

Filling a Council Vacancy

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A Councilmember resigns, retires or dies, now what? Government Code Section 36512 governs the filling of Council vacancies for general law cities, if the City has not already adopted its own ordinance governing vacancies pursuant to that section, and for a charter city, which does not have its own provision and relies on the general law.

No Local Ordinance - Options Under Government Code § 36512¹

The City Council shall, **within 30 days from the commencement of the vacancy**, either fill the vacancy by appointment or call a special election to fill the vacancy.

If the vacancy is in the office of an elected mayor, then Council has 30 days to make an appointment, and if it fails to make an appointment, then must call a special election. Government § 34902 (a).

The special election shall be held on the next regularly established election date not less than 114 days from the call of the special election.

City Enacted Ordinance May Provide the Following:

- All Council vacancies, including elected mayor, shall be filled by special election. The special election shall be held on the next regularly established election date not less than 114 days from the call of the special election.
- Council may appoint someone to fill a Council vacancy, but only until the date of the special election. An elected mayor may not be filled by an interim appointment. If there is an appointment, the special election must be either 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.
- A special election held to fill the vacancy when petitions bearing a specified number of verified signatures are filed. The special election shall be held on the next regularly established election date not less than 114 days from the filing of the petition, or the Council may also call a special election within 30 days of the vacancy without waiting for the filing of a petition.

Majority Appointed:

If the appointment would result in the majority of members, including an elected mayor of the Council being appointed, then the Council may call an election to fill the vacancy,

¹ A copy of Gov't Code §36512 is attached.

to be held on the next regularly established election date not less than 114 days after the call. If the Council fails to call for an election, the vacancy shall be filled at the next regularly established election date.

When Does the Vacancy Commence?

It is very important to understand when the vacancy occurs because the 30 day time period for Council to take action on the vacancy runs from date of the vacancy.

Under Government Code Section 36501, City Councilmembers are officers of a general law city. In the case of death of a Councilmember, the office becomes vacant upon death of the official unless there is a municipal code/charter provision providing otherwise. (Government Code § 1770 (a)). In *Pollack v. Hamm* (1970) 3 Cal.3d 264, 272, 90 Cal.Rptr. 181, the court found that a vacancy occurs in a superior court office when an elected incumbent dies. A later City of San Diego case found *Pollack* to be distinguishable because the San Diego Municipal Code implementing a Charter provision on elections provided that the date of the vacancy by reason of death will be the date of adoption of the Council's Declaration of Vacancy. (*Condie v City of San Diego* (2005) 134 Cal.App.4th 346, 36 Cal.Rptr. 54. Therefore, without a municipal ordinance granting Council the authority to declare a vacancy, the date of the vacancy is the date of the elected official's death.

When a Councilmember resigns, the resignation is effective upon the date stated in the written resignation filed with the City Clerk. (Government Code §1750 (e) and *Meeker v. Reed, City Clerk* (1924) 70 Cal.App. 119, 123, 232 P. 760.) Thus, the vacancy commences on the effective date of the resignation. The City Council does not need to act on the resignation for it to be effective.

How Long Does the Appointed or Elected Person Serve?

A person appointed or elected to fill a vacancy holds office for the unexpired term of the former incumbent. Government Code §34902 (a) – elected mayor and §36512 – council member.

Conclusion

If following State law, the remaining Councilmembers may appoint someone for the remainder of the term or call a special election. Council, however, may not make an interim appointment.

If adopting local ordinance, then there can be no appointment to fill the remaining term; only an interim appointment until election; and a special election must be called.

Thousand Oaks Case Study

One of Thousand Oaks City Councilmembers filed a resignation letter with the City Clerk effective the same day, November 30, 2005. The City had no local ordinance governing the filling of a Council vacancy. Since the Council had only 30 days to act and because of the impending holiday season, a special meeting of the Council was called for December 2. The Council was advised of the following three options:

- I. Appointment of Resident to Fill Vacancy for the Remainder of the Term (3 years remaining).
 - A. Make an immediate appointment.
 - B. Make an appointment by December 30, 2005
 - Announce vacancy & solicit applications
 - Filing Deadline
 - Public Meeting to conduct interviews & selection
 - Develop calendar to meet December 30 deadline
2. Call a Special Election by December 30, 2005
 - A. If Council called the election prior to December 19, then the election would have had to be held on April 11, 2006.

This was true because Election Code §1000 establishes election dates during the year. In even numbered years, the second Tuesday of the month of April is an election day. If the election was called before December 19th, the April date was the next regularly scheduled election after the 114 day waiting period.

