



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Proposed Ordinance
Establishing Grounds and
Procedures for Removal of a
Member of the City Council

DATE: July 28, 2006

RECOMMENDATION

Consideration of the proposed ordinance amending Title 12 of the San José Municipal Code to add Chapter 12.18 to specify the grounds and the procedures for removal of a member of the City Council for willful misconduct in office.

OUTCOME

The proposed ordinance, if adopted, would implement Charter Section 405 setting forth the grounds and procedure for removing a member of the City Council from office.

BACKGROUND

On June 28, 2006, the City Council held a special meeting to discuss possible action that could be taken relative to the current Mayor, including whether the Mayor could be removed from office pursuant to San José City Charter Section 405. Although Charter Section 405 authorizes the City Council to set forth the grounds for forfeiture or loss of elective office in the City of San José, no action had been taken to implement this Charter Section. At the special meeting, the Council directed this Office to draft a proposed ordinance to implement Charter Section 405 setting forth the grounds and procedure for removing a member of the City Council from office. The proposed Ordinance is attached to this memorandum.

Charter Section 405 grants the City Council the authority to be the judge of the grounds for forfeiture or loss of their respective offices; however, the Council has the discretion to establish or not establish additional grounds apart from those enumerated in Section 409. If the City Council does not adopt the proposed ordinance establishing willful misconduct in office as a ground for removal, a member of the City Council may still be removed by recall of the electors or the office may be deemed vacant pursuant to other grounds set forth in Section 409.

Other Jurisdictions

Our Office contacted various jurisdictions in California and/or reviewed the charter of these municipalities for removal or suspension provisions. The cities surveyed included San Diego, Santa Ana, Anaheim, Fresno, Los Angeles, Long Beach, Santa Clara, Mountain View, Oakland, San Francisco, and Sacramento. The Charters of most of these cities do not provide for the removal of an elected official. In jurisdictions without a charter removal provision, courts have held the elected official would be subject to the removal procedures in state law. For those jurisdictions, state law vests the district attorney with the authority to initiate the removal of an elected official upon conviction of willful or corrupt misconduct in office. (Government Code Section 3060 et seq.) Under this process, the elected official has all the protections of a criminal trial but could only be removed from office and would not have a criminal record upon conviction. In addition, elected officials may be subject to recall by the electors.

San Francisco and Los Angeles have specific charter provisions allowing for suspension and/or removal of an elected official from office. According to our survey, neither San Francisco nor Los Angeles has invoked their respective provisions to suspend or remove an elected official.

In San Francisco, elected officials and commission members are subject to suspension and removal for official misconduct. Official misconduct includes "any wrongful behavior...in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of interest or government ethics law." (City and County of San Francisco Charter Section 15.105)

The Los Angeles City Charter provides for the suspension of officials pending trial of a criminal charge and removal only when "the incumbent is convicted of an offense involving a violation of official duties including a violation of the conflict of interest and government ethics provisions of the Charter or City ordinances." A court, however, would need to first determine that the official is culpable for the violations and that these violations are sufficiently egregious to warrant removal. (Los Angeles City Charter Sections 207 and 209)

City Council Conduct Policy

In San José, the City Charter and City Council Conduct Policy 0-28 together contemplate several levels of action, of progressive severity, that the City Council may take against one of its members, including the Mayor, for misconduct in office. As described in City Council Conduct Policy 0-28, the City Council may seek to admonish, sanction, or censure the accused member.

The least severe of these actions is an admonition which may be directed to all members of the City Council as a warning or reminder that a particular type of behavior is in violation of law or City policy, and that, if it occurs or is found to have occurred, could make a member subject to sanction or censure.

A sanction is directed to a particular member based on a particular action or actions that are determined to violate a law or City policy, but are not sufficiently serious to require censure. A sanction may be issued after Council's review and consideration of a written allegation of a violation and after the accused member is afforded an opportunity to respond in writing. Because neither an admonition nor a sanction constitutes punishment or discipline, either may be issued by the Council without an investigation or a separate hearing. The Council may take these actions based on a majority vote.

A censure is a formal statement of official reprimand reserved for cases where the Council determines that the violation of law or policy is a serious offense. Prior to imposition of this negative action, an investigation may be initiated and a hearing shall be set to provide the accused member an opportunity to present evidence and question witnesses. A censure requires a two-thirds vote of the Council. A censure will not result in a fine or suspension of the rights of the accused member as an elected official.

