



## AGENDA

### SPECIAL CITY COUNCIL MEETING

### CITY OF BANNING, CALIFORNIA

August 18, 2022

5:00 p.m.

**In Chambers and via Zoom**

Council Chambers  
99 E. Ramsey Street  
Banning, CA 92220

**REVISED AGENDA PUBLISHED AUGUST 17, 2022. A previous version of this agenda was issued on August 15, 2022.**

*The following information comprises the agenda for the regular meeting of the Banning City Council, a joint meeting of the City Council and Banning Utility Authority, and the Banning City Council sitting in its capacity as the Banning Successor Agency Board.*

***This meeting is being held via Zoom so that members of the public may observe and participate in this meeting electronically. If you participate in this meeting via Zoom, you are agreeing to abide by the City's Zoom Community Standards for Public Meetings (provided in full on the last page of the agenda). Esta reunión se lleva a cabo en la Cámara y a través de Video/Teleconferencia en Zoom para que los miembros del público puedan observar y participar en esta reunión de manera electrónica. Si elige participar en esta reunión a través de Zoom, acepta cumplir con los Estándares comunitarios de Zoom para reuniones públicas de la ciudad (que se proporcionan en su totalidad en la última página de la agenda).***

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**Meeting ID: 886 9861 3223  
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#### 1. **CALL TO ORDER**

Roll Call

#### 2. **PUBLIC COMMENT – Agenda Items Only**

#### 3. **REPORTS OF OFFICERS**

3.1. Receipt of Amended Resignation Letter from Kyle Pingree, Council Member for District 2.....**5**  
*(Staff Report: Doug Schulze, City Manager)*

**Recommendation:** Receive and file.

3.2. Response to Three Letters (The “Letters”) Dated August 10, 2022 and August 11, 2022 from Ms. Sheri Flynn, Mr. Kevin Bundy, and Ms. Shaila Nathu Asking that the City Council Cure and Correct an Alleged Violation of the Ralph M. Brown Act that Occurred at the City Council Meeting Held on July 12, 2022 and to Cease and Desist from the Same Violation in the Future [This Report was updated and revised on August 17, 2022 to address a Supplemental Letter from Mr. Kevin Bundy dated August 17, 2022. This updated and revised Report was posted on the City’s website not less than 24 hours prior the August 18, 2022 Special Meeting]..... 7  
(*Staff Report: Kevin Ennis, City Attorney*)

**Recommendation:** That the City Council respond to the Letters by approving the following City response letters: (1) Send response letter to Ms. Sheri Flynn in which the City Council corrects the misrepresentations of the record made by her Letter, and by which, the City Council commits to cease and desist from the alleged improper actions. (2) Send response letter to Mr. Kevin Bundy in which the City Council corrects the misrepresentations of the record made by his Letter, and by which, the City Council commits to cease and desist from the alleged improper actions. (3) Send response letter to Ms. Shaila Nathu in which the City Council corrects the misrepresentations of the record made by their Letter, and by which, the City Council commits to cease and desist from the alleged improper actions.

3.3. Rescission of July 12, 2022 Decision to Fill Impending City Council District 2 Vacancy by Appointment or Special Election; New Decision to Fill Impending City Council District 2 Vacancy by Appointment or Special Election; and Discussion of and Decision on the Next Steps and Timetable to Fill the Vacancy [This an updated and revised report from the version previously posted. This updated and revised report was posted on the City’s website not less than 24 hours prior to the August 18, 2022 Special City Council Meeting.]..... 15  
(*Staff Report: Doug Schulze, City Manager & Kevin Ennis, City Attorney*)

**Recommendation:** Staff respectfully recommends that the City Council: (1) Rescind its decision made on July 12, 2022, to fill an impending vacancy of the City Council District 2 office by appointment; (2) Start over to discuss, make a motion, and vote on a new action as to how to fill the impending vacancy of the City Council District 2 office, whether via appointment or special election, and if via appointment, the process for filling the vacancy by appointment; and (3) Provide direction to Staff on next steps for informing the public of the choice made by the Council, steps to be taken in furtherance of that choice, and the timetable for the filling of the vacancy.

3.4. Interviews for Impending Vacancy of City Council District 2 Office..... 20  
(*Staff Report: Doug Schulze, City Manager*)

**Recommendation:** Staff recommends that City Council, depending on the Council’s actions on the immediately preceding agenda items and if the Council decides to fill

Mayor Pingree's vacancy by appointment, interview candidates for the impending vacancy of the City Council District 2 office. The City Council may appoint one of the candidates at its next regular meeting on August 23, 2022, or direct staff to extend the recruitment process and fill the vacancy at a subsequent meeting.

#### **4. ADJOURNMENT**

##### **Zoom Community Standards for Public Meetings**

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- Your microphone must remain on mute, and you may only unmute your microphone when/if you are recognized by the Mayor.
- Your camera must be turned off unless/until you are recognized by the Mayor.
- To indicate a desire to make Public Comment, you must use the Raise Hand function. The Mayor will not recognize those who have not used the Raise Hand function.
- Public Comment from Zoom attendees will immediately follow in person comment from members of the public in Council Chambers.
- If you fail to adhere to these community guidelines, **you may be removed** for disrupting the meeting occurring in Council Chambers. You may rejoin the meeting but may be removed for each violation of these community standards.
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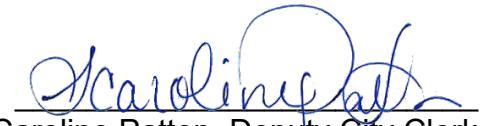
##### **Estándares comunitarios de Zoom para Reuniones Públicas**

