



MUNICIPALITY OF ANCHORAGE

MEMORANDUM

DATE: OCTOBER 16, 2020

TO: ANCHORAGE MUNICIPAL ASSEMBLY

FROM: KATHRYN R. VOGEL, MUNICIPAL ATTORNEY *KRV*
DEAN T. GATES, ASSEMBLY COUNSEL *DG*

SUBJECT: OPTIONS FOR COMPLYING WITH ANCHORAGE MUNICIPAL
CHARTER § 7.02(C) TO FILL A VACANCY IN THE OFFICE OF MAYOR

QUESTION: What are the Assembly's options for filling the vacancy created by Mayor Berkowitz's resignation effective October 23, 2020?

SHORT ANSWER: The Anchorage Municipal Charter requires the Assembly to fill the vacancy in one of three ways: (1) through a special election to be held on or after Thursday, January 21, 2021 to elect a new mayor to serve until June 30, 2021; (2) through a regular election to be held on April 6, 2021 to elect the next mayor who would take office on July 1, 2021, similar to past practice; or (3) through the regular election to be held on April 6, 2021 but seating the successor at some earlier date to be provided in Code. (This requires a simple Code amendment, which should be adopted soon if this option is desired.)

The Chair of the Assembly will serve as "Acting Mayor" in the interim, and return to the assembly as chair once the successor mayor has taken office. Performing as acting mayor does not create a vacancy in the assembly chair's elected seat.

CHARTER PROVISION: The Anchorage Municipal Charter, Section 7.02(c) provides:

(c) A vacancy in the office of mayor shall be filled at a regular or special election held not less than 90 days from the time the vacancy occurs. If less than 90 days remain in the term when the vacancy occurs, the vacancy shall not be filled. When a vacancy occurs in the office of mayor, the chair of the assembly shall serve as acting mayor until a successor is elected and takes office. The acting mayor has the veto power, but may not vote on assembly action. The assembly by ordinance shall provide for further succession to the office of acting mayor.

DISCUSSION: For only the second time in the history of the Anchorage Municipality, the office of mayor will soon be vacant.¹ The charter provision that governs the vacancy leaves unanswered key details about how to respond to the vacancy, making those matters for the Assembly to decide.²

I. Charter Analysis

In this memorandum we analyze Anchorage Municipal Charter Section 7.02(c) using standard tools of constitutional interpretation, looking primarily to the plain meaning of the provision in the context of the Charter as a whole, and then considering the discussion within the charter minutes, past interpretation of the provision including in any court decisions, and state law parallels.³

A. The plain language of the Charter gives the Assembly some flexibility regarding an election date for a successor.

To provide the plain language analysis, we examine each of the first three sentences of Section 7.02(c) in turn.

A vacancy in the office of mayor shall be filled at a regular or special election held not less than 90 days from the time the vacancy occurs.

By its terms, this first sentence of Section 7.02(c) provides an instruction to fill a mayoral vacancy through an election. It forbids the election from happening too close in time to the vacancy, requiring that it be held “not less than” 90 days from the vacancy. The Charter only prohibits acting too quickly, it does not expressly place an outer time limit on the election. Finally, the provision states that the vacancy can be filled at either a regular or a special election.

The language of this sentence stands in contrast to charter provisions filling other vacancies. The Charter does not allow the option of special elections for school board members, but instead mandates an appointed replacement until a successor is elected at the next regular election.⁴ With respect to a vacant assembly seat, a temporary appointee is optional and an elected replacement is selected at “the *next* regular or special election”

¹ The first time was in 2009 when Mark Begich resigned on January 3, 2009 in advance of taking office as a U.S. Senator. A vacancy was also contemplated when Mayor Dan Sullivan ran for Lt. Governor in 2014. Sean Doogan, *Anchorage Charter Clear as Mud When it Comes to Replacing Mayor*, Anchorage Daily News (March 2, 2014), <https://www.adn.com/anchorage/article/anchorage-charter-clear-mud-when-it-comes-replacing-mayor-who-leaves-office/2014/03/03/>

² The assembly has the power to call special elections. AMC 28.20.010.B.

³ See *Wielechowski v. State*, 403 P.3d 1141, 1146-47 (Alaska 2017) (“Our analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself.”).

⁴ Anchorage Municipal Charter 7.02(a). Prior to a 1984 amendment, this appointment provision applied to assembly members as well as school board members.

(a qualifier absent in the mayoral vacancy provision).⁵ The Assembly’s discretion on when to hold an assembly member election is defined to prevent acting too slowly rather than too swiftly, requiring a special election within 60 days of the vacancy, “if the vacancy occurs more than six months before the next regular election.” That said, if an assembly seat rather than the mayor’s seat was vacant today, the provision would steer the Assembly towards filling the seat at the April 6, 2021 election because that is less than six months away.⁶

If less than 90 days remain in the term when the vacancy occurs, the vacancy shall not be filled.

