



# Memorandum

**TO: RULES AND OPEN  
GOVERNMENT COMMITTEE**

**FROM: Toni J. Taber, CMC  
City Clerk**

**SUBJECT: BOARD OF FAIR CAMPAIGN  
AND POLITICAL PRACTICES  
SJMC TITLE 12 AND SAN JOSE  
CITY COUNCIL RESOLUTION  
777879 RECOMMENDED  
REVISIONS**

**DATE: October 11, 2017**

## RECOMMENDATION

Provide feedback and direction to the Board of Fair Campaign and Political Practices ("Board") on the attached table of Suggested Revisions to the San José Municipal Code Title 12 and the transmittal letter from the Board's Chair outlining proposed recommendations to Title 12, Resolution 77879, and the Board's authority under Title 12 and the City Charter.

## OUTCOME

The outcome of this action will be to provide feedback and direction on the Board's recommended changes to Title 12, the Board's complaint process and Resolution, and the Board's name and authority.

## BACKGROUND

Pursuant to the City of San José Municipal Code Section 12.04.070 (C), the Board performs a biennial review of Title 12 and the Resolution that governs the regulations and procedures of the Board for investigations and hearings. The current resolution governing the Board's regulations and procedures is Resolution 77879.

The review is based upon issues that the City encountered during the recent 2016 Election cycle, complaints filed with the Board, and issues raised by the public, staff, and the City Council. In addition, the Board made recommendations based on their guiding resolution and administrative practices.

The Board, at its September 13, 2017 meeting approved the attached transmittal letter and table of topics to be forwarded to the Rules and Open Government Committee for feedback and direction on the issues that are included in the table. After Rules and Open

Government Committee, staff will begin drafting the proposed changes to the issues that have been identified in the table and any additional recommendations received.

### **ANALYSIS**

For discussion of the Board's proposals, please refer to the attached transmittal letter from the Board Chair Adrian Gonzales, on behalf of the entire Board, to the Rules and Open Government Committee.

There is one recommended change to Title 12 that is campaign related. The Board recommends requiring that General Purposes Committees, also known as Independent Committees under the San José Municipal Code, to complete the "Election to Date" column on the Form 460. State law does not require that General Purpose Committees complete this column, and leaves completion of this column to local ordinance.

If the Rules Committee recommends moving forward with this amendment, the Council, at latest, will need to pass an ordinance for publication by October 31, 2017 with final adoption on November 7, 2017 for the ordinance to be in place by December 7, when the campaign contribution period for the June 2018 Primary Election begins.

### **EVALUATION AND FOLLOW-UP**

The City Clerk's Office will work with the City Attorney's Office to bring forward the ordinance by October 31, 2017 in order for the ordinance changes to be in effect prior to the opening of the campaign contribution period. The next biannual review of Title 12 is scheduled for 2019, although if any urgent matters become apparent prior to that timeframe, the City Clerk's Office will bring those forward off schedule.

### **PUBLIC OUTREACH**

This memorandum will be posted on the Rules and Open Government Agenda for October 11, 2017.

### **COORDINATION**

This memo was coordinated by the Board of Fair Campaign and Political Practices, the Office of the City Attorney, and the Office of the City Clerk.

Rules and Open Government Committee

October 11, 2017

**Subject:** SJMC Title 12 and City Council Resolution 77879 Recommended Revisions

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**COMMISSION RECOMMENDATION/INPUT**

The Board unanimously approved the suggested revisions at its September 13, 2017 monthly meeting.

**CEQA**

CEQA: Not a Project, File No. PP10-069(c), City Administrative Activities.



Toni J. Taber, CMC  
City Clerk

cc: Norberto Dueñas, City Manager



## CITY OF SAN JOSÉ, CALIFORNIA

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### BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES

Adrian Gonzales, Chair  
Chris Peacock, Vice Chair  
Madhavee Vemulapalli  
Amarpal Randhawa  
Thomas Goodwin

**TO:** RULES AND OPEN GOVERNMENT  
COMMITTEE

**FROM:** Adrian Gonzales, Chair  
Board of Fair Campaign  
and Political Practices

**SUBJECT:** Biennial Ethics Review

**DATE:** September 13, 2017

Pursuant to Section 607 of the City Charter, the Mayor is responsible for conducting a biennial review of the City's ethics ordinances and policies. Under San Jose Municipal Code Section 12.21.410, the City Council shall review Chapter 12.21 on Open Government and the Consolidated Open Government and Ethics Resolution (Resolution No. 77135) biennially, during the Mayor's biennial review of the City's ethics ordinances and policies. With Section 12.04.070 assigning the responsibility of making recommendations to the City Council regarding campaign and ethics regulations, the biennial review has conventionally started with the Board of Fair Campaign and Political Practices (Board) conducting a preliminary assessment of the City's related laws.

As the oversight body responsible for monitoring and enforcing the city's campaign and ethics laws, our recommendations are based on a cumulative review of complaint cases we have encountered over the past two years, feedback from the Offices of the City Clerk and City Attorney, and industry best practices. Please review the attached matrix outlining 12 recommendations (Topics) for streamlining, clarifying, and improving our City's ethics laws. Our recommendations range in complexity, some possible through immediate administrative action, and others requiring additional time to research and refine with the assistance of the City Council and administration. Narrative explanations are presented below, the recommendations being grouped into the following categories:

- Adjusting Reporting Requirements;
- Enforcement Procedures;
- Community Partnerships;
- Improving Oversight of the City's Ticket Distribution Policy; and,
- Establishing Independence and Obtaining Adequate Resources.

### Adjusting Reporting Requirements

#### **Topic 1: Reporting for General Purpose Committees**

Recommendation: Require cumulative contribution reporting.

Discussion: General Purpose Committees, also known as Independent Committees under the San José Municipal Code, are campaign committees that support or oppose more than one candidate or ballot measure, possibly in different electoral jurisdictions. The City Clerk expressed concern that when General Purpose Committees file their campaign disclosure forms, it is difficult to determine how much a contributor has donated within a given election cycle. Campaign disclosure forms

issued by the State (Form 460) and used in our City's reporting process already contain an optional column for reporting cumulative contributions that local Independent Committees only need to complete if required by local ordinance. We recommend standardizing this reporting for all campaign committees active in City elections by amending Section 12.06.910 to require that this column be completed. This change would result in Independent Committees having to complete the column titled "Per Election to Date" when filing the Form 460: *Recipient Committee Campaign Statement*.

### **Topic 2: Penalties for Candidates for Non-Compliance**

Recommendation: Maintain current remedial action for late and non-filers.

Discussion: In June 2016, the Office of the City Auditor published its audit report of the City Clerk's Office, wherein one recommendation suggested creating additional steps to address repeat violations of filing deadlines. In consultation with the City Clerk, the Board has determined that additional remedial action is not necessary for late and non-filers since such violations are not pervasive. Also, the City Clerk already has the power to fine candidates \$10 per day of delinquency pursuant to Section 12.06.910, and the City Clerk is also obliged, pursuant to Section 12.06.920, to refer violations of campaign disclosure ordinances to the Board where violators can face steeper penalties.

