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May 18, 2016

REPORT TO THE CHARTER REVIEW COMMITTEE

STATE LAW AND CHARTER CITY PROVISIONS GOVERNING REMOVAL OF OFFICERS FOR CAUSE

INTRODUCTION

At the February 2, 2016 Charter Review Committee (Committee), the City Attorney discussed issues related to the removal of City of San Diego (City) elected officials from office for misconduct. The City was the subject of a County of San Diego Grand Jury investigation regarding limitations in the City of San Diego Charter (Charter) related to the removal of elected officials. According to the Grand Jury report, the Charter's limited definitions of vacancy prevented the Grand Jury from initiating removal proceedings under state law.

Several Charter sections provide for forfeiture of office, but the Charter provides no explicit enforcement mechanism for removing an officer for misconduct. In its response to the Grand Jury report, the City pledged to explore a Charter amendment addressing the removal of City officers for misconduct. To assist the Committee with recommendations for Charter amendments, this Report outlines causes and procedures for removal of an officer for cause under California state law and removal procedures of other charter cities, as well as enforcement procedures for current Charter sections calling for forfeiture.

QUESTIONS PRESENTED

1. Can the voters amend the Charter to provide for the removal of elected officials?

2. What constitutes cause for removal under California state law and what procedures are available for removing elected officers from office for misconduct?

3. How have other California charter cities addressed removal of elected officers in their charters?

4. When do the forfeiture provisions of the Charter apply and how can the City enforce those sections?

5. Can the Charter be amended to provide for a San Diego City Council (Council)-initiated special election to remove an elected officer with or without cause?

SHORT ANSWERS

1. Yes. The California Constitution gives charter cities plenary authority to provide for the removal of officers. Cal Const. art. XI, § 5(b).

2. California Government Code (Government Code) section 3060 provides a procedure for a grand jury to remove an officer for willful or corrupt misconduct. Additionally, state law requires forfeiture of office for those convicted of designated crimes and provides procedures for the removal of state officers by impeachment.

3. Most cities define "vacancy" to include removal, but do not provide a procedure for removal. The effect of this is to allow for removal under Government Code section 3060. The charter of the City and County of San Francisco provides a procedure for the Board of Supervisors to remove elected officials for official misconduct.

4. When a City officer is responsible for unlawful expenditures or other conduct calling for forfeiture from office, he or she must forfeit the office and can never hold City office again. Currently, the available enforcement mechanisms are a writ proceeding, a *quo warranto* proceeding, or declaratory relief action. Amending the Charter to define "removal" as a form of vacancy allows state law removal procedures to be utilized for enforcement, such as the Grand Jury procedure under Government Code section 3060.

5. A Council initiated special election removal process would be unique in California, but possible based on the plenary power provided to the City to provide for the removal of officers. If the removal is for cause, due process concerns could limit the ability to refer a determination to voters.

ANALYSIS

I. PLENARY AUTHORITY OF CHARTER CITIES.

The California Constitution grants plenary authority to charter cities to provide for the removal of officers. Cal. Const. art. XI, § 5(b). Charter provisions on vacancy and removal will trump conflicting state laws. *Id.* The following discussion in Section II provides an overview of the state law provisions regarding vacancy, as applied to general law cities. Section III discusses how state law interacts with conflicting charter provisions. Section IV discusses referring the decision to remove to the voters.

Under state law, a vacancy in office occurs under a number of scenarios, including removal. Cal. Gov't Code § 1770. By contrast, the Charter only provides for vacancy in three scenarios for the mayor: death, resignation, or recall. San Diego Charter § 265(j). For Councilmembers, in addition to those listed for the Mayor, unexcused absences also creates a vacancy. San Diego Charter § 12 (e)(2). Several Charter sections provide for forfeiture of office for certain misconduct, including Charter sections 94, 97, 100, 101, 108, 217, and 218. Although forfeiture causes are addressed, the Charter provides no procedure for the forfeiture of office in most cases; Charter sections 217 and 218 specify that a court or the Council can find an officer guilty of those sections.

II. STATE LAW PROVIDES FOR THE REMOVAL OF OFFICERS FOR MISCONDUCT BY GRAND JURY ACCUSATION OR IMPEACHMENT.

A. Vacancy For Reasons Other Than Misconduct.

Removal, death, resignation, adjudication of mental or physical incapacity, moving from a district, or conviction of certain felonies are some of the situations that create vacancies under state law. Cal. Gov't Code § 1770. Courts have ruled that vacancies for reasons other than removal exist *ipso facto* and the office may be filled without any sort of hearing or proceeding. *Klose v. Superior Court in & for San Mateo County*, 96 Cal. App. 2d 913, 917 (1950), citing *People ex rel. Tracy v. Brite*, 55 Cal. 79 (1880).

