



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Nora Frimann
City Attorney

Toni J. Taber
City Clerk

SUBJECT: SEE BELOW

DATE: May 19, 2023

**SUBJECT: BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES
RECOMMENDED REVISIONS TO TITLE 12 OF THE SAN JOSE MUNICIPAL,
ETHICS AND OPEN GOVERNMENT, AND RESOLUTION NO. 79187 GOVERNING
THE BOARD'S REGULATIONS AND PROCEDURES.**

REASON FOR REPLACEMENT

This Replacement Memorandum updates the recommendation section to recommend the City Council approve one of two proposed ordinances and adopt a resolution amending the Board's regulations and procedures and repealing Resolution No. 79187.

RECOMMENDATION

- A. Approve an ordinance amending Title 12 of the San José Municipal Code to amend Section 12.04.080 of Chapter 12.04 authorizing 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 regulating the schedule of Special Elections for certain initiative measures; Section 12.06.295 of Chapter 12.06 removing limitations on the amount a candidate may loan to their own campaign or campaign committee; Section 12.10.020 and 12.10.050 of Chapter 12.10 removing the nonprofit exception in the Revolving Door Ordinance; and Section 12.12.440 of Chapter 12.12 removing the late filing fee for weekly lobbyist reports; or
- B. In the alternative, approve an ordinance amending Title 12 of the San José Municipal Code to amend Section 12.04.080 of Chapter 12.04 authorizing 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 regulating the schedule of Special Elections for

certain initiative measures; Section 12.06.295 of Chapter 12.06 removing limitations on the amount a candidate may loan to their own campaign or campaign committee; Section 12.10.020 of Chapter 12.10 to redefine the nonprofit exception in the Revolving Door Ordinance; and Section 12.12.440 of Chapter 12.12 removing the late filing fee for weekly lobbyist reports; and

- C. Adopt a resolution amending regulations and procedures for the San José Board of Fair Campaign and Political Practices, Investigations, and Hearings and repealing Resolution No. 79187.

BACKGROUND

In 2019, the Board of Fair Campaign and Political Practices (“Board”) performed its review of Title 12 of the San Jose Municipal Code and Resolution No. 79187 governing its regulations and procedures for investigations and recommended various revisions for the consideration of the Rules and Open Government Committee (“Rules Committee”). On February 4, 2020, the Board recommended various changes to Title 12 and Resolution 79187, including striking the nonprofit exemption from the Revolving Door Ordinance. The Rules Committee approved all the proposed revisions with instruction to calendar these recommendations for consideration 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 as a result, some of the proposed revisions have not yet been codified.

In February 2023, the Board formalized additional recommendations for revisions to Title 12 and Resolution No. 79187 after completing another review of Title 12. This memorandum discusses the Board’s recommendations.

ANALYSIS

1. Remove 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.

In 2017, the City Auditor issued an audit report titled *Open Government: The City Has Made Progress in Meeting the Goals of the Sunshine Reform Task Force*¹. Included in the report was a recommendation for the City Council to consider a change to the Revolving Door Ordinance to revise rules surrounding former designated employees who work for non-profit organizations as lobbyists or on legislative matters which they worked on as part of their City employment.

The purpose of the recommendation was to:

- a) Align exemptions for non-profits in the City's Revolving Door Ordinance with the City's Lobbying Ordinance, which only mentions and exempts 501(c)(3) organizations, and
- b) Provide consistent treatment under the Revolving Door Ordinance between non-profit organizations that *receive* financial support from the City, and non-profits that *do not receive* financial support from the City, or other outside organizations.

As noted in the audit report, aligning the definition of non-profit in the Revolving Door Ordinance to the definition within the Lobbying Ordinance would make the rule less confusing and prevent City employees from using their former position to gain advantage for lobbying firms without a waiver. Currently, 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 exemption does not apply for non-profits that have not received financial support from the City.

Also noted in the 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, the City Council referred the City Auditor's recommendation, from the August 2017 Open Government Audit Report, regarding the non-profit exemption 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 work for non-profit or for-profit organizations.

¹ <https://www.sanjoseca.gov/Home/ShowDocument?id=33904>

After considering the merits of each direction, the Board recommends 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.

Two alternative proposed ordinances are before the City Council for consideration and approval.

- a) One proposed ordinance would remove the nonprofit exemption to the Revolving Door Policy by amending Section 12.10.020(E.) which defines nonprofit organizations and Section 12.10.050(A.) which provides the exemption to the Revolving Door Policy for former city officials and employees that become employed by, or volunteer with, a nonprofit organization. The City Council would 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.
- b) In the alternative, the second proposed ordinance would redefine nonprofit organization under Section 12.10.020 to be an organization with tax exempt status under Section 501(c)(3) of the Internal Revenue Code to be consistent with the exemption for nonprofit organization under the Lobbying Ordinance.

2. 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 proposed ordinance would amend Section 12.12.440(D) and 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 representation.

The City Clerk advised the Board that the requirement to impose this fine results in an administrative burden, and would not be 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. Due to the extensive work required to review the accuracy of the weekly reports submitted by lobbyists, the Office of the City Clerk has been unable to enforce this provision with regularity.

3. 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 approved by the Rules Committee on February 4, 2020.

a. Clarify 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, yet the Board has received complaints about these issues.

The proposed amendments to Resolution 79187 would specify the areas outside of its jurisdiction to clarify the scope of its jurisdiction for members of the public.

b. Clarify 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 code 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 violation. If that occurs, the complaint is then forwarded to the evaluator to process.

The proposed amendments to Resolution 79187 would memorialize this practice and further define the Clerk’s role in handling complaints that do not meet the procedural requirements imposed by the SJMC.

c. Technical Changes

The proposed amendments to Resolution 79187 make other technical changes including reorganization of sections, eliminating redundant regulations, 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 Constitution of the State of California 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 the special election must occur, so, per 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. According to the Elections Code, as amended by AB 765, special elections must occur within 88 days and 103 days of the order of the election. But 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 just for the citizen-sponsored initiative when a regularly scheduled election was approaching. AB 765, however, repealed the ability to defer a special election, as part of a broader effort to remove the process allowing initiative proponents to force a special election with a higher signature threshold. The repeal of this deferral mechanism has implications for the City because the Charter retains its process for proponents of an initiative ordinance measure to force a special election. 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 proposed ordinance would bring 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 if pending 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 the amount that a candidate may loan to their campaign at \$20,000. 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 ordinance to amend Sections 12.06.295, 12.10.020, 12.10.050 (if applicable), 12.12.440(D), 12.05.020, and amend Resolution 79187 would address the Board's recommendation for the reasons stated above.

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

cc:

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