PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

SHARON B. SPIVAK
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA
92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

July 8, 2016

REPORT TO THE CITY COUNCIL

CHARTER AMENDMENT PROPOSALS REGARDING ELECTION PROCEDURES FOR CANDIDATES AND BALLOT MEASURES

INTRODUCTION

Two proposed ballot measures submitted by a citizens' group seek to amend the San Diego Charter to fundamentally change the structure of elections for candidates for municipal office, and the timing of elections for all ballot measures. The proposals can be summarized as follows:

- **Candidate Elections:** This measure would eliminate the provision that a candidate can win office upon earning a majority of votes in the June primary. Amendments would require a November runoff for all elections for Mayor, City Attorney and Councilmember, even if a candidate received more than 50 percent of the primary vote. The amendment would state that the two candidates receiving the highest number of votes in the primary must advance to a November runoff.

- **Ballot Measure Elections:** This measure seeks to move all ballot measure elections to the November ballot. The draft submitted seeks only to amend Charter section 23, which requires an "*expeditious* and complete procedure" for municipal elections (emphasis added) and has been interpreted to not allow the City to delay an election that otherwise could be held. The proposal does not fully address all of San Diego's election laws that are potentially affected.

The proposals were submitted to the City Clerk and considered by the Council's Rules Committee (the Committee) on June 15, 2016. The Committee asked this Office to analyze the proposals as possible measures for the November 8, 2016 ballot. Council President Lightner also directed this Office to review whether it was possible to add an amendment that would eliminate the June primary and delay until November any election for an office when only two candidates have qualified to run for the seat.

This memorandum is provided only as *preliminary legal guidance* of the proposed measures. The proposals were not provided to this Office until mid-June, at a time we have been directed to draft propositions, analyze substantive legal issues, and prepare ballot materials related to 16 measures targeted for the November ballot. This memorandum details legal issues implicated by the proposals, and indicates where additional analysis is necessary if a measure is to be placed on the ballot.

QUESTIONS PRESENTED

1. Can the Charter legally be amended to require all candidate elections to proceed to a November general election runoff, regardless of whether a candidate receives more than 50 percent of the vote in the June primary election?

2. Is it legally possible, as proposed by Council President Lightner, to delay two-person candidate elections for certain offices from a June primary to a November-only ballot?

3. Can the Charter legally be amended to require that all municipal ballot measures be submitted to voters only on a November general election ballot?

SUMMARY OF ANSWERS

1. Yes, based upon our preliminary review, eliminating the law that says one can win municipal office in a municipal primary election is a policy call that, if desired, may be made by the Council and voters. The Charter could be amended to eliminate the provision that states that a candidate receiving more than 50 percent of the vote in the June primary has won the office. The same electorate then would be required to vote a second time, for the two candidates receiving the highest number of votes in the primary.

Subject to further review, this proposal appears to be legal; it is a policy call regarding costs and staffing issues related to the additional election, including costs related to preparation of additional pages in the sample ballot and counting and certifying votes. It also fails to consider what occurs when only one candidate seeks a seat. If the proposal advances, we would request information regarding other Charter cities, if any, that structure elections this way. An ordinance placing this measure on the ballot would need to provide recitals to justify the proposed change to the legal structure of the City's municipal elections.

2. No, the proposal to submit certain races directly to a November ballot without a primary election based upon who seeks a seat violates San Diego's election laws, is unworkable, would create confusion and havoc in the election process, and eviscerates participation by write-in candidates. The proposal appears untenable, based on the timing and process of how elections are called and consolidated and the timing of candidate nominations. Moreover, even if it is deemed legal, the proposal could cause voter and candidate confusion regarding the staggering of campaigns and collection and designation of campaign contributions. It would require numerous Charter and Municipal Code amendments, related to everything from candidate nominations to the Election Campaign Control Ordinance.

3. The Charter may require certain ballot measures to be submitted to voters only in November, but there are different types of measures that could be implicated by such an amendment, each governed by different laws. Each type of measure requires analysis to determine if it could be delayed to a November ballot. The proposal as drafted by the Independent Voter Project also needs to be rewritten, as it does not reflect the scope of San Diego's election laws and overreaches beyond what state law provides. Based on preliminary research, it appears some municipal ballot measures may be delayed to November

ballots, but only if the Charter no longer requires an "expeditious" election process, as stated in Section 23. The scope of the proposal requires further analysis; this memorandum addresses only preliminary findings.

