



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Proposed Charter Amendment
on Recall Elections

DATE: January 3, 2008

RECOMMENDATION

That the City Council consider the California Elections Code recall process, which allows voters to recall an official by a majority vote and elect his or her successor by a plurality vote in the same election, and direct the City Attorney to prepare amendments to the Charter if the Council approves changes to the City of San Jose recall process consistent with the California Elections Code.

BACKGROUND

The Reed Reforms put forth by Mayor Reed at the beginning of his term in office included a proposal that San Jose voters be asked to "revise the Charter to make it easier to recall the Mayor and Councilmembers for a violation of the Charter or the Oath of Office."

At the February 6, 2007 Council Meeting, the Council approved proposed amendments to the Charter to provide that the City follow the recall procedure applicable to state officials in which the vote to recall the official and choose a replacement occurs in the same election.

Under the current Charter provisions, a vacancy resulting from a recall is filled by Council appointment or through an election called by the Council. This means that the City might have to hold two elections – one election for the recall and, if the recall is successful, another election to replace the recalled official. The purpose of this memorandum is to outline the Charter amendments that the City Council may wish to consider.

ANALYSIS

Recall is the power vested solely in the voters to remove an official from office prior to the expiration of his or her term. The voters can recall an official for any reason. There is no limit on the grounds for recall.

A. Recall – City and State Requirements

Charter Section 1603 states that the provisions of the Elections Code of the State of California governing the recall of municipal officers in cities apply insofar as the provisions do not conflict with the Charter. The Elections Code sets forth a comprehensive process for recall elections of both state and local officials. California voters became familiar with the recall process through the 2003 recall of former Governor Gray Davis, which resulted in the removal of Governor Davis and the election of Arnold Schwarzenegger as Governor. Recalls of local officials under the Elections Code would follow a similar process including a single election at which a vote to recall would be taken at the same time as a vote for a replacement if the recall is successful. The first ballot question would be whether to recall an official and the second would include a list of candidates to succeed the recalled officer.

Most of the recall provisions of the Elections Code apply to recall elections in San Jose. One exception relevant here is the process for selection of a replacement if a recall is successful, which is set forth in the Charter.

Charter Section 409, subsection (e), states that the office of the Mayor or a member of the Council becomes vacant "upon removal of the incumbent from office." Removal would include removal by recall as well as by other means. Charter Section 410 provides that if a vacancy as defined in Section 409 occurs, "the Council shall either fill the vacancy by appointment by a majority of its remaining members, or call an election for the purpose of filling such vacancy."

This conflict can be resolved by a Charter amendment providing that removal by recall does not create a vacancy in office to be filled under Charter Section 410. Without this conflict, the City would then follow the Elections Code practice of permitting the voters to select the individual to serve the remainder of the term at the same election that the recall vote occurs. However, this solution raises another potential conflict.

The Elections Code allows for the election of the successor official by a plurality vote. In other words, the winner would be the candidate receiving the most votes even if less than a majority. Charter Section 1600(g), however, provides that no person shall be elected to the office of the Mayor or Councilmember unless the person receives a majority of the votes cast for the office.

B. City Council Options

The Council has two options. First, the Council may propose amending the Charter so that the election of the successor to a recalled official can be by a plurality vote, as an exception to the majority vote requirement for all other municipal elections. Alternatively, the Council can require a separate run-off election if no candidate receives a majority of the vote in the recall election.

Following the Elections Code and allowing a plurality to select the successor would increase the likelihood of a more streamlined, efficient recall process with one election deciding the questions of whether to recall the official and, if so, who will serve the remainder of the term. Requiring the winning candidate to receive a majority of the vote would make it more likely that a second election would be necessary as a run-off election, diminishing the efficiency benefit that was the impetus for the proposed Charter amendment. The tradeoff to installing a new representative as soon as possible and without the cost of another election is that the chosen candidate could be elected receiving much less than a majority of the vote depending on the number of candidates in the field.

PUBLIC OUTREACH/INTEREST

This memorandum is posted on the website for the January 15, 2008 Council Meeting.

CEQA

Not a project.

RICHARD DOYLE
City Attorney

By *Sandra Lee*
SANDRA LEE
Deputy City Attorney

cc: Debra Figone

For questions please contact Sandra Lee, Deputy City Attorney, at (408) 535-1988.