ANALYSIS

Charter Section 405

San José Charter Section 405 provides authorization for the City Council to remove a member of the City Council from office. Section 405 reads in its entirety as follows:

The Council shall be the judge of the election and qualification of its members, including the Mayor, and of any other elective officer, and of the grounds for forfeiture or loss of their respective offices, and for that purpose shall have the power to subpoena witnesses, administer oaths and require the production of evidence. A member, or the Mayor, or the holder of any other elective office, charged with conduct constituting grounds for forfeiture or loss of his or her office shall be given, if he or she so demands, an opportunity to be heard in his or her own defense at a public hearing after reasonable notice to such members.

The proposed ordinance implements Charter Section 405 by providing that a member of the City Council may be removed from office for willful misconduct in office. The proposed ordinance does not address the procedure for forfeiture or loss of office based on the other grounds enumerated in Section 409 of the Charter. With Council direction, this Office can develop for consideration a procedure to address these additional grounds.

Willful Misconduct in Office

The removal of a member of the City Council from office is the most severe response to misconduct in office and should be exercised only for the most serious offenses. Cases interpreting the standard "willful misconduct in office" under Government Code section 3060 may provide guidance on how this standard should be applied.

Willful misconduct in office is serious misconduct that involves criminal behavior or, at the least, a purposeful failure to carry out mandatory duties of office. The conduct does not require an evil intent but a purpose or willingness to commit the act or omission with knowledge of a duty to act. It is not necessary that the official knew that the act or omission constituted misconduct in office. The courts have found willful misconduct in office when a school board member failed to disclose a financial interest in contracts and voted on the contracts in violation of conflicts law; a chief of police failed to investigate illicit gambling in violation of the penal code; a sheriff did not investigate and concealed a complaint of child molestation; and when a city councilman used a city vehicle for private purposes. In each of these instances, the officials knew of the facts giving rise to the misconduct and purposefully committed the acts or omission that violated a state or local law.

To warrant removal, an official must have actual knowledge of the acts or omissions constituting the misconduct. An official cannot be removed for mere negligence or for acts where the official was unaware of facts which made the act improper. In a case involving two members of the Orange County Board of Supervisors, the court set aside accusations of willful misconduct in office because the allegations did not support that the Supervisors had actual knowledge of the treasurer's financial mismanagement. Similarly, no willful misconduct of office was found when a court official issued checks under his official control without sufficient funds because he was not aware of the irregular bookkeeping practices and the bank did not give him notice.

Nexus

The misconduct must have occurred in the City Council member's official capacity or while the member was performing the duties of his or her office. For example, the San Francisco Board of Supervisors removed an airport commissioner pursuant to their charter because, while serving on that commission, he was a labor union official and supported the union's participation in a strike against the city. The court found the removal improper because the commissioner did not violate any statutes that would support a charge of official misconduct and the charges were not related to the performance of his duties as an airport commissioner. Specifically, the airport commission's duties dealt with airport policy and not wage standards; and the commissioner was not involved in any airport transactions nor did he gain monetary advantage for his union by using his official position.

Fundamental Right to Hold Public Office

An elected official's right to hold public office is a fundamental constitutional right. The courts, in cases involving the removal of elected officials, have consistently interpreted ambiguous provisions calling for forfeiture of office in favor of continued eligibility. Although the cases finding willful misconduct in office have involved violations of law, the courts do not foreclose the possibility that a violation of policy may be sufficiently egregious to warrant removal. The City has numerous policies of varying significance ranging from the proper use of city equipment to the obligation to disclose material facts. Prior to initiating the removal process, serious consideration should be given to the fact that holding public office is a fundamental constitutional right and cases which have sustained removal under state law involved actual violations of law.

Process

Charter Section 405 sets forth, in general terms, a process for removal of the Mayor, another member of the Council, or any other elected City official. Section 405 states that the Council, as the judge of the qualification of the City's elected officials, shall have the power to subpoena witnesses, administer oaths, and require the production of evidence. Further, the member or officeholder subject to removal shall be given an opportunity to present a defense at a public hearing after reasonable notice of the charge or charges against him or her. The proposed ordinance creates a more detailed process to implement Charter Section 405. The removal process set forth in the ordinance is patterned in part on the City's existing censure process, but contains additional due process protections given the significantly greater consequence of the removal action.

