



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Proposed Ordinance Clarifying  
Who Can Direct Vehicular  
Traffic Within The Public Right  
Of Way

**DATE:** June 11, 2009

## RECOMMENDATION

Approval of an ordinance repealing Section 11.12.040 of Chapter 11.12 of Title 12 of the San Jose Municipal Code and amending Section 11.12.050 of Chapter 11.12 of Title 12 to clarify the persons who are authorized to direct traffic within the public right of way.

## BACKGROUND

San Jose Municipal Code Section 11.12.040 currently authorizes fire department officers to direct traffic at the scene of a fire. With regard to other persons authorized to direct traffic, San José Municipal Code Section 11.12.050 states, in full:

No person other than an officer of the police department or a person deputized by the chief of police or persons authorized by law shall direct or attempt to direct traffic by voice, hand or other signal.

The City currently permits contractors performing construction within certain portions of the public right of way to use trained, civilian flaggers to provide traffic control. The City's practice has been to allow contractors to use such flaggers for construction activities within those portions of the public right of way that are not at or near signalized intersections. The City has required contractors to use San José police officers or San José Reserve police officers to provide traffic control for construction activities at or near signalized intersections.

At various times in the past, there have been proposals to expand the use of trained, civilian flaggers. The Departments of Public Works and Transportation are currently analyzing a proposal to expand the use of such flaggers for construction work at or near signalized intersections not having high traffic volumes or complex traffic patterns.

June 11, 2009

**Subject: Proposed Ordinance Clarifying Who Can Direct Vehicular Traffic Within The Public Right Of Way**

Page 2

The authorization contained in San Jose Municipal Code Section 11.12.050 does not expressly refer to the use of trained, civilian flaggers to direct traffic. However, the use of such flaggers arguably is permitted pursuant to the "persons authorized by law" language contained in Section 11.12.050. The proposed ordinance would simply clarify the situation by expressly authorizing the use of trained, civilian flaggers. The proposed ordinance would not address the extent to which such flaggers are used; this would be determined by a separate policy decision. The proposed ordinance would also make some other clarifying changes regarding who can direct traffic.

**ANALYSIS**

California Vehicle Code Section 21100 gives the City broad authority to adopt rules and regulations regarding the regulation of traffic. In relevant part, it allows a local jurisdiction to adopt rules by ordinance or resolution regarding the regulation of traffic by traffic officers, and the regulation of traffic at the site of road construction or maintenance by persons authorized for that duty by the local authority.

Pursuant to the broad authority granted by California Vehicle Code Section 21100, the proposed ordinance would clarify the persons who are authorized to direct traffic. Beyond authorizing an officer of the Police Department and any person deputized by the Chief of Police to direct traffic, the proposed ordinance would clarify that flaggers are authorized to direct traffic at the site of any construction or maintenance when:

- The flagger is trained or certified in accordance with the requirements of Section 1599 of Title 8 of the California Code of Regulations; and
- The person is a City employee performing construction or maintenance work; or
- The City authorized the use of the flagger in the construction contract, encroachment permit or other document pursuant to which the construction is occurring.

Section 1599 of Title 8 of the California Code of Regulations provides a number of regulations regarding the use, safety and training of flaggers. The requirement that the use of flaggers has to be authorized in the document pursuant to which the construction is occurring means that the scope of the use of flaggers must be determined separate from this ordinance.

The proposed ordinance would also clarify that any person who the Chief of Police temporarily or permanently appoints to perform traffic control in accordance with the requirements of Subdivision (e) of California Vehicle Code Section 21100 is authorized to direct traffic. Vehicle Code Section 21100 allows a local jurisdiction to adopt rules by

June 11, 2009

**Subject: Proposed Ordinance Clarifying Who Can Direct Vehicular Traffic Within The Public Right Of Way**

Page 3

ordinance or resolution regarding the regulation of traffic by a person given "temporary or permanent appointment" for that duty by the local authority whenever official traffic control devices are disabled or otherwise inoperable, at the scenes of accidents or disasters, or at locations as may require traffic direction for orderly traffic flow. Before a local jurisdiction can give a person "temporary or permanent appointment" the person must complete a training program that has been reviewed and approved by the chief law enforcement officer. The San José Police Department has used this provision in the past to train some of the parking control personnel at the Airport so that they could direct traffic at the terminal.

Finally, the proposed ordinance would move the authorization for an officer of the Fire Department to direct traffic from San Jose Municipal Code Section 11.12.040 to Section 11.12.050. This change would identify in one provision all of the persons authorized to direct traffic.

**CONCLUSION**

The proposed ordinance is a "clean-up" ordinance. It would simply clarify the persons who are authorized by the City to direct traffic and would not impact the City's current traffic control policies. Specifically, it would expressly authorize the use of trained, civilian flaggers to provide traffic control. It would not affect the manner in which the City is currently using such flaggers and would not restrict the City's ability to change the scope of use of such flaggers in the future.

**CEQA**

Not a Project.

RICHARD DOYLE, City Attorney

By   
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