

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

JENNIFER L. BERRY
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

JAN I. GOLDSMITH

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178

TELEPHONE (619) 236-6220

FAX (619) 236-7215

June 15, 2016

REPORT TO THE RULES COMMITTEE

DRAFT OF CHARTER AMENDMENTS RELATED TO VACANCY AND REMOVAL OF ELECTIVE OFFICERS

INTRODUCTION

On May 18, 2016, the Charter Review Committee asked the City Attorney's office to draft amendments to the City of San Diego Charter (Charter) related to the vacancy and removal of elective officers to consider for inclusion on the November 2016 general election ballot. This report summarizes the amendments drafted in response to that request, for review and direction by the Rules Committee prior to consideration by the full City Council (Council). These draft amendments are submitted at the direction of the Charter Review Committee and are not proposals made by this Office.

DISCUSSION

The draft amendments for consideration address vacancy in elected office, including removal, for all elective officers. Existing Charter sections addressing vacancy and forfeiture are amended and new sections provided. The new provisions apply to all elective officers, with the exception of a vote of no confidence, which would apply only to the Mayor or City Attorney.

The amendments also clarify procedures for succession and interim authority when there is a vacancy in elective office.

I. SECTION AMENDMENTS

The following Charter sections would be amended as discussed.

Section 7: Elective Officers Residency Requirement

Currently, Charter section 7 provides residency requirements for elective officers and provides that Council members forfeit their office when they move from their district. The draft amendment strikes the forfeiture provision, which is included in a new Charter section defining vacancy, discussed below. The new section defines vacancy to occur when any elective official violates residency requirements.

Section 12: The Council

Council vacancy definitions and succession procedures are deleted and included in a new Charter section providing uniform definitions of vacancy and succession procedures for all elective officers, discussed below.

A new subsection provides for interim authority in the office of a Council member during a vacancy, providing that the chief of staff for the departing Council member can continue to manage the Council office under the authority of the Council President, until a replacement Council member is appointed or elected. It specifies that the chief of staff cannot appoint new staff, approve new expenditures, such as funding for Community Projects, Programs and Services pursuant to Council Policy 100-06, or participate or vote in Committee or Council meetings or outside boards and commissions. The draft does not address the termination of staff. If the Council would like to limit authority to terminate staff, this can be added to the draft. This limited interim authority is given pending appointment or election of someone to fill the vacancy as provided in section XI discussed below.

Section 40: City Attorney

City Attorney vacancy and succession procedures are deleted and included in a new Charter section providing for uniform definitions of vacancy and succession procedures for all elective officers, discussed below.

A new subsection provides for interim authority in the office of the City Attorney by requiring the City Attorney to designate an Assistant City Attorney to serve as Interim City Attorney in the case of a vacancy. The City Attorney records the name of the designated Assistant City Attorney with the City Clerk. The Interim City Attorney fulfills all of the duties of the City Attorney required by the section.

Section 94: Contracts; Section 100: No Favoritism in Public Contracts; Section 101: When Contracts and Agreements are Invalid

Charter sections 94, 100, and 101 provide for forfeiture of office for misconduct related to contracting. No amendments are necessary for these forfeiture provisions to operate under new vacancy procedures. Further, an expanded definition of vacancy, discussed below, clarifies that conviction of these offenses operates to vacate an office.

The Charter Review Committee approved proposed amendments to Charter section 94 as part of a proposal to update the Charter's contracting provisions. Our Office will review proposed contracting amendments for consistency with the draft vacancy provisions.

Section 108: Forfeiture of Office for Fraud

The draft amendment provides that fraud, as defined in the section, may be determined by civil liability or prosecuted as a misdemeanor, providing a specific trigger for forfeiture of office. This makes the provision consistent with other forfeiture provisions in the Charter and provides an explicit enforcement mechanism absent in the current section.

Section 217: No Payment for Office and Section 218: No Contributions for Employment

Currently, these sections allow the Council or a court to find an officer or employee guilty of the offense of giving or promising money (217) or soliciting or accepting money (218) in exchange for appointment or election. These sections are the only forfeiture provisions in the Charter allowing the Council to determine guilt.

