

MEMORANDUM

TO: Charter Commission

FROM: Joseph J. Langel
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DATE: February 7, 2019

RE: Charter Election Provisions

We were asked to review the existing provisions in the City Charter relating to the conduct of elections because the current Charter language is not entirely consistent with State law. These inconsistencies are causing problems in the administration of City elections. The following provides some general background and then discusses specific issues related to the Charter election provisions.

Background

As a general matter, the administration of elections is governed by state election law and related regulations. Minnesota Statutes chapter 205 contains the bulk of the relevant law. That chapter specifically incorporates other election law chapters to the extent practicable.¹ For charter cities, certain provisions that are otherwise applicable to statutory cities do not apply.² Beyond those exceptions, however, state election law controls over any conflicting provision of the Charter.

Upon review of the Charter, it is apparent that several provisions are unnecessary because they are duplicative of state law. While it is not necessarily problematic to duplicate state law, it is not necessary to do so. Further, should state law change (which regularly occurs with election law), the Charter would then be inconsistent with state law and therefore preempted. As a result, there is no benefit to include language that is fully covered by state law, and best practice is to remove such language.

¹ Minn. Stat. §§ 205.02, subd. 1 (“Except as provided in this chapter the provisions of the Minnesota Election Law apply to municipal elections, so far as practicable.”); 200.01 (“This chapter and chapters 201, 202A, 203B, 204B, 204C, 204D, 205, 205A, 206, 208, 209, 211A, 211B, and 211C shall be known as the Minnesota Election Law.”); 200.015 (“The Minnesota Election Law applies to all elections held in this state unless otherwise specifically provided by law.”).

² Minn. Stat. § 205.02, subd. 2 (“sections 205.065, subdivisions 4 to 6; 205.07, subdivision 3; 205.10; 205.121; and 205.17, subdivision 3, do not apply to a city whose charter provides the manner of holding its primary, general or special elections.”).

Several other items in the Charter conflict with state law and are therefore inoperative because they have been preempted. While the language is impotent as written, there is no reason to include such language in the Charter because doing so just confuses and misdirects those who look to the Charter for guidance of City affairs. Again, best practice is to remove such language.

Specific Provisions

Sec. 4.1. - The regular municipal election.

A regular municipal election shall be held on the first Tuesday after the first Monday in November of each even-numbered year, commencing in 1984, at such places as the city council shall designate. At least 15 days prior notice shall be given by the city clerk by posting a notice thereof in at least one public place in each election precinct, and by publishing a notice thereof at least once in the official newspaper of the city stating the time and the places of holding such election and of the officers to be elected. Failure to give such notice shall not invalidate such election. Elected and qualified officers provided for by this Charter shall assume the duties of office to which they were elected on the first business day in January following such election.

Commentary:

The first sentence of this Section is fine, but entirely unnecessary. The day designation is consistent with, but preempted by, state statute. *See* Minn. Stat. § 205.07, subd. 1 (“The municipal general election in each city shall be held on the first Tuesday after the first Monday in November in every even-numbered year.”). The clause “commencing in 1984” is unnecessary and could be removed. The clause regarding the location of polling is unnecessary, as state statute requires that municipalities designate polling places for each precinct annually for use the following calendar year. *See* Minn. Stat. §204B.16, subd. 1.

The notice requirements in the second sentence are covered by state statute, though the Charter’s notice requirements are different. In essence, this language adds a burden to the City that would not otherwise be required. Statute contains three requirements for this type of election notice: (1) “two weeks’ published notice,” (2) “ten days’ posted notice,” and (3) “post a copy of the notice in the clerk's office for public inspection.” Minn. Stat. § 205.16, subd. 1. The notice must contain “the time of the election, the location of each polling place, the offices to be filled, and all propositions or questions to be voted upon at the election.” *Id.*; *see also id.*, subds. 4 and 5 (requiring notice to the county auditor and secretary of state 74 days before the election). The

Charter language requires an additional notice at “one public place in each election precinct,” a phrase that is vague to the point of being problematic. There is no legal reason to have such posted notice given the vagueness of the location requirement and the low likelihood that any given voter will be informed of the election solely through happening upon the posted notice in the 15 days prior to the election. The publication and content requirements either duplicate or are preempted by state statute, and therefore are unnecessary.