### **Topic 3: Publishing Campaign Statement Information**

Recommendation: Keep publishing requirements, but research opportunities for automating campaign finance reporting and analytics.

Discussion: Section 12.06.920 requires the City Clerk to issue a press release and website posting of cumulative campaign expenditures and contributions two days prior to a city council/mayoral election. This process involves a lot of manual compiling and calculating of data from individual campaign filings that seem inefficient when new software systems and tools exist to automate campaign finance reporting analytics.

For example, the City of Oakland partnered with Open Oakland, a local brigade of Code for America, to create an online portal, Open Disclosure, that automatically translates Oakland's campaign disclosure forms into easily accessible charts and graphs depicting how much money candidates and campaign committees raise and spend each election. If our City can create, procure, or partner with a similar service provider, we could automate campaign finance reporting and alleviate the City Clerk's responsibility of manually calculating and posting its static reports.

We recommend keeping the current ordinance requirement in the spirit of transparency until we are able to automate the process. At the time of this report, the Office of the City Clerk reported that it has already requested that additional language addressing this type of automated reporting be included in the City's upcoming RFP addressing our electronic filing system for campaign and lobbyist reports.

### **Topic 4: Amend Form 504**

Recommendation: Direct staff to administratively update Form 504 on filing deadlines.

Discussion: Section 12.06.930 requires campaign committees to disclose post-election payment agreements, which are filed via the City Clerk's Form 504. City Clerk staff explained that some candidates have expressed confusion about what the deadline is to file this form. After reviewing the Municipal Code and consulting with the Board, we recommend that the City Clerk use its administrative authority to revise Form 504 and clarify filing deadlines.

## **Enforcement Procedures**

### **Topic 5: Clarity of Resolution Language**

**Recommendation:** Update City Council Resolution No. 77879 to clarify language.

**Discussion:** In addition to the Municipal Code, the City Council dictates much of the Board's policies and procedures for overseeing enforcement activities through resolution. Currently, Resolution No. 77879 governs the Board's policies and procedures. Over the years, the language and structure of this guiding Resolution has been changed and some of the language is inconsistent, redundant, and potentially confusing. In collaboration with the City Attorney's Office, attached is a draft version of a revised Resolution where you can see that many clauses have been made more concise by removing jargon and modernizing linguistics.

### **Topic 6: Process for Hiring Alternate Evaluator**

**Recommendation:** Amend Resolution No. 77879 to permit an Alternate Evaluator/Investigator.

**Discussion:** As a result of a complaint filed on June 5, 2015 the Board's contract with the Evaluator and Investigator underwent a complete investigation. In accordance with Section F.8 of Resolution No. 76954 (the predecessor to Resolution No. 77879), when the Board's Investigator found evidence suggesting that other individuals were involved in violating the same campaign reporting requirement as Respondent, the Investigator filed an amended complaint against the other alleged violators. While the Board stands by its compliance with the policies and procedures set forth by the City Council at the time, concern was expressed by respondents and some members of the City Council that this process might create the appearance of a conflict of interest. The City Council subsequently updated the Board's policies through Resolution No. 77879 which included an amendment to Section F.8 to have the City Clerk file amended complaints instead of the Investigator.

In addition to this change, the City Attorney's Office suggested revising the Board's Resolution to formalize the process for contracting with an Alternate Evaluator in situations where a complaint is filed against the City's Evaluator or some other specific conflict of interest arises with the City's retained Evaluator. The Board supports this recommendation. Specific language is included in the draft revised Resolution attached to this report under section C.

### **Topic 7: Complaint Intake Process**

**Recommendation:** Direct the City Clerk to work with the Board on researching ways to improve our complaint intake process.

**Discussion:** Pursuant to Resolution No. 77879, the current complaint intake and review process can result in a public hearing, regardless of whether the complaint contained sufficient information to indicate a potential violation of Title 12. The Board has dismissed multiple complaints over the last few years wherein our Evaluator found no evidence indicating a possible violation of Title 12.

The Board also believes that due to the public nature of our evaluation process, campaigns may seek to use this process for staging negative press as the local media regularly covers our public hearings even when our Evaluator recommends dismissal of complaints. It is our understanding based on initial online research that comparable jurisdictions, like the San Francisco and Los Angeles Ethics Commissions, California Fair Political Practices Commission (FPPC) and Federal Election Commission (FEC), moderate their evaluation process with more scrutiny so that evaluations which do not identify law violations or lead to enforcement actions are not publicly disclosed. The Board would like to work with the City Clerk to conduct additional research on how the other four local ethics commissions in California and the FPPC manage their complaint intake and review process to mitigate the potential misuse of our current review process for political gain. The Board and City

Clerk will also confer with the City Attorney's Office to ensure our proposed adjustments for the intake process do not violate any due process or open government laws.

### **Community Partnerships**

#### **Topic 8: Public Education Campaign**

**Recommendation:** Direct the City Clerk to work with the Board in developing educational materials and build informal community partnerships for distribution.

**Discussion:** Over the past two years, and extending beyond that, the Board has seen most of its complaints being related to campaign finance violations. We feel that the public has little awareness of the various Chapters within Title 12 that the Board is responsible for enforcing. Title 12 addresses a range of ethics issues including accepting gifts, lobbying disclosures, using public office for prospective employment, nepotism, and other issues. The Board would like to collaborate with the City Clerk to compile marketing materials to raise awareness of the Board's jurisdiction. These materials, whether physical or electronic, can be placed in public facilities, such as community centers and libraries, as well as distributed to local community organizations such as the chamber of commerce, nonprofit community, and other relevant community agencies.

### **Improving Oversight of the City's Ticket Distribution Policy**

#### **Topic 9: Distribution of Arena Tickets**

**Recommendation:** Amend Council Policy 9-11 and Title 12 to include ticket distribution under the purview of the Board and require quarterly reports to the Board on trends in ticket distribution.

**Discussion:** Under State law, tickets to events are considered reportable gifts. However, FPPC Regulation 18944.1 provides an exception for tickets to an event when given by an agency to an official or designated employee so long as the distribution complies with the City's written policy and the distribution is reported by the agency. For the City of San José, this situation mostly occurs with the use of the City's box at the SAP Center. The FPPC does not actively review compliance with these local policies.

In October 2016, the Bay Area News Group published an analysis evaluating compliance with a ticket distribution policy for entities involved in the ownership and management of Oracle Arena and Oakland Coliseum. This includes the City of Oakland, the County of Alameda, and their Joint Powers Authority used to manage these facilities. The analysis pointed out that over the course of three years, tickets were distributed to reward community groups and individuals only 24 percent of the time, while at least 56 percent were used to reward government employees, and many tickets were difficult to determine how they were used due to incomplete disclosure forms. Several public officials regularly claimed tickets for sporting events and concerts, creating an appearance of misusing the ticket policy for personal gain. Tickets were also distributed to campaign donors and campaign staffers. After conducting a review of the City of Oakland's ticket distribution policy, the Oakland Public Ethics Commission issued a report in April 2017 recommending several revisions to the ticket program, including better oversight and reporting of the ticket program monitored under the purview of the Public Ethics Commission.

