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MEMORANDUM OF LAW

DATE: July 31, 2013

TO: City Council and City Clerk

FROM: City Attorney

SUBJECT: Analysis of Municipal Code Law Regarding Multiple Recall Efforts

INTRODUCTION

In the past week, two people have published notices of intention to circulate petitions to recall the Mayor from office, and are taking other preliminary steps to begin a recall campaign. Their actions, which have been proceeding separately, have raised legal issues concerning the City's recall laws. San Diego Municipal Code section 27.2701 states:

> Any official elected by City-wide vote who has held office for six (6) months or more, and *against whom no recall petition has been filed* within the preceding six (6) months, may be recalled by a majority vote of the voters of the City.

San Diego Municipal Code (SDMC) § 27.2701 (Emphasis added).

Our Office has been asked to address whether two separate efforts to recall the Mayor may legally proceed at once, and what constitutes having more than one recall petition "filed" under the law. News accounts have increased confusion about the process, what constitutes a "filed" "recall petition," and whether recall proponents are violating City laws. This Memorandum of Law is provided to clarify the intent and reach of the Municipal Code, analyzing constitutional implications and the rights reserved to the people to remove an elected official.

QUESTIONS PRESENTED

1. Can multiple petitions to recall the Mayor be circulated for signatures at the same time, in an effort to qualify a recall for the ballot?

2. What does it mean for a "recall petition" to have been "filed," according to San Diego Municipal Code section 27.2701? The section states that "Any official elected by City-wide vote who has held office for six (6) months or more, and against whom *no recall petition has been filed* within the preceding six (6) months, may be recalled by a majority vote of the voters of the City.

3. May a recall petition that is legally insufficient and therefore not certified preclude the filing of another recall petition, or must a proponent wait for six months?

SHORT ANSWERS

1. Yes. There is nothing in San Diego's recall law that prohibits multiple efforts to circulate petitions to qualify a recall for the ballot. Thus, two voters can proceed with separate petitions to collect signatures to attempt to qualify a recall of the Mayor for an election.

However, once a recall petition has been certified for the ballot, the City Clerk may not accept for filing any other recall petition against that public official. At that point, the City Council will be required to call a special election. If the Mayor is not recalled in the election, another recall petition may not be filed against the Mayor for six months. It is the "holding of frequent special elections which the law is seeking to prevent rather than the filing of successive recall petitions which the clerk may find insufficient." *Moore v. City Council of the City of Maywood*, 244 Cal. App. 2d 892 (1966).

2. To date, no one has filed a "recall petition" against the Mayor. A "recall petition" is not merely a notice of intention or affidavit, but a complete package accepted for filing by the City Clerk that includes: a notice of intention, affidavit of publication, affidavit of service, answer by the public official to the statement (if any exists), the petition itself, voter signature sheets, and related affidavits. A "recall petition" is accepted for filing by the Clerk if it meets statutory requirements. *See* San Diego Charter § 23; SDMC §§ 27.2701 to 27.2732. It is the filing of a *successful* recall petition – i.e., one that results in a recall election – that triggers the prohibition against filing another petition for six months.

3. No, a petition that is legally insufficient and therefore not certified will not preclude the filing of another recall petition. The California Constitution and the City Charter guarantee the right of recall to the people. A petition validly signed by 15 percent of the number of registered voters of the City as of the last general election will qualify the recall of a mayor for the ballot. If a filed petition is deemed insufficient, this does not trigger a six-month waiting period. A California appellate court reviewing a law similar to Municipal Code section 27.2701 held the failure to secure sufficient names on an initial petition does not prejudice the filing of a new petition, or recall laws would work an "absurd and unjust" result. *Moore,* 244 Cal. App. 2d at 902.

ANALYSIS

I. AS A CHARTER CITY, SAN DIEGO HAS ADOPTED ITS OWN PROCEDURES FOR THE RECALL OF A PUBLIC OFFICIAL

As this Office explained in a Report to Council dated July 26, 2013, the California Constitution grants broad authority to charter cities like San Diego to establish procedures for their own elections, including recall procedures. Article XI, section 5(a) of the California Constitution provides that a charter city may "make and enforce all ordinances and regulations in respect to municipal affairs," and that "[c]ity charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." California Constitution, Article XI, section 5(b) also grants plenary authority to charter cities to provide for the manner in which "municipal officers and employees whose compensation is paid by the city shall be elected or appointed, *and for their removal*." (Emphasis added.)

