

UPDATING SAN DIEGO'S CITY CHARTER

A RECOMMENDATION TO AMEND THE CHARTER'S PROVISIONS RELATED TO REMOVAL OF ELECTED OFFICIALS

SUMMARY

On October 15, 2013, the mayor of San Diego pled guilty to a felony of false imprisonment and two misdemeanor battery charges against three women. The San Diego City Charter, which supersedes other statutes regarding elected officials, does not provide for the removal of the mayor or other elected officials for such a conviction. In fact, there is no provision in the charter for the removal of such an official other than death, resignation or recall. The 2013-2014 San Diego Grand Jury recommends that the San Diego City Charter be amended to include other reasons that could lead to the removal of an elected city official.

INTRODUCTION

Within a few days after the Grand Jurors were sworn, the mayor of San Diego was publicly accused of sexually harassing a number of women. His former communications director filed a lawsuit against him for sexual harassment on July 22, 2013¹, and within weeks several other women publicly claimed he had sexually harassed them while he was mayor and, earlier, as a San Diego area congressman. Federal and state authorities began investigations into charges related to other instances of alleged misconduct. The Mayor apologized, saying he was seeking professional help to change his behavior. Nevertheless, local, state, and national political leaders, including all nine members of the San Diego City Council called for his immediate resignation, and citizen groups began mounting a recall campaign.

During the ensuing weeks, the city struggled to conduct everyday business in the midst of the evolving scandal. Although the Mayor eventually resigned, thus ending the recall effort, community leaders suggested that the San Diego City Charter be amended to include additional provisions that could lead to removing elected officials. The Grand Jury concludes that the City Charter should be updated and revised in many areas of interest to the public, but has chosen to narrow its focus to the removal of elected officials from office.

PROCEDURE

The Grand Jury interviewed several officials on the City Council and from the offices of the City Attorney, in addition to members of previous San Diego Charter Review Commissions and Committees. The Grand Jury also reviewed the California Government Code provisions for removing elected officials, the City's Municipal Code's provisions related to removing city personnel and the city charters of several California cities with strong-mayor forms of government similar to San Diego's.

¹ Irene McCormack Jackson v. City of San Diego, Robert ("Bob") Filner, et al (7/22/13), Superior Court of California, County of San Diego, Case No. 37-2013-00058613-CU-OE-CTL

The Grand Jury's investigation centered on the following questions:

- What conditions other than death, resignation and recall should be considered for removing an elected official?
- How do the California Government Code and the San Diego Municipal Code relate to the City Charter?
- What provisions for removing an elected official should be added to the San Diego City Charter?
- What is the most expedient and cost effective way to amend the City Charter?

The Grand Jury interviewed individuals from the following entities:

- San Diego City Council
- San Diego City Attorney's Office
- Previous Citizens' Review Commissions and Committees

The Grand Jury reviewed the following documents:

- San Diego City Charter
- San Diego Municipal Code
- California Government Code
- California Constitution
- Los Angeles City Charter
- Fresno City Charter
- Oakland City Charter
- San Francisco City Charter
- San Jose City Charter
- Final Report, San Diego Charter Review Committee, October 4, 2007
- Kevin F. McCarthy and Rae W. Archibald, "Facing the Challenge of Implementing Proposition F in San Diego," Rand Corporation, 2005
- Glen W. Sparrow, "San Diego: Switch from Reform to Representative," *More Than Mayor or Manager; Campaigns to Change Form of Government in America's Large Cities*, Georgetown University Press, edited by James H. Svava and Douglas J. Watson, (Washington, D.C., 2010), pp. 103-120.

DISCUSSION

When allegations arose in 2013 against the Mayor for various instances of misconduct, San Diegans became aware of the lengthy and costly recall process, which was the only recourse allowed by the City Charter other than death, resignation or, possibly, through a forfeiture process per Section 108.² The City Charter does not provide for the removal of a mayor or other elected official *for misconduct* or other actions.