Because these sections apply to employees and both elective and non-elective officers, the draft amendment preserves the Council's ability to determine guilt of employees and non-elective officers, but requires a finding of civil liability or criminal conviction for elective officers consistent with other Charter forfeiture provisions. The draft also specifies that applicable Civil Service rules apply to employees. There is no indication that the Council has exercised its authority under these sections in the past.

Section 265: The Mayor

The draft strikes Mayoral vacancy definitions and succession procedures, which are included in a new Charter section providing uniform definitions of vacancy and succession procedures for all elective officers, discussed in Section II.

Draft amendments also make the following changes to interim authority provisions in the office of the Mayor during a vacancy:

- Presiding officer of the Council is given the title Interim Mayor.
- The Interim Mayor does not chair Council committee meetings or Council meetings.
- The Rules of Council shall provide for the exercise of the presiding officer's duties during service as Interim Mayor.
- The periods provided by sections 280 and 290 for Mayoral approval of resolutions and ordinances do not apply during a mayoral vacancy. Resolutions and Ordinances passed by the Council will take effect as they would if the Mayor had no veto power.
- The Interim Mayor has no authority to appoint members to Charter section 41 Commissions and Charter section 43 Advisory Boards and Committees.
- A Mayoral vacancy suspends the waiting period to take action on appointments and the Council may make appointments, subject to applicable governing laws regarding appointment authority and the noticing and posting of vacancies.

II. NEW SECTIONS ON VACANCY AND REMOVAL

A. Vacancy in Elective Office

A new Charter section defines vacancy consistently for all elective officers. This section provides a more comprehensive definition of vacancy, including situations where the current

Charter is silent, such as incapacity, felony convictions, and removal. Those bases for vacancy that are new are underlined. The new section provides for vacancies follows:

- The death of the elective officer.
- An elective officer ceases to be a resident and elector of the City or a Councilmember moves from the district of which the Council member was elected to represent.
- An adjudication by a court of competent jurisdiction declaring that the elective officer is physically or mentally incapacitated due to disease, illness, or accident, and that there is reasonable cause to believe that the elective officer will not be able to perform the duties of his or her office for the remainder of his or her term.
- The resignation of an elective officer, effective on the date specified in the written letter of resignation or, if there is no date certain specified in the letter, upon receipt of the letter by the City Clerk.
- In the office of a Council member only, unexcused absences from eight (8) consecutive meetings or fifty percent (50%) of any scheduled meetings as provided by section 12 of this Charter.
- An elective officer's conviction or civil liability of an offense requiring forfeiture of office under the Charter.
- An elective officer's conviction of a felony.
- His or her removal from office by recall or other Charter procedure.

Consistent with state law and courts' interpretation of similar charter provisions, other than removal, vacancies occur automatically upon the occurrence of the specified event. *See Klose v. Superior Court*, 96 Cal. App. 2d 913, 917 (1950). For example, following a felony conviction, an office is vacant and Council can appoint or voters can elect a successor as provided by the Charter. This section is also intended to make recall and Charter removal procedures exclusive, precluding removal of elective officials pursuant to California Government Code 3060.

B. Removal for Cause

A new draft Charter section provides a procedure to remove an elective officer for cause. As explained above, the draft defines removal as a type of vacancy and the removal for cause section outlines the procedure to remove an elective officer for dereliction of duty and malfeasance in office.

1. Causes for Removal

The draft defines dereliction of duty as ceasing to discharge official duties for 90 days without excuse. Currently, the Council can direct the City Attorney to apply for a writ of mandamus to compel an officer to perform any duty expressly enjoined by law or ordinance. San Diego Charter § 40. In conjunction with that authority, this section will provide for removal if the elective officer fails to fulfil official duties after compelled by a court order.

Malfeasance in office “has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful.” *Mazzola v. City & County of San Francisco*, 112 Cal. App. 3d 141, 150 (1980). The draft defines malfeasance in office to include:

- Conviction for crimes of moral turpitude.
- Conviction for crimes involving a violation of official duties.
- Conduct that falls below the standards of decency, good faith and right action impliedly required of all elective officers (referred to as “noncriminal misconduct”).

Since the drafted amendments provide for automatic vacancy upon felony conviction, crimes leading to removal under this section would all be misdemeanors.

