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February 1, 2005

REPORT TO THE COMMITTEE ON RULES, FINANCE
AND INTERGOVERNMENTAL RELATIONS

RECONCILING THE SAN DIEGO CITY CHARTER AND MUNICIPAL CODE
REGARDING WRITE-IN CANDIDATES

INTRODUCTION

The Mayor has requested that this Office provide the history, legal analysis, and recommendations regarding a discrepancy between the City Charter and the San Diego Municipal Code [SDMC] concerning the permissibility of write-in candidates in City run-off elections. The discrepancy was raised by the write-in candidacy of Councilmember Donna Frye in the run-off election for the office of Mayor in the November 2, 2004, election. In the primary election held in March 2004, the candidates receiving the two highest votes were incumbent Dick Murphy and County Supervisor Ron Roberts. Under City Charter section 10, those were the only names printed on the ballots. Approximately five weeks before the run-off election, Councilmember Donna Frye was qualified by the City Clerk as a write-in candidate for the run-off election.

After the election, two complaints were filed challenging the City's decision to allow a write-in candidate in the Mayoral run-off election.[1] The plaintiffs contended that the San Diego Municipal Code [SDMC] provision that allows write-in candidates conflicts with the City Charter requirement that only the two candidates receiving the highest number of votes be candidates for office. Further, the plaintiffs contended that the California Supreme Court decision in *Canaan v. Abdelnour,* 40 Cal. 3d 703 (1985) that had required the City to allow write-in candidates in run-off elections was overruled by *Edelstein v. City and County of San Francisco*, 29 Cal. 4th 164 (2002), and, therefore, write-in candidates should no longer be permitted in City run-off elections. The courts ultimately declined to decide this issue, resolving the cases on the procedural ground that the challenges should have been brought before the election.[2]

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[1] *See, McKinney v. Superior Court*, 124 Cal. App. 4th 951 (2004); and *McDonald v County of San Diego*, U. S. District Court Case No. 04-CV-2265-IEG (2004).

[2] It should be noted that the trial court in *McKinney* found that the write-in candidacy was authorized by virtue of the "custom and practice" of the city in allowing write-ins in runoff elections, but even if it was not, McKinney had waited too long to challenge the election and his complaint was barred by latches. *See, McKinney,* 124 Cal. App. 4th at 956. This report is not intended to opine on the City's decision to allow a write-in candidate in the November 2004 run-off election.

This report discusses (i) the San Diego City Charter provisions that govern the candidates for the general election; (ii) the SDMC revisions during the last 20 years that address write-in candidates in City elections; (iii) the two California Supreme Court cases that discuss write-in candidates in municipal run-off elections; and (iv) options for the City Council to consider to resolve conflicts between the City Charter and the SDMC.

DISCUSSION

I. History of Write-in Provisions.

A. San Diego City Charter Section 10 and Historical Interpretation

San Diego City Charter section 10 provides in relevant part:

> *All elective officers of the City shall be nominated at the municipal primary election*. In the event one candidate receives the majority of votes cast for all candidates for nomination to a particular elective office, the candidate so receiving such majority of votes shall be deemed to be and declared by the Council to be elected to such office. In the event no candidate receives a majority of votes cast as aforesaid, *the two candidates receiving the highest number of votes for a particular elective office at said primary shall be the candidates, and only candidates, for such office* and the names of only those two candidates shall be printed upon the ballots to be used at the general municipal election. (emphasis added).

According to the plain language of this section, all elective officers shall be nominated at the primary election, and only the two candidates receiving the highest number of votes at the primary shall be the candidates for such office. This section emphasizes that these two candidates shall be the *only* candidates for the general run-off election. Accordingly, the section can be interpreted as prohibiting write-in candidates in the general election. This interpretation is supported by language in the SDMC prior to 1985 that stated: "No write-in candidates shall be permitted. A ballot containing the name of any person not printed on the official ballot shall be counted as if the name added did not appear." Former SDMC § 27.2205.

In 1983, this Office opined that SDMC section 27.2205, as above quoted, prohibited write-in candidates in both the primary and general elections. *See,* 1983 Op. City Att'y 318. The opinion also concluded that write-ins are not possible in the general election because Charter section 10 also states that:

> At the general municipal election held for the purpose of electing any other elective officer there shall be chosen by all of the electors of the whole City

> *from among the candidates chosen at the primary* one candidate to succeed any other elective officer whose term expires in December succeeding the election. (emphasis added).

Based on the language in Charter section 10, this Office concluded that the Charter would appear not to preclude write-ins at primary elections, but that it does preclude write-ins in the general election.