State law also provides an expedited process for challenging an elected official's right to hold office, known in the law as *quo warranto*. Cal. Code. Civ. Proc. § 803. *Quo warranto* is the proper procedure to determine whether an individual lawfully holds office for any reason other than removal for misconduct. Cal. Code Civ. Proc. § 803; 73 Cal. Op. Att'y Gen. 191 (1990). For example, under the state law definition of vacancy, the *quo warranto* procedure must be used to adjudicate when an official is considered mentally or physically incapacitated for the purposes of vacating an office. Cal. Gov't Code § 1770(b). Generally, an individual or agency must initiate an action by application to the California Attorney General. Cal. Code. Civ. Proc. § 811.

B. Removal For Misconduct.

The people have the power to remove elected officials by recall. Cal. Const. Art. 2, § 19. Additionally, state law provides a procedure for the removal of officers for cause after conviction of crimes or misconduct. The state provides a legislatively directed impeachment process for certain statewide office holders. Cal. Gov't Code § 3020, *et seq*. Government Code sections 3060-3075 outline procedures for grand jury initiation of judicial removal proceedings for other officials.

1. Forfeiture Of Office After Conviction.

Government Code section 3000 requires forfeiture of office upon the conviction of certain crimes. Examples of crimes requiring forfeiture include: acceptance by a public officer of a pass or discount from a transportation company (Cal. Const. art. XII, § 7); an officer accepting compensation for appointment of another to office (Cal. Penal Code § 74); and bribery or other act of official corruption (Cal. Penal Code § 98). Government Code section 3001 makes intoxication while discharging duties a misdemeanor requiring forfeiture of office. The procedure for removal of an elected official under these sections is judicial, as a court will impose the penalty of forfeiture of office after conviction through the criminal process. *People v. Hawes*, 129 Cal. App. 3d 930, 939 (1982).

2. An Officer's Willful Or Corrupt Misconduct Can Lead To Removal Initiated By Grand Jury Action.

Whereas forfeiture upon conviction is provided for certain crimes, for "willful or corrupt misconduct" of municipal officers, the state law provides for removal through grand jury proceedings. Government Code sections 3060-3075 provide for the removal of officials not subject to impeachment, including municipal officials. The procedure allows for grand jury proceedings against municipal officers for "willful or corrupt misconduct." The procedure for removal is initiated by an accusation by a grand jury that is then transmitted to the district attorney. Cal. Gov't Code § 3062. The district attorney has a mandatory duty to serve the accusation and notice to appear on the defendant, commencing the prosecution. The accused is entitled to a jury in the same manner as a criminal indictment. Cal. Gov't Code § 3070. The removal action is a special proceeding and is not the same as an impeachment or criminal proceedings. *People v. Hulburt*, 75 Cal. App. 3d 404, 408 (1977).

The Government Code does not define "willful or corrupt misconduct." Courts have ruled that misconduct leading to removal does not necessarily have to be a crime, but conviction of a crime under the California Penal Code (Penal Code) does constitute misconduct warranting a grand jury accusation. *People v. Harby*, 51 Cal. App. 2d 759, 767 (1942).[1] Further, violation of a municipal ordinance can constitute willful misconduct if it "betrays, in the heart of the malefactor, a contempt for the law." *Id.* Courts have found misconduct "broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office." *Coffey* v. *Superior Court of Sacramento County*, 147 Cal. 525, 529 (1905). Officials do not have to act with the intent to commit misconduct or have a "corrupt or malicious motive." *Id.*

A *quo warranto* action challenging an elected official's right to hold office may proceed concurrently with a state law or charter removal proceeding for misconduct if the misconduct provides another reason for vacancy. 90 Cal. Op. Att'y Gen. 82 (2007). For instance, if an elected official moves from his or her district, a *quo warranto* action to determine whether he or she is qualified for the office can proceed concurrently with a removal action for falsification of election documents.

3. Legislative Impeachment For Certain Statewide Officials.

The removal procedures of Government Code section 3060 apply only to those officers not subject to impeachment, such as municipal officials. "State officers elected on a statewide basis, members of the State Board of Equalization, and judges of state courts are subject to impeachment for misconduct in office." Cal. Gov't Code § 3020. The state impeachment procedures are inapplicable to municipal officers, but are of value in determining what removal procedures the city council may wish to include in any ballot measure. The City has plenary authority under the California Constitution to legislate removal procedures, and may provide for a legislatively-directed removal process like impeachment. *Coffey*, 147 Cal. at 532.

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[1] However, crimes leading to forfeiture as described in Section II.B.1 above must be prosecuted under those specific sections rather than Government Code section 3060. *People* v. *Hawes*, 129 Cal. App. 3d 930, 939 (1982).

The California Constitution vests the power to impeach in the Assembly and the power to adjudicate the impeachment in the Senate. Cal. Const. art. IV, § 18. Government Code sections 3020-3040 provide a procedure for the initiation of articles of impeachment in the Assembly and trial by the Senate. A two-thirds vote is required for conviction. Cal. Gov't Code § 3032. If convicted, penalties include removal from office and disqualification to "hold any office of honor, trust, or profit under the State." Cal. Gov't Code § 3035.

