

## CITY COUNCIL

For City Clerk's Use:

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Reso No. \_\_\_\_\_

File No. \_\_\_\_\_

Ord No. \_\_\_\_\_

**Agenda Item No.: 5**

**Date: December 5, 2012**

**TO:** Honorable Mayor and Members of the City Council

**FROM:** Jeffrey Epp, City Attorney  
Diane Halverson, City Clerk

**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 2012 election budget.

**BACKGROUND:**

In the regular municipal election on November 6, 2012, Council member Marie Waldron was elected to the California State Legislature. She will be sworn into that office on December 3, 2012, and will have resigned from her Council office. Her resignation will create a vacancy in that office, which has two years remaining on the term. The City Council has had vacancies in 1998 and 2010, choosing both times to follow state law and make an appointment to the vacant position for the remainder of the term.

**Applicable Law**

A vacancy in an elective office can occur in a number of ways, including resignation. 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 60 days of a vacancy, 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.

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 60-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 no later than December 3, 2012, at the time Council member Waldron is sworn in as a member of the California State Legislature. Thus, the City Council will have 60 days from the date of the resignation 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.<sup>1</sup> 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 18 and 25, 2012, 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 Union Tribune and placed on the local government channel 19. It was also announced at the November 14, 2012 City Council meeting. The application form and the invitation to apply was placed on the City's website on Monday, November 19, 2012 at [www.escondido.org](http://www.escondido.org).

Applicants were advised to submit all information no later than Monday, December 3, 2012 by 3:30 p.m. to enable the City Council to have time to consider the materials prior to December 12, 2012.

As a result of this process, 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.

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<sup>1</sup> 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).

Respectfully submitted,



Jeffrey Epp  
City Attorney



Diane Halverson, CMC  
City Clerk