The thrust of the third sentence is to excuse any violation of the notice requirements in the previous sentence, thus making the prior sentence precatory for purposes of enforcement through invalidation of the election. Further, the decision of whether the failure to follow a procedural requirement invalidates an election is not something that the Charter could prospectively determine.

The final sentence is duplicative of, or preempted by, state statute. The terms of council members are set by statute. Minn. Stat. §205.07, subd. 1a (“The terms of all city council members of charter cities expire on the first Monday in January of the year in which they expire. All officers of charter cities chosen and qualified shall hold office until their successors qualify.”). Because the first business day in January is not always the same as the first Monday, the statute controls. Given that the issue is fully and specifically controlled by statute, and the Charter language is preempted and therefore without effect, it should be removed.

4.1.1 Primary elections.

Primary elections shall be held on the same date as prescribed by the Minnesota Statute, which establishes the statewide primary election date. The primary election shall be for the selection of two nominees for each elective office at the regular municipal election, unless two nominees or fewer file for each elective office.

Commentary:

The first sentence is problematic. State statute dictates that “[a] municipal primary for the purpose of nominating elective officers may be held in any city on the second Tuesday in August of any year in which a municipal general election is to be held for the purpose of electing officers.” Minn. Stat. § 205.065, subd. 1; *see also* Minn. Stat. § 204D.03, subd. 1 (“The state primary shall be held on the second Tuesday in August in each even-numbered year to select the nominees of the major political parties for partisan offices and the nominees for nonpartisan offices to be filled at the state general election, other than presidential electors.”). But neither the Charter language nor state statute reflect the possibility of a primary for the narrowing of the field for a special election outside of the schedule for a general election. *See* Minn. Stat. §§ 200.02, subd. 2

(“General election’ means an election held at regular intervals on a day determined by law or charter at which the voters of the state or any of its subdivisions choose by ballot public officials or presidential electors.”); *id.*, subd. 3 (“Primary’ means an election at which the voters of the state or any of its subdivisions choose by ballot the nominees for the offices to be filled at a general election.”). If there were to be a primary for a special election, does this Charter language mean that it would necessarily only be held in an even year on the second Tuesday in August? Is this Charter language intending to mean that primaries are only held for general elections, and not for special elections?

Depending on the interpretation this language is given, this language may be problematic for different reasons. For example, if this language is thought to require primary elections only for regular elections, that may conflict with state law that appears to require primaries for all elections if they are used for any elections. Minn. Stat. § 205.065, subd. 2 (“The resolution or ordinance [for primaries], when adopted, is effective for all ensuing municipal elections until it is revoked.”). Alternatively, if the language requires that primaries be used for all elections, how does that square with the vacancy-filling requirements of section 4.5 of the Charter?³

The second sentence is also difficult, in that the wording is different than state statute. Regardless, however, this language is preempted by state statute and unnecessary. “If not more than twice the number of individuals to be elected to a nonpartisan office file for the nomination, their names and the name of the office shall be omitted from the state and county nonpartisan primary ballot and the candidates who filed shall be the nominees.” Minn. Stat. § 204D.07, subd. 3. This sentence also does not identify what happens if two nominees or fewer file for an office; the absence of a primary is implied but is not certain. This sentence also does not address a situation in which there are multiple seats available, which is not possible now but would be if the City elected council members at large.

Sec. 4.2. - Filing for office.

All persons who shall desire to be elected to any elected office shall file an affidavit not more than ten weeks nor less than eight weeks before the primary election with the city clerk, paying a filing fee to the city clerk in an amount as set by ordinance.

³ There is some uncertainty regarding the ability to hold primaries for special elections to fill vacancies. Because Ramsey is governed by a Charter, there is an additional layer of uncertainty to this. Regardless, the statutes are not completely consistent with respect to the ability for a municipality to hold a primary election for a special election. For example, the timing language related to primaries quoted herein only refers to primaries that occur at the time that they would occur for a general election. Similarly, the term “special primary” only appears in a substantive portion of the Election Law in relation to filling vacancies in state senator or state representative offices. *See* Minn. Stat. §§ 204D.17, subd. 1; 204D.20, subds. 2 and 3; *see also* Minn. Stat. § 200.02, subd. 5 (“Special primary” means an election held to choose the nominees for vacant public offices to be filled at a special election.”).

