

CITY COUNCIL

For City Clerk's Use:

☐ **APPROVED** ☐ **DENIED**

Reso No. _____ File No. _____

Ord No. _____

Agenda Item No.: 60
Date: December 1, 2010

TO: Honorable Mayor and Members of the City Council
FROM: Marsha Whalen, City Clerk and Jeffrey Epp, City Attorney
SUBJECT: City Council Vacancy

RECOMMENDATION:

Consider and take action on the procedures related to the appointment or make such appointment.

FISCAL ANALYSIS:

Approximately \$500-\$1,000 to cover costs associated with advertisements and miscellaneous expenses. Costs will be covered from the 2010 election budget.

BACKGROUND:

In the regular municipal election on November 2, 2010, Council member Sam Abed received a majority of votes for the elective office of Mayor of the City of Escondido. Since he is an incumbent Council member, it is anticipated that he will resign the office of Council member and accept the office of Mayor on December 1, 2010, when elective officers will be administered the oath of office and commence their terms.

Applicable Law

A vacancy in an elective office can occur in a number of ways, including resignation. In order for a resignation to be effective, it must be in writing and filed with the City Clerk. Gov't Code section 1750(e). The resignation takes effect by its terms. It need not be "accepted" by anyone to be effective.

The California Government Code provides the required steps that must be taken when a vacancy occurs. Within 30 days of a vacancy¹, the City Council must fill the vacancy by appointment or by calling a special election, to be held on the next established election date not later than 114 days thereafter. Gov't Code section 36512; 34902(a). The successor serves from the date of appointment (or the Tuesday following the election, if an election is held) until the expiration of the predecessor's term.

¹ AB (1668) (Knight) amended Gov't Code section 36512, to allow 60 days for filling a vacancy in a city elective office. Although this bill has been adopted and has been signed by the Governor, it does not take effect until January 1, 2011.

In general law cities, the City Council has broad discretion to choose the method for filling the vacancy. Section 36512 does not contain a detailed process, but instead gives the City Council discretion to choose either appointment or special election, and provides a 30-day deadline for making that decision from the time of the vacancy. Section 36512 also specifies that if a special election is chosen, the special election must be held not less than 114 days from the call for the special election.

In the present case, the vacancy is anticipated to occur on December 1, 2010, at the time Councilmember Abed resigns his position as a Council member and assumes the elective office of Mayor. Thus, the City Council will have until December 30, 2010, to make an appointment or adopt the necessary resolutions to call for a special election.

Eligibility

In order to be eligible to hold a municipal office, a person must be a resident of the city and a registered voter of the city at the time nomination papers are issued. Gov't Code sections 34882, 34904.

Process

Most cities fill mayoral and city council vacancies by appointment, rather than special election. This is due to the high cost of holding a special election.² In those cities using an appointment process, the most common practice is to direct the City Clerk to put out an announcement to the public that the position will be filled by appointment, and inviting interested persons to apply for the position.

On Sunday, November 14 and Thursday, November 18, 2010, the City Clerk published a notice of the vacancy and invited interested persons to apply by completing an application and providing answers to a supplemental questionnaire. This notice was published in the North County Times and placed on the local government channel 19. It was also announced at the November 10, 2010 City Council meeting. The application form and the invitation to apply was placed on the City's website on Monday, November 15, 2010 at www.ci.escondido.ca.us/news.

Applicants were advised to submit all information no later than November 24, 2010 to enable the City Council to have time to consider the materials prior to December 1, 2010.

As a result of this process, 26 applications and supporting material have been received and all materials have been placed in the City Clerk's office for public inspection, and copies made available to all Council Members.

² For example, the Registrar of Voters provided Poway (population approximately 50,000 with 29,000 registered voters) an estimate of approximately \$250,000 for a special election. Our City Clerk has indicated that Registrar estimates for a similar election in Escondido would be \$465,000 to \$485,000.

Voting Requirements

The Escondido Municipal Code does not have specific voting requirements for City Council decisions. Thus, state law applies and the City Council may generally take action by a vote of a majority of a quorum (Civil Code section 12, Code of Civil Procedure section 15). In the unlikely event the City Council wishes to adopt an ordinance or resolution, three votes will be required pursuant to Government Code section 36936 (requiring a majority vote of the total membership of the city council for resolutions, orders for the payment of money, and ordinances).

It should be noted that the Brown Act does not allow for the City Council to hold a closed session on the subject of filling a Mayor or City Council vacancy. Although closed sessions are allowed for the appointment or evaluation of a public employee pursuant to Gov't Code section 54957, "employee" does not include an elected official or member of the legislative body. Gov't Code section 54957.

Additionally, when the public action on filling the vacancy is taken, it should be noted that the Brown Act also prohibits the use of secret ballots. Gov't Code section 54953(a).

The most recent point in Escondido history when the City Council was required to fill a vacancy occurred in 1998, when Lori Pfeiler was elected Mayor and the City Council had to select a replacement to fill the vacancy left in the Council term of office. In that circumstance, the City Council solicited applications and requested applicants to fill out a short questionnaire and address certain specific questions. Some applicants were eliminated by consensus, and the City Council then considered the remaining list of approximately 19 applicants. In that particular case, 3 separate motions on 3 different candidates were considered and failed either due to a lack of a second or lack of a majority vote. Applicant Jerry Kaufman received a majority vote on the 4th motion made, and was thereby selected. None of the remaining candidates were the subject of either a motion for appointment or a vote.

Respectfully submitted,



Jeffrey Epp
City Attorney



Marsha Whalen, CMC
City Clerk