



MEMORANDUM

COUNTY OF LAKE

COUNTY COUNSEL

TO: HONORABLE BOARD OF SUPERVISORS

FROM: ANITA L. GRANT
COUNTY COUNSEL

SUBJECT: ELECTION TO FILL DISTRICT 4 SUPERVISOR VACANCY

DATE: JULY 5, 2022

The question presented is whether and by what means an election may be held to fill the upcoming vacancy of the District 4 supervisorial seat on the Lake County Board of Supervisors.

In this case, the vacancy will occur on July 31, 2022. A resignation is effective according to its terms. (Elections Code sec. 1770; 64 Cal.Ops.Atty.Gen. 1,2 (1981).)

A review of the law relating to filling this vacancy initially entails a review of two sections of the Government Code which are critical to this analysis, sections 25060 and 25061.

Government Code section 25060 provides that whenever a vacancy occurs in a board of supervisors, the Governor shall fill the vacancy. The appointee shall hold office until the election and qualification of his or her successor.

Government Code section 25061 provides that the election of a supervisor to fill the vacancy for the unexpired term shall be held at the next general election, unless the term expires on the first Monday after January 1st succeeding the election.

The next general election will occur on November 8, 2022.¹

-
- ¹Elections Code section 324 defines a general election as either of the following:
- The election held throughout the state on the first Tuesday after the first Monday of November in each even-numbered year. . . . or
 - Any statewide election held on a regular election date as specified in Section 1000. . .

It should be noted that, despite the requirement that the election to fill this vacancy must occur with a general election, this election to fill a board of supervisors vacancy is nonetheless considered to be a special election. In *People v. Porter*, (1856) 6 Cal.26, the California Supreme Court held:

An election to fill a vacancy occasioned by the death or resignation of an officer is a special election, and the provision of our laws which requires such elections to be held at the same time and place with general elections, does not change their character.

The above distinction of this election to fill a vacancy as a special election is significant in this review. For example, it is the determining factor as to whether the new or old District 4 boundaries apply for this election. Elections Code section 21506 provides that this category of elections is excluded from the general rule that new district boundaries shall apply in elections after redistricting occurs. Here, instead, the old district boundaries apply. The fact this election is a special election will also be important in considering the time frames for the election nomination process, which is discussed hereinbelow.

While there is not a great deal of legal analysis offered through case law, there is a 1981 Attorney General opinion that merits some consideration. Nonetheless, it should be noted that opinions of the attorney general are advisory, but not mandatory, authority.

In that 1981 opinion, the Attorney General's Office considered a similar fact pattern similar to the one before your Board today in that the question to that Office involved a county supervisor whose four-year term commenced in January 1979, and who had filed his written resignation on June 9, 1980, which by its terms was effective August 5, 1980. The Attorney General's Office opined that if the Governor filled the vacancy by appointment, the appointee would hold office until the election and qualification of his successor. A successor could have been elected at the November 4, 1980 general election if the laws for independent nominations were followed. [citing to Elections Code sec. 6800, now Elections Code sec. 8300; see f.n.2] If no successor was so elected and qualified, the appointee would hold office for the remainder of the four-year term. (64 Cal.Ops.Atty.Gen. 1, 2-3 (1981).)

That opinion relied upon section 25061 of the Government Code which provides that the election of supervisor to fill the vacancy for the unexpired term shall be held at the next general election, unless the term expires on the first Monday after January 1st succeeding the election. The Attorney General's Office reasoned that since members of a board of supervisors serve four-year terms which commence in January and general elections are held at one or two times during a supervisorial term of office, in the factual situation before it, a plain reading of section 25061 compels the conclusion that the "next general election" is the one immediately following the vacancy or November 4, 1980. (64 Cal.Ops.Atty.Gen., *supra*, at p.2.)

The Attorney General's Office further noted that, the resignation having occurred after the primary election in June, the only manner by which there could have been an election on November 4, 1980 would be through the independent nomination process, which procedure offers a method for candidates to be nominated by petition without resort to the June primary and thus may be used in lieu of a primary election. (See 64 Cal.Ops.Atty.Gen., *supra*, at p. 2.) .

