



Rent Stabilization Board  
Legal Department

## MEMORANDUM

**DATE:** February 6, 2017  
**TO:** Rent Board Commissioners  
**FROM:** Jay Kelekian, Executive Director  
Matt Brown, Staff Attorney  
**SUBJECT:** Selection and Appointment to Fill Vacancy on the Rent Stabilization Board

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### ISSUE:

Rent Board Commissioner Katherine Harr, whose term of office ends November 30, 2018, resigned effective January 30, 2017. How is this vacancy to be filled?

### CONCLUSION:

A successor to complete Commissioner Harr's term will be elected at the general election in November of 2018. In the interim, the Rent Board must, at a regular Board meeting, after proper notice of its intent to fill the vacancy, appoint a successor to serve until that November election.

### ANALYSIS:

#### *I. Charter Requirements*

Commissioner Harr was elected in 2014 to a four-year term that expires November 30, 2018.

Section 12.2 of Article V of the City Charter controls the filling of a vacancy on the Rent Board. Section 12.2(1)(a) instructs that, if a vacancy occurs on the Board, "[a]n election shall be held at the next feasible general municipal election to elect a successor." The next occurring general

municipal election will be held November of 2018.<sup>1</sup> The next general election is almost two years from now, so there is sufficient time to nominate and elect a successor within the time limits prescribed by the Election Code and, therefore, it is feasible to elect a successor to Commissioner Harr at the November 2018 election.

The Charter also provides that, before a successor is elected by the electorate, the remaining members of the Board shall appoint a successor to serve until the next general municipal election. The interim appointment must be made at a regular Board meeting and the intent to fill the vacancy must have been placed on the meeting's agenda. The term of the appointed interim Commissioner expires on the November 30<sup>th</sup> immediately following the general municipal election at which the successor is elected. Thus, at a regular meeting after giving proper notice, the Board must appoint an interim successor to serve in Commissioner Harr's stead until November 30, 2018. If the Board feels prepared to do so, it may make a selection this evening because proper notice has been given of that possibility. Alternatively, the Board may discuss and determine the process it wishes to follow to make the interim appointment.

Apart from the requirements that there be reasonable notice by placement on a regular meeting agenda, neither the City Charter nor the Rent Stabilization Ordinance set out a specific procedure for the appointment of an interim Commissioner. Article XVII Section 123(5) of the City Charter, however, requires a vote of five Commissioners for the Board to take any action. Also, the vote cannot be by secret ballot, but must be by voice or a show of hands. (California Government Code §54953(c).) Otherwise, the Board is free to establish its own procedures for making the appointment of any qualified "elector".

The Board has made appointments to fill vacant seats in the past; most recently filling Commissioner Jack Harrison's vacated seat in April of 2010. To fill Commissioner Harrison's seat, the Board formed an Ad Hoc Search Committee. The Ad Hoc Committee drafted a written recommendation to the full Board at the April 19, 2010 meeting, and Commissioner Katherine Harr was ultimately selected by the Board. As mentioned previously, since the Board has already given proper notice, the Board may make a selection this evening or it could choose to follow past protocol and form an ad hoc committee to bring a recommendation on either procedure or candidates to the full Board.

Finally, Article XVII Section 122(1) of the Charter establishes a four-year term of office for Rent Board Commissioners and provides that "Commissioners shall serve a maximum of two full terms." A full term is four years. The Alameda Superior Court has held that that serving a partial term did not preclude an individual from serving two full four-year terms. (Dadak v. Bryden, et al. (Alameda Co. Sup.Ct. No. 674043-8.)) Thus, a person who is either appointed to serve the interim of Commissioner Harr's term will remain eligible to serve two four-year terms on the Rent Board. However, the Board may not appoint any individual that has already served two full terms to serve any additional time on the Board.

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<sup>1</sup> Under the terms of the Charter, a general municipal election only occurs on the first Tuesday following the first Monday in November of even-numbered years. (Charter, Article III, §4.) Thus, under the Charter, any non-November election is considered a special election, not a general municipal election.

## *II. Possible Process for Selecting an Interim Commissioner*

Any Commissioner may nominate a candidate for appointment. Any person appointed to the Board must be a resident of Berkeley and registered voter. (City Charter, Article XVII, Section 121(1).) Once nominations are closed, the Board chair must conduct the election according to the agreed upon voting procedures. The first candidate to receive five votes will be appointed to the Rent Board. Before assuming office, the newly appointed Commissioner must take an oath of office. (City Charter, Article V, Section 18.)