Impeachment of state officials is available for misconduct. Cal. Gov't Code § 3020. The Government Code is silent as to what constitutes misconduct beyond the general forfeiture requirements of Government Code sections 3000 and 3001. As applied to judges, courts have found that criminal acts and acting "with partiality, or maliciously, corruptly, arbitrarily, or oppressively" constitute misconduct warranting impeachment. *Frazier v. Moffatt*, 108 Cal. App. 2d 379, 385 (1951).

III. REMOVAL FROM OFFICE FOR MISCONDUCT IN CHARTER CITIES.

When a city charter provides for the exclusive means for removal of officers, the charter supersedes the application of Government Code section 3060 grand jury proceedings removal for misconduct. *Curphey v. Superior Court*, 169 Cal. App. 2d 261, 268-69 (1959). Many charter cities provide for removal as a type of vacancy, but provide no procedure for removal other than recall. Courts have ruled that where charters allow for removal as a form of vacancy, by recall or by a legislative body, but did not provide sole or exclusive authority for removal, the application of grand jury proceedings under state law was appropriate. *Coffey,* 147 Cal. at 532; *Harby v. Superior Court*, 64 Cal. App. 2d 911, 914 (1944); *Betkouski v. Superior Court in & for Los Angeles County*, 34 Cal. App. 117, 126 (1917). For example, a Los Angeles county charter provision similar to Charter section 108 requiring forfeiture of office for fraud was enforced via the state law procedure for removal for misconduct provided under Government Code section 3060. *Betkouski*, 34 Cal. App. at 119. In that case, the court ruled there was no conflict between the charter and state law removal procedures because the charter defined vacancy to include removal without providing a removal procedure. *Id.*

The charter of the City and County of San Francisco (San Francisco Charter) does provide a procedure for the removal of elected officials for official misconduct. San Francisco Charter § 15.105. The San Francisco Charter provides, in part:

> Official misconduct means any wrongful behavior by a public officer 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 governmental ethics law. When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.

San Francisco Charter § 15.105(e).

The San Francisco Charter allows the mayor to suspend elected officials for official misconduct and then initiate proceedings with the Ethics Commission by notifying the Board of Supervisors and presenting written charges to both the Board of Supervisors and the Ethics Commission. San Francisco Charter § 15.105(a). After an evidentiary hearing where the official has the opportunity to respond to charges, the Ethics Commission presents findings to the Board of Supervisors. *Id.* The Board of Supervisors can then remove the officer with a three-fourths vote. If an official is convicted of a felony crime involving moral turpitude, he or she may be removed following conviction and a determination from the Ethics Commission that the crime warrants removal. *Id.*[2]

IV. CHARTER SECTIONS CALLING FOR FORFEITURE CAN BE JUDICIALLY ENFORCED.

While the Charter's definition of vacancy is limited, several Charter sections provide for forfeiture of office, including:[3]

- Forfeiture for personal interests in contracts with or for the City (San Diego Charter § 94).
- Forfeiture for favoritism in contracts (San Diego Charter § 100).
- Forfeiture for favoritism or collusion in contracts (San Diego Charter § 101).
- Forfeiture for fraud in payments not authorized by law (San Diego Charter § 108).[4]
- Forfeiture for payments for office (San Diego Charter § 217).
- Forfeiture for accepting payments for employment (San Diego Charter § 218).

The Charter does provide a removal procedure for forfeiture in certain instances. Charter sections 217 and 218 specifically allow the Council, in addition to a court, to find an officer guilty of improper payments and, thereby, forfeit office. As to its own members, the Council can enforce both forfeiture and qualification issues pursuant to its power to judge the qualification of its members, subject to judicial review. San Diego Charter § 14.

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[2] The Mayor would be subject to removal as an elected official. However, the charter procedure does specify who would remove the Mayor.

[3] The Committee has recommended Charter amendments addressing contracting procedures, including sections calling for forfeiture. Current draft language does not change the forfeiture provisions. Whether additional changes regarding forfeiture can be included in a ballot measure regarding contracting procedures will depend on the Committee's recommendations.

[4] This Office previously opined about the enforceability of Charter section 108 in 2013 City Att'y MOL 99 (2013-13; Aug. 14, 2013), attached. The memorandum concluded that, in the absence of removal procedures in the Charter, the City could enforce Charter section 108 judicially though an application for declaratory relief.

Provisions with no enforcement mechanism in the Charter would require judicial enforcement. Depending on whether there was a prior judicial determination of guilt for a crime that would also constitute a violation of a Charter provision calling for forfeiture of office, a declaratory action, a writ of mandamus, or *quo warranto* action may be appropriate to ensure an elected official actually forfeits his office. *Klose,* 96 Cal. App. 2d at 919.

For instance, a conviction under state law for participating in interested contracts under Government Code section 1090 would mean that a San Diego elected official was "forever disqualified" from holding office under state law. Cal. Gov't Code § 1097. The same conduct would likely constitute a violation of current Charter section 94, which prohibits personal interests in City contracts. Currently, the Charter provides no procedure to enforce Charter section 94.