The city clerk shall prepare and have printed at the expense of the city the necessary ballots or other required material for such election.

The ballots or other material shall contain no political party designation of any candidate and the names of the candidates for each office may be arranged on the ballot alphabetically according to the surname of each candidate. The ballots or the results shall be counted and preserved and the city clerk shall be the final custodian of such ballots or returns for the city.

A sample ballot or a facsimile representation of the ballot shall be posted at the place of election at least one week before such election by the city clerk, whose duty it is to preserve such sample ballots.

Commentary:

The first clause of the first sentence, related to the timing of the filing of an affidavit, conflicts with state statute and is therefore preempted. State law dictates that, “[i]n a city nominating candidates at a primary, an affidavit of candidacy for a city office voted on in November must be filed no more than 84 days nor less than 70 days before the city primary.” *See* Minn. Stat. § 205.13, subd. 1a (84 days is 12 weeks, 70 days is 10). Thus, this provision is preempted. Numerically, the timing in the Charter language coincides with the timing for filing of affidavits for a “municipal general election held in March in any year, or a special election not held in conjunction with another election,” but no other circumstance. *Id.* Given the conflict between these provisions, the presence of primary-possible language creates a complication that does not need to exist. The second portion of the first sentence is fine, but this language does not contemplate the filing of a petition in place of the fee. *See id.*, subd. 4. The amount of fees charged with the affidavit of candidacy is one of the lone instances in which the presence of a Charter is helpful, in that fees for candidates are set by statute except that “[a] home rule charter city that sets filing fees by authority provided in city charter is not subject to the fee limits in this section.” *Id.*, subd. 3(c).

The second sentence is entirely unnecessary, because that authority is given by statute. “The municipal clerk shall prepare and have printed the necessary election materials, including ballots, for a municipal election.” Minn. Stat. § 205.185, subd. 1.; *see also* Minn. Stat. § 205.17, subd. 1 (“In all statutory and home rule charter cities, and in all towns, the municipal clerk shall have printed the official ballot containing the names of all candidates for municipal offices and municipal ballot questions.”).

The first clause of the third sentence is vague and duplicative. As to ballots, this is language is duplicative of language dictating that “[u]pon receipt of the proper filing fee, the clerk shall place the name of the candidate on the official ballot without partisan designation.” Minn. Stat. § 205.13, subd. 1; *see also* Minn. Stat. § 200.02, subd. 28 (designating municipal offices as nonpartisan). As to non-ballot material, this is probably unnecessary, as cities generally publish very little information about candidates directly. Further, there is no definition of “other material,” such that it is not clear if this is specific to material created by the City, or if this would prevent any party identification by the candidate on their own materials? Certainly, the latter could be problematic under the First Amendment.

The second clause of the third sentence, regarding the arranging of the candidate names on the ballots, is in conflict with state law. State statute requires that “[t]he names shall be arranged on city ballots in the manner provided for the state elections.” Minn. Stat. § 205.17, subd. 1. For state law, the names are rotated along precinct lines. *Id.*, subd. 2. Minn. R. 8220.0825 and 8250.1810.

As to the fourth sentence, there are significant statutory requirements on how and when the ballots must be “counted,” so the inclusion of this word does not seem to add much to the discussion. Similarly, saying that the ballots must be “preserved” does not give a level of detail that would be sufficient to comply with the relevant requirements. The Minnesota records retention schedule⁴ requires that voted ballots be preserved for 22 months except in the case of a challenge, and unvoted ballots destroyed after certification. The Charter language does not contain an end date on which ballots no longer need to be preserved, thus creating an argument that the ballots must be preserved forever. The final clause of this sentence, stating that the clerk is the custodian of the records, is completely duplicative of statute. *See* Minn. Stat. § 205.185, subd. 3(c) (“[T]he clerk shall be the final custodian of the ballots and the returns of the election.”).

