

Memorandum

TO: THE HONORABLE MAYOR
and CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: City Charter Section 405

DATE: 6/26/2006

BACKGROUND:

On June 21, 2006, the Grand Jury of Santa Clara County filed an Indictment against Mayor Ron Gonzales and the Mayor's Budget Director, Joseph Guerra, containing several counts of alleged criminal conduct. The Council has set a special meeting for June 28, 2006 to discuss possible courses of action to be taken by the Council. This Office has been asked to provide its opinion on whether the Mayor may be removed from the office of the Mayor of the City of San José pursuant to San José City Charter Section 405 for the conduct alleged in the Indictment.

EXECUTIVE SUMMARY:

San José City Charter Section 405 states that the Council "shall be the judge" of the "grounds for forfeiture or loss" of office of elective City officers, including the Mayor. While the Charter does not state grounds for removal from office, it grants authority to the Council to establish those grounds. Charter Section 405 also provides the framework for the removal process. The Council may adopt specific grounds and clarify the stated process by ordinance or resolution. After a thorough analysis, it is unlikely that grounds for removal, if adopted at this time, could be applied to conduct that occurred before such adoption.

ANALYSIS:

A. The Interpretation of Charter Section 405.

Charter Section 405 reads in its entirety as follows:

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.

This provision was included in the San José City Charter approved by the voters in 1965. This Office has been able to locate only limited legislative history regarding this Section, and that limited legislative history does not provide any guidance as to the intended meaning of this Section. In adopting Charter Section 405, the voters of the City of San José empowered the City Council to "be the judge of the election and qualification of its members, including the Mayor, and of any other elective officers, and of the grounds for forfeiture or loss of their respective offices." Thus, by its terms, this Section empowers the Council to "judge" the grounds for forfeiture or loss of office of the Mayor and members of the City Council.

The Section, however, does not contain the grounds upon which a Councilmember or the Mayor may be removed. It does provide, along with Charter Section 200, the authority for the Council to adopt, by ordinance or resolution, specific grounds for removal and further clarification of the process to be followed in the removal proceeding. Charter Section 200 provides the Council with "the power to make and enforce all laws and regulations in respect to municipal affairs, subject only to such restrictions and limitations as may be provided in this Charter and in the Constitution of the State of California."

Thus, the likely interpretation of Charter Section 405 is that it was intended to provide the authority to the City Council to establish the grounds that would specify conduct upon which the Councilmembers or the Mayor could be removed. Section 405 also provides the framework for the removal process and provides that the Council would be the judge of whether grounds for removal had been found in a specific instance.

It should be noted that an interpretation of Charter Section 405 that would allow the Council to remove one of its members or the Mayor without the Council first having established the standards or grounds for removal would be subject to a strong constitutional challenge. An interpretation of Charter Section 405 that would allow removal, without the Council having first adopted grounds for removal, could be challenged as being unconstitutionally void for vagueness, i.e., that it does not adequately provide notice to the Councilmembers or the Mayor of the conduct that would be grounds for removal. It could also be argued that such an interpretation would make the provision unconstitutionally overbroad because it would allow the Council to remove one of its members or the Mayor for conduct which is constitutionally protected, such as exercising free speech rights. For these reasons, it is unlikely that such an interpretation was intended by the voters in adopting this Section.

B. The Council May Adopt Grounds for Forfeiture or Loss of Office by Ordinance or Resolution.

As noted above, Charter Section 405, along with Charter Section 200, provide the Council with the authority to adopt the grounds which would constitute reason for removal from office and to clarify the process to be followed. This can be done by way of ordinance or resolution. That the Council has this authority is supported by a recent decision of a California Court of Appeal in a case entitled *Penrod v. County San Bernardino*, 126 Cal.App.4th 185 (2005) where the Court upheld a County ordinance containing provisions for removal for cause of County officers adopted pursuant to a County Charter provision. It is also supported by the fact that the City of San José is a Charter City. California Constitution Art. XI, §5 grants charter cities "plenary authority" over municipal affairs. The courts have interpreted removal provisions of a municipality's officers and employees to be municipal affairs.

Some examples of the types of grounds that are contained within other charters or statutes regarding removal of elected officials are as follows:

- "Any elective officer . . . is subject to suspension and removal for official misconduct as provided in this section . . ." "Official misconduct means any wrongful behavior by a public officer in relation to 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." (City of San Francisco Charter Sec. 15.105(a) & (c).) "An appointing authority must immediately remove from office [any elective officer] . . . 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. . . . Failure to remove an appointee as required under this subsection shall be official misconduct." (Sec. 15.105(c).)
- "[W]illful or corrupt misconduct in office" (Cal. Gov't Code Sec. 3060)
- Texas Government Code Section 21.002 provides that an elected officer of a general-law municipality is subject to removal from office for "official misconduct or incompetency" as those terms are defined in the statute.

(State v. Bradley, 956 S.W.2d 725 (1997).)

- In Iowa, a state statute provides that "[a]ny county attorney, sheriff, mayor . . . shall be removed from office by the district court or judge . . . for the following causes (1) For willful or habitual neglect or refusal to perform the duties of his office. (2) For willful misconduct or maladministration in office. (3) For corruption. (4) For extortion. (5) Upon conviction of a felony. (6) For intoxication or upon conviction of being intoxicated." (*State v. Henderson*, 124 N.W. 767 (1910).

C. May Grounds Adopted by the City Council be Applied to Remove the Mayor or a Councilmember for Conduct That Occurred Before the Adoption of the Grounds?

