

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Michael J. Aguirre
CITY ATTORNEY

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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

LEGAL ISSUES ARISING FROM MAYOR
MURPHY'S RESIGNATION

INTRODUCTION

On April 25, 2005, Mayor Dick Murphy announced that he will be resigning from office effective July 15, 2005. On April 27, 2005, the Mayor submitted a letter of resignation to the City Clerk, a copy of which is enclosed as Attachment 1, also specifying July 15, 2005, as the date of his resignation.

The Mayor has called a special Council meeting for Monday, May 2, 2005, for the City Council to consider whether the vacancy should be filled by appointment or by special election. At this time we have identified and are answering a number of questions that have arisen about the procedures to be followed in this situation. If other questions arise subsequently, we will, in order to best assist the Council, address them without delay.

In our consideration of these issues, the point of reference will be the foundational principles enunciated in the Charter. City Charter section 24 generally sets forth the procedure in the event of a vacancy in the Office of the Mayor. In relevant part it provides:

In the event of a vacancy occurring in the office of the Mayor, existing by reason of any cause, the Council shall have authority to fill such vacancy, provided, however, that if the Council shall fail to fill such vacancy by appointment within thirty (30) days after the vacancy, the Council must immediately cause an election to be held to fill such vacancy.

The Charter provides no further specific guidance, however, it is clear that the intent of the Charter is for the process of filling a Mayoral vacancy to proceed with all due diligence and speed. Charter section 8 requires the adoption of an Election Code, which is set forth in Chapter 2, Article 7 of the Municipal Code, and which sets forth more specific procedures to be followed in filling the vacancy. We look to these provisions, utilizing general principles of statutory construction applicable to City Charters and other local laws, in setting forth our views on the procedure to be followed in this instance.

QUESTIONS PRESENTED

1. Does the process of filling the vacancy begin with the Mayor's announcement of his intent to resign at a future date, or is a letter of resignation filed with the City Clerk necessary?
2. What are the City Council's immediate responsibilities upon learning of a vacancy in the office of the Mayor?
3. What procedures must the City Council follow to fill the vacancy by appointment?
4. What procedures must the City Council follow to fill the vacancy by special election?
5. May the City Council consolidate the special election or the special run-off election with a statewide election on November 8, 2005, and, if so, what would be the legal impact?
6. Are write-in candidates permitted in a special election to fill the vacancy?
7. May Mayor Murphy participate in the discussions and voting on these issues?
8. Does the pendency of the litigation over the election for Mayor in November of 2004 affect Council Member Frye's participation in the discussions and voting on these issues?
9. What is the role of the Deputy Mayor during the vacancy?

SHORT ANSWERS

1. The Mayor's letter of resignation must be received by the City Clerk before the process of filling a vacancy in the Office of the Mayor may commence.
2. As soon as a letter of resignation is received by the City Clerk the City Council must consider whether the vacancy shall be filled by appointment or special election. Such discussions shall occur at the City Council's next regularly scheduled meeting, or at a special meeting called for that purpose. The City Council may make a decision with respect to that issue at the special meeting called for May 2, 2005, but may also put the matter over for further discussion if appropriate. If a decision is made to fill the vacancy by appointment, the application process may begin immediately but the appointment process may not begin until after July 15, 2005, the date the vacancy actually exists. If a decision is made to call a special election to fill the vacancy, the City Council may call the special election at any time, however, the election must occur within 90 days of the date the election is called.
3. San Diego Municipal Code [Municipal Code or SDMC] Chapter 2, article 7, division 8 sets forth procedures by which the City Council may fill the vacancy by appointment. The City Council may conduct one or two hearings to evaluate applicants. The City Council has 30 days from the date of the actual vacancy, not the date of the announcement or the date the letter of resignation was submitted, to adopt a resolution appointing an applicant to fill the vacancy.

4. Municipal Code Chapter 2, article 7, division 9 sets forth procedures by which the City Council may fill the vacancy by special election. If the City Council chooses in the first instance to call a special election, or does not appoint a successor within 30 days of the date of the actual vacancy, the City Council must “immediately cause” an election to be held to fill the vacancy. A special election called for that purpose must be held within 90 calendar days of the adoption of the ordinance calling the election, unless there is a regular municipal, statewide, or countywide election schedule to be held within 180 calendar days of the vacancy, in which case the special election may be consolidated with that regular election. The candidate elected at either the special election or the special run-off election shall be declared elected for Mayor Murphy’s unexpired term and shall assume his or her office at the time the City Council adopts the resolution declaring the results of the election.

