



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Nora Frimann
City Attorney

Toni J. Taber
City Clerk

SUBJECT: SEE BELOW

DATE: August 17, 2023

SUBJECT: PROPOSED REVISIONS TO THE REVOLVING DOOR POLICY UNDER TITLE 12 OF THE SAN JOSE MUNICIPAL CODE, THE CITY'S ETHICS AND OPEN GOVERNMENT PROVISIONS UNDER TITLE 12 OF THE SAN JOSE MUNICIPAL CODE, AND RESOLUTION 79187 GOVERNING THE BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES REGULATIONS AND PROCEDURES.

RECOMMENDATION

- A. Approve an ordinance of the City of San Jose amending Title 12 of the San José Municipal Code to amend Section 12.04.080 of Chapter 12.04 to authorize the City Clerk to dismiss without prejudice insufficient complaints or complaints that are outside the jurisdiction of the Board of Fair Campaign and Political Practices; Section 12.05.020 of Chapter 12.05 to regulate the scheduling of Special Elections for certain initiative measures; Section 12.06.295 of Chapter 12.06 to remove limitations on the amount a candidate may loan to their own campaign or campaign committee; and Section 12.12.440 of Chapter 12.12 to remove the late filing fee for weekly lobbyists reports;
- B. Approve an ordinance amending Title 12 of the San José Municipal Code to amend Sections 12.10.020 and 12.10.030 of Chapter 12.10 to redefine the exception to the Revolving Door Ordinance and reduce the prohibition from two years to one year; and
- C. Adopt a resolution amending the Regulations and Procedures for the San José Board of Fair Campaign and Political Practices concerning investigations and hearings and repealing Resolution 79187 as recommended by the Board of Fair Campaign and Political Practices.

BACKGROUND

Pursuant to Chapter 12.04 of Title 12 of the San José Municipal Code, the Board of Fair Campaign and Political Practices (“Board”) is tasked with reviewing campaign and ethics regulations and policies and making recommendations to the City Council. The Board typically completes this review on a biennial basis to avoid implementing changes during election cycles. In 2019, the Board performed this review and recommended revisions to Title 12 and Resolution 79187, which memorialized the Regulations and Procedures for the San Jose Board of Fair Campaign and Political Practices investigations and hearings previously adopted by the City Council.

Under Resolution 79367, the Rules and Open Government Committee (“Rules Committee”) has purview to consider and make recommendations on a variety of issues including “elections and initiatives.” On February 12, 2020, the Board's recommended revisions to the Ethics Provisions of Title 12 and Resolution 79187 were approved unanimously by the Rules Committee with instruction to calendar these recommendations for consideration by the City Council during the Mayor’s 2020 Biennial Ethics Review. As a result of the COVID-19 Pandemic, the 2020 Biennial Ethics Review did not take place and some of the proposed revisions have not been codified.

In February 2023, the Board formalized additional recommendations for revisions to Title 12 and Resolution No. 79187. These recommendations were deferred during the May 23, 2023 City Council meeting to August 2023, to incorporate additional recommendations from Councilmembers Jimenez and Cohen to modify the Revolving Door Policy. This memorandum discusses both the Board’s and the Councilmembers’ recommendations.

ANALYSIS

1. Recommendation to redefine the non-profit exemption to the Revolving Door Ordinance.

The Revolving Door Ordinance generally applies for two years after leaving City employment or office, although the City Council may grant a waiver if it is in the City’s best interests and consistent with the purpose of the Revolving Door Ordinance. Currently, former City officials and designated employees who either work or volunteer with a nonprofit organization that has engaged in programs or projects that received financial or other formal support from the City Council within the past five years are exempt from this prohibition. The nonprofit exemption covers all nonprofit entities organized under 501(C) of the Federal Internal Revenue Code, including 501(c)(4) and 501(c)(6) organizations. Under this broad definition, the exemption applies to more than charitable organizations (501(C)(3)), but also civic leagues or organizations operated solely for the promotion of social welfare or local association of employees (501(C)(4)),

and business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (501(C)(6)).

In August 2017, the City Auditor authored an Open Government Audit Report entitled, *Open Government: The City Has Made Progress in Meeting the Goals of the Sunshine Reform Task Force*. This Audit Report contained recommended revisions to the City's non-profit exemption to align the definition of non-profit organizations in the Revolving Door Ordinance with the definition in the Lobbying Ordinance. The Revolving Door Ordinance allows former designated City employees to lobby the City immediately after leaving City employment—without a Revolving Door waiver—if they work for a non-profit that has received financial support from the City within the past five years. However, the same exemptions do not apply for non-profits that have not received financial support from the City.