² San Diego City Charter, Article II, Section 108: Forfeiture of Office for Fraud: "Every officer who shall willfully approve, allow, or pay any demand on the treasury not authorized by law, shall be liable to the City individually and on his official bond, for the amount of the demand so approved, allowed or paid, and shall forfeit such office and be forever debarred and disqualified from holding any position in the service of the City." Compare to Federal law of bribery which disqualifies a public official from "holding any office of honor, trust, or profit under the United States." Title 18, United States Code, Section 201 (b)(4).

In the weeks leading up to the Mayor's resignation, the recall effort was well underway. The legal proceedings and the possibility of two special elections could cost the city several millions of dollars,³ an expense that would have been avoided if the City Charter specified other reasons for removal from office than death, resignation or recall. Several former elected officials have had to leave office during the past 20 years, but, again, only after extensive public pressure forced their resignations.

Although the Mayor eventually resigned, it became clear to San Diegans that their charter needs clarification on matters related to removing elected officials. Moreover, prominent citizens publicly challenged the County Grand Jury to investigate the issue and to put forward its recommendations for consideration.

City Charter Article XIV, Section 223, states that the charter may be amended in accordance with the provisions of the Constitution of the State of California, a process that requires a majority vote of its electors.⁴ San Diego's Municipal Code stipulates several circumstances by which city employees can be removed, but, as mentioned earlier, only the City Charter's conditions can be considered for removing elected officials. In other words, it is our understanding that with respect to the removal of certain elected officials, the City Charter trumps the Municipal Code and the California Government Code. If conditions for removing elected officials are specifically addressed in the City Charter, the Charter provisions control and the City cannot act upon the provisions contained in the City's Municipal Code or the California Government Code, even if the elected official was convicted of a felony (e.g., bribery, extortion, drug dealing) while in office.

Previous Charter Review Commissions

In the past, charter review commissions and committees have been instrumental in amending the City Charter. Commissioners and committee members were selected in a variety of ways, including the selection of potential commissioners by the mayor and, at another time, citizens volunteered to serve. In all instances, the commission/committee process took many months at a significant cost to taxpayers, with politics playing a large part when selecting commission/committee members.

Other California Charter Cities with Strong-Mayor Form of Governance

City charters similar to San Diego's strong-mayor form of governance, such as Los Angeles, Fresno, San Jose, San Francisco and Oakland, list at least eight separate reasons for which elected officials can be removed. Situations that could lead to removal include absence from a certain number of council meetings, commitment to a hospital or sanitarium, pleading guilty or no contest to or conviction of a felony or instances of moral turpitude.⁵

³ San Diego County Office of Registrar of Voters reports the projected cost for both elections associated with Mayor Filner's resignation at approximately \$8 to \$8.5 million.

⁴ California Constitution, Article 11, Section 3 and Section 7.5

⁵The Grand Jury also reviewed charters of Sacramento, Long Beach, Bakersfield, Anaheim, Los Angeles, Fresno, Oakland and San Francisco.

San Diego City's Municipal Code

The city's municipal code is primarily concerned with the conduct of city employees, not elected officials. It includes a process for removing elected officials via an Ethics Commission, but only for matters related to campaign contributions limits and disclosures, gifts, conflicts of interest, lobbying and other matters adopted by a majority of the City Council.⁶

California Government Code, §3060

Sections 3060-3075 of the California Government Code provide that a Grand Jury can present an accusation against any officer of a district, county, or city for willful or corrupt misconduct. Nevertheless, the Grand Jury does not currently have the authority to file an accusation against the mayor of the City of San Diego and remove him/her from office because the Charter of the City of San Diego exclusively limits the manner in which a vacancy may occur in the mayor's office to death, resignation or recall. When a California city charter provides the exclusive manner for removal, the charter prevails over the general law of the state. The *procedure* for using a Grand Jury as outlined in §3060, however, would be useful if incorporated into the San Diego City Charter.

Two Proposals

During the Grand Jury's investigation, two proposals for revising the City Charter's provisions related to removing elected officials were put forward: One, that a new Charter Review Commission should be established by the City Council, and, two, that a supermajority of the City Council (six or seven out of nine members) should vote on additional provisions for removing elected officials, without going through a lengthy and costly review commission process. (In either case, the City Council votes on proposed charter revisions prior to a public vote.)