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- Su cámara debe estar apagada a menos que sea reconocido por el alcalde.
- Para indicar el deseo de hacer un Comentario Público, debe utilizar la función Levantar la mano. El alcalde no reconocerá a quienes no hayan utilizado la función Levantar la mano.
- Los comentarios públicos de lo que atienden por Zoom seguirán inmediatamente los comentarios en persona de los miembros del público en las Cámaras del Consejo.
- Si no cumple con estas pautas de la comunidad, es posible que lo destituyan por interrumpir la reunión que tiene lugar en las Cámaras del Consejo. Puede volver a unirse a la reunión, pero es posible que lo eliminen por cada violación de estos estándares de la comunidad.
- La función de chat estará deshabilitada para todas las Reuniones del Ayuntamiento en Zoom.

## **AFFIDAVIT • DECLARACIÓN JURADA**

IT IS HEREBY CERTIFIED under the laws of the State of California that the above agenda was posted on the City's website ([www.banningca.gov](http://www.banningca.gov)) as well as the Bulletin Board at Banning City Hall, located at 99 E Ramsey Street, Banning, CA 92220 by 5:00 P.M. on the 17<sup>th</sup> day of August 2022.



Caroline Patton, Deputy City Clerk  
Secretario adjunto de la ciudad

## **PUBLIC NOTICE • NOTICIA PÚBLICA**

### **Meeting Agendas and Notices**

Interested in receiving email and/or text notifications of upcoming City Council meetings? Sign up for meeting notifications through Notify Me (<https://banningca.gov/list.aspx>). Pursuant to amended Government Code §54957.5(b), staff reports and other public records related to open session agenda items are available on the City's website ([www.banningca.gov/archive](http://www.banningca.gov/archive)).

### **Public Comment**

#### *Agenda Items*

Any member of the public may address this meeting of the City Council on any ***item appearing on the agenda***. A five-minute limitation shall apply to each member of the public and no member of the public shall be permitted to share their time with any other person. ***Special meetings do not have public comment periods for non-agenda items.***

### **Special Assistance/Accessibility Requests**

In compliance with the Americans with Disabilities Act, any member of the public may request that the agenda and agenda packet be mailed to them. If you need special assistance to participate in this meeting (such as translation services), please contact the Office of the City Clerk. Advanced notification of at least 48 hours prior to the meeting will allow the city to make arrangements to ensure your accessibility.

**¿Necesita servicios de traducción para participar?** Contacto Oficina del Secretario de la Ciudad.

## **CONTACT • CONTACTO**

Office of the City Clerk • 951-922-3102 • [CityClerks@banningca.gov](mailto:CityClerks@banningca.gov)  
99 East Ramsey Street, Banning, California 92220



## CITY OF BANNING STAFF REPORT

**TO:** CITY COUNCIL

**FROM:** Douglas Schulze, City Manager

**MEETING DATE:** August 18, 2022

**SUBJECT:** Receipt of Amended Resignation Letter from Kyle Pingree,  
Council Member for District 2

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### **RECOMMENDATION:**

Receive and file.

### **BACKGROUND:**

On July 12, 2022, Mayor Kyle Pingree submitted a letter of resignation, indicating his resignation from the office of Councilmember for Council District No. 2. That letter had an effective date of August 31, 2022. Mayor Pingree submitted a revised letter of resignation on July 14, 2022, which supersedes his July 12th resignation letter. The July 14th resignation letter amends the effective date of Mayor Pingree's resignation to the date upon which a successor is appointed to the District 2 City Councilmember Office rather than August 31, 2022.

This revised letter has several potential impacts. First, if the Council decides to fill the vacancy by appointment rather than a special election, then it could result in an earlier or later effective resignation date than the previously set effective date of August 31, 2022. For example, if the Council votes to fill his vacancy by appointment and his successor is appointed at the August 23rd meeting, Mr. Pingree's resignation will occur as soon as his successor is appointed at that August 23, 2022 meeting.

Second, Government Code Section 36512, which is the provision of state law that governs how vacancies on the City Council are to be filled, provides in subsection (e) that if the City Council of a City that elects councilmembers from districts elects to fill the vacancy by appointment as a result of a city council member resigning from office, the resigning councilmember may cast a vote on the appointment of a successor. That provision precludes the resigning councilmember from voting for a family member or any other person with whom the councilmember has a relationship that may create a potential conflict of interest. This provision does not apply to a person who is "subject to a recall election." At the present time, no recall petitions have been filed with the City Clerk and determined to be sufficient by the Registrar of Voters to make Mayor Pingree "subject to a recall election." Accordingly, Mayor Pingree's revised letter will permit him to participate

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and vote on the appointment of his successor pursuant to Government Code Section 36512(e).

