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## MEMORANDUM

TO: The Honorable Larry Reid  
Oakland City Council President

FROM: Jesse Capin Smith  
Chief Assistant City Attorney *(SCS)*  
Jon Givner *JG*  
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Deputy City Attorneys

DATE: June 2, 2011

RE: Timing of a Possible Special Election for the Oakland City Attorney

### Summary of Advice

The President of the City Council has asked this Office to provide a written opinion regarding the timing of a possible special election to fill a vacancy in the office of Oakland City Attorney. Following the planned resignation of City Attorney John Russo, a vacancy in the office will occur on June 13, 2011. If the Oakland City Council does not appoint a City Attorney within 60 days of the vacancy, then the vacancy must be filled by special election. *See* Oakland City Charter § 401(4). We conclude that if a special election is required, it must be held within 120 days of the final day on which Council could fill the vacancy by appointment, that is, within 180 days of June 13, 2011. This deadline may be extended by 60 days if that would permit the special election to be consolidated with the next municipal or statewide election.

Charter section 401(4) establishes the procedures for filling a vacancy in the Office of City Attorney. It provides that "if the Council shall fail to fill a vacancy by appointment within sixty days after such office shall become vacant, the City Council shall cause an election to be held to fill such vacancy pursuant to the manner and method as provided for in Article II, Section 205 of the Charter." Section 205, in turn, states that "[a]ll vacancies occurring in the office of Councilmember shall be filled by special election within 120 days of a vacancy." In a limited exception, it also provides that "[a]n extension of up to 60 days may be allowed for the express purpose of consolidating the special election with the next Municipal Election or Statewide Election." The question here is whether the general rule of Section 205 requires that a special election to fill the vacancy must be held within 120 days of when office becomes vacant or within 120 days of the Council's failure to fill the vacancy by appointment – that is, within 180 days of the vacancy.

Under the Charter, the City Council can call a special election *only after* the expiration of the initial 60-day period for an appointment. If the Charter required the City to hold an election within 120 days of when the vacancy actually occurs, then the City would have to hold the special election just 60 days after the date of its calling. But governing state and local law sets key elections deadlines well more than 60 days in advance of an election. Based on those statutory elections deadlines, and the rule of statutory construction that statutes should not be interpreted to produce absurd or impossible results, we conclude that Section 401(4) requires a special election to be held within 120 days of the expiration of the Council's 60-day period to fill

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the vacancy by appointment, and thus within 180 days of the vacancy (subject to the possible 60-day extension to consolidate such special election with the next municipal or state election, as mentioned above).

**Background**

On May 4, 2011 City Attorney John Russo announced that he had accepted the job of Alameda City Manager and delivered a letter to the Council President resigning from the office of Oakland City Attorney effective June 13, 2011. Russo was elected to his third term as City Attorney in November 2008, and he will vacate the office with approximately 18 months remaining in that term. The next regularly scheduled election for Oakland City Attorney is in November 2012.

At the request of Oakland City Council President Larry Reid, and with the consent of City Attorney John Russo, Oakland retained the San Francisco City Attorney's Office to provide advice on questions related to the timing of a possible special election for City Attorney. The Oakland City Attorney's Office and the San Francisco City Attorney's Office have a valued and long standing reciprocal legal services arrangement for situations presenting an actual or apparent conflict to either office.

This opinion interprets provisions of the Oakland City Charter. For ease of reference, we attach the relevant Charter provisions.

**Discussion**

The fundamental task of statutory and charter interpretation is to determine the intent of the legislative body in enacting the measure. *See White v. Ultramar Inc.*, 21 Cal.4th 563, 572 (1999). To determine legislative intent, a court must 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). Under established rules of statutory construction, courts must harmonize the provisions of a statute or measure if possible, giving full effect to each. *See Cacho v. Boudreau*, 40 Cal.4th 341, 352 (2007). Accordingly, "significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." *DuBois v. Workers' Comp. Appeals Bd.*, 5 Cal.4th 382, 388 (1993) (quoting *Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal.3d 222, 230-231 (1973)). "In construing legislative intent, it is fundamental that a statute should not be interpreted in a manner that would lead to absurd results." *Central Pathology Service Medical Clinic v. Superior Court*, 3 Cal.4th 181, 191 (1992) (quoting *People v. Morris* 46 Cal.3d 1, 15 (1988)).

Our analysis begins with the text of Charter section 401(4), which establishes the process for filling a vacancy in the Office of City Attorney. The full text of this section provides:

Upon the declaration of vacancy in the Office of the City Attorney, the Office of the City Attorney shall be filled by appointment by the majority vote of the members of the Council; provided, that if the Council shall fail to fill a vacancy by appointment within sixty days after such office shall become vacant, the City Council shall cause an election to be held to fill such vacancy pursuant to the manner and method as provided for in Article II, Section 205 of the Charter. An appointee or the person elected to the Office of City Attorney for the balance of an unexpired term shall hold office until the next general election for the Office of the City Attorney.

