

LESLIE A. FITZGERALD  
ASSISTANT CITY ATTORNEY

KATHY J. STEINMAN  
DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO  
**MARA W. ELLIOTT**  
CITY ATTORNEY

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

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REPORT TO RULES COMMITTEE

**INTRODUCTION**

On July 26, 2023, the Rules Committee considered ballot measure proposals for placement on the March 2024 ballot. One of the proposals would amend San Diego Charter section 5.1 to change the Appointing Authority for the Redistricting Commission “to ensure a just and inclusive process that maximizes participation by ALL communities throughout the City.” (Proposed 2024 Ballot Measure – Amendments to City Charter Regarding Redistricting, Item 1, Subitem-A on Rules Committee Agenda for July 26, 2023, capitalization in original.) The Rules Committee approved a motion directing the City Clerk to work with City staff on the proposal and to provide options for the makeup of the Appointing Authority.

This report provides a high-level preliminary legal analysis of the proposal. To thoroughly analyze any legal issues and draft an appropriate ballot measure, this Office needs policy direction from the Rules Committee.

**BACKGROUND OF CHARTER SECTION 5.1 AND THE APPOINTING  
AUTHORITY**

Every ten years, after the U.S. Census concludes its count, the independent Redistricting Commission of the City of San Diego adopts a plan which specifies the boundaries of City Council districts. Charter § 5.1. With respect to the Appointing Authority which selects the Redistricting Commission’s commissioners, Charter section 5.1 states:

The Redistricting Commission shall be composed of nine members who shall be appointed by a panel of three retired judges who served in any of the following courts, the Superior Court of the State of California, an appellate court of the State of California, or a U.S. District Court located within California. Names of the retired judges willing to serve will be submitted to the City Clerk and drawn at random by the City Clerk, using procedures . . . set forth in the San Diego Municipal Code. . . .

If a complete panel of three retired judges is unable or unwilling to serve as the Appointing Authority, the City Clerk will serve as the Appointing Authority.

With respect to the selection of commissioners, Charter section 5.1 states:

The Appointing Authority shall appoint members who will give the Redistricting Commission geographic, social and ethnic diversity, and who, in the Appointing

Authority's judgement, have a high degree of competency to carry out the responsibilities of the Commission. The appointees shall include individuals with a demonstrated capacity to serve with impartiality in a nonpartisan role.

As noted in the City Clerk's August 29, 2023, Staff Report, the voters amended Charter section 5.1 in 2016 to change the Appointing Authority to three retired judges. The intent in using retired judges as the Appointing Authority for the Redistricting Commission was to guarantee that the Appointing Authority had no relationship with City of San Diego elections. Prior to 2016, the Presiding Judge of the Municipal Court appointed the commissioners. However, when the Municipal Court ceased to exist, the City was informed that sitting Superior Court judges could no longer serve as the Appointing Authority, making the 2016 amendments necessary.

## **PRELIMINARY LEGAL ANALYSIS**

### **I. PRELIMINARY LEGAL ANALYSIS OF THE PROPOSED MEASURE**

#### **A. Preliminary Legal Analysis of the Proposed Changes to the Appointing Authority**

The proposal heard by the Rules Committee in July recommended replacing the current Appointing Authority of three retired judges with the City's Ethics Commission. San Diego Municipal Code section 26.0401, et seq., established the Ethics Commission.<sup>1</sup>

The purposes of the Ethics Commission shall be to monitor, administer, and enforce the City's governmental ethics laws, propose new governmental ethics law reforms, conduct investigations, refer violations to appropriate enforcement agencies, audit disclosure statements, and advise and educate City officials and the public about governmental ethics laws.

SDMC § 26.0401.

As noted during the July Rules Committee meeting, Ethics Commission commissioners are appointed by the Mayor and confirmed by the Council. Therefore, they are not completely detached from the political process, which was the intent of the 2016 amendments.

Moreover, Redistricting Commission commissioners are Form 700 filers and fall under the jurisdiction of the Ethics Commission. If the Ethics Commission appoints a majority of the Redistricting Commission commissioners, as this proposal recommends, and those commissioners became the subject of a matter pending before the Ethics Commission, it is likely that all of the Ethics Commission commissioners would have a conflict of interest because they appointed the Redistricting Commission commissioners.

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<sup>1</sup> Neither the Municipal Code nor the City Charter authorizes the Ethics Commission to appoint members of the Redistricting Commission. Additional Charter and Municipal Code sections relating to the Ethics Commission's duties would need to be amended if the Rules Committee seeks to make the Ethics Commission the Appointing Authority.

Finally, since the 2016 amendments to Charter section 5.1, there has been only one Redistricting Commission selected using the retired judges as the Appointing Authority, i.e. the 2020-2021 Commission. For that cycle, the selection of both the Appointing Authority and the commissioners occurred during the height of the COVID-19 pandemic resulting in a low number of applicants for the Appointing Authority. The pandemic also affected who was able to serve as a commissioner, who were all volunteers.

### **B. Preliminary Legal Analysis of Other Proposed Changes**

The proposal also recommends expanding the number of Redistricting Commission commissioners to a total of 13: nine commissioners selected by the Ethics Commission representing each Council District, with two alternates also selected by the Ethics Commission; and four city-wide or at large commissioners selected by the nine district commissioners. Under this proposal, the two alternates would not be eligible for selection for the city-wide seats.

During a follow-up meeting with the proponents, they clarified that the two alternates selected by the Ethics Commission would be for the city-wide seats. It was unclear whether there would be alternates for the district seats or how they would be selected. This Office would need further direction on this issue to prepare a ballot measure.

The proponents also expressed interest in including diversity, equity, and inclusion language in the Charter amendment to ensure that future Redistricting Commissions reflect the diversity of the City. There are legal concerns if a proposed Charter amendment requires certain quotas or mandates. This Office issued a memorandum in 2015 that a “requirement to take sex and race into consideration in selecting appointees to City commissions, boards, committees or panels violates the California equal protection clause.” City Att’y MOL No. 2015-17 (Nov. 3, 2015).

## **II. PRELIMINARY LEGAL ANALYSIS OF BENCHMARKED JURISDICTIONS**

The City Clerk’s August 29, 2023, Staff Report indicates that of the other jurisdictions it benchmarked, only Oakland had an independent redistricting commission not selected by appointed officials. In Oakland, a panel of one retired judge, one student, and one nonprofit representative determine the 30 most qualified applicants for the commission, with at least two from each district. From those 30 applicants, the City Clerk draws six names at random to serve as commissioners. Those six commissioners then choose seven additional members and two alternates, including one commissioner from each district. However, because the City Administrator, who is appointed by the Mayor and confirmed by the City Council, selects the initial panel, the panel is not entirely independent. Additionally, there are legal concerns that a prohibited contract of interest could be created if the non-profit employer of the non-profit representative has contracts with the City or otherwise receives public funds.

The Long Beach and Sacramento models use their Ethics Commission to serve as the Appointing Authority. The legal issues in using the Ethics Commission for San Diego’s Redistricting Commission are addressed above. The other benchmarked cities’ appointing authorities are not independent from the political process.

**CONCLUSION**

This report provides a high-level preliminary legal analysis of the proposal and identifies potential legal issues with some of the models from other jurisdictions. To thoroughly analyze potential legal issues and draft an appropriate ballot measure, this Office needs policy direction from the Rules Committee and may need additional information depending on the policy direction received.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/Kathy J. Steinman  
Kathy J. Steinman  
Deputy City Attorney

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