**ATTACHMENT:**

1. Letter of Resignation dated July 14, 2022  
[https://banningca.gov/DocumentCenter/View/11050/2022-07-14\\_DISTRICT-2\\_Pingree-Kyle](https://banningca.gov/DocumentCenter/View/11050/2022-07-14_DISTRICT-2_Pingree-Kyle)
2. Government Code Section 36512  
[https://banningca.gov/DocumentCenter/View/11070/GOV\\_36512-2](https://banningca.gov/DocumentCenter/View/11070/GOV_36512-2)

Approved by:



Douglas Schulze  
City Manager



## CITY OF BANNING STAFF REPORT

**TO:** CITY COUNCIL

**FROM:** Douglas Schulze, City Manager  
Kevin G. Ennis, City Attorney

**PREPARED BY:** Kevin G. Ennis, City Attorney

**MEETING DATE:** August 18, 2022

**SUBJECT:** Response to Three Letters (The "Letters") Dated August 10, 2022 and August 11, 2022 from Ms. Sheri Flynn, Mr. Kevin Bundy, and Ms. Shaila Nathu Asking that the City Council Cure and Correct an Alleged Violation of the Ralph M. Brown Act that Occurred at the City Council Meeting Held on July 12, 2022 and to Cease and Desist from the Same Violation in the Future

**This Report was updated and revised on August 17, 2022 to address a Supplemental Letter from Mr. Kevin Bundy dated August 17, 2022. This updated and revised Report was posted on the City's website not less than 24 hours prior the August 18, 2022 Special Meeting**

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### **RECOMMENDATION:**

That the City Council respond to the Letters by approving the following City response letters:

1. Send response letter to Ms. Sheri Flynn in which the City Council responds to the points and statements made by her Letter, and by which, the City Council commits to cease and desist from the alleged improper actions.
2. Send response letter to Mr. Kevin Bundy in which the City Council responds to the points and statements made in his August 10th and August 17th Letters, and by which, the City Council commits to cease and desist from the alleged improper actions.
3. Send response letter to Ms. Shaila Nathu in which the City Council responds to the points and statements made by her Letter, and by which, the City Council commits to cease and desist from the alleged improper actions.

### **BACKGROUND:**

At the Regular City Council meeting on July 12, 2022, the City Manager proposed adding item 8.7, entitled "Council Direction to Fill a Pending Council Vacancy" to the Agenda to discuss the City Council's plan to fill the pending City Council vacancy created by Mayor

Pingree's impending resignation of his seat on the City Council. The City Council voted 4-0 to add item 8.7 to the Agenda. When the Council reached Agenda item 8.7, Mayor Pingree read his resignation letter, dated July 11, 2022, to the City Council and public. The City Attorney then informed the City Council that in order for the City Council to add an agenda item to the City Council Agenda in compliance with the Brown Act, the Council must first make a finding that the need for the action came to the attention of the City Council after the Agenda was posted and there is a need to take immediate action that could not wait until the next City Council Meeting on August 23rd, 2022 (Gov't Code § 54954.2(b)(2)).

The resignation letter was dated July 11, 2022, the day immediately preceding the meeting. Therefore, the resignation letter was submitted after the regular meeting Agenda had been posted on Thursday, July 7, 2022. These facts satisfy the requirement that the need to take action arose after the Agenda for the July 12, 2022 meeting was posted.

With respect to the "need to take immediate action," it was previously disclosed and noticed to the public that the City Council had cancelled its second regular meeting in July and the first regular meeting in August, as was traditional for the City Council to cancel those meetings for its annual summer recess. That meant that the next regular City Council meeting would not be until August 23, 2022, more than a month after the July 12, 2022 meeting and only 8 days before Mayor Pingree's seat would become vacant. Based on these well-understood facts, Mayor Pingree then made the motion to find that there was a need to take immediate action and that the need for action came to the attention to the City Council after the Agenda for the meeting was posted without orally stating and repeating the above listed reasons why immediate action was needed. The motion was unanimously passed by the City Council (4-0, with 1 absence since Council Member Happe excused).

The City Council and City Manager then began the discussion of whether to appoint someone or hold a special election to fill Mayor Pingree's seat. Only one person spoke during the public comment period. Mayor Pro Tem Wallace then indicated her preference that the Council appoint Mr. Pingree's successor and made that as a motion. Thereafter, Ms. Sheri Flynn approached the public speaker podium and expressed a desire to speak on the motion. The Mayor noted to Ms. Flynn that the time for public comment on the added Agenda item had already concluded. The City Council then proceeded to adopt the motion to fill the vacancy by appointment, which passed unanimously (4-0, with one absence). As explained, the item was appropriately added to the Agenda and the facts and rationale why it was important to take immediately action on the matter was abundantly clear from the existing facts and the discussion that ensued.

On August 10, 2022 the City received two letters, one from Ms. Sheri Flynn in the form of an e-mail, and one from Mr. Kevin Bundy, an attorney with the law firm of Shute, Mihaly & Weinberger, representing the Pass Action Group, alleging a Brown Act violation by the addition of Agenda item 8.7 at the July 12, 2022 meeting without orally asserting why there was an immediate need to add the item to the Agenda. Ms. Flynn's letter is attached

as **Attachment A-1** and Mr. Bundy's letter is attached at **Attachment B-1**. On August 10, 2022, the City received an additional letter from Ms. Shaila Nathu, Assistant General Counsel for Californians Aware also alleging the same Brown Act violation regarding the addition of Agenda item 8.7 (**Attachment C-1**). Each letter generally alleges a violation of Government Code § 54954.2(b)(2) occurred at the July 12, 2022 meeting because the City Council did not orally identify what immediate need existed to support the motion to add item 8.7 to that night's Agenda. Each letter also alleged there was no immediate need that would warrant adding the item to that July 12, 2022 regular meeting Agenda. On August 17, 2022 at 9:02 a.m., the City Council received a second and supplemental letter from Mr. Kevin Bundy (**Attachment B-2**). A response to Mr. Bundy's August 17, 2022 Letter is found toward the end of this report and in the revised report for Agenda Item 3.3.

