

DATE: March 25, 1988

SUBJECT: Direct Submission of Proposition to
Electors for Binding Vote/Use of
Initiative or Referendum Powers

REQUESTED BY: Charles G. Abdelnour, City Clerk

PREPARED BY: Cristie C. McGuire, Deputy City Attorney

QUESTION PRESENTED

Under existing municipal law, may the City Council refer a measure to the electors for a vote without having first received a qualifying petition?

CONCLUSION

Under existing municipal law, it is not entirely clear that the City Council may refer a measure (other than advisory in nature) to the electors for a vote without having first received a qualifying petition. However, an amendment to the Municipal Code may authorize and validate such a procedure.

BACKGROUND

At the February 3, 1988, meeting of the Rules Committee, the Committee was asked to consider placing on the November ballot a measure concerning development restrictions in environmentally sensitive areas. An initiative petition seeking to qualify this measure is being circulated but has not yet qualified.

ANALYSIS

A. Initiative and Referendum under State Constitution and Statutes

The power of the people to adopt, repeal or amend legislation directly at either the state or local level is exercised by powers known as the initiative or referendum. The powers of

initiative and referendum are powers reserved to the people, not granted to them, by the State Constitution.¹ *Martin v. Smith*, 176 Cal.App.2d 115, 117 (1959). Consequently, these powers are construed liberally in favor of their exercise. *Hunt v. Mayor & Council of Riverside*, 31 Cal.2d 619, 628 (1948); *Ortiz v. Board of Supervisors*, 107 Cal.App.3d 866, 870 (1980); *Martin v. Smith*, supra 176 Cal.App. at 117. If there is a conflict between a city charter and the state constitution, that which reserves the greater power of initiative or referendum prevails. *Hunt v. Mayor & Council of Riverside*, supra 31 Cal.2d at 622-23; *Atlas Hotels, Inc. v. Acker*, 230 Cal.App.2d 658, 661 (1964).

Generally, initiative and referendum powers may be exercised for all types of legislative acts, except for certain types of tax and spending ordinances. A city charter may, however, expand the area in which its electors have the power of direct

legislation as compared with general law cities. *Atlas Hotels, Inc. v. Acker*, 230 Cal.App.2d 658, 661 (1964); 38 Cal.Jur. 3d .. 56, 61.

The methods of exercising the initiative and referendum powers are governed by statute for general law cities and counties. California Elections Code Sections 4000-4061 govern the methods of exercising the initiative and referendum for city electors; California Elections Code Sections 3700-3756 govern the methods of exercising the initiative and referendum powers for county electors. The statutes indicate that both powers generally are exercised by means of a petition signed by a certain percentage of the voters.

1 Article II, Section 8 (formerly article IV, Section 22), reserves the initiative power to the people to adopt or reject state statutes or constitutional amendments; article II, Section 9 (formerly article IV, Section 23), reserves the referendum power to the people to approve or reject state statutes, except certain identified types of statutes; article II, Section 11 (formerly article IV, Section 25), reserves the initiative and referendum powers to the people for action on local measures and declares that the Legislature will specify the procedures to be used; it specifically states that it does not affect charter cities; article XI, Section 3, authorizes cities and counties to adopt charters.

Under the general laws of the state, as a method of exercise of the initiative powers, a city council may submit to the voters, without a petition, a proposition for the repeal, amendment, or enactment of an ordinance. California Elections Code . 4017. This Code section was adopted in 1976 (Stats. 1976 Ch.248 . 3), but this method of exercising the initiative has existed for many years for general law cities.² Interestingly, this same method of exercising a reserved power is treated by the State Legislative Assembly as a method of exercising the referendum power for counties. See California Elections Code Section 3750.³

A charter city may provide for the exercise of the referendum power in a manner different from that provided by state law for general cities, but the charter may not impinge on the basic right of initiative or referendum expressed in the Constitution. See *Atlas Hotels, Inc. v. Acker*, 230 Cal.App.2d 230, 260-61 (1964).

2 See Ex.Sess. Stats. 1911 Ch.33, P.131, 133. The 1911 Statutes did not treat this method of exercising the reserved powers as either that of the initiative or of the referendum; it was merely one method of exercising either one of these powers.

