June 19, 1990

REPORT TO THE COMMITTEE ON RULES, LEGISLATION,
AND INTERGOVERNMENTAL RELATIONS
POTENTIAL BALLOT PROPOSALS INCLUDING
CHARTER AMENDMENTS ETHICS AND ELECTIONS REFORMS

At its April 18, 1990, meeting the Rules Committee asked the City Attorney to comment or add information on several matters the Committee may recommend for placement on the ballot sometime this calendar year and on other matters the Committee may recommend for Council action pertaining to campaign, ethics and elections reform. This report is in response to that request.

To maintain consistency with references contained in prior documents, we quote directly from the Rules Committee Consultant's Analysis of April 18, 1990. We also retain the numbering scheme used in that Analysis.

A. Proposed Charter Amendments:

Item 15 (p. 2)

> Requires that franchise agreements could only be made with businesses whose securities are regulated by the Securities and Exchange Commission (SEC). The Council currently has the power to grant to any person, firm or corporation, franchises . . . for the use of any public property under the jurisdiction of the City. If the securities are not regulated by the SEC the City has no way of knowing what purpose these securities serve or that they are legitimate. (Mayor)

City Attorney Response:

Although the City, by virtue of Charter section 103, has legislative authority to grant franchises for the use of public property, it is questionable whether that authority would permit the City to disqualify companies whose stocks are not registered with the SEC from being eligible to hold franchises within the City, because to do so would possibly constitute a denial of equal protection of the laws. If adopted and challenged, a court could find that there is no reasonable basis for a law that automatically precludes a company because of its size or organizational structure from becoming a franchise holder in The City of San Diego (e.g., Cox Cable, a current franchise holder, is a closely held Corporation that does not have stock registered

with the SEC).

Item 16 (p. 2)

> Since our cities have a vital interest in what kind of companies will provide essential services, the City has the power to grant franchises. We need amendments that will make explicitly clear the original intent of the council -- Franchises in this City must be specifically by the Council sic and Franchises granted by the City cannot be passed around from one company to another without the Council's approval. (Mayor)

City Attorney Response:

It is the City Attorney's view that current language in San Diego City Charter section 103 is clear and requires no amendment. This section states that the City Council must specifically approve all franchises for use of City property. By implication, it also prohibits transfer of franchises without permission of the Council.

Altering the language in Section 103 might have some affect on current litigation in which the transferability of franchises is in issue. City of San Diego v. San Diego Gas & Electric, Southern California Edison & SCE Corporation, (San Diego Superior Court No. 621000). In this case, the parties are litigating whether language in the franchise agreement itself prohibits or permits transfer of a franchise to a new company without Council approval. It is the City's position that the franchise agreement clearly prohibits transfer without Council approval.

Item 17 (p. 2)

> Currently the San Diego Municipal Election Campaign Control Ordinance (Division 29 of the San Diego Municipal Code) has numerous limits on the amounts of money that may be contributed to political campaigns,
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> prohibitions of contributions by organizations, and limits on loans and credit . . . all because inherent to the high cost of campaigning is the problem of improper influence, (real or potential) exercised by campaign contributions over elected officials. In order to further limit this improper influence and open the elected offices to all citizens we should enact realistic spending limits to the Campaign Control Ordinance. (Mayor)

City Attorney Response:

The issue raised by this proposal is whether the City may impose spending limits on candidates for City office. Under the United States Supreme Court case of Buckley v. Valeo, 424 U.S. 1, 54 (1976), a government may not place spending limits on candidates or committees unless the spending limits are tied to public financing of campaigns. Current California law, however, prohibits public financing of campaigns. Government Code section 85300 (adopted by California voters as part of Proposition 73, June 1988). This statute was very recently upheld against a constitutional attack in the case of California Common Cause v. Fair Political Practices Commission, (Cal. App. 3d Dist.) (D.A.R. p. 6021, June 1, 1990). This law is also currently being challenged on other constitutional grounds by the County of Sacramento, which has an ordinance permitting public financing of local campaigns. There is no resolution to this litigation to date. Also, we understand that on June 5, 1990, the voters of the City of Los Angeles adopted a provision to allow public financing of local campaigns as part of a broader campaign reform ordinance. The Los Angeles City Attorney has opined that public financing of local elections is not preempted by Government Code section 85300. (Report to Rules and Elections Committee of the Los Angeles City Council, Report No. 091156, dated December 19, 1989, from Los Angeles Deputy City Attorney Anthony Alperin.)

