

November 14, 1990

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
ENACTMENT OF AN ORDINANCE ESTABLISHING A HUMAN
RELATIONS COMMISSION FOR THE CITY OF SAN DIEGO

At the Public Services and Safety Committee ("Committee") meeting of September 5, 1990, Councilmember Wes Pratt placed the issue of the enactment of a Human Relations Ordinance for The City of San Diego on the agenda. The matter was continued until the October 4, 1990, meeting of the Committee for further discussion and public testimony. At the October 4, 1990 meeting, numerous amendments to the draft ordinance were proposed by members of the Committee and by the public. For the purpose of further discussion, the Committee adopted many of the proposed amendments even though some were inconsistent with others. During the course of the meeting, Chief Deputy City Attorney John Kaheny indicated that the draft ordinance had not yet been analyzed for legality and expressed additional concern that parts of the draft ordinance and the proposed amendments may, in fact, require the Charter of The City of San Diego to be amended in order to implement many of the proposed concepts and procedures. The Committee then voted to forward the draft ordinance as amended to the City Council for discussion. A copy of the draft ordinance is attached as Enclosure 1. This office was requested to prepare this report indicating those areas of the draft ordinance which cannot be implemented under the current Charter or state law.

Initially, it should be noted that the draft ordinance provided to the Committee was prepared by concerned members of the public who possess strong credentials in the area of civil rights. However, these individuals did not have the opportunity to reconcile the draft with the current applicable provisions of the Charter of The City of San Diego. In accordance with the request from the Committee, this report will articulate those provisions of the draft ordinance emanating from the Committee which will require amendments to the Charter and point out other provisions which conflict with state or federal law. We have also prepared a proposed ordinance creating an advisory board called the "Human Relations Commission" (herein "HRC") (a copy of

which is attached as Enclosure 2) which can be adopted without the necessity of amending the City Charter and which will be in

compliance with state law.

Nature of Advisory Boards and Committees

Under Charter Section 43

Charter section 43 authorizes the Council to create advisory boards to advise the Mayor, the City Council or City Manager on matters designated by ordinance. Technically, the term "Commission" as used in the Charter refers only to the Funds Commission, Civil Service Commission and City Planning Commission which are specifically set forth in Charter section 41. The title of "Commission" has been used in the past to describe advisory boards and committees formed pursuant to the Council's authority under Charter section 43. However, the use of the term "Commission" does not change the nature and powers of the boards and committees the Council is authorized to create under Charter section 43. *Brown v. City of Berkeley*, 57 Cal. App. 3d 223 (1976).

Charter section 43 authorizes the establishment of boards and committees whose purpose is to consult and advise with the Mayor, City Council or City Manager but states that such advisory boards are specifically prohibited from directing the conduct of any City department or division. The members of such advisory boards and committees are considered members of the unclassified service in accordance with Charter section 117(a)(2) but serve without compensation.

Nothing in the Charter precludes an advisory board from holding public hearings to study and investigate racial intolerance or other forms of prejudice within The City of San Diego as long as the purpose is to advise the Mayor, City Council or the City Manager on matters within their purview. For example, such a board could hold public hearings on problems or conditions in the City which result in discrimination, disparate treatment or hate crimes. An ordinance creating an advisory board may authorize the City Manager to provide appropriate staff support for such an advisory board.

However, we must point out that in addition to the specific limitations found in Charter section 43, the Council may not create, by ordinance, a board, commission or a department of the City government, by whatever name it is given, which duplicates or infringes upon the specific powers or duties assigned by the Charter to another department, commission or office. *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380 (1976).