Initiation of Proceedings

Under the proposed ordinance, only a member of the City Council may initiate the removal process by submitting to the Rules Committee a written request for removal containing specific allegations of willful misconduct in office. This written request would be served on the member who is the subject of the removal request at least five (5) days before the Rules Committee meeting at which the request would be considered. The accused member would have an opportunity to appear and address the Rules Committee.

After consideration of the allegations in the removal request, the ordinance provides that the Rules Committee would determine one or more of the following: investigation of the allegations is warranted for consideration of removal; the recommended level of action is admonition, sanction or censure; or no additional action is warranted. The recommendation of the Rules Committee would be considered by the City Council within sixty (60) days, and the Council would either confirm the recommendation or determine that an alternative action be taken.

If the City Council determines that removal should be considered, the investigation of the allegations is proposed to be conducted by a committee appointed by the Mayor, or by the Vice Mayor if the Mayor is the subject of the removal request. If both the Mayor and Vice Mayor are the subject of the removal request, then the committee would be appointed by a simple majority of the City Council members who are not the subject of the removal request. The ordinance specifies that the committee conduct its investigation in public proceedings and subject to the Brown Act. The committee, which may be granted subpoena power by the City Council, would be charged with determining whether there are reasonable grounds to believe that the conduct, violation, or offense occurred based on all the facts and evidence. The committee would be required to issue a final report and recommendation to the City Council.

Upon review of the committee's report, the ordinance provides that the City Council would determine one or more of the following: that further investigation is warranted; that the removal request shall be set for a public hearing before the City Council; that the recommended level of action is admonition, sanction or censure under City Council Conduct Policy 0-28; or that no further action is warranted. If the Council decides that additional investigation should be conducted, the Council would be required to specify the further information that it believes is needed through that investigation.

Removal Hearing

Before the City Council may decide to remove a Council member, the member shall be entitled to a public hearing before the Council with reasonable notice and with a reasonable period of time to prepare a defense. If the Council determines that the removal request should be set for hearing, the ordinance provides that the Council shall direct the City Clerk to serve the member subject to removal with a notice of the hearing, which will alert the member to the nature of the proceeding, state each act or omission upon which the proposed removal is based, and advise the member of his or her right to appear and present a defense. At the time of service, the City Clerk also would be required to provide the member with all documents received by the committee. The hearing before the City Council would be set not less than twenty (20) calendar days from the date that the notice of hearing is served on the member subject to removal.

At the public hearing, the Council member who is the subject of the proceedings would have the right to be represented, to subpoena witnesses and documents, to present evidence, and to question witnesses. A designee of the committee that issued the final investigation report would have the same rights. The Mayor, or the Vice Mayor if the Mayor is the subject of the removal hearing, would preside at the hearing. If both the Mayor and Vice Mayor are the subject of the removal hearing, then the City Council members remaining would elect one of their members to preside at the hearing. The hearing would not be a formal adversarial proceeding subject to the strict rules of

evidence. The City Attorney or designee would provide legal advice to the City Council during the hearing.

To remove a member of the City Council from office, the ordinance provides that the City Council must find that willful misconduct in office occurred and adopt a resolution making findings with regard to the specific allegations. The proposed ordinance provides that a finding of willful misconduct in office shall be by unanimous vote of the City Council (excluding the member subject to removal) and based upon proof beyond a reasonable doubt. This high standard is consistent with the accusation and removal process that may be utilized by the District Attorney under the California Government Code. However, neither the reasonable doubt standard of proof nor a unanimous vote is legally required with respect to the City's process for removal under the Charter.

Although the proposed ordinance specifies a unanimous vote, Charter Section 601 requires only that Council action be taken by a vote of at least a majority of the members. Further, the City's censure policy requires a vote of two-thirds of the City Council to censure a member. With respect to the standard of proof, in some analogous proceedings, including the process for removal of judges under state law and for discipline of attorneys by the State Bar, a clear and convincing evidence standard is used. Clear and convincing evidence is that which leads a person to conclude that the truth of an allegation is highly probable. In contrast, proof beyond a reasonable doubt is evidence that leaves a person with an abiding conviction that the allegation is true.

POLICY ALTERNATIVE

Charter Section 405 grants the City Council the authority to be the judge of the grounds for forfeiture or loss of their respective offices; however, the Council has the discretion to establish or not establish additional grounds apart from those enumerated in Section 409. If the City Council does not adopt the proposed ordinance establishing willful misconduct in office as a ground for removal, a member of the City Council may still be removed by recall of the electors or the office may be deemed vacant pursuant to other grounds set forth in Section 409.