Item 18 (p. 2)

> The Citizens of San Diego have a vital interest in what kind of companies do business with the City. We cannot have companies which we know little or nothing about doing business with the City. Therefore, I would propose that we amend the City Charter in order to make it explicitly clear that this City will not do business with anonymous parties. (Mayor)

City Attorney Response:

While the City Attorney agrees that the City has a vital interest in the type of company with which the City does business, a Charter amendment prohibiting doing business with "anonymous parties" would be unclear. What is an "anonymous party" for the purposes of this proposed amendment? Furthermore, names and addresses of corporate shareholders and of limited partners in a limited partnership are not available as public information. See Corporations Code section 1600 (right of shareholders to obtain lists of other shareholders only under certain conditions; right not held by public generally). See

also Corporations Code section 15634 (right of inspection of partnership list held by other limited and general partners; not a right held by public generally).

Item 23 (p. 2)

Amend section 53 to read:

Revenue of the Water Utility, including proceeds of the sale or lease of Water Utility land, shall be deposited in a Water Utility Fund, only as necessary to provide for the redemption of municipal bonds heretofore or hereafter issued for water purposes together with a sum sufficient to pay the interest thereon. The balance of revenues of the Water Utility may be deposited in the General Fund and shall be available thereafter for use for any legal City purpose.

The City may exchange Water Utility land for privately owned land and thereafter may use such privately owned land for any legal City purpose. The City need not reimburse the Water Utility from the General Fund as a result of any such exchange.

Amend section 90.2 which presently reads "Interest (including interest on investments) on the Sewer Revenue Fund or on any fund created by or under the authority of this section shall be credited to the particular fund." (Wolfsheimer)

City Attorney Response:

As we have repeatedly pointed out (see 1932 Op. S.D. City Att'y 177-182; 1932 Op. S.D. City Att'y 362--363; 1933 Op. S.D. City Att'y 526-531; 1947 Op. S.D. City Att'y 98-100; 1965 Op. S.D. City Att'y 23; 1966 Op. S.D. City Att'y 157-165; 1967 Op. S.D. City Att'y 37-40; 1980 Op. S.D. City Att'y 69; 1980 Op. S.D. City Att'y 83), Section 53 has since 1931 dictated that the Water Utilities be a fiscally self-sufficient and financially independent department.

The proposed amendment to Section 53 would substantially change this concept. While the amendment could legally be submitted to the voters, the effective date of the change should be made explicit. Any attempt to make this retroactive would run contrary to existing bond covenants. 1980 Op. S.D. City Att'y at 71. For the amount of Water and Sewer Revenue Bonds outstanding, see 1989 Annual Financial Report, Fiscal 1989 pp. 49 and 83, for water and sewer bonds respectively.

As to the amendment of Section 90.2 which is a detailed section on the authorization and issuance of sewer revenue bonds, Councilmember Wolfsheimer suggests an amendment only to Subsection 8, Subdivision C, which deals with the disposition of interest on the Sewer Revenue Fund or funds created under authority of Section 90.2. Without seeing the actual language of the amendment, no specific response can be framed. In general, however, any attempt to divert interest revenues of the existing fund would run afoul of existing bond covenants as discussed above.

B. Proposed Revenue Producing Ballot Propositions:

Item 24 (p. 4)

> Incurring further indebtedness to finance additional park and open space facilities. Such bonds, if approved by majority vote, would be secured by annual special assessment taxes levied against the taxable real property at the rate necessary to service the debt. (Roberts)

City Attorney Response:

Municipal Code Chapter VI, Article 1, Division 20, section 61.2000 et seq., is known as the "San Diego Park Facilities District Procedural Ordinance."

In about 1977, the San Diego Open Space Park Facilities District No. 1 was created pursuant to the procedure set forth in the Municipal Code. The District is City-wide. The noticed public hearing was held at the time of the formation of the District and the District is still in existence.

The ordinance allows for the sale of bonds subject to a majority vote of the electorate for the purpose of acquiring open space and park property. In 1978 the electorate approved the sale by the District of $65 million in bonds. Such bonds were subsequently sold in increments and the proceeds have now been expended for open space acquisition.

Last year the concept of selling additional bonds for open space and park acquisition was discussed. The firm of Jones Hall Hill & White was retained as bond counsel and concluded that, with certain modifications to the ordinance and subsequent majority vote of the electorate, additional bonds could be authorized, with bond service to be paid by an "assessment" against all of the real properties in the City.

The distinction between a new issue and the $65 million bond issue is that the $65 million bond issue is basically being paid off from from monies in the Environmental Growth Fund as described in Charter section 103.1a. Any new bonds would have to

be serviced through a City-wide assessment since there are no additional funds available in the Environmental Growth Fund to service new bonds.

