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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

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*

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).

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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By /s/ Carrie L. Gleeson

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