

July 10, 2022

Honorable chair and board members:

In May, I wrote to ask two pertinent questions. They remain pertinent to Tuesday's agenda item 7.5.

1. On what date will the vacancy for District 4 supervisor exist in fact? In today's staff report, county counsel states, "Pursuant to Government Code § 1770, this vacancy will legally occur July 31, the effective date of Supervisor Scott's resignation." This important fact is undisputed.

2. May the Board of Supervisors discuss or take formal action to fill a vacancy before it occurs? One might assume the answer is yes, if only because the resolution is back before your board today. However, no facts or statutes are cited to support that assumption. The apparent hope is that the board's approval of the resolution will create a *de facto* board vacancy in District 4 while also authorizing the Registrar of Voters to begin taking nominations by the applicable Elections Code deadline of July 18.

If that is the goal, however, some degree of caution is warranted: Declaring a *de facto* board vacancy before July 31 could have unanticipated consequences beyond the calling of the special election itself. As one example, the winner of a special election called improperly could be subject to a *quo warranto* action to determine who holds proper title to the office (Code of Civil Proc. § 803 et seq.).

In contrast, taking no action until Supervisor Scott's resignation takes full legal effect carries zero risk. The county cannot be faulted if it decides not to set an official election for an as-yet unofficial vacancy.

Gov. Code § 25061 requires setting a special mid-term election for some supervisorial vacancies, not all of them. A special election can be called only when sufficient time exists for pre-election procedures to be followed, including filing and processing of candidate nomination papers. Today's draft resolution proposes that nomination procedures for candidates will open July 18, nearly two weeks before Ms. Scott intends to resign. That's putting the elections cart well before the vacancy horse.

While it's admirable to take initial steps to comply with Gov. Code § 25061, by preparing to call a special mid-term election, one should not despair if analysis reveals a special election is not timely or feasible. Rather, the board can and should take heart that a highly feasible course of action remains available under Gov. Code § 25060, which authorizes the governor to make an interim appointment.

Should your board adopt the resolution proposed in agenda item 7.5(b), it could delay or unlawfully forestall the selection of Ms. Scott's rightful successor in these circumstances, namely, a person appointed by the governor to serve the full remainder of her unexpired term, as authorized by state law. Therefore, I respectfully write to oppose adoption of the resolution calling for a special election.

Instead, I ask your board to direct staff to prepare a resolution for consideration at the Aug. 2, 2022, meeting calling on Gov. Newsom to fill the newly vacant board seat by appointment. Said appointee would hold office until the election and qualification of his or her successor, per Gov. Code § 25060.

Respectfully submitted,

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