Moral turpitude¹ is a legal term of art used to describe crimes that have an element of dishonesty and demonstrate:

. . . inherent baseness or vileness of principle in the human heart; it means, in general, shameful wickedness, so extreme a departure from ordinary standards of honesty, good morals, justice, or ethics as to be shocking to the moral sense of the community.

50 Am. Jur. 2d Libel and Slander § 161; *People v. Chavez*, 84 Cal. App. 4th 25, 28 (2000); *In re Craig*, 12 Cal. 2d 93, 97 (1938). Examples of both felony and misdemeanor crimes considered to involve moral turpitude in California include:

- Forgery. *In re Bogart*, 9 Cal. 3d 743, 748 (1973).
- Burglary. *People v. Collins*, 42 Cal. 3d 378, 395 (1986).
- Grand theft. *In re Basinger*, 45 Cal. 3d 1348, 1358 (1988).
- Embezzlement. *In re Ford*, 44 Cal. 3d 810, 813 (1988).
- Violation of securities laws prohibiting insider trading. *Chadwick v. State Bar*, 49 Cal. 3d 103 (1989).
- Arson. *People v. Miles*, 172 Cal. App. 3d 474, 481-82 (1985).
- Assault with intent to commit murder. *People v. Olmedo*, 167 Cal. App. 3d 1085, 1097-98 (1985).
- Murder. *People v. Johnson*, 233 Cal. App. 3d 425, 459 (1991).
- Voluntary manslaughter. *People v. Parrish*, 170 Cal. App. 3d 336, 349-50 (1985).
- Felon in possession of a firearm. *People v. Littrel*, 185 Cal. App. 3d 699, 703 (1986).
- Child abuse. *People v. Brooks*, 3 Cal. App. 4th 669, 671-72 (1992).
- Possession of heroin for sale. *People v. Castro*, 38 Cal. 3d, 301, 317 (1985).

Courts have ruled city charter definitions of official misconduct² including crimes of moral turpitude to be constitutionally sufficient to provide notice of prohibited conduct to officials. *Mazzola*, 112 Cal. App. 3d at 151.

¹ Crimes of moral turpitude are determined by the courts. *In re McAllister*, 14 Cal.2d 602 (1939).

The third basis for malfeasance allows for removal where there has been no criminal conviction. While no conviction is necessary, malfeasance implies unlawful conduct by definition and courts are reluctant to find cause for removal absent a “specified statutory violation.” *Mazzola*, 112 Cal. App. 3d at 151. Accordingly, this provision would allow for removal for unlawful, but non-criminal conduct, for example as discrimination based on race, gender, or other protected categories or as the court reviewed in *Mazzola*, non-criminal provisions relating to incompatible offices. *Id.*

2. Procedure for Removal for Cause

As drafted, the City Clerk would notify the Council of the circumstances leading to removal. The draft provides for the initiation of removal proceedings for dereliction of duty upon a court of competent jurisdiction’s order of enforcement for failure to obey a writ of mandamus. This allows the Council to follow current procedures provided by the Charter to compel the performance of duties prior to the initiation of removal proceedings. The Council would vote to send the question of removal to the voters after a court compels the elective officer’s performance and he or she still refuses to perform required duties.

In the case of criminal conduct, notification of a criminal conviction by the City Clerk would initiate a Council vote on whether to ask the voters to remove the elective officer. Since malfeasance is broader than criminal conduct, the draft provides for the initiation of removal proceedings for noncriminal misconduct upon the filing a written accusation of misconduct with the City Clerk, but the current draft does not specify who would file the accusation because more policy direction from the Council is needed. Once the City Clerk notifies the Council, the Council initiates proceedings to determine whether the noncriminal misconduct warrants removal. The Council would provide detailed procedures for removal proceedings in the San Diego Municipal Code or Council Policy.

The Charter Review Committee did not give policy direction for procedures to remove elective officers for noncriminal misconduct, so if the Rules Committee would like this option, our Office needs more direction.³ Options for initiating removal for noncriminal conduct include:

- An accusation by an official or body, such as the Mayor, the Council, or the Ethics Commission for adjudication by the Council. This would provide flexibility to remove for unforeseeable conduct, but since a court decision is not the prompt for removal, it is not as objective as other removal options.
- An accusation by an official or body forwarded to another body for adjudication. For instance, the City and County of San Francisco Charter gives the mayor the authority to file an accusation with the San Francisco Ethics Commission, which holds hearings on the misconduct and forwards its findings to the board of supervisors for a final decision on removal.