5. At the present time, no statewide election has been called. There are indications, however, that Governor Schwarzenegger may choose to call a special statewide election to put before the voters certain ballot measures. November 8, 2005, has been identified as a possible date for such an election. If it is known that a statewide election will be held on that date, it appears that the City Council may consolidate a special primary election with that statewide election. The ability to consolidate a special run-off election with a November 8, 2005, statewide election depends in large part on the date of the special primary election and the time necessary for the County Registrar of Voters to determine the results of the primary.

6. This office has previously opined that write-in candidates, while allowed in a primary election, are not permitted by the City Charter in a run-off election. Therefore, write-in candidates would be permitted in the special primary election but not in the special run-off election.

7. Until he departs office Mayor Murphy is a member of the legislative body of the City of San Diego. He may thus participate in the discussions and votes on the issues until he leaves office.

8. The City is not a party to the litigation concerning the November 2004, election for Mayor, and there is no reason why Council Member Frye would be precluded from participating in the discussions and votes on the issues concerning the vacancy.

9. Pursuant to Charter section 25, the Deputy Mayor “shall perform all the duties of the Mayor . . . when the Mayor is absent or unable to perform his duties.” The Mayor would be both absent and unable to perform duties in the event of a vacancy by resignation, and thus the Deputy Mayor is required to perform the duties of the Mayor.

DISCUSSION

1. REQUIREMENT FOR A LETTER OF RESIGNATION

As set forth in Charter section 24, in the event of a vacancy in the office of the Mayor the City Council has discretion to cause the vacancy to be filled either by appointment or election.

The Charter, however, does not speak to the specific process, and in particular the timing of that process, to be followed in filling a vacancy. The Municipal Code provides further guidance in that regard.

Chapter 2, Article 7, Division 7 of the Municipal Code contains general provisions for the filling of vacancies in elective offices. Municipal Code section 27.0705(a) provides:

As soon as it is known that there will be a vacancy in the office of the Mayor . . . for any reason other than a successful recall election, the presiding officer of the City Council shall, at the next regularly scheduled City Council meeting, or at a special meeting called for that purpose, consider the question of whether the vacancy shall be filled by appointment or special election.

Thus, the question of how the resignation is effectuated is important because the City Council is required “as soon as [the vacancy] is known” to begin the process of meeting to consider whether the vacancy will be filled by appointment or election. The Municipal Code provides further guidance on when “it is known that there will be a vacancy in the office of the Mayor.”

Municipal Code section 27.0703(a) provides that the date of a vacancy “will be the date specified in the written letter of resignation” or if there is no specified date “upon the date of receipt of the letter by the City Clerk.” Section 27.0706 provides that a “letter of resignation [for the Mayor] containing an effective date may be withdrawn in writing” if the withdrawal is sent no later than the business day before the City Council meeting called pursuant to section 27.0705.

It seems clear to us by these references that a resignation is effected only by the submittal of a written letter of resignation to the City Clerk. Thus, in our opinion, the submittal of a written letter of resignation is required to make it “known that there will be a vacancy,” and an announcement regarding a resignation absent a written letter to that effect does not start the process by which the City Council may initiate filling the vacancy. The Mayor has submitted to the City Clerk a written letter of resignation specifying July 15, 2005, as the date of resignation. Accordingly, the process to fill the vacancy may commence.

2. COUNCIL MEETING TO DETERMINE HOW VACANCY WILL BE FILLED

As indicated in Part 1, above, the date of vacancy is the date specified in the written letter of resignation, or if there is no date specified, it is the date of receipt of the Mayor’s resignation letter by the City Clerk. SDMC § 27.0703(a). Here, Mayor Murphy submitted a letter of resignation designating July 15, 2005, as the date of resignation. Therefore, the City Council has a duty to discuss at its next meeting (either its next regular meeting, or a special meeting called for this purpose) whether the vacancy shall be filled by appointment or special election. The Mayor has called a special meeting for Monday, May 2, 2005, for that purpose.

While the Municipal Code does not require that the City Council do anything more than “consider” its options at its next meeting, the notice for the special meeting provides that there is the possibility of action arising out of the discussion, including the calling of an election to fill the vacancy. Therefore, in our opinion the City Council may choose to make a decision to either fill the vacancy by appointment or election, and may vote to call a special election to fill the vacancy, or may continue the discussion to a future time. The only time constraint on the decision is set forth in Charter section 24, which requires that an election be called immediately if an appointment is not made within 30 days of the vacancy.