The Attorney General relied upon several sections of the Elections Code in relation to the time frame necessary to complete the nomination process: Section 6880, now Elections Code section 8300; section 6554, now Elections Code section 8105; section 6555, now Elections Code section 8106; and section 23302.5, now Elections Code section 10407. (See 64 Cal.Ops.Atty.Gen., *supra*, at p. 2.).² A review of the code sections relied upon in this opinion is instructive.

Elections Code section 8300 provides:

A candidate for a partisan office, including that of presidential elector, may be nominated subsequent to, or by other means than, a primary election pursuant to this chapter. *A candidate for nonpartisan office or for voter-nominated office may be nominated subsequent to, or by other means than, a primary election* pursuant to this chapter only if a candidate was not nominated or elected at the primary election for that office. [emphasis added]³

Elections Code section 8106, which was is similar to former Elections Code section 6555, referred to in the above-described Attorney General's opinion, makes specific provisions for special elections to fill vacancies. That code section, in pertinent part, provides that:

(a) Notwithstanding any other provision of this article, a candidate, or a person authorized by the candidate, may submit a petition containing signatures of registered voters in lieu of a filing fee as follows:

. . . (4) For all other offices for which a filing fee is required, if the number of registered voters in the district in which a candidate seeks nomination is 2,000 or more, the candidate may submit a petition containing three signatures of registered voters for each dollar of the filing fee, or 7 percent of the total of registered voters in the district in which the candidate seeks nomination, whichever is less. . .

²The Attorney General's Office offered a number of Election Code sections in support of its above-referenced opinion. However, subsequent to that opinion, the entire Elections Code was repealed, reorganized, and code sections were renumbered. (Stats. 1994, ch. 920 (SB 1547).)

³Elections Code section 8400, establishes the minimum number of eligible voters who must sign a candidate's nomination papers for an office other than a statewide office.

(b) . . . in cases of vacancies for which a special election is authorized or required to be held to fill the vacancy, and where the prescribed nomination period would commence less than 60 days after the creation of the vacancy, the forms shall be made available within five working days after the creation of the vacancy. . . [emphasis added] . . .

Although Elections Code section 8106.5 post-dates the above-described Attorney General's opinion, it is significant here because it again illustrates a legislative intent to make available certain statutory time lines which are unique to special elections to fill vacancies. That code section provides, in pertinent part, that:

. . . (b) If the number of days for a candidate to collect signatures on a petition in lieu of a filing fee for a special election that is held to fill a vacancy is less than the number of days that a candidate would have to collect signatures on a petition for a regular election for the same office, the elections official shall reduce the required number of signatures for the petition, as specified in subdivision (a) . . . [emphasis added]

Finally, as to the filing of nomination documents by candidates where a special election must occur at the time and place of a general election, Elections Code section 10407 provides:

Notwithstanding any other provision of law, whenever other elections are consolidated with a regularly scheduled election, the period for the filing of nomination documents by candidates in elections consolidated with the regularly scheduled election shall commence on the 113th day prior to the election. The nomination documents shall be filed not later than the close of business on the 88th day prior to the regularly scheduled election in the office of the appropriate officer, during regular office hours. . . [emphasis added]

Given the above, it appears that an abbreviated time line for the nomination process is permissible for special elections to fill vacancies. Such a time line is consistent with a legal commitment of long-standing that:

The right of suffrage is protected by the Constitution of California and every reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process. [citations omitted] (Hedlund v. Davis (1956) 47 Cal.2d 75.)

While several counties have faced this or a similar situation previously, they do not appear to adhere to a single common approach to address it. In the instant case, the vacancy will exist as of July 31, 2022. This is 100 days from the November 8, 2022 general election.

It appears that there are two options to address the election to fill a vacancy:

1. Your Board may determine to wait for the Governor's Office to appoint a candidate to fill the unexpired term, with an election to be held for a new term of office in 2024.

This option removes the choice of a representative being chosen by the electorate for a significant period of time.

2. Your Board may take action to accept on July 12, 2022, Supervisor Scott's resignation, with *no change in its effective date of July 31, 2022*.

Although the office will not be vacant for purposes of taking action to fill that vacancy until July 31, 2022, accepting the resignation would arguably allow the nomination process for special elections to fill vacancies to proceed and would allow interested candidates to avail themselves of the in-lieu of option to reduce the amount of the filing fee.

Both the Registrar of Voters and I will be available to answer any questions your Board may have.