- B. If Council waited until December 19 to call the election, then it would be held in June based on the 114 day waiting period.
3. Adopt Urgency Ordinance
 - A. Adopt urgency ordinance providing for:
 - Appointment to fill vacancy until special election.
 - Special election to be immediately called. Special election may be held on the date of next regularly scheduled municipal election.
 - B. Make Appointment after adoption of Urgency Ordinance by December 30.
 - C. Call the Special Election after adoption of Urgency Ordinance by December 30 with the election being held in November 2006.

Government Code §36937 (a) allows for an ordinance relating to an election to take effect immediately. Arguably a local ordinance for filling a Council vacancy falls within

the purview of this Government Code Section since it provides for the calling of a special election. There is no case or Attorney General Opinion construing this statute. To further bullet proof the immediate effective date of such an ordinance, it should be adopted as an urgency measure with appropriate findings. Then, if challenged, one may argue that the ordinance is effective immediately under either §36937 (a) or (b) – urgency measures. One other caveat to adopting an ordinance while the vacancy is pending is that filling the vacancy pursuant to such an ordinance may be challenged in court on the grounds that the ordinance was not in place at the time of the vacancy, and therefore does not apply to fill the vacancy.

Thousand Oaks City Council decided to solicit applications for appointment of a resident and on December 13, 2005 held public interviews. The Brown Act no longer allows for a closed session for appointment of a Councilmember (Gov't Code §54957). The Council received 43 applicants and in open session decided to interview all 43, although staff offered an array of options in determining who to interview.

The order of interviews was determined by drawing names from a hat. All of the applicants waited in a separate room, where they remained until it was their turn to be interviewed. Each applicant was given 3 minutes to summarize why they believed they should be appointed. Council did question applicants. At the end of the interviews, members of the public were given an opportunity to comment on the item. The Council then made their selection that same night.

Attached to this paper is a copy of the Resolution appointing the selected resident as a Councilmember.

In April 2006, the City Council considered whether or not to adopt a local ordinance pursuant to Government Code Section 36512 (c). The Council chose not to adopt such an ordinance because they wanted future Councils to have the option of appointing someone to fill the vacancy for the remaining term.

Government Code § 36512

(a) If a vacancy occurs in an appointive office provided for in this chapter, the council shall fill the vacancy by appointment. A person appointed to fill a vacancy holds office for the unexpired term of the former incumbent.

(b) If a vacancy occurs in an elective office provided for in this chapter, the council shall, within 30 days from the commencement of the vacancy, either fill the vacancy by appointment or call a special election to fill the vacancy. The special election shall be held on the next regularly established election date not less than 114 days from the call of the special election. A person appointed or elected to fill a vacancy holds office for the unexpired term of the former incumbent.

(c) Notwithstanding subdivision (b) and [Section 34902](#), a city may enact an ordinance which:

(1) Requires that a special election be called immediately to fill every city council vacancy and the office of mayor designated pursuant to [Section 34902](#). The ordinance shall provide that the special election shall be held on the next regularly established election date not less than 114 days from the call of the special election.

(2) Requires that a special election be held to fill a city council vacancy and the office of mayor designated pursuant to [Section 34902](#) when petitions bearing a specified number of verified signatures are filed. The ordinance shall 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 governing body which has enacted such an ordinance may also call a special election pursuant to subdivision (b) without waiting for the filing of a petition.

(3) Provides 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.

(d)(1) Notwithstanding subdivision (b) and [Section 34902](#), an appointment shall not be made to fill a vacancy on a city council if the appointment would result in a majority of the members serving on the council having been appointed. The vacancy shall be filled in the manner provided by this subdivision.

(2) The city council may call an election to fill the vacancy, to be held on the next regularly established election date not less than 114 days after the call.

(3) If the city council does not call an election pursuant to paragraph (2), the vacancy shall be filled at the next regularly established election date.

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF THOUSAND OAKS APPOINTING A MEMBER TO FILL THE OFFICE OF CITY COUNCILMEMBER EDWARD L. MASRY AS A RESULT OF RESIGNATION

WHEREAS, Councilmember Edward L. Masry submitted his resignation/retirement from the Thousand Oaks City Council effective November 30, 2005;

WHEREAS, at Special Council Meeting on December 2, 2005, City Council selected the appointment process to fill remainder of vacated term ending November 2008 pursuant to Government Code Section 36512; and

WHEREAS, at December 13, 2005 Regular City Council Meeting, City Council held interviews and selected a candidate to serve said term.

NOW THEREFORE, BE IT RESOLVED by the City Council of the City of Thousand Oaks as follows:

Section 1. Pursuant to Government Code Section 36512

(Name)

is appointed as a member of the City Council and shall serve for the unexpired term of the former incumbent, Edward L. Masry.

Section 2. The person appointed shall take office effective at the Special Council Meeting on December 15, 2005, and serve exactly as if elected at a municipal election for the office.

PASSED AND ADOPTED

Mayor _____

ATTEST:

City Clerk _____