

TO: HONORABLE MAYOR AND CITY COUNCIL **FROM:** NORA FRIMANN
City Attorney

SUBJECT: Charter Provisions on Council Vacancy **DATE:** October 23, 2024

INFORMATIONAL MEMORANDUM

On October 3, 2024, the San Jose Police Department (SJPD) served a search warrant on Councilmember Torres as part of an investigation into allegations of extortion made by the Councilmember and communications allegedly sent by him of a sexual nature involving a minor. In an October 4, 2024 statement, Councilmember Torres indicated that the search was based on misinformation provided to law enforcement.

On October 10, 2024, SJPD's probable cause affidavit requesting the October 3 search warrant was published, which contained more detailed allegations of Councilmember Torres' text communications. Councilmember Torres' attorney was quoted in articles stating that these communications were "role play", and "do not reflect any real world actions or intentions." His attorney also indicated that Councilmember Torres does not intend to resign.

In light of recent events, this memorandum discusses various Charter sections that govern Council authority to act and events that may give rise to vacancy of an elected office.

DISCUSSION

San Jose is a Charter City, and an elected office may become vacant pursuant to several provisions in the Charter, including:

1. Recall of the elected official pursuant to City Charter Section 1603(d);
2. Office vacancy for various reasons (City Charter Section 409); or
3. Removal for official misconduct pursuant to City Council authority and subject to specific procedures (City Charter Sections 405 and 409(e), Municipal Code Chapter 12.18).

I. Recall Pursuant to City Charter Section 1603

Under Charter Section 1603(d), the voters of the Councilmember's district retain the right to initiate proceedings for the exercise of the power of recall. To initiate the proceedings, a petition for recall must be signed by the voters of the district equal in

number to at least twelve percent (12%) of the number of persons residing in the district eligible to vote according to the last report of registration filed by the County Registrar of Voters with the Secretary of State, which is in effect at the time the notice of intent to circulate the petition is published. If this happens, a recall election would need to be held.

II. Office Deemed Vacant Under City Charter Section 409

Under City Charter Section 409, an elected City office may become vacant if certain events, listed below in abbreviated form, should occur:

- (a) Death;
- (b) Insanity, as determined by a final order of a court;
- (c) Resignation;
- (d) Failure to satisfy any requirement for retention of office;
- (e) Removal;
- (f) Absence from California for more than sixty (60) days;
- (g) Failure to discharge duties of office for three (3) consecutive months;
- (h) Felony conviction or any offense involving a violation of official duties;
- (i) Refusal or failure to file official oath or bond;
- (j) A decision of a tribunal declaring the election or appointment of the member void;
- (k) An order vacating the office for failure to furnish a supplemental bond;
- (l) A final order by a court of commitment to a hospital for substance addiction; or
- (m) Unexcused absence from five (5) consecutive Council meetings.

Upon the occurrence of any of these events, without an applicable exception, the elected official's office becomes vacant. Many of the events do not require an investigation or hearing to determine whether they occurred while other events including removal for official misconduct (discussed below in Section III) would require a hearing and finding.

For example, under City Charter Section 409(g), an office may become vacant if the incumbent ceases to discharge the duties of their office for a period of three (3) consecutive months, except when prevented by sickness or when absent from the State with Council approval.

An alternate ground under City Charter Section 409(m) provides that the incumbent's absence from five (5) consecutive regular meetings of the Council could result in a vacancy unless excused by written resolution of the Council. Council can only excuse absences prospectively under this provision.

Charter Section 409(m) states, in its entirety, that an office becomes vacant upon:

The incumbent's absence from five (5) consecutive regular meetings of the Council, unless excused by written resolution of the Council. No such excuse shall operate retroactively. No resolution shall excuse an incumbent's absence from more than five (5) consecutive regular meetings immediately following the date of adoption of such resolution although additional resolutions may be adopted excusing an incumbent's absence from not more than five (5) additional regular meetings immediately following the date of each such resolution. For purposes of this subsection, regular meetings from which an incumbent has been absent shall not be deemed consecutive if separated by one or more regular meetings at which such incumbent has been present or their absence from which has been excused by the Council. Also, for purposes of this subsection, "regular meetings" shall not be deemed to mean or include "regular adjourned meetings", "special meetings", or any committee meetings.

Separately, an elected official could seek to have their absence excused under Charter Section 407(e) and Rules of Conduct Resolution 2023-22, wherein Council may excuse an absence because the Councilmember is away on authorized City business, is ill, or is tending to the illness or death of a close family member. If Council approves the request for excused absence, that absence would not be counted towards the consecutive absences that could trigger vacancy under City Charter Section 409(m).

III. Removal for Official Misconduct Under City Charter Section 405, 409(e) and Municipal Code Chapter 12.18

Under City Charter Section 405, the City Council has authority to judge the grounds for forfeiture or loss of a Councilmember's respective office, including removal under City Charter Section 409(e).

Charter Section 405 states:

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.

On December 5, 2006, the City Council adopted Ordinance 27925, implementing its authority under Charter Section 405 by adding Chapter 12.18 to Title 12 of the San Jose Municipal Code. Chapter 12.18 codifies the grounds and process for removal of a Mayor or Councilmember for acts deemed official misconduct in office.