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The general rule of section 401(4) is that a vacancy in the Office "shall be filled by appointment by the majority vote of the members of the Council." Section 401(4) also includes a specific contingency rule that applies only if the Council does not fill the vacancy within 60 days. In that event, the Council "shall cause an election to be held to fill such vacancy pursuant to the manner and method as provided for in Article II, Section 205 of the Charter." Thus, Section 401(4) includes two operative provisions that are triggered by different events. First, the Council's authority to appoint a City Attorney becomes operative when there is a vacancy in the Office of City Attorney. Second, the Council's obligation to cause an election to fill the vacancy becomes operative only if the Council fails to appoint a City Attorney within 60 days of the vacancy.

Once the Council's obligation to call a special election is triggered – 60 days after the office becomes vacant – the Council must "cause an election to be held" in the "manner and method" described in Article II, Section 205. This section concerns Council vacancies, which, unlike City Attorney vacancies, may be permanently filled only by election.<sup>1</sup> Section 205 lists several procedural requirements for a special election to fill a Council vacancy:

- Timing: "All vacancies occurring in the office of Councilmember shall be filled by special election within 120 days of a vacancy. An extension of up to 60 days may be allowed for the express purpose of consolidating the special election with the next Municipal Election or Statewide Election."
- Ranked Choice voting: "Special elections for the office of Councilmember that take place during or after the first use of ranked choice voting in a Municipal Election shall be conducted using the same ranked choice voting procedures used to elect Councilmembers in General Municipal Elections."
- Alternative Voting Procedures: "Alternative legal voting procedures shall be used to the greatest extent feasible to increase voter participation in special elections including but not limited to mail ballot voting, electronic voting and extended voting period."

Even though these three requirements specifically address elections to fill Council vacancies, the special election for Office of City Attorney must comply with these requirements. The provisions regarding ranked choice voting and alternative voting procedures readily apply to a special election for City Attorney, but the timing provision requires interpretation.

The Charter provides a different process for filling Council and City Attorney vacancies, and that difference affects the timing of the special election. Council vacancies may be permanently filled only by election, and cause for an election accrues immediately upon the vacancy. By contrast, City Attorney vacancies may be permanently filled by appointment, and cause for an election does not accrue until the Council fails to fill the vacancy within a 60-day period. To apply the timing provision to a City Attorney vacancy, we need to determine whether the election must be held within 120 days of the vacancy or within 120 days of the date that the election became necessary, i.e., the expiration of the Council's 60-day period to fill the vacancy by appointment.

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<sup>1</sup> Section 205 states that under certain conditions the Council may make *temporary* appointments to fill a vacancy, but the appointee may not be a candidate for the vacated seat, the appointment may not exceed 128 days, and the appointment ends when the new incumbent assumes office.

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When statutory language is ambiguous, courts may look to legislative history to determine the intent of the enacting body. *Halbert's Lumber*, 6 Cal. App. 4th at 1238-39. Section 401(4) was adopted by the voters of Oakland as part of Measure E at the March 5, 2002 election. Therefore, ballot materials are part of the relevant legislative history. *See Hodges v. Superior Court*, 21 Cal.4th 109, 113-115 (1999). The City Attorney's Impartial Analysis of Measure E,<sup>2</sup> which was included in the Voter Information Pamphlet, describes the process of filling a vacancy in the Office of City Attorney as follows:

This measure would provide for the city council to fill a vacancy in the office by majority vote within 60 days; if the council failed to do so, the current charter's special election procedure, used for councilmember vacancies, would take effect. A special election would be required within 120 days of the vacancy, unless a 60 day extension was allowed expressly to consolidate the special election with the next Municipal Election. The candidate receiving the highest number of votes would be sworn into office as soon as possible.

This summary confirms that the special election procedures "would take effect" only after the expiration of the 60-day period for the Council to make an appointment. The summary otherwise tracks the language of Section 205, suggesting that the voters intended that the special election must be held "within 120 days of the vacancy." But as explained below, this literal reading would require the election to be held within 60 days of the date it is called, a timeline that is not possible under governing elections law.

As an initial matter, a special election to fill a vacancy in the Office of City Attorney may not be called until the expiration of the Council's 60-day period to act. *See* Charter § 401(4) ("provided, that *if* the Council shall fail to fill a vacancy by appointment within sixty days after such office shall become vacant, the City Council shall cause an election to be held to fill such vacancy . . .") (emphasis added). The text of Section 401(4) does not authorize the Council to call a special election until the 60-day period has elapsed and the Council has not made an appointment.

Any interpretation that would require the Council to call a special election before the end of that 60-day period would either nullify the appointment provision at the heart of section 401(4) or lead to the absurd result that the appointment and election processes would occur simultaneously. Rules of statutory construction compel against such an interpretation. *See DuBois*, 5 Cal.4th at 388 ("significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose") (quoting *Moyer*, 10 Cal.3d at 230-231); *Central Pathology Service Medical Clinic*, 3 Cal.4th at 191 ("a statute should not be interpreted in a manner that would lead to absurd results") (quoting *People v. Morris*, 46 Cal.3d at 15)). Interpreting Section 205 to reduce or eliminate the Council's 60-day appointment period would violate the "well-settled" rule that an "interpretation that renders related provisions nugatory must be avoided." *People v. Shabazz*, 38 Cal.4th 55, 67 (2006).

Because an election may not be called until 60 days have elapsed after the vacancy, it would not be possible for the City to hold an election within 120 days of the vacancy – just 60 days from the date of its calling. Governing elections law sets key deadlines that occur more than 60 days in advance of an election. For most election deadlines, Oakland follows state law. *See* Oakland Charter § 1103 ("Except as may be otherwise provided by ordinance or by this

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<sup>2</sup> The Impartial Analysis for Measure E was prepared by outside counsel.

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charter, declarations of candidacy, nominations for election, all elections and all procedures relating thereto shall be in accordance with the applicable provisions of state law."); Oakland Code § 3.08.010 ("Except as otherwise set forth in this chapter, all city elections and all procedures relating thereto shall be, where practicable, in accordance with the applicable provisions of state law relating to elections in general law cities.").

The California Elections Code requires that the City publish notice of a special election at least 113 days before an election, Cal. Elec. Code § 12101, and that candidates file nomination papers at least 88 days before an election, *id.* § 10220. Title 3 of the Oakland Municipal and Planning Codes further requires that candidate qualification statements be filed at the same time as nomination papers, Oakland Code § 3.08.080, and that the City Clerk hold a drawing to determine the order in which names shall appear on the ballot by the 77<sup>th</sup> day before the election, *id.* § 3.08.150. These are just a few of the election deadlines that fall more than 60 days before the election. *See also* Cal. Elec. Code § 10002 (when a county provides election services for a city, the city must provide a list of its precincts no later than 61 days before the election); *id.* § 10225 (filing deadline extended to 83 days before election if an eligible incumbent does not file nomination papers by the 88 day deadline); Cal. Govt. Code § 87201 (candidates must file disclosure of economic interests by the deadline for filing a declaration of candidacy).

Operational constraints lead to additional deadlines that fall more than 60 days before an election. The City Clerk informs us that the Oakland Tribune requires four days lead time to publish the notice of election, meaning that notice of a special election must be submitted at least 117 days before the election to be published 113 days before the election. Furthermore, Oakland does not conduct its own elections and relies on the Alameda County Registrar of Voters to conduct Oakland elections. This arrangement requires the City Clerk to provide information to the Registrar well in advance of an election. For instance, the City Clerk informs us that the Registrar requires a resolution calling the election by the 88<sup>th</sup> day before the election; a notice of cancellation of the election, if any, by the 83<sup>rd</sup> day before the election; and a list of candidates whose names will appear on the ballot by the 81<sup>st</sup> day before the election.

Because of these legal deadlines and operational constraints, it is not possible to hold an election within 60 days of the date the election is called. Interpreting Sections 401(4) and 205 to require an election within this timeframe would lead to an unreasonable result the voters could not have intended. It is "a fundamental maxim of constitutional law that a provision or provisions should not be interpreted so as to produce an unreasonable result." *City and County of San Francisco v. County of San Mateo*, 10 Cal.4th 554, 577 (1995) (citing *Pollack v. Hamm*, 3 Cal.3d 264, 273 (1970)); *see also Central Pathology Service Medical Clinic*, 3 Cal.4th at 191. Therefore, we conclude that Sections 401(4) and 205 must be interpreted to allow adequate time for the City and candidates to comply with pre-election deadlines. These provisions may be harmonized, and effect given to each, by construing them to require an election within 120 days of the date the election becomes necessary because the Council fails to fill the vacancy by appointment. In effect, the vacancy is not final for election purposes until the 60-day period runs.