3. FILLING THE VACANCY BY APPOINTMENT

Municipal Code section 27.0707(a) provides that “When a vacancy is to be filled by appointment, the City Council shall fill such vacancy in accordance with the provisions set forth in Division 8 of this article.” Division 8 (commencing with Section 27.0802) provides detailed procedures governing the deadlines, notices, applications, and hearings applicable to the appointment process. A copy of Division 8 is enclosed as Attachment 2.

As mentioned above, an appointment to fill a vacancy in the office of the Mayor must be made within 30 days of the date of the vacancy. Charter § 24. If the City Council determines that the vacancy is to be filled by appointment, the City Clerk must publish a notice within five calendar days of the Council decision. SDMC § 27.0803(c). The notice shall state that a vacancy exists, and that interested applicants may obtain information and forms from the City Clerk. *Id.* Applications are due no later than 14 calendar days after the date the City Council determines that the office is to be filled by appointment. *Id.*

Before an appointment can be made to fill the vacancy, the City Council must hold at least one public hearing to consider the applications for appointment. SDMC § 27.0806. At the public hearing, each applicant shall be allowed three minutes to make a presentation to the City Council. SDMC § 27.0807(a). At the discretion of the presiding officer, Council Members may ask brief questions for clarification concerning either the presentation or matters contained in the application. *Id.* At the conclusion of the public hearing, or at a later meeting, the City Council may adopt a resolution appointing an applicant to fill the vacancy. SDMC § 27.0807(b). If there are too many candidates to consider in a single public hearing, the City Council may conduct a second public hearing to consider the qualifications of no less than four and no more than six applicants. SDMC § 27.0808.

These hearings must be scheduled so that the appointment can be made within 30 days of the date of the vacancy. SDMC § 27.0801. However, while the process of submitting applications may begin following the decision to appoint, in our opinion the plain language of Charter section 24 prohibits the appointment itself until the vacancy actually exists (“in the event of a vacancy *occurring* in the office of the Mayor”). (Emphasis added.) Because Mayor Murphy’s letter of resignation identifies July 15, 2005, as his date of resignation, the date of vacancy will be July 15, 2005. Thus, the City Council would have 30 days from July 16 to appoint a successor.

Any person appointed to fill the vacancy “shall hold office only until the next regular municipal election, at which date a person shall be elected to serve for the remainder of such unexpired term.” Charter § 24. The next regular municipal election is scheduled for June 6, 2006. Therefore, any person appointed to fill a vacancy in the office of Mayor would serve only until another person is elected during the 2006 election cycle.

4. FILLING THE VACANCY BY SPECIAL ELECTION

Municipal Code section 27.0707(b) provides that “When a vacancy is to be filled by special election, the City Council shall fill such vacancy in accordance with the provisions set forth in Division 9 of this article.” Division 9 provides more detailed procedures to be followed with respect to a special election to fill a vacancy. A copy of Division 9 is enclosed as Attachment 3.

As discussed above, the City Council may choose to conduct a special election, or it may be required to conduct a special election if an appointment to fill the vacancy is not made within 30 days of the vacancy. Charter § 24. In any event, once a vacancy occurs, if the vacancy is to be filled by special election the City Council must *immediately* call a special election to be held within 90 calendar days of the ordinance calling the election, unless there is a regular municipal, statewide, or countywide election scheduled to be held within 180 calendar days of the vacancy, in which case the special election may be consolidated with that regular election. SDMC § 27.0902(b).¹ “Immediately” means occurring, acting or accomplished without a loss of time.

If one candidate receives the majority of votes cast at the special election, the candidate shall be deemed to be and declared by the Council to be elected to the vacant office. SDMC § 27.0905. If no candidate receives a majority of the votes cast, a special run-off election shall be held within 49 calendar days of the first election between the two candidates receiving the highest number of votes, unless there is a regular municipal, statewide, or countywide election scheduled to be held within 90 days of the proposed special run-off election, in which case the special election may be consolidated with that regular election. SDMC § 27.0906.

“A candidate elected to the office of Mayor . . . at either the special election or the special run-off election . . . shall be declared elected for the unexpired term of his or her predecessor and shall assume his or her office at the time the City Council adopts the resolution declaring the results of the such election to the vacant office.” SDMC § 27.0907(b).

¹ These provisions in the Municipal Code relating to a special election to fill a Mayoral vacancy are consistent with provisions in the City Charter for special elections to fill vacancies in Council Districts. See Charter § 12(h).

