



January 28, 2019

TO: LOCSD Board of Directors

FROM: Roy Hanley, District Legal Counsel

SUBJECT: Agenda Item 7A – 2/7/2019 Board Meeting

Resolution of Board of Directors Taking Action in Regards to the Clerical Error by County of San Luis Obispo Elections Officials Concerning Christine Womack's Membership and Term on the Board of Directors of the Los Osos Community Services District

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DESCRIPTION

This item is on to give the Board of Directors the opportunity to take official action for the Los Osos Community Services District (District) in regards to Christine Womack's tenure as a member of the Board of Directors and declaring the District's intent as to the term of that tenure in the event the Board determines that its position is that she does remain on the Board of Directors.

STAFF RECOMMENDATION

Staff recommends that the Board adopt the following motion:

Motion: I move that the Board adopt Resolution 2019-08 resolving that Christine Womack continues as a member of the Board of Directors and that it is for a four year term.

PREAMBLE

The Los Osos Community Services District is a public agency created by State Law. It is not part of nor subservient to the County of San Luis Obispo. The County, therefore, in this context, may not direct the District in any fashion. General Counsel represents the District, essentially a corporate entity. While General Counsel speaks to his client through the members of the Board of Directors, the individual members are not clients of General Counsel. General Counsel has no power to make rulings. General Counsel is giving advice to the Board of Directors, in this case in open session. While General Counsel is confident and firm in his advice, the Board considers that advice and makes its own determination.

DISCUSSION

The first part of this staff report seeks to inform the Board of Directors of the timeline for events that led to the County Clerk\Recorder Office's much reported clerical error, the conduct of an election for only two four year terms on the Los Osos Board of Directors, and the concurrent two year unopposed term with only Christine Womack as a candidate. This in turn led to Christine Womack not being on the ballot at all.

The District, like most special districts in California, does not have its own elections official, and has no power to appoint one. The District has never conducted its own election. In fact, under the Uniform District Election Law, the County registrar is the district elections official and necessarily runs its elections. This is unlike many other public agencies, for instance cities, which do have the power to appoint their own elections official and while they have the power to conduct their own elections often simply choose to consolidate their election with the County's.

On or about May 17, 2018, the County Office of the Clerk-Recorder first contacted the District in regards to the biennial election to be held on Tuesday, November 6, 2018. The correspondence did two main things in context of the current situation. First, it gave the District a road map of the activities the District must undertake in order for the District to comply with relevant elections code requirements. The District believes that it met all those requirements.

Second, the form specifically lists that the LOCSD will be conducting an election for three full terms. The form did list Jon-Erik Storm as an incumbent, but since this standard form list had likely been created prior to Jon-Erik Storm's resignation effective March 20, 2018, and Christine Womack was appointed to fulfill his unexpired term only on April 5, 2018, no one at the District took any notice of the names listed as incumbents. The District did, in fact, timely notify the State of California and the County of the appointment of Christine Womack having taken place on April 5, 2018. Incorrect listing of names on this form had, and has, no legal affect.

District staff duly processed the required election information as per the directions from the County Clerk-Recorder. On June 8, 2018, the District sent to the elections officials the *"Notice To County Elections Official Elective Offices to Be Filled, Map of District Boundaries, Payment of Candidate Statement of Qualifications per the Elections Code"*. That document listed the number of Directors to be elected as three (3) and specified that each of the three terms was to be for four years. On July 18, 2018 or soon thereafter, the County published the *"Notice of Election"* and specified that the Los Osos CSD election would be for two four year terms and one two year term. The Notice of Election is always prepared by the County elections officials without consultation or direction from either the Board of Directors or staff of the Los Osos Community Services District. The County later sent this form to the District by letter dated July 26, 2018. The letter was actually received by the District on August 1, 2018.

The District has no record of any other written communication from the County to the District in regards to the length of terms for the Los Osos Community Services District Board of Directors election. No representative of the District was consulted in the decision by the County elections officials to list two four year terms and one two year term. In light of the fact that the District has no elections powers it is not a surprise that the published election forms were created without District's input or review.

The County elections officials have stated that the publication, the posted notices, and the ballots all containing a reference to just two four year positions and one two year term were done in error and that the error was a result of a clerical mistake. While we don't know the exact nature of the clerical mistake, the County has never taken the position that District staff made the clerical error, and District staff indeed had nothing to do with those determinations.