While such controversy has not been reported in San Jose, and the City's ticket distribution policy is different than the City of Oakland's, there could be potential for abuse. Oversight of the City's ticket program has not been assigned to any particular enforcement body within the City to regularly ensure compliance. We recommend amending Council Policy 9-11 and Title 12 of the Municipal Code to assign the Board the responsibility of enforcing compliance with the City's ticket distribution policy.

## **Establishing Independence and Obtaining Adequate Resources**

### **Topics 10 and 11: Removing References to “Ethics Commission” and “Elections Commission” in Title 12 and Resolution 77879**

**Recommendation:** Rename the Board to the Ethics Commission and amend Title 12 and Resolution 77879 to make references consistent.

**Discussion:** Over the course of several years, the oversight body responsible for monitoring and enforcing Title 12 has been subject to name changes by the City Council. City Clerk staff included this topic as a part of the Board’s biennial review as there are still many references in Title 12 and Resolution No. 77879 referring to the Ethics Commission and Elections Commission. Although we understand the City Clerk’s request to clean up references based on the City Council’s decision to change the Board’s title, we are once again requesting as a part of the biennial ethics review for the City Council to revert the Board’s title back to the Ethics Commission.

Of the 50 states in our country, 42 states (84%) maintain statewide oversight bodies that enforce campaign finance and ethics laws. Of these 42 states, 35 states (70%) use the term “ethics” in titling their oversight bodies. Within California, the four other cities that have adopted and enforce their own range of campaign finance and ethics laws refer to their oversight bodies as ethics commissions (San Francisco Ethics Commission, Oakland Public Ethics Commission, Los Angeles Ethics Commission, and San Diego Ethics Commission).

Aside from conforming to the industry, it is important for the Board’s title to be consistent with its mission and jurisdiction. As we discuss in the introduction of this memo, this biennial ethics review stems from Section 607 of the City Charter, which itself is titled “Code of Ethics,” and consistently refers to the City’s set of laws addressing campaign finance, lobbying, gifts, and conflicts of interest as ethics laws. This is also reflected in Title 12 by the fact that its title is “Ethics and Open Government Provisions,” and the very first requirement under this Title states, “This title is intended to implement Charter Section 607. It is a compilation of all city ordinances which directly regulate campaign conduct and ethics.” (Section 12.02.010)

We recommend changing the Board’s title back to the Ethics Commission so that it conforms to the industry, truly reflects its mission and jurisdiction, and demonstrates the independence that the Board is supposed to have without having its name and authority changed every time a politically sensitive issue becomes publicized.

### **Topic 12: Charter Protection and Minimum Resources and Staffing**

**Recommendation:** We recommend that the City Council sponsor a ballot measure amending Section 607 of the City Charter so that the renamed Ethics Commission’s title, authority, and existence are better protected from the volatility of elections, campaigns, and political conjecture.

**Discussion:** As discussion on the last topic, the Board has noticed its authority subject to change at whim during the course of an election or in reaction to political incidents. Not only do we wish to protect our name and authority in the City Charter, we would like to require the City Council to commit a reasonable minimum level of staffing and funding to fulfill our mission.

Section 12.04.070 assigns the Board the responsibility to “monitor compliance with all campaign and ethics ordinances [under Title 12].” Federal standards for internal control in a government agency (*U.S. Government Accountability Office Standards for Internal Control*) dictate that an effective internal control system is one in which management monitors the internal control system through ongoing monitoring and separate evaluations, evaluations being audits or other system tests.



Although Title 12 establishes our City's campaign and ethics laws, the Board's ability to enforce these laws relies primarily on a reactive complaint system. Since the Board has not been appropriated support staff beyond administrative and legal support it receives from the Offices of the City Clerk and City Attorney, we do not have the necessary resources to effectively monitor compliance with our laws through audits.

Recent events in the County of Contra Costa also demonstrate the inherent risk in our ethics laws that rely primarily on an honor code of compliance. In June 2017, the Contra Costa District Attorney resigned from office after pleading guilty to a felony perjury charge for illegally spending over \$66,000 in campaign funds for personal use. The only reason this abuse came to light was due to a periodic audit of campaign funds by the California Franchise Tax Board, as the 600 transactions made from 2011 through 2015 had not been reported in the individual's campaign disclosure statements.

In order to fulfill our responsibility, as outlined in Section 12.04.070, we recommend that the City Council direct the City administration to evaluate options for providing the Board with adequate staffing and resources to carry out an independent audit function.

Thank you for supporting the Board of Fair Campaign and Political Practices and our common goal of making our City more transparent and accountable to the public. Please do not hesitate to contact me if we can provide additional information about our recommendations.



ADRIAN G. GONZALES, Chair  
City of San José  
Board of Fair Campaign and Political Practices

Suggested Revisions to the San José Municipal Code Title 12 and Resolution 77879

#	TOPIC	ISSUE	FROM	POSSIBLE SOLUTION	TYPE	BOARD RECOMMENDATIONS
1	Reporting for General Purpose Committees	It is sometimes hard to tell how much contributors have given to a General Purpose Committee for each election.	City Clerk	Revise SJMC 12.06.910 to include language requiring General Purpose Committees to fill out the "total per election" section on Form 460. May need to add a definition for General Purpose Committee in SMJC 12.06, Part 1.	ORD	Amend 12.06.910 to make "Per Election Date" column required for the City of San José.
2	Penalties for Candidates for Non-Compliance	Review whether additional penalties for non-filing candidates is necessary. Candidates may purposely file campaign forms late for strategic gain.	City Clerk/ City Auditor	Revise SJMC 12.06.910(G) to add or increase penalties for non-filing candidates.	ORD	Without evidence that the problem is prevalent, there is no need to have additional penalties. The City Clerk's Staff should report back to the Board if this becomes a larger problem in the future.
3	Publishing Campaign Statement Information	SJMC 12.06.920 requires the City Clerk to issue a press release and website posting containing information on campaign contributions and expenditures two days prior to a city council/mayoral election. This report is to be translated into languages designated by the SCC Registrar of Voters. The public has access to campaign statement filings at any time because the statements are electronically filed. Since there are so many absentee voters now, is it worth the efforts since many voters send in their vote by mail ballots so early. Title 12 indicates that the Clerk shall prepare the report 5 days before an election that contains data as of 7 days before the election to be published 2 days before the election. The timing does not work well since it takes time to pull the numbers, prepare the report, and send for translation. It is also very costly to have the report translated into 4 other languages within the given timeline.	City Clerk	Remove this requirement from SJMC.	ORD	Recommend keeping requirement until a more transparent solution can be found, and direct the City Clerk to reach out to organizations like Code for America to create a transparency portal for the City. See Open Disclosure California Project in Oakland as an example.

