



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Proposed Ordinance
Establishing the Ground and
Procedure for Removing a
Member of the Council from
Office

DATE: November 29, 2006

RECOMMENDATION

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

OUTCOME

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

BACKGROUND

On November 21, 2006, the City Council reviewed various issues it had previously requested clarification of and requested additional revisions be made to the proposed ordinance. The proposed ordinance is attached to this memorandum. All substantive revisions are underscored to facilitate review.

ANALYSIS

Requiring Five Business Days Notice

Consistent with Council direction, the proposed ordinance would require that the member of the Council subject to the removal request receive notice a minimum of five (5) business days prior to the Rules Committee meeting to consider the request.

Rule Committee Recommendation

A member of the City Council may initiate a request for removal by submitting the request to the Rules Committee in writing with **specific allegations** of willful misconduct in office. The proposed ordinance would provide that the Rules Committee

may recommend an investigation, only if assuming the allegations are true, the allegations would constitute willful misconduct in office under state law. The Rules Committee recommendation is not a finding by the Rules Committee that the subject member has actually committed willful misconduct in office but is merely a determination that the allegation is not frivolous and sets forth sufficient facts to warrant further investigation.

Investigation Committee Restriction

To militate against potential bias, the proposed ordinance would impose various restrictions on the investigation committee members during their tenure on the committee including but not limited to a restriction on their ability to hold employment with the City, Redevelopment Agency, or any member of the City Council outside of City employment.

Investigation Committee Determination of Disqualifying Bias

The proposed ordinance would provide that the investigation committee may, if asked by the City Council, determine whether a member of the Council has an actual bias or a high probability of actual bias such that the member cannot be an impartial, unbiased decision-maker.

Posting the Investigation Committee Final Report

The proposed ordinance would require the City Clerk to post a copy of the investigation committee's final report on the City's website within three (3) business days of the report being issued. The posting of the report on the City website would give the public an opportunity to comment and/or initiate a recall under Charter Section 1603.

State law provides that the recall petition be examined within thirty (30) days from the date the petition is filed to determine if the petition has been signed by the requisite number of voters. If the petition is found sufficient, the Registrar of Voters would submit a certificate as to the sufficiency of the petition to the City Council at its next regular meeting. Within fourteen (14) days after receiving the certificate of sufficiency, the City Council is required to issue an order stating that an election shall be held. The election would be held not less than eighty-eight (88), nor more than one hundred and twenty-five (125) days after the issuance of the order.

Clear and Convincing Standard of Proof

The proposed ordinance would require that the City Council find willful misconduct in office based on proof of clear and convincing evidence.

POLICY ALTERNATIVES

If the City Council does not approve the proposed ordinance establishing the ground and procedure for removal, a member of the City Council may still be removed by recall of the electors. In addition, the office may be deemed vacant pursuant to other grounds set forth in Charter Section 409.

PUBLIC OUTREACH/INTEREST

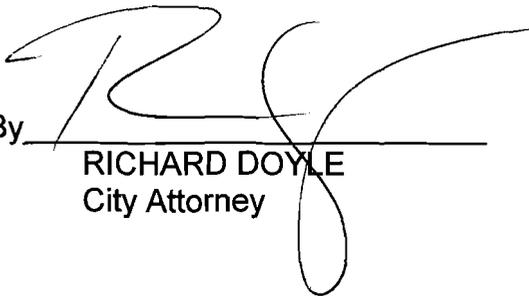
The contemplated action does not appear to qualify as an item of significant interest based on the established criteria. This memorandum and proposed ordinance are posted on the City's website for the December 5, 2006 Council Agenda.

COORDINATION

Not applicable.

CEQA

Not a project.

By 
RICHARD DOYLE
City Attorney

cc: Les White
Lee Price

Enclosure

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 GROUND AND THE
PROCEDURE 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 ground 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. The removal process set forth in this Chapter is the most severe response to misconduct in office and should be exercised only for the most egregious and serious offenses.

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 an egregious and serious 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 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 Recall Result in Termination of Removal Proceedings

All proceedings under this Chapter shall terminate and cannot be reinstated if at any point during the process, a recall of a Member of Council has been initiated, pursuant to Charter Section 1603, and the County Registrar of Voters issues a certificate of sufficiency for the petition pursuant to Elections Code Sections 11224 and 11225, as may be amended.