The San Diego Charter thus governs City elections and requires the City to adopt an election code ordinance, "providing an adequate and complete procedure to govern municipal elections." San Diego Charter § 8. The Charter states, "All elections provided for by this charter, whether for choice of officers or submission of questions to the voters, shall be conducted in the manner prescribed by said election code ordinance." *Id*.

San Diego Charter section 23 requires the Council to include in the election code ordinance an "expeditious and complete procedure for the exercise by the people of . . . recall." San Diego Charter § 23. The City thus adopted Municipal Code sections 27.2701 through 27.2732 to set forth the City's recall procedures. Additionally, the Municipal Code states that the purpose and intent of the City's election code is:

> . . . to provide an expeditious and complete procedure for the people's right to exercise the vote. If there is any ambiguity or contradiction between the provisions of general law and the provisions of this article, the provisions of this article shall govern. The divisions relating to initiative, referendum and recall (including the initiative provisions relating to Charter amendments) are exclusive as required by the Charter.

SDMC § 27.0101.

San Diego's election laws regarding recall, as stated in its Charter and Municipal Code, exclusively constitute its governing law. The City's Elections Ordinance states, however, that if there is no controlling provision in San Diego's election laws, state elections law may be relied upon for guidance. SDMC § 27.0106(d) ("All elections shall be conducted under the Charter and this article. The City Clerk and City Council may rely on state elections law for guidance if there is no controlling provision in this article.").

II. RULES OF STATUTORY INTERPRETATION ARE APPLICABLE TO CITY LAWS

City charters, ordinances, and voter-approved measures are interpreted by rules of statutory interpretation. *See Castaneda v. Holcomb,* 114 Cal. App. 3d 939, 942 (1981); *City of Berkeley v. Cukierman* 14 Cal. App. 4th 1331, 1338-1341 (1993); *HowardJarvis Taxpayers Association v. County of Orange* 110 Cal. App. 4th 1375, 1381 (2003). The fundamental rule of statutory construction is to determine the intent of the Legislature in enacting the statute and intent is determined first by the language of the statute itself. *People v. Aston,* 39 Cal. 3d 481, 489 (1985). *See also* Cal. Code Civ. Proc. § 1859.

If there is any question or ambiguity, the statute should be interpreted so as to harmonize with the rest of the statutory scheme. The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute, and where possible the language should be read so as to conform to the spirit of the enactment. *Conradv. Medical Bd. of California*, 48 Cal. App. 4th 1038, 1046 (1996). However, if the application of a statute would lead to absurd results based on a plain reading of the language, that language "should not be given a literal meaning." *Younger v. Superior Court,* 21 Cal. 3d. 102, 113 (1978).

III. THE CITY'S RECALL LAWS ALLOW ONE CERTIFIED PETITION TO PROCEED; AN INSUFFICIENT PETITION WILL NOT PROHIBIT THE FILING OF A SECOND PETITION SEEKING TO RECALL THE SAME OFFICIAL

The right of recall is a fundamental right under the Equal Protection Clause of the United States Constitution. See, for example, *DeBottari v. Melendez,* 44 Cal. App. 3d 910, 916 (1975). San Diego's Charter provides "an expeditious and complete procedure for the people's right to exercise the vote" and reserves to the people of the City the right to recall municipal officers. Charter §§ 23, 8. Recall laws protect the people's constitutional right to remove an elected official from office, yet include certain limitations that protect a public official from repeated elections designed to remove him from office and interfere with the operations of government. *See,* for example, Cal. Const., art. II, § 18. These paramount goals provide the framework for recall laws.

A. Multiple Petitions May Be Circulated to Attempt to Qualify a Recall for the Ballot

San Diego's recall laws do not prohibit voters from circulating multiple petitions to qualify a recall for the ballot. As set forth above, Municipal Code section 27.2701 states that, "Any official elected by City-wide vote who has held office for six (6) months or more, and *against whom no recall petition has been filed* within the preceding six (6) months, may be recalled by a majority vote of the voters of the City" (Emphasis added.). *Id*.

Our Office was asked to review section 27.2701 because two parties separately published notices of intention and filed affidavits to begin separately circulating petitions to recall the Mayor. The California Supreme Court, reviewing analogous state law, concluded that two

petitions can be circulated simultaneously, so long as one of them has not yet been certified. In *Morrow v. Board of Directors of Imperial Irr. Dist.*, 219 Cal. 246 (1933), the Court considered a situation in which one petition was stalled in legal proceedings, while another petition for recall was presented for filing. The Court said:

> The fact that two valid petitions may be on file at the same time does not warrant a refusal to act if either of them is sufficiently certified. When the election is called under one petition, any other petition for the same purpose then on file or in existence becomes functus officio.