Suggested Revisions to the San José Municipal Code Title 12 and Resolution 77879

#	TOPIC	ISSUE	FROM	POSSIBLE SOLUTION	TYPE	BOARD RECOMMENDATIONS
4	Amend Form 504	Clarify SJMC 12.06.930 (B) on when Form 504 can be filed.	City Clerk	Revise language on Form 504 and in SJMC 12.06.930 (B) to indicate filing deadline as date before election.	ORD	Direct staff to administratively change the language on Form 504 to clarify deadline and to better educate candidates on deadlines.
5	Clarity of Language	Reso 77879, Sections J.3 and J.4, have similar language that may be viewed as redundant. Section J.3 may also use improper language that should be reviewed.	City Attorney	Determine the intent of the language in Section J of Reso 77879 and revise as needed.	RESO	Clarify language as proposed by City Attorney's Office to correct any perceived redundancy.
6	Process for Hiring Alternate Evaluator	There is sometimes a need to hire an alternate evaluator when Hanson Bridgett has a conflict of interest.	City Attorney	Add a process in Reso 77879 to 1) direct Hanson Bridgett to notify staff of the conflict; 2) permit the City Attorney to review potential conflicts, and 3) determine how and who would be hired as an alternate.	RESO	Direct Staff to develop a process in which an alternate evaluator is hired when conflicts arise.
7	Complaint Intake Process	People file complaints that are outside the jurisdiction of Board and to not provide sufficient evidence. Using Board for PR.	Chair	Reach out to other jurisdictions with Ethics Commission.	RESO	Direct City Clerk to reach out to other municipalities to see what their process is.
8	Public Education Campaign	People only file complaints for campaign finance issues and not for other issues under the jurisdiction of the Board.	Chair	Developing educational materials and community partnerships.	ADMIN	Work with the City Clerk to develop educational materials.
9	Distribution of Arena Tickets	FPPC regulations permit cities like San José that own stadiums to accept and distribute free tickets to events. As observed in Oakland, FPPC regulations fail to implement an active oversight mechanism to ensure tickets are used for public good.	Chair	Amend Council Policy 9-11 and Title 12 to include oversight and enforcement of the City's policy on ticket distribution under the Board's purview.	RESO and ORD	Amend Council Policy 9-11 and Title 12 to include ticket distribution under the purview of the Board, and require quarterly reports to the Board on trends in ticket distribution.

Suggested Revisions to the San José Municipal Code Title 12 and Resolution 77879

#	TOPIC	ISSUE	FROM	POSSIBLE SOLUTION	TYPE	BOARD RECOMMENDATIONS
10	Remove References to Ethics or Elections Commission	Title 12 refers to past Board names.	City Clerk	Update sections of Title 12 to refer to Board of Fair Campaign and Political Practices Commission in place of Ethics or Elections Commission as those sections are otherwise revised for substantive reasons.	ORD	Bring to Council to change name back to Ethics Commission.
11	Remove References to Ethics Commission	Reso 77879 refers to past Board name.	City Clerk	Update Reso 77879 to refer to Board of Fair Campaign and Political Practices Commission in place of Ethics Commission when otherwise revised for substantive reasons.	RESO	Bring to Council to change name Ethics Commission.
12	Establishing Independence and Adequate Resources	Of the five local commissions in California that regulate campaign finance and government ethics laws, San José's Board is the only entity that is not protected by City Charter and does not maintain its own staff or adequate resources to carry out its mission. With our current structure, the Board is not complying with its mandate in Ordinance Code Section 12.04.070 to monitor compliance since we do not have an active audit function.	Chair Gonzales	A City Charter amendment could establish the independence of the Board in the City Charter and require a minimum level of resources to fulfill its obligation of not only hearing complaints, but actually monitoring Title 12 compliance through an audit program.	BALLOT	Work with the City Council and administration to sponsor a ballot measure that would establish the independence of the Board in the City Charter and require a minimum level of resources to fulfill its obligation of not only hearing complaints, but actually monitoring Title 12 compliance through an audit program.

RESOLUTION NO. \_\_\_\_\_

**A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE AMENDING REGULATIONS AND PROCEDURES FOR THE SAN JOSE ETHICS COMMISSIONBOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES INVESTIGATIONS AND HEARINGS, AND REPEALING RESOLUTION 77879**

**WHEREAS**, the San José ~~Ethics Commission~~Board of Fair Campaign and Political Practices ("CommissionBoard") is charged, under Chapter 12.04 of the San José Municipal Code, to investigate complaints alleging violations of Title 12 of the San José Municipal Code and take enforcement action where appropriate; and

**WHEREAS**, formal regulations ~~are required to~~ ensure that all interested parties are apprised of and understand the procedures by which a fair hearing will be conducted; and

**WHEREAS**, the City Council desires to amend the current regulations and procedures for ~~Commission Board~~ investigations and to reflect the Board's current practice of the ~~Commission~~;

**NOW, THEREFORE**, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

**SECTION 1.** The following Regulations and Procedures ~~as amended are hereby adopted and shall govern all proceedings before the San José Ethics Commission Board of Fair Campaign and Political Practices (Ethics Commission or Commission Board).~~

**REGULATIONS AND PROCEDURES FOR SAN JOSE ETHICS COMMISSIONBOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES INVESTIGATIONS AND HEARINGS**

**A. PREAMBLE**

~~These Regulations and Procedures of the San José Ethics Commission Board of Fair Campaign and Political Practices are promulgated in order to ensure the fair, just, and timely resolution of complaints presented to the Commission Board that allege violations of City ordinances relating to the campaign finance, lobbying, conflicts of interest and certain governmental ethics ordinances set forth in under~~ Title 12 of the San José Municipal Code, by:

1. ~~Setting and maintaining objective standards for the investigation and determination of investigating and determining matters brought before the Commission~~Board;
2. ~~Eliminating any improper influence in the investigation of and determinations relating to persons alleged to have committed ethics violations~~violated Title 12 of the San José Municipal Code; and
3. ~~Assuring reasonable time frames for completing within which enforcement proceedings should be completed.~~

## B. DEFINITION OF TERMS

For purposes of these Regulations and Procedures, the following definitions shall apply:

1. "Alternate Evaluator" means a person who is neutral and impartial, meets the qualifications in Section C, and has been retained for the limited purpose as provided herein because the Evaluator cannot maintain the appearance of neutrality or impartiality in evaluating or investigating a particular Complaint.
2. "Board" means the San José Board of Fair Campaign and Political Practices.
3. "Candidate" means a person who is running for City Office or is a City elected officeholder.
24. "Chair" means the elected Chair of the San José ~~Ethics Commission~~Board of Fair Campaign and Political Practices. If the Chair is not available, the elected Vice-Chair may temporarily assume the duties and responsibilities of the Chair.
35. "Code Enforcement" means the Code Enforcement Division of the Planning, Building, and Code Enforcement Department which provides citywide enforcement service for all reported concerns and violations relating to neighborhood residential properties as well as commercially and industrially zoned properties.
46. "Complainant" means a person or entity that files a complaint.
57. "Complaint" means ~~a complaint alleging a possible violation of Title 12 of the San José Municipal Code that is filed with the Office of the City Clerk on the Ethics Commission~~Board of Fair Campaign and Political Practices Complaint Form, which the Complainant has m, completed and signed by the Complainant, which is on file with the City Clerk.