Also noted in the Audit Report, the Revolving Door Ordinance does not apply to all City employees. It only applies to City employees designated in the City's Conflict of Interest Code, who, due to their position and ability to make or influence public decisions, are required to disclose receipt of gifts and potential economic conflicts of interest annually. It also only applies when employees leave City employment to lobby or work on legislative or administrative matters that directly relate to the work they did for the City in the past year.

On September 12, 2017, City Council referred the City Auditor's recommendations to the Board for its consideration. The Board evaluated two policy directions, (1) narrowing the non-profit exemption to 501(c)(3) organizations, regardless of whether the organization had received support from the City; or (2) striking the non-profit exemption, such that the same rules apply whether the former designated employees go to work for non-profit or for-profit organizations.

After considering the merits of each direction, the Board recommended striking the nonprofit exemption from the Revolving Door Ordinance so that the same rules apply whether former officials and designated employees go to work for a non-profit or for-profit organization. The recommendation of the Board was presented to City Council ahead of the May 23, 2023 City Council meeting. Councilmembers Jimenez and Cohen authored a memorandum dated May 19, 2023 recommending a modification to the nonprofit exemption of the Revolving Door Policy that was different than the Board's recommendation to strike the nonprofit exemption entirely.

The Councilmembers' memorandum recommended amending Sections 12.10.020 and 12.10.030 of Chapter 12.10 to limit the exemption for nonprofit organizations to those organizations meeting the definition of a 501(C)(3) under the Federal Internal Revenue Code, and to reduce the revolving door prohibition to one instead of two years to match the state revolving door limitation. On May 23, 2023, the City Council deferred consideration of the ordinance.

The current proposed ordinance (as revised from that brought to Council on May 23, 2023) is different than the Board's recommendation and incorporates the recommendation from Councilmembers Cohen and Jimenez. The proposed ordinance would redefine the nonprofit exemption to the Revolving Door Policy by amending Section 12.10.020(E.) to exempt all nonprofit organizations that qualify as 501(c)(3) organizations under the Federal Internal Revenue Code regardless of any prior financial or other formal support received from the City Council or the Redevelopment Agency. Additionally, the proposed ordinance would change the two-year prohibition imposed by the Revolving Door Policy to a one-year prohibition¹. The City Council would continue to reserve the discretion to grant a waiver if the waiver was in the best interests of the City and otherwise consistent with the Revolving Door Policy. In addition, certain provisions of the Revolving Door Ordinance would continue to not apply if the designated employee left the City as a result of a reduction in work force.

2. Recommendation concerning late fines to lobbyists who fail to timely file a weekly report.

Section 12.12.440(D) of Chapter 12.12 of Title 12 requires the City Clerk to assess a late filing fine to lobbyist that fail to file a weekly report on time. The City Clerk advised the Board that the requirement to impose this fine results in an administrative burden and is not feasible without adding additional full-time staff.

In order to impose late filing fines, the City Clerk must cross-reference the weekly reports submitted by lobbyists with all the registration reports and calendars from the previous week to confirm accuracy. The proposed ordinance would amend Section 12.12.440(D) to remove the fee for late weekly filings by lobbyists. Section 12.12.400 still provides for the payment of fees by lobbyists and contract lobbyists for annual registration and client presentation.

3. Recommended amendments to Resolution 79187, the Board's Regulations and Procedures, would clarify the Board's jurisdiction, make procedural changes to how the Board receives complaints, and other technical changes.

This recommendation contains various revisions which were presented to and recommended by the Rules Committee on February 12, 2020 and referred to the Mayor's Biennial Ethics Review for hearing in the Spring of 2020. Ultimately, the Biennial Ethics Review did not occur, and the recommendations have not yet been addressed by City Council.

¹ Under Charter Section 607, the Code of Ethics includes guidance on issues including regulations regarding disqualification of former City officers and employees in matters connected with former City duties or official responsibilities, and a two-thirds vote of the City Council is required to lessen the ethical standard in regulations. The proposed change in the prohibition from two years to one year would require a two-thirds vote.

a. Clarifying jurisdiction of the Board.