District staff did receive the July 26, 2018 correspondence on August 1, 2018. Staff did note that there were only two terms listed for four years and one for two years. District General Manager, Renee Osborne, did call the elections department as to why that was the case. It is General Counsel's understanding that the Assistant County Clerk-Recorder took that call and explained to the General Manager that the County had made the determination that because there was an appointment made to an unfilled term on the Board of Directors that position could only be elected to a two year term. District staff, having been told that the correct position was two four year terms and one two year term, duly and properly posted the Notice of Election. The Notice of Election was prepared by the County without consultation with District personnel.

The Notice of Election for those two four year terms and one two year term was therefore duly published and duly posted before the time ran for persons to file to run for those offices. All persons, including all potential

candidates had access to the same information about the available positions, including the fact that they could then choose to run for a two year term as opposed to a four year term. The nomination period opened July 16, 2018, the Notice of Election was published on or about July 18, 2018, and since Louis Tornatzky, an incumbent, chose not to run for reelection, the nomination period to run for offices on the Board of Directors did not close until August 15, 2018. It is General Counsel's understanding that prior to the time running to file nomination papers, the County Elections official called Christine Womack with a concern about her designated description to be placed on the ballot. She had requested to be described as an incumbent. A person appointed to fill out a remaining term on a board of directors is indeed an incumbent. The elections official informed her that she could not describe herself as an incumbent unless she was running for what he had determined would be a two year term on the Board of Directors. She acquiesced to his decision and authorized him to change her declaration of candidacy to run for the two year term as she wanted to continue to refer to herself as an incumbent.

The Notice of Election published in July and posted on August 1 clearly states that "in the event there are no nominees for each elective office, and a petition for an election is not filed with the elections official within the time period prescribed by law, an appointment shall be made pursuant to Elections Code 10515." No one besides Christine Womack chose to run for the two year term prior to the cut off for filing nomination papers. No one filed a petition for an election for that term. This is the reason Christine Womack's name and potential two year term did not appear on the ballot. This is not an uncommon occurrence. In the same election no one filed to run against the three incumbent city council persons in Pismo Beach, no one petitioned to have those elections on the ballot, and the November 2018 election was held without the Pismo Beach council candidates appearing on the ballot. They were all appointed pursuant to Elections Code 10515.

Interested parties are allowed to challenge ballots within legal time frames prior to the final publication of ballot materials, etc. No person or agency timely filed any challenge to the ballot for the election that showed four people running for two four year terms on the Los Osos CSD Board of Directors. The time for a challenge to the ballot passed and the election was held. Thereafter, the County did appoint Christine Womack pursuant to Elections Code 10515. This is a ministerial action by the Board of Supervisors over which they have no discretion.

After voting was complete, but before the counting was finished, the County apparently became aware of their ballot error. The County took purported action to rescind the appointment they made of Christine Womack to a two year term. That action was taken by the County in open session at the Board of Supervisors meeting and that record speaks for itself. The County did certify the election as well by separate action. General Counsel can find no authority giving the Board of Supervisors the power to rescind their ministerial action under Elections Code 10515.

ANALYSIS

Christine Womack was duly appointed to an unexpired term by the Los Osos CSD in April of 2018. Government Code 61047 governs the length of terms of members of boards of special districts (of which the Los Osos CSD is one) and says that the term she was appointed to in April of 2018 lasts until a duly elected successor is sworn in. No one else has been sworn in, therefore she still serves on the Board of Directors per Government Code 61047. If the Board of Supervisors does not have the power to rescind their ministerial action in following Elections Code 10515, then the only person who could be sworn in, is indeed Christine Womack. If the Board of Supervisors had the power to rescind, then no one is duly elected and she continues to serve under §61047.

The action pending in Superior Court is not on the agenda for discussion. If it were, the discussion would be in closed session. For the purposes of making this decision tonight, the Board of Directors should assume that the action has no merit. General Counsel will not discuss all reasons for making that recommendation, but some obvious ones can be mentioned without violating the confidentiality of closed session and without prejudicing the District's legal interests. All persons received the same notice from the County that the election would be for two four year terms and one two year term. All persons had the opportunity from the publication

of the notice in July, and its posting at the District's office on August 1 and could have filed for the described two year position certainly prior to August 10, and likely prior to August 15 as former member Tornatzky's decision not to seek re-election should have opened up the nomination period for all three seats.

Once the ballot was set, and it included only two four year terms, there began a time frame during which any interested person could have sued to have the ballot corrected. That time likely ran sooner than the date of the election itself, but it certainly ran by that date. No action challenging the ballot having been timely filed, an action filed after the election that does not allege (nor could it) any irregularities in the counting of the actual ballots and described as an election challenge cannot succeed based upon alleged irregularities in the ballot. There are many other reasons why this mentioned suit will not succeed, but they are not listed now. This one alone is sufficient for the Board to ignore the suit as any legal risk to its actions tonight.