5. SPECIAL ELECTION CONSOLIDATION WITH STATEWIDE ELECTION

Although not a certainty, there is a significant possibility that a statewide election will be held on November 8, 2005.² If so, this would be a “special” election, and not a “regular” statewide election as described for purposes of consolidation in SDMC sections 27.0902 and 27.0906. Normal rules of statutory construction would cause a conclusion that a “special” statewide election, even though held within the appropriate time frame, could not be consolidated. However, we believe the clear intent of the provision is to provide for efficiency and cost saving with respect to the conduct of elections. Therefore we believe that consolidation of a special municipal election to fill the Mayoral vacancy with a special statewide election called in November of 2005 would comply with the Municipal Code. Nevertheless, in order for such consolidation to occur, we believe there must be certainty with respect to the statewide election at the time the special municipal election is called. Accordingly, if it is known that a special statewide election will occur, the City may request consolidation with the special municipal election; if it is unknown, such consolidation cannot be requested.

If the state does hold a statewide election on November 8, 2005, and the City Council is able to request consolidation with the special municipal election, the City’s options may otherwise be limited. State law provides that all election materials for consolidated statewide elections be provided to the Registrar of Voters no later than 88 days prior to the election. Municipal Code section 27.0906 requires that a run-off election to fill a vacancy be held within 49 days of the primary unless there is a statewide election held within 90 days of the proposed run-off election. Thus, the ability to seek consolidation of any run-off election with a statewide election held in November of 2005 will depend on the date of the special primary election, as well as knowledge of whether a special statewide election has been called.

If the City Council calls for a special primary election to be consolidated with a statewide election, the date of the statewide election has to be within 180 days of the date of vacancy. In other words, the statewide election would have to take place prior to January 11, 2006. If the state calls a statewide election on November 8, 2005, that date would clearly be within the 180 day period. If a Mayoral candidate obtained a majority of votes at that election, that person would assume office as soon as the City Council passed a resolution declaring the results of the election. Because the County Registrar of Voters has 28 days to complete its canvass, it is possible that the City Council would be unable to pass such a resolution until after December 6, 2005.

If no candidate obtained a majority of the votes at a November 8, 2005, special election, then a special run-off election would be held no later than December 27, 2005 (forty-nine days after the first special election). Thereafter, the candidate with the most votes would assume

² Under article 2, section 8 of the California Constitution, the governor has the power to call a special statewide election for voters to consider one or more ballot measures. Although Governor Schwarzenegger has not called such an election yet, there are indications that he may do so.

office as soon as the City Council passed a resolution declaring the results of the election. Given that the 28 days for the Registrar to complete the canvass, the City Council would be unlikely to declare the results of the election until late January of 2006.

If the City Council calls a special primary election in advance of a possible November 8, 2005, statewide election, the special statewide election may be used for a potential special run-off election. If a special primary were called more than 88 days prior to the anticipated November 8, 2005, statewide election, and the date of a run-off election was within 90 days of the proposed November, 2005, special statewide election, the City Council could seek to consolidate the two, although time must also be accounted for the canvass of returns. Ultimately, the ability to consolidate may rest with the ability of the County Registrar of Voters to provide the results of the special primary election. If a special run-off election is held on November 8, 2005, the Registrar would likely complete its canvass in time for the City Council to declare the results in late November or early December of 2005.

6. WRITE-IN CANDIDATES ARE PERMITTED IN THE SPECIAL PRIMARY ELECTION BUT NOT A SPECIAL RUN-OFF ELECTION

This Office recently opined that a write-in candidacy is permitted in a primary election but is not permitted by the terms of the City Charter in a run-off election. A copy of our recent Report to the Rules Committee to that effect is enclosed as Attachment 4. Accordingly, it is our opinion that a write-in candidacy is permitted in a special primary election to fill a vacancy, provided all other provisions of the Municipal Code relating to write-in candidates are followed, but that a write-in candidacy is not permitted in a special run-off election to fill a vacancy.

7. MAYOR MURPHY MAY PARTICIPATE IN DISCUSSIONS AND VOTES AS LONG AS HE IS A MEMBER OF THE LEGISLATIVE BODY

The Mayor is a member of the City Council, the legislative body for the City of San Diego, and is entitled to all the rights and privileges of that office. City Charter §§ 11, 12 and 24. In our opinion, as long as Mayor Murphy is occupying the Office of Mayor, even though he has submitted a letter of resignation effective at a future date, he is entitled to participate in the discussion relating to the upcoming vacancy in the office, and may vote on issues pertaining to that vacancy.

