



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Richard Doyle
City Attorney

SUBJECT: Filling Council Office Vacancies DATE: March 24, 2008

SUPPLEMENTAL MEMORANDUM

BACKGROUND

On February 6, 2008, during the discussion of the proposed Charter amendment for recall elections, the Rules and Open Government Committee requested that the City Attorney look at options for streamlining the process for filling office vacancies in general. This supplemental memorandum addresses two such options, instant runoff voting (also referred to as ranked choice voting) and appointment of a temporary officeholder pending the election of a successor.

ANALYSIS

The purpose of expediting the filling of office vacancies is to reduce the cost of multiple elections and minimize the time that a council district is unrepresented. With a traditional or simple majority vote requirement, often no candidate wins a majority of the vote in a field of multiple candidates, necessitating a runoff election, which is not only costly but also typically receives less voter participation. Also, while this process is running its course, a seat may remain vacant and the district could be without representation for an extended period of time. The two alternatives discussed address one or both of these goals.

A. Instant Runoff Voting

1. How instant runoff voting works

Instant runoff voting ("IRV") is an election method that allows voters to rank their preferences for candidate races on one ballot, eliminating the need for a separate runoff election. In an IRV election, generally, voters rank their first, second and third choices in each race. Voters' first choices are counted and if no one candidate receives a simple majority (50% plus 1 vote), the voting system conducts an "instant runoff" by eliminating the candidate with the fewest votes and assigning those votes among the remaining candidates to the second choice preference for each ballot. In other words, voters whose top candidate was eliminated will have their next choice count. The process is repeated until one candidate has a majority of the votes.

2. Experience with instant runoff voting

In the last decade, several local jurisdictions have passed charter amendments allowing for instant runoff voting when the technology is available. These jurisdictions include Berkeley, Oakland, San Leandro, and Santa Clara County.

The only city or county to implement instant runoff remains San Francisco whose voters in 2002 approved a measure requiring the Department of Elections to implement instant runoff (which San Francisco refers to as ranked choice voting or "RCV") for elections of most city officers. In 2004, San Francisco received conditional certification from the California Secretary of State of its existing voting machines to do RCV and approval to conduct RCV as a pilot program. Conditional certification was applicable only for the 2004 election for a single race, and has had to be renewed for each subsequent election in which RCV was used. In 2005 and 2006 it was used for three candidate races and in 2007 for four races.

The Secretary of State in 2007 imposed tough restrictions on San Francisco's use of its RCV voting machines, which delayed the reporting of voting results and led San Francisco to miss the deadline to certify the final outcome of the election. The long list of conditions included a requirement to hand count ten percent of the city's precincts, increased from one percent, as a check on the electronic count.

3. Current state of instant runoff voting

Last year, the cities of Berkeley, Oakland and San Leandro had projected implementation of instant runoff voting for the June or November 2008 elections. However, due to the lack of voting machines certified for instant runoff voting by the federal government and the California Secretary of State, they have further delayed implementation. Meanwhile, these cities are working with a vendor, Sequoia Voting Systems of Oakland whose certification is pending, and meeting regularly with the Registrar of Voters for Alameda County to prepare for anticipated implementation.

San Francisco, which entered into a contract with the Sequoia Voting Systems last year, is also awaiting word on the Sequoia machines, which are certified for traditional elections but have not received full certification for instant runoff voting. If not certified for instant runoff voting, the San Francisco Director of Elections has indicated that the machines could be used to determine whether a local candidate won a simple majority, but if there was no such winner, city elections workers would have to examine the ballots by hand to determine the ranked choices.

In October 2007, Governor Schwarzenegger vetoed AB 1294 which would have allowed non-charter cities and counties to use instant runoff voting for local candidate races. The Governor cited the experience of charter cities, only one of which – San Francisco

– had held a ranked choice voting election and that on a trial basis, and the technological challenges, namely that the machines necessary to implement instant runoff voting are not widely available.

4. Steps to adopt instant runoff voting

As outlined above, technological challenges pose a barrier to immediate implementation of instant runoff voting in San Jose. In addition, an amendment of the Charter would be required in order to give the City of San Jose the opportunity to use instant runoff voting in the future. If Council would like to be able to use instant runoff voting for local candidate elections, it could propose a charter amendment to the voters to allow for instant runoff when technologically feasible, as other jurisdictions have done.

Implementation of instant runoff voting will require coordination with the Registrar of Voters for Santa Clara County and involve increased costs for voting system upgrades, public outreach and voter education, training, and printing and mailing a second ballot for instant runoff elections if there are other non-IRV elections (i.e., propositions, state and federal elections) on the ballot.

B. Appointment of a Temporary Officeholder

Under the Charter, the Council currently has the ability to make an interim appointment to fill an office vacancy pending the election of a successor. If the Council desires that the appointee be ineligible to run for the office in the upcoming election, the Council could propose a Charter amendment to modify the eligibility requirements for office in the Charter. Courts have stated that the right to serve in public office is a fundamental right of citizenship that cannot be restricted except by a clear declaration of law. At the same time, the courts have reviewed such restrictions using the rational basis test (the restriction must be rationally related to a legitimate state interest), unless the law has also unduly burdened a fundamental right such as the right to travel or free speech. A law that provides that an appointed official is ineligible to run for the seat he or she is temporarily filling due to the perceived advantage of running as an incumbent should pass that constitutional test, given the limited nature of the prohibition.

Instead of a Charter amendment, the Council could also secure a voluntary commitment from the temporary appointee during the appointment process to refrain from running for the open seat in the upcoming special election. Although the pledge would not be legally enforceable, practically speaking, the risk that an appointee will violate the pledge may not be significant.

CONCLUSION

Instant runoff voting still faces challenges to implementation, but if the Council would like to have the opportunity to use instant runoff voting once the technology is available,

RULES AND OPEN GOVERNMENT COMMITTEE

March 24, 2008

Subject: Filling Council Office Vacancies

Page 4

an initial necessary step is amendment of the Charter. The extent to which instant runoff voting will result in cost savings is unclear, but it will shorten the period of time that a seat remains open. Council already has the ability to fill a seat by appointment until the next regular election or a specially called election.

PUBLIC OUTREACH/INTEREST

This memorandum is posted on the website for the March 26, 2008 Rules Committee Meeting Agenda.

CEQA

Not a project.

RICHARD DOYLE
City Attorney

By *Sandra Lee*
SANDRA LEE
Deputy City Attorney

cc: Debra Figone

For questions please contact Sandra Lee, Deputy City Attorney, at (408) 535-1988.