The City Council should respond to these letters by addressing the allegations made in each, correcting the incorrect or misleading allegations made in each letter, and notwithstanding those corrections and without admitting to any violation of the Brown Act, making the commitment to cease and desist from the alleged behavior that violated the Brown Act. This commitment must be written and approved by the City Council in open session at a regular or special meeting and must be listed as a separate item of business and not on the City Council's consent agenda (Government Code Section 54960.2 (c)(2)). If the City Council makes such a commitment, it must no longer engage in the challenged actions described in the cease and desist letter. This option would remove any threat of a lawsuit as long as the City Council complies with this commitment.

Attached as **Attachments A-2, B-3 and C-2**, are response letters to each of the three Cure and Correct/Cease and Desist Letters attached as **Attachments A-1, B-1 (and as supplemented by B-2) and C-1**.

### **DISCUSSION:**

As explained earlier, some of these allegations are not fully or accurately reported by the record of the regular City Council meeting at 5:00 pm on July 12, 2022. At that meeting, after the invocation, pledge of allegiance, and roll call, City Manager Doug Schulze proposed adding item 8.7, entitled "Council Direction to Fill a Pending Council Vacancy" to the Agenda to discuss the City Council's plan to fill the pending City Council vacancy created by Mayor Pingree's resignation of his seat on the City Council (City Council Meeting, 07-12-22 at 00:08:41). Mayor Pro Tem Wallace then made a motion to add item 8.7 to the Agenda and the City Council voted 4-0 to add item 8.7 to the Agenda (City Council Meeting, 07-12-22 at 00:09:03-00:09:27). The City Council then went through other items on the agenda and reached Agenda item 8.7 towards the end of the meeting (City Council Meeting, 07-12-22 at 03:21:15). Mayor Pingree turned to the City Manager to introduce item 8.7 and the City Manager then stated to the Council he had received the resignation letter from Mayor Pingree and then asked Mayor Pingree if he would like to read it (City Council Meeting, 07-12-22 at 03:21:15). Mayor Pingree then read his resignation letter, dated July 11, 2022, and stated that his resignation will be effective on August 31, 2022 (City Council Meeting, 07-12-22 at 03:21:43). After Mayor Pingree read

his letter, he stated the City Council needed to determine how to fill his soon to be vacant position.

The City Attorney then interjected before the City Council could begin discussions on how to fill Mayor Pingree's soon to be vacant seat (City Council Meeting, 07-12-22 at 03:22:33). The City Attorney informed the City Council that in order for the City Council to add an agenda item to the City Council Agenda in compliance with the Brown Act, the Council must first make a finding that the need for the action came to the attention of the City Council after the Agenda was posted and there is a need to take immediate action that could not wait until the next City Council Meeting, which would be on August 23rd, 2022 (Gov't Code § 54954.2(b)(2); City Council Meeting, 07-12-22 at 03:22:33-03:23:05). As indicated by the Mayor's reading of the letter, the resignation letter was dated July 11, 2022, the day immediately preceding the City Council meeting. Therefore the resignation letter was submitted after the regular meeting Agenda had been posted on Thursday July 7, 2022. The date of the letter made clear that the item came to the attention of the City after the Agenda was posted. Adding to the urgency of the decision, as previously disclosed and noticed to the public, the next City Council meeting would not be until August 23, 2022, more than a month after the July 12, 2022 meeting and only 8 days before Mayor Pingree's seat would become vacant. Mayor Pingree then made the motion to find that there was a need to take immediate action and that the need for action came to the attention to the City Council after the Agenda for the meeting was posted (City Council Meeting, 07-12-22 at 03:23:08). The motion was seconded by Mayor Pro Tem Wallace and was unanimously passed by the City Council (City Council Meeting, 07-12-22 at 03:23:10-03:23:22).

After the vote to make the proper findings required to add Agenda item 8.7 in compliance with the Brown Act, the City Manager began the discussion of the pros and cons of appointing someone to fill Mayor Pingree's vacant seat versus holding a special election to fill the seat. The discussion focused on whether there was time to call a special election to fill the vacancy and have that special election consolidated with the regular City Council election on November 8, 2022. The City Manager stated, and was later clarified by the City Attorney, that the advance notice requirement between calling the special election and holding the election to fill a City Council vacancy is 130 days and there was insufficient time between when the seat will be vacated on August 31, 2022 and the November 8th, 2022 general election to have the seat filled at that election (City Council Meeting, 07-12-22 at 03:23:38-03:29:10). Therefore, the City Council would have to hold and fund a separate special election on a later date to fill Mayor Pingree's seat if the City Council chose a special election to fill the seat.

Given that there was not going to be another regular or other planned meeting of the City Council prior to August 23, 2023, the Council understood it was important to immediately discuss and figure out if the process of filling the vacancy needed to start immediately in order to permit the Council to call a special election to consolidate with the next Regular Election Date of November 8, 2022 and if that was not possible or if it was not the Council's preference, to let staff know. In addition, given that Mayor Pingree's vacancy was going to occur on August 31, 2022, it was important to start the process of filling the

anticipated vacancy at the July 12, 2022 meeting rather than waiting another six weeks to begin that process.

The City Council discussed the matter for approximately eight minutes, including opening the discussion to public comment. One person spoke during the public comment period (City Council Meeting, 07-12-22 at 03:29:27-03:29:53). Mayor Pingree then asked for Council comment and direction (City Council Meeting, 07-12-22 at 03:29:58). Mayor Pro Tem Wallace then stated her preference to appoint a replacement to fill Mayor Pingree's position (City Council Meeting, 07-12-22 at 03:30:31). The City Council then proceeded to adopt a motion to fill the vacancy by appointment (City Council Meeting, 07-12-22 at 03:31:39). As explained, the item was appropriately added to the Agenda and the facts and rationale why it was important to take immediately action on the matter was abundantly clear from the existing facts and the discussion that ensued.

