

LAW OFFICES OF J. BYRON FLECK



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May 18, 2018

bdoyle@santaclaraca.gov  
Brian Doyle, Esq.  
City Attorney  
1500 Warburton Ave.  
Santa Clara, CA 95050

**Re: Santa Clara City Charter Section 703**  
**PLEASE INCLUDE IN COUNCIL PACKETS FOR MAY 22, 2018 MEETING**

Dear Mr. Doyle and City Council:

**INTRODUCTION**

Please accept the following in the constructive manner intended. The Council's collective professional and restrained while compassionate handling of the crisis concerning Councilmember Caserta is welcome and deservedly appreciated by residents of Santa Clara. This letter is offered in that same spirit. The importance of calm, sober deliberation must continue in the next critical phase. Filling the vacancy.

I offer the following analysis of statutory interpretation and application of City of Santa Clara City Charter Section 703. The section is entitled "Vacancies." The section applies to an elected office when during a term it may, as here, become vacant.

To be clear, the City is required to follow the command of the Charter duly approved by the resident voters of Santa Clara. There is no qualification that provides this Council any discretion whatsoever to deviate from the clear words of Section 703. Application of Section 703 is mandatory. In the vernacular, Section 703 says what it says and means what it says.

Bottom line. For the reasons set forth below, the Santa Clara City Council must first, have five votes to fill a vacancy. A vote is required before moving to any next step. There is no limitation as to how long nor how many rounds of votes are required to get to the magic five. By default, if no candidate secures the five, then a Special Election<sup>1</sup> is required to be set if after 30 days from vacancy the seat is not filled with (presumably) incursion of hundreds of thousands of dollars additional costs to Santa Clara residents. By operation of Section 703 this is the singular outcome.

### SUMMARY

Therefore, the only legally required and fiscally responsible action the Council must take on May 22, 2018 is to ask for people to come forth at the next meeting to fill the vacant seat, hear them and vote. Keep voting until the cows come home until five votes are secured, 30 days is the cut off to default special election. Given the time remaining until the next general election, it would be irresponsible to call for a special election as you otherwise must by default under the Charter. Deferring to the next regularly scheduled election has no support under the Charter.

### LEGAL ANALYSIS

So, how does this singular conclusion follow? Read the Charter. In relevant part to the present matter:

#### **Sec. 703 Vacancies.**

A vacancy in any elective office of the City...from whatever cause arising, shall be filled by appointment by the City Council by a four-fifths (4/5) vote of the remaining members. In the event the City Council shall fail to fill a vacancy by appointment within thirty (30) days after such office shall have been declared vacant, it shall forthwith<sup>2</sup> cause an election to be held to fill such vacancy.... (As approved at election held November 5, 1968, approved by Joint Resolution of Legislature filed with the Secretary of State January 15, 1969; Amended by electors at an election held November 8, 2016, Charter Chapter 19 of the State *Statutes of 2017*). [Emphasis Added].

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<sup>1</sup> See, especially, legal analysis. As noted, inclusion of the word/phrase "Forthwith," and "[S]hall...cause an election," while knowingly omitting words to the effect that the vacancy would (or could) be filled at the next regularly scheduled election, can only reasonably be read that absent a five-vote consensus, Special Election must occur by default. This interpretation is consistent with the express wording of Section 703 and its policy of consensus discussed below.

<sup>2</sup> "Immediately, without delay." <https://www.merriam-webster.com/dictionary/forthwith>

As a threshold matter from the above, the law requires that the City SHALL fill the vacancy by appointment. Therefore, any suggestion that a Council vote can be ignored to fill a vacancy is illegal. The Council must vote to fill the vacancy first, contrary to any suggestion otherwise.

Secondly, what happens if the Council (after as many rounds as may be necessary and 30 days from the date of vacancy elapses) cannot secure the five votes to fill the vacancy? By default, the Charter commands that the Council “[F]orthwith<sup>3</sup> cause an election to be held.”

This is critical. The drafters could have, but declined, to state the seat must remain open until the next scheduled election. Why? It is apparent the drafters wanted to force the Council into consensus over factionalism.<sup>4</sup> Hence, not only this provision, but also the 4/5 requirement to insure, as best they could, that consensus would prevail over faction.

It is what the Charter commands. The Council is duty bound to follow. Its what resident voters told Councilmembers to do.

### **NO POLITICS WITH THE CITY CHARTER**

All are presumed familiar with the story of Judge Garland. President Obama’s nominee to the U.S. Supreme Court after the death of Justice Scalia. Instead of acting on Presidents Obama’s nominee, GOP Senate leadership blocked his nomination until “after the regularly scheduled election.” That was the most cynical of politics. I presume no one on this Council would disagree with that conclusion.

While I have no information that any Councilmember is considering offering an analogous path for filling the instant vacancy (indeed, that would be wildly inconsistent with the thoughtful and magnanimous manner Council has addressed their greatest challenge ever at least that I can recall), adding politics and consequent factionalism is exactly the outcome the Charter’s drafters (and current circumstances) required be avoided. Falling into any such trap is cynical, wrong and wholly outside the clear wording of your Charter. Any such argument which may be presented must be rejected for the reasons cited herein.

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<sup>3</sup> Id.

<sup>4</sup> There is further support that the Charter Commission valued the policy of consensus. For instance, in the prior Charter only a 3/5 was sufficient to install a replacement. Clearly, that was increased to the higher standard to promote consensus over factionalism. Good thinking by the drafters.

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### CONCLUSION

The Santa Clara City Charter requires this Council to vote until the Council vacancy is filled. If you cannot summon five votes for one candidate after 30 days, proceed to a special election. There are not other options under this City's Charter.

### NOTE

I am not retained nor have any client in this matter. This letter is offered only as assistance to the City Attorney and Council on the issue presently before the Council. I am not currently a resident of Santa Clara. I do, as you, have many friends and family in the City. I served as a Planning Commissioner in Santa Clara for eight years.

My only intent in submitting the foregoing is to try, as best I can, to mitigate the pain and harm caused by a disturbed Councilmember and the harm inflicted on his victims. It is critical you continue to move forward dispassionately and in accordance with your city's charter.

The best way to mitigate the shame to Santa Clara now, is to reaffirm your commitment to follow the command of the law your constituents told you to follow. Any politicking with the obvious will defeat the progress you made.

Follow the Charter. The drafters got it right.

Very truly yours,



J. BYRON FLECK, ESQ.

Cc: Santa Clara Mayor and Councilmembers

/kdw