



# Filling Vacancies & Cancelling City Council Elections

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**Notes:** \_\_\_\_\_

This image shows a single page of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins or other markings visible.

## **FILLING VACANCIES OFFICES AND CANCELLING ELECTIONS: THE NUTS AND BOLTS**

This paper discusses the law governing two election-related issues: filling vacancies in elected offices, and situations where a city may cancel an election. This paper is intended to provide an overview of the primary statutes, cases and attorney general opinions addressing these issues.

### **A. A Fond Farewell**

Before discussing the law governing how to fill a vacancy, it is important to address when a vacancy is deemed to exist. There are numerous ways in which a vacancy may arise. Government Code section 1770 specifies a number of circumstances in which a public office – which includes city elective office – may be deemed vacant:

- (1) Death.
- (2) An adjudication pursuant to a quo warranto proceeding declaring that the incumbent is physically or mentally incapacitated due to disease, illness, or accident, and that there is reasonable cause to believe that the incumbent will not be able to perform the duties of his or her office for the remainder of his or her term.<sup>1</sup>
- (3) Resignation, which in the case of a city council member is effected by delivering a letter of resignation to the city clerk.
- (4) Removal from office.
- (5) Ceasing to be to be resident of the jurisdiction in which they serve.<sup>2</sup>
- (6) Absence from the state without the permission required by law beyond the period allowed by law.
- (7) Ceasing to discharge the duties of his or her office for the period of three consecutive months, except when prevented by sickness, or when absent from the state with the permission required by law.<sup>3</sup>
- (8) Conviction of a felony or of any offense involving a violation of his or her official duties.
- (9) Refusal or neglect to file his or her required oath or bond within the time prescribed.
- (10) The decision of a competent tribunal declaring void his or her election or appointment.

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<sup>1</sup> See 78 Ops.Cal.Atty.Gen. 134 [granting leave to proceed in quo warranto to determine whether councilmember vacated office due to physical or mental incapacity].)

<sup>2</sup> More specifically, a city council member who moves his or her residence outside the city or district from which he or she was elected immediately vacates his or her office. (Government Code sections 36502 and 34882, respectively; see 79 Ops.Cal.Atty.Gen. 21 (1996) [duty of mayor to maintain residence within the city].)

<sup>3</sup> As to city council members, this provision is modified by Government Code section 36513, which provides that a city council office becomes vacant if the city councilmember is absent without permission from all regular city council meetings for 60 days consecutively from the last regular meeting he or she attended, or 70 days if the council meets once a month. It would be prudent for a city to define by ordinance the process for obtaining permission to be absent from council meetings.

(11) The making of an order vacating his or her office or declaring the office vacant when the officer fails to furnish an additional or supplemental bond.

(12) His or her commitment to a hospital or sanitarium by a court of competent jurisdiction as a drug addict, dipsomaniac, inebriate, or stimulant addict; but in that event the office shall not be deemed vacant until the order of commitment has become final.

The Government Code includes provisions that specify other situations that can lead to a vacancy in public office. Under Government Code section 1099, an official forfeits an office if he or she assumes an office that is incompatible with the first office, creating a vacancy. Under Article XII, section 7 of the California Constitution, anyone holding an office in the state who accepts a free pass or discount from a transportation company forfeits his or her office.<sup>4</sup> Most of the law discussing the issue of whether a particular office has become vacant takes the form of attorney general opinions, usually in opinions addressing whether to grant leave to bring quo warranto proceedings to challenge a particular individual's right to hold a particular office. (See, *e.g.*, 64 Ops.Cal.Atty.Gen. 42 (1981) [concluding that office of city attorney may be deemed to be vacated where attorney was suspended from practice of law, and discussing meaning of "vacancy" in office in other contexts].)

## **B. Hello, Replacement**

Once it is determined that a vacancy in an elective office exists, Government Code section 36512 governs the process for filling the vacancy. That section provides that the council must, within 60 days from the date of the vacancy, either fill the vacancy by appointment or call a special election to fill the vacancy. A person appointed or elected to fill a vacancy holds office for the unexpired term of the former incumbent.

If the city council chooses to fill the vacancy through a special election – or if the council seeks to fill the position by appointment but does not do so within 60 days of the vacancy – the special election must be held on the next regularly established election date not less than 114 days from the call of the election.

Government Code section 36512 provides the city council with another option. It may choose to adopt an ordinance to govern the process for filling a vacancy. Such an ordinance may adopt any of the three following approaches for filling vacancies:

(1) It may require that a special election be called immediately to fill every city council vacancy and [elected mayor]. The ordinance must provide that the special election will be held on the next regularly established election date not less than 114 days from the call of the special election.

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<sup>4</sup> For example, it would, in my view, run afoul of section 1099 for an individual to be a member of both a city council, and a member of the local school board, since there would potentially be a significant clash of loyalties between the two offices, which owe their duty of loyalty to two different constituencies. (65 Ops.Cal.Atty.Gen. 606 (1982) [issued before enactment of section 1099].) Accordingly, a city council member elected to the school board would forfeit his or her office upon becoming a member of the school board.

(2) It may require that a special election be held to fill a city council vacancy and [elected mayor] when petitions bearing a specified number of verified signatures are filed. The ordinance must provide that the special election shall be held on the next regularly established election date not less than 114 days from the filing of the petition. A city council that has enacted such an ordinance may also call a special election without waiting for the filing of a petition.

(3) It may provide that a person appointed to fill a vacancy on the city council holds office only until the date of a special election which shall immediately be called to fill the remainder of the term. The special election may be held on the date of the next regularly established election or regularly scheduled municipal election to be held throughout the city not less than 114 days from the call of the special election.

Section 36512 prohibits filling a vacancy by appointment if the appointment would result in a majority of the members serving on the council having been appointed. Rather, the vacancy must filled through a special election.

Finally, Section 36512 contains special provisions related to filling vacancies in city council seats elected by district, where the vacancy is created by resignation of a councilmember for reasons other than facing charges of, or conviction for, corruption or criminal behavior, or who is subject to a recall election.<sup>5</sup> Under those provisions, the resigning city council member may cast a vote on the appointment if the resignation will go into effect upon the appointment of a successor. A city council member may not cast a vote for a family member or any other person with whom the city council member has a relationship that may create a potential conflict of interest. Moreover, if a city council member elects to cast a vote under these provisions, the city council member is prohibited advocating on any measure or issue coming before the city council in which the city council member may have a personal benefit, entering into a contract of any kind with the city or a city vendor, accepting a position of employment with the city or a city vendor, or applying for a permit that is subject to the approval of the city council.

## **C. What If They Held an Election: Grounds for Cancelling an Election for City Office**

The California Constitution, statutes and city charters all contemplate that mayors and members of city councils will be elected at regularly scheduled elections. California law, however, recognizes certain situations where such elections may be cancelled. This paper addresses the two most common situations where elections may be cancelled.

### **1. A Decided Lack of Interest**

Elections Code Section 10229 addresses the most common situation where an election to select a mayor or city council member may be cancelled: where the number of persons who have been

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<sup>5</sup> Presumably this provision is intended to ensure that the residents of the affected district are represented in the process of selecting the new council member.

nominated for the city office at a general municipal election does not exceed the number of offices to be filled at that election. In that situation, Section 10229 actually provides three options to the city council: 1. Appoint to the office the person who has been nominated. 2. Appoint to the office any eligible voter if no one has been nominated. 3. Hold the election if either no one or only one person has been nominated.

Section 10229 first specifies that it applies where:

by the 88th day, during normal business hours as posted, prior to the day fixed for a regularly scheduled municipal election or the 83rd day before the election, during normal business hours as posted, if an incumbent fails to file pursuant to Section 10225, (i) no one or only one person has been nominated for any office that is elected on a citywide basis, or (ii) no one or only one person is nominated to be elected from or by a legislative district, or (iii) in the case of any office or offices to be elected at large, the number of persons who have been nominated for those offices does not exceed the number to be filled at that election; if, by the 88th day, during normal business hours as posted, before a municipal election to fill any vacancy in office, no one or only one person has been nominated for any elective office to be filled at that election, and the election is [to fill a vacancy in an elective office under Government Code Section 36512 Code] . . . .

Section 10229(b) also makes clear that it does *not* apply if more than one person has been nominated to another city office to be elected on a citywide basis or a city measure has qualified and is to be submitted to the voters at that municipal election.

The Legislature has also specified the procedure that must be followed under Section 10229. First, the city clerk must certify to the city council – at a regular or special meeting council meeting – the existence of facts showing that Section 10229 may be properly invoked, and the options available to the city council. Second, notice of these facts must be published or posted after the close of the nomination period, and at least five days before the meeting at which the city council intends to make appointments. Third, the appointments must be made no later than the 75th day before the election. If all of these requirements are satisfied, the city council may make its appointments, and cancel the election. If not, the election must still be conducted.

Finally, Section 10229 addresses three additional issues. First, it provides if the governing body of a city makes an appointment, the city clerk may not accept for filing any statement of write-in candidacy submitted after the council has made the appointment. Second, it confirms that a city may, by ordinance adopted pursuant to Government Code section 36512, require that a special election be held, or that a person appointed to fill a vacancy on the city council may hold office only until the date of the special election, or both. Finally, it states that if an appointment to office is made in a particular council district, that appointment will not affect the conduct of the election in other council districts. There are no cases or attorney general opinions interpreting this section.

If an appointment to office is made in a particular legislative district pursuant to subdivision (a), that appointment shall not affect the conduct of the municipal election in other legislative districts of the city.

## **2. On a Sadder Note**

Elections Code Section 8026 *requires* that an election for a city-wide office be cancelled where an incumbent is a candidate and only one other candidate (excluding any write-in candidates) has qualified for the ballot for that office, and either the challenger or the incumbent dies “after the hour of 12:01 a.m. of the 68th day before the election.” In that case, the city council is required to call a special election to fill that office.

In *Faulder v. Mendocino County Board of Supervisors* (2006) 144 Cal.App.4<sup>th</sup> 1362, the court addressed whether Section 8026 was limited solely to primary elections, or whether it extended to general elections as well.<sup>6</sup> In that case, the incumbent district attorney, who was seeking reelection against only one other candidate, died less than 68 days before the election. The county argued that Elections Code section 15402, rather than Section 8026, governed that situation. Section 15402 generally requires that if a deceased candidate receives the majority of votes in an election, the vacancy is filled in the same manner as if he or she had died after the election.

The *Faulder* court concluded that “section 8026 applies to *all* elections, including general elections, when a candidate in a two-person, nonpartisan, nonjudicial contest dies within 68 days of the date set for the election.” (144 Cal.App.4<sup>th</sup> at p. 1367.) Accordingly, the court ordered the cancellation of the election for district attorney. (*Id.*)

The Legislature subsequently amended this section to make clear that it only applies to primary elections, and that Elections Code section 15402 governs this situation in general elections.

## **CONCLUSION**

There are a limited number of cases and administrative opinions interpreting these important statutory provisions. As is often the case, seeking the guidance of your city attorney colleagues who may have faced similar situations will likely be your best course.

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<sup>6</sup> Section 8026 applies to counties and special districts as well as cities.

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