The draft ordinance emanating from the Committee purports to give the HRC powers of appointment and investigation which conflict with specific provisions of the Charter. For example, the procedures available to investigate the operation and

enforcement of the Civil Service provisions of the Charter and the rules established thereunder are found in Charter section 128. To the extent that the Committee draft ordinance indicates that the HRC is not precluded from investigating an alleged unfair or unlawful practice by the City's Equal Opportunity Commission or the Civil Service Commission as a whole, such an investigation must conform to the procedural requirements set forth in Charter sections 128 and 41. While Charter section 128 clearly permits the City Council to designate persons to make investigations into the facts in respect to the operation and enforcement of the Civil Service provisions of the Charter and the rules established thereunder, it limits that investigatory power by stating "that in the event of more than one investigation concerning the same person or the same subject matter or matters closely allied thereto, then and in that event but one hearing shall be had and the entire matter shall be disposed of in the one hearing."

The Committee draft ordinance states that "the Executive Director shall be appointed by the Commission pursuant to applicable Civil Service Statutes." The Committee draft ordinance also makes the Executive Director the administrative head of the committee staff, implying the establishment of a separate administrative department of the City not under the control of the Manager, contrary to the provisions of Charter section 28. This manner of authorizing staff personnel for the HRC is also inconsistent with Charter section 26 which sets forth the procedures for establishing City departments. These proposals cannot be reconciled with the existing Civil Service provisions of Article VIII (Section 115 et seq.) of the Charter even though the Committee draft ordinance attempts to reconcile these provisions by expressly referring to the Civil Service provisions of the Charter. In addition, the creation by the Council of an investigatory body with broad powers over City employees could be interpreted as a violation of Charter section 22(b) which prohibits interference by members of the Council with the administrative services of the City.

Method of Selection of Commissioners

The selection process for members of Advisory Boards and Commissions is set forth in Charter section 43 and the criteria for selection is described in Charter section 42. Council Policy 000-13 was adopted to provide a uniform procedure for the appointment and confirmation of members of the commissions,

boards and committees of The City of San Diego pursuant to the provisions of California Government Code sections 54970 through 54974. To the extent that the Committee draft ordinance purports

to impose additional restrictions on the ability of the Mayor and Council to appoint members to the HRC, such restrictions may not be implemented. Specifically, the Council, by ordinance, may not restrict appointees to Boards and Commissions solely to individuals who are members or participants of a specific type of organization. In accordance with the provisions of Charter section 42, membership on boards, committees and commissions must reflect the entire community. Council Policy 000-13 is designed to assist the Mayor and Council in ensuring that appointments to the advisory boards and committees meet the requirements and intent of both Charter sections 42 and 43.

Confidentiality

The Committee draft ordinance indicates that the HRC can ensure confidentiality of communications during its hearings and investigations by stating that disclosure to the HRC will not waive any legal or constitutional privilege. Whether or not any particular privileged communication is waived is a matter of state and federal law and The City of San Diego cannot, by ordinance, create privileges not found in the California Evidence Code or the Federal Rules of Evidence.

In addition, contrary to the express provisions of the Committee draft ordinance, advisory boards created by legislative bodies are covered by the Ralph M. Brown Act and may not exempt themselves from its provisions by ordinance. California Government Code section 54952.3.

Funding

The Committee draft ordinance attempts to dictate specific annual staffing levels for the HRC. The Charter requires that each year the Council develop a budget and pass an appropriation ordinance. The Council may, of course, express its present intent but the funding and staffing levels in any particularly year must be the result of the procedures set forth in Article VII (Section 68 et seq.) of the Charter. We note also that this Council cannot bind future Councils to any specific method or amount of funding.

