

OPINION NUMBER 90-3

DATE: August 28, 1990

SUBJECT: Effect of Redistricting Ordinance on  
Recall Effort

REQUESTED BY: Charles G. Abdelnour, City Clerk

PREPARED BY: John W. Witt, City Attorney

This is in response to your memorandum of August 8, 1990, regarding the effect of a proposed redistricting ordinance on an effort to recall a Council member. This opinion is limited to addressing only that issue that is ripe for determination at this time, namely, the determination of who is eligible to sign a petition for recall of an incumbent Council member.

QUESTION PRESENTED

In view of the fact that a redistricting ordinance modifying district boundaries was duly adopted on August 27, 1990, which Council district boundaries will be effective for purposes of determining who is eligible to sign a petition for recall of an incumbent Council member?

ANSWER

The district boundaries as they existed on August 10, 1990, the date of publication of the notice of intention to circulate a petition to recall the incumbent Council member from District No. 5, should be used to determine which persons are eligible to sign the recall petition.

FACTS

A redistricting ordinance modifying district boundaries was adopted by the San Diego City Council on August 27, 1990. The ordinance will become effective thirty (30) days thereafter (i.e. on September 26, 1990). In addition to setting new district boundaries, this ordinance contains a clause repealing the prior redistricting ordinance.

Meanwhile, a notice of intention to recall the incumbent Council member for District 5 was published on August 10, 1990, in the San Diego Daily Transcript. The recall petition may begin to be circulated on the twenty-first (21st) day after publication of the notice of intention to circulate a recall petition (i.e. on August 31, 1990). San Diego Municipal Code (SDMC) section 27.2708. The proponents of the recall petition must file the signed petitions within sixty (60) days of the date of publication of the notice of intent (i.e. on October 9, 1990). SDMC section 27.2715. The proponents have an additional thirty (30) days to file one supplemental petition if the first set

contains insufficient numbers of signatures to force an election. SDMC section 27.2719. When the redistricting ordinance becomes effective on September 26, 1990, the boundaries of the new District 5 will be substantially different from the boundaries in effect on August 10, 1990.

#### ANALYSIS

Resolution of the issue in the present case requires analysis of both recall and redistricting (reapportionment) concepts. Both are grounded in constitutional principles. Charter cities such as The City of San Diego have authority under article XI, section 5, of the California Constitution to regulate their own elections, including the authority to adopt their own procedures to recall locally elected officers.

According to article II, section 19, of the California Constitution, the state legislature must provide a mechanism for the recall of elected officials of general law cities and counties.

The principle of recall of elected officials in this state was first adopted into the California Constitution in 1911. The principle of recall was embodied, however, in the San Diego City Charter long before that date. See, eg., *Good v. Common Council of the City of San Diego*, 5 Cal. App. 265 (1907), concerning the procedure for recall of a City Council member under then-existing Charter language providing for recall.

A fundamental principle underlying redistricting (also commonly called reapportionment) -- that of one person, one vote -- is grounded in the equal protection clauses of both the state and federal constitutions (U.S. Constitution, 14th Amendment; California Constitution, article I, section 7). See, *Assembly v. Deukmejian*, 30 Cal. 3d 638, 665 (1982). How these two constitutional principles are implemented in the San Diego Charter and local ordinances is discussed below.

##### I. San Diego City Charter

In accordance with authority granted by article XI, section 5, of the California Constitution and its predecessor clauses, section 23 of the San Diego City Charter provides for the recall of municipal officers. It reads in relevant part:

#### SECTION 23. INITIATIVE, REFERENDUM AND RECALL.

The right to recall municipal officers and the powers of the initiative and referendum are hereby reserved to the people of the City. . . . 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 recall of a Council member other than the Mayor it shall require a petition signed by fifteen per cent of the registered voters of the Councilmanic District at the last general City election.

While the City Charter as amended on June 5, 1990, contains an entire section -- Section 5 -- devoted to the subject of redistricting, the language of that section does not bear on the issue presented here.