8. COUNCIL MEMBER FRYE MAY PARTICIPATE IN DISCUSSIONS AND VOTES

There is currently pending in the state appellate court a challenge to the results of the election for the Office of Mayor held in November of 2004. The litigation seeks to compel the counting of certain write-in votes disallowed by the County Registrar of Voters. While not a party to that litigation, Council Member Donna Frye has an interest in the outcome of that litigation as she was the write-in candidate for Mayor in that election. In our opinion, the pendency of that litigation does not affect Council Member Frye's status as a member of the

legislative body of the City, nor does her interest in the outcome of that litigation preclude her from participating in the discussions and votes on the matter of the vacancy.

The only manner in which the pendency of the litigation would be relevant to Council Member Frye's participation is if the City Council's decisions relating to the vacancy would have a reasonably foreseeable material financial effect upon Council Member Frye, as set forth in the Political Reform Act and its implementing regulations, California Government Code sections 87100 et seq.³ and California Code of Regulations sections 18700 et seq. In our view, the only way this could occur is if the actions taken relating to the vacancy would have an impact on that litigation. It has been reported that the appellate court has requested briefing on the issue of whether the Mayor's resignation has made the case moot (The Daily Transcript, April 28, 2005). We express no view with respect to that issue, but in our opinion even if the resignation, or the discussions and actions taken with respect to the vacancy affect the litigation, there is no reasonably foreseeable, material financial impact on Council Member Frye that would prohibit her from participating.

The only impact we can see arising from the litigation would be whether Council Member Frye is declared to be the Mayor. Thus the impact would be on her employment position with the City (either as Mayor or City Council Member), and the salary and benefits attendant to the position. The Code of Regulations implements the general prohibition set forth in Government Code section 87100 regarding conflicts of interest. Code of Regulations section 18702.4 provides that an official is not participating in the making of a decision implicating the conflict of interest rules if the decision is one relating to compensation or terms and conditions of employment. Furthermore, Code of Regulations section 18705.5 provides that decisions which affect only the salary received from a public entity by an official (provided such salary is not different from other persons in the class of employees) is not "material" for purposes of the conflict of interest laws. Finally, applying the standards set forth in Code of Regulations section 18706 regarding foreseeability, in our opinion any impact arising from the litigation is not reasonably foreseeable now because it is unknown how the appellate court may resolve the case or the issue of mootness.

In sum, it is our opinion that Council Member Frye is not precluded by the conflict of interest laws from participating in the discussions and votes on the issues surrounding the vacancy.

9. THE ROLE OF THE DEPUTY MAYOR

Charter section 25 provides for the position of the Deputy Mayor and states:

The Council shall annually in the month of December select one of its members who shall be the Deputy Mayor. The Deputy Mayor shall perform all the duties of the Mayor as prescribed by this

³ We see no implication with Government Code section 1090.

Charter or by ordinance when the Mayor is absent or unable to perform his duties.

In the event of a vacancy actually occurring in the Office of the Mayor, the Mayor would be both absent and unable to perform the duties of Mayor, and the Deputy Mayor would thus perform all Mayoral duties until such time as the Office of the Mayor is filled either by appointment or election.

CONCLUSION

Mayor Murphy submitted a letter of resignation dated April 27, 2005, to the City Clerk identifying July 15, 2005, as the date of his resignation, creating a vacancy in the office of Mayor as of July 15, 2005. The process for filling the vacant position may commence immediately, and a special meeting of the City Council has been called for May 2, 2005, for that purpose. The City Council may take action at that time, or at a future time, to call a special election or to fill the vacancy by appointment, although no appointment can be made until after the vacancy actually exists. If an appointment is pursued but not made within 30 days following July 15, 2005, the City Council must call a special election immediately to fill the vacancy.

Any person appointed would serve only until the next regular municipal election cycle, which is scheduled to begin on June 6, 2006. If the vacancy is filled by special election, that election must be held within 90 days of the ordinance calling for the election, or within 180 days of the vacancy if the election can be consolidated with a statewide election that has been called at the time the City Council makes the decision to set the special municipal election. If a statewide election has been called for November 8, 2005, the City Council may be able to consolidate the special primary election or the special run-off election with that state election.

A write-in candidacy is permitted in a special primary election, but not in a special run-off election that might be necessary. Both Mayor Murphy and Council Member Frye may participate in the discussions and votes on the issues relating to the vacancy, and the Deputy Mayor is to perform all duties of the Mayor as long as there is a vacancy in the Office.

Other questions will arise relating to this matter, and we are committed to provide answers to those questions in a timely fashion to assist you in your deliberations. Please let us know if you have additional questions at this time.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

Honorable Mayor and
City Council

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April 29, 2005

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Attachments (4)