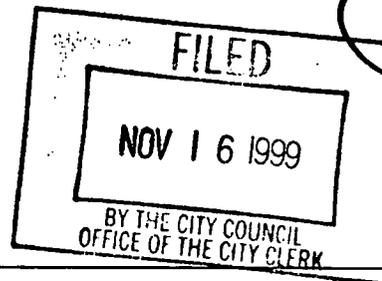


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LEGAL OPINION MEMORANDUM

TO: Robert Thomas, City Manager

FROM: Samuel L. Jackson, City Attorney 

RE: **Vacancy in the Office of the Mayor**

As a result of the death of Mayor Joe Serna, Jr. on November 7, 1999, you posed several questions relating to the vacancy and immediate actions required by the Council under the City Charter. Please do not hesitate to contact me at any time of the day or night should you have questions regarding this matter.

This memorandum is the product of a great deal of thought, research and consultation. The consultation included in-house round table discussions, as well as discussions with the Secretary of State's Office, the League of California Cities, other City Attorneys and the Sacramento County Counsel. I have examined the following law: The City Charter which contains the critical language which will guide the Council's action upon a vacancy in the Office of Mayor; the Code of Civil Procedure Section 12, which is employed by courts to the computation of filing periods for civil actions; Government Code Sections 6800 which governs the computation of time for the performance of acts required by law, 6803 which defines a year and 6806 which defines a day; Webster's Dictionary and Black's Law Dictionary. I have searched, without success, for historical interpretation of the relevant City Charter provisions and similar provisions of other cities. Of the various cities contacted, none had identical language relating to the time period at which a vacancy is created. I had received information that the City of Berkeley Charter contained identical language. However, when I attempted to verify this, I learned that Berkeley's Charter contains the phrases "if the unexpired term is less than one year" or "is for one year or more." This proved not to be helpful. In addition, decisional law which has

ATTACHMENT A

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some application to the issue at hand is scarce. However, some law was located which may prove helpful to the City Council in determining whether to accept or reject the opinion of the City Attorney set forth below.

It should be noted that it is the responsibility of the City Attorney to serve as legal counsel to the City Council. It is within purview of the City Counsel to render policy decisions after considering and accepting or rejecting the legal opinion of the City Attorney. Because of its authority over policy issues, it is the Council which has ultimate responsibility for determining what the language of the Charter means. If that determination is challenged in court, courts generally give great deference to that interpretation if there is a rational basis to support such interpretation.

The foregoing having been stated, it is the opinion of the City Attorney that the vacancy in the Office of the Mayor did not occur within one year of the next general election at which the Office of Mayor would normally be filled. Accordingly, it is the opinion of the City Attorney that a special election is required to fill that vacancy. The basis for this opinion is set forth below, with information that could be utilized to draw a conclusion to the contrary. I explain why I did not draw a contrary conclusion. I am aware of speculation as to the pros and cons associated with an opinion on one side or the other of this issue. I am also aware of the deference courts give to the legislative body charged with the interpretation of its laws. Finally, I am aware that courts generally decide close election questions in favor of providing the voters the opportunity to express their will. However, my opinion is not impacted by any of these factors.

The order in which the following questions and answers are set forth is of no significance, with the exception of the first two questions.

ISSUE NUMBER 1. What was the last day Mayor Serna was required to serve in office to avoid a special election to fill his unexpired term?

BRIEF ANSWER NUMBER 1. In the opinion of the City Attorney, it appears that the last full day the Mayor was required to serve in office to avoid a special election to fill his unexpired term was November 7, 1999.

ISSUE NUMBER 2. Is the City Council *required* to call a special election if a vacancy occurs prior to November 8, 1999? If so, when must such election be called and conducted?

BRIEF ANSWER NUMBER 2. Pursuant to the City Charter and as specified in response 1 above, the Council is required to call a special election to fill the vacancy. A special election must be called as soon as practical (the next regular Council meeting or an earlier called special meeting) after the vacancy occurred, but in no event later than 14 days following the date upon which the vacancy occurred.

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ISSUE NUMBER 3. May a member who is currently seeking election to a Council Office during the upcoming primary also seek election to fill Mayor Serna's unexpired term during a simultaneously held special election?

BRIEF ANSWER NUMBER 3. Yes. This is true regardless of whether that member is elected in the primary or not.