As to the final sentence, the requirements that sample ballots be posted and preserved are different from, but not necessarily in conflict with state statute. State statute requires that the sample ballot be published and posted two weeks ahead of the election, while the Charter requires that the ballot be posted in the polling place one week ahead of the election. *See* Minn. Stat. § 205.16, subds. 2 and 3. Given that the polling places include non-City buildings, the posting of the sample ballot a week ahead of the election seems onerous and unnecessary, particularly in light of the pre-existing statutory requirement.

⁴ https://www.mcfoa.org/vertical/sites/%7B067FFB58-E3CD-42BA-9FB1-11EFC7933168%7D/uploads/General_Records_Retention_Schedule_2018.pdf

Sec. 4.3. - Procedure at elections.

Consistent with the provisions of this Charter and applicable state statutes, the council may by ordinance further regulate the conduct of municipal elections. Except as otherwise provided by this Charter and supplementary ordinances, general state statutes on elections shall apply to municipal elections.

Commentary:

There is nothing inherently wrong with any of this language, but it does not add anything to the authority of the City or affect the analysis of the language of the Charter at all. Indeed, state statute would apply regardless of whether the Charter agreed with that proposition. Given that the language has no effect, it should be removed.

Sec. 4.4. - Special and advisory elections except for elected office.

The council may by resolution order any special or advisory election deemed appropriate by the council, for any reason, and provide all means for holding it. At least 15 days' prior notice shall be given by the city clerk by posting a notice thereof in at least one public place in each election precinct, and by publishing a notice thereof at least once in the official newspaper of the city stating the time and the places of holding such election.

Commentary:

The second sentence of this Charter section is essentially the same as the second sentence in section 4.1, above, and the same analysis applies here.

The first sentence, authorizing advisory elections, is of questionable validity. Normally, special elections may only be held if there is a specific law or charter provision allowing it, but that statutory restriction does not apply to charter cities.⁵ This Charter language is quite broad, allowing to pass judgment on any issue, so long as the outcome is not binding on the City. It is not clear whether this generalized grant of authority to hold public opinion polls at taxpayer expense is sufficient to authorize an election.

⁵ Minn. Stat. §§ 205.10, subd. 1 (“Special elections may be held in a city or town on a question on which the voters are authorized by law or charter to pass judgment.”); 205.02, subd. 2 (excepting charter cities from 205.10 entirely).

Sec. 4.5. - Vacancy of municipal elected office.

It will be helpful to have some commentary before discussing the specifics of the Charter language.

State law dictates that “[s]pecial elections shall be held in statutory cities to fill vacancies in elective city offices as provided in section 412.02, subdivision 2a.” Minn. Stat. § 205.10, subd. 2. Thus, the statutory vacancy-filling scheme for cities does not apply to charter cities. *See* Minn. Stat. § 412.016, subd. 1 (“This chapter applies to any city which has not adopted a home rule charter pursuant to the constitution and the laws of this state.”). There is no stop-gap or fill-in measure for charter cities, so the general concept of this Charter section does not conflict with statute. However, the language of this section that purports to require special elections within certain time frames after the occurrence of a vacancy cannot be complied with under state law.

First, elections may only be held on one of five dates: “the second Tuesday in February, the second Tuesday in April, the second Tuesday in May, the second Tuesday in August, or the first Tuesday after the first Monday in November.” Minn. Stat. § 205.10, subd. 3a(a) (“A home rule charter city must not designate additional dates in its charter.”). The Secretary of State interprets this as also limiting primary elections to these specific dates. As a result, unless the special election that would otherwise be required to fill a vacancy by this Charter section just so happens to fall onto one of these dates, the Charter’s requirements must give way to statute. Certainly, the requirement of Charter section 4.5.5.3 that “a special primary election and a special election shall be held in January of the subsequent year following the vacancy,” cannot stand in light of these uniform election dates.