Section 5 reads in full as follows:

**SECTION 5. REDISTRICTING.**

In the event that any voting precinct which may be established at the time this Charter takes effect or which may be thereafter established is partly within two or more such districts, said

precinct shall be allocated to the District in which a majority of the voters within such precinct resides, and said district boundaries shall be changed accordingly by an ordinance of the Council. The City shall be redistricted by ordinance for the purpose of maintaining approximate equality of population, at least every ten (10) years, but no later than nine months following the receipt of the final Federal Decennial Census information. The City shall not be redistricted within four years after any redistricting, except that there shall be a one-time waiver of the four year minimum to permit redistricting prior to the 1993 Municipal election should final Federal Decennial Census figures so require.

Any territory hereafter annexed to or consolidated with The City of San Diego shall at the time of such annexation or consolidation be added to an adjacent District or Districts by an ordinance of the Council, provided, that if any territory annexed or consolidated at any one time shall contain a population sufficient to upset the approximate equality of the established districts, the Council shall at least sixty days before an election after such annexation or consolidation redistrict the City regardless of the time limitation of four years heretofore mentioned.

In any redistricting, the districts shall be comprised of contiguous territory and made as equal in population as shown by census reports, and as geographically compact as possible, and the districts so formed shall, as far as possible, be bounded by natural boundaries, by street lines and/or by City boundary

lines.

Other Charter sections are relevant on the subject of the effect of redistricting. In particular, Charter section 7 states:

**SECTION 7. ELECTIVE OFFICERS  
RESIDENCY REQUIREMENT.**

An elective officer of the City shall be a resident and elector of the City.

In addition, every Council member shall be an actual resident and elector of the district from which the Council member is nominated.

Any Council member who moves from the district of which the Council member was a resident at the time of taking office forfeits the office, but no Council member shall forfeit the office as a result of redistricting.

The Council shall establish by ordinance minimum length of residency requirements for candidacy to elective office, whether by appointment or election. (Emphasis added.)

In addition, Section 12 reads in relevant part:

Upon any redistricting pursuant to the provisions of this Charter, incumbent Council members will continue to represent the district in which they reside, unless as a result of such redistricting more than one incumbent Council member resides within any one district, in which case the City Council may determine by lot which Council member shall represent each district. At the next municipal primary and general elections following a redistricting, Council members shall be elected from those districts not represented and from those districts represented by incumbent Council members whose terms expire as of the general election in said year. If as a result of any redistricting more than a simple majority of the City Council as redistricted shall be elected at either the municipal primary or general election next following any such redistricting, the City Council prior to any such election shall designate one or more new districts for which the initial councilmanic term shall be two (2) years in order to retain staggered terms for Council members. As shown above, there is no express language in the City

Charter indicating what effect redistricting might have on recall.

There is also no guidance in the California Elections Code, which governs the recall process in general law cities. See Elections Code section 27000 et seq.

Read as a whole, however, language in the City's Charter indicates an intent that redistricting should have no direct effect on incumbent officeholders. For example, Section 7 of the Charter states that "no Council member shall forfeit the office as a result of redistricting." Section 12 also contains language supporting the interpretation that redistricting does not directly affect incumbent Council members, as follows: "Upon any redistricting pursuant to the provisions of this Charter,

incumbent Council members will continue to represent the district in which they reside . . . ."

Other language in Section 12 lends clear support to the notion that, for the purpose of forthcoming elections, the new boundaries are to apply only at the next regularly scheduled primary election: "At the next municipal primary and general elections following a redistricting, Council members shall be elected from those districts not represented and from those districts represented by incumbent Council members whose terms expire as of the general election in said year. . . ." It is significant that the Charter does not require holding special elections immediately following redistricting. Read as a whole, the Charter contemplates that the new district boundaries become applicable to the next regularly scheduled election process. The one exception to that rule occurs when, as a result of redistricting, two incumbent Council members reside within the same new district boundaries. In that case, and that case alone, the Council is permitted to draw lots to determine which Council member will represent which district. San Diego Charter section 12.

