

REPORT



FROM CITY ATTORNEY

May 1, 2007

POLICY & SERVICES COMMITTEE
Palo Alto, California

RE: Council Term Commencement Following Elections

Dear Members of the Policy & Services Committee:

Article III, section 2 of the Palo Alto Charter provides that the terms of office for council members shall be four years, commencing on the first day of January next succeeding their election. Section 2.04.060 of the Palo Alto Municipal Code provides for the election of the mayor at the first regular council meeting in January, and the City has a historical practice of swearing in new council members along with the new mayor at that meeting in January. This report describes potential problems related to council member terms of office and outlines alternatives to address those issues.

I. Issue

Given that the Palo Alto Charter and Code provisions regarding the timing of swearing in for the new mayor and council members create the potential for a short gap in office between term commencement and swearing in, what are the options to reduce confusion relating to term commencement?

II. Short Answer

Although the existing provisions for term commencement and swearing in are legally sufficient because existing law allows incumbents to hold over in office until successors are qualified, the potential confusion could be reduced by (1) setting the first meeting in January for the earliest date possible, January 2; or (2) by amending the City Charter and the City Code to provide for swearing in of the mayor and new council members at a meeting in December, following certification of election results.

RE: Council Term Commencement Following Elections

III. Background and Potential Solutions

A. Potential Problem of Gaps in Office Stemming from City's Term Commencement Provisions

The City Council has traditionally set the meeting for the swearing in of new council members to coincide with the election of the Mayor at the first meeting in January. The Council chooses the date for the first meeting in January, not the staff. The practice of scheduling the swearing-in ceremony for the new mayor and council members for the first meeting in January creates a gap between the term commencement date specified in the Charter for new council members (January 1) and the first meeting date at which they are sworn in. Thus, new council members are not qualified to serve on January first when their terms are supposed to begin because they will not be sworn in until the first council meeting of the month. For outgoing council members, whose terms expire on December 31 pursuant to the City Charter, there may be similar confusion as to who holds the office when the new council members have not yet been sworn in. In addition, where one of the outgoing council members is also the mayor, the December 31 term expiration date would create a similar gap in the office of mayor because a new mayor is not appointed until the first regular meeting in January.

B. Existing Law Eliminates Potential Problems Because Incumbents May Hold Over in Office

Existing California law already provides a solution to these "problems" because it provides that incumbent office holders "hold over" in office until their successors are qualified. Gov't. Code § 1302. To be qualified, an officer must take the oath of office before commencing the duties of that office. Although the holdover rule is a general law, the California Supreme Court has approved of the concept in a number of cases, finding that avoiding vacancies in office is a basic rule of public policy:

...[A]n officer will not be considered out of office merely by the limitation of his term. In the absence of a statute authorizing or requiring him to hold until the qualification of his successor a vacancy arises upon the expiration of his term; but, notwithstanding, the law, for the public convenience, empowers him to continue to occupy his office. . . . He is a makeshift merely, *locum tenens*, temporarily filling a public office which it is inexpedient to permit to stand without an incumbent.

People ex rel. Sweet v. Ward (1895) 107 Cal. 236, 239; *see also Hartford Acc. & Indem. Co. v. City of Tulare* (1947) 30 Cal.2d 832. Although the Charter specifies term start and end dates, it does not conflict with the holdover policy because it does not expressly prohibit holdovers in office. *See Hartford, id.* at 836. Therefore, continuing to apply the holdover rules when necessary to fill any gap periods for incoming and outgoing council members and mayors is reasonable and legal.

RE: Council Term Commencement Following Elections

We have referred this issue to outside counsel who reached the same conclusion – the City Council’s present approach is legal.

C. Options

1. Schedule the First Council Meeting for January Second

If the Council determines that the potential confusion nevertheless necessitates some change, it could eliminate the problem simply by scheduling the first meeting in January for the earliest possible date in January, such as January second. The Council itself traditionally sets January meeting dates. For example, in 2006 the first Council meeting of the year was on January ninth, creating a nine day gap between the time the term for new council members commenced under the Charter, and the time when they were actually sworn in. The simplest option to reduce the potential confusion would be to move the meeting date at which new members and the mayor are sworn in to a date as close to January first as possible so that the gap period is reduced.

In fact, setting a January second meeting date each year would eliminate the problems created by any gap period. In spite of the charter provision stating that new terms of office begin on January first, January second would actually be the soonest possible date for the swearing-in ceremony because January 1 is an official holiday (Gov’t. Code § 6700(b)), and no city business may take place on an official holiday (Gov’t. Code § 6702).

2. Amend the Charter to Clarify Term Commencement

The Charter could be amended to change term dates to allow new council members to be seated in December. Such an amendment could provide that council terms begin and end at a meeting in December following a council election. The amendment should also specify that the meeting will be held following certification of the election by the Registrar of Voters, as the District Attorney claimed that Sunnyvale should not have commenced terms prior to election certification. In order to avoid creating the potential for a gap in the mayoral office, the municipal code provision that currently provides for the seating of the mayor at the first meeting in January, would also have to be amended so that the appointment of mayor would correspond to the date new council members are seated in December.

D. Conclusion

Although the term dates provided for council members in the Charter, and for the mayor in the Municipal Code, have the potential to create confusion related to precise start and end dates for existing and incoming council members, existing law resolves that confusion by permitting existing members to hold over in office until successors are qualified to serve. Nothing in the Charter or the Code prohibits the City from applying that rule of public policy where a technical

POLICY & SERVICES COMMITTEE

May 1, 2007

Page 4

RE: Council Term Commencement Following Elections

gap is created between the term dates provided and the actual date of the swearing-in ceremony in January. The remaining option is to amend the Charter to move the new Council term's commencement to December following certification of the election by the Registrar of Voters. However, scheduling the first council meeting in January for the second, or as soon thereafter as possible, would also help resolve the problematic "gap" and the necessity to apply the holdover rules. The Council will need to determine what, if any, change is appropriate to avoid future confusion.

Approved by:

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Respectfully submitted,

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MCT:cjs

cc: Frank Benest, City Manager
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