The Board of Directors faces the following situation. There is no timely action filed that can affect Christine Womack's service on the Board of Directors. Even though the ballot did not include her name, she was duly elected and confirmed pursuant to Elections Code 10515. Christine Womack either holds the seat pursuant to Government Code 61047 or she holds it pursuant to Government Code 61042. The District is an independent local government agency, not a mere creature of the County. Service in office is governed by the referenced sections, and by Government Code section 1770 defining vacancies, none of which have occurred here. There is nothing in the Community Services District statute, contained in the Government Code, that allows the Board of Supervisors to rescind an appointment once made. In fact, once the April 2018 appointment was made even the Los Osos Community Services District Board was without power to rescind the appointment.

It is also likely that in spite of the fact that the purported term was for two years, it is in fact for four years. As stated, the term of office is defined by the Government Code, not by the County. Government Code 61042 states that terms are for four years. Neither the Elections Official nor the County of San Luis Obispo have the legal authority to alter the nature of a term on the Board of Directors of the District that is set by State law.

General Counsel recommends the draft resolution be adopted. The draft resolution confirms the District's position that the election was duly held without timely challenge. The "appointment" under Elections Code 10515 can not be rescinded. The draft resolution further insulates the Board by confirming an appointment even though not required.

ALTERNATIVES

The Board has a few alternative actions that are possible, though they risk running counter to the law as described above. Included, without limitation, are the following:

Change the resolution to make the "appointment" of Christine Womack effective for two years, and have the remaining two years of that term on the ballot in 2020. This alternative removes the threat of the County attempting to make an appointment, combines the new election with a general election, but sooner than the term would normally be subject to election. This action would subject the District to the possibility of a quo warranto action by Christine Womack, since her term legally runs for four years. General Counsel does not represent individual members of the Board and has no information about whether or not Christine Womack would consider filing such a suit. The cost of a general election for Los Osos CSD is much less than calling a special election. This option has the added advantage that the Board may feel that it is the right thing to do even with the risk of a quo warranto action.

Take no action. This alternative would leave things in status quo, and in the opinion of General Counsel Christine Womack would remain as a member of the Board of Directors until her duly elected successor takes office after the general election in 2022. There are two reasons not to choose this alternative. One is that while General Counsel is firm in his belief as to the rule of law, General Counsel does not make rulings. The County of San Luis Obispo might take the position that they could indeed legal revoke the elections code appointment of Christine Womack. If the revocation was/is effective, then the Government Code provides that the Board of Directors has 60 days within which to make an appointment. If the Board of Directors does

not make an appointment within 60 days, then the right to make an appointment goes to the Board of Supervisors instead. The resolution as drafted prevents that possibility.

Declare the position vacant and appoint someone to the position. This is extra legal in the sense that the position is not in fact vacant. However, there is no specific procedure required to declare a vacancy, and the remedy would be for Christine Womack to file an action in quo warranto to have a court declare that the position was indeed not vacant and that she serves. This seems like an invitation to litigation, and litigation where the proponent has a too high a chance for success.

Call for a special election. This has all the infirmities mentioned before. Special elections are more expensive to the District, and although the County Elections official has offered to pay such cost, there is no legal requirement that the County pay for such cost. County expenditures for a special election would have to be approved by the Board of Supervisors. Even though it was clearly an error at the County that led to the issue, the County is immune from a suit for election costs under these circumstances and could not be compelled to pay for such costs. The County could choose to pay, but will have to be convinced both that it is the right thing to do and that paying for something the County is not legally obligated to pay for is not an illegal expenditure of public funds under these circumstances.

Attachment – LOCSD Resolution 2019-08

RESOLUTION NO. 2019-08

**A RESOLUTION OF THE BOARD OF DIRECTORS
OF THE LOS OSOS COMMUNITY SERVICES DISTRICT
AFFIRMING THAT DIRECTOR CHRISTINE WOMACK IS A LAWFUL MEMBER OF THE
BOARD OF DIRECTORS FOR A FOUR-YEAR TERM EXPIRING UPON THE QUALIFICATION
AND SEATING OF HER SUCCESSOR AFTER THE NOVEMBER 2022 ELECTION**

WHEREAS, under the Uniform District Elections Law, Elections Code section 10501 et seq., the San Luis Obispo County Registrar-Recorder conducts elections for the Los Osos Community Services District (the "District").

WHEREAS, on April 5, 2018, the District's Board of Directors (the "Board") appointed Christine Womack to a vacancy on the Board with a term to last until the qualification and seating of a successor after the November 2018 election.

WHEREAS, on May 17, 2018, the San Luis Obispo County Clerk-Recorder notified the District that the November 2018, election would contest three, four-year District Boards terms.