12.18.320 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.
- C. The City Clerk shall place the request on the agenda of the second regularly scheduled Rules Committee meeting following receipt of a request with specific allegations.

12.18.330 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) business 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.

12.18.340 Rules Committee Review

- A. At the Rules Committee meeting at which the removal request is considered, the Rules Committee shall recommend one or more of the following:
 - 1. Investigation of the allegations in the request is warranted for consideration of removal assuming the allegations are true and could be deemed willful misconduct in office under state law;
 - 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 recommendation 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. The City Clerk shall place the Rules Committee report on the agenda of a regularly scheduled City Council meeting within thirty (30) days of the Rules Committee meeting.
 - D. The City Council may by resolution confirm the recommendation of the Rules Committee or determine that another action enumerated in Subsection A be taken. The City Council shall set forth the reasons for its determination in the resolution. The resolution of the City Council requires the affirmative vote of no less than six (6) members of the City Council.

12.18.350 Investigation Committee

- A. The investigation of the removal request shall be undertaken by a committee. The committee members shall be appointed by the Mayor, or 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 hearing, then the Members of Council remaining shall by a simple majority of no less than six (6) affirmative votes appoint the committee members. The appointments shall be confirmed by the City Council.
- B. The committee shall be comprised of not less than five (5) and no more than seven (7) members. One member of the committee shall be an attorney in good

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standing with the California State Bar, and one member of the committee shall have held elective government office.

- C. Each member of the investigation committee shall comply with the following qualifications during his or her tenure on the committee:
1. Each member shall be a qualified elector of the City of San Jose.
 2. No member may participate in any campaign supporting or opposing a candidate for City elective office. For the purposes of this Section, participation in a campaign includes but is not limited to making contributions or soliciting contributions, publicly endorsing or urging endorsement of a candidate, or participating in decisions by organizations to participate in a campaign.
 3. No member may be a registered lobbyist or campaign consultant, or be employed by or receive gifts or other compensation from a registered lobbyists or campaign consultant.
 4. No member may hold employment with the City, Redevelopment Agency, or any member of the City Council outside of City employment.
 5. No member may hold any other City office.
 6. No member may become a candidate for City elective office during his or her tenure on the Committee, and for twelve (12) months thereafter.

12.18.360 Investigation

All of the following shall apply to committee investigations:

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- A. The committee may be staffed by administrative, investigative, and legal staff. Legal staff shall be outside counsel retained by the City Council to investigate the allegations and serve as the prosecutor in a removal hearing.
- B. If authorized by the City Council, the committee may subpoena witnesses and documents.
- C. If requested by the City Council, the committee may determine whether a member of the City Council is disqualified from participating in the removal proceedings due to actual bias or a high probability of actual bias.
- D. 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.
- E. The City Clerk shall place on the agenda of regularly scheduled City Council meeting a status report on the progress of the investigation by the committee within thirty (30) days of the committee's appointment by the City Council.
- F. 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:
 - 1. A statement of the facts and allegations leading to the investigation;
 - 2. A summary of the evidence reviewed and relied upon for the recommendation;
 - 3. A statement of the applicable laws and policies;
 - 4. An analysis applying the evidence to the applicable laws and policies; and

5. A conclusion setting forth the committee's findings and recommendation.

- G. The City Clerk shall post the final report of the committee on the City's website no later than three (3) business days after the committee issues the report.

- H. 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.

- I. 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.

12.18.370 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.

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- 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 thirty (30) calendar days and within sixty (60) days from the date that the notice of hearing is served on the Subject Member. The date for the removal hearing may be extended beyond sixty (60) days upon a showing of good cause by either party and approval by a simple majority of no less than (6) affirmative votes of the City Council.

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

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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 subjects of the removal hearing, then the Members of Council remaining shall by a simple majority of no less than six (6) affirmative votes of the City Council 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 by clear and convincing evidence that such misconduct occurred. A decision to remove the Subject Member from office requires the adoption of a resolution at the conclusion of the hearing, by three-fourths (3/4) vote of the Members of Council who are eligible to vote but no less than six (6) affirmative votes of the City Council 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).

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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