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NAPA COUNTY BOARD OF SUPERVISORS Board Agenda Letter

TO: Board of Supervisors

FROM: Robert Westmeyer - County Counsel
County Counsel

REPORT BY: Robert Westmeyer, County Counsel, 259-8245

SUBJECT: Discussion and Possible Action Regarding Commencing the Process of Separating the Registrar of Voters Duties from the County Clerk's Duties and Making the Position Appointive

RECOMMENDATION

County Executive Officer and County Counsel request direction regarding whether or not the process of separating the duties of the Registrar of Voters from the duties of the County Clerk and making the position of Registrar of Voters appointive should commence.

EXECUTIVE SUMMARY

Supervisor Dillon has requested that the process of converting the Registrar of Voters (hereafter the "ROV") from an elective to an appointive position be outlined so the Board may consider whether it wishes to have the County Executive Office prepare a report on the feasibility of implementing such an approach.

A County Clerk is *ex officio* the ROV. The County Clerk is an elective position unless the voters approve a proposal to make the County Clerk appointive. Although a proposal to make the County Clerk appointive has never been placed before the Napa County voters, the Board of Supervisors may nonetheless secure statutory authorization to appoint the ROV in the same manner as other county officers are appointed. In such a case, the County Clerk by statutory fiat is not *ex officio* the ROV.

Making the ROV an appointed position is authorized by section 26802.5 of the Government Code providing the county wishing to do so is listed in section 26802.5. Over the years ten counties have secured the necessary authorization from the state legislature (El Dorado, Kings, Lake, Marin, Merced, Monterey, Riverside, San Joaquin, Solano, and Tulare). However, only the following counties have implemented the statutory authorization and actually made the ROV appointive: Lake, Monterey, Riverside, San Joaquin and Solano. A survey will be provided to the Board on April 11th identifying where the ROV is located in each of the 58 counties that have responded to the survey.

The essential duties of an elected official cannot be transferred to another county officer or employee without the consent of the elected official during his or her term of office. However, the California Supreme Court in 1995

concluded that Clerk of the Court duties, that were not deemed essential duties of the County Clerk, could be transferred to a Court Executive Officer during the County Clerk's term of office regardless of the County Clerk's consent or lack thereof. Thus, while the matter is not completely free from doubt since the present situation involves the ROV rather than the Court Executive Officer, it is likely that if the Board successfully amends section 26802.5 allowing the ROV to be appointed, creating a separate ROV office could occur prior to the end of the term of office of the existing County Clerk who at the present time is *ex officio* the Napa County ROV.

Due to the enactment of section 26802.5, it is unlikely that a transfer of ROV duties to someone other than the County Clerk prior to Napa County being added to the statute would be possible since it seems likely that by enacting the statute the legislature intended fully control the manner in which a ROV may be appointed by a Board of Supervisors.

If it is concluded that the duties of the ROV should be performed by the County Clerk, any change would have to occur at the end of a term of the County Clerk or the County Clerk would need to resign thereby creating a vacancy. However, it is not possible for the County Clerk to resign his office without also resigning from the other two consolidated offices he occupies: Assessor and Recorder. Any exception to this requirement must be authorized by state legislation. To date the only exception to this requirement involves the consolidated offices of District Attorney and Public Administrator. In the case of these consolidated offices, but only in the counties of Glenn, Lassen, Madera, Mendocino, Napa, Trinity, Tuolumne and Lake, the District Attorney is statutorily authorized to resign from the elective position of Public Administrator without also resigning from the elective position of District Attorney. Similar statutory authorization relating to the Assessor-County Clerk-Recorder could be pursued with a goal of authorizing the resignation of the County Clerk without also requiring the resignation of the Assessor and Recorder.

The first step in the separation of the ROV from the County Clerk therefore would be for the Board to propose state legislation that would add Napa County to the list of counties that are entitled to appoint a person as the ROV who is not the County Clerk. Once that has occurred, a determination would need to be made as to whether the change should occur during the term of the County Clerk or await the end of the term. Awaiting the end of the term would mean any change would not take effect until January of 2011.

FISCAL IMPACT

Is there a Fiscal Impact? No

ENVIRONMENTAL IMPACT

ENVIRONMENTAL DETERMINATION: The proposed action is not a project as defined by 14 California Code of Regulations 15378 (State CEQA Guidelines) and therefore CEQA is not applicable.

BACKGROUND AND DISCUSSION

Supervisor Dillon has requested that the process of making the Registrar of Voters (hereafter the "ROV") a free standing office and appointed by the Board of Supervisors rather than elected be outlined so the Board may consider whether it wishes to have the County Executive Office prepare a report on the feasibility of implementing such an approach.

A procedure exists allowing the voters of a County to vote on whether to make the County Clerk appointive rather than elective. If the voters approve the County Clerk is transformed into an appointive position. In such a case, the ROV would also automatically become an appointed position since the County Clerk in such a scenario would continue to be *ex officio* the ROV. Such a change could only occur at the end of the term of a County Clerk following the vote since the position involved is an elective position. It is not expected this is an approach the Board will wish to pursue and therefore while it is noted here it will not be discussed in more detail.

A second approach would be to unconsolidate the office of County Clerk from the offices of Assessor-County Clerk-Recorder. In such a case at the next election (i.e. in 2010) two elective positions would be on the ballot: the elective position of County Clerk and the elective position of Assessor-Recorder. This would result in the person serving as County Clerk not also being burdened with the duties of the Assessor-Recorder. As with the previous approach, it seems unlikely this approach would be looked on favorably by the Board since it would not result in an appointed ROV. Additionally, this change could not occur until the next election cycle four years from now because all of the changes involve elective positions. Thus, this possibility is also noted but not discussed in more detail.