The second sentence of Section 7.02(c) explains that the Assembly should not hold an election for a mayoral vacancy if less than 90 days remain in the term when the vacancy occurs. This provision does not apply here because more than 90 days remain in the current mayoral term, which ends June 30, 2021.

When a vacancy occurs in the office of mayor, the chair of the assembly shall serve as acting mayor until a successor is elected and takes office.

This third sentence of 7.02(c) provides that the Chair of the Assembly serves as the acting mayor between the date of the vacancy and the date, after an election, when a successor takes office.⁷

B. Contemporaneous documents do not narrow the plain meaning.

The minutes of the charter convention can sometimes be useful for interpreting ambiguous provisions, but generally are less important than the plain meaning that the

⁵ Anchorage Municipal Charter 7.02(b) (emphasis added). The full provision reads: “If a vacancy occurs on the assembly, the remaining members may appoint a qualified person to fill the vacancy within 30 days. The person appointed shall serve until the next regular or special election, at which time a successor shall be elected to serve the balance of the term. If the vacancy occurs more than six months before the next regular election, the assembly shall provide for a special election to fill the vacancy not more than 60 days after the occurrence of the vacancy. If less than 30 days remain in a term when a vacancy occurs, the vacancy shall not be filled. However, if at any time, the membership is reduced to fewer than a quorum, the remaining members, within seven days, shall appoint a number of qualified persons sufficient to constitute a quorum.”

⁶ Six months from October 23, 2020 is April 23, 2020.

⁷ The Charter Commission commentary at the end of the document clarifies that “[i]t is intended that the acting mayor cease to function as an assemblyman during his tenure as acting mayor. However, when the office of mayor is filled by election, the acting mayor reverts to his status as chairman of the assembly in all respects.” Charter Commentary § 7.02(b) [sic].

voters likely gave to the words when they ratified the charter.⁸ Here, we reviewed the charter minutes concerning vacancies and did not find them particularly helpful.⁹ We did not locate clarifying substantive explanation of the language chosen for the first sentence, which applies when the vacancy is longer and would have been more relevant to today's analysis.

C. Past practice avoided a special election and seated the successor at the regular time.

The only other mayoral vacancy that has occurred in the Municipality (and thus under the relevant charter provisions) occurred when Mark Begich resigned effective January 2, 2009 to become a U.S. Senator.¹⁰ Mayor Begich's resignation was 94 days before the regular mayoral election held Tuesday, April 7, 2009, and 180 days before the July 1, 2009 end of the mayoral term. Assembly Chair Matt Claman served as acting mayor during that entire vacancy—from January 3, 2009 through July 1, 2009.¹¹ Dan Sullivan was elected in the regular election that year, and took office on July 2.¹²

We have not located any legal opinions explaining the decisions regarding the vacancy¹³. A newspaper article quoting Matt Claman from several years later stated that the decision was made in order to avoid the high costs of a special election.¹⁴

⁸ *Wielechowski*, 403 P.3d at 1146 (“Because of our concern for interpreting the constitution as the people ratified it, we generally are reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning.”).

⁹ On May 3, 1975 there was a discussion about mayoral vacancy, especially around the second sentence of what became Section 7.02(c) that discussed that the head of the assembly would serve up to 89 days as acting mayor under that provision. Anchorage Charter Commission Meeting, May 3, 1975 at Tape 1 of 3, Side b, 7:50, audio available at Municipal Attorney's Office (note slight discrepancy in days between audio and written minutes which quote members as saying “90 days”). Some of the discussion concerning this provision appears to characterize the Charter provision as requiring an election within 90 days, which contradicts the plain language that was eventually put before the voters.

¹⁰ See “Honor Roll of Anchorage Assembly Members”, available at <http://www.muni.org/Departments/Assembly/Clerk/Elections/Pages/ResultsAndHistory.aspx>

¹¹ *Id.*

¹² *Id.*

¹³ We checked the records of the Municipal Attorney's Office and those of Assembly Counsel.

¹⁴ Sean Doogan, *Anchorage Charter Clear as Mud When it Comes to Replacing Mayor*, Anchorage Daily News (March 2, 2014), <https://www.adn.com/anchorage/article/anchorage-charter-clear-mud-when-it-comes-replacing-mayor-who-leaves-office/2014/03/03/>.

D. State law on mayoral vacancies does not apply to Anchorage as a home rule municipality but would require other municipalities to wait to fill the vacancy at a regular election if one is within six months of the vacancy.