ISSUE NUMBER 4. May a member who is currently seeking election to the Office of Mayor in the primary also seek election to fill Mayor Serna's unexpired term during a simultaneously held special election?

BRIEF ANSWER NUMBER 4. Yes. This is true regardless of whether that member is elected for a full term in the primary or not.

ISSUE NUMBER 5. Would the response to issue number 3 or number 4 change if a member is elected outright to the Council Office or the Office of Mayor in the primary election?

BRIEF ANSWER NUMBER 5. No. Such an election will not adversely impact the current term of such member.

ISSUE NUMBER 6. Is the Council legally precluded from electing a Council member to serve two consecutive terms as Vice-Mayor?

BRIEF ANSWER NUMBER 6. No.

ISSUE NUMBER 7. If the Vice-Mayor holds office as acting Mayor, is it necessary for the Council to immediately take further action regarding the vacancy?

BRIEF ANSWER NUMBER 7. No, except calling for a special election as specified above. In addition, action must be taken at the commencement of the new year to elect the same or a new Vice-Mayor to act as Mayor until the special election.

ISSUE NUMBER 8. If the Council is operating with a Vice-Mayor acting as Mayor, what action should the Council take to provide backup to the acting Mayor?

BRIEF ANSWER NUMBER 8. Appoint a Mayor Pro Tem. This person must be a member of the Council.

ISSUE NUMBER 9. If a vacancy in the Office of Mayor is filled by a current Council member, may the Council fill the Council Office vacancy by appointment?

BRIEF ANSWER NUMBER 9. It depends on the time remaining on the term. If the unexpired term has less than one year remaining before the next general election, it is appropriate to make

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an appointment. However, if more than one year remains of such term, a special election must be called to fill the vacancy.

ISSUE NUMBER 10. Is there adequate time remaining to consolidate a special election with the primary election?

BRIEF ANSWER NUMBER 10. Based upon a review of the Charter provisions and the State Election Code and discussions with the City Clerk, ample time remains to consolidate a special election with the upcoming primary election.

ISSUE NUMBER 11. Does the fact that the Mayor's death occurred on Sunday have an impact on the computation of the subject time period?

BRIEF ANSWER NUMBER 11. No. The subject time period is calculated on a calendar rather than business or work day basis.

ISSUE NUMBER 12. If the Council functions with only eight (8) members, what impact does that have on the Council's ability to conduct the business of the City?

BRIEF ANSWER NUMBER 12. At least five (5) votes of the Council are required to conduct the business of the City. Some actions require two-thirds or four-fifths vote. An eight (8) member Council poses situations where four votes in favor and four votes opposing an action results in no action having been taken. This situation worsens if a member of the Council is absent or abstains from voting.

BACKGROUND

As a result of the death of Mayor Joe Serna, Jr. on November 7, 1999, which created a vacancy in his office, you have requested that I respond to the above-referenced questions. These questions, some of which have also been asked of me and the City Clerk, are relevant to events that may require Council action under provisions of the City Charter.

More specifically, several inquiries have been made as to what occurs and the timing of such occurrence in the event that the Office of Mayor is vacated. These inquiries included calculation of the time period the Mayor would be required to serve in office to avoid a special election, the timing for calling a special election and which members are eligible for a special election.

ANALYSIS

The answers to most of the issues raised herein are clearly set forth in the Sacramento City Charter. However, some of the answers, especially the answer to the first two questions above, requires interpretation of various sections of the Charter and significant review of state

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law. The Charter provisions that bear directly on the answers provided herein are set forth in numerical order as follows: Charter Sections 28, 30, 31, 43, 45, 46, 153 and 154. These sections will hereafter be referred by "Section number" without use of the word "Charter."

The Mayor's current term of office will expire on or about the third Tuesday in November, 2000 or November 28, 2000. However, the critical language that impacts the determination as to whether a special election is required is found in Section 46, which, in pertinent part, reads:

A vacancy in the office of the mayor shall be filled by special election . . .
unless such vacancy occurs within one year of the next general election at
which the office of mayor would normally be filled

At first appearance, the language seems to be rather clear and unambiguous. It is rather easy to opine that a vacancy in the Office of Mayor occurring on November 6, 1999, requires a special election, and that a vacancy occurring on November 8, 1999 affords the remaining members of the Council the opportunity to appoint an Interim Mayor. However, arriving at an opinion in this case is difficult because of the Mayor's death, which gave rise to the vacancy, on November 7, 1999, exactly 365 days or one year from the next election. The vacancy actually occurred 367 days prior to the next election but, as shown below, we are required to adjust the days back to 365 days.