Conclusions

After its investigation, the Grand Jury concluded that it would be more advantageous to the community if the City Council developed a process to amend the City Charter to include reasons other than death, resignation or recall for removing elected officials. Moreover, the Grand Jury recommends that a supermajority of the City Council vote on its recommended changes to the City Charter, rather than establishing a charter review commission or committee. Councilmembers would chair hearings in their own districts, prior to a Council vote on proposals to amend the City Charter.

Although some opined that a commission would take the "political heat" throughout the process, the Grand Jury came to understand that the commission process is just as sensitive a political matter as are votes by city councilmembers. However, action by the City Council to place its proposed revisions to the City Charter on the ballot without initiating the commission/committee process has the advantage of costing fewer taxpayers' dollars in addition to saving valuable time. By the time city councilmembers hold public hearings in each of their own districts and finally vote on final recommendations, San Diego voters should be well aware of the issues involved as they go to the ballot box to support – or reject – the Council's proposals for change.

⁶ San Diego Municipal Code, §26.0404

FACTS AND FINDINGS

Fact: The San Diego City Charter can be amended pursuant to Article 11, Sections 3 and 7.5 of the Constitution of the State of California.

Fact: The Constitution of the State of California states that a county or city charter can be amended, revised, or repealed by a majority vote of its electors voting on the question.⁷

Fact: The City Charter provision for removal of elected officials supersedes the California Government Code and the San Diego Municipal Code.⁸

Fact: The San Diego City Charter specifies the conditions by which elected officials can be removed as death, resignation or recall.

Fact: The City Charter's Section 108 provides one possible additional avenue for removing a public official for fraud but not for other felonies.

Fact: The San Diego County Grand Jury does not have the procedural means to file an accusation against an elected official of the City of San Diego leading to removal.⁹

Finding 01: Removal of an elected official for reasons other than as presently listed in the City Charter requires the Charter to be amended.

Fact: California's Constitution specifies that the governing body or a charter commission of a county or city may propose its charter's revisions.¹⁰

Finding 02: The San Diego City Council as a governing body can propose charter revisions which would be presented to San Diego voters for approval or rejection.

RECOMMENDATIONS

The 2013-2014 San Diego County Grand Jury recommends the San Diego City Council:

- 14-01: Identify additional reasons (other than death, resignation, or recall) for removing elected officials and place them on the ballot for an upcoming election.**
- 14-02: Actively seek citizens' recommendations for Charter amendments and hold hearings to ensure the process is transparent to the public.**
- 14-03: Amend the City Charter to provide that a City Council supermajority vote**

⁷ California Constitution, Article 11, §3.b.

⁸ San Diego County Office of County Counsel opinion

⁹ *ibid.*

¹⁰ *ibid.* (California Constitution, Article 11, §3.b.)

– at least six of the current nine members – is authorized to remove an elected official.

14-04: Consider the following possible reasons for removing an elected official:¹¹

- **The elected official pleads guilty or no contest to any felony or is convicted of a misdemeanor or felony involving moral turpitude.**
- **The elected official is adjudged insane.**
- **The elected official ceases to be a registered voter or resident of the city or district he/she represents.**
- **The elected official ceases to discharge the duties of the office for 90 consecutive days, unless excused by six out of nine Council members. In the case of illness or other urgent necessity, and upon a proper showing thereof, the time limited for absence from the city shall be extended to another 40 days by the Council by a vote of at least six out of nine Councilmembers.**
- **The elected official is removed from office by a judicial procedure.**
- **The official's election or appointment is declared void by a judicial decision.**

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such comment shall be made *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

- (a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
 - (1) The respondent agrees with the finding
 - (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
- (b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
 - (1) The recommendation has been implemented, with a summary regarding the implemented action.

¹¹ List includes situations currently in force in other strong-mayor California cities' charters.

- (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
 - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
 - (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
- (c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

<u>Responding Agency</u>	<u>Recommendations</u>	<u>Date</u>
San Diego City Council	14-01 through 14-04	06/11/14