PUBLIC OUTREACH/INTEREST

The contemplated action does not appear to qualify as an item of significant interest based on the established criteria. This memo and ordinance are posted on the City's website for the August 8, 2006 Council Agenda.

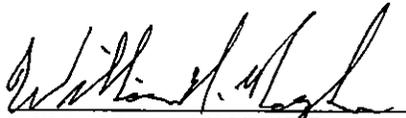
COORDINATION

Not applicable.

CEQA

Not a project.

RICHARD DOYLE
City Attorney

By: 
WILLIAM H. HUGHES
Assistant City Attorney

cc: Les White

Attachment

DRAFT

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING
TITLE 12 OF THE SAN JOSE MUNICIPAL CODE TO ADD
CHAPTER 12.18 TO SPECIFY THE GROUNDS AND THE
PROCEDURES FOR REMOVAL OF A MEMBER OF THE
CITY COUNCIL FOR WILLFUL MISCONDUCT IN OFFICE**

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

Title 12 of the San José Municipal Code is hereby amended to add a new chapter, to be numbered, entitled and to read as follows:

**CHAPTER 12.18
REMOVAL FROM OFFICE**

**Part 1
Purpose**

12.18.010 Purpose

This Chapter implements the grounds and process for removal of a member of the City Council pursuant to Charter Section 405. The purpose of the proceeding established in this Chapter is to determine whether the member should be allowed to continue in his or her capacity as an elected official of the City of San José and not to determine whether the member is guilty of a crime. The principal objective of the proceeding is to protect the City of San José and the public which it serves from persons unfit to hold elective office as a member of the City Council.

Part 2

Definitions

12.18.200 Definitions

The definitions set forth in this Part shall govern the application and interpretation of this Chapter.

12.18.210 Member of Council

“Member of Council” means any of the members of the City Council including the Mayor as provided in Charter Section 1704.

12.18.220 Misconduct in Office

“Misconduct in Office” means any wrongful or unlawful act, lawful act performed in a wrongful manner, or a failure to act when a duty to act existed, that is taken in his or her official capacity or in relation to the duties of office. For purposes of this Chapter, Members of Council have a duty to abide by federal and state law, City charter, City ordinances, and City policies, including conflict of interest or governmental ethics laws.

12.18.230 Rules Committee

“Rules Committee” means the committee of the City Council established as the rules committee by City Council Resolution No. 73321, as such resolution may be amended or superseded.

12.18.240 Subject Member

“Subject Member” means the Member of Council who is the subject of the request for removal from office.

12.18.250 Willful

“Willful” means a purpose or willingness to commit the act or to not act with knowledge of a duty to act. Willfulness does not require knowledge that the act violates the law, or an intent to violate the law, injure another or to acquire any advantage.

Part 3

Grounds for Removal, Initiation of Proceedings

12.18.300 Grounds for Removal

The City Council may remove a Member of Council from office for Willful Misconduct in Office pursuant to the provisions of this Chapter.

12.18.310 Request for Removal

- A. A Member of Council may initiate a request for removal hearing by submitting the request in writing to the Rules Committee. Only a Member of Council may make this request.
- B. The request must contain the specific allegations of Willful Misconduct in Office upon which the proposed removal is based.

12.18.320 Service of Removal Allegations

A copy of the request for removal and the specific allegations shall be served on the Subject Member by personal service at least five (5) days prior to the Rules Committee meeting at which it will be considered. The Subject Member shall have the right to appear and address the Rules Committee.

12.18.330 Rules Committee Review

- A. At the Rules Committee meeting at which the removal request is considered, the Rules Committee shall determine one or more of the following:
 - 1. Investigation of the allegations in the request is warranted for consideration of removal;
 - 2. The recommended level of action is admonition, sanction and/or censure pursuant to City Council Conduct Policy (0-28), as may be amended; or
 - 3. No action is warranted.
- B. The Rules Committee shall set forth the reasons for its determination in a report to the City Council.
- C. The determination of the Rules Committee on the removal request shall be subject to confirmation by the City Council as part of the Rules Committee report at a City Council meeting within sixty (60) days of the Rules Committee determination. The City Council may by resolution confirm the recommendation of the Rules Committee or determine that any of the actions enumerated in Subsection A be taken. The City Council shall set forth the reasons for its determination in the resolution.

12.18.340 Investigation

- A. The investigation of the removal request shall be undertaken by a committee appointed by the Mayor. If the Mayor is the subject of the allegations, the committee shall be appointed by the Vice Mayor. If both the Mayor and Vice Mayor are the subject of the removal request allegations, then the committee shall be appointed by a simple majority of the City Council members remaining who are not the subject of the removal request.

