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APPOINTMENT VS ELECTION: How Should the Vacated Board of Supervisor Seats Be Filled?

Issue

Should the process for filling a vacated seat on the San Mateo County Board of Supervisors be changed?

Background

On November 4, 2008, a San Mateo County Supervisor for District 2 was elected to the California State Assembly. There were two years left on the Supervisor's term.

On November 18, 2008, the four remaining members of the San Mateo County Board of Supervisors (Board) met to consider a process for filling the vacated seat. According to Section 203 of the County Charter, the Board can fill the seat by appointment or by special election:

“If a vacancy occurs on the Board of Supervisors, the Board shall, within 30 days of the effective date of the vacancy, either make an appointment or order the calling of a special election to fill the vacancy. If the Board does not make an appointment or call a special election within 30 days, the county officer responsible for conducting elections shall immediately order a special election to be called to fill the vacancy.”

After the November 18, 2008 meeting, the Board advertised that it was accepting applications to fill the vacancy for the District 2 Supervisor seat for the remainder of the term ending at noon on January 3, 2011. Applicants needed to be registered voters of District 2.

The application form for appointment was available on December 1, 2008 in the office of the Clerk of the Board of Supervisors and via the County web site. Like any candidate for the Board of Supervisors, the Board required applicants for appointment to file a completed Fair Political Practice Commission Form 700 Statement of Economic Interests. Completed applications and Form 700 statements were due no later than 5:00 p.m. December 11, 2008.

The Board heard public presentations from the eleven applicants at a special Board meeting on December 15, 2008 which was moderated by the San Mateo County Chapter of the League of

Women Voters. Each candidate made a fifteen minute presentation to the Board, after which ten minutes of public testimony or candidate endorsements were allowed.

Of the eleven candidates, two applicants offered to fill the vacancy until an election could be held or until the term expired in January 3, 2011. Both candidates stated that they would not run in the subsequent election.

Public support and opposition

At the November and December 2008 Board meetings, the following organizations voiced support for the appointment process and supported the applicant selected by the Board: the San Mateo County Central Labor Council; the Building Trades Council; the American Federation of State, County and Municipal Employees, Local 829; Service Employees International Union, Local 521; as well as, unions representing firefighters, transport workers, electrical workers, painters and tapers, and plumbers. These unions represent a large number of County employees who work and/or live in San Mateo County.

Through letters and newspaper articles, the following organizations favored an election to fill the vacated seat: the San Mateo County Chapter of The League of Women Voters; the San Mateo County Democratic Party; the San Mateo County Republican Party; the Sierra Club, Loma Prieta Chapter; and the San Mateo League for Coastline Protection.

Deliberations by the Board of Supervisors on Whether to Appoint a Supervisor or Hold an Election

On December 16, 2008, the Board met to decide whether to fill the vacated seat by appointment or special election. Six members of the public addressed the Board. Five of the speakers were from various San Mateo County (County) unions and asserted that they were speaking on behalf of their union membership. All five of the union speakers spoke in favor of an appointment, citing the consequences of the economic downturn and that dollars spent on an election could better be spent on county services. Some also spoke on behalf of the candidate who was subsequently appointed. The sixth and final public speaker said this was a rare chance to have an election to fill the vacancy to allow voters a direct voice in the process.

After public comment closed, the Board had an open session deliberation on how to fill the vacated seat. Some Board members questioned the wisdom of spending an estimated \$1.6 million on a special election at this economically uncertain time. Some supervisors also voiced concerns regarding their workloads and their need to quickly fill a seat with an experienced candidate.

One Supervisor called for a special election and stated:

“Now is the time to engage the citizens of this County in the important issues that we face. For those challenges to be debated and discussed without broad public input does, I think, a disservice to the needs of the citizens of this County. There is a time for an appointment and there is a time for an election. This cycle calls for an election.”

This Supervisor made a motion to fill the vacancy by election, but the motion died for lack of a second, thereby eliminating further discussion of an election.

While all four members of the Board expressed admiration for the very strong field of candidates, three Board members only spoke specifically about the one candidate whom they ultimately selected. They did not address the benefits or legality of filling the vacancy in a provisional or temporary manner, as some of the applicants suggested. Ultimately, the Board, by a 3-1 vote, chose to make an appointment to fill the District 2 vacancy rather than call a special election. From the same 3-1 vote, the new member of the Board of Supervisors was selected.

Investigation

The investigation included interviews with members of the current Board; officials from the San Mateo County elections office; representatives from the San Mateo County Central Committees of the American Independent Party, Democratic Party, Green Party, Libertarian Party, Peace and Freedom Party, and Republican Party; the League of Women Voters; and interested citizens. Additionally, the San Mateo County Civil Grand Jury (Grand Jury) read local newspapers and websites, the San Mateo County Charter, and state and local ordinances relating to elections and the filling of vacancies. The Grand Jury reviewed recordings of the Board meetings at which the issue was discussed.

