CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: RULES AND OPEN GOVERNMENT COMMITTEE

FROM: Richard Doyle
City Attorney

Toni J. Taber
City Clerk

SUBJECT: SEE BELOW

DATE: February 4, 2020

SUBJECT: BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES RECOMMENDED REVISIONS TO THE CITY'S ETHICS AND OPEN GOVERNMENT PROVISIONS UNDER TITLE 12 OF THE SAN JOSÉ MUNICIPAL CODE AND RESOLUTION NO. 79187 GOVERNING THE BOARD'S REGULATIONS AND PROCEDURES.

RECOMMENDATION

Consider the revisions proposed by the Board of Fair Campaign and Political Practices to the City's Ethics and Open Government Provisions and the Resolution Governing the Board's Regulations and Procedures and provide feedback and direction for further action.

BACKGROUND

In accordance with Section 12.04.070.C of the San Jose Municipal Code,[1] the Board of Fair Campaign and Political Practices (Board) performed its review of Title 12 and the Resolution governing its regulations and procedures for investigations and hearings in 2019 and recommends the following for consideration. Furthermore, to implement these recommendations a proposed ordinance and resolution are also included for consideration.

[1] Unless otherwise stated, all statutory references are to the San José Municipal Code.

ANALYSIS

1) The first recommendation relates to the scheduling of special elections under Charter Section 1601(a)(1) and Section 12.05.020.

The Board brings forward this recommendation because of changes the State Legislature made to the Elections Code, through the passage of AB 765 in 2017, regulating the scheduling of special elections when a citizen-sponsored initiative qualifies for the ballot.

Under former Elections Code Section 9214, proponents of an initiative could force a special election (e.g. an off-cycle election held on a date other than an established election date like a statewide primary or general election) if 15% of registered voters signed the petition supporting the initiative. The City has a similar process under Charter Section 1603(a)(1) for initiative ordinances but with a lower signature threshold of 8%.

Further, under 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.

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.[2] 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 when the initiative qualified for the ballot, be required to hold a special election even though a regularly scheduled election was approaching.

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[2] Elec. Code §1405.

To remove this possible scenario, the Board recommends amending Section 12.05.020, which governs the scheduling of city municipal elections, to allow the 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.

2) The second recommendation is a clarifying amendment requiring disclosure of the source of all personal funds deposited into a campaign bank account.

As currently written in Section 12.06.930, candidates for city office must disclose the source of all personal funds deposited into their campaign bank account and report this information to the Clerk on or before the date of the next pre-election statement which must be filed after the funds are deposited into the campaign's bank account. The form the City Clerk provides for this purpose is the Form 502.

The Board recommends amending Section 12.06.930 to clarify that the Form 502 must be filed with any campaign disclosure statements, even those required to be filed after the election.

3) The third recommendation is an amendment regulating the classification and use of surplus campaign funds to better align with State law.

Both the Municipal Code and State law regulate surplus funds, which are those campaign funds remaining under the control of a candidate after an election and have not been designated for use in a future election.[3] Once campaign funds become surplus, the use of such funds is regulated under the Municipal Code and by State law. But the Municipal Code and State law differ in when campaign funds become surplus funds and the permissible uses for surplus funds.

The Municipal Code designates "any remaining campaign funds in excess of expenses incurred for allowable expenses as specified under the Political Reform Act as surplus campaign funds after withdrawal, defeat, or election to office and requires that within 180 days such funds be (1) returned to the contributors on a pro rata basis, (2) turned over to the general fund of the city (3) or may be used for attorney's fees and other

[3] Candidates in City elections may only designate campaign funds for future elections if a written disclosure, specified in the Municipal Code, appeared on all materials printed by the campaign committee during the campaign, which informed potential donors that such contributions are subject to being transferred to the candidate's own city and noncity campaigns, at any time, at the discretion of the candidate. (SJMC §12.06.420). Further, while State law still allows campaign funds to be transferred into officeholder accounts before they become surplus funds, the City prohibits officeholder accounts. (SJMC §12.06.810.)

costs in connection with an election contest or recount resulting from an election that commenced the one hundred eighty day post-election contribution period."[4]

State law, on the other hand, designates any remaining campaigns funds not designated for a future election or transferred to an officeholder account as surplus funds on the 90th day after the end of the postelection reporting period following the election in which the candidate was defeated or withdrew from the election, or upon the 90th day after leaving elective office.[5] Once funds are considered surplus funds under State law, they may only be used for the following purposes:

(a) The payment of outstanding campaign debts or elected officer's expenses.

(b) The repayment of contributions.

(c) Donations to a bona fide charitable, educational, civic, religious, or similar tax exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.

(d) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3.

(e) Contributions to support or oppose a candidate for federal office, a candidate for elective office in a state other than California, or a ballot measure.

(f) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees and other costs for litigation that arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action brought for a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount.

The Board recommends amending the City's ordinance governing surplus campaign funds to better align with State law requirements for surplus campaign funds. The recommended changes would designate campaign funds still under the control of each

[4] SJMC §12.06.720.
[5] Gov. Code §89519.

candidate as surplus campaign funds on the 90th day after the end of the postelection reporting period following the election in which the candidate was elected or defeated or from which the candidate withdrew. This proposed deadline for surplus campaign funds is consistent with when campaign funds become surplus campaign funds under State law.