One could contend a contrary view based on the phrase contained in Charter language section 12, paragraph 3, "unless as a result of such redistricting more than one incumbent Council member resides within any one district, in which case the City Council may determine by lot which Council member shall represent each district." This phrase could reflect an underlying assumption in the minds of the drafters of this Charter provision that redistricted boundaries would become effective immediately. The view that the "new" district boundaries take effect immediately for all purposes is supported by the fact the proposed redistricting ordinance itself contains language repealing the "old" district boundaries and making the ordinance

"effective" thirty (30) days after its adoption.

We believe the better, more reasonable and consistent view, however, is that the Charter read as a whole contemplates that "new" district boundaries will apply to the next regularly scheduled primary and general election processes. Consequently, a redistricting ordinance would have no effect on a recall effort. To find otherwise would wreak havoc on any recall election process, in that the very electors who placed the incumbent in office would, by virtue of new geographic lines, be prevented from judging the incumbent's effectiveness in office. This would render recall a meaningless election tool of the voters, which is clearly contrary to the constitutional mandate. We believe that electors who voted to adopt the Charter never

thought recall could be so easily defeated. This view is also supported by case law, discussed in section III, below.

## II. City's Election Code

As explained above, the Charter does not expressly address the issue of the effect of redistricting on a recall effort, but we may infer the electors' intent by reading the Charter language as a whole. Analysis of the issues presented is not complete, however, without examination of the City's Election Code.

Section 8 of the Charter requires the Council to adopt an elections code to govern the manner of City elections. The City's Election Code is contained in Chapter II, Article 7, of the San Diego Municipal Code. An entire division (No. 27) is devoted to the recall process. In lieu of reciting the numerous provisions of the recall procedure, a copy of Chapter II, Article 7, Division 27, is attached for the reader's convenience. The overall scheme laid out by the Municipal Code is described briefly below.

As amended on June 12, 1989, to conform to newly amended Charter sections 10, 12 and 23 (the "District-Only" Elections Charter Amendments of November 1988), SDMC section 27.2701 permits recall of a City Councilmember who was elected by district vote to be recalled by a "majority of the voters in the district represented by the Councilmember." There is nothing in this or any other Municipal Code section stating which boundaries define the "district represented by the Councilmember" after a redistricting ordinance is adopted part way through a recall process.

Although not express on its face, the recall process starts once the notice of intention to circulate a petition is published at least once in a daily newspaper of general circulation. SDMC section 27.2704.

The California Elections Code, governing recall of state officers and local officers, except those of Charter cities and counties, specifies that recall proceedings commence by "the service, filing, and publication or posting of a notice of intention to circulate a recall petition . . . ." Elections Code section 27007.

Within five (5) days of the date the notice of intent is published, the affected public official must be served with a copy of the notice and "statement of reasons for the recall." SDMC section 27.2706.

Within ten (10) days from the date the notice of intent is published, the proponents must file with the City Clerk an affidavit of publication along with a copy of the notice of intent and statement of reasons. SDMC section 27.2705. The official may answer the notice within fourteen (14) days of the notice of intent. SDMC section 27.2707. The petition may be circulated on the twenty-first (21st) day after publication of the notice of intent. SDMC section 27.2708. The recall petition, including supplemental petitions, must be filed with the City Clerk no later than sixty (60) days from the date of publication of the notice of intent. SDMC section 27.2715. The City Clerk has thirty (30) days to verify signatures. SDMC section 27.2716.

If the City Clerk finds sufficient signatures to force a recall election, the City Clerk must notify the City Council "without delay." SDMC section 27.2717. If the City Clerk finds an insufficient number of signatures to force an election, the proponents may file one more supplemental petition with the City Clerk within thirty (30) days after the City Clerk's notice of insufficiency. SDMC section 27.2719. The City Clerk then has another thirty (30) days to verify the signatures on that supplemental petition. SDMC section 27.2720. If there are sufficient signatures to force a recall election, the City Council must call a special election to recall the official named in the petition and to elect a successor. SDMC section 27.2722. For Council members elected by district vote, the election may be held within one hundred twenty (120) days from the date the recall petition is presented to Council if there is another election already scheduled in which those same voters are entitled to vote. Otherwise the special election must be held between sixty (60) and ninety (90) days from the date of the ordinance calling the special election. The recall proposal and election of a successor are to be voted upon at the same election. The recall election must conform to other municipal elections to the extent "practicable." SDMC section 27.2724.