Findings

The 2008-2009 San Mateo County Civil Grand Jury found that:

1. **The San Mateo County Board of Supervisors (Board) cites cost as the main reason to make an appointment rather than hold an election.**

During Board of Supervisor discussions of how to fill the vacancy, an estimated \$1.6 million cost to San Mateo County (County) of an election was cited as the main reason for not holding an election. County elections costs are funded through the San Mateo County general fund.

The Grand Jury also learned that:

- a. The costs of a countywide mail-only election, compared to a conventional election, are reduced by approximately 30%.
- b. Half the registered voters in the State and 49% of the registered voters in San Mateo County vote permanently by mail.
- c. State law sets forth what can be included in the County Charter. It is not clear whether it is possible to set forth in the County Charter a provision that would authorize the Board to use a mail ballot election for the filling of vacancies on the Board.

2. Incumbents are almost always re-elected.

According to a study funded by several large private philanthropic organizations, 92% of all state legislative incumbents in the 2006 election cycle were reelected.¹ This pattern holds true for the Board.

- a. Since 1980, incumbents seeking reelection have been reelected 100 percent of the time.

3. Individuals who fill vacancies have the possibility of extended term limits.

- a. Individuals who fill vacancies, whether by appointment or special election, can serve longer than supervisors who do not fill vacancies.
- b. According to the County Charter Article II, Section 202, term limits only apply to three four-year full terms, or 12 years total. Individuals who fill vacated seats can serve three full terms in addition to the time the individual is filling a vacated seat.
- c. In the case of the current Board, two sitting members, one elected in a special election and one appointed, will serve more than 12 years.

Several of the organizations that supported an election to fill the vacated seat discussed the power of incumbency. For example, in its press release, the San Mateo County Democrat Central Committee wrote:

“The person who is elected or appointed to fill Jerry Hill’s seat will likely remain on the Board until he or she is termed out in 2022.”

In other words, that person may legally serve in the office fourteen years.

4. The term “appointed incumbent” must be used on the ballot but not on the campaign statements.

- a. According to state election law, the appointed Supervisor must use the words “appointed incumbent” on the ballot.
- b. This requirement does not apply to the candidate statement or election literature that is available to voters to learn about the candidates. For example: one Supervisor, appointed in 2000, who first campaigned for election in 2002, was able to describe herself on her candidate statement as a “San Mateo County Supervisor,” whereas on the ballot she was mandated, under state law, to use the term “appointed incumbent.”

¹ Jordon, Scott, “Advantage, Incumbent” May 7, 2008: supported by Carnegie Foundation, Ford Foundation, Pew Charitable Trust, Rockefeller Brothers Fund
https://www.policyarchive.org/bitstream/handle/10207/15819/MoneyIncumbency2006_Final.pdf?sequence=1

5. Two applicants for the Board seat offered to be provisional appointees.

Two of the candidates who sought to fill the vacated seat on the Board of Supervisors in December 2008, offered to be “placeholders” who would fill out the term, but would not run for the seat in 2010, thus, neutralizing the power of incumbency.

- a. Placeholder or “provisional” appointees do not run for the seat to which they are appointed in the next available election, but they may run for that seat thereafter and for any other office at any time.
- b. It is questionable whether this offer by the applicants, if accepted by the Board, would have been enforceable because the County Charter does not provide for provisional appointments.

6. The County Charter can be, and has frequently been, changed.

State law requires that amendments to the County Charter be approved by the voters in the form of a ballot measure. There are two ways for a measure to be placed upon the ballot:

- a. The Board of Supervisors may place a measure on the ballot.
- b. Citizens may place a measure on the ballot if they collect signatures equal to or more than 10% of the voters who voted in the last gubernatorial election.

The San Mateo County Charter has been fully revised by the electorate twice since it was first adopted in 1932. The electorate has amended the County Charter 20 times since 1932 and was last amended in 2004.

The County has in place an on-going charter-review process. According to Section 801 of the Charter, a supervisor-appointed County Charter Review Committee meets every eight years to:

“review the Charter and, after public hearings, make appropriate recommendations for amendment or revision to the Board.”

The Charter Review Committee last met in 2002, and it is anticipated that one will be convened by the Board in 2010.