- B. The committee shall be comprised of not less than three (3) and no more than seven (7) members.

- C. All of the following shall apply to committee investigations:
 - 1. The committee may be staffed by administrative, investigative, and legal staff.

 - 2. If authorized by the City Council, the committee may subpoena witnesses and documents.

 - 3. In formulating its recommendation to the City Council at the culmination of the investigation, the committee shall determine if there are reasonable grounds to believe or not believe that the conduct, violation, or offense occurred based on all the facts and evidence obtained by and available to the committee.

 - 4. The committee shall issue a final report and recommendation to the City Council. The final report shall include but is not limited to all of the following:
 - (a) A statement of the facts and allegations leading to the investigation;

- (b) A summary of the evidence reviewed and relied upon for the recommendation;
 - (c) A statement of the applicable laws and policies;
 - (d) An analysis applying the evidence to the applicable laws and policies; and
 - (e) A conclusion setting forth the committee's findings and recommendation.
5. The final report shall be available to the public.
 6. The meetings of the committee shall be subject to the Ralph M. Brown Act, California Government Code Section 54950 et seq., as may be amended.
 7. All the documents received by the committee shall be retained by the City in accordance with the City Clerk's records retention schedule and shall be subject to disclosure pursuant to the Public Records Act, California Government Code Section 6250 et seq., as may be amended.

12.18.350 City Council Review of Committee Report

- A. After consideration of the final report from the committee, the City Council shall determine one or more of the following:
 1. Further investigation of the allegations in the removal request is warranted;
 2. The removal request is to be set for a public hearing;

3. The recommended level of action is admonition, sanction and/or censure pursuant to City Council Conduct Policy (0-28), as may be amended; or
 4. No further action is warranted.
- B. If the City Council determines that further investigation of the allegations in the removal request is warranted, the Council shall specify the additional information sought and a due date for the additional information to be presented to the Council.
- C. If the City Council sets the matter for a public hearing, it shall direct the City Clerk to serve the Subject Member by personal service with a notice of hearing and all documents received by the committee. The notice of hearing shall include:
1. A statement of the nature of the proceeding;
 2. A statement in ordinary concise language of each act or omission upon which the request for removal is based; and
 3. A statement advising the Subject Member of his or her right to appear and present a defense as set forth in this Chapter.

Part 4

Removal Hearing

12.18.400 Removal Hearing

Prior to a decision by the City Council to remove the Subject Member from office, the Subject Member shall receive a public hearing before the City Council. The hearing shall be set to provide reasonable notice to the Subject Member and to provide him or her a reasonable time to prepare a defense. The hearing shall be set not less than twenty (20) calendar days from the date that the notice of hearing is served on the Subject Member.

12.18.410 Removal Hearing Procedures

The following shall apply to the conduct of the public hearing:

- A. The Subject Member may be represented and may have the representative speak, present evidence, or question witnesses on his or her behalf.
- B. The Subject Member and a designee of the committee shall have an opportunity to present evidence and question witnesses.
- C. The Subject Member and a designee of the committee shall have the ability to subpoena witnesses and documents through the City Council.
- D. Oral evidence shall be taken only on oath or affirmation.
- E. The public hearing is not a formal adversarial proceeding and strict rules of evidence shall not apply. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule

which might make improper the admission of such evidence over objection in civil actions.

- F. The Mayor, or the Vice Mayor if the Mayor is the subject of the allegations, shall preside at the hearing. If both the Mayor and Vice Mayor are the subject of the removal hearing, then the Members of Council remaining shall by a simple majority elect a Member of Council to preside at the hearing.
- G. The City Attorney or designee shall provide legal advice to the City Council during the hearing.

12.18.420 Findings and Decision

- A. The City Council may determine that the Subject Member has committed Willful Misconduct in Office only if all Members of Council who are eligible to vote find beyond a reasonable doubt that such misconduct occurred. A decision to remove the Subject Member from office requires the adoption of a resolution by unanimous vote setting forth the City Council's findings with regard to the specific allegations.
- B. The Subject Member is not eligible to vote.

12.18.430 Effect of Removal

Removal of a Member of Council will result in the office becoming vacant under Charter Section 409 (e).

PASSED FOR PUBLICATION of title this _____ day of _____, 2006, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

RON GONZALES
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk