CITY OF OAKLAND

OFFICE OF THE CITY ATTORNEY

PUBLIC LEGAL OPINION

TO: Mayor Sheng Thao
Council President Nikki Fortunato Bas
Members of the City Council
City Administrator Jestin D. Johnson
Oakland Residents and Businesses

FROM: City Attorney Barbara J. Parker

DATE: November 27, 2024

RE: **Process to Address Vacancies in the Office of the Mayor and District 2 Council Office and the 2025 Special Election**

I. INTRODUCTION

Dear Mayor Thao, Council President Bas, Councilmembers, City Administrator Johnson, Oakland residents and businesses:

We have received many inquiries regarding the process to address vacancies in the Office of the Mayor and the District 2 Council Office as well as the special election to fill vacant seats. The results of the November 5, 2024 election have not been certified. However, based on the votes posted to date by the Alameda County Registrar of Voters in the Mayoral Recall and the Alameda County Supervisor 5th District elections race, vacancies in those seats are probable.

This public legal opinion explains the applicable law that guides the process to address potential vacancies in the Office of the Mayor and the District 2 Council Office, including a 2025 special election or elections.

This opinion is public because it addresses the respective rights and powers of the Mayor, the Council, Councilmembers, and the Council's Officers – Council President and Council President Pro Tempore – under the Charter and California election law. Like all public legal opinions, this opinion will be posted on the City Attorney's website at: https://www.oaklandcityattorney.org

II. OFFICE OF THE MAYOR

A. When will the Mayor's seat be vacant?

If the majority of Oakland voters cast "yes" votes regarding the Mayoral recall, the Office of the Mayor will become vacant when the Council passes a resolution declaring the election results and declares a vacancy in the Office in accordance with Charter section 303.

Process:

The Alameda County Registrar of Voters ("ROV") is responsible for tallying the election results. The ROV posts unofficial election results on their website. The November 5, 2024 unofficial election results are available here: https://alamedacountyca.gov/rovresults/252/. According to the ROV's website, the last update of the results was on November 20, 2024 and the next update will be on Tuesday, December 3, 2024.

The ROV has 30 days from the election (i.e., until December 5th) to provide the City a certified statement of election results and typically takes most or all of the 30 days to complete the vote count. Accordingly, the City expects to receive the final, certified election results from the ROV on December 5, 2024. Upon receipt of the certified results from the ROV, the City Clerk will review and certify the election results for the City, and the City Council will pass a resolution declaring the results of the November 5, 2024 election and declaring the vacancy in the office of Mayor. We anticipate that the Council likely will pass this resolution at its regularly scheduled Council meeting on December 17, 2024.

B. When will the special election to fill the Mayoral vacancy take place?

Under the Charter, onvafter the Council declares a vacancy in the Office of the Mayor, a special election must be held within 120 days of the declaration of vacancy if the unexpired term of the Mayor exceeds one year. (Charter § 303.) The Mayor's unexpired four-year term of office ends on January 4, 2027. (Charter § 303.) A special election must be held to fill the vacancy because the unexpired term exceeds one year.

If the Council declares a vacancy in the Office of the Mayor at the December 17, 2024 Council meeting, the special election likely will be scheduled for Tuesday, April 15, 2025, based on the requirements of the Charter and Elections Code § 1100, which requires elections that all elections be held on a Tuesday.

The nominations period would run from Monday, December 23, 2024 to Friday, January 17, 2025.

C. Who becomes Mayor until the special election?

The Charter provides that the Council President serves as Mayor until a new Mayor is elected in the special election. (Charter § 303.) The Council President's service as Mayor would end when the newly-elected Mayor is sworn into office.

The Council President's term is two years. (Charter §§ 200, 208.) The current term is January 9, 2023 to January 6, 2025. (*See* City Resolution 89545 CMS electing District 2 Councilmember Nikki Fortunato Bas as Council President.) On January 6, 2025, the Council will meet to, among other things, elect a Council President for the next two-year term which will run from January 6, 2025 to January 4, 2027.

From declaration of vacancy to first Council meeting of 2025

Upon the passage of the resolution declaring the vacancy in the Office of the Mayor, the Council President shall assume the Office of the Mayor. (Charter § 303.) Upon taking the Oath of Office, the Council President – now interim Mayor, shall perform the duties of the Mayor until their term as Council President expires on Monday, January 6, 2025 and a Council President is elected for the new term. (Charter §§ 200, 204, 1206.)

From first Council meeting of 2025 to swearing in of new Mayor

Under the Charter, new Councilmembers' terms begin at "11:00 a.m. on the Monday following January 2 following their election". (Charter § 204.)

