

September 25, 2019

**To:** MAYOR AND CITY COUNCIL

**From:** CITY ATTORNEY

**Subject:** *CITY COUNCIL VACANCY QUESTIONS AND ANSWERS*

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Attached to this memorandum are answers to questions that have arisen or that the City Attorney's Office anticipates will arise from Council Member Hamilton's recent resignation, including the available options for filling the resulting City Council vacancy. These questions and answers represent our office's best efforts to translate complex, interlinked statutes into concise, understandable information for the City Council and the community.

To assure the information is objective and accurate, our office had the information reviewed by Ms. Marguerite Leoni, an Elections Law expert with the law firm of Nielsen Merksamer in San Rafael, California. At the conclusion of her review, Ms. Leoni provided our office with a letter certifying the information accurately summarizes and interprets the law applicable to filling this vacancy on the Carlsbad City Council.

While our office has endeavored to be thorough, there may be questions from the City Council and the community our office has not answered. These questions should be submitted to our office in writing for inclusion, as appropriate, in any future updates to the information. Meanwhile, our office is available to assist the City Council through whichever process it selects to fill the impending City Council vacancy.

Very truly yours

A handwritten signature in blue ink, appearing to read 'Celia Brewer'.

Celia A. Brewer  
CITY ATTORNEY

Attachment: A. City Council Vacancy Questions and Answers  
B. Certification Letter from Marguerite Leoni of Nielsen Merksamer

cc: City Manager  
City Clerk  
City Clerk Services Manager



**City Attorney**

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## CITY COUNCIL VACANCY QUESTIONS AND ANSWERS

### OCCURRENCE OF A VACANCY

#### **When does a City Council vacancy by resignation occur?**

A City Council vacancy by resignation occurs when a City Council member delivers a written letter of resignation to the city clerk. (Gov. Code, §§ 1750, subd. (f), 1770, subd. (c)(2).) The letter of resignation may specify the resignation's effective date. (Gov. Code, § 1770, subd. (c)(2).)

The vacancy begins on the effective date of the resignation. The City Council does not need to accept the resignation for the resignation to be effective. (*Meeker v. Reed, City Clerk* (1924) 70 Cal.App. 119, 123.)

#### **When is the effective date of Council Member Hamilton's resignation?**

Council Member Hamilton's resignation states it "will be effective October 31<sup>st</sup>, 2019, or before if a successful appointment to fill the District 1 seat is made by Council."

### FILLING A VACANCY

#### **How may a City Council vacancy be filled?**

A City Council vacancy may be filled by a City Council appointment or by a special election called by the City Council. If, however, the city clerk receives petitions bearing verified signatures of 10% of the registered voters in the affected City Council district, the City Council must call a special election. (Gov. Code, § 36512, subd. (b), (c)(2); Carlsbad Municipal Code (CMC), § 2.04.030(A), (B).)

#### **How will the City Council make its decision whether to fill the vacancy by appointment or special election?**

The City Council will make its decision to fill the vacancy by appointment or special election by a majority vote at an open, noticed meeting.

#### **May the City Council fill a vacancy by making an interim appointment and calling a special election?**

CMC 2.04.030(A) currently permits the City Council to fill a vacancy either by making an appointment or by calling a special election, but not by both actions. The City Council has the authority to amend CMC 2.04.030 to permit both actions. (See Cal. Const., art. XI, § 5, subd. (b)(3) [authority of charter cities]; see also Gov. Code, § 36512, subd. (c)(3) [permitting a city to adopt an ordinance requiring the city council to immediately call a special election and providing that a person appointed to fill a vacancy holds office only until the date of the special election].)

#### **When may the City Council act to fill a vacancy?**

The City Council may act to fill a vacancy upon the effective date of the vacancy. (Gov. Code, § 36512, subd. (b); CMC, § 2.04.030(A).) If the City Council acts to fill the vacancy by appointment under

Government Code section 36512, subdivision (e) (discussed further below), the City Council's action and the effective date of the vacancy necessarily occur simultaneously.

### **CITY COUNCIL APPOINTMENT**

#### **How long does the City Council have to fill the vacancy by appointment?**

The City Council must fill the vacancy by appointment within 60 days of the effective date of the vacancy. If the City Council does not fill the vacancy within this time period, the City Council must call a special election to fill the vacancy. (CMC, § 2.04.030(B); see also Elec. Code, § 12001 [requiring the City Council to issue a resolution to call a special election].)

#### **What process would the City Council use to fill the vacancy by appointment?**

The City Council may determine this process at the time it decides to fill the vacancy by appointment. Most recently, when the City Council opted to fill a City Council vacancy by appointment, the City Council provided public notice of the vacancy and established an application period within which to accept applications from qualified residents. The City Council reviewed the applications and also allowed the applicants to give a 3-minute presentation in open session summarizing their experience and their reasons for why they believed they would be the best candidate to fill the vacancy. The City Council then selected the successor in open session.