Nevertheless, in order to avoid unnecessary litigation and without admitting any violation of the Ralph M. Brown Act, the Banning City Council has the option of issuing letters back to each objector, unconditionally committing that it will cease, desist from, and not repeat the challenged past action as described above. That past action was the addition of an agenda item without stating orally the reasons why there was an immediate need to take the action at that meeting.

The Banning City Council may rescind this commitment only by a majority vote of its membership taken in open session at a regular meeting and noticed on its posted agenda as "Rescission of Brown Act Commitment."

If, pursuant to the next agenda item, the City Council acts to rescind and make a new decision as to how the Council would like to fill the vacancy, information as to that action to cure and correct the alleged violation will be added to each of the letters.

#### **RESPONSE TO AUGUST 17, 2022 LETTER FROM MR. KEVIN BUNDY:**

On August 17, 2022 at 9.02 a.m. the City Council received a supplemental letter from Mr. Kevin Bundy that responded to the earlier version of this staff report, to the City's draft response to his August 10, 2022 Letter and pointing out other concerns with the City Council's July 12, 2022 action. This staff report has been revised and updated to provide responses to this new August 17, 2022 letter (**Attachment B-2**).

The first point is that the proposed cure and correct action on tonight's agenda as Item 3.3 does not cure and correct the violation because: (1) it is not worded to be a "rescission" of the July 12, 2022 City Council action; and (2) it is characterized as a "re-do" of the action which implies that the Council will merely make the same choice the Council made at the July 12, 2022 meeting rather than making a new decision on whether to appoint or fill the vacancy by special election. In response, the staff report for the next agenda item has been revised to make clear that the Council is asked to rescind the July 12, 2022 action and make a new decision and not simply "re-do" the prior decision. In so doing, we note that the Court's decision in *Boyle v. City of Redondo Beach* (1999) 70

Cal.App. 4th 1109, 1118, which is cited by Mr. Bundy, did not find or hold that “rescission” is the only and legally permissible response to a cure and correct demand, but was the action that the Redondo Beach City Council took in that case. The Brown Act does not specify precisely what is required to “cure and correct” an alleged violation. Many local agencies regard such actions as “do-overs” or an action to “re-do” the prior action. Thus, the use of that term was not intended to imply that the Council would make the same decision. Rather it was intended to mean that the Council would make a new decision. Nevertheless, to avoid any question, staff is recommending that the Council take this additional action to “rescind” its July 12, 2022 action as well as make a new decision on whether it wants to appoint or call a special election.

The second point made is that after the Council has rescinded the July 12, 2022 action, that the Council must “reconsider” whether to fill Mayor Pingree’s seat by appointment or by special election. Staff believes that once the council has “rescinded” the July 12, 2022 action, the Council can proceed to make a new decision and does not have to also take a subsequent action to “reconsider” the prior action before proceeding to make a new decision on how to fill Mr. Pingree’s seat.

The third point made is that the City Council must cease and desist from any future actions taken in reliance on the July 12, 2022 decision. Mr. Bundy asserts that those actions include both solicitation of applications and interviews of applicant seats that appear ongoing. Staff does not believe that staff actions to begin the process of presenting to the Council options and individuals who seek to be appointed to fill the vacancy, including putting out information to the public about the process must also start over or be redone. Those processes are not legally required in order to fill a vacancy by appointment. In addition, those actions do not pre-commit the Council to fill the vacancy by appointment or otherwise foreclose the Council from making a new and different decision to fill the vacancy by election. As the City Council has the option on the following agenda item to rescind the July 12, 2022 decision as part of the next agenda item, the Council is free to decide through that next agenda item to call a special election rather than appoint someone to fill the vacancy. For these reasons, staff does not believe that any staff action to notice the vacancy and encourage applicants to apply for the position must start over in order for the Council to make a new decision, or that if the Council decides to appoint a person to fill the vacancy, that such earlier staff actions must be started over in order for the Council to fill that vacancy by appointment. Nevertheless, staff is recommending, as part of the next agenda item, that if the Council does decide to appoint Mr. Pingree’s successor that the Council extend the time period to apply and provide additional public notice of that opportunity so as to have the new action begin a new and additional process with respect to filling the vacancy.

The fourth point is that Mr. Bundy takes issue with the earlier version of this staff report and the draft response letter to him by asserting that he had made “misrepresentations of the record” in his August 10, 2022 Letter. This staff report points out facts and arguments not included in his August 10th Letter. City Staff has therefore revised the statement in this report and in the response letter to merely state that the response letter responds to points and statements in his Letter. At the same time City Staff reserves the

right to contest any factual statements and omissions, if any, in his Letters and does not admit that each and every statement in his Letters is a true, correct or a fair representation of all relevant facts.

The fifth point is that the City Manager and City Attorney did not accurately cite to the relevant deadline for the Council to call a special election to fill the vacancy. Mr. Bundy points out that if the Council decided to call a special election to fill the vacancy and had done so at the July 12, 2022 meeting, there would have been sufficient time to have that election consolidated with the November 8, 2022 election. Specifically, Government Code Section 36512 (b)(1) provides that a special election to fill a vacancy has to be set not less than 114 days from the call of the special election. As of July 12, 2022, there would have been 119 days prior the November 8, 2022 election.