Finally, this interpretation of the Charter is consistent with the state law procedures for filling a vacancy in municipal offices, even though those procedures do not apply in a charter city like Oakland. The California Government Code establishes a process that gives a city council 60 days to fill a vacancy in elective office by appointment or to call a special election to fill the vacancy. *See* Cal. Govt. Code § 36512. If the city council calls a special election, it must

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be held "not less than 114 days from the call of the special election," allowing sufficient time to comply with election deadlines set by state law. *Id.* Although that state law provision does not apply here, our interpretation of the Charter effects the same result: the Council may make an appointment within 60 days of the vacancy, and if it does not, the Council must call a special election on a schedule that allows the City, the County and all interested parties to comply with established election deadlines.

**Conclusion**

For these reasons, we conclude that under the Charter the City Council may appoint a new City Attorney within 60 days of the vacancy, which will occur on June 13, 2011. If the Council does not make an appointment during that period, then the Council must call a special election to be held within 120 days of the end of the Council's 60-day period to make an appointment, and thus within 180 days of the vacancy. If applicable, this deadline may be extended by up to 60 days to consolidate the special election with the next municipal or statewide election.

Encl: Relevant Provisions of the Oakland City Charter

Cc: LaTonda Simmons, City Clerk and Clerk of the Council  
John Russo, City Attorney  
Mark Morodomi, Deputy City Attorney  
Dennis J. Herrera, San Francisco City Attorney

## Relevant Provisions of the Oakland City Charter

**Section 205. Vacancy, Filling of.** All vacancies occurring in the office of Councilmember shall be filled by special election within 120 days of a vacancy. An extension of up to 60 days may be allowed for the express purpose of consolidating the special election with the next Municipal Election or Statewide Election. If the special election is to take place before the first use of ranked choice voting in a Municipal Election, the Council shall have the authority to provide for a ranked choice voting election by ordinance. Otherwise, the candidate who receives the highest number of votes at the special election shall be declared the winner and thereafter sworn into office as soon as legally possible. Special elections for the office of Councilmember that take place during or after the first use of ranked choice voting in a Municipal Election shall be conducted using the same ranked choice voting procedures used to elect Councilmembers in General Municipal Elections. Whenever the period of vacancy in a Councilmember's term of office equals or exceeds 120 days the vacancy may be temporarily filled by appointment through the majority vote of the remaining Councilmembers, provided the appointee is not a candidate for the office which created the vacancy and provided the appointment does not exceed 128 days or go beyond the date the new incumbent is sworn in, whichever is shortest. Alternative legal voting procedures shall be used to the greatest extent feasible to increase voter participation in special elections including but not limited to mail ballot voting, electronic voting and extended voting period. Notwithstanding any other provision of this section 205 or this Charter, an election shall not be required to fill a vacancy in the office of Councilmember that occurs when the Vice Mayor fills a mayoral vacancy pursuant to Sections 303 and 304 of this Charter, and the Vice Mayor shall be entitled to return to his/her seat.

(Amended by: Stats. November 1998, November 2000, March 2002 and February 2007.)

**Section 401(4). Vacancy, Filling of.** Upon the declaration of vacancy in the Office of the City Attorney, the Office of the City Attorney shall be filled by appointment by the majority vote of the members of the Council; provided, that if the Council shall fail to fill a vacancy by appointment within sixty days after such office shall become vacant, the City Council shall cause an election to be held to fill such vacancy pursuant to the manner and method as provided for in Article II, Section 205 of the Charter. An appointee or the person elected to the Office of City Attorney for the balance of an unexpired term shall hold office until the next general election for the Office of the City Attorney.

(Amended by: Stats. November 1988, November 1998 and March 2002.)

**Section 401(5). Vacancy, What Constitutes.** The Office of City Attorney shall be declared vacant by the Council when the person elected or appointed thereto fails to qualify within ten days after his or her term is to begin, dies, resigns, ceases to be a resident of the City or absents himself or herself continuously from the City for a period of more than thirty days without permission from the Council, absents himself or herself from any ten consecutive regular meetings except on account of own illness or when absent from the City by permission of the Council, is convicted of a felony, is judicially determined to be an incompetent, is permanently so disabled as to be unable to perform the duties of his or her office, forfeits his or her office under any provision of this Charter, or is removed from office by judicial procedure. A finding of disability shall require the affirmative vote of at least six members of the Council after considering competent medical evidence bearing on the physical or mental capability of the City Attorney.

(Amended by: Stats. November 1988, November 1998 and March 2002.)

**Section 1103. Election Procedure.** Except as may be otherwise provided by this charter, the mode, manner, form and procedure for nominations, qualifications, petitions, filing — including fees therefor and amounts thereof — and elections, for elective office, may be provided by ordinance. Except as may be otherwise provided by ordinance or by this charter, declarations of candidacy, nominations for election, all elections and all procedures relating thereto shall be in accordance with the applicable provisions of state law.

(Amended by: Stats. November 1988 and February 2007.)