Prior to discussing factors which led to the opinion that the vacancy did not occur within one year of the next election, it is important to note that three factors were considered and rejected immediately. First, the pivotal language does not state that the vacancy must occur "within one year *of the date* of the next election." Pursuant to Government Code Section 6806, a day is the period of time between any midnight and the midnight following. Although, the definition of a day will become important later, I do not believe it is critical within the context of this first issue. The omission of the phrase "*of the date*" creates an interpretation issue as to whether the drafters and voters intended to use the time of the election itself (less than a full day) as the event for calculating the precise time at which the vacancy must precede or follow. The language in the Charter could be interpreted to mean the commencement or the conclusion of the actual election rather than the beginning of the date on which the election will be held. Research revealed a non-election case, which dissects the day into hours and fixes an event to a particular hour of a day where the use of such an intent is manifest. See Scoville vs. Anderson (1901) 131 C 590 in which the court held that a certain act occurred within a month when that act occurred on January 24 at 12:30 p.m. and the month would have come to an end on February 24 at 4:20 p.m. In Section 31, the Council is required to hold a meeting after 5:00 p.m. weekly to afford working citizen an opportunity to address their elected officials. Had the drafters or voters desired to state a precise time within a day at which the vacancy must occur, they could have easily so stated. Thus, I concluded that the drafters and voters did not intend to select such a precise time.

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The second factor, considered and dismissed prior to arriving at my decision, is the fact that a year is 365 days and year 2000 is a leap year. Government Code Section 6803 defines a year to be a period of 365 days. In elections matters, the Secretary of State counts a leap year as 366 days and more than one year. If an election time period fell on the 29th of February, and the required act was performed on that date, it would be timely. Most of the election matters handled by the Secretary of State are based on day counts, (e.g., 35 days prior to the election date) as opposed to the year count as in our case. In addition, Section 6803, provides that when determining what constitutes a 365 day year, the leap year date shall be merged into the day before so as to maintain the 365 day year. In our situation, the leap year date was deleted from the calculations.

The final factor considered and dismissed is the language of the subject Charter section which commences with the premise that there will be a special election, then moves to the alternative of an appointment upon the occurrence of a qualifying act. It could be argued that the drafters and the voters wished to give greater weight to the first part of the language because it reserved to the voters the first option of a special election. I found no indication of a specific intent of the drafters or the voters in this regard. Thus, I rejected this potential argument as a deciding factor. However, as discussed below, some significance was given to the order of special election and appointment.

This brings us to the central issue, the requirement that a vacancy must occur *within one year* of the next election to prevent the call of a special election. This phrase in general, and the word "within" in particular, hold the elusive key to the answer. It is important to find the meaning of the word "*within*" which the drafters and voters intended to give it. When interpreting statutes, it must be presumed that the Legislature intended each and every word or phrase to have some meaning and serve some useful purpose. *People vs. Collins* (1969) 273 Cal.App. 2nd 1.

As stated above, my repeated calculations from November 7, 1999, to November 7, 2000, (after deletion of the leap year day) led me to the conclusion that the Mayor's death occurred on the 366th day of the next election. This would be within the period for a special election. However, the analysis does not stop here because Code of Civil Procedure Section 12 and Government Code Section 6800 provide that the time in which an act is to be done is computed by excluding the first day and including the last to arrive at the precise time period.

To apply this computation formula to our facts, we would determine the Mayor's death to be the first day and exclude it because we cannot exclude the fixed election day. Therefore, counting forward to November 7, 2000, after excluding the leap year day and the date of the Mayor's death, brings us to 365 days. As specified above, 365 days equals one year. In and of itself, the 365th date is neither within a year or outside a year. Yet for our purposes it must be considered either within the time for a special election or within the time for appointment. Conversely, it is either outside of the time for special election or outside the time for appointment since a thing can exist and not exist at the same time.