68. "Day" means calendar day, unless otherwise ~~specifically indicated~~stated.
7. ~~"Ethics Commission" or "Commission" means the San José Ethics Commission.~~
8. ~~"Ethics Ordinances" means all ordinances found in Title 12 of the San José Municipal Code.~~
99. "Evaluator" means a person who is neutral and impartial, meets the qualifications in Section C and has been retained as provided herein.
4010. "Exculpatory information" means information tending to show that the Respondent has not committed ~~is not guilty~~ of the alleged violations.
114. "Hearing" means a formal meeting of the San José ~~Ethics Commission~~Board of Fair Campaign and Political Practices convened for the purpose of making determinations regarding a Complaint and conducted in accordance with ~~the requirements in~~ Section G.
122. "Investigator" means a person who is neutral and impartial, meets the qualifications in Section D<sub>1</sub> and has been retained as provided herein.
133. "Mitigating information or circumstances" means information or circumstances tending to excuse or reduce the significance of the Respondent's conduct.
144. "Preliminary Evaluation" is the initial review of a complaint conducted by the Evaluator to determine whether sufficient cause exists to conduct an full investigation prior to any presentation to the ~~Commission~~Board.
155. "Respondent" means a person or entity that is alleged in a complaint to have violated ~~an Ethics Ordinance~~a provision of Title 12 of the San José Municipal Code.
4616. "Sufficient Cause" means that a complaint identifies specific facts, which if proven, would be a violation of Title 12 of the ~~San Jose~~San José Municipal Code.
17. "Title 12" means the campaign, lobbying, conflicts of interest and ethics ordinances under Title 12 of the San José Municipal Code.

### C. HIRING OF THE EVALUATOR

1. The ~~Commission Board shall will~~ prepare and issue a Request for Qualifications/Quotes for an Evaluator at least six (6) months before the ~~existing existing contract with the Evaluator~~ expires.
2. The Evaluator ~~shall must~~ have a legal background and experience with ethics, election, or political law.
3. The Evaluator ~~shall must~~ be neutral and impartial and ~~shall may~~ not have or appear to have any bias or favoritism toward any person or entity involved in ~~any way~~ with any complaint or investigation.
4. The ~~Commission Board shall will~~ select the Evaluator and present the contract with the selected candidate to the Council for approval of the contract on a public agenda.
5. ~~6.~~ The contract ~~shall may~~ have up to a four (4) year term and ~~shall may not~~ end ~~on June 30 of~~ an odd numbered year.
76. The ~~Board may terminate the contract with the Evaluator at its pleasure. shall be subject to termination at the pleasure of the Commission.~~
78. The ~~Board contract shall may be terminated the contract with the Evaluator if any circumstances arise which, in the Board's judgment, of the Commission would compromise the Evaluator's appearance of neutrality.~~
89. If circumstances arise where the Evaluator cannot be neutral or impartial, or maintain the appearance of being neutral or impartial, when evaluating or investigating a particular Complaint, the City Attorney, in consultation with the Chair, may enter into an agreement with an Alternate Evaluator for the limited purpose of conducting a Preliminary Evaluation or Investigation of that Complaint. All Regulations and Procedures applicable to the Evaluator are applicable to the Alternative Evaluator.

### D. HIRING OF AN INVESTIGATOR

1. ~~In addition to the Evaluator, if~~ When necessary, the Ethics Commission Board may is authorized to hire an independent Investigator by contract executed by the City Clerk.



2. ~~The Commission Board shall~~ will prepare and issue a Request for Qualifications/Quotes for the Investigator to conduct or assist with investigations ~~or assist with investigations of complaints which are assigned by the Ethics Commission Board, and to monitor compliance with the requirements of Title 12 of the San José Municipal Code as requested by the Ethics Commission Board.~~
3. The Investigator ~~shall~~ must have experience in conducting investigations such as law enforcement, ethics, or employment related investigations. Familiarity with conflict of interest, campaign finance, and lobbying laws is desirable.
4. The Investigator ~~must~~ shall be neutral and impartial and ~~must~~ may not have or appear to have any bias or favoritism towards any person or entity involved in ~~any way with any complaint or investigation.~~
5. ~~The Board may terminate the contract with the Investigator shall be subject to termination at at their~~ its ~~pleasure of the Commission.~~
6. ~~The Board may contract shall be terminated the contract with the Investigator if any circumstances arise which, in the Board's judgment of the Commission, would compromise the Investigator's appearance of neutrality.~~
7. ~~The City Clerk will administer the contract with the Investigator shall be administered by the City Clerk.~~
8. ~~For purposes of the investigation of complaints by the Investigator, the provisions of these~~ The Regulations and Procedures which are applicable to the Evaluator shall also apply applicable to the Investigator.

#### **E. COMPLAINTS OF ALLEGED VIOLATIONS**

1. Any person may file a complaint alleging possible violations of the campaign finance, lobbying, conflicts of interest and certain governmental ethics ordinances set forth in Title 12 ~~of the San José Municipal Code.~~
2. Complaints ~~shall only~~ must be filed with the City Clerk, ~~who shall act as who serves as the Secretary to the Commission Board. Complaints may be filed with the Office of the City Clerk in person during normal business hours, by mail, by electronic mail, or by facsimile.~~
3. Complaints ~~may~~ must be filed on the complaint form that is approved by the ~~Commission Board, and is available in the Office of the City Clerk or from the City Clerk's website. In addition, t~~ The City Clerk may also accept complaints complaints filed by letter or electronic mail that if the complaint

~~provides the specificity and detail, including the identity of the Complainant, as~~  
~~as required in under this Section, by letter or electronic mail.~~

4. ~~Complaints shall be filed with the City Clerk in person during business hours, by~~  
~~mail, by electronic mail or by facsimile on a complaint form.~~

5. A complaint ~~shall~~ must provide as much specificity and detail as possible,  
including facts constituting the alleged violations, the name and address of the  
person who is alleged to have violated an ordinance and the names and  
addresses of potential witnesses.

6. ~~The City Clerk will forward any written complaint that satisfies the requirements~~  
~~of this Section to the Evaluator. Written complaints, which provide specificity and~~  
~~detail, including the identity of the Complainant, and which are filed with the City~~  
~~Clerk, shall be forwarded promptly to the Evaluator by the City Clerk.~~

7. ~~The following types of complaints matters are outside the Board's jurisdiction of~~  
~~the Ethics Commission, and the Board may not take any action. no action can or~~  
~~will be taken by the Commission regarding these types of complaints on:~~

a. ~~Complaints against the Ethics Commission, Board and/or its members;~~  
~~and/or~~

b. ~~Complaints against the City Clerk; and/or~~

c. ~~Complaints regarding the placement or size of political signs. The City~~  
~~Clerk will alleging political sign placement or size violation which shall be~~  
~~forwarded complaints of this nature promptly to to Code Enforcement by~~  
~~the City Clerk; and/or~~

d. ~~Complaints alleging violations other that are not under Title 12 in the~~  
~~campaign finance, lobbying, conflicts of interest and certain governmental~~  
~~ethics ordinances set forth in Title 12 of the San José Municipal Code.~~

8. A complaint may be submitted anonymously by calling the "~~Ethics~~  
~~Commission Board of Fair Campaign and Political Practices~~ Anonymous  
Complaint Hotline" at 408-975-ANON (2666). The Complainant ~~shall~~ must state  
good cause for anonymity, which is limited to:

~~(a).~~ (a). an employee of the City or the Successor Agency to the \_\_\_\_\_  
\_\_\_\_\_ Redevelopment Agency who is not protected by the Civil Service \_\_\_\_\_  
\_\_\_\_\_ system making a complaint about a supervisor in his or her chain of \_\_\_\_\_  
\_\_\_\_\_ command; or

~~(b).~~            a private sector employee making a complaint about his or her  
           employer.

