



CITY COUNCIL AGENDA REPORT

MEETING DATE: NOVEMBER 16, 2010

ITEM NUMBER: IX-2

SUBJECT: OPTIONS FOR FILLING COUNCIL VACANCY

DATE: NOVEMBER 9, 2010

FROM: CITY ATTORNEY'S OFFICE

PRESENTATION BY: KIMBERLY HALL BARLOW, CITY ATTORNEY

FOR FURTHER INFORMATION CONTACT: KIMBERLY HALL BARLOW (714) 754-5399

RECOMMENDATION:

Consider options available to fill an anticipated vacancy on the City Council and provide direction.

BACKGROUND:

Council Member Katrina Foley was on the ballot for a seat on the Newport Mesa Unified School District Board at the election of November 2, 2010. While the results of the election have not yet been certified, Member Foley is the apparent winner of the school board seat, and has announced that she intends to resign her Council seat effective December 14, 2010 when she would be sworn into the School Board position. While the Council cannot currently take any action to fill the anticipated vacancy that would be created if Member Foley does resign her position, staff felt it would be appropriate for the Council to be informed of its options to fill a vacancy should it occur and to give staff direction.

ANALYSIS

City Council Members are among the officers and employees in whom government of general law cities is vested.¹ Council Members are required to be residents of the City and are elected by general municipal election.² They hold office for four years.³

If a vacancy occurs in the office of a council member, then the City Council "shall within 30 days from the commencement of the vacancy, either fill the vacancy by appointment⁴ or call a special election to fill the vacancy."⁵ The "person appointed or

¹ Cal. Govt. Code ' 36501 (a).

² Cal. Govt. Code ' ' 36502 (city council member must be Aat the time of assuming such office an elector of the city and has resided in the city for the year preceding his election@); 36503 (Acity councilmen . . . shall be elected by the city electors at a general municipal election@).

³ Cal. Govt. Code ' 36503.

⁴ This option is not available Aif the appointment would result in a majority of the members serving on the council having been appointed.@ Cal. Govt. Code ' 36512 (d)(1).

elected to fill a vacancy holds office for the unexpired term of the former incumbent.”⁶
The vacancy commences on its effective date.⁷

Based on the above provisions, a City Council Member vacancy must be filled by appointment within 30 days of the occurrence of the vacancy. If the City Council either fails to appoint within the required time period or chooses to proceed by way of election, a special election must “be held on the next regularly established election date not less than 114 days from the call of the special election.”

The next regularly scheduled election is June 7, 2011. Thus, assuming that the vacancy actually arises, if the Council does not appoint a new member within thirty days of the anticipated Council vacancy on December 14, 2010 (by January 12, 2011), then a special election will have to be conducted to fill the seat, and the position will remain vacant until the election results from the June 7, 2011 election are certified.

In the event the City Council chooses to fill the unexpired term by way of appointment, there are alternative means available to do as summarized in the “Alternatives Considered” segment of this report. Neither State law nor the municipal code specifies the appointment process. However, the City has prior experience in filling unexpired terms for members of the City Council. Beyond the decision of whether to fill the vacancy by way of appointment, there are certain procedural matters what will require direction, as follows:

1. If a solicitation for applicants is authorized, what will be the timing and duration of the solicitation? Will all applications be made available to the public upon submission or at the time nominations for appointment are to be made?
2. Do members of the City Council, as a body, want to interview applicants or conduct individual interviews?
3. Does the City Council have a preferred method of voting on the appointment and when the matter should be scheduled before the City Council?

Further, the City Council should keep in mind that there will already be one vacancy on the City’s Planning Commission by way of the election of Chairman Jim Righeimer to

⁵ Cal. Govt. Code § 36512 (b). The City may, by ordinance, require that any vacancy *must* be filled by special election, special election when a certain number of signatures on a petition are filed, or by appointment until a special election can be held. Cal. Govt. Code § 36512 (c). The City, however, has not so required in the Municipal Code. The Government Code section has been amended by AB 1688 to extend the time of appointment to sixty days, but the amendment does not take effect until January 1, 2011. Thus, the thirty day appointment period will govern the anticipated vacancy if it occurs prior to January 1st.

⁶ Cal. Govt. Code § 36512 (b).

⁷ To be effective, a resignation should be in writing and filed with the City Clerk. Cal. Gov’t Code §1750(e). A resignation takes effect by its terms. *Meeker v. Reed*, (1924) 70 Cal. App. 119, 123. That is, a resignation takes effect upon the date stated in the written resignation. *Id.*; 64 Cal. Op. Atty. Gen. 1 (1981).

the City Council. In accordance with Council Policy 000-2.5, the City Manager is required to place the issue of Commission appointments before the City Council on its 2nd regular meeting agenda in January. In 2011, the terms of Planning Commissioners Fitzpatrick, Clark and Righheimer's vacant seat and Parks and Recreation Commissioners Galitski, Brumbaugh and Shaw are scheduled to expire. The City Council may want to consider direction to open the recruitment now for the upcoming City Council vacancy, the pending Planning Commission vacancy, as well as the expiring terms on both Commissions.

ALTERNATIVES CONSIDERED

1. Council could wait until the vacancy actually occurs to give direction to staff.
2. Council could direct staff to issue an invitation to interested persons to apply for the position, which applications would not be considered until after the vacancy occurs.
3. Council could consider appointing an individual to the vacant position without soliciting applications, but only after the vacancy occurs.
4. Council could decline to fill the vacancy and call for a special election to do so.

FISCAL REVIEW

There are no direct fiscal impacts related to filling the vacancy unless the Council either cannot or declines to appoint an individual to fill the vacancy within thirty days of its occurrence, thus requiring the calling of a special election. The costs associated with calling a special election are likely to be \$200,000 or more based on information received from the County Registrar of Voters.

LEGAL REVIEW

The City Attorney has prepared this report for Council consideration.

CONCLUSION

Council is requested to consider its options with respect to filling the anticipated vacancy and to give direction to staff.

KIMBERLY HALL BARLOW
City Attorney



ALLAN L. ROEDER
City Manager

Distribution: City Manager
Department Heads