Second, there are statutory requirements for notice periods in advance of elections, including notice periods for the deadlines for filing affidavits of candidacy. Minn. Stat. § 205.13, subd. 2. The statute requires that notice of the filing period be given two weeks ahead of the filing period itself. *Id.* Statute also dictates that the filing period occur somewhere between 56 and 98 days before the election or primary election, depending on the circumstances. *Id.*, subd. 1a. Thus, there may need to be up to 112 days, or 16 weeks advance notice of the election, not to mention the need to make preparatory decisions at a council level. Where there is some uncertainty regarding the implication of this language with respect to primaries that are not correlated with a general municipal election, it is clear that a demarcation of eight weeks before the primary (as in Charter section 4.5.5.1 and 4.5.5.2) is unworkable because it does not give sufficient time to comply with the statutorily required notice periods. Further, it is not clear that the Charter can waive the primary if the vacancy occurs within that timeframe as in charter section 4.5.5.1. *See* Minn. Stat. § 205.065, subd. 2 (dictating that a resolution to hold primaries “is effective for all ensuing municipal elections until it is revoked”).

With that in mind, turn to the specific language of this section.

4.5.1 When a vacancy in an elected office of the city occurs with 365 days or more remaining in the term of the vacated office, there shall be a special election held within 90 days after the vacancy occurs to elect a successor to serve for the remainder of the unexpired term of the office vacated.

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4.5.4 In the case of a vacancy where there remains less than 365 days in the unexpired term, the council shall, by a majority vote, appoint a successor to serve for the remainder of said term. In the case of a tie vote of the council, the mayor, or acting mayor if the office of mayor be vacant, shall make the appointment from the candidates involved in the tie vote.

4.5.5 Office vacancy when less than eight weeks prior to primary election.

4.5.5.1 Special election. When a vacancy in an elected office of the city occurs when there is less than eight weeks prior to a primary election there shall be no primary election, except as provided in section 4.5.5.3 below. The special election to fill the vacancy shall coincide with the regular Municipal Election and the notice of such vacancy shall be published as soon as is practicable.

4.5.5.2 Vacancy in offices to be voted on in the regular Municipal Election. If a vacancy occurs less than eight weeks prior to the primary election, in the office of the mayor or the council members whose seats are to be voted on in the regular Municipal Election, said vacancy shall be considered not to exist for the purpose of the regular Municipal Election. The person elected to fill the vacancy in the regular Municipal Election, if approved by unanimous vote of the sitting council, may assume the duties of the office to which elected on the first business day following the city clerk's issuance of a certificate of election to said person.

4.5.5.3 Vacancy in an office not to be voted on in the regular Municipal Election. If a vacancy occurs in the office of the mayor or a councilmember not standing for election in the regular Municipal Election, a special primary election and a special election shall be held in January of the subsequent year following the vacancy to fill said vacancy. The election procedures for the special primary election and the special election shall be those election procedures for municipal

office candidates as prescribed in Minnesota Statutes and this Charter. Notwithstanding section 2.3.1 of this Charter, which provides for a four-year term for the mayor and council members, the term of the mayor and/or a councilmember elected pursuant to this subsection will be for the remainder of the vacant term.

Commentary:

Throughout this Charter section, the goal of electing a new person to fill the vacancy as soon as is reasonably possible is evident. Requiring that election if there is one year or more left in the term is an awkward line, however, because it permits the situation where the vacancy occurs after the November general election date in the third year of a four-year term but more than one calendar year before the end of the term. Further, the requirement that the election occur within 90 days is both onerous and largely impossible to comply with. The dividing line of eight weeks before the primary is problematic for similar reasons, as discussed above, because it does not permit compliance with the relevant statutory deadlines.

A better line would be 15 weeks before the second Tuesday in August in the third year of the term, if there continues to be a primary, or 17 weeks before the first Tuesday after the first Monday in November in the third year of the term if there does not. For reference, these dates work out to be April 30th and July 9th in 2019, respectively. Those time frames give the City an opportunity to comply with the relevant notice periods with an additional week for the council to declare a vacancy under Charter section 2.5 and to call a special meeting for that purpose if needed. If the vacancy occurs after that deadline, the council could appoint until the election of a new official at the next municipal general election in the fourth year of the term, at which point the newly elected official could take office immediately and serve the balance of the unexpired term before beginning their full four-year term. As discussed elsewhere, the council could continue to appoint someone to fill the seat in the interim. This proposed scheme is similar to that required by statute for school board members, with the exception that the timeline proposed here can be complied with whereas the timeline in the school board member vacancy statute is problematic.