9.            ~~The Chair of the Commission shall~~will assess whether there is good cause for  
anonymity. ~~It is recommended, but not required, that~~ ~~The Complainant may~~  
provide a telephone number or other contact information for the Chair to contact  
the Complainant to gather additional information about the cause for anonymity.  
If the Chair ~~determines there~~ ~~Complainant has~~ ~~is~~ good cause for anonymity, the  
City Clerk will forward the ~~complaint shall be forwarded promptly to the~~  
Evaluator by the City Clerk. If the Chair determines that the Complainant does  
not have good cause for anonymity, the complaint ~~shall~~may not be forwarded to  
the Evaluator.

910. The City Clerk ~~shall~~will promptly notify the ~~Board~~ ~~Commission~~ members promptly  
that a complaint has been filed, the date the complaint was filed, and the general  
nature of the complaint.

4011. If a Board member of the ~~Commission~~ files a complaint, that member's right to  
participate in the complaint process is the same as any other complaining party.  
However, that member ~~shall~~may not participate in deliberations or vote on a  
matter concerning such complaint.

4412. Under the circumstances described in Subsection F.8., the Evaluator may  
file a complaint with the City Clerk alleging possible violations of Title 12 as  
provided in this Section ~~E alleging possible violations of the Ethics Ordinance.~~

## F. REVIEW OF COMPLAINTS BY EVALUATOR

1. Upon receipt of the complaint, ~~The~~ ~~Evaluator shall~~ must notify the Respondent of  
the allegations and provide the Respondent with a complete copy of the  
complaint and the Regulations and Procedures of the ~~Ethics Commission~~ Board  
~~immediately upon the receipt of the complaint, unless the Evaluator determines~~  
~~that it is necessary to delay the notification in order not to~~ avoid compromising  
the investigation.
2. The Evaluator ~~shall~~ must conduct a preliminary evaluation of every complaint to  
determine whether ~~sufficient~~ sufficient ~~cause~~ cause exists to conduct a full  
investigation. ~~Sufficient cause shall exist when a complaint identifies specific~~  
~~facts, which if proven, would be a violation of Title 12 of the San José Municipal~~  
~~Code.~~ The Evaluator may not ~~No investigation shall be conducted~~ an  
investigation if:

- a. the complaint does not identify specific facts to demonstratedemonstrating  
           a-potential    violation;  
if
- b. the facts would not amount to a violation of law; or  
if
- c. identical allegations have already been addressed in a prior complaint.
3. The Board may not consider Complaints filed more than four (4) years after the  
allegedwhich allege violations which have occurred, more than four (4) years  
prior to the date of filing shall not be considered by the Commission.
4. Any City employee who is a Candidate for City office ~~shall~~ must be treated ~~as like~~  
any other Candidate for the purposes of San José Municipal Code Chapter 12.06  
~~of the San José Municipal Code. However, T~~the Evaluator ~~shall~~ must refer any  
complaint where the Respondent is a classified or unclassified employee  
appointed by a City Council Appointee to the appointing authority for investigation  
and action. ~~The Commission Board shall~~ may not take ~~no~~ further action on the  
complaint with regard to the employee.
5. If the Complaint, on its face, does not warrant an investigation, the Evaluator  
~~shall~~ will advise the Chair. ~~The Chair shall~~ and schedule a Hearing for the Board  
to consideration of the Evaluator's Report and Recommendations.
6. If the Board determines, If the Commission, upon reviewing the Evaluator's  
determination of lack of sufficient cause, determines that the complaint identifies  
specific facts which that if proven would be a violation of Title 12, the Municipal  
Code, the Commission Board shall may direct the Evaluator to commence an  
investigation.
7. If When there is sufficient cause is found, by the Evaluator, or on review by the  
Commission, the Evaluator shall will conduct an investigation. Such, which must  
include investigation must include an interview with the Respondent unless the  
Respondent refuses to cooperate. The investigation Evaluator may also include,  
but shall not be limited to, the interview of the Complainant and any witnesses,  
as well as the review of documents and other evidence.
8. In the event the Evaluator uncovers facts and information ~~in the course of~~ during  
an investigation that may implicate possible violations of the Ethics  
Ordinances Title 12 by one or more persons or entities who are not identified as  
Respondents in a complaint under investigation, the Evaluator shall will notify the  
Chair of this discovery and the Chair ~~shall~~ will schedule a Hearing for  
~~consideration of~~ to consider the Evaluator's Report and Recommendations.

9. ~~If the Commission Board~~ determines that the Evaluator has identified specific facts ~~which that if proven would be a violation of the Municipal Code Title 12,~~ the ~~Commission Board shall may~~ direct the Evaluator to conduct an investigation. The City Clerk ~~shall will~~ file an amended complaint against the new Respondent(s) using the complaint form established for such purpose. To the extent the information giving rise to the complaint relates to the circumstances of another complaint under investigation, the City Clerk ~~shall may~~ reference this in the complaint and indicate that the complaint should be treated as an amendment of the existing complaint. In this event, the Evaluator ~~shall must~~ notify the new Respondent(s), as well as the Complainant and Respondent(s) of the existing complaint, of the new allegations. ~~The Evaluator must also and~~ provide copies of the subject complaints to all parties and the Board's Regulations and Procedures of the Ethics Commission.
10. If the information giving rise to the new complaint is not related to another complaint and deserves a separate and independent investigation, the Evaluator will notify the Respondent(s) of the allegations and provide a complete copy of the complaint and the Board's Regulations and Procedures of the Ethics Commission, unless the Evaluator determines that it is necessary to delay the notification ~~in order not to not~~ compromise the investigation.
11. When the Evaluator concludes an investigation, the Evaluator ~~shall will~~ prepare a written Report and Recommendation. The Report ~~shall must~~ contain a summary of law and evidence gathered through the investigation, including any exculpatory and mitigating information. The Evaluator may consider all relevant facts and evidence, including, ~~but not limited to hearsay evidence,~~ and ~~must and shall~~ include in the Report all facts bearing on the weight ~~accorded given to the~~ evidence considered. The Report ~~shall must also~~ state whether the Evaluator concludes that a Respondent(s) did or did not violate City law Title 12. Recommendations may include actions to be taken by the Commission Board or further investigation to be conducted by the Evaluator.
12. No complaint, investigative file, or information contained therein, ~~shall may be~~ disclosed to any person other than a Respondent or Respondent's representative, the City Attorney, District Attorney, a court, a law enforcement agency, or otherwise as necessary to the conduct of an investigation, prior to the presentation of the Report and Recommendations to the Commission Board. The Evaluator, however, may communicate with the Chair ~~of the Commission~~ during the course of the investigation of a pending complaint in the following circumstances:
- a. On procedural matters; or

- b. As required for a determination that a subpoena is essential under the provisions of Section G.

