



Agenda Date: 4/4/2006  
Agenda Placement: 9D

## NAPA COUNTY BOARD OF SUPERVISORS Board Agenda Letter

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**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

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### **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 costs involved in implementing such an approach.

A County Clerk is *ex officio* ROV. The County Clerk is an elective position unless the voters approve a proposal to make the County Clerk appointive. If a proposal to make the County Clerk appointive has never been placed before the voters, a Board of Supervisors may nonetheless secure statutory authorization to appoint an 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 4th which will identify where the ROV is located in all 58 counties.

The 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, duties that are not duties that the elected official must perform, may be transferred during the elected officials term of office. Thus, while the matter is not free from doubt,

it is possible 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 must be performed exclusively 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.

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 (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 costs involved in 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. In such a case, and if the voters approved a change in the status of the County Clerk from an elective position to an appointive position, the ROV would be an appointed position since presently the Napa County Clerk is *ex officio* the ROV. Such a change could only occur at the end of the term of the 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 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 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. A listing of where the ROV is located in the 58 counties will be distributed to the Board on April 4, 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 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 has never been decided and thus the matter cannot be totally free from doubt.

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 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.

**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. Thus, enabling this to happen would require state legislation patterned after section 24011.

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 some of 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: Policy Issue

Reviewed By: Helene Franchi