With that line in mind, this entire section of the Charter could be replaced with a section that read:

In the event that a vacancy in an elected office of the city occurs more than [15 weeks before the second Tuesday in August in the third year of the term or 17 weeks before the first Tuesday after the first Monday in November in the third year of the term], the city must hold a special election on the

first Tuesday after the first Monday in November of the next even year following the vacancy. The person elected at that special election to fill the balance of the unexpired term shall take office immediately after being qualified.

In the event that a vacancy in an elected office of the city occurs less than [15 weeks before the second Tuesday in August in the third year of the term or 17 weeks before the first Tuesday after the first Monday in November in the third year of the term], no special election shall be held. In that event, the person elected to that office at the municipal general election for the ensuing term shall take office immediately after being qualified.

Under that language, a vacancy that occurs in the first year of the term would be filled in the next municipal general election, i.e., a vacancy in 2019 is filled at the 2020 election for the rest of the term. A vacancy that occurs in the second year of the term or prior to the cutoff date in the third year of the term would be filled in the second even-year election of the term, i.e. a vacancy in 2020 or the first part of 2021 would be filled at the 2022 election for the rest of the term into the next term. A vacancy in the second part of 2021 or 2022, as the time after the cutoff date in the third year and any time in the fourth year, would simply be filled as normal in the next municipal general election except that the person elected would take office immediately and continue to serve into the next term.

Other portions of this section:

4.5.2 The city clerk shall give at least 60 days published prior notice of such special election, except as set forth under 4.5.5 of this section.

Commentary:

The requirement of section 4.5.2 is simply that there be a longer period of published notice for special elections for vacancies. There is nothing that would prevent that in statute, but there is also no need for it, if the special election language is corrected to ensure that special elections are permitted at more regular occasions. Again, it is unlikely that any voter learns of an election only through the notice provided as a result of the statutory or Charter requirements.

4.5.3 The procedure at such election and assumption of duties of elected officers following such election shall conform as

nearly as practicable to that prescribed for other municipal elections under this Charter.

Commentary:

The language of section 4.5.3 is entirely unnecessary. Special elections have to be administered just like any other election, regardless of this Charter language. *See* Minn. Stat. § 205.02, subd. 2 (“In all statutory and home rule charter cities, the primary, general and special elections held for choosing city officials and deciding public questions relating to the city shall be held as provided in this chapter.”).

4.5.6 If there are insufficient numbers of candidates in a regular or special election to fill expiring or vacated municipal offices, the city council shall fill said offices by appointment until the next regular municipal election. In the case of a tie vote of the council, the mayor shall make said appointment from the candidates under consideration.

Commentary:

Finally, this section appears to authorize the council to decide not to hold an election if it determines that the number of candidates is “insufficient.” *See* Minn. Stat. §§ 205.10, subd. 6 (“A special election ordered by the governing body of the municipality on its own motion under subdivision 1 may be canceled by motion of the governing body, but not less than 74 days before the election.”); 205.02, subd. 2 (excepting charter cities from complying with section 205.10, subdivision 6). There is no definition of insufficient, such that this would appear to permit the cancellation of an election simply because there were no good candidates. This would also appear to permit the council to decide that there are not enough candidates at a regular municipal election (note that this applies to “expiring” offices) and unilaterally delay the election for that office until the next general election. *See* Minn. Stat. § 205.07, subd. 1 (requiring municipal general elections on either even or odd years). Finally, there is no deadline on this, such that the election could apparently cancel the election on election day, or even after the results came in. Indeed, while there is no apparent limitation on the ability of the City to cancel the election it is difficult to imagine a situation in which the authority supposedly granted by this section could be legal or enforceable. Once an election has been called, the number of candidates is not a justification for cancelling it.

In conclusion, most of the Charter election provisions could be eliminated. Indeed, the entire section could be repealed, making administration of City elections far more straightforward. We look forward to discussing these issues at the Charter meeting.