

**RESPONSES TO
COUNCIL QUESTIONS POSED
AT OCTOBER 26, 2019 MEETING**

1. *Can the City Charter contain a provision prohibiting the current councilmembers elected to Seats 1, 2 and 3 in the November 2018 election from running for the office of Mayor or the office of councilmember in one of the newly created districts in the November 2020 election?*

There is case law indicating that there is no “fundamental” right to run for office under the *federal* constitution. The United States Supreme Court has held that “[f]ar from recognizing candidacy as a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny.’” *Clements v. Fashing*, 457 U.S. 957, 963 (1982).

California law, however, appears to be different, but evolving in the direction of federal law. Some older cases have referred to the right to seek office as a “fundamental” right and have accordingly applied strict scrutiny. (*Johnson v. Hamilton*, 15 Cal.3d 461, 466-68 (1975); *Zeilenga v. Nelson*, 4 Cal.3d 716, 721-22 (1971)). On the other hand, these cases striking down overly-long residency requirements were also premised in part on voters’ rights (which are intertwined with candidate’s rights, per *Johnson*), but also on the fundamental right to travel.

Moreover, as noted in an unpublished decision issued on October 28, 2019, those older cases cited above “were decided before *Clements*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Legislature v. Eu*, 54 Cal.3d 492 (1991), and *Burdick v. Takushi*, 504 U.S. 428 (1992), and no longer control.” *Friedman v. Gates*, 2019 Cal. App. Unpub. LEXIS 7180, *13 (Oct. 28, 2019); see also *Boyer v. County of Ventura*, 33 Cal.App.5th 49, 57-58 (2019) (declining to apply strict scrutiny to candidate qualifications case); *Rawls v. Zamora*, 107 Cal.App.4th 1110, 1115-16 (2003).

None of the above cases are directly on-point regarding an outright ban on running for office based on current incumbency. Rather, they address qualification and residency requirements. Nevertheless, it appears that the evolving standard in California is the balancing test articulated by the U.S. Supreme Court in *Burdick*, and adopted by the California Supreme Court in *Edelstein v. City and County of San Francisco*, 29 Cal.4th 164 (2002), in which the level of scrutiny depends on the severity of the burden imposed. (*Id.* at 174 (noting “[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Norman v. Reed* (1992), 502 U.S. 279, 289)). But when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of

voters, “the State's important regulatory interests are generally sufficient to justify' the restrictions.” *Anderson, supra*, 460 U.S. at 788-89 and n.9. In light of above analysis, and in the absence of an intent to discriminate, the permissibility of restricting a candidate elected in November 2018 from running for a district-based seat would likely turn on a determination of the severity of the restriction, and the strength of the rationale for the restriction.

2. *Proposed Charter Section 603(b) states that “every member of the Council elected by District shall remain a qualified voter in the District...throughout the full term of his or her office.” A request was made to clarify the terms residency and domicile and how these terms would affect a councilmember’s qualifications for office.*

In order to be a qualified voter, you must be registered to vote and a resident of the City of Sunnyvale and District in which you reside. California Elections Code section 349 defines residence for the purpose of voting as a person's domicile:

- (a) “Residence” for voting purposes means a person's domicile.
- (b) The domicile of a person is that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning. At a given time, a person may have only one domicile.
- (c) The residence of a person is that place in which the person's habitation is fixed for some period of time, but wherein he or she does not have the intention of remaining. At a given time, a person may have more than one residence.

One scenario that was raised related to a councilmember needing to be out of the City for 60 days due to a work-related assignment. This scenario would likely meet the domicile test in Elections Code section 349(b) and not affect Sunnyvale qualified voter status because the councilmember’s intention would be to return to his or her residence upon the completion of the assignment.

However, note that such a scenario could raise issues other than residence or voter status. For example, Charter Section 604(a)(2) (renumbered to section 606 in proposed charter), an unexcused absence from meetings for more than 60 consecutive days triggers a vacancy.

3. *How do the term limit provisions of the proposed Charter Section 603 impact the Councilmembers whose terms were extended by 1 year to a one-time 5-year term as a result of Measure A (switch from odd to even year elections)?*

Measure A extended the terms of councilmembers elected to Seats 4, 5, 6 and 7 (elected in November 2011) by one year, which resulted in their term of office ending in January 2017 instead of January 2016. Mayor Klein was elected to fill a vacancy in Seat 4 at a special election in August 2016. The councilmembers elected to Seats 5, 6 and 7 in 2011 are no longer serving on City Council. As Mayor Klein’s initial term of office was 4 months and 8 days (130 days), under the proposed Charter Section 603

(current Charter section 602), this term of office would not be considered a full term because it was less than two years, and the limitation on his service in office would be that he could not serve more than 12 years in a 16-year period, commencing with his assuming office on January 10, 2017.

4. If a vacancy results from a councilmember submitting a letter of resignation, can the Councilmember add an effective date set at a specific date in the future, and, if so, can the councilmember subsequently elect to withdraw their resignation?

Charter Amendment Section 602 states that a vacancy occurs upon resignation. The section also states: "In the event of a vacancy on the City Council, the Council shall officially declare the seat vacant within thirty days of the commencement of any vacancy." The Charter does not provide for the resigning Councilmember to specify a specific future date when the resignation would be effective. In contrast, pursuant to Government Code section 1770(c)(2) a letter of resignation may specify a date on which the resignation becomes effective. A resignation takes effect by its terms and need not be accepted. *Meeker v. Reed*, 70 Cal.App 119, 123 (1924). Although a resignation can be withdrawn before it becomes effective, once effective, it may not be withdrawn. *American Fed'n. of Teachers v. Bd. of Educ.* 107 Cal.App.3d 829, 840 (1980); *Armistead v. State Personnel Bd.* 22 Cal.3d 198, 206 (1978).

Proposing amendments to this provision to clarify issues pertaining to the ability of a Councilmember to specify the effective date of her/his resignation and the effect of such specification in light of other Charter language, is not material to the issue of establishing district-based elections. Hence, it is our recommendation that these issues be deferred to future Charter study.