ANALYSIS

I. THE CALIFORNIA CONSTITUTION GRANTS BROAD AUTHORITY TO CHARTER CITIES LIKE SAN DIEGO TO PROVIDE THEIR OWN ELECTION PROCEDURES, INCLUDING THE MANNER IN WHICH MUNICIPAL OFFICERS ARE ELECTED.

The California Constitution grants broad authority to charter cities like San Diego to establish procedures for their own elections. Article XI, section 5(a) of the California Constitution provides that a charter city may "make and enforce all ordinances and regulations in respect to municipal affairs," and that "[c]ity charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." California Constitution, Article XI, section 5(b) also grants plenary authority to charter cities to provide for the manner in which "municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal."

The San Diego Charter thus governs City elections and requires the City to adopt an election code ordinance, "providing an adequate and complete procedure to govern municipal elections." San Diego Charter § 8. The Charter states, "All elections provided for by this charter, whether for choice of officers or submission of questions to the voters, shall be conducted in the manner prescribed by said election code ordinance." *Id.* San Diego Charter section 23 requires the Council to include in the election code ordinance an "expeditious and complete procedure" for the people's right to exercise their vote. San Diego Charter § 23. The City thus adopted Municipal Code sections that constitute the City's Election Code Ordinance and that govern procedure for municipal elections.

Additionally, the Municipal Code states that the purpose and intent of the City's election code is: ". . . to provide an expeditious and complete procedure for the people's right to exercise the vote. If there is any ambiguity or contradiction between the provisions of general law and the provisions of this article, *the provisions of this article shall govern*." (Emphasis added.) SDMC § 27.0101. To the extent that certain election matters are preempted by state and constitutional law and are not considered to be matters that are a purely municipal affair, such as the process of amending the City Charter, the state law will prevail and this Office has previously provided legal guidance.

II. THE CHARTER MAY REQUIRE THAT ALL CANDIDATE ELECTIONS MUST BE DECIDED IN A NOVEMBER RUNOFF ELECTION, EVEN IF A CANDIDATE RECEIVES A MAJORITY VOTE IN THE PRIMARY.

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.

San Diego Charter § 10 (emphasis added).

The proposal would eliminate the words in italics above, requiring all municipal offices to be decided in November runoff elections, regardless of the vote totals in a primary election. The same electorate then would be required to vote a second time, for the two candidates receiving the highest number of votes in the primary.

As set forth above, based upon preliminary research, this Charter amendment appears to be legal, but is a policy call: Assuming that a candidate would have won outright in the primary, the second, runoff election for that office would not have been held. The policy issues related to such an amendment involve costs and staffing issues tied to preparation of the November ballot, publishing candidate information in the sample ballot, and counting and certifying votes. The recitals in the ordinance placing such a measure on the ballot would need to include a rationale for such amendments. The proposal also does not consider what would occur if only one candidate is on the ballot (as seen in a recent Council race).

The proposal appears to be modeled on the California Open Primary law, which is distinguishable in its rationale: San Diego's municipal offices are technically *non-partisan* offices in which ballot materials cannot list a political party affiliation. By contrast, California's law was designed to allow all candidates for a *partisan* office to be listed on a single primary ballot, along with their party preferences. The Open Primary allows voters to vote for any candidate without regard to the party preference of the candidate or voter, and the top two vote-getters then advance to a general runoff election for the partisan seat. *See Field v. Bowen*, 199 Cal. App. 4th 346 (2011).[1]

Given the limited time provided to review this measure, we have not yet determined if any other California Charter cities structure elections this way. If the proposal advances, we would request that staff obtain information regarding other cities, if any, that have required a runoff election after a candidate received a majority vote. As set forth above, an ordinance

[1] The proposal does not consider other voting processes used in California. General law cities, for example, use the California Elections Code and a system subject to plurality votes, in which a candidate may win office with less than a majority vote. The plurality voting system has supporters, but also has been criticized for producing weak mandates, electing those who may not be true "representatives" of the majority of a district. Certain Charter cities, such as San Francisco and Berkeley, have used Instant Runoff Voting (IRV), in which voters rank choices. This system, which requires a registrar of voters who can calculate such ballots, has been praised for saving costs as the election is decided in one ballot, but has also been criticized for manufacturing majorities that otherwise might not exist.

placing this measure on the ballot would need to provide recitals to justify the proposed change to the legal structure of the City's municipal elections.