But Staff points out that to have chosen this option, the City Council would have had to add an item to the July 12, 2022 agenda, which Mr. Bundy and others have claimed there was no immediate need to do so, or immediately called and set a special meeting to occur shortly thereafter (between Wednesday, July 13, 2022, and Sunday, July 17, 2022), and then also act to call an election before the vacancy had even occurred. If Mr. Pingree had rescinded his resignation before it was effective or modified its effective date so as to postpone the effective date of the vacancy, the call of the special election could have been premature. The Council, in that situation, would have called an election that would need to be cancelled or moved because the effective date of the resignation had changed because the vacancy would not have occurred as planned. In sum, objectors cannot have it both ways and assert that, on the one hand, the Council acted prematurely on July 12, 2022 and should have waited until August 31, 2022, but then also argue that the City Council did not act fast enough to prematurely make a decision to call a special election.

Sixth, Mr. Bundy asserts that Mr. Pingree's resignation and a decision to appoint his successor may have been taken to head off a potential recall of Mr. Pingree. Staff notes that Mr. Pingree's resignation letter states that he is moving out of state. It does not state that he is resigning to avoid a recall election. Staff also notes that filling Council vacancies by appointment is not unusual. In fact, Mr. Pingree was originally appointed to the Council to fill an earlier vacancy on the City Council.

In summary, staff is recommending in the next agenda item that the Council "rescind" its July 12, 2022 decision and make a new decision on whether to fill Mr. Pingree's seat by appointment or election. Either choice is not a "fait accompli." The City is doing this in a transparent manner by having this subject fully addressed in a series of agenda items on tonight's Special Meeting agenda.

#### **FISCAL IMPACT:**

There is no specific fiscal impact regarding this item except the time of staff and the City Attorney's office to evaluate the issues, prepare this report and the proposed response letters to the objectors.

### **NOTICING PROCEDURES:**

Responses to the letters are required within 30 days of receipt of each of the Letters pursuant to the Ralph M. Brown Act. The open session agenda item on the August 18, 2022 Special City Council Meeting will permit the City Council to act on each of the Letters as required by the Brown Act and then for City Staff to send the response letters to each objector within the required 30-day period of time.

### **ATTACHMENTS:**

#### **A-1. Letter from Ms. Sheri-Flynn to City dated August 10, 2022**

<https://banningca.gov/DocumentCenter/View/11075/Att-A-1-Sheri-Flynn>

#### **A-2. Draft Letter from City to Ms. Sheri Flynn:** Letter response to allegations disagreeing with the portrayal of some events and agreeing to cease and desist from behavior that the letter describes to avoid any potential legal suit stemming from the accusations.

<https://banningca.gov/DocumentCenter/View/11077/Att-A-2-Flynn-Response>

#### **B-1. Letter from Mr. Kevin Bundy to City dated August 10, 2022**

<https://banningca.gov/DocumentCenter/View/11073/Att-B-1-Kevin-Bundy>

#### **B-2 Letter from Mr. Kevin Bundy to City dated August 17th, 2022**

<https://banningca.gov/DocumentCenter/View/11163/Att-B-2-Bundy-Letters-Cont>

#### **B-3. Draft Letter from City to Mr. Kevin Bundy:** Letter response to allegations disagreeing with the portrayal of some events and agreeing to cease and desist from behavior that the letter describes to avoid any potential legal suit stemming from the accusations.

<https://banningca.gov/DocumentCenter/View/11175/B-3Banning---Updated-Response-Letter-to-Mr-Bundy-v-2>

#### **C-1. Letter from Ms. Shaila Nathu to City dated August 10, 2022**

<https://banningca.gov/DocumentCenter/View/11074/Att-C-1-Shaila-Nathu>

#### **C-2. Draft Letter from City to Ms. Shaila Nathu:** Letter response to allegations disagreeing with the portrayal of **some** events and agreeing to cease and desist from behavior that the letter describes to avoid any potential legal suit stemming from the accusations.

<https://banningca.gov/DocumentCenter/View/11076/Att-C-2-Nathu-Response>

Approved by:



Douglas Schulze  
City Manager



## CITY OF BANNING STAFF REPORT

**TO:** CITY COUNCIL

**FROM:** Douglas Schulze, City Manager

**PREPARED BY:** Caroline Patton, Deputy City Clerk *CP*

**MEETING DATE:** August 18, 2022

**SUBJECT:** Rescission of July 12, 2022 Decision to Fill Impending City Council District 2 Vacancy by Appointment or Special Election;  
New Decision to Fill Impending City Council District 2 Vacancy by Appointment or Special Election; and  
Discussion of and Decision on the Next Steps and Timetable to Fill the Vacancy

**[This an updated and revised report from the version previously posted. This updated and revised report was posted on the City's website not less than 24 hours prior to the August 18, 2022 Special City Council Meeting.]**

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### **RECOMMENDATION:**

Staff respectfully recommends that the City Council:

1. Rescind its decision made on July 12, 2022, to fill an impending vacancy of the City Council District 2 office by appointment;
2. Start over to discuss, make a motion, and vote on a new action as to how to fill the impending vacancy of the City Council District 2 office, whether via appointment or special election, and if via appointment, the process for filling the vacancy by appointment; and
3. Provide direction to Staff on next steps for informing the public of the choice made by the Council, steps to be taken in furtherance of that choice, and the timetable for the filling of the vacancy.