Conclusions

The 2008-2009 San Mateo County Civil Grand Jury concludes that:

1. The 2008 supervisorial vacancy should have been filled by calling a special election rather than by appointment.
2. The cost of an election is not a valid excuse for denying voters the right to a special election, specifically if there is more than a year remaining in the term.
3. The decision to appoint rather than elect a Board member in 2008 was inappropriate because:
 - a. The voters were denied the opportunity to debate serious issues facing San Mateo County during a campaign.
 - b. 50% of the term for the vacated seat was remaining.
4. The power of incumbency is demonstrable and should not be bestowed by an appointment.
5. Provisional appointments, in which appointees are prohibited from running for the seat to which s/he was appointed at the next election, neutralize the power of incumbency, although such appointments are currently not allowed by the County Charter.
6. A mail-only ballot process to fill a vacated Board seat would be a less expensive election option, although currently not allowed by the County Charter.

Recommendations

The 2008-2009 San Mateo County Civil Grand Jury recommends that the San Mateo County Board of Supervisors place a ballot measure for the next available general election giving voters a choice on whether to amend the County Charter such that:

1. Elections shall be called to fill a vacated supervisorial seat if the term remaining is one year or more.
2. If the term for the vacated seat is less than one year, a provisional appointment should be made in which the appointee is prohibited from running for the seat to which s/he was appointed during the next election cycle.
3. When filling supervisorial vacancies by special election, mail-only ballots are allowed.

**APPROVED BY
BOARD OF SUPERVISORS**

SEP 15 2009

**CLERK OF BOARD
BY *Maria H. Peterson* DEPUTY**



**COUNTY OF SAN MATEO
Inter-Departmental Correspondence**

County Manager's Office

DATE: September 1, 2009
BOARD MEETING DATE: September 15, 2009
SPECIAL NOTICE/HEARING: None
VOTE REQUIRED: None

TO: Honorable Board of Supervisors
FROM: David S. Boesch, County Manager
SUBJECT: 2008-09 Grand Jury Response

A handwritten signature in black ink, appearing to read "D. Boesch".

RECOMMENDATION:

Accept this report containing the County's responses to the following 2008-09 Grand Jury report: Appointment vs. Election: How Should the Board of Supervisor Seats Be Filled? Report.

BACKGROUND:

Accepting this report contributes to the Shared Vision 2025 outcome of a Collaborative Community by ensuring that residents are informed about and engaged in the governance of the County and the process of selecting elected government officials. This activity contributes to this outcome by ensuring that all Grand Jury findings and recommendations are thoroughly reviewed by the appropriate County departments and that, when appropriate, process improvements are made to improve the quality and efficiency of services provided to the public and other agencies.

DISCUSSION:

The County is mandated to respond to the Grand Jury within 90 days from the date that reports are filed with the County Clerk, and Elected Officials are mandated to respond within 60 days. To that end, attached is the County's response to the Grand Jury report titled *Appointment vs. Election: How Should the Board of Supervisor Seats Be Filled?*, issued on June 24, 2009.



Appointment vs. Election: How Should the Board of Supervisor Seats Be Filled? Report

Findings:

Staff acknowledges and provides the following in response to the Grand Jury's findings. However, there is one inaccuracy with Finding 1b, which states that half the registered voters in the State and 49% of the registered voters in San Mateo County vote permanently by mail. Per the County Elections Office, about 34% of registered voters statewide are permanent vote-by-mail voters and 43% of voters in San Mateo County choose to vote by mail in every election. The Elections Office has clarified that half of the state and county voters, on average, vote by way of mail ballots.

Recommendations:

The Grand Jury recommends that the San Mateo County Board of Supervisors place a ballot measure for the next available general election giving voters a choice on whether to amend the County Charter such that:

1. Elections shall be called to fill a vacated supervisorial seat if the term remaining is one year or more.

Response: Agree in part. The county agrees with the concept that the time remaining in a supervisorial seat needs to be taken into consideration when determining if an appointment or special election should occur to fill the vacated seat. However, the County is unsure if the remaining time should be one year, two years, or any specific amount of time. A Charter Review Committee will be convened in 2010. This recommendation and other alternatives will be forwarded to the committee for their consideration.

2. If the term for the vacated seat is less than one year, a provisional appointment should be made in which the appointee is prohibited from running for the seat to which s/he was appointed during the next election cycle.

Response: Agree in part. The person appointed by the Board should be the one who is determined to be the most qualified applicant to fill the seat. There are concerns that eliminating their chances to continue serving in this position may not be in the best interests of the County. There are also concerns that a provisional appointee may not represent the best long-term interests of the district and may not engage in collaborative discussion. This recommendation will be forwarded to the Charter Review Committee for their consideration.

3. When supervisorial vacancies by special election, mail-only ballots are allowed.

Response: Agree in part. County Counsel will conduct a thorough review of the state legislation to verify if the County Charter can be changed to include mail-only ballot special elections to fill a partial-term supervisorial vacancy. If state legislation allows this to occur, this recommendation will be forwarded to the Charter Review Committee for their consideration.