3 Whether direct submission of a proposition to the voters without petition is considered to be a method of exercising the initiative as opposed to the referendum power is relevant only to understand how these two powers have been distinguished traditionally. Under the traditional view, referendum may not be used to enact an ordinance, but only to repeal or amend an existing one. Only the initiative may be used to enact an ordinance. *Whitmore v. Carr*, 3 Cal.App.2d 591, 593 (1934). Under present statutory law, however, the method may be used either to effect a referendum or an initiative. See California Elections Code Sections 3750 and 4017.

B. San Diego City Charter Provisions

In San Diego, legislative power is vested generally in the City Council, but reserved also to the people:

All legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California, in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the State. San Diego City Charter, art. III, Section 11 (emphasis added).⁴

In addition to the general grant of legislative power in Charter Section 11, Charter Section 2 contains another expression of the grant of power to the City. This reads as follows:

The City of San Diego, in addition to any of the powers now held by or that may hereafter be granted to it under the Constitution or Laws of this State, shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations proved in this Charter; provided, however, that nothing herein shall be construed to prevent or restrict the City from exercising, or consenting to, and the City is hereby authorized to exercise any and all rights, powers and privileges heretofore or hereafter granted or prescribed by General Laws of the State. (Emphasis added.)

4 The next Charter section restricts the delegation of some legislative power by the Council. Charter Section 11.1 (adopted June 3, 1980; amended November 4, 1980, and June 3, 1986). Although the title of Section 11.1 of the Charter implies that all legislative powers of the City are nondelegable, a careful reading of that section reveals that it prohibits delegation of power to adopt, repeal or amend only limited kinds of legislation, namely, ordinances or resolutions which involve raising or spending of public monies. This interpretation is

confirmed by reading California Constitution, article XI, Section 11a, which this Charter section expressly parrots. See also City Attorney's Report to the Honorable Mayor and City Council regarding "Ballot Proposition - Nondelegation of Legislative Power," dated April 10, 1980.

Both Sections 2 and 11 of the Charter were adopted in 1931 and have not been amended since.

Although Section 11 allows the City to exercise any and all powers granted to all cities under the general laws of the state, this section also specifically states that the use of the powers is restricted and limited by the Charter.

The question, then, is whether some section of the Charter restricts, or appears to restrict, the manner of exercise of the initiative and referendum powers reserved to the people. For the answer, it is necessary to look to other Charter sections governing elections and the initiative and referendum powers.

San Diego City Charter Section 8 requires the City Council to adopt procedures governing municipal elections and place them in an "election code ordinance." It specifically provides that "all elections provided by this Charter, . . . including submission of questions to the voters, shall be conducted in the manner prescribed by said election code ordinance." This the City Council has done.

The City's election code appears at San Diego Municipal Code (SDMC) Sections 27.2001 through 27.3211 SDMC Sections 27.2501 through 27.2531 set forth the manner of exercising the initiative power within the City; SDMC Sections 27.2601 through 27.2620 set forth the manner of exercising the referendum power. Neither the initiative nor the referendum provisions in the Municipal Code authorize the City Council to submit a proposed ordinance to the people for enactment by binding vote without first having received a petition.

Charter Section 8 is not the only Charter section treating election matters. Charter Section 23 deals specifically with both the initiative and referendum powers. This Charter section reads as follows:

The right to recall municipal officers and the powers of the initiative and referendum are hereby reserved to the people of the City. Ordinances may be initiated; and referendum may be exercised on any ordinance passed by the Council except an ordinance which by the provisions of this Charter takes effect immediately upon its passage; and any elective officer may be recalled from office. The Council shall include in the election code ordinance required to be adopted by Section 8, article

II, of this charter, an expeditious and complete procedure for the exercise by the people of the

initiative, referendum and recall, including forms of petitions; provided that the number of signatures necessary on petitions for the initiation of an ordinance for the consideration of the Council shall be three percent of the registered voters of the City at the last general City election; that for the direct submission of a measure to the people it shall require a petition signed by ten percent of the registered voters of the City at the last general City election; that for a referendum upon an ordinance passed by the Council it shall require a petition signed by five percent of the registered voters of the City at the last general City election; and that for the recall of an elected officer it shall require a petition signed by fifteen percent of the registered voters of the City at the last general City election.