Morrow, 219 Cal. 246, 248. The term "functus officio" is defined in Black's Law Dictionary as having "accomplished the purpose, and therefore of no further force or authority." Black's Law Dictionary (6th ed. 1991). Thus, the Supreme Court confirmed that it is the certification of a recall petition that prohibits another such petition from proceeding.[1] Until one petition is certified, both petitions may be circulated for signatures.

B. The Phrase "Against Whom No Recall Petition Has Been Filed" in Section 27.2701 Means A Public Official Who Has Not Faced a Recall Election in the Past Six Months

Our Office has been asked to analyze and clarify the legal meaning of the phrase "against whom no recall petition has been filed" in Municipal Code section 27.2701. This Municipal Code section mirrored language of former California law, and the phrase at issue has been in effect since at least 1968.

Former California Elections Code section 27500 declared that recall proceedings could not be commenced against an officeholder "unless, at the time of commencement, the holder has held the office for at least six months and *no recall petition has been filed against such holder within the preceding six months*." *Moore v. City Council of the City of Maywood,* 244 Cal. App. 2d 892, 901 (1966) (emphasis in citing case), citing former Elections Code section 27500. The Court in *Moore* wrote, "In our opinion it is the filing of a recall petition which eventuates in the calling and holding of a recall election for the removal of a particular municipal officer that is referred to in section 27500, and prohibits the filing for six months of a petition to the same effect." *Id.* at 901.

Since that time, section 27500 of the state law has been repealed. The California Elections Code now states more clearly that a recall may not proceed against a public official if: ". . . (b) A recall election has been determined in his or her favor within the last six months." Cal.

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[1] In a public opinion issued December 19, 2011, the City Attorney of Oakland, California reached the same conclusion, as two groups of proponents took preliminary steps to initiate a recall of Oakland's mayor. In a public legal opinion, Oakland's City Attorney concluded that more than one petition could be circulated at the same time and, "The first petition that the City Clerk certifies is the only effective petition." Although Oakland is a Charter city, its Charter "generally provides that the recall of elected officials will be exercised in the manner prescribed by general state law." *See* "Legal Implications of Two Recall Petitions," Office of the City Attorney, City of Oakland (December 19, 2011). Although the analysis is the same, San Diego has adopted its own elections code instead of California's general election laws.

Elec. Code § 11007(b) (Limitation on the Commencement of Recall Proceedings). This language underscores the original legislative intent that it is not the filing of a petition, but the certification of a petition and holding of a recall election that trigger a waiting period before another recall petition may proceed. More significantly, it mirrors the California Constitution, which states that if a state official is not recalled in an election scheduled for that purpose, "Another recall may not be initiated against the officer until six months after the election." Cal. Const., art. II, § 18.

San Diego's Municipal Code section must be read in this context. The statutory interpretation of state law applies with equal force here, to avoid an "absurd and unjust" result. (*See* Section II above.) A public official should not be subject to repeated recall elections every few months, nor should a city bear the expense and intrusion upon its government process, thus leading to a short waiting period between such elections. As the Court said in *Moore,* it is the "holding of frequent special elections which the law is seeking to prevent rather than the filing of successive recall petitions which the clerk may find insufficient." *Moore*, 244 Cal. App. 2d at 902. Thus, once a recall petition has been certified, the Council will be required to call a recall election. If the Mayor is not recalled in the election, another recall petition may not be filed against the Mayor for six months. SDMC § 27.2701 *et seq.*

C. A "Recall Petition" is Defined in the Municipal Code and Includes Signatures of Voters in a Certain Percentage, as Required by the Charter

News accounts have increased public confusion regarding what constitutes a "recall petition." *To date, no one has filed a "recall petition" against the Mayor*. Rather, proponents have taken preliminary steps to do so.

A "recall petition" is not merely a notice of intention or affidavit, but a complete package for filing with the City Clerk that includes: a notice of intention, affidavit of publication, affidavit of service, answer by the public official to the statement (if any exists), the petition itself, signature sheets signed by registered voters, and related affidavits. A "recall petition" is accepted for filing by the Clerk if it meets statutory requirements. *See* San Diego Charter § 23; SDMC §§ 27.2701 to 27.2732. As set forth above, it is the filing of a successful, certified recall petition and the resulting election that prohibits the filing of another petition for six months.