While the Board has jurisdiction over matters addressed in Title 12, there are specific Chapters within Title 12 where the Board is not authorized to act such as allegations of nepotism. Similarly, matters related to election fraud, misuse of public funds, and the truth or accuracy of campaign materials, for example, are areas of campaign or political activity not regulated by Title 12 and therefore outside of its jurisdiction. Nonetheless, the Board has received complaints about these issues. The proposed amendments to Resolution 79187 would specify the areas outside of the Board's jurisdiction to clarify the scope of its jurisdiction for members of the public.

b. Clarifying process for City Clerk to reject complaints, without prejudice.

Section 12.04.080 of Chapter 12.04 of Title 12 states that "a complaint filed with the Board may be investigated only if the complaint identifies the specific alleged violation which forms the basis for the complaint and contains sufficient facts to warrant a formal investigation." Presently, complaints that do not specify the alleged violation by citing the specific section or sections of the SJMC are rejected by the City Clerk without prejudice as not conforming with Section 12.04.080. Complainants are instructed to resubmit the complaint with a citation to the alleged SJMC violation. If that occurs, the complaint is then forwarded to the evaluator to process. The Board recommended proposed amendments to Resolution 79187 to memorialize this practice and further define the Clerk's role in handling complaints that do not meet the procedural requirements imposed by the San Jose Municipal Code.

c. Technical Changes.

The proposed amendments to Resolution 79187 recommended by the Board make other technical changes including a reorganization of sections, eliminating redundant regulations, and clarifying the process for the City Clerk to deliver complaints to the evaluator for review.

4. Scheduling of special elections under City Charter Sections 1601(a)(1) and Section 12.05.020 of Chapter 12.05 of the San Jose Municipal Code.

Charter Cities have the authority under the California Constitution to regulate the conduct of City elections. In accordance with this authority, the City Charter contains an election procedure for its elections, including the scheduling of special elections for initiatives to be submitted to the voters.

Under the current reading of the Charter if an initiative ordinance were to qualify with the 8% threshold, the Council must either adopt the measure within ten days after

presentation or immediately call a special election to submit the initiative ordinance to the voters. Other than that directive, the City Charter does not provide specific guidance on when a special election must occur. Accordingly, under Charter Section 1602, the City defaults to the California Elections Code unless otherwise provided by ordinance.

In 2017, the State Legislature made a change to the Elections Code with the passage of AB 765. Under the Elections Code, as amended by AB 765, special elections must occur within the time period between 88 days and 103 days of the order of the election. Before AB 765, the Elections Code allowed a governing body to defer the special election to a regularly scheduled election (e.g. statewide primary or general election) if the special election would occur within 180 days of the regularly scheduled election or would occur between a statewide primary and general election in the jurisdiction. The ability to defer to a regularly scheduled election allowed a city to avoid holding a special election solely for a citizen-sponsored initiative when a regularly scheduled election was approaching.

Under AB 765, the City may no longer defer a special election solely for a citizen-sponsored initiative when regularly scheduled elections are approaching unless the City adopts an ordinance codifying that authority. Currently, if proponents of an initiative were to invoke this Charter provision (to date it never has been invoked), the City could, depending on when the initiative qualified for the ballot, be required to hold a special election even though a regularly scheduled election was approaching.

The Board recommended bringing back the ability to defer an initiative to an upcoming general election which was previously permitted by state law. The proposed ordinance would accomplish this by amending Section 12.05.020 to allow the City Council to place the initiative ordinance on the ballot of a regularly scheduled election being held in the City within a certain amount of time and avoid the expense of calling a special election. The ability to adopt this ordinance is consistent with the authority provided to the City under the State Constitution, the Elections Code, and the City Charter.

5. Limitations imposed on the amount candidates may loan to their campaign committees.

Section 12.06.295(D) of Chapter 12.06 of Title 12 caps at \$20,000 the amount that a candidate may loan to their campaign. As a result of changing legal precedent, the proposed ordinance would address the Board's recommendation to strike this financial cap limitation on loans made by candidates to their own campaigns.

CONCLUSION

The proposed ordinances and resolution to amend Resolution 79187 would address the Board's recommendation for the reasons stated above.

August 17, 2023

Subject: Title 12 Amendments

Page 7

CEQA

Not a Project, File No. PP17-008, General Procedure and Policy Making resulting in no changes to the physical environment. (City Attorney)

NORA FRIMANN
City Attorney

By /s/ Matthew Tolnay
Deputy City Attorney

For questions, please contact Matthew Tolnay, Deputy City Attorney, at (408) 535-1900.

cc: Jennifer Maguire, City Manager