That leaves the possibility of amending the state law for the purpose of authorizing the Napa County Board of Supervisors to appoint the ROV.

The County Clerk is *ex officio* the ROV unless the Board of Supervisors takes action at the state level to appoint the ROV in the same manner as other county officers are appointed. In such a case, the County Clerk is not *ex officio* the ROV. Such action by the Napa County Board will be authorized by section 26802.5 of the Government Code once Napa County is added to the list of counties already empowered to take such action. See section 26802.5 which is reproduced below for the list of counties that have previously secured the necessary authorization.

"Section 26802.5. Registrar of voters; certain counties; appointment; duties

In the Counties of El Dorado, Kings, Lake, Marin, Merced, Monterey, Riverside, San Joaquin, Solano, and Tulare, a registrar of voters may be appointed by the Board of Supervisors in the same manner as other county officers are appointed. In those counties, the County Clerk is not *ex officio* Registrar of Voters, and the Registrar of Voters shall discharge all duties vested by law in the county elections official that relate to and are a part of the election procedure."

Not all counties that have secured the necessary legislative authorization have in fact changed the ROV to an appointed position. Only the following counties have implemented the statutory authorization and actually made the ROV appointive: Lake, Monterey, Riverside, San Joaquin, Solano and Tulare. There are a number of charter counties that also have an appointed ROV which is authorized by their county charter. Charter counties are not required to secure legislative authorization to appoint an ROV. An updated listing of where the ROV is located in each of the 58 counties that have responded to the survey will be distributed to the Board on April 11, 2006.

The Attorney General and the courts have issued a series of opinions regarding when certain of the duties performed by an elected official may be transferred to another officer or employee of the county during the elected official's term of office. The controlling principle seems to be that a transfer of duties from an elected official during his or her term of office to another county officer or employee may only occur if the transferred duty is not one that must be performed exclusively by the person occupying the elective office. Typically, *ex officio* duties are not considered to be duties that must be performed exclusively by the person elected to an office that includes *ex officio* duties. (See *Anderson v. Superior Court* [court executive officer duties may be transferred from the County Clerk to the Court Executive Officer during the County Clerk's term of office (with however a strong dissent arguing that it should only occur at the end of a term of office)]; See also Opinions of the California Attorney General [removing duties of the Clerk of the Board of Supervisors from the purview of the County Clerk during the County Clerk's term of office is lawful]. However the precise issue of removing ROV duties from a County Clerk during the County Clerk's term of office has never been decided and thus the matter cannot be totally free from doubt. Based on the *Anderson* case it is our view that such a removal during the County Clerk's term of office is possible.

Assuming without deciding that the ROV duties of a County Clerk cannot be transferred prior to the end of the elective term of a County Clerk, and therefore a resignation creating a vacancy in the office of the County Clerk would be required to achieve a mid-term transfer, another difficulty faces Napa County because of the fact that the Napa County Clerk is one of the consolidated offices of County Clerk-Assessor-Recorder. The rule has long existed that if a single individual occupies multiple elective offices due to consolidations, that individual cannot resign from one office without resigning from all offices. Any exception to this legal requirement must be authorized by state legislation. To date, the only circumstance in which this statutory exception exists is in the case of the consolidated offices of the District Attorney. The statute authorizing this is reproduced immediately below.

"Section 24011. Elective or appointive offices; exceptions for specified counties.

Notwithstanding the provisions of Section 24009:

(a) The Boards of Supervisors of Glenn County, Madera County, Mendocino County, Napa County, Solano County, Trinity County, Tuolumne County, and Lake County may, by ordinance, provide that the public administrator shall be appointed by the board.

(b) The Boards of Supervisors of Madera County, Mendocino County, Napa County, Trinity County, Tuolumne County, and Lake County may appoint the same person to the offices of public administrator, veteran service officer, and public guardian. The Board of Supervisors of Glenn County and Solano County may, by ordinance, appoint the same person to the offices of public administrator and public guardian.

(c) The Boards of Supervisors of Glenn County, Madera County, Mendocino County, Napa County, Trinity County, Tuolumne County, and Lake County may separate the consolidated offices of District Attorney and Public Administrator at any time in order to make the appointments permitted by this section. Upon approval by the Board of Supervisors, the officer elected to these offices at any time may resign, or decline to qualify for, the office of public administrator without resigning from, or declining to qualify for, the office of district attorney.
(emphasis added)"

Even if the County Clerk was interested in resigning it seems unlikely that he would also be willing to resign as Assessor and/or Recorder. Proposing state legislation that would enable the County Clerk to resign without also requiring resignations from the offices of Recorder and Assessor patterned after section 24011 would resolve this issue.

Transferring the ROV duties with the County Clerk-Assessor-Recorder's consent, of course, is always a possibility. One clear legal principle in this area is that the duties of an elected official may be transferred to another county officer or employee with the consent of the elected official during his or her term of office.

CONCLUSION

The first step in the process of being in a position to appoint an ROV would be for the Board to propose state legislation that would add Napa County to the list of counties that are entitled to appoint a person as the ROV who is not the County Clerk. This is the case whether the transfer would occur during the term of office of the County Clerk or at the end of the term of office of the County Clerk.

SUPPORTING DOCUMENTS

None

CEO Recommendation: Approve

Reviewed By: Maiko Klieman