



CITY OF POMONA COUNCIL REPORT

October 1, 2018

To: Honorable Mayor and Members of the City Council

From: Linda Lowry, City Manager

Submitted by: Arnold Alvarez-Glasman, City Attorney

Subject: **City Council Vacancy for District Four and Consideration of Re-appointment of Councilmember Ontiveros-Cole and Request for Additional Information**

SUMMARY

Recommendation – The City Council should reappoint Councilmember Elizabeth Ontiveros-Cole or provide other direction with respect to filling the District 4 vacancy.

Fiscal Impact – There will be no cost to the City to reappoint, as Councilmember Ontiveros-Cole's retirement benefits will be paid by Pomona Unified School District (PUSD).

Should the City choose to call a special election to fill the vacancy, the estimated cost would be \$153,000. The estimated cost of a stand-alone election for District 4 called by the City Clerk as required by the City Charter is unknown at this time.

Previous Council Action – On September 17, the City Council continued this matter to the October 1, 2018 meeting in order to have certain questions addressed which were raised by members of the City Council.

DISCUSSION

The California Public Employees Retirement System (CalPERS) provides retirement benefits for employees of public agencies which contract with CalPERS to administer such benefits. The City of Pomona contracts with CalPERS to provide its retirement benefits, as does Pomona Unified School District (PUSD) for its non-credentialed employees. Councilmember Ontiveros-Cole was formerly employed full-time by PUSD.

Councilmember Ontiveros-Cole elected to separate from full-time employment with PUSD effective May 5, 2018, after 25 years of employment. Because her PUSD retirement benefits are

through CalPERS, in order for her to receive her earned retirement benefits from PUSD, she must separate from all employment covered by CalPERS for at least one day. This means she required to also resign as a member of the Pomona City Council and retire from the City of Pomona, due to CalPERS' legal requirements.

Councilmember Ontiveros-Cole resigned from the City Council on September 11, 2018, and the effective date of her retirement from the City of Pomona was September 12, 2018. She has requested that the City Council re-appoint her to her unexpired term.

Any portion of her retirement associated with the City of Pomona will be suspended if she is re-appointed to the City Council. In addition, she will not be eligible to earn any future CalPERS service credit.

At the September 17, 2018 Council Meeting, the issue of reappointment of the District 4 seat was discussed. The City Council requested that questions regarding this matter be brought back for further discussion.

Responses to Questions from Councilmembers

What do other cities do in addressing vacancies? There is no set process or legal requirements established by the California Government Code, the Pomona City Charter or Municipal Code, other than time deadlines, which defines a specific procedure to following in filling a vacancy. The City Attorney, in serving as City Attorney in numerous other cities, has been involved in approximately 10 to 12 vacancy processes. By law, a Council vacancy must be filled, either by appointment or election. Cities vary on whether there is an application process, with or without interviews, or merely a person is selected to fill the vacant seat without applications or interviews. Over the past 30 years, with the exception of the re-appointment of Councilmember Carrizosa, the City of Pomona has followed an application and interview process in filling prior Council District vacancies.

Can someone file a legal challenge to the re-appointment or the appointment process followed by the City Council? Yes, but not against the City. A case would be filed as a *Quo Warranto* action against the appointed individual to challenge their ability to hold office. Such action requires authority from the Attorney General to file such suit, and the first step would be to review the process regarding the appointment. A City Council maintains ultimate authority to fill any vacancy in any manner they deem appropriate when there is no statute, charter or ordinance which governs the vacancy appointment process. As stated above, there are no rules or laws which govern the appointment process (i.e. applications and/or interviews). However, while there is a specific process to be followed, if the City Council *does not* appoint within 30 days from the date of the vacancy, the vacancy must be filled by election.

Timing of the resignation? CalPERS regulations require at least one day between retirement from a CalPERS entity and the reinstatement to an elected position that is covered by CalPERS retirement. The date of resignation was September 11, 2018 and the date of retirement from the City of Pomona was September 12, 2018. Both of these dates were controlled and decided by Councilmember Ontiveros-Cole, and were well past August 8, 2018, the last day to call for an election to fill a vacancy in the City Council, in the event one existed.

In order for the timing for a special election to fill a vacancy to have coincided with the November 6, 2018 general municipal election, the notice of resignation would have needed to be submitted to the City Council no later than August 8, 2018 in order to give time for the City Clerk to call for a special election, which is required to take place no sooner 90 days and not later than 120 days following the vacancy, in the event the City Council did not fill the vacancy by appointment.

City's Options

While Government Code Section 36512, requires that a City Council must either appoint to fill the vacancy or call for a special election within sixty (60) days from the date of the vacancy. Pomona City Charter Section 403 (c) requires an appointment to occur within thirty (30) days of the vacancy or if no action is taken to fill the vacancy, the City Clerk must call for a special election. The last date for the City Council to take action without the City Clerk calling for an election is October 11, 2018. Due to the timing of the resignation and the upcoming November City Council Elections, filling the vacancy at the November election at this time is not possible. If the City Council does not make an appointment there appears to be no prohibition from the City Council to act to call for a special election and to apply the timelines set forth in the Government Code.

Therefore, the City Council's options at this time are:

- (1) accept the request from Councilmember Ontiveros-Cole and re-appoint her to the unexpired term;
- (2) appoint another qualified District Four resident to fill the unexpired term;
- (3) the City Council can call for a special election pursuant to the Government Code for March 5, 2019, to fill the vacancy until November 2020; or
- (4) take no action prior to the October 11 deadline and thus requiring the City Clerk to call for special election to occur between December 10, 2018 and January 9, 2019 pursuant to Charter section 403(c) to fill the vacancy until November 2020.