If a court convicted a San Diego elected official under state law, and he or she refused to vacate office and the Council refused to fill a vacancy, a writ of mandamus may be appropriate. A writ of mandamus compels mandatory government action. Cal. Code Civ. Proc. § 1085. If guilt under Government Code section 1090 constitutes guilt under Charter section 94, the writ of mandamus could command the Council to fill the vacancy. If the Council sought to determine whether a guilty conviction under section Government Code section 1090 constituted a violation of Charter section 94, a *quo warranto* action may be appropriate.

If the Council appointed a replacement following the state law conviction, the replaced elected official could challenge the vacancy *quo warranto,* arguing that the Charter does not define a vacancy for a violation of state law, so no vacancy existed. Absent a judicial proceeding adjudicating guilt under state law or otherwise, under the current language of the Charter, a declaratory action could determine if the official was guilty of the conduct requiring forfeiture of office. However, *quo warranto* would not be available because it is not a method of determining guilt for misconduct.

Including removal as a reason for vacancy would permit state law removal proceedings under Government Code section 3060 to be used to enforce Charter forfeiture provisions. *See Betkouski,* 34 Cal. App. 117. State law proceedings could establish guilt where no procedure is provided by the Charter. Alternatively, a removal procedure could be provided in the Charter. In that case, even with removal defined as a vacancy, state law would only apply where it did not conflict with an exclusive procedure provided by the Charter.

V. THE CHARTER CAN INCLUDE A PROCEDURE WHERE VOTERS CAN DECIDE ON THE QUESTION OF REMOVAL IN CERTAIN CASES.

Courts have placed few limitations on a charter city's ability to define the terms of removal. The Committee heard suggestions for Charter amendments providing a procedure for the Council to initiate a special election to ask the voters if an elected official should be removed.[5] A council-initiated special election for the purposes of removing an elected official is a novel idea in California and judicially untested.

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[5] Voters have a right to remove an elected official for any reason by recall. Cal. Const. art. 2, § 13. There have been no suggestions to change the current recall process.

A removal provision requiring a determination of cause would be inappropriate to put to the voters. *Betkouski,* 34 Cal. App. 117 at 122. However, no specific statute or case analyzing charter cities' plenary authority limits the City from providing for removal without cause, or for cause with no requirement for a hearing, under its plenary authority. One court determined that a charter-created office is not required to provide for any kind of judicial proceeding determining cause prior to removal, stating:

> . . . in creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and that in such a case the incumbent takes the office subject to the conditions which accompany it.

In re Carter, 141 Cal. 316, 320 (1903). If determination of cause is unnecessary, the voters could likely amend the Charter to allow the Council to initiate a procedure for the voters to decide whether to remove an elected official.

If voters are asked whether cause exists for removal, constitutional due process rights may be implicated. When removed under specified conditions, an elected official has no constitutional challenge to the removal. *Cline,* 184 Cal. At 336. When removal occurs absent an express condition, the elected office is "treated as property right and is not subject to attack except in a direct proceeding for that purpose and instituted by the authority of the state." Since voters can vote for any reason they want, a special election would not meet due process requirements for a hearing. *Harby*, 64 Cal. App. 2d at 912-13.

Final language of any proposed procedure would require analysis to ensure no other federal or state constitutional rights are implicated. While there are no cases on point, courts have ruled that charter cities' plenary authority allows for restrictions on elected office without violating voters' or officials' free speech or equal protections rights rights in other contexts, such as term limits. *See Cawdrey v. City of Redondo Beach*, 15 Cal. App. 4th 1212, 1231 (1993).

CONCLUSION

As a charter city, the City has plenary authority to provide for the removal of officers. The Charter provides for vacancies in cases of death, resignation, or recall and other Charter sections provide for forfeiture of office with no procedure. State law provides for the removal of officers for willful or corrupt misconduct and forfeiture of office upon the conviction of certain crimes. Courts can punish certain crimes with forfeiture of office, statewide office holders can be impeached, and a special judicial proceeding, initiated by an accusation of a grand jury leads to removal for misconduct for other public office holders, including local officials. If the City desires the certainty the Grand Jury suggested, a Charter amendment expanding the definition of vacancy can provide for the application of state law procedures for removal or a unique removal

process. The City can provide for a removal process directed by the Council. A process where the Council initiates a special election is untested, but charter cities have broad authority to determine how officials are removed from office and there is no indication that removal power be restricted to specific causes or require certain procedural requirements.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Jennifer L. Berry
Jennifer L. Berry
Deputy City Attorney

JLB:sc:ccm
RC-2016-7
Doc. No. 1248700_3
Attachment: 2013 City Att'y MOL 99 (2013-13; Aug. 14, 2013)
The City and County of San Francisco Charter section 15.105

ATTACHMENT 1

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MEMORANDUM OF LAW

DATE: August 14, 2013

TO: City Council

FROM: City Attorney

SUBJECT: Enforcement of Charter Section 108 Against an Officer of the City

INTRODUCTION

This office has been asked whether there are provisions in the San Diego City Charter (Charter) for impeachment of elected officers by the San Diego City Council (Council). Although there are no such provisions, the Charter does address forfeiture of office. This Memorandum of Law focuses on Charter section 108 (Section 108).