4113. When a complaint, investigative file, or information contained therein has been released to the public by any person or entity prior to presentation of the Report and Recommendations to the ~~Commission~~Board, the City Clerk may acknowledge receipt of the complaint and issue a statement noting that:

- a. Any given complaint may or may not ~~actually~~ fall within the purview of the ~~Commission~~Board;
- b. A complaint ~~merely~~ represents unsubstantiated allegations pending the results of an investigation and Hearing; and
- c. Early release of a complaint to the public is a violation of the San ~~Jose~~José Municipal Code.

4214. After presentation of the Report and Recommendations, complaints, related documents, and investigative files ~~shall~~may not be disclosed except as required by the California Public Records Act, as amended (Government Code §§ 6250 et seq.).

#### **G. COMMISSION-BOARD HEARING**

1. The Evaluator ~~shall~~must advise the Chair ~~of the Commission~~ to set a Hearing at the earliest practicable date based on the projected schedule for submittal and distribution of the Evaluator's Report and Recommendations.
2. The City Clerk ~~shall~~must notify the Complainant and the Respondent of the date and time of the Hearing at which the ~~complaint~~Complaint will be reviewed by the ~~Commission~~Board.
3. ~~The Evaluator's will deliver the Report and Recommendations shall be delivered to the Commission Board, the Complainant, the Respondent and all interested parties who request the Report, three (3) business days in advance of the Commission Board Hearing.~~
4. The ~~Commission Board shall~~will consider the Report and Recommendation of the Evaluator as well as any other evidence presented at the Hearing.
5. The Respondent may ~~, but need not,~~ submit a written response to the Report and Recommendations. The response may contain legal arguments, a summary of evidence, and any mitigating or exculpatory information.

6. The Respondent who chooses to submit a response ~~shall~~must deliver the response at least 24 hours in advance of the ~~Commission Board~~ Hearing, if possible. The Respondent ~~shall~~must deliver a total of eight copies of the response to the City Clerk for distribution to the ~~Commission Board~~ and the Evaluator.
7. The Respondent may personally appear before the ~~Commission Board~~ ~~personally~~ or be represented by counsel or any other person.
8. The formal Rules of Evidence ~~shall~~do not apply to the Hearing.
9. All testimony presented to the ~~Commission Board~~ ~~shall~~must be under oath or affirmation.
10. ~~Commission Board~~ members may ask questions of the Complainant, Respondent, witnesses or the Evaluator when recognized by the Chair.
11. The ~~Commission Board~~, if necessary, may compel the testimony of witnesses and may compel the production of relevant documents to the Evaluator by subpoena, but this power may be used only as a last resort, after good faith efforts to acquire the relevant information have failed and upon a finding that the information or testimony is essential for a determination in the matter.
  - a. The Chair ~~of the Commission~~, after consultation with the Evaluator, may subpoena witnesses and compel their attendance and testimony, and may require by subpoena the production of any books, papers, records or other items at a scheduled ~~Commission Board~~ Hearing.
  - b. Use of the subpoena power by the Chair ~~shall~~may only be used ~~only~~ after a written determination that the information or testimony is essential for a determination in the matter and material to the duties ~~and/or~~ exercise of the ~~Board's powers of the Commission~~ and that good faith efforts to acquire the relevant information have failed.
  - c. The City Clerk ~~shall~~must promptly notify the ~~Commission Board~~ members ~~promptly~~ that subpoena power has been used and ~~shall~~must describe the general basis for the written determination without reference to specific details of the complaint, investigative file or information contained therein.
12. Except as otherwise provided above, individual ~~Board~~ members ~~of the Commission~~ may not investigate complaints ~~nor~~or discuss pending complaints with anyone except during the course of a Hearing.

13. The Complainant is to be treated like any other witness in providing evidence. Any interested person can submit a brief or any written argument to the ~~Commission Board at least or any written argument~~ 24 hours before the ~~Commission Board~~ Hearing, if possible. The brief or written argument must be simultaneously provided to the Respondent.
14. The Hearing ~~shall is to be~~ recorded by the City Clerk.
15. The Hearing ~~shall must~~ be open to the public except that witnesses may be excluded at the Board's discretion ~~of the Commission~~.
16. Prior to a final determination on the merits of a complaint, there ~~shall may~~ be no oral or written communications regarding the merits of a complaint with any person or entity unless the communication is necessary for the conduct of the investigation or except as otherwise provided above in these Regulations. After the final determination, the Chair ~~shall be will be~~ the sole contact with the public and media.

#### H. SCHEDULING

1. This process is to be completed at the earliest possible time. While timeliness cannot be precise because of the nature of an investigation, timeliness is paramount, particularly when an elections-related complaint is filed within two (2) weeks of an election. In all cases, the Evaluator's Report and Recommendations must be submitted to the City Clerk within thirty (30) calendar days after the Evaluator receives the complaint unless an extension has been requested and granted as provided in this section.
2. Whenever an action is required to be completed by a particular time pursuant to these Regulations or an order of the Commission Board, the Evaluator or Respondent may request an extension of time by filing a written request with the City Clerk. The Clerk ~~shall will~~ promptly forward the request for an extension to the Chair ~~of the Commission~~ and the City Attorney's Office. In consultation with the City Clerk and the City Attorney's Office, the Chair may grant the request only upon a showing of good cause. The extension granted by the Chair ~~shall must~~ be in writing and must specify the amount of additional time that has been granted.
3. ~~If an the Chair grants an extension has been granted~~ to the Evaluator, the Evaluator ~~shall must~~ submit a progress report on the status of the Evaluator's Report and Recommendations at each regularly scheduled meeting of the Commission Board until the Report has been delivered. The progress report



should explain, ~~generally,~~ the status of the Report and Recommendations without divulging details about the Complaint or the investigation.

4. If the Chair has denied the Evaluator's request for an extension, the Evaluator ~~shall must~~ deliver, within three (3) business days, a Report that summarizes the law and evidence gathered through the investigation up to that point, including any exculpatory and mitigating information.

#### **I. ROLE OF THE CHAIR**

1. The Chair ~~shall will~~ make procedural determinations including but not limited to the scheduling of Hearings, time extensions, and order of witnesses.
2. The Chair ~~is free to may~~ consult with the Evaluator and the City Attorney on procedural matters. The Chair may also discuss procedural matters *ex parte* with the Respondent.
3. The Chair ~~shall is serve as the sole only contact~~ ~~Commission contact and/or~~ spokesperson for interactions with the public, the City Council, and the media. Except for routine administrative matters within their individual areas of responsibility, the City Clerk, City Attorney, Evaluator, and Investigator ~~shall will~~ refer all inquiries to the Chair.

