sets forth three possible deadlines for the vacancy election depending on the upcoming election schedule. The date that the winner of the election assumes office depends on which of the three scenarios applies:

- **Scenario 1: Regularly scheduled election for the seat within one year.** If an election for the vacated seat is scheduled to occur less than one year after the vacancy occurs, then the appointee may hold the seat until that election, at which point the voters would elect a person to serve the next term. Recent examples of such late-term vacancies include the vacancy in the District Attorney's Office after Kamala Harris assumed office as Attorney General in 2011, and in the District Five Supervisor's Office after Ross Mirkarimi took office as Sheriff in 2012. In this scenario, the City Attorney's Office has consistently advised that the appointee remains in office until the conclusion of the unexpired term, regardless of who wins the November election for the seat. Unlike vacancies that occur closer to the middle of a term (scenarios 2 and 3 below), the Charter does not state that the winner of the election will "fill the unexpired term." If the appointee wins the election, the appointee remains in office both for the remainder of the unexpired term and for subsequent the full term (as in the 2011 District Attorney election); if the appointee loses the election, the appointee still remains in office until the end of the term, and the successor can assume office when the full term begins on the January 8 following the election (as in the 2012 District Five election).
- **Scenario 2: Regularly scheduled election for another seat on the Board within 120 days to one year.** If there is no regularly scheduled election for the vacated seat on the Board within a year, but an election for any other seat on the Board is scheduled to occur between 120 days and one year after the vacancy, then the appointee may serve until a successor is selected at that election. *See id.* A recent example of this scenario is the vacancy in the District Four Supervisor's Office after Ed Jew resigned in 2008. In that instance, the Charter specifies that "the appointee shall serve until a successor is selected at that election to fill the unexpired term." Unlike in scenario 1 described above, the appointee in this scenario does not remain in office until the end of the term. The winner of the election takes office once the election results are final, and may serve the remainder of the term.
- **Scenario 3: Regularly scheduled election for a Board seat less than 120 days away or more than one year away.** In any other instance—for example, if the nearest Board elections are less than 120 days away or more than one year away—the appointee may serve until a successor is selected at the next election, as long as that election is scheduled to occur at least 120 days after the vacancy. *See id.* A recent example is the vacancy in the District Four Supervisor's Office after Carmen Chu assumed office as Assessor in 2013. This year's District Three Supervisor election also falls into this scenario. As in

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scenario 2, the Charter here states that the purpose of the vacancy election is “to fill the unexpired term.” So again, the winner of the election takes office once the election results are final, and may serve the remainder of the term.

The question, then, is what date the winner of the election under scenarios 2 or 3 may take office to “fill the unexpired term.” The Charter does not specify a date, but it does state that the winner of the election may hold the seat for the entire unexpired term. Accordingly, the winner of the election may assume office when the election is final—that is, upon receipt of a certificate of election from the Director of Elections.

Under the California Elections Code, the Director of Elections must prepare a certified statement of the election results within 30 days of the election. Elec. Code § 15372. After the Director of Elections issues the certified statement, the Board of Supervisors must declare the results of the election, including the names of the persons elected to each office. *Id.* § 15400. The Board declares the election results by adopting a resolution, which must be passed by a majority of the Board and signed by the Mayor. The adoption of the resolution is a ministerial act. The resolution typically is prepared by the City Attorney at the request of the Director of Elections, introduced by the Board President, and voted on by Board on the “Adoption Without Committee Reference” portion of the Board’s agenda. As a final step, the Director of Elections must then prepare and deliver a certificate of election to each person elected to office. *Id.* § 15401. This, too, is a ministerial act.

Some questions have been posed about whether the winner of a vacancy election in scenario 2 or 3 should assume office on January 8, which, as mentioned above, is the date that applies to all non-vacancy elections for seats on the Board of Supervisors, and to vacancy elections for the first scenario above, instead of the date the election results become final. But nothing in the Charter suggests that the January 8 date applies in those circumstances. The Charter designates January 8 as the date that full four-year terms begin for members of the Board of Supervisors, but does not designate that date for mid-term vacancy elections. Indeed, applying a January 8 date to mid-term vacancy elections could lead to absurd consequences in some situations. Vacancy elections can occur in June, with the Board typically declaring the election results in late June or early July, and can also take place at other times of year if the City holds a special election. Requiring the winner of such an election to wait until January 8 to take office could significantly undermine the purpose of a mid-term election.

For these reasons, a person elected to fill the remainder of an unexpired term under scenario 2 or 3 above may be sworn in when the election results are final, upon receipt of a certificate of election from the Director of Elections.

Conclusion

On January 8, 2015, Mayor Edwin M. Lee appointed Julie Christensen to fill the District 3 Supervisorial vacancy created when former Board of Supervisors President David Chiu assumed office as a member of the California State Assembly. The term for the seat that Supervisor Chiu vacated began on January 8, 2013 and will conclude on January 8, 2017. The election for the next term beginning on January 8, 2017 will be in November 2016. Since the vacancy occurred more than a year before the November 2016 election, the City held an election for the seat at the next election for the Board more than 120 days but less than one year after the vacancy—scenario 3 described above.

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Accordingly, the purpose of the November 3, 2015 election was to fill the remainder of the unexpired term, not to determine who will hold the office for the full term beginning on January 8, 2017. As such, under the Charter's language, the winner of that election may be sworn in as soon as those election results are final, that is, when the Director of Elections issues the certificate of election, following the Board of Supervisor's adoption of a resolution declaring the results of the November 3, 2015 election.