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Arguments could be made on both sides of the issue and they would seem to have equal support. Thus, I turned to the Code of Civil Procedure Section 1859, which provides that, in the construction of a statute the intention of the Legislature is to be pursued. Although this statute uses the term "Legislature," it is also applicable to City Charters. See San Diego vs. Atlas Hotels, Inc., (1967) 252 Cal.App. 2d 591 where the court applied this section to San Diego's City Charter. Section 1859 alone did not provide the answer. So I next turned to the Dictionary for assistance. Webster's defines "within", as - to the inside of or being inside. This definition leads to the conclusion that 365 days equaling one year is not "within" a year. The event would have to occur at least one day short of that time period or on the 364th day of the next general election to be inside a year. Next, I turned to Black's Law Dictionary which defines "within" as - in inner or interior part of, or not longer in time than; inside the limits of; any time before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than; embracing the last day. This definition is consistent with or the same as Webster with one exception. Black's seem to indicate that "at" also means "within."

This led to the search for decisions which have interpreted "within" and the manner in which the term was used and interpreted. Research revealed non-election statute of limitation cases which arrived at the conclusion that the 365th day when moving toward the expiration of a time period is still "within" that time period. In Wixted vs. Fletcher (1961) 192 Cal.App. 2d 706, the court held that where a statute of limitation required the filing of a lawsuit "within" one year of the date of injury, a filing on the anniversary of the date of injury was *within* the one year time period. In Wixted, the injury occurred on February 5 and the action was filed the following February 5. The court excluded the first day and included the last day. The facts in Wixted appear to be similar to our facts, namely, the next election occurring on November 7, 2000, and the Mayor's death occurring on November 7, 1999. However, the party in Wixted was always *within* the one year time period for filing and could move outside that period of time by not acting timely. In addition, there was no other time period in progress prior to the occurrence of the injury in Wixted. Conversely, in our case, the required act was initially outside the required time period for appointment and had to move within that time period to become a qualifying act. Further, we have two time periods to consider, whereas Wixted involved only one of our time periods, the one relating to special elections, was in progress prior to arriving at the 365th day. Following the Wixted analogy of remaining within the time period in progress when arriving at the 365th day, we arrive at the conclusion that the Mayor's death occurred within the special election time period and not within the appointment time period. I view the impact of the Wixted and other statute of limitation situations as extending, not shortening, the time period which the acting party is already within by eliminating the first day of the computation period. The Court explained this point in footnote 1 by stating:

One of the grounds most frequently advanced is that the computation of time should be so made to protect a right and prevent a forfeiture if this can be done without violating a clear intention or a positive statutory provision . . . Still another theory of excluding the day is to treat it as an indivisible point of time only, and to regard any act done in the compass of it as no more referable to any one than to

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another portion of it. The act and the day are considered coextensive, with the result that the act cannot properly be said to pass until the day is passed.

This footnote language supports the conclusion that unless the vacancy occurred on or after November 8, 1999, we remain in the special election time period. It measures and protects the right of the voters to vote on the office of the Mayor at a special election. However, by necessity, this conclusion means that the Council's right to appoint an Interim Mayor is forfeited. Perhaps a court would conclude that there is no meaningful difference in these positions and the excluded date may be used to shorten, as well as extend the time for a required act. Reasonable minds could differ and apply the *Wixted* decision, in a different manner so as to come to the opposite conclusion. If it were not for the fact that we have two time periods (one for the special election and the other for the appointment), and that we must be in one time period or the other at all times, and never in both such periods at the same time or in neither time period at the same time, I could have come to the same conclusion in *Wixted*. The Council could interpret this differently to include that the Mayor's death occurring on the 365th day prior to the next election fell within the prescribed time period to appoint his successor. However, this case could also be interpreted to add a day to the required time period. That would move us in the direction of the requirement of a special election rather than away from it because that would add a day to the time in which the vacancy must occur. If this is deemed to be a sufficiently gray area, courts usually err on the side of caution to afford the voters the opportunity to express their will.

1. Based on the foregoing, it is the opinion of the City Attorney that the last full day the Mayor was required to serve in office to avoid a special election to fill his unexpired term was one day or fraction of that day less than one year of the next general election. The office will be filled at the general election which occurs on November 7, 2000. Therefore, the one day or a fraction of that day less than one year of the next election occur on November 8, 1999. Thus, the Mayor was required to serve in office until at least a fraction of time after midnight on November 7, 1999, to avoid the requirement of a special election.