On January 6, 2025, at 11:00 a.m., after new Councilmembers are sworn into office, the Council will hold its first meeting of 2025. (Charter § 208.) At that meeting, the Council will elect the Council President and President Pro Tempore, and will pass a resolution confirming the Council Committee appointments. (Rules 4 and 6 of the Council's Rules of Procedure (Resolution No. 90066 C.M.S.)) lf the Council President is re-elected to serve as Council President for the next two-year term (January 6, 2025 to January 4, 2027), that person will continue to serve as Mayor until the completion of the special election to fill the vacancy and swearing in of the mayoral candidate who wins the special election.

If a different Councilmember is elected as Council President, the new Council President will serve as interim Mayor, until the completion of the special election to fill the vacancy and swearing in of the mayoral candidate who wins the special election. In that event, the outgoing Council President will immediately cease to be Mayor or Council President and will return to their seat on the Council to once again execute their official duties as a Councilmember. (Charter § 205.)

D. Does the law allow the Council President to simultaneously serve as Mayor and a Councilmember?

Under the Charter and the Oakland Municipal Code (OMC), the Mayor and Councilmembers may not simultaneously hold any other City office or employment with the City. (Charter § 1202; OMC § 2.25.040(F).) However, the Charter also expressly dictates that the Council President assumes the Office of the Mayor in the event of a vacancy. (Charter § 303.) Thus, when the Council President assumes the Office of the Mayor per the Charter, they serve solely as the Mayor of the City of Oakland and may not perform any of their official duties or exercise any of their powers as Councilmember until they complete their service as Mayor and return to their Council seat. (Charter § 205.)

The OMC and state law also prohibit a public servant from simultaneously holding two public offices that are incompatible. (OMC § 2.25.040(E); Gov. Code § 1099.) However, two offices are

not "incompatible" when "simultaneous holding of the particular offices is compelled or expressly authorized by law." (OMC § 2.25.040(E)(1); Gov. Code § 1099(a).) Here, the Charter expressly authorizes the Council President to temporarily fill a mayoral vacancy. Thus, the temporary service by the Council President as Mayor cannot be deemed incompatible because it is expressly authorized by law.

E. Is the Council President's Council District seat vacant while they are serving as the interim Mayor?

The Council President's service as interim Mayor does not meet the definition of a "vacancy" under the Charter. Thus, no election is required or permitted and the Council President is entitled to return to their seat when their service as Mayor ends. (Charter §§ 205 and 206) As discussed above, however, while the Council President serves as Mayor they may not perform any of the duties of their Council office or exercise any of their powers as a Councilmember. Thus, the Council President will be absent from Council meetings and on leave during their service as Mayor, except to the extent they attend meetings in their official capacity as Mayor.

To that end, the Council President's absence from the Council meetings will count as a "no" vote for the purposes of determining whether the Council is evenly divided (i.e. "tied") on a particular vote under Charter section 305(i). Furthermore, while serving as Mayor, the Council President will have the right to cast tie-breaking votes under Charter section 305(i).

During the Council President's service as Mayor, their Council District staff may remain available to receive constituent correspondence. Likewise, the At-Large District Office will remain open and available to receive and address constituent concerns for the entire City. In addition, constituents of any Council district, including the Council President's district, may contact the Office of the Mayor. However, as discussed above, the Council President cannot give direction to staff in their District office.

F. Is the Council President's seat also vacant?

The Council President's Council seat is not vacant while the Council President serves as interim Mayor. (Charter § 205.) The Charter provides that the President Pro Tempore "shall perform the duties and shall have the powers of the President of the Council during any time that the President of the Council has assumed the office of the Mayor." (Charter § 303.)

G. What happens if the Council President resigns as Council President?

If the Council President resigns from their appointment as Council President, which they are entitled to do at any time for any reason, the City Council will be able to elect a new Council President for the unexpired term of that Council President. (Charter §§ 200, 207.)

The Council President's term as D2 is two years. (Charter §§ 200, 208.) The current term is January 9, 2023 to January 6, 2025. (*See* City Resolution 89545 CMS electing District 2 Councilmember Nikki Fortunato Bas as Council President.) The next two-year Council President term will run from January 6, 2025 to January 4, 2027.

Thus, for example, if Nikki Fortunato Bas resigns as Council President prior to January 6, 2025, the Council could elect a new Council President to complete her term, which ends on January 6, 2025.

Any resignation of a Council President that occurs during the vacancy in the Office of the Mayor will result in the newly-elected Council President assuming the Office of the Mayor as set forth in Section II.C, above.

H. Can the Council President run for Mayor?

A Council President who accepts the Charter mandate to serve as Mayor until a new Mayor is elected and sworn in can run for Mayor in the special election as long as they otherwise meet the requirements for a mayoral candidate in the City of Oakland. Under the Charter, they must be a citizen of the United States, a qualified elector and a resident of the City at least 30 days prior to the time they submit their nomination paperwork to the City Clerk. (Charter § 301.)

