

LESLIE E. DEVANEY  
ANITA M. NOONE  
LESLIE J. GIRARD  
SUSAN M. HEATH  
GAEL B. STRACK  
ASSISTANT CITY ATTORNEYS

RICHARD A. DUVERNAY  
DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

**Casey Gwinn**  
CITY ATTORNEY

CIVIL DIVISION  
1200 THIRD AVENUE, SUITE 1100  
SAN DIEGO, CALIFORNIA 92101-4100  
TELEPHONE (619) 533-5800  
FAX (619) 533-5856

**MEMORANDUM OF LAW**

**DATE:** November 30, 2004  
**TO:** Mayor Dick Murphy  
**FROM:** City Attorney  
**SUBJECT:** Term of Office for Mayor

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**QUESTION PRESENTED**

In an e-mail dated November 15, 2004, you asked the City Attorney for his opinion on the following question: "If the 2004 Mayoral election results are not certified, or if in any other way a definitive result is not reached, by December 6, 2004, does Mayor Murphy continue in office beyond that date? If so, until when?"

**SHORT ANSWER**

In accordance with San Diego City Charter [Charter] section 12(b), the Mayor shall hold office until his successor is elected and qualified. If, for any reason, the City Council does not declare the results of the election for the Office of Mayor by December 6, 2004, or if the candidate declared to be the person elected by the Council does not subscribe to the oath of office required of him or her by the Charter, then you will continue to hold the office of Mayor.

**DISCUSSION**

A public officer's term of office is determined by the law creating that particular office. *Boyd v. Huntington*, 215 Cal. 473, 479 (1932). Moreover, pertinent law provides that qualifications to hold public office are established by charter under the "home rule" provision of the California Constitution. 82 Cal. Op. Att'y Gen. 6, 8 (1999). Therefore, because the office of Mayor for the City of San Diego was created by the City Charter, the term of this office is subject to the Charter language applicable to that office. Charter section 12(b) specifically provides that "A Mayor shall thereafter be elected for a term of four (4) years in the manner prescribed by Section 10 of this Charter. The Mayor shall hold office for the term prescribed

from and after 10 a.m. the first Monday after the first day of December next succeeding the election **and until a successor is elected and qualified**" (emphasis added).

The above Charter language is consistent with the longstanding rule that an officeholder shall remain in office until his or her successor has been elected and qualified. "[W]hen there is no expression in the statute to the contrary, a public officer who continues to perform the duties of the office and holds office beyond the term for which he was elected or appointed, holds office until his successor is selected and qualifies. The basis for that rule is the policy against having a vacancy in public office -- having a gap between successive office holders." *Hartford Accident & Indemnity Co. v. Tulare*, 30 Cal. 2d 832, 836 (1947). This premise is also codified in state law: "Every officer whose term has expired shall continue to discharge the duties of his office until his successor has qualified." Cal. Gov't Code § 1302.

The process for electing and qualifying a successor is set forth in Charter section 10 which reads as follows:

After the result of an election for any office is declared, or when an appointment is made, the City Clerk, under his hand and official seal, shall issue a certificate therefor, and shall deliver the same immediately to the person elected or appointed, and such person must within ten days after receiving such certificate file his official bond, if one be required for his office, and take and subscribe to the oath of office required of him by this Charter, which oath must be filed with the City Clerk.

Although the Charter language quoted above does not specifically reference any role for the City Council in declaring the results of a City election, historically it has been our City Council that makes the declaration for City elections. This practice is consistent with state law, which provides that it is the responsibility of the City Council to judge the qualifications of its members and of elections returns. Cal. Gov't Code § 36812. Once the results of an election have been declared by the City Council, it is then incumbent on the candidate to "subscribe to the oath of office" which is typically administered by the City Clerk and which must be accomplished within a 10 day period after the results have been declared. After both of those events have occurred, the successor to your term in office can be considered "elected and qualified." Until that point, you remain the officeholder.

The proposition that a public officer may continue in office past the established term of office pending the eligibility of a successor is not unique to the office of the Mayor. This proposition is consistent with the law applicable to the governor, the state's highest executive officer. Article 5, section 2 of the state constitution provides that "The Governor shall be elected every fourth year at the same time and places as members of the Assembly and hold office from the Monday after January 1 following the election until a successor qualifies." Locally, the City's board and commission members also remain in office past the specific length on their term if a successor has not been appointed. *See, e.g.*, Funds Commission, Charter § 41(a): members "shall serve without compensation for terms of four (4) years and until their successors are elected and qualified." *See also* Civil Service Commission, Charter § 41(b);

Planning Commission, Charter § 41(c); Citizens Equal Opportunity Commission, SDMC § 26.16; Park and Recreation Board, SDMC § 26.30; and Science and Technology Commission, SDMC § 26.1402. All of these provisions acknowledge the need for public officials to remain in office until an eligible successor is available.

### **CONCLUSION**

In the days ahead, the City Clerk and County Registrar must fulfill their respective ministerial duties as provided for in the City Charter, the City's Election Code, and state law in connection with completing the election process for the current Mayoral election. These public officials may yet seek legal advice regarding the performance of their duties from the City Attorney or the Office of the County Counsel. Several lawsuits have been filed challenging the election process and the qualification of the candidates and so it is possible that a court may intervene with the issuance of an order directing or delaying the conduct of the process. Such an order could be directed toward a particular official with a role in the process, or the order could be directed to the City Council. Ultimately, after the City Clerk has performed all necessary ministerial duties and completed the process, it falls to the City Council to declare the results of the election and it is then incumbent upon the person declared to have won the election to be sworn into office. The Charter requires that you remain the officeholder for the office of Mayor until these events occur.

CASEY GWINN, City Attorney

By

Richard A. Duvernay  
Acting Assistant City Attorney

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