### **BACKGROUND:**

On July 12, 2022, Mayor Pingree submitted his resignation letter to the City Clerk's Office. Consistent with the provisions of Government Code Section 1770(c)(2), the July 12th letter stated that the effective date of Mayor Pingree's resignation would be August 31, 2022.

On July 14, 2022, Mayor Pingree submitted an amended resignation letter, which amended the effective date of the resignation to the date upon which the City Council

makes an appointment of the successor to the City Council District 2 office. Because Mayor Pingree's initial resignation letter did not yet take effect as of July 14, 2022, the City was permitted to accept the amended resignation letter submitted on July 14, 2022.

On August 10th and 11th, 2022, three letters were received by the City asserting that a prior decision of the City Council taken at the July 12, 2022 Regular City Council Meeting to fill the impending vacancy by appointment was not made in compliance with the Brown Act. Those letters asserted that at the July 12, 2022 meeting, the City Council had not orally stated the reasons why there was a need to take immediate action on the process for filling Mayor Pingree's impending vacancy when the Council added the item to that July 12, 2022 meeting agenda. Each of the three letters from objectors (letters from Ms. Sheri Flynn, Mr. Kevin Bundy, and Californians Aware) asked the City Council to cure and correct the alleged violation by complying with the Brown Act and also cease and desist from making similar violations of the same provision of the Brown Act. On August 17, 2022, Mr. Kevin Bundy submitted a supplemental Letter asserting various points that have been addressed in the preceding item on this Agenda and also in this updated and revised Report.

The means to cure and correct the alleged violation is to rescind the Council's prior action and consider the action again in a new action in compliance with the Brown Act. Even though the City does not believe the Council inappropriately added the item to the July 12, 2022 City Council agenda, the City Council is being presented with this agenda item to cure and correct the alleged violation by having the City Council rescind its prior decision and consider again, as a new item, how it desires to fill the impending vacancy. This new action cannot be a "ratification" of the prior action but rather as a separate and fully and newly considered action. Upon taking the action under this agenda item, the City will inform the objectors that the City Council has cured and corrected the alleged violation (Government Code Section 54960.1 (c)(2)).

## **DISCUSSION**

Government Code Section 36512(b) provides that if a vacancy occurs in an elective office, then within 60 days of the commencement of the vacancy, the City Council must either (1) fill the vacancy by appointment or (2) call a special election to fill the vacancy. This report summarizes those two procedures in the order mentioned in state law. As explained below, calling a special election to fill the vacancy at the next regularly scheduled Consolidated General Election on November 8, 2022 is not a feasible option given the relatively short time between the effective date of Mayor Pingree's resignation and that election.

### **1. Appointment**

Mayor Pingree was elected in November 2020, began his current term of office in December 2020, and is currently serving the first half of his four-year term. A person appointed to fill a vacancy occurring in the first half of a city council member's term, and which vacancy is more than 130 days from the next general municipal election that is scheduled 130 or more days after the council is notified of the vacancy, would hold office until his successor would be elected at that next general municipal election.

(Gov. Code, § 36512(b)(2)(A).) On July 11, 2022, Mayor Pingree informed the City of his impending vacancy. July 11, 2022, is 120 days from November 8, 2022. Accordingly, because there are not at least 130 days from the date the Council was informed of Mr. Pingree's vacancy until the November 8, 2022 election, then pursuant to Government Code Section 36512 (b)(2)(B), the person appointed to fill Mr. Pingree's vacancy would hold office for the unexpired term of the former incumbent (until the successor is elected at the November 2024 election). If the City Council chooses to fill the impending vacancy of the District 2 office by appointment, the appointee would hold office for the remainder of Mayor Pingree's unexpired term until December 2024.

Mayor Pingree was elected by the voters in City Council District 2. Per Banning Municipal Code Section 2.04.035(B)(2), any candidate for appointment to District 2 must reside in, and be registered to vote in, District 2.

State law does not mandate a particular process for making such an appointment. The City Council could, but is not required to, solicit applications and conduct interviews of potential candidates. Whatever process the City Council chooses to follow, all discussions and deliberations regarding the appointment must be held in open session and at duly noticed public meetings held in compliance with the Brown Act.

If the City Council chooses to fill the impending vacancy of the District 2 office by appointment, staff recommends that the City Council appoint an individual after soliciting applications from and conducting interviews of potential applicants. Since the public notice of the impending vacancy of the District 2 office on July 12, 2022, the City has received five applications from individuals who desire to be appointed by the Council to fill the impending vacancy. Staff recommends that the City Council review those applications and interview those candidates during today's meeting under Item 3.4. Staff further recommends that the City Council direct staff to conduct a new and additional solicitation period between August 19, 2022 and September 3, 2022, and interview any additional candidates that apply during that new and additional solicitation period and make a final appointment to fill the impending vacancy during a special meeting on September 6, 2022. This additional period is intended to provide public outreach and for applicants to apply and be interviewed as part of a new and additional process that commences following the approval of this agenda item. Accordingly, if the City Council proceeds with the next agenda item on this Agenda, and begins to undertake interviews of prospective appointees, such action is being taken as the first step pursuant to the action taken on this Agenda item and not pursuant to the action taken on July 12, 2022.

## 2. Special Election

Alternately, the City Council may call for a special election to fill the vacancy. The special election must be held on the next regularly established election date **not less than 114 days from the call of the special election** (Gov. Code § 36512(b)(1).).

The person elected to fill the vacancy would hold office for the unexpired term of the former incumbent.