I. How long will the new Mayor's term be?

The mayoral candidate who wins the special election will complete the Mayor's unexpired term, which ends January 4, 2027. The City's next regularly-scheduled mayoral election is November 2026, which will be for a four-year term from January 4, 2027 to January 6, 2031.

III. DISTRICT TWO COUNCIL OFFICE

A. When is the seat vacant?

If Council President Nikki Fortunato Bas wins the Alameda County Supervisors 5th District race, the District 2 Council office she currently holds will be vacant upon her resignation or when she is sworn into office as a Supervisor, whichever occurs first. Council President Fortunato Bas' D2 term runs until 10:59 a.m. on January 4, 2027.

B. Who becomes District 2 Councilmember until the special election?

Under the Charter, "[w]henever the period of vacancy in a Councilmember's term of office equals or exceeds 100 days the vacancy may be temporarily filled by appointment through the majority vote of the remaining Councilmembers, provided the appointee may not simultaneously fill the vacancy and run as a candidate for that office and provided the appointment does not exceed 180 days or go beyond the date the new incumbent is sworn in, whichever is shortest." (Charter § 205.)

A vacancy in a Council Office must be filled by special election occurring within 120 days of the vacancy. (Charter § 205.)

Since the District 2 term will not expire until January 4, 2027, the unexpired term of the office exceeds 100 days. Accordingly, once the D2 seat is vacant, the Council may by majority vote of the remaining Councilmembers, pass a motion appointing a District 2 Councilmember. Such a motion passes with the affirmative votes of 4 out of the 7 remaining Councilmembers. The

appointed District 2 Councilmember would serve until the election and swearing in of a new District 2 Councilmember who would complete the existing four-year term.

As noted above, the appointed person may not run for the District 2 office in the special election and they may not occupy the seat for more than 180 days. (Charter § 205.)

To be eligible for the appointment the prospective appointee must be "a citizen of the United States, a qualified elector, a resident for at least thirty days of the City or of a territory lawfully annexed or consolidated, and a resident of the district from which they may be a candidate for at least thirty days immediately next preceding their nomination or appointment." (Charter § 201.)

C. When will the special election to fill the District 2 vacancy take place?

Under the Charter, after the Council declares a vacancy in the District 2 Council Office, the special election must be held within 120 days of the declaration of vacancy. (Charter § 205.)

If the District 2 Councilmember waits until she is sworn in as the Alameda County 5th District Supervisor in January, a special election likely will not be held until May 2025.

If the District 2 Councilmember provides notice of resignation, and the City Council is able to declare the vacancy in the District 2 Council Office at the December 17, 2024 Council meeting, the special election for the District 2 Council Office vacancy could be scheduled for Tuesday, April 15, 2025, and be consolidated with the mayoral vacancy special election. (Gov. Code § 1770(c)(2); Charter §§ 205, 206.) The nominations period would run from Monday, December 23, 2024 to Friday, January 17, 2025.

IV. 2025 SPECIAL ELECTION

A. Will the City Council call two separate special elections?

If possible, the City Council will coordinate the declaration of vacancies in the Office of the Mayor and District 2 Council Office so the two vacancies can be consolidated into a single special election. This will avoid the City paying for two separate special elections. The ROV reports that the expected cost for a special standalone election is $19.00-$21.00 per voter. See https://acvote.alamedacountyca.gov/election-information/election-cost.

The special election for the mayoral vacancy likely will be set for April 15, 2025. Based on that date, the nomination period would run from Monday, December 23, 2024 to Friday, January 17, 2025.

In order to be able to consolidate the District 2 special election with the mayoral special election, the District 2 Councilmember will need to resign from her Council District office. Under the Charter, a Council office "shall be declared vacant by the Council when the person…resigns." (Charter § 206.)

Under state law, if Councilmember Bas tenders her letter of resignation to the City Clerk on December 17, 2024 and the resignation effective date is consistent with the Charter, the Council

would be able to declare a vacancy on December 17, 2024, and fulfill its Charter obligation to call a special election for the D2 Council seat within 120 days of the vacancy. (Gov. Code § 1770(c)(2); Charter § 205.) In that event, the special election for the District 2 Council Office vacancy could be scheduled for Tuesday, April 15, 2025, and would be consolidated with the mayoral vacancy special election. The nominations period for both the Office of the Mayor and the District 2 Council seat would run concurrently from Monday, December 23, 2024 to Friday, January 17, 2025.

B. What if a Recount is Pursued in the Alameda County 5th District Race?

If a voter or campaign committee pursues a recount, two separate special elections may be unavoidable. There is no deadline under state law to complete a recount; it continues as long as the requesters continue to pay for the cost of the recount or until it is completed. In the event of a recount, and if the District 2 Councilmember's victory is affirmed, the City Council likely will not be able to consolidate the two special elections and the City will have to pay for two separate special elections to fill the vacancies in the Office of the Mayor and the District 2 Council Office.

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