This conclusion was restated in a subsequent opinion by this Office. *See*, 1985 Op. City Att'y 578. In that opinion, this Office provided a draft of a proposed Charter amendment to permit write-in candidates in the primary and general elections. The report also included a draft of an ordinance amending the SDMC to permit write-in candidates at both these elections. The opinion again states that the SDMC can be amended to permit write-in candidates in the primary election without amending the Charter. Further, the report cautioned that permitting write-in candidates in the general election could result in a plurality rather than a majority vote:

> Permitting write-in candidates at the municipal general election involves additional considerations. The primary election narrows the field of candidates to two thus the winner of the general election is elected by a majority of the voters. Permitting write-in votes in the general election will make possible the election of a candidate by a plurality rather than a majority.

On June 17, 1985, the City Council amended SDMC section 22.2205 by Ordinance O-16477, to allow write-in candidates in primary and special elections.[3] However, write-ins were still prohibited in general elections, special run-off elections, and recall elections.

B. Canaan v. Abdelnour.

At about this same time in 1985, the City was defending a lawsuit seeking to compel the City to allow write-in candidates in municipal general elections. *Canaan v. Abdelnour,* 40 Cal. 3d 703 (1985). The *Canaan* court ruled that any provisions of law that prohibited write-in candidates at any election violated the protections afforded by the state and federal constitutions. The court concluded that "a balancing of the rights of the candidates and voters against the interests asserted by respondents leads to the conclusion that San Diego's prohibition on write-in voting is unconstitutional." *Id.* at 724.

After the *Canaan* decision, the City Council revised the SDMC by Ordinance O-18664, to permit write-in candidates in all of its elections. The SDMC currently provides that: "Write-in candidates are permitted in municipal elections including special elections called by the City Council pursuant to SDMC section 27.0107 of this article." SDMC § 27.0301. Pursuant to this language, write-in candidates have been permitted in City elections for almost two decades.

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[3] SDMC section 22.2205 was renumbered as SDMC section 27.0636 on July 26, 1999.

C. Edelstein v. City and County of San Francisco.

In November 2002, the *Canaan* decision was overruled by *Edelstein v. City and County of San Francisco*, 29 Cal. 4th 164 (2002), which held that San Francisco could prohibit write-in candidates in a run-off election. The *Edelstein* court analyzed the *Canaan* decision in light of *Burdick v. Takushi,* 504 U.S. 428 (1992), a decision that upheld a total ban on write-in candidates in Hawaii. The *Edelstein* court balanced the freedom of expression interests against the electoral process, stating:

> We conclude that San Francisco's prohibition against write-in voting in the mayoral runoff election was not a severe restriction on voting rights, but rather that it imposed only a limited burden on voters' rights to make free choices and to associate politically through the vote. [citing *Burdick*]. After all, voters were not denied an opportunity to cast a write-in ballot for the candidate of their choice. They were only denied the opportunity to cast a write-in ballot twice." *Id.* at 182.

The *Edelstein* court further noted that: "permitting write-in votes even in the runoff would defeat San Francisco's purpose in having a runoff election - - to ensure that the winning candidate receive a majority of the votes." *Id.* at 182. Because San Francisco allowed write-in voting in their primary election, the court did not reach the question whether a total ban on write-in voting would offend the California state Constitution.

The *Edelstein* decision arguably revived that portion of Charter section 10 that requires elected officials to be chosen from among those candidates chosen at the primary. *See, Domar Electric, Inc. v. City of Los Angeles,* 9 Cal. 4th 161, 170 (1994) (The charter is the supreme law of a charter city, subject only to conflicting provisions in the federal and state constitutions, and to conflicting provisions of preemptive state law.) Accordingly, there is an inconsistency between the Charter and the SDMC with respect to write-in candidates in the general election.

II. Recommendations to Reconcile the Charter and the SDMC.

Charter section 10 appears to preclude write-in candidates in general elections while SDMC section 27.0301 expressly permits write-in candidates in such elections. To resolve the conflict, the City Council should decide whether: (i) to allow write-in candidates only in the primary; or (ii) to allow write-in candidates in both the primary and general elections. We do not recommend a total ban on write-in candidates in all municipal elections because, as discussed above, it is unclear whether a total ban would violate the California Constitution.

Under option (i), the SDMC would need to be revised to allow write-in candidates only in the primary election. If option (ii) is chosen, the Charter must be amended to allow write-in candidates in both elections. A Charter amendment would require a vote of the electorate. This Office is willing to work with the City Council to provide appropriate draft amendments to the Charter or ordinances.

CONCLUSION

At this time, the City's Municipal Code permits write-in candidates in all elections, including both the primary and general elections. However, this is in conflict with the Charter provision that has been interpreted as prohibiting write-in candidates in the general election. The conflict was the result of the *Canaan* court ruling that required the City to allow write-in candidates in all elections. Now that *Canaan* has been overruled by *Edelstein*, the conflict should be resolved by appropriate amendments to the Charter, the SDMC, or both. Finally, the *Edelstein* decision arguably revived that portion of Charter section 10 that appears to prohibit write-in candidates in run-off elections. Accordingly, we recommend that the City no longer allow write-in candidates in any general election.

Respectfully submitted,

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RC-2005-2