#### **J. COMMISSION BOARD FINDINGS**

1. If the ~~Commission Board~~ concludes that further investigation is necessary, it ~~shall will~~ direct the Evaluator to conduct further investigation and to report back to the ~~Commission Board~~.
2. Upon conclusion of the ~~final~~ Hearing, the ~~Commission Board~~ ~~shall must~~ issue a decision by Resolution.
3. If the ~~Commission Board~~ decides that there is sufficient evidence to establish that ~~no a violation has occurred~~, the ~~Commission Board~~ ~~shall must~~ publicly announce this ~~fact decision~~.
4. If the ~~Commission Board~~ decides that ~~that~~ there is insufficient evidence to establish that a violation ~~has occurred~~, the ~~Commission Board~~ ~~shall must~~ publicly announce this ~~fact decision~~.
5. A decision that a violation has occurred ~~shall be is~~ based on a preponderance of the evidence from the entire record of the proceedings.

6. The votes of at least three (3) members of the ~~Commission Board~~ are required to decide that a violation of Title 12 of the San José Municipal Code has occurred. Each ~~Commission Board~~ member voting on the decision of the ~~Commission~~ shall must certify on the record that he or she ~~has heard~~ (either in person or by listening to a recording) or read the transcript of the testimony at the Hearing on the complaint and reviewed all the evidence in the record.
7. The ~~Commission Board~~ shall ~~may~~ not impose a penalty if it is presented with clear and convincing evidence that, prior to the alleged violation:
  - a. The Respondent ~~had~~ requested and obtained a written opinion from the City Attorney or the California Fair Political Practices Commission (FPPC); and
  - b. The Respondent, in requesting the opinion, truthfully disclosed ~~truthfully~~ all the material facts pertinent to the case; and
  - c. The Respondent committed the acts or violations alleged in the complaint in good faith reliance upon the formal, written opinion of the City Attorney or the FPPC.
8. The City Clerk shall ~~must~~ provide a copy of the Resolution of the ~~Board's~~ decision ~~Commission's determination~~ to the Respondent and Complainant. A copy of the Resolution must ~~shall~~ be posted on the ~~Ethics Commission~~ Board's website.
9. The decision of the ~~Commission Board~~ shall ~~be the~~ is a final administrative determination of the City, unless the ~~Commission Board~~ makes another decision by Resolution to impose penalties under Section K, in which case that decision shall ~~is~~ be the final administrative determination of the City.

#### **K. ADMINISTRATIVE ORDERS AND PENALTIES**

1. If the ~~Commission Board~~ finds a violation, the ~~Commission Board~~ may:
  - a. Find mitigating circumstances and take no further action;
  - b. Issue a public statement or reprimand;
  - c. Require corrective action by a particular deadline; ~~and/or~~
  - d. Impose a penalty in accordance with Chapter 12.04 of the San José Municipal Code.

2. The votes of at least three (3) Board members ~~of the Commission~~ are required to impose any order, and/or penalty, or both for a violation of Title 12 ~~of the San José Municipal Code~~. Each Commission Board member voting to impose any order, and/or penalty, or both for a violation must certify on the record that he or she has heard (either in person or by listening to a recording) or read the transcript of the testimony at the Hearing on the complaint and reviewed all the evidence in the record.
3. In determining if penalties should be imposed for violations of Title 12 ~~of the San José Municipal Code~~ and the amount of any such penalties, the Commission Board shall ~~may~~ consider all the relevant circumstances surrounding the case including:
  - a. The severity of the violation;
  - b. The presence or absence of any intention to conceal, deceive, or mislead;
  - c. Whether the violation was deliberate, negligent or inadvertent;
  - d. Whether the violation was an isolated incident or pervasive enough to indicate a pattern of disregard for Chapter 12.04 of the San José Municipal Code;
  - e. Whether the Respondent has a prior record of violations of City law relating to campaign finance, lobbying, conflicts of interest, or governmental ethics;
  - f. The degree to which the Respondent cooperated with the investigation;
  - g. Whether or not corrective actions were taken, if appropriate, in accordance with the provisions of Chapter 12.04 of the San José Municipal Code.
4. Civil penalties ~~shall~~ are ~~be~~ imposed by Resolution of the Commission Board.
5. ~~The City Clerk shall~~ must provide a copy of the Resolution imposing a penalty to the Respondent and Complainant. ~~A copy of the Resolution s, and post a copy of the Resolution shall~~ on ~~be~~ posted to the Ethics Commission Board's website.

## L. REFERRALS TO OTHER ENFORCEMENT AGENCIES OR OFFICIALS

At any time, the Evaluator or the ~~Commission Board~~ may refer a complaint and, if applicable, any information gathered in investigating the complaint, to another government agency or official if the ~~Commission Board~~ determines that the agency or official may more appropriately resolve the allegations in the complaint or enforce the applicable provisions of law. A copy of all information gathered must be sent by the City Clerk's Office or City Attorney's Office to the agency or official together with the referral.

## M. JUDICIAL REVIEW

1. The Resolution ~~shall~~must advise the Respondent that he or she can seek judicial review of the ~~Commission Board's~~ decision in accordance with Chapter 1.16 of the San José Municipal Code.
2. Upon receipt of any complaint filed ~~in Superior Court challenging which challenges any decision of the Commission Board,~~ the City Attorney ~~shall~~will decide whether or not ~~that Office has there is~~ a conflict of interest which precludes the City Attorney's ~~Office~~ from representing the ~~Commission Board~~ in the action.
3. If the City Attorney determines that a conflict exists, the City Attorney ~~shall~~will retain conflicts counsel to defend the lawsuit.

## N. COLLECTION OF CIVIL PENALTIES

1. Civil penalties imposed by the ~~Commission Board shall~~must be paid remitted to the City Clerk within 100 days of the date of the Resolution by cashier's check for the specified amount. ~~A cashier's check for the specified amount shall be remitted to the City Clerk.~~
2. If the civil penalties are not paid within the time specified, the Clerk shall refer the debt to the Director of Finance for submission to the City's collection agency.

## O. ROLE OF THE CITY ATTORNEY

1. The City Attorney may provide legal advice to the ~~Commission Board on matters unrelated to to non-complaints matters or on general interpretations of the San José Municipal Code or relevant state or federal law.~~ The but City Attorney may shall not participate in investigations or reviews of complaints. (SJMC § 12.04.080.H)

2. The Chair or the Evaluator may consult with the City Attorney at any time with regard to procedure or an interpretation of the San José Municipal Code, in general, and not as it applies to facts that are the subject of a pending complaint.

SECTION 2. Resolution No. 77879 is hereby repealed.

ADOPTED this \_\_\_\_\_ day of \_\_\_\_\_, 2017, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

\_\_\_\_\_  
SAM LICCARDO  
Mayor

ATTEST:

\_\_\_\_\_  
TONI J. TABER, CMC  
City Clerk