The state law provision on vacancy in the office of mayor, AS 29.20.280, does not apply to home rule municipalities, and therefore does not supersede our charter. It is a helpful persuasive source for discussion purposes. For general law and first class municipalities, however, state law provides:

A vacancy in the office of mayor occurring six months before a regular election shall be filled by the governing body. The person appointed serves until the next regular election when a successor is elected to serve the balance of the term. . . . If a vacancy occurs more than six months before a regular election, the governing body shall call a special election to fill the unexpired term.¹⁵

We are less than six months before the regular election, so if this provision applied we would be instructed to wait until the next regular election to fill the vacancy.

II. Options

A. Special Election

If the Assembly chooses a special election, it should consider a date towards the beginning of the allowable timeframe. Ninety days after the Mayor's announced resignation date of October 23, 2020 is January 21, 2021.¹⁶ If the first ballot on the special election does not have any candidate with at least 45 percent of the vote, a runoff election will need take place.¹⁷ Factoring the length of time it takes to certify the special election results and up to 3 weeks to hold a runoff election, this would place the runoff election near the end of February at the earliest, close in time to the regular mayoral election.¹⁸ If the date selected for the special election is too late, ballots for the regular election could be getting sent out around the same time that the runoff election is underway. Selection of a special election date at the early side of the allowable timeframe would help prevent overlapping ballots that could confuse voters.

The official would take office following certification and serve until the next term begins on July 1, 2021. The elected official would by law be permitted to serve two additional three-year consecutive terms, if elected to do so, because Alaska Supreme Court precedent provides that serving a partial term does not count against term limits.¹⁹

¹⁵ AS 29.20.280(b).

¹⁶ This date falls in the middle of the period for filing declarations of candidacy for the regular election April 6, which opens January 15 and closes January 29. AMC 28.30.030.

¹⁷ Anchorage Municipal Charter § 11.02(b).

¹⁸ See AMC 28.20.010.D (requiring a runoff election to be held not more than 30 days after certification of special election). There is a pending Assembly Ordinance, AO 2020-140, to reduce the time for the run-off election from four weeks to three, which would be consistent with the Charter.

¹⁹ *Municipality of Anchorage v. Mjos*, 179 P.3d 941, 944 (Alaska 2008) (analyzing assembly member term limit provision very similar to mayoral term limit provision). *Also*

B. Regular election held on April 6, 2021 to seat successor on July 1, 2021.

If the Assembly chooses to wait for the regular election, it should determine what to do about filling the remainder of the current mayoral term. The Assembly could take the approach taken during the transition of Matt Claman/Dan Sullivan and have the winner of the regular election take office as normal at the start of the next term. This method of filling the vacancy without having the next official serve any of the vacant term happens in school board vacancies whenever the vacancy occurs in the last year of a member's term, and assembly vacancies when the vacancy occurs within six months of the election held at the end of the member's term. It also provides for the full transition period prescribed by AMC 3.20.030.

C. Regular election held on April 6, 2021 to seat successor sooner than July 1, 2021.

There currently are no targeted code provisions that implement Charter Section 7.02(c)'s process for filling mayoral vacancy at a regular (or special) election.²⁰ The Assembly could fill that gap through an ordinance, and provide for an alternate start date and clarification that a regular mayoral election held when the office of mayor is vacant will result in a more immediate assumption of office prior to the start of the July 1 term, such as upon certification of the election or X days after certification to allow a short transitional period. This would more plainly provide meaning to the requirement to "fill the vacancy" at the regular election because the official would serve part of the current mayoral term. The ordinance would need to make clear that consistent with precedent, serving this portion of a predecessor's term would not count against term limits or limit the ability of the mayor-elect to serve a full three-year term ending June 30, 2024.²¹

CONCLUSION: The Charter provides multiple acceptable paths for fulfilling its requirements. The options are all legally defensible but may have varying degrees of legal risk if challenged in court. Filling the vacancy with a special election held January 21, 2021 or later is allowed. Waiting for the regular election, which is less than six months away, to fill the vacancy is also allowed. And the assembly may choose to provide in code, for an alternative start date for a mayor elected at the regular mayoral election during a period of vacancy.

see Anchorage Municipal Charter 4.02(e): "(e) A person who has served on the assembly for three consecutive terms may not be reelected to the assembly until one full term has intervened."; *Cf.* Charter 5.01(d) "(d) A person who has served as mayor for two consecutive terms may not be re-elected to that office until one full term has intervened."

²⁰ *But see* AMC 3.20.030 (discussing transition period for mayor elect following regular municipal election).

²¹ *See Mjos*, 179 P.3d at 944.