D. A Recall Petition that is Legally Insufficient and Not Certified Will Not Preclude the Filing of Another Recall Petition Against the Same Public Official

The California Constitution and the City Charter guarantee the right of recall to the people. A petition validly signed by 15 percent of the number of registered voters of the City as of the last general election will qualify the recall for the ballot. If a filed petition is deemed insufficient, this does not trigger a six-month waiting period before another petition can be filed. A California appellate court reviewing a law similar to Municipal Code section 27.2701 held the failure to secure sufficient names on an initial petition does not prejudice the filing of a new petition, or recall laws would work an absurd or unjust result. *Moore,* 244 Cal. App. 2d at 902.

Our Office also has been asked whether a petition filed to intentionally thwart the process could preclude a legitimate filing. At the state level, a person can be guilty of a misdemeanor for

filing a petition "with the intention of thereby defeating the initiative or referendum measure that is embraced in the petition." Elections Code section 18670 (applying to initiative and referendum petitions). Any petition or section of a petition filed "with an intention of defeating an expression of the public will is null or void." Elections Code section 18671 (initiatives and referenda). Although the statute applies to initiative and referendum petitions at the state level, it is instructive to underscore legislative intent: The law recognizes the paramount importance of the expression of the public will through signatures on a recall petition. Recall laws would be rendered meaningless if someone could intentionally "hijack" the process by filing a "petition" in an attempt to stop others from proceeding with a legitimate one. As the Court said in *Moore*:

> To hold the clerk must accept for filing any petition which on its face purports to have appended to it signatures of voters in the required number, although it does not qualify in substantial particulars as a recall petition, or *to hold that a recall petition certified by the clerk as insufficient prohibits the filing of a new petition to the same effect for a period of six months would result in the following absurd and unjust results.* "An absurd and unjust result will never be ascribed to the legislature, nor will it be presumed that it used inconsistent provisions on the same subject." (45 Cal. Jur. 2d 613, § 99.) The clerk would be required to waste public time, effort, and funds by checking names from an invalid or patently insufficient recall petition. A petition certified as insufficient would exclude the recall of an unfaithful or unscrupulous municipal officer for a period of 10 to 12 months; and *a confederate of such an officer could prevent a recall indefinitely by seriatum recall filings of invalid or insufficient petitions. The failure or inability of one citizen to have a filed recall petition certified as sufficient would prohibit the right of any other citizen to commence proceedings for the recall of a municipal officer for a period of six months.* We do not believe the Legislature intended such an unfair and inequitable result. In our opinion any filed recall petition bearing the clerk's certificate of insufficiency does not prohibit the filing of a new petition to the same effect for six months or any other particular time interval.

Moore, 244 Cal. App. 2d at 902 (Emphasis added; footnotes omitted).

This Office previously has opined that "Courts have acknowledged the desirability of presenting recall questions to the people without excessive delay. [citations] . . . [A] city council may not enact an ordinance which curtails or unreasonably burdens recall, and may not practically nullify or hinder the purposes of the charter provisions on recall." *See* Report to Council, 1990 City Att'y Report 1414 (90-54; Oct. 24, 1990). The people's right to recall a municipal official is protected by the Equal Protection Clause and First Amendment of the U.S. Constitution, the California Constitution, and the City Charter. For these reasons, the ability of voters to file a recall petition is read expansively in our local laws.

CONCLUSION

The U.S. Constitution, California Constitution and City Charter guarantee voters their fundamental right to recall a public official. Multiple recall petitions may be circulated for signatures until a recall petition has qualified for the ballot. If the official survives a recall election, another recall petition may not be filed against that official for six months. It is the "holding of frequent special elections which the law is seeking to prevent rather than the filing of successive recall petitions which the clerk may find insufficient." To hold otherwise, and to allow an insufficient recall petition to prevent the filing of a legally sufficient one, would create an "absurd and unjust" result and render recall laws meaningless. Section 27.2701 cannot be read to place an unreasonably burdensome limit on the people's exercise of recall rights or it would not survive a constitutional challenge.

To underscore this legislative intent, the Council should amend Municipal Code section 27.2701 and adopt the language of the California Elections Code, to better explain the six-month waiting period that must occur after a recall election has been held. Even absent such an amendment, however, a court would liberally construe the section to protect the voters' fundamental right to recall an elected official.

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By /s/ Sharon B. Spivak
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