There are no set rules for selecting and voting on a proposed interim Commissioner. The Board may wish to establish procedures for considering possible appointees and for making a selection from among candidates or this task could be delegated to an Ad Hoc Committee. I understand the Board Chair has developed a proposal for the Board's consideration. The last two times there has been a vacancy on the Board, the Chair has appointed an Ad Hoc Committee to vet potential candidates and make a recommendation to the full Board. This committee speaks with candidates and reviews their resumes.

The issue of how the full Board selects an interim Commissioner is a bit more complicated. When the Board has to make a simple yes/no decision on an issue there's really only one way: ask everyone whether they're for or against, and the majority rules. Complicated questions, however, often require a different approach. When choosing among several candidates for a single position many candidates may be acceptable, so the candidates who get voted on first generally have the advantage, because they might get chosen by a bare majority, while another candidate might be more popular but never have the question called regarding his/her candidacy. When the Board last selected an interim Commissioner in 2010, the Commissioners chose the following six step method as the most transparent and fair:

1. After reading the resumes of each of the applicants as well as the report from the Ad Hoc Committee, Board members ask the Committee members questions for clarification purposes.
2. All candidates that are present in the Council Chambers shall be given 3 minutes to introduce themselves to the Board. Board members may ask questions of any of the candidates present.
3. The question who the Board should select will be discussed among Board members. Board members may ask additional questions of the candidates, if necessary.
4. Upon conclusion of the discussion among Board members and questioning of candidates, the Board will hold an open straw vote to determine the candidates with the strongest support. The concept is that it is fairer to vote first on a candidate with the broadest support as several candidates may be acceptable to the Board. So that no Board member has a positional advantage, each member will write down his or her first and/or second choices in order on a slip of paper with the voting Commissioner's name at the top. Staff will then collect and read the name of the member and his or her selection(s), and

tabulate the votes on a chalkboard. The straw vote will determine the order in which candidates are voted on by the full Board but not be considered the final vote or action by the Board.

- The candidate with the greatest **total** votes (combined first and second place votes) in the straw poll would be the first person for the Board to formally consider. If that individual is not selected by the formal Board vote, the candidate with the next greatest number of combined first and second-place votes will be voted on second, and so forth.
- If any candidates have the same combined totals, the candidate with more first-place votes will be voted on ahead of the other candidate. For example, you have the following situation:

	1 <sup>st</sup> Place Votes	2 <sup>nd</sup> place votes	Total Votes
Candidate A:	4	3	7
Candidate B:	3	4	7
Candidate C:	1	1	1

In this scenario, Candidate A would be voted on by the full Board first, followed by Candidates B and C, if necessary.

- If any candidates tie both in first and second-place totals, a coin-flip will determine the order in which they get voted on.
- One scenario that requires clarification - Should any candidate receive five or more first-place votes (a majority of the Board) in the straw poll, but **not** receive the greatest number of total votes - will that candidate be voted on first or based upon where s/he stands in the total number of votes? For example, you have the following situation(s):

	1 <sup>st</sup> Place Votes	2 <sup>nd</sup> place votes	Total Votes
Candidate A:	7	0	7
Candidate B:	1	7	8
Candidate C:	0	1	1

Or

	1 <sup>st</sup> Place Votes	2 <sup>nd</sup> place votes	Total Votes
Candidate A:	5	0	5
Candidate B:	1	7	8
Candidate C:	2	1	3

There are arguments to be made on both sides of this "Passion or Consensus" debate and the Board must determine which approach it wishes to take prior to the straw poll.

5. If no candidate receives five votes during the direct voting by the full Board, the candidate who receives the fewest votes will be eliminated, and we will begin the process again, starting from the straw vote, with one fewer candidate. If there's a tie for fewer positive votes, the candidate with the weakest straw-vote total will be the one eliminated, following the above rules.

If the process runs to the end and even the last remaining candidate does not get five votes, the chair will open the floor for new nominations or other motions.

### **CONCLUSION**

Commissioner Harr's seat remains vacant. Therefore, at a regular Board meeting after proper notice, the Rent Board must appoint an interim successor to fill the vacancy until a successor is elected at the November 2018 general election. The Board must also decide how it wishes to structure the voting process.