

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

CATHERINE M. BRADLEY
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178

TELEPHONE (619) 236-6220

FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: July 21, 2011

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Effect of Referendum on City's Ability to Enact Subsequent Ordinance

INTRODUCTION

The ordinance amending the City of San Diego Land Development Code to allow medical marijuana consumer cooperatives (Ordinance No. O-20042) recently was the subject of a successful referendum petition. The question has arisen whether the Council can repeal the ordinance and enact new regulations affecting medical marijuana consumer cooperatives.¹

This Office has opined in the past that California Elections Code section 9241 should be used for guidance when enacting a new ordinance that deals with the subject matter of a referendary petition.² Elections Code section 9241 prohibits the enactment of an essentially similar ordinance for a period of one year after the repeal of an ordinance stayed by a referendary petition. This memorandum confirms our previous advice regarding the applicability of section 9241 to the City's referendary process. It also discusses the framework for determining whether a new ordinance is essentially similar to the first ordinance.

QUESTION PRESENTED

If the City Council repeals the Ordinance, must it wait one year before enacting another ordinance relating to medical marijuana cooperatives?

¹ The related medical marijuana ordinance addressing non-land use matters (Ordinance No. O-20043) became effective on May 27, 2011. However, as a practical matter, the permitting and regulating aspects of that ordinance cannot be enforced until there are legal locations established for medical marijuana cooperatives.

² See, CityAtt'yMOL No. 97-8 (Mar 5, 1997) "Effect of Referendum on Subsequently Adopted Ordinance" and 2005 CityAtt'yReport 374 (05-10; May 13, 2005) "Mt. Soledad Memorial Property."

SHORT ANSWER

When an ordinance suspended by a referendum has been repealed by the Council, or if it is placed on the ballot and a majority of the voters do not vote in favor of it, the Council cannot enact another essentially similar ordinance for a period of one year after the date of repeal or disapproval by the voters. Conversely, the Council may enact an ordinance that deals with the subject matter of medical marijuana cooperatives during the one-year period, but such ordinance must be essentially different than the ordinance that was subject to the referendum.

ANALYSIS

“The referendum is the means by which the electorate is entitled, as a power reserved by it under our state Constitution, to approve or reject measures passed by a legislative body. [Citations.]” *Empire Waste Management v. Town of Windsor*, 67 Cal. App. 4th 714, 717 (1998). The San Diego Charter recognizes this Constitutional right and specifically reserves the power of referendum to the people of the City. Charter § 23. The procedures for the exercise of the right of referendum for ordinances adopted by the City Council are codified in San Diego Municipal Code sections 27.1101 et. seq.

A referendum of an ordinance requires a petition signed by five percent of the registered voters of the City at the last general election. Charter § 23. When a referendary petition has the required signatures and is deemed sufficient by the City Clerk, the Council must reconsider the ordinance and either: (1) repeal the legislative act in question; or (2) submit the matter to the voters. SDMC § 27.1132. If the Council repeals the ordinance, or submits the ordinance to the voters and a majority of the voters do not vote in favor of it, the Council may not enact the same ordinance for a period of one year after the date of its repeal by the legislative body or disapproval by the voters. Cal. Elec. Code § 9241.³

The Council, however, is not precluded from dealing further with the subject matter of the suspended ordinance provided that the new ordinance is “essentially different” from the first ordinance. The court in *In re Stratham*, 45 Cal. App. 436 (1920), explained:

[W]hen an ordinance which has been suspended by a referendum has been repealed . . . the council cannot enact another ordinance in all essential features like the repealed ordinance. . . The council may, however, deal further with the subject matter of the suspended ordinance, by enacting an ordinance essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance. If this be done, not in bad faith, and not with intent to evade the effect of the referendum petition, the second ordinance should not be held invalid for this cause. *Id.* at 439-40.

³ California Elections Code section 9241 applies to Charter cities. *Rubalcava v. Martinez*, 158 Cal. App. 4th 563, 570 (2007).

The determination whether subsequent legislation is essentially the same requires a comparison of the terms of the ordinance, focusing on the features that gave rise to “popular objection.” *Lindelli v. Town of San Anselmo*, 111 Cal. App. 4th 1099 (2003). The record as a whole may be used to determine the “popular” objections to the ordinance. *Rubalcava v. Martinez*, 158 Cal. App. 4th 563, 575 (2007). After determining the popular objections, the language is reviewed to determine whether the ordinances are “essentially different.” There are several cases that have compared ordinances stayed by referendum with subsequently enacted ordinances.⁴ The comparisons and analysis are very fact specific. Accordingly, any new ordinance dealing with medical marijuana cooperatives that is proposed for adoption during the year after repeal or rejection by the voters must be reviewed to ensure compliance with the referendum process.

CONCLUSION

When an ordinance suspended by a referendum has been repealed by the Council, or if it is placed on the ballot and a majority of the voters do not vote in favor of it, the Council cannot enact another essentially similar ordinance for a period of one year after the date of repeal or disapproval by the voters. Whether the subsequent ordinance is essentially similar will require analysis by our Office before it is proposed for adoption.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Catherine M. Bradley
Catherine M. Bradley
Chief Deputy City Attorney

CMB:als
Document No.: 216986
cc: Elizabeth Maland, City Clerk
Andrea Tevlin, Independent Budget Analyst
MOL-2011-9

⁴ See, for example, *In re Stratham* 45 Cal. App. 436 (1920); *Martin v. Smith*, 176 Cal. App. 2d 115 (1959); *Reagan v. City of Sausalito*, 210 Cal. App. 2d 618 (1962); *Lindelli v. Town of San Anselmo*, 111 Cal. App. 4th 1099 (2003); and *Rubalcava v. Martinez*, 158 Cal. App. 4th 563 (2007).