This Charter section was adopted in 1941 and has not been amended since.

The question next arises: Does Charter Section 23 restrict or purport to restrict the manner of exercising the initiative or referendum powers by the electors of the City to exclude direct referral of legislation to the electors for enactment when no petition has been received by the Council?

To determine whether Charter Section 23 prohibits this type of direct legislation by the people, it is necessary to determine the intent of this provision. Since there is no case construing Charter Section 23, to determine the legislative intent of this Charter section, the first task is to determine whether the voters intended this prohibition when they adopted this Charter provision in 1941. 58 Cal.Jur. 3d Statutes . 83. As a preliminary step in construing this Charter section, it is necessary to decide whether the intent of the people can be determined from its language. That is, is the section clear or is it uncertain and ambiguous? The rules of statutory construction do not usually come into play unless the language of the statute, or municipal charter in this case,⁵ is uncertain or ambiguous. 58 Cal.Jur. 3d Statutes . 84.

⁵ The rules of statutory construction apply to municipal charters. *Diamond International Corp. v. Boas*, 92 Cal.App.3d 1015, 1031-34 (1979). For ease in reference, this memorandum will refer to rules of statutory construction, although the questions in this memorandum deal with interpretation and construction of municipal charter provisions.

The rules of statutory construction should not have to be applied in this present instance because careful reading of Charter Section 23 reveals that the language is clear and unambiguous: it deals with only one manner of exercising the initiative and referendum powers; that is, use of the petition.⁶ Specifically, this Charter section sets forth the minimum number of signatures required if petitions are the method used to exercise either the initiative or referendum powers. It makes no direct reference to the potential manner of exercise of these powers by direct submission of legislation to the voters by the City Council without petition.

Instead, Charter Section 23 requires that, in its election code adopted pursuant to Charter Section 8, the City Council include "an expeditious and complete procedure for the exercise by the people of the initiative . . . and referendum . . ."

The plain language of this Charter section leaves the task of developing the rules for exercising the initiative and referendum to the City Council. Therefore, from the plain terms of this Charter section it may reasonably be concluded that the City Council is empowered to adopt an ordinance allowing the City Council to refer a proposed ordinance to the electors for enactment without first having received a petition. The City's election code would have to be amended, however, since there is presently no section in the Municipal Code to accomplish this.

C. Amendment to San Diego Municipal Code Necessary

As a final matter, the current Municipal Code sections governing initiative and referendum contain no provision allowing the City Council to refer a proposed ordinance to the electors for enactment without having first received a petition.

Therefore, should you so desire, we can prepare an amendment to the Municipal Code along the lines of the state law setting forth this method of exercising the reserved powers for general law cities (California Elections Code Section 4017) in language substantially as follows:

6 This Charter section also treats the recall process, but that process is not at issue here and will not be discussed.

The City Council may submit to the voters of the City of San Diego, without a petition therefor, a proposition⁷ for the repeal, amendment or enactment of any ordinance, to be voted upon at any succeeding regular or special municipal election, and if the proposition submitted receives a majority of the votes cast on it at the election, the ordinance shall be repealed, amended or enacted accordingly. A proposition may be submitted, or a special election may be called

for the purpose of voting on a proposition, by ordinance or resolution.

Such a proposed amendment may be added to the sections on initiative (SDMC 27.2501 through 27.2531), to avoid the problem raised in *Whitmore v. Carr*, 2 Cal.App.2d 590, 593 (1934) where it was held that the referendum power could not be used to enact legislation, but only for rejection or amendment of existing legislation.⁸

Respectfully submitted,
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APPROVED:

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7 We recommend the term "proposition" instead of "ordinance" be used here to avoid the problem raised in the case of *Schildwachter v. City of Compton*, 14 Cal.2d 342 (1939). In that case one of the issues on appeal to the California Supreme Court was whether the term "proposition" had the same meaning as "ordinance" under the City Initiative and Referendum Law of 1911. We make this recommendation to avoid litigating this issue again.

8 Although the Legislative Assembly did not appear to believe that case stated the current law on referendum when it placed the direct referral, without petition, of ordinances for enactment in the provisions governing county electors' referendum powers, (Elections Code Section 3750), it appears unnecessary to raise the question, since it may be avoided simply by placing it among the "initiative" provisions.