III. THE PROPOSAL TO SUBMIT CERTAIN RACES DIRECTLY TO A NOVEMBER BALLOT WITHOUT A PRIMARY ELECTION, STAGGERING CERTAIN ELECTIONS, IS NOT SUPPORTED BY SAN DIEGO'S ELECTION LAWS AND RAISES SIGNIFICANT LEGAL ISSUES.

The Charter provides that all candidates for municipal office are nominated in primary elections. San Diego Charter § 10. The section contemplates that general elections include only those two candidates who have participated in a primary election and received sufficient votes to advance to a general election ballot; it thus limits who is qualified to seek the seat and sets the qualifications of those who ultimately may hold office.

Council President Lightner asked this Office to add an amendment to the proposed candidate election measure to state that certain municipal elections would "skip" the June primary ballot if only two candidates successfully submitted nomination papers for that office. Under the proposal, for example, if elections were scheduled for Council districts 2, 4, 6 and 8, and only two candidates qualified to seek election for districts 6 and 8, respectively, those races would not appear on a primary ballot and the election would be delayed until November.

The proposal cannot be legally supported by San Diego's unique election laws. Aside from violating the Charter directive that candidates be nominated in the primary, it would eviscerate a voter's ability to cast a ballot for a write-in candidate in those races. California law provides that voters have an opportunity to cast a vote for a qualified write-in candidate and have those votes counted. The law is clear that this must occur in a primary election, as it is not allowed on a general election ballot where candidates are expected to win a majority vote: "*Except for a voter-nominated office at a general election*, each voter is entitled to write on the ballot the name of any candidate for any public office, including that of President and Vice President of the United States." Cal. Elec. Code § 15340 (emphasis added). All valid write-in votes are tabulated and certified to the elections official, added to the results and included in official returns for a precinct. Cal. Elec. Code § 15342. Thus, voters are allowed in primary elections to cast votes for qualified write-in candidates and to have their votes tabulated.

The San Diego Municipal Code, which governs municipal candidate elections, follows state law, guaranteeing the right in the primary election:

> **§27.0636 Counting of Write-In Votes**
>
> Write-in *candidates* are permitted only in *District Primary Elections, City-wide Primary Elections*, primary *special elections*, and recall *elections*. Any name written upon a ballot, including a reasonable facsimile of the spelling of such name, shall be counted for the office for which it was written, if it is written in the blank space provided therefor, unless prohibited by the provisions of section 27.0637 of this article.

§27.0637 Qualification for Write-In Candidacy Required

A write-in *candidate's* name written upon a ballot in any *election* shall be counted only if a declaration of write-in candidacy, nomination papers, and filing fee or signatures in-lieu of the filing fee have been filed in the Office of the City *Clerk* during the filing period for write-in candidates.

San Diego has an extensive history with write-in candidates and related litigation. Without revisiting that history here, it is worth noting what the U.S. Supreme Court has stated of the importance of this voter right:

> . . . some voters cannot vote for the candidate of their choice without a write-in option. In effect, a write-in ban, in conjunction with other restrictions, can deprive the voter of the opportunity to cast a meaningful ballot. As a consequence, write-in prohibitions can impose a significant burden on voting rights. [citations omitted] ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government") . . . The fact that write-in candidates are longshots more often than not makes no difference; the right to vote for one's preferred candidate exists regardless of the likelihood that the candidate will be successful . . .

Burdick v. Takushi, 504 U.S. 428, 447 (1992).

