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## OFFICE OF THE COUNTY COUNSEL

### MEMORANDUM

**DATE:** August 11, 2021  
**TO:** Board of Supervisors  
**FROM:** Christian M. Curtis, County Counsel *CMC*  
**SUBJECT:** Legal Issues re: Auditor's Retirement

Supervisors,

In light of Auditor Weer's recently announced retirement, I went back and reviewed my research regarding appointment to vacant elected offices. It appears that the appointment of an auditor is governed by the same rules that applied to the Sheriff's position. I understand that the Auditor may be bringing forward an agenda item for appointment of a successor, and before that happens, I wanted to make sure that the Board was aware of a few points. Specifically:

**Appointment of an Auditor is an "Open Session Item".** Typically, interviews of candidates and other aspects of public employee appointments are handled in closed session under Government Code section 54957. That statute, however, explicitly provides that "the term 'employee' . . . shall not include any elected official . . ." (Gov. Code § 54957(b)(4).) As a result, I don't see a way to discuss the matter in closed session. My email to you, however, is privileged attorney-client communication and should be withheld from any Brown Act packet under *Roberts v. City of Palmdale*. ((1993) 5 Cal. 4th 363.) Previously, the Board waived privilege and disclosed my prior email regarding appointment of a Sheriff, on which this email is based.

**The Board Can Appoint a New Auditor, but it Cannot Call a Special Election.** Under Government Code section 25304, the Board of Supervisors is the entity responsible for appointment to vacancies of elective county offices. In interpreting this section, the Attorney General has opined that "a board of supervisors of a general law county may not call a special election to fill the unexpired term of a constable who has resigned during his term in lieu of appointing a person to fill the vacancy for the unexpired term." (57 Ops. Cal. Atty. Gen. 149; see also *People ex rel. Murphy v. Col* (1901) 132 Cal. 334.) By statute, a special election is only called where the elected official has died or resigned after being elected but before taking office. (Gov. Code § 25304.5.) Since Mr. Weer is retiring after starting his most recent term, a special election is not an option.

**If the Board Does Not Appoint a Successor, the Assistant Auditor will Discharge the Duties of Auditor Until a Successor Takes Office.** Under Government Code section 24105, the assistant auditor discharges the duties of auditor whenever the office of auditor is vacant. While performing this function, an assistant is sometimes referred to as "acting auditor." (64 Ops. Cal. Atty. Gen. 561.) This title, however, is merely descriptive. Absent formal appointment by the Board, the

assistant auditor does not actually assume a higher office, they merely discharge the duties of that office. (Id.) Therefore, she retains the position of assistant once a new auditor is appointed or elected. (Id.) Consequently, if the Board does not appoint an auditor, the assistant will perform the duties of auditor until such time as the Board makes an appointment or a successor is elected to the next term of office.

**The Board Cannot Make a Temporary or Provisional Appointment.** When a vacancy occurs in an appointed office that reports to the Board, it is fairly common for the Board to make a short term appointment entitled either "Interim" or "Acting." When the Board makes an appointment to fill a vacancy in an elected position, however, this does not appear to be an option. By statute, the appointee serves the remainder of the unexpired term. (Gov. Code § 25304.) The Attorney General has opined that means that "the [B]oard [of Supervisors] ha[s] no authority to fill the vacancy on a temporary basis. Their authority is to fill the vacancy by the appointment of a new [official] who will hold office for the balance of the term." (64 Ops. Cal. Atty. Gen. 561.) Consequently, after the Board makes an appointment and the appointee takes office, the successor can only be removed in the same manner as an elected auditor.

Please feel free to reach out to me individually if you have any questions.

CMC