Significantly, if the recall election is successful, the successor to the office only serves the remainder of the "unexpired term." SDMC section 27.2732. Hence, both the focus of the recall and, if successful, the focus of the successor are retrospective, i.e., limited to the unexpired term.

As outlined above, there is no San Diego Municipal Code section expressly or impliedly declaring the effect of redistricting on the recall process. Therefore, we turn to case law for guidance.

### III. Case Law

There is no California case squarely addressing the issue of the effect of a redistricting ordinance on a recall effort.

The leading California case on the issue of the effective date of reapportionment (redistricting) legislation is *Assembly v. Deukmejian*, 30 Cal. 3d 638 (1982). In that case, the court found that a successful referendum petition stays the effective date of a reappointment statute. That case does not address the effect of reapportionment on a recall effort.

Case law in other jurisdictions, however, supports the view that the right to recall an elected official remains with the original election district even when that district's boundaries have been superseded by a reapportionment statute (or redistricting ordinance). *McCall v. Legislative Assembly*, 291 Or. 663, 634 P.2d 223, 231, 234 (1981). In the *McCall* case, petitioners challenged the validity of a legislative measure reapportioning the state's legislative assembly. Although Oregon's Constitutional provisions on recall (Or. Const. art. II, sec. 18, cited at 634 P.2d 230, n.8) read somewhat differently from those in the California Constitution and the San Diego City Charter (cited above), the principles articulated by the Oregon Supreme Court apply here.

Striking down a reapportionment measure that allowed one geographical area to remain without any legislative representative for a span of two years, the Oregon Supreme Court in *McCall* found that there was an ongoing identification between electoral districts and particular elected representatives. The court cited the Oregon Constitution's recall provisions as one item of evidence that Oregon's constitutional scheme presupposed an ongoing identification between electoral districts and particular legislators. 634 P.2d at 234.

Citing the *McCall* case with approval, the Colorado Supreme Court also recognized that reapportionment efforts should not be used to defeat the important constitutionally based principle of recall. In *re Reapportionment of the Colorado General Assembly*, 647 P.2d 191, 199 (Colo. 1982).



## CONCLUSION

Applying the above principles to the facts at hand, we conclude that the new redistricting ordinance, modifying district boundaries that was adopted on August 27, 1990, should not affect the recall effort that is underway involving the incumbent Council member of District 5. The better view, which is

supported by language in the Charter read as a whole and by case law in other jurisdictions, is that the new boundaries apply to the next regularly scheduled election process.

In the present instance, a recall effort against the incumbent Council member of District 5 commenced on August 10, 1990, the date the notice of intention to circulate the recall petition was published. The redistricting ordinance modifying district boundaries was not introduced until August 13, 1990 and was duly adopted on August 27, 1990. The signature gathering effort may begin on or after August 31, 1990. SDMC section 27.2708. The signature gathering effort will begin before the redistricting ordinance modifying district boundaries becomes effective (September 26, 1990). In order not to defeat the electors' constitutional right of recall, which is focused on the existing incumbent and only affects the unexpired term of the incumbent, the signatures should be gathered from the electors of the district as it was on the date the recall effort was begun, namely, on August 10, 1990.

We reserve the other questions in your memorandum pertaining to the eligibility of successor candidates and the eligibility of electors to vote in a recall election until such time as they may become relevant.

Respectfully submitted,  
JOHN W. WITT, City Attorney  
By  
Cristie C. McGuire  
Deputy City Attorney

CCM:jrl:920.66(x043)

Attachment

LO-90-3

APPROVED:

JOHN W. WITT  
City Attorney