#### **May Council Member Hamilton vote on the appointment of a successor?**

Because the city elects City Council members by district, if the City Council opts to fill the vacancy by appointment, a resigning City Council member may vote on the appointment of a successor if the resigning City Council member's resignation will go into effect upon the successor's appointment. (Gov. Code, § 36512, subd. (e)(1).)

Nonetheless, the resigning City Council member may not vote for a family member or any person with whom the resigning City Council member has a relationship that may create a potential conflict of interest. (Gov. Code, § 36512, subd. (e)(1).)

Additionally, if the resigning City Council member votes on the appointment of a successor, then for 2 years after the successor's appointment, the resigning City Council member may not:

1. Advocate on any measure or issue coming before the City Council in which the resigning City Council member may have a personal benefit.
2. Enter into any contract with the city or a city vendor.
3. Accept employment with the city or a city vendor.
4. Apply for a permit subject to the City Council's approval. (Gov. Code, § 36512, subd. (e)(2).)

#### **May Council Member Hamilton vote on the appointment of a successor if the City Council decides to fill the vacancy by appointment after October 31, 2019?**

Since Council Member Hamilton's resignation will be effective no later than October 31, 2019, she will not be on the City Council and, therefore, will not be able to vote on her successor under Government

Code section 36512, subdivision (e)(1), if the City Council decides to fill the vacancy by appointment after that date.

**If there is a tie vote on whether to fill the vacancy by appointment, or on whom to select to fill the vacancy by appointment, how will the vacancy be filled?**

A resolution to fill a vacancy by appointment requires a majority vote of the total membership of the City Council. (Gov. Code, § 36936.) If a majority of the City Council does not vote to fill the vacancy by appointment within 60 days of the effective date of the vacancy, the City Council must call a special election to fill the vacancy. (CMC, § 2.04.030(B); see also Elec. Code, § 12001 [requiring the City Council to issue a resolution to call a special election].)

**Who is eligible to be appointed to fill the vacancy?**

To be eligible to be appointed to fill the vacancy, a person must reside in and be registered to vote in District 1. (Elec. Code, § 321; Gov. Code, §§ 34882, 36502, subd. (a); CMC, §§ 2.04.060(A), 2.040.070, 2.040.080(A)(1), (C).) District map information is located at <http://www.carlsbadca.gov/cityhall/clerk/district.asp>.

**May the City Council appoint a current City Council member to fill the vacancy?**

The City Council may not appoint a current City Council member to fill the vacancy. (Gov. Code, § 1752, subd. (a).)

**How long will the appointed person hold office?**

If there is no subsequent special election, the appointed person will hold office for the unexpired balance of the resigning City Council member's term. If there is a subsequent special election called after the city clerk's receipt of voter petitions (discussed further below), the appointed person will hold office until the date of the special election. (CMC, § 2.04.030(A).)

**SPECIAL ELECTION CALLED BY THE CITY COUNCIL**

**If the City Council decides to fill the vacancy by a special election, when must the City Council call the special election?**

The City Council must call the election within 60 days of the effective date of the vacancy. (Gov. Code, § 36512, subd. (b); CMC, § 2.04.030(A); see also Elec. Code, § 12001 [requiring the City Council to issue a resolution to call a special election].)

**If the City Council calls a special election, when will the election occur?**

If the City Council calls a special election, the election must be held on the next regularly established election date that is at least 114 days after the election is called. (Gov. Code, § 36512, subd. (b)(1); Elec. Code, § 1400; CMC, § 2.04.030(A), (B).)

The next regularly established election date is November 5, 2019. (Elec. Code, § 1000, subd. (c).) However, the special election cannot be held on this date because it is less than 114 days away. The regularly established election dates in 2020 are March 3 (statewide presidential primary election), April 14, and November 4 (statewide general election). (Elec. Code, § 1000, subds. (a), (c), (d).) To have the special election on March 3, 2020 and ensure the election date is at least 114 days after the election is called, the City Council has until Sunday, November 10, 2019 to adopt a resolution calling for the special election. (See Code Civ. Proc., § 12 [regarding the computation of time to adopt the resolution]; see also *Steele v. Bartlett* (1941) 18 Cal.2d 573, 574.) To have the special election on April 14, 2020, the City Council has until Sunday, December 22, 2019 to adopt a resolution calling for the special election. If the City Council calls a special election after December 22, 2019, the election can be held no earlier than November 4, 2020.

If the special election will occur on the date of a statewide election (either March 3 or November 4, 2020), the City Council must, on the same day it adopts a resolution calling the special election, adopt a resolution requesting the County Registrar of Voters consolidate the special election with the statewide election. (Elec. Code, § 10403 (a), (b).)

**How much will a special election cost?**

If the special election occurs on March 3, 2020, the estimated cost for the election is between \$7,500 and \$19,500. If the special election occurs on April 14, 2020, the estimated cost for the election is between \$175,000 and \$300,000. If the special election occurs on November 4, 2020, the estimated cost for the election is between \$10,000 and \$25,000.

**How would a special election be funded?**

The City Council would appropriate money for the special election from the General Fund and the money would be transferred to the city clerk's budget to be used to pay for the special election.

**Who is eligible to be elected to fill the vacancy?**

To be eligible for election to fill the vacancy, a person must reside in and be registered to vote in District 1. (CMC, §§ 2.04.060(A), 2.040.070, 2.040.080(A)(1), (C).) District map information is located at <http://www.carlsbadca.gov/cityhall/clerk/district.asp>.

**How long will the person specially elected hold office?**

The person specially elected will hold office for the unexpired balance of the resigning City Council member's term. (Gov. Code, § 36512, subd. (b)(1).)

**What if there is only one candidate nominated to fill the vacancy?**

If there is only one candidate nominated to fill the vacancy, the City Council may either appoint the person to fill the vacancy or hold the special election. (Elec. Code, §§ 10229, subd. (a)(1), (3), 12101, subd. (b).)

### **SPECIAL ELECTION CALLED AFTER RECEIPT OF VOTER PETITIONS**

#### **May registered voters require the City Council to fill the vacancy by a special election?**

The City Council must call a special election if the city clerk receives petitions bearing 10% of the verified signatures of the registered voters in the resigning City Council member's district. (Gov. Code, § 36512, subd. (c)(2); CMC, § 2.040.030(A); see also Elec. Code, § 12001 [requiring the City Council to issue a resolution to call a special election].)

#### **What are the requirements for petitions and petition signers?**

The requirements for petitions and petition signers are in Elections Code sections 100 through 105, which are available at <http://leginfo.legislature.ca.gov/faces/home.xhtml>. Petitioners must also comply with Government Code section 34093, which is available in the same location.

#### **When may petitioners begin circulating special election petitions?**

Petitioners may begin circulating petitions when the vacancy is effective. (See Gov. Code, § 36512, subd. (c)(2); CMC, § 2.04.030(A).)

#### **How many signatures are needed to meet the 10% requirement?**

According to the most recent information received from the County Registrar of Voters, there are 16,535 registered voters in District 1. Assuming no significant change in voter registration occurs, petitioners would need to gather approximately 1,654 verified signatures of registered voters to meet the 10% requirement.

#### **How long do the petitioners have to submit petitions?**

Neither Government Code section 36512 nor CMC section 2.04.030 expressly address this question. However, under these statutes, the petitioning process acts as a substitute for a City Council decision to call a special election. Since these statutes give the City Council 60 days to decide to call a special election, logically the petitioners should have the same time period to collect and submit signatures to the city clerk. This interpretation also avoids any potential conflict between the special election petitioning process and a recall petitioning process. (See Elec. Code, §§ 11000–11386.)

If the City Council believes further clarification of this question is warranted, the City Council has the authority to amend CMC 2.04.030 to expressly address it. (See Cal. Const., art. XI, § 5, subd. (b)(3) [authority of charter cities].)

#### **If the City Council appoints a person to fill the vacancy and the city clerk receives petitions with sufficient verified signatures to require a special election, how long will the appointed person hold office?**

The appointed person will hold office until the date of the special election. (CMC, § 2.04.030(A).)

September 25, 2019

Celia A. Brewer  
City Attorney, City of Carlsbad  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008

VIA .PDF**Re: City Council Vacancy Questions and Answers**

Dear Ms. Brewer:

Per your request, we have reviewed the attached document titled "City Council Vacancies," prepared by your office in light of the resignation of the City Council member representing District 1. We agree that this document accurately summarizes and interprets the law applicable to filling this vacancy on the Carlsbad City Council.

Our firm was pleased to assist you with this project. Nielsen Merksamer is one of the preeminent political, election, and government law firms in the country, and advises dozens of local jurisdictions, including counties, cities, and special districts, on these matters. We regularly work with local jurisdictions on election law issues, including those related to filling vacancies on their governing bodies, and are often brought in to assist with projects that involve complex legal and factual election law scenarios. As such, we have developed a particular expertise in this area of law.

Please let us know if we can be of any further assistance.

Sincerely,



Marguerite Mary Leoni



Hilary J. Gibson

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#2291.01  
Attachment