Subpoena Power

Although the Committee draft ordinance speaks in terms of voluntary compliance, it contains a provision granting power of subpoena to the HRC. The Charter of The City of San Diego makes

reference to the power of subpoena in only two specific areas. The first involves the determination of the proper qualification of the Council's own members (Charter section 14). The second involves the Civil Service Commission's power when conducting an investigation of charges of misconduct by a City officer or employee (Charter section 128). The fact that there is no

express grant of power in the Charter, however, is not a limitation on the Council's powers. A charter operates not as a grant of power but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the City is assumed to possess. *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595 (1949). On the assumption that the power to subpoena is an inherent power of a municipality unexpressed in the Charter, the City would then have under Charter section 2 all of the rights, powers and privileges granted or prescribed by the general laws of the state. California Government Code section 37104 grants the legislative body of a city the power of subpoena which may only be enforced by an action in superior court. Government Code section 37105 requires that such subpoena be signed by the Mayor and attested to by the City Clerk. Although the general rule in California is that a City Charter may specifically grant subpoena power to an advisory board or commission, there are no appellate court cases in California concerning the delegation of that subpoena power to an advisory board absent specific authority under a charter. *Brown v. City of Berkeley* at 236. We therefore cannot say with any degree of certainty that the Council has the ability to delegate the power of subpoena to an advisory board, especially in light of the language of Charter section 43 restricting the actions of advisory boards.

Enforcement

The text of the Committee draft ordinance recognizes that the state of California has preempted a major portion of the field of invidious and unlawful discrimination and concedes that cities have no authority to create "dual regulations" which might result in confusion and uncertainty. *Alioto's Fish Co. v. Human Rights Com. of San Francisco*, 120 Cal. App. 3d 594 (1981).

Under current California law, city attorneys have the authority to intercede and seek relief from the courts when any person's civil rights are violated within their jurisdiction. Those rights and remedies are set forth in California Civil Code sections 52 and 52.1. It is also true that where the state's preemption is not complete, local supplementary legislation maybe adopted in those areas not covered by state law. *Baron v. City of Los Angeles*, 2 Cal. 3d 535 (1970).

However, the California courts have left undecided the issue of whether or not a city can create, by charter amendment or otherwise, an agency or commission that has power to hear and resolve unlawful discrimination disputes between third parties. Other states have had problems with this concept. The Supreme Court of Missouri recently held that such activity is not a

municipal affair. *Yellow Freight Systems Inc. v. Mayor's Com'n*, 791 SW 2d Rpt 382 (1990). That decision followed an appellate court decision in Maryland earlier this year which struck down the civil rights ordinance of Montgomery County. *McGrory Corp. v. Fowler*, 570 A2d 834 (1990). Other court decisions hold that absent specific statutory authority from the state, cities have no authority to investigate civil rights abuses. *City of Minneapolis Com'n v. University of Minn.*, 356 NW2d 841 (Minn. App. 1984) and *New Haven Com'n, ETC. v. Yale University, Conn.*, 439 A2d 404. These decisions follow the general rule that local governments cannot create by ordinance a cause of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves. 6 E. McQuillin, *The Law of Municipal Corporations* section 22.01 (1988).

The enforcement provisions of the Committee draft ordinance are also subject to attack for vagueness. Specifically, it purports to authorize legal action to restrain unfair or unlawful practices. The Committee draft ordinance defines "unfair" as "not fair or conforming to fundamental notions of justice, honesty, ethics or the alike." The term "unlawful practice" is not defined at all. In addition, the language of the Committee draft ordinance purports to exclude from its purview any preemptive federal or state law or any existing federal or state program dealing with discrimination. The combined effect of these provisions results in a failure to give adequate notice of the specific conduct the ordinance attempts to proscribe. Such a defect may very well cause the ordinance to be unenforceable. *People v. Superior Court (Caswell)*, 46 Cal. 3d 381, 389-390 (1988).

SUMMARY

If the Mayor and City Council desire to establish an advisory board pursuant to Charter section 43 to advise the Mayor, City Council and/or the City Manager on matters concerning human relations, this office will prepare an ordinance creating and establishing an HRC along the lines set forth in Enclosure 2.

If the Mayor and City Council desire to amend the Charter of The City of San Diego in order to create the HRC with greater power than currently available under Charter section 43, this office will assist in preparing appropriate ballot language.

Respectfully submitted,
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Enclosures 1 and 2

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