The next regular election date is the November 8, 2022 Consolidated General Election (Banning Municipal Code § 1.12.030; Elec. Code, §§ 1000, 1002). There are 82 days between the date of this City Council meeting and November 8, 2022. Therefore, the Council would not be able to call a special election to be held on the November 8, 2022 election date because the calling of that special election (if that occurred today) would be less than 114 days from the November 8, 2022 Consolidated General Election date. Additionally, the deadline imposed by the County Registrar of Voters for cities to submit special elections for placement on the November 8, 2022 Consolidated General Election ballot has passed and was on July 18, 2022. The next “regularly established election date” will not occur until March 7, 2023 (Elec. Code § 1000). If the City Council chooses to fill the vacancy by special election and because that special election must be on a regularly established election date—the soonest of which would be March 7, 2023—the position would remain vacant until that results of that election were certified.

**JUSTIFICATION:**

Based on the discussion above, staff recommends that the City Council fill the impending vacancy of the District 2 office by appointment so that someone can immediately begin representing the interests of that District upon that appointment. The appointee would serve the remainder of Mayor Pingree’s unexpired term and until a candidate for District 2 is elected by the District 2 voters during the Consolidated General Election in November 2024.

**FISCAL IMPACT:**

None, if approved as recommended.

**ALTERNATIVES:**

1. Approve as recommended.
2. Do not approve and provide alternative direction.

**ATTACHMENTS:**

1. Municipal Code Section 2.04.040  
<https://banningca.gov/DocumentCenter/View/11067/Att-1-Municipal-Code-Section-204040>
2. Government Code Section 36512  
<https://banningca.gov/DocumentCenter/View/11068/Att-2-Government-Code-Section-36512>
3. Elections Code Sections 1000-1003  
<https://banningca.gov/DocumentCenter/View/11069/Att-3-Elections-Code-Sections-1000-1003>

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4. Municipal Code Section 1.2.030

<https://banningca.gov/DocumentCenter/View/11066/Att-4-Municipal-Code-Section-112030>

5. Municipal Code Section 2.04.035

<https://banningca.gov/DocumentCenter/View/11071/Att-5-Municipal-Code-Section-204035>

Approved by:



Douglas Schulze  
City Manager



## CITY OF BANNING STAFF REPORT

**TO:** CITY COUNCIL

**FROM:** Douglas Schulze, City Manager

**PREPARED BY:** Caroline Patton, Deputy City Clerk *CP*

**MEETING DATE:** August 18, 2022

**SUBJECT:** City Council District 2 Vacancy Interviews

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### **RECOMMENDATION:**

Staff recommend that City Council interview applicants for the City Council District 2 vacancy. City Council will be asked to appoint one of these candidates at their next regular meeting on August 23, 2022, or direct staff to extend the recruitment process.

### **BACKGROUND:**

On July 12, 2022, Mayor Pingree submitted his resignation letter to the City Clerk's Office. On July 14, 2022, he submitted an amended resignation letter, moving the date of its effect from August 31, 2022 to the time the City Council appoints a successor.

The City Clerks' Office publicly noticed the vacancy in the Record Gazette in the July 22<sup>nd</sup> edition. The Record Gazette published a web story on the vacancy on July 28, 2022 and it appeared as a front-page article in the July 29<sup>th</sup> edition.

Both the City of Banning and the Record Gazette Facebook accounts promoted the vacancy and application period, with information about when and how to apply.

Additionally, the information was posted on the City's website on July 13, 2022. An image with details about the vacancy and a link to the application appeared on the City's homepage beginning on July 13, 2022.

During the 30-day application period, the City Clerk's Office received five applications. All three applicants are registered voters in the City of Banning's District 2 and are qualified to serve. City Council may choose to appoint a candidate at their next regular meeting on August 23, 2022.

### **ALTERNATIVES:**

1. Following these interviews, City Council may move to appoint an applicant to fill the vacancy on the City Council at their next regular meeting on Tuesday, August 23, 2022.

2. Delay the appointment decision until the next regular meeting on September 13, 2022.
3. Direct staff to reopen the recruitment.

**ATTACHMENTS:**

1. Applicant Packet  
[https://banningca.gov/DocumentCenter/View/11064/Att-1-2022-08-12\\_Packet-of-District-2-Applicants](https://banningca.gov/DocumentCenter/View/11064/Att-1-2022-08-12_Packet-of-District-2-Applicants)
2. Written Questions  
[https://banningca.gov/DocumentCenter/View/11065/Att-2-2022\\_City-Council-Vacancy\\_Written-Questions](https://banningca.gov/DocumentCenter/View/11065/Att-2-2022_City-Council-Vacancy_Written-Questions)
3. Sample Interview Questions  
[https://banningca.gov/DocumentCenter/View/11061/Att-3-2022\\_Sample-Questions-for-City-Council-Candidates](https://banningca.gov/DocumentCenter/View/11061/Att-3-2022_Sample-Questions-for-City-Council-Candidates)
4. Public Notice of Vacancy – Proof of Publication  
[https://banningca.gov/DocumentCenter/View/11062/Att-4-2022-07-22\\_Proof-of-Publication](https://banningca.gov/DocumentCenter/View/11062/Att-4-2022-07-22_Proof-of-Publication)
5. Record of Public Noticing of the District 2 Vacancy  
<https://banningca.gov/DocumentCenter/View/11063/Att-5-Record-of-Noticing-for-District-2-Vacancy>

Approved by:



Douglas Schulze  
City Manager