Under Section 108, every City officer who willfully approves or allows unauthorized payments from the City treasury is subject to removal from office. The Mayor is an "officer" under the Charter. Upon decision of the Council in closed session, the City may file a declaratory relief action to enforce Section 108 in court. A declaratory relief action is designed to provide a relatively prompt forum in which to adjudicate the rights and obligations of the parties.

ANALYSIS

I. SECTION 108 PROVIDES FOR FORFEITURE OF OFFICE

Section 108 was approved by the voters as part of the 1931 Charter. It is found in Article VII, the Finance article of the Charter, and seeks to punish the misuse of City funds. It states:

Section 108: Forfeiture of Office for Fraud

> Every officer who shall willfully approve, allow, or pay any demand on the treasury not authorized by law, shall be liable to the City individually and on his official bond, for the amount of the demand so approved, allowed or paid, and shall forfeit such office and be forever debarred and disqualified from holding any position in the service of the City.

Thus, under the plain meaning of Section 108:

1. "Every officer"

2. "who shall willfully"

3. "approve, allow or pay"

4. "any demand on the treasury not authorized by law . . ."

5. "shall forfeit such office and be forever debarred and disqualified from holding any position in the service of the City."

Similar language in Article X, section 9 of the City's 1889 Charter did not include the forfeiture requirement:

> Section 9. Every officer who shall approve, allow or pay any demand on the treasury not authorized by law, ordinance, or this charter, shall be liable to the city individually, and on his official bond, for the amount of the demand so illegally approved, allowed or paid.

The penalty for the offense of approving or allowing an illegal payment by the City was thus heightened in the 1931 Charter to add forfeiture of office and disqualification from future employment by the City.

Reflecting the importance of protecting the public, other provisions in Article VII also require that an officer or employee found violating the City's financial trust forfeit the office and employment with the City.[1] *See* Charter §§ 94 (personal interest in city contracts), 100 (favoritism in public contracts), and 101 (consequences of favoritism, collusion in bidding).[2]

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[1] *See* Minutes of the Meeting of the Board of Freeholders, Aug. 9, 1929, calling Article VII "the most important and valuable part of the charter."

[2] Forfeiture provisions are also included in Charter sections 131 (knowingly false statement by applicant for employment), 136 (willful or corrupt violation of the Civil Service rules), 217 (payment for office), and 218 (contribution for employment).

II. "EVERY OFFICER" INCLUDES THE MAYOR

Section 108, by its express language, applies to "every officer" of the City and does not distinguish between appointed or elected officers.[3]

The office of the Mayor is created by law as reflected in Articles IV and XV of the Charter. 45A Cal. Jur. 3d *Municipalities* § 109 (2013); *also* Cal. Const. Art. XI § 5, subd. (b) (granting plenary authority to charter cities to provide for municipal officers and employees).

The Charter expressly states that the Mayor is an "officer". Under Charter section 265 (b) (1), the Mayor is the "chief executive officer" of the City. The Mayor has all "the authority, power and responsibilities formally conferred upon the City Manager." Charter § 265(b).

The Mayor is clearly an "officer" of the City. Had the framers of the "Strong Mayor" amendments to the Charter wanted to exempt the chief executive officer from the provisions of Section 108, they could have done so. Having not done so, Section 108 should be interpreted in accordance with its plain meaning. *DiCampli-Mintz v. City of Santa Clara*, 55 Cal. 4th 983, 992 (2012) (words in a statute should be given their ordinary meaning; we must assume the legislative body knew how to create an exception).

III. ENFORCEMENT OF SECTION 108 REQUIRES COURT ACTION

A. The City's Legislative Body Can Only Act to Remove an Individual from Office if that Power is Expressly Granted by the City's Charter

Removal of a city's elected or appointed official is a municipal affair subject to the control of charter cities. Cal. Const. Art. XI, § 5 (b); 45A Cal. Jur. 3d *Municipalities* § 385 (2013). The plenary authority granted to charter cities includes authority to provide for their removal. *Id.* Removal or termination of office is a limitation or condition that can be imposed by the City as part of the creation of the office. *In re Carter*, 141 Cal. 316, 320 (1903). The official "takes the office subject to the conditions which accompany it." *Id.*

The removal power can be vested in the city's legislative body, the courts, or both, depending upon the specific language in the charter. *Legault v. Bd. of Trustees of City of Roseville*, 161 Cal. 197 (1911). If the city's charter is silent, then the municipality must resort to state laws for removal, and cannot imply a power in the legislative body to remove an officer. *Id; See also Carter,* 141 Cal. at 321. If the city is empowered to remove an officer, and it exercises

[3] In a 2007 court case brought by former City Attorney Mike Aguirre, the City sought money damages under Section 108 against a terminated employee who was deputy director of the airports division of the City's Real Estate Assets Department. The trial court dismissed the claim on the grounds that the terminated employee had no personal liability under Section 108 as there was no evidence that the terminated employee was an "officer" or bonded. In an unpublished opinion (which under court rules may not be cited as authority), the Court of Appeal upheld the ruling based solely on the ground that the defendant was not an officer. By contrast, a Mayor is expressly an "officer".

that power, it must do so consistent with the law's provisions. *Id.* at 322 ("The prescribed mode must be strictly pursued . . .").