Various memoranda and correspondence identified below regarding the modifications needed to the Procedural Ordinance to accommodate a new issue are in the City Attorney's office available for review. (Letter to John W. Witt from Jones Hall Hill & White, dated August 31, 1989, regarding "Park Facilities District Ordinance Amendments" with attachments; memorandum to file from Ken Jones (Attorney) dated, August 31, 1989, regarding "City of San Diego Park Facilities District" with Exhibit A; letter to John W. Witt from Jones Hall Hill & White dated September 6, 1989, regarding "Open Space Bonds," Memorandum of Law to Councilmember Ron Roberts from City Attorney dated September 26, 1989, regarding "Proposition C-Open Space Bonds Proposal to Obtain Voter Authorization for Additional Bonds" with attachments; letter to John W. Witt, from Jones Hall Hill & White, dated November 15, 1989, regarding "Park Facilities District Ordinance Amendments" with attachments; letter to John W. Witt from Jones Hall Hill & White dated December 20, 1989, regarding "Park Facilities District Ordinance; Maintenance Levies;" FAX materials to Hal Valderhaug, Deputy City Attorney, from Steve Mikelman, San Diego Housing Commission dated May 3,

1990, containing two draft resolutions initiating proceedings for the formation of Citywide Landscaping, Lighting & Landscaping Districts and related matters.)

As a related matter which we can discuss if the issue arises, there have also been discussions of a possible City-wide assessment for maintenance of park and open space properties.

C. Proposed San Diego Municipal Code Amendments:

Item 26 (p. 5)

Campaign Control Ordinance: Create a category of individuals known as "Major Contributors" (MC's). MC's are defined as persons who have contributed more than $500 in the aggregate over the previous twelve (12) months to a member of the City Council;
Includes in the category of MC's those corporations, businesses and partnerships whose principals have contributed a cumulative amount of more than $500 over the previous twelve (12) months;
Requires the City Clerk to compile and maintain a list of MC's;
Requires the City Clerk, when a project comes

before City Council, to note on the Council Docket, with the listing of the item, the MC's of members of the City Council;
Requires a City Councilmember to be disqualified from voting on a project if that individual has received contributions totaling more than $1,000 in the prior twelve (12) months from an MC;
Requires any individual who appears before the City Council to actively support or oppose a project to submit a statement to the Council disclosing any contribution of more than $500 to any member of the City Council;
Disallows any individual who has a favorable decision rendered by the City Council on their project from contributing more than $500 to any member of the City Council for the following twelve (12) months.

City Attorney Response:

These suggestions pose several legal questions:

1. In creating the definition of "major contributor," the Council will need to declare their intent clearly as to whether "major contributor" can include anyone other than a "natural person." If other than than natural persons will be allowed to make contributions, then the City's current (very restrictive) provisions prohibiting contributions to candidates by all but natural persons will be stripped of meaning and effect.

The Council will also need to provide clear direction on the meaning of the phrase "cumulative amount." For example, will this mean cumulative amounts to one candidate per election? Or to one race per election? Or will it have other meanings?

2. The proposal to require a Councilmember to disqualify him or herself from voting on a project if that Councilmember has received a contribution of more than $1,000 in the prior twelve (12) months from a major contributor raises serious legal issues. First, it may be contrary to current Charter section 15's duty to vote. Therefore a Charter amendment may be necessary.

Also, it poses severe constitutional problems. As stated in the case of Woodland Hills Residents Ass'n., Inc. v. City Council, 26 Cal. 3d 938, 946-947 (1980).

> Governmental restraint on political activity must be strictly scrutinized and justified only by compelling state interest. (Buckley v. Valeo, supra, 424 U.S. 1, 25 46 L.Ed.2d 659, 691.) While disqualifying contribution

> recipients from voting would not prohibit contributions, it would curtail contributors' constitutional rights. Representative government would be thwarted by depriving certain classes of voters (i.e., developers, builders, engineers, and attorneys who are related in some fashion to developers) of the constitutional right to participate in the electoral process.
>
> Public policy strongly encourages the giving and receiving of campaign contributions. Such contributions do not automatically create an appearance of unfairness. Adequate protection against corruption and bias is afforded through the Political Reform Act and criminal sanctions. (Citations omitted.)

Also, in an unreported U.S. District Court case a similar provision in a Santa Barbara ordinance was struck down as unconstitutional (Beaver v. County of Santa Barbara, U.S.D.C. Central District of Cal. No. CV 88-0038-1H, filed July 13, 1988, Judge Irving Hill).