The Board also recommends expanding the allowable uses for surplus campaign funds to better align with State law. Under the recommended amendment, surplus campaign funds could be used for:

(a) The payment of outstanding campaign debts.

(b) The repayment of contributions on a pro-rata basis.

(c) Donations to the general fund of the City or to a bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.

(d) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined under the Political Reform Act.

(e) Contributions to support or oppose a ballot measure.

(f) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees and other costs for litigation that arises directly out of a candidate's activities, duties, or status as a candidate, including, but not limited to, an action to enjoin defamation, defense of an action brought for a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount.

Although the above uses for surplus campaign funds are similar to State law, the Board's recommendation differs in one respect. The Board does not recommend allowing candidates to use surplus funds to support or oppose a candidate for federal office or a candidate for elective office in a state other than California, as candidates may do under State law. This difference incorporates the City's long-standing prohibition

on transfers of campaign funds to other candidates.[6] Furthermore, the Board's recommendation would clarify that candidates may still give surplus campaign funds to the City's general fund.

4) The fourth recommendation relates to removing the non-profit exception to the Revolving Door Ordinance.

On September 12, 2017, the 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 former designated employees go to work for non-profit or for-profit organizations.

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.

For background, the City's Revolving Door Ordinance prohibits former City officials, including commissioners, and designated employees (e.g. Form 700 filers) from:

- Working on any legislative or administrative matter which they worked on during the twelve months prior to terminating City employment;
- Representing anyone else on any matter before the City (i.e. lobbying) whether or not for compensation; or
- Receiving any gifts or payment in violation of the City's Gift Ordinance.

The ban imposed by the Revolving Door Ordinance 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.[7]

However, because of an exception in the Revolving Door Ordinance, this ban does not apply to former City officials and designated employees who either work or volunteer with a nonprofit organization recognized under the Federal Internal Revenue Code that has engaged in programs or projects that received financial or other formal support from the City Council within the past five years. This nonprofit exception covers all nonprofit

[6] See SJMC § 12.06.410.
[7] SJMC §§ 12.10.030 12.10.070.

entities organized under 501(c) of the Federal Internal Revenue Code, including 501(c)(4) and 501(c)(6) organizations.

If the Council were to move forward with the Board's recommendation, all City officials and designated employees (e.g. Form 700 filers) would be prohibited from working with a nonprofit on any legislative or administrative matter[8] which they worked on during the 12 months prior to terminating City employment. Further, no City official, member of a commission, or designated employee could represent a nonprofit, whether or not for compensation, on any matter before the City Council, an individual member of the Council, Commission,[9] or any City staff. The Council would still be able to grant a waiver to the Revolving Door if in the best interests of the City. In addition, certain provisions of the Revolving Door Ordinance would continue to not apply if the or designated employee left the City as a result of a reduction in work force.[10]

5) The fifth recommendation is an amendment to the Lobbyist Ordinance to clarifying the weekly reporting obligations for lobbyists.

In June of 2017, the Council replaced the quarterly reporting requirement for lobbyists with a weekly reporting requirement. In monitoring compliance with this weekly reporting requirement, the Board recommends that the Council amend Section 12.12.430 to make technical changes to further clarify the circumstances in which lobbyists are required to file a weekly report.

6) The sixth recommendation, amending 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.

The Board recommends adopting a resolution amending and restating the Regulations and Procedures currently stated in Resolution No. 79187 to clarify its jurisdiction and to make procedural changes to how the Board processes complaints.

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[8] Per Section 12.10.035.A.1, "Work on any legislative or administrative matter" includes, but is not limited to, providing advice or recommending any action with regard to a city or agency legislative or administrative matter, such as a project involving land use, development, or public works. Legislative matters include city council, agency board and city or agency board or commission actions related to ordinances, resolutions, agreements, permits or licenses.

[9] Under Section 12.10.040, members of a commission may not, for two years after leaving their respective commission, represent anyone else, whether or not for compensation, before the commission on which the former member served.

[10] SJMC §12.10.035.

First, the Board recommends further clarifying its jurisdiction. 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. 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 Board recommends that the Resolution regulating its procedures should specify the areas outside of its jurisdiction to clarify the scope of its jurisdiction for members of the public.

Furthermore, Section 12.04.080 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." Currently, complaints that do not specify the alleged violation by citing the specific code section or sections of the Municipal Code 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 Board's proposed Resolution would memorialize this practice and further define the Clerk's role when receiving complaints that do not meet the procedural requirements imposed by the Municipal Code.

The technical changes include reorganization of sections, eliminating redundant regulations, clarifying the process for the City Clerk to deliver complaints to the Evaluator for review.

CONCLUSION

Each of the Board's recommendations is summarized in the table below for the consideration and direction of the Rules and Open Government Committee.

Recommendation No.	Description	Proposed Action
1	Scheduling of Special Elections for initiative ordinances	Amend Section 12.05.020
2	Disclosure of the source of all personal funds into a campaign bank account	Amend Sections 12.06.295, 12.06.930
3	Aligning surplus campaign funds with State Law	Amend Section 12.06.720
4	Removing Non-Profit Exemption from Revolving Door Ordinance	Repeal Sections 12.10.020, 12.10.050
5	Clarify weekly reporting obligations for Lobbyists	Amend Section 12.12.430
6	Clarify the Board's jurisdiction over ethics complaints, make procedural changes to Board's complaint intake process	Amend Resolution No. 79187

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