In *Legault*, the board of trustees for the city of Roseville brought charges against the city's elected marshal for dereliction of duty, held a hearing, and ordered the marshal removed from office. 161 Cal. at 198. Roseville's charter did not confer a power of removal on its Board, but the city argued that such a power was implied based upon the rule of necessity as applied in English common law and followed by courts in a few other states. *Id.* at 199-200. The California Supreme Court rejected application of the rule finding that in California, because the general law provides an avenue for the removal of municipal officers, the necessity that formed the basis for the implied right is removed. *Id.* at 204. Without that implied power, the charter city has the power to remove its officers only if that power is expressly conferred by charter or state law. *Id.; see also Clouse v. City of San Diego*, 159 Cal. 434 (1911) (where charter did not address expenditure of bond funds on local projects, the city must use procedures set forth in state law).

A charter city's power to remove its officers can be exclusive or can exist concurrent with state law, depending upon the language in the charter. *Id.*; *see also Coffey v. Superior Court of Sacramento Cnty.*, 147 Cal. 525 (1905). For example, in *Coffey*, a case involving the removal of the chief of police, the city of Sacramento's charter provided for removal of some officers by complaint brought to the board of trustees, the city attorney, or the district attorney, but not all. *Id.* at 531, 534. Based on the incomplete manner in which the charter addressed removal and the option to proceed externally by complaint to the district attorney, the Supreme Court found no intent in the charter to confer exclusive jurisdiction on the board of trustees. *Id.* Accordingly, the action to remove the chief of police could proceed either before the board of trustees or the superior court. 147 Cal. at 534.

B. The City's Charter Does Not Empower the Council to Remove an Officer Under Section 108

Based on the authorities cited above, the first step in determining the process for enforcement of Section 108 is to examine the language of the Charter. No process is specified in Section 108 for enforcement. The section states the grounds for liability and forfeiture of office but does not specify a procedure for making a finding of liability.

Further, the Charter does not provide a uniform or consistent way for handling the removal of officers. Instead, in a patchwork quilt of provisions, the Council is sometimes tasked with adjudicating grounds for removal from office, and other times the Charter is silent. For those Charter sections that place the Council in the role of adjudicator, none appear to extend to Section 108.

Charter section 14, for example, empowers the Council to decide disputes related to Council elections and the qualifications of Council members, and makes that decision subject to the review of the courts.

> The Council shall be the judge of the election and qualification of its members, and in such cases, shall have power to subpoena witnesses and compel the production of all pertinent books, records and papers; but the decision of the Council in any such case shall be subject to review by the courts.

Charter section 14 also empowers the Council to "punish its members for disorderly behavior after notification of the charge and opportunity to be heard in defense." Section 14 does not, however, explicitly empower the Council to "be the judge" under Section 108.

Charter section 41 specifically empowers the Council to remove any Civil Service Commission member for cause by a vote of two-thirds of the Council after the presentment of written charges and a public hearing. For other commissions, the Council can remove members for cause by a majority vote. Likewise, under Charter section 43, Advisory Boards and Committees, the City Council can remove members by a majority vote.

Other Charter sections provide the option of either an internal or a court process. Sections 217 (No Payment for Office) and 218 (No Contributions for Employment) both state that any officer or employee found guilty of the provision "by the Council or a court of competent jurisdiction shall thereby forfeit his office or position." Section 94, Contracts, contains forfeiture language very similar to that contained in Section 108, but unlike Section 108, it states that violation of the section is a misdemeanor, thereby referencing a court process.[4]

In contrast, the charter for the city of San Jose specifically empowers its council to adjudicate forfeiture cases, including against its mayor. In its corollary to section 14, the San Jose charter provides that the council shall be the judge of the grounds for forfeiture:

> 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*

[4] Section 94 states, in pertinent part: "No officer, whether elected or appointed, of The City of San Diego shall be or become directly or indirectly interested in, or in the performance of, any contract with or for The City of San Diego. . . . Any person willfully violating this section of the Charter shall be guilty of a misdemeanor and shall immediately forfeit his office and be thereafter forever barred and disqualified from holding any elective or appointive office in the service of the City."

> *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.

San Jose Charter § 405 (emphasis added). Thus, unlike the City's Charter, the San Jose charter expressly empowers the council to enforce the provisions found elsewhere in the charter that may result in forfeiture of office.