² Official misconduct is often the term used to describe conduct leading to the removal of a public office and is inclusive of malfeasance by definition. *Coffey v. Superior Court of Sacramento County*, 147 Cal. 525, 529 (1905).

³ California Government Code section 3060 allows a grand jury to file an accusation for willful misconduct, initiating a judicial removal process. The Charter Review Committee specifically rejected this option.

- A court of competent jurisdiction's decision adverse to the elective official in a civil action involving noncriminal misconduct. This option would provide for an objective prompt by a court determination. However, the nature of civil proceedings, such as length, may hamper removal pending the resolution of litigation.

As the method of initiating of removal is largely a policy decision, other options for the process include:

- Notification to the Council by a party other than the City Clerk.
- Initiation or removal by criminal charges rather than criminal conviction.
- Issuance of a writ of mandate to perform duties, rather than failure to comply with a writ.

After a finding of noncriminal misconduct warranting removal, or upon notification of a criminal conviction or court order, by a three-fourths vote, the Council can initiate a special election where the voters decide whether to remove the elective official. The voters would remove by a majority vote.

The draft provides for a removal election when six months or more remain in a term. A similar restriction exists for recall elections. San Diego Municipal Code § 27.2701. When less than six months remain, the Council would have the option to suspend the elective officer through the end of the term by a three-fourths vote.

The Committee asked for an option to suspend an elective official pending criminal conviction. The draft includes a provision allowing the Council to suspend by a three-fourths vote upon criminal charges where a conviction would lead to vacancy or removal.

Other than the six-month limitation on calling a removal election, the San Diego Municipal Code would define the conduct of the special election, consistent with other special elections in the City. Excluding these details from the Charter ensures that procedures and deadlines are sufficient to allow the City Clerk to perform the necessary actions for conducting a special election.

C. Removal for Lack of Confidence

The draft includes a new section allowing the Council to initiate a special election to remove the Mayor or City Attorney upon a unanimous vote. The unanimous vote of the Council signifies the lack of confidence, rather than defining lack of confidence as a specific cause for Council action.

As explained in the recent report issued by this Office outlining the removal of elective officers in California, removal elections for cause or by unanimous vote of a legislative body are untested in California and implicate voters' federal and state constitutional equal protection and due process rights. City Att'y Report 2016-7 (May 18, 2016). *In re Carter*, 141 Cal. 316, 320 (1903) supports the concept of charter-created offices being subject to removal without judicial

proceedings to determine cause, as a term and condition of taking office. Even though it has never been overruled, this case is over 100 years old and is not specific to elective offices. No other jurisdictions have a procedure allowing a council to call a special election upon a unanimous vote of no confidence. This Office will continue to analyze constitutional issues should the Rules Committee refer these options to the full Council for consideration.

III. SUCCESSION TO OFFICE

A new section provides a uniform procedure for succession to all elective offices following a vacancy. The new section combines the current procedure for succession applicable to the Mayor and the Council for consistency and extends the procedure to vacancies in the office of the City Attorney. The Council adopts succession procedures following removal by recall or by a special removal election, which allows a vote on the question of removal and succession on the same ballot. This is the current procedure provided for recall. The Council fills other vacancies by appointment or special election depending on when the vacancy occurs.

CONCLUSION

The draft Charter amendments provide uniformity for vacancy and succession in elective office and provide procedures for removing elective officers as requested by the Charter Review Committee. This Report notes policy alternatives for review and direction by the Rules Committee and this Office is prepared to make any changes prior to review by the full Council. If the Committee approves procedures providing for a removal election initiated by Council, analysis of additional constitutional issues not yet addressed by this Office will accompany drafts provided for Council approval. The City Clerk should review any proposal forwarded to the Council for conformance with the conduct of similar elections.

JAN I. GOLDSMITH, CITY ATTORNEY

By: /s/ Jennifer L. Berry

Jennifer L. Berry

Deputy City Attorney

JLB:sc:als

RC-2016-9

Doc. No. 1301712_3

Attachment: Draft Charter Amendments Related to Vacancy and Removal of Elective Officers
(Doc No. 1294899_5)