3. Last, the proposal to disallow any individual who has a favorable decision rendered by the city council from contributing more than $500 to any councilmember for the following twelve (12) months raises severe enforcement problems and possibly impermissibly impinges on a person's constitutional rights of free speech and political expression. See, e.g., Woodland Hills, 26 Cal. 3d at 946-947.

Item 28 (p. 5)

> Candidates must eliminate all campaign debt within thirty (30) days of the election. No debt will be permitted after thirty (30) days. (Mayor)

City Attorney Response:

Current San Diego Municipal Code section 27.2441(b) prohibits extension of credit to a candidate's campaign for more than thirty (30) days, except for a candidate's personal loans to the campaign. It is our understanding that the Mayor proposes to limit even personal loans by individual candidates to their own campaign. The U.S. Supreme Court case in Buckley v. Valeo, 424 U.S. 1 (1976) held that an attempt by the federal government to set limits on the amount of expenditures a candidate may make on his or her own behalf was unconstitutional because it impermissibly interfered with the candidate's first amendment right of free speech. Id. at 51-53. The Court further held that

this attempted expenditure limitation could not be sustained on the basis of the governmental interest in preventing actual and apparent corruption of the political process, or on the basis of equalizing the relative financial resources of candidates competing for elective office. Id. at 53-54. The Court noted that labelling a candidate's expenditure on his or her own behalf a "contribution" did not cure the basic problems cited above. Id. at 52, n.58. As the Court noted, "Unlike a person's contribution to a candidate, a candidate's expenditure of his personal funds directly facilitates his own political speech." Id.

For the reasons cited above by the Court in Buckley v. Valeo, 424 U.S. 1 (1976), it is our opinion that the proposal to expand current SDMC section 27.2941(b) to prohibit a candidate from loaning his or her campaign money beyond thirty (30) days would violate the candidate's constitutional rights.

We do agree, however, that current SDMC section 27.2941(b) as drafted creates severe enforcement problems and that the current provision could be substantially more effective if it were redrafted.

Item 29 (p. 5)

> To amend the thirty (30) day campaign requirement provision. (Bernhardt)

City Attorney Response:

Although not clear in the Rules Committee Analysis of April 18th, we understand from prior meetings and communications that the proposal here is precisely the opposite of Item 28. That is, Councilmember Bernhardt seeks to have the SDMC section 27.2941(b) repealed in its entirety. The legal effect will be to allow both vendor debt and personal campaign debt to endure beyond the current thirty (30) day limit. This proposal raises policy, not legal, issues.

Item 32 (p. 6)

> Candidates and campaign consultants must sign all campaign literature so that they may be held accountable for the contents. (Mayor)

City Attorney Response:

The intent behind this suggestion is unclear. If the idea here is to place restrictions on independent expenditures (i.e., mailings) by requiring signatures of candidates on those mailings, the proposal would effectively eliminate the "independent" nature of the expenditures. The proposal would therefore possibly run afoul of the protected first amendment rights of persons wishing to make expenditures on behalf of candidates. Further, anonymous expression of ideas has been held

to be within the protective ambit of the first amendment. Schuster v. Municipal Court, 109 Cal. App. 3d 887 (1980).

C. Matters Referred to City Attorney for More Information

(Unnumbered items appearing on p. 8 of Rules Committee Analysis).

Amends Section 12 (the Council) to provide for the election of a Council member within a

district if the full Council fails to fill a vacancy by appointment within 30 days of the vacancy. The individual receiving the highest number of votes in the district is elected to fill the vacancy until the next regularly scheduled Council election. (Charter Review Commission) (Referred to City Attorney, for opinion of appropriateness with District Elections.)

City Attorney Response:

This election-by-plurality proposal was discussed by the Charter Review Commission. It raises serious policy issues, but raises no legal issues.

D. City Charter Amendments Proposed by Charter Review Commission and Previously Approved by Council

Item 11

Strikes gender-specific words such as "he" that are throughout the Charter and replaces them with non-sexist terms.

City Attorney Response:

As laudable as this proposal may be, a preliminary review of the Charter shows that many sections will be affected by this proposal. Also, in many instances mere replacement of gender-neutral terms for gender-specific terms may not suffice; substantial rewording will have to occur to make some sections "gender-neutral."

Also, if the council decides to place this proposal on the ballot, we suggest that no other Charter amendments be placed on the same ballot at the same time. To do otherwise will perhaps require alternative ballot language; some with simple gender-neutral language, some without.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Attachment
RC-90-35