As the proposal would eviscerate the ability for a voter to cast a ballot for a qualified write-in candidate, the proposal is problematic. Moreover, even if it were deemed legal to "skip" a primary in a San Diego municipal election and send a two-candidate race directly to a November runoff, the proposal is unworkable. The Municipal Primary Election is called by ordinance months in advance of the June primary, and the ordinance must specify the elections to be held, well before candidates face deadlines to submit nomination papers. The proposal would require extensive additional amendments to the Charter to "eliminate" a primary election in such uncertain circumstances.

Additionally, staggering elections based upon the number of candidates who seek office could cause confusion and havoc for election officials overseeing the election, require new laws regarding timelines for candidate nominations, cause voter confusion during campaigns and at the ballot box when some offices have elections and others do not, and complicate campaign contribution laws tying contributions to given elections. In turn, this could potentially lead to legal challenges by voters. The proposal would also require extensive amendments of the San Diego Municipal Code.[2]

---

[2] We note that Chula Vista, beginning in 2016, began electing Councilmembers by district and enacted a hybrid law that does state that two-candidate elections will be sent directly to a November runoff. Chula Vista's Charter states

As the proposal would require extensive amendments, it cannot be added to the proposed measure at this time.

IV. THE BALLOT MEASURE PROPOSAL REQUIRES REVISION AND ADDITIONAL RESEARCH TO BE PLACED ON THE NOVEMBER BALLOT.

The second proposed measure is more extensive, as it seeks to require that all ballot measures be placed only on a November general election ballot. The draft submitted would need to be revised in its entirety, as it does not consider the scope of San Diego's election laws and overreaches beyond those measures that the state submits to a November ballot.

If the Council wishes to proceed with this measure, this Office will conduct additional research to determine the legal parameters of such a measure for the City of San Diego. Generally, those measures initiated by the City and its officials could be required to be placed on a November ballot, along with certain citizen initiatives.

This Office has previously opined that the "expeditious" clause of Charter section 23 has required a referendum petition that qualifies for the ballot to be placed on the next citywide ballot available to voters, and that to "skip" an election in favor of another would violate the clause. Moreover, a referendum stays the underlying legislative act and a delayed election would necessarily further delay the potential effective date of that act, triggering other ramifications.

This Office would need to consider the law regarding citizen initiative measures, recall elections and Charter amendments. As Charter amendment ballot measures are governed by state – and not local – law, the City must comply with preemptive laws governing their procedure. If the Council wishes to proceed with a measure that moves certain or all measures to a November ballot, this Office requests additional time to fully research related issues and return with a new draft measure that does not overreach.[3]

CONCLUSION

The proposals require more extensive legal review than the time allotted under the Council Policy 000-21 process. These are critical substantive proposals that change the structure of San Diego's candidate and ballot measure elections, which require appropriate time and attention for legal analysis and discussion by the Council. This report is therefore preliminary. As has been stated regarding other, unrelated ballot proposals, Charter language proposed on short deadlines could lead to unintended consequences and impacts and needs further review.

---

that Chula Vista will follow the California Elections Code, which governs elections for *general law cities* and differs from the San Diego Municipal Code. The provision is untested, does not appear to make an allowance for write-in candidates, and yet the city's laws also provide that candidates may win an office with a majority vote in the primary. If the Council seeks to proceed, our Office would require additional time to analyze the differences between the body of Chula Vista's election laws and San Diego's, not limited to its treatment of write-in candidates.

[3] State law requires that the governing body hold at least two public hearings, at least 30 days apart, when a legislative body is proposing the adoption of a Charter, as opposed to an amendment. Cal. Gov't Code § 34458(b). We note that one trial court in Riverside recently held that a proposed Charter amendment measure fell into that category; that decision is on appeal and not binding precedent as a trial court decision. However, it is instructive that the Legislature considers Charter language should not be rushed without certain public review.

It is our recommendation that the Council provide appropriate time for analysis and discussion of these substantive changes. To the extent the Council wishes to proceed, our Office will continue legal analysis and thoroughly review related sections of the Charter and San Diego Municipal Code that may require amendments, and will return with revised measures that are legally supportable.

JAN I. GOLDSMITH, CITY ATTORNEY

By /Sharon B. Spivak
Sharon B. Spivak
Deputy City Attorney

SBS:jdf
RC-2016-13
Doc. No.: 1320373