The removal process is the most severe response to misconduct in office, and should be exercised only for the most egregious and serious offenses. The limitation of the grounds for removal to official misconduct is based on a survey of state law and other jurisdictions in California, and how the courts have interpreted the requirement to remove an elected official from office. Most jurisdictions do not have removal provisions in their charter, and are subject to state law involving removal following a conviction of willful or corrupt misconduct in office. San Francisco and Los Angeles have charter provisions allowing for suspension and/or removal of an elected official based on official misconduct. Officials subject to removal are entitled to due process, including proper notice of the charges against them, the right to an impartial hearing, and the opportunity to present evidence in their defense. This universally accepted approach in limiting the basis for removal is derived from the importance of protecting the fundamental right to hold public office under the First Amendment, and against potential misuse that could lead to the disenfranchisement of voters in the absence of a recall.

a. Fundamental Right to Hold Public Office

The California Supreme Court has made clear that an elected official's right to hold public office is a fundamental right derived from the First Amendment, and the exercise of this right should not be curtailed in any way unless clearly stated by law:

“[The] right to hold public office, either by election or appointment, is one of the valuable rights of citizenship. It is a ‘fundamental right’ which the First Amendment protects against infringement. There is ‘a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.’ To justify any impairment of First Amendment rights, there must be present a compelling governmental interest.”¹

b. Willful Misconduct in Office

Chapter 12.18 of the San Jose Municipal Code defines willful misconduct in office as:

- “Willful” is defined as “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.” (Section 12.18.300)
- “Misconduct in office” is defined as “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

¹ *Zeilenga v. Nelson*, 4 Cal. 3d 716, 720-21 (1971)

abide by federal and state law, city charter, city ordinances, and city policies, including conflict of interest or governmental ethics laws.” (Section 12.18.220)

An elected official does not need to commit a knowing or purposeful violation of the law for their actions to amount to willful or corrupt misconduct; courts have held that “deliberate misbehavior” that does not amount to criminality may be enough. Removal may be justified if the conduct of such officer is below the standard of decency rightfully expected of a public official, such as a gross and repeated failure to carry out official duties in a timely and appropriate manner. 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;
- a city councilman used a city vehicle for private purposes; and
- a county sheriff falsely certified her financial disclosures and favored campaign donors and personal connections for concealed carry licenses.

In each of these instances, the officials knew of the facts giving rise to the misconduct and purposefully committed the acts or omissions that violated a state or local law or policy.

Ambiguities in the law are to be resolved in favor of eligibility to office. 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.

- In one case, the court held that a former Lieutenant Governor was not considered “convicted” for the purpose of forfeiting office even after a jury found him guilty of perjury, because the court had not entered judgment against him yet. Until that judgment, the official retained their right to hold office and receive compensation. The court emphasized that the word “convicted” was ambiguous, and ambiguities in a provision calling for forfeiture of an existing office should be resolved in favor of continued eligibility.
- In another case in which a city councilmember previously pled guilty to misdemeanor obstruction of justice for making a false statement in a lawsuit against the city, the court held that the criminal proceedings did not establish “malfeasance in office” evidencing moral corruption and dishonesty, actions that would disqualify a person from holding public office under state law. In upholding the trial court’s ruling that the councilmember was eligible to continue to hold office, the court stressed the requirement that the authority for forfeiture of office be unambiguous and specifically outlined in state law.

c. Nexus to Official Duties

The misconduct must have occurred in the Councilmember's official capacity or while the member was performing the duties of their office. The requirement of a nexus between misconduct and the official duties of a public official mirrors state law and other jurisdictions with charter removal provisions. A nexus to official duties ensures that only actions taken in connection with the official's public role are grounds for removal or disciplinary action. It protects officials from being penalized for purely private conduct when that conduct does not involve an abuse of official authority or a violation of the public's trust.

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 was 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.

d. Procedure for Removal

Removal of a Councilmember under Chapter 12.18 will result in the office becoming vacant under Charter Section 409(e). A member of City Council subject to removal from elected office for willful misconduct has a due process right to an impartial, unbiased decision-maker. Chapter 12.18 provides the specific procedures for initiation of the proceeding, the investigation, hearing, and removal. The purpose of the removal proceeding is to determine whether a member of Council should continue in his or her capacity as an elected official of the City of San Jose and not to determine whether the member is guilty of a crime. The Council may determine that the Councilmember 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. If Council decides to remove the member from office, they must adopt a resolution at the conclusion of the hearing by three-fourths vote of the members of Council who are eligible to vote.

VI. City Council Policy 0-28 (Council Conduct Policy)

City Council Policy 0-28, titled the "Council Conduct Policy," additionally provides that City Council can take one of the following three actions against members of the Council for violations of law or City policy:

- **Admonition:** This is the least severe form of action, 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.
- **Sanction:** 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.
- **Censure:** 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.

CONCLUSION

The City Council has authority under the City Charter to determine the grounds for forfeiture or loss of office, subject to limitations set forth in the Charter and the San Jose Municipal Code. These provisions balance the elected official's right to due process in protecting the fundamental right to hold office with the compelling government interest in addressing misconduct in office.

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By /s/ _____
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