Also in contrast, the language of former Charter section 27 (suspended in 2006 and repealed in 2010 as part of the "Strong-Mayor" changes) not only empowered the Council to remove the City Manager and to hold hearings for that purpose, but also specifically provided that the Council's decision on such removal was final, "it being the intention of this Charter to vest all authority and fix all responsibility for such suspension or removal in the Council."[5]

> The Manager shall be chosen by the Council solely on the basis of his proven administrative qualifications. . . . The Manager shall be elected for an indefinite term, but may be removed at the pleasure of the Council; provided, however, that the Manager shall not be removed unless a majority of the members of the Council shall vote in favor of such removal. Before the Manager may be removed he shall, if he shall so demand, be given a written statement of the reasons alleged for his removal and the right to be heard publicly thereon at a meeting of the Council prior to the final vote on the question of his removal, but pending and during such hearing the Council may suspend him from office. At least two weeks shall be given the Manager between notice and hearing for the preparation of his answer to the reasons for removal. *The action of the Council in suspending or removing the Manager shall be final and conclusive on everyone, it being the intention of this*

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[5] *See also*, the original language of Charter section 31, amended in 1963, which provided for the determination of fault to be made by the Civil Service Commission or Council (emphasis added):

> Section 31. CITY EMPLOYEES OUT OF POLITICS. Neither the City Manager nor any person in the employ of the City, other than elective officers, shall take any active part in any municipal campaign, or in securing or in contributing or soliciting the contribution of money toward the nomination or election of any candidate for municipal office. Any person found guilty of violation of this Section of the Charter shall immediately forfeit his office or employment. *The personnel director is charged with the enforcement of this provision and the decision of the Civil Service Commission or Council in any case arising thereunder shall be final and conclusive.*

Charter to vest all authority and fix all responsibility for such suspension or removal in the Council.

None of these sections include general language giving the Council the power to hear all forfeiture cases or complaints of malfeasance of elected officials. As a matter of statutory construction, given the clear direction provided in some parts of the Charter for the handling of forfeiture of or removal from office, and the lack of any direction in Section 108, we cannot infer or imply that the Council has the power to sit in a judicial capacity for the purpose of adjudicating liability under Section 108. *Carter,* 141 Cal. at 321. Instead, Section 108 provides the basis for liability that, if found, results in a forfeiture of office, and the City must look beyond an internal process for a determination of that liability.

IV. THE CITY MAY SEEK ENFORCEMENT OF SECTION 108 THROUGH THE FILING OF A CIVIL ACTION

A. The City May Bring a Civil Action to Enforce the Charter

As noted above, a city charter may vest removal power in the city's legislative body, the courts or both. Where it is silent, the municipality must resort to state law. *Legault v. Bd. of Trustees of City of Roseville, supra; Coffey v. Superior Court of Sacramento Cnty., supra.*

Since the Charter does not provide a process for enforcing Section 108, the City must look to the courts for a remedy.[6] Following the City's normal procedures and in compliance with the Brown Act, the City Attorney can advise the Council in a noticed closed session of the basis for filing an enforcement action, and request authorization to file. Cal. Gov't Code § 54956.9(d)(4). The City Attorney could seek approval by the Council of both the filing of the action and the grounds upon which the action is to be filed. Cal. Gov't Code § 54956.9(a). *See* Charter § 40.

B. The City May File a Declaratory Relief Action for a Speedy Judgment of the Legal Rights and Duties of the Parties.

The purpose of a declaratory relief action under California Code of Civil Procedure section 1060 is to provide a ready and speedy remedy in cases of actual controversy relating to the legal rights and duties of the respective parties. *Leahey v. Dep't of Water Power of City of Los Angeles,* 76 Cal. App. 2d 281 (1946). A declaratory relief action will result in a judgment that declares the legal relationship between the parties; it will not award damages or enjoin to do or to refrain from doing something. *Mycogen Corp. v. Monsanto Co.* 28 Cal. 4th 888 (2002). For that reason, it allows the prompt adjudication of respective rights and obligations of parties. *Lortz v. Connell,* 273 Cal. App. 2d 286 (1969).

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[6] The case referred to in footnote 3 involving enforcement of Section 108 was filed in Superior Court.

If an actual controversy exists as to whether a violation of Section 108 has occurred, the City may sue for declaratory relief seeking a judgment that Section 108 has been violated and that the office should be declared forfeit and vacant. The City's complaint for declaratory relief would allege the appropriate facts setting forth the violation and seek a judgment from the court as to the rights and duties of the parties with respect to Section 108 including removal from office.

CONCLUSION

As a charter city, the City has the right under the California Constitution to create positions for municipal officers and employees, and to provide the terms and conditions for their service to the City, including their removal. The Charter includes several provisions designed to protect the City and to remove from office those who violate the public trust and misuse the City's resources. Under Section 108, every City officer who willfully approves or allows an unauthorized payment from the City treasury is subject to removal from office. The Mayor is an "officer" under the Charter. Upon decision of the Council in closed session, the City may file a declaratory relief action to enforce Section 108 in court. A declaratory relief action is designed to be a relatively prompt forum in which to adjudicate the rights and obligations of the parties.