2. The City Council is *required* by Section 46 to call a special election if a vacancy occurs prior to midnight, November 7, 1999. When Section 46 is read in conjunction with Section 154, it is clear that the Council has a mandatory duty to call a special election when the specified vacancy occurs. Such a special election must be called and conducted as soon as practicable but in no event later than fourteen (14) days after the office becomes vacant. Again, the language of Section 154 is mandatory and leaves the Council no other options if a vacancy occurs prior to midnight, November 7, 1999.

3. A member who is seeking election to a Council office during the upcoming primary election may also seek election to the Office of Mayor for the remainder of the unexpired term. According to the Charter and state law, a member is prohibited from seeking the same office at the same election or hold two separate offices simultaneously. However, a special election and

a primary election for the same office are not within this prohibition because the elections are deemed to be separate elections and for different time periods for the same office.

4. The response for number 3 is also fully applicable here. A member may seek both the Office of Mayor at the primary election and to fill the current unexpired term of Mayor in the special election.

5. The response to the previous issue will not change if a member is elected outright in the primary to either a full term as Council member or as Mayor. See answer 3 for further explanation.

6. I do not recall an occasion where the Council has elected one of its members to serve as Vice-Mayor for two consecutive terms during the past twenty plus years. Thus, it has an established past practice of electing a new Vice-Mayor each year. This notwithstanding, the Council is not legally precluded from electing a Council member to serve two or more consecutive terms as Vice-Mayor. See Section 45.

7. If the Vice-Mayor holds office as Acting Mayor, it is not necessary for the Council to take further immediate action regarding the current vacancy. The elected Vice-Mayor is already empowered to act as Mayor until December 31, 1999. The Council is required to elect a Vice-Mayor at its first meeting in January 2000. See Section 45.

8. While the Council is operating with a Vice-Mayor acting as Mayor, it is permitted but is not required to appoint a Mayor Pro Tem to provide backup to the Acting Mayor. It is recommended that this course of action be undertaken immediately and again at the first meeting of January 2000. The Mayor Pro Tem will serve until the special election. The Vice-Mayor will continue to serve for the remainder of the Year 2000. See Section 45.

9. If a current Council member is elected to fill the unexpired term of the Mayor, the manner in which that member's seat is filled will depend on the time remaining on that member's unexpired term. Similar provisions applicable to a vacancy in the Office of Mayor apply to a vacancy in the Office of Council. Thus, the Council could leave the Council Office vacant or appoint someone to fill it if the vacancy occurs within one year of the next general election to fill that office.

10. State law provides that special elections may not occur in less than eighty-eight (88) days nor more than one hundred and three (103) days after the call of the special election. In addition, the Charter provides that special elections must be called as soon as possible but not later than fourteen (14) days following the vacancy. The last date to meet these time periods is December 9, 1999. However, the City Clerk requires time for a nomination period, time to place the matter on the agenda, and time to arrange the elections with the Court Registrar of Voters. The Clerk has assured that there is adequate time to consolidate a special election on

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the ballot with the upcoming primary election at a substantial cost savings. The City Clerk is prepared to provide time calculations and election costs figures.

11. The fact that the Mayor's death occurred on Sunday as opposed to a week day has no bearing on the computation of the relevant time period. The time period is clearly set forth in the City Charter. There are occasions when an act required by law falls on a holiday or weekend and the time period is adjusted. In such situations, the time period is always extended to allow the required act to be performed on the next business or work day. Such method of computation does not apply to this situation. Even if it did apply, it would work in favor of the requirement of a special election by extending the time period to Monday, November 8, 1999, rather than reducing it to another date.

12. While Council is functioning with only eight (8) members, this situation could impact the Council's ability to conduct the business of the City. The Charter requires five (5) votes to conduct the business of the City. Some actions require two-thirds or four-fifths vote. An eight (8) member Council poses situations where four votes in favor and four votes opposing an action results in no action having been taken. This situation is made worse if a member of the Council is absent or abstains from voting.

CONCLUSIONS

The conclusions to the issues presented are set forth in detail above and do not warrant repeating in this part of the opinion. However, should you find any of the above in need of further explanation, or have additional clarifying questions, please do not hesitate to contact me at your earliest convenience.

SLJ/gcm

c: Acting Mayor/City Council
City Clerk
City Treasurer