If the City Council were to adopt grounds for forfeiture or loss of office of members of the City Council or the Mayor, the remaining question is whether these grounds could be applied to conduct which occurred before the adoption of the grounds. We have been unable to locate any California case, or any case throughout the United States for that matter, where grounds for removal, that were adopted after the conduct occurred, were utilized to remove an elected official from office.

One case we have been able to locate that is somewhat similar to this situation is a case decided by the Supreme Court of the State of Georgia. Because it is not a California case, it would not be binding on the California courts and is mentioned here only to demonstrate the issues involved. In that case, impeachment proceedings were being pursued against the Mayor of the City of Ludowici pursuant to a city charter provision which contained grounds for impeachment, but did not contain the process for impeachment. The Supreme Court of Georgia found the charter provision to be unconstitutional on due process grounds as applied to the mayor because it did not contain the process for impeachment and stated that it could not be saved "by legislating after the fact." The court noted that the mayor and the council had the power under the city charter to establish rules and regulations for impeachment, but no such procedure had been established at the time of the mayor's conduct. (*City of Ludowici v. Stapleton*, 258 Ga. 868, 375 S.E. 2d 855 (1989).)

Here, an attempt to apply grounds adopted by City Council after the fact would raise similar due process concerns. In the criminal legislation context, legislation which makes conduct a criminal violation after the fact, would be considered an unlawful "ex post facto" (i.e. "after the fact") legislation if it changes the nature of the offense or the punishment for the offense. There are specific constitutional prohibitions against criminal "after the fact" legislation found in both the federal and state constitutions. However, a process to remove an elected official from office is not considered a criminal proceeding in California. California cases have held that removal from office by a grand jury accusation pursuant to Government

Code § 3060 is not considered a criminal proceeding. The California courts have stated that it is more closely related to a civil nuisance abatement action. See, *Bradley v. Lacey* (1997) 53 Cal.App.4th 883, 890. By analogy, a process of removal of a city official by a charter city council is also unlikely to be considered a criminal proceeding.

In the context of legislation that does not amount to new criminal conduct or increased criminal penalties for pre-existing criminal conduct, but where due process rights are implicated, California courts have found that legislation can be retroactively applied under certain circumstances. This is true even where vested property rights are involved. The California courts have looked at the following factors in determining whether to retroactively apply legislation:

1. The significance of the state interest served by the law,
2. The importance of the retroactive application of the law to the effectuation of that interest,
3. The extent and legitimacy of reliance upon the former law,
4. The extent of actions taken on the basis of that reliance, and
5. The extent to which the retroactive application of the new law would disrupt those actions.

These factors were pronounced by the California Supreme Court in reviewing the retroactive application of a state statute that modified community property rights. A retroactive application would take away vested property rights of a wife in what had been community property before the adoption of the statute. *In re Marriage of Bouquet*, 16 Cal.3d 583, 592 (1976). The California Supreme Court applied the five factors and found that despite the fact that a retroactive application of the state statute would result in a taking away of the vested property rights, the state's interest in the equitable dissolution of the marriage relationship supported the use of the police power to adopt legislation which canceled rights in marital property that derived from "patently unfair former law" and consequently, the retroactive application of the state statute was appropriate.

However, no California case has applied the analysis utilized in the *Marriage of Bouquet* case to a situation where after the fact grounds for removal are sought to be used in order to remove an elected official prior to the expiration of his or her term. In a situation where a mayor or councilmember is elected for a specific term, and an attempt is made to remove the mayor or councilmember prior to the expiration of that term, the individual has a strong fundamental right with First Amendment protection in serving out the term. For example, in the context of an action seeking the removal of a Public Utilities Commissioner from his appointed position, a California Court held that "... forfeiture provisions are disfavored because they encroach on the fundamental right to hold office. The rights to hold public office, either election or appointment, is one of valuable rights of citizenship ... *The exercise of this right should not be declared prohibited or*

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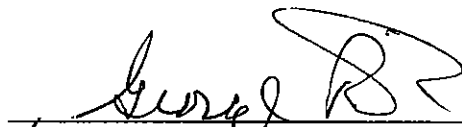
curtailed except by plain provisions of law...." People ex rel. Foundation for Taxpayer and Consumer Rights v. Duque 105 Cal. App. 4th 259, 265 (2003) (internal quotation marks omitted).

In addition, the courts interpret any ambiguity in provisions calling for forfeiture of an existing office and disqualification from holding a public office in favor of continued eligibility. *Helena Rubenstein International v. Younger*, 71 Cal. App. 3d 406, 418. Thus, holding elected public office is more than just a monetary interest in serving out the term.

Consequently, while it is unclear whether the California courts would apply the court's analysis in *in re Marriage of Bouquet* to the removal of an elected official under these circumstances, any ambiguities are likely to be resolved in favor of the individual continuing to hold office.

CONCLUSION:

Council can adopt grounds for "forfeiture or loss of office" and can clarify the process for removal of the Mayor or a member of the Council by ordinance or resolution. Whether the grounds, once adopted, can be applied to conduct that occurred before the adoption of the grounds raises serious constitutional concerns as it invades the constitutional right to hold elective office. The courts would look at any ambiguity in rules governing forfeiture of office strictly, and would favor continued eligibility to hold office. At a minimum, any attempt to apply grounds retroactively will be met with a legal challenge that could potentially take months, if not years, to resolve.


for RICHARD DOYLE
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cc: Les White, Interim City Manager