WHEREAS, on June 8, 2018, the District confirmed to the Clerk-Recorder that three, four-year term Board seats would be contested at the November 2018 election.

WHEREAS, on July 18, 2018, the Clerk-Recorder erroneously published a Notice of Election stating that two, four-year term and one, two-year term on the District Board would be contested at the November 2018 election. The Clerk-Recorder provided a copy of that notice to the District on July 26, 2018.

WHEREAS, upon receipt of erroneous notice, the Assistant Clerk-Recorder informed the District General Manager that the Clerk-Recorder had determined that a short, two-year term should be contested because one seat was then held by an appointed incumbent. District staff, relied on this decision and posted the notice of election, as Elections Code section 12113 requires.

WHEREAS, several candidates timely filed to run for the four-year terms, but none filed for the two-year term. On August 9, 2018, the Clerk-Recorder notified Director Womack he would accept her requested ballot designation of "Appointed Incumbent" only if she ran for the two-year term seat. Director Womack accepted this decision and authorized the Clerk-Recorder's changes to her Declaration of Candidacy form to that effect.

WHEREAS, only Director Womack timely filed to run for the two-year term. As Elections Code section 10515 required, the San Luis Obispo County Board of Supervisors appointed Director Womack to the Board on November 6, 2018.

WHEREAS, after the election, the Clerk-Recorder's earlier errors were recognized and the Clerk-Recorder stated the District must determine how to proceed and opined that the Board of Supervisors' November 6, 2018 appointment of Director Womack was invalid. On November 20, 2018, the San Luis Obispo County Board of Supervisors adopted Resolution No. 2018-289 purporting to rescind that appointment.

WHEREAS, the Clerk-Recorder and Board of Supervisors' are unauthorized to adjust Directors' terms. Government Code section 61042, subdivision (a) defines Directors' terms as four years.

WHEREAS, a Director, once appointed or elected, serves until the qualification and seating of a successor under Government Code section 61042, subdivision (a). Accordingly, Director Womack holds office under this statute by her April 5, 2018 appointment until a successor is qualified and takes the seat.

WHEREAS, Elections Code section 10515 required the Board of Supervisors' November 6, 2018 appointment of Director Womack. Director Womack thereafter holds the office as if she had been elected to it under subdivision (a) of that statute. Nothing in that section authorizes the Board of Supervisors to rescind an appointment once made. Other than by recall, an appointed or elected official may be removed from office only a court acting in quo warranto under Government Code section 1770, subdivision (j).

WHEREAS, under these statutes, Director Womack was lawfully appointed on November 6, 2018 to, and currently holds, a four-year term, ending upon the qualification and seating of a successor at the November 2022 election.

WHEREAS, the Board of Supervisors' rescinding of Director Womack's appointment was unauthorized and therefore had no effect. If it had, however, a vacancy would exist which the District Board may fill by appointment under Government Code, sections 1780 and 61042, subdivision (c).

NOW THEREFORE, THE BOARD OF DIRECTORS OF THE LOS OSOS COMMUNITY SERVICES DISTRICT DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. The foregoing recitals are true and correct, and incorporated by reference as if set forth herein.

SECTION 2. Director Christine M. Womack was lawfully appointed on November 6, 2018 by the San Luis Obispo County Board of Supervisors under Elections Code section 10515 and Government Code section 61042, subdivision (a) to a full, four-year term on the Los Osos Community Services District Board of Directors, ending upon the qualification and seating of a successor at the November 2022 election.

SECTION 3. While the Board concludes that no vacancy exists on the Board, in the alternative and if a competent court concludes otherwise, the Board of Directors hereby reappoints Christine M. Womack to be a Director holding a full, four-year term on the Los Osos Community Services District Board of Directors, ending upon the qualification and seating of a successor at the November 2022 election or for such other term as a court may determine is within the Board's power to confer.

SECTION 3. This Resolution shall take effect immediately and the District's Board Secretary shall certify to the adoption of this Resolution.

PASSED and ADOPTED this 7th day of February 2019, by the following vote:

On the motion of Director _____, seconded by Director _____,
and on the following roll call vote, to wit:

Ayes: _____
Nays: _____
Absent: _____
Conflicts: _____

The foregoing resolution is hereby passed, approved, and adopted by the Board of Directors of the Los Osos Community Services District this 7th day of February 2019.

Marshall E. Ochylski
President, Board of Directors
Los Osos Community Services District

ATTEST:

APPROVED AS TO FORM:

Renee Osborne
General Manager and Secretary to the Board

Roy A. Hanley
District Legal Counsel