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ATTACHMENT 2

Print

San Francisco Charter

SEC. 15.105. SUSPENSION AND REMOVAL.

(a) ELECTIVE AND CERTAIN APPOINTED OFFICERS. Any elective officer, and any member of the Airport Commission, Asian Art Commission, Civil Service Commission, Commission on the Status of Women, Golden Gate Concourse Authority Board of Directors, Health Commission, Human Services Commission, Juvenile Probation Commission, Municipal Transportation Agency Board of Directors, Port Commission, Public Utilities Commission, Recreation and Park Commission, Fine Arts Museums Board of Trustees, Taxi Commission, War Memorial and Performing Art Center Board of Trustees, Board of Education or Community College Board is subject to suspension and removal for official misconduct as provided in this section. Such officer may be suspended by the Mayor and the Mayor shall appoint a qualified person to discharge the duties of the office during the period of suspension. Upon such suspension, the Mayor shall immediately notify the Ethics Commission and Board of Supervisors thereof in writing and the cause thereof, and shall present written charges against such suspended officer to the Ethics Commission and Board of Supervisors at or prior to their next regular meetings following such suspension, and shall immediately furnish a copy of the same to such officer, who shall have the right to appear with counsel before the Ethics Commission in his or her defense. The Ethics Commission shall hold a hearing not less than five days after the filing of written charges. After the hearing, the Ethics Commission shall transmit the full record of the hearing to the Board of Supervisors with a recommendation as to whether the charges should be sustained. If, after reviewing the complete record, the charges are sustained by not less than a three-fourths vote of all members of the Board of Supervisors, the suspended officer shall be removed from office; if not so sustained, or if not acted on by the Board of Supervisors within 30 days after the receipt of the record from the Ethics Commission, the suspended officer shall thereby be reinstated.

(b) BUILDING INSPECTION COMMISSION, PLANNING COMMISSION, BOARD OF APPEALS, ELECTIONS COMMISSION, ETHICS COMMISSION, AND ENTERTAINMENT COMMISSION. Members of the Building Inspection Commission, the Planning Commission, the Board of Appeals, the Elections Commission, the Ethics Commission, and the Entertainment Commission may be suspended and removed pursuant to the provisions of subsection (a) of this section except that the Mayor may initiate removal only of the Mayor's appointees and the appointing authority shall act in place of the Mayor for all other appointees.

(c) REMOVAL FOR CONVICTION OF A FELONY CRIME INVOLVING MORAL TURPITUDE.

(1) Officers Enumerated in Subsections (a) and (b).

(A) An appointing authority must immediately remove from office any official enumerated in subsections (a) or (b) upon:

(i) a court's final conviction of that official of a felony crime involving moral turpitude; and

(ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the official was convicted warrants removal.

(B) For the purposes of this subsection, the Mayor shall act as the appointing authority for any elective official.

(C) Removal under this subsection is not subject to the procedures in subsections (a) and (b) of this section.

(2) Other Officers and Employees.

(A) At will appointees. Officers and employees who hold their positions at the pleasure of their appointing authority must be removed upon:

(i) a final conviction of a felony crime involving moral turpitude; and

(ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the appointee was convicted warrants removal.

(B) For cause appointees. Officers and employees who by law may be removed only for cause must be removed upon:

(i) a final conviction of a felony crime involving moral turpitude; and

(ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the appointee was convicted warrants removal.

(3) Penalty for Failure to Remove. Failure to remove an appointee as required under this subsection shall be official misconduct.

(d) DISQUALIFICATION.

(1) (A) Any person who has been removed from any federal, state, County or City office or employment upon a final conviction of a felony crime involving moral turpitude shall be ineligible for election or appointment to City office or employment for a period of ten years after removal.

(B) Any person removed from any federal, state, County or City office or employment for official misconduct shall be ineligible for election or appointment to City office or employment for a period of five years after removal.

(2) (A) Any City department head, board, commission or other appointing authority that removes a City officer or employee from office or employment on the grounds of official misconduct must invoke the disqualification provision in subsection (d)(1)(B) and provide notice of such disqualification in writing to the City officer or employee.

(B) Upon the request of any former City officer or employee, the Ethics Commission may, after a public hearing, overturn the application of the disqualification provision of subsection (d)(1)(B) if: (i) the decision that the former officer or employee engaged in official misconduct was not made after a hearing by a court, the Board of Supervisors, the Ethics Commission, an administrative body, an administrative hearing officer, or a labor arbitrator; and (ii) if the officer or employee does not have the right to appeal his or her restriction on holding future office or employment to the San Francisco Civil Service Commission.

(e) OFFICIAL MISCONDUCT. Official misconduct means any wrongful behavior by a public officer 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 governmental ethics law. When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.

(Amended November 2001; March 2002; November 2003)

SEC. 15.106.

(Repealed November 2003)