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MEMORANDUM OF LAW

DATE: September 15, 2014

TO: Councilmember Marti Emerald

FROM: City Attorney

SUBJECT: Legal Analysis of Proposed Change to Timing of Referendary Elections

INTRODUCTION

City voters have power reserved to them by the California Constitution and San Diego Charter to seek the referendum of legislative acts passed by the City Council. Cal. Const. art. II, §§ 8, 9; San Diego Charter § 23.

Voters can seek a referendum by following procedures in the Charter and San Diego Municipal Code (SDMC and Municipal Code). If proponents file petitions with sufficient signatures to qualify a referendum for the ballot, the Council must either repeal the legislative act or expeditiously submit the measure to voters. The Municipal Code requires a referendary measure to be submitted to voters at the next regularly scheduled Citywide election where it can be placed on the ballot, whether it is a primary or general election. The Council also may call a special election prior to the next Citywide election for the purpose of deciding the matter. SDMC § 27.1133.

Your office has asked whether the Municipal Code may be amended to eliminate the option of placing a referendary measure on the ballot for a Citywide primary election. This memorandum analyzes the legal implications of the proposed amendment.

QUESTION PRESENTED

What are the legal implications of eliminating the option of placing a qualified referendary measure on the ballot for a Citywide primary election?

SHORT ANSWER

The San Diego Charter requires the Municipal Code to provide an “expeditious and complete” procedure for voters to exercise the power of referendum of a legislative act. San Diego Charter § 23. The Council is required to place a qualified referendary measure on the next available Citywide ballot – whether it is a Citywide primary or general election – or to call a special election prior to that time so the referendum can be decided. SDMC § 27.1133. State law is similar. Cal. Elec. Code § 9241.

If the Municipal Code is amended to eliminate the primary election option, voters may have to wait longer to exercise their referendary power to vote on an ordinance. The amendment could be subject to legal challenge if it is interpreted to preclude the “expeditious” procedure required by the Charter and infringe on voters’ constitutional power. This could occur when a referendary petition has been certified more than 88 days before the next Citywide primary election, but the Council skips the election and waits five more months to submit the matter to voters.

This timeline is significant because the filing of a referendary petition stays the legislative act, prevents the Council from enacting similar legislation for one year, and prevents the legislative act from taking effect – if at all – until after the vote is held and certified. SDMC §§ 27.1130, 27.1140; Cal. Elec. Code § 9241; *In re Stratham*, 45 Cal. App. 436, 439-40 (1920); Cal. Const. art. II, § 10(a); *Assembly v. Deukmejian*, 30 Cal. 3d 638, 654–57 (1982). If the proposed amendment were challenged in court, voters’ rights to a swift referendum process would likely prevail.

ANALYSIS

I. AS A CHARTER CITY, SAN DIEGO HAS ADOPTED ITS OWN PROCEDURES FOR REFERENDUM.

The California Constitution grants broad authority to charter cities like San Diego to establish procedures for their own elections. 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), grants plenary authority to charter cities to provide for the “conduct of city elections.” The Charter 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.*

II. THE CHARTER AND MUNICIPAL CODE REQUIRE AN “EXPEDITIOUS” PROCESS FOR THE REFERENDUM OF A CITY ORDINANCE.

As set forth above, referendum is governed by San Diego Charter section 23, which states that petitions must be validly signed by “five percent of the registered voters of the City at the last general election.” *Id.* Section 23 also states:

... 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;

...

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. . .

San Diego Charter § 23 (emphasis added).

The need for an “expeditious” procedure for the people’s exercise of their referendary power is reiterated in the Municipal Code, which states that the purpose 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 (emphasis added); *See also*, San Diego Charter § 8.

Municipal Code section 27.1133 provides that a qualified referendary petition must be placed on the next Citywide ballot:

§27.1133 Time for Special Election for Referended Legislative Act

A special election for a referended legislative act shall be consolidated with the next *City-wide Primary* or *City-wide General Election* at which the matter can be placed on the ballot; or at a

separate *special election* called prior to that time for the purpose of voting on the matter.

SDMC § 27.1133.

San Diego's municipal laws regarding referendum 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).

The California Elections Code also requires referendary petitions to be heard at the next election in which the matter can be heard. Cal. Elec. Code § 9241. (If the ordinance is not repealed, "the legislative body shall submit the ordinance to the voters, either at the next regular municipal election occurring not less than 88 days after the order of the legislative body, or at a special election called for the purpose, not less than 88 days after the order of the legislative body.") Thus, San Diego's procedure mirrors California's election law.

III. THE CHARTER'S USE OF THE TERM "EXPEDITIOUS" IS SUBJECT TO STATUTORY INTERPRETATION.

The proposal to eliminate the Citywide primary election as a ballot for referendary petitions raises a question of statutory construction: What qualifies as an "expeditious" procedure for voters to decide a referendum?

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, 1338-41 (1993); *Howard Jarvis 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.

When statutory language is clear and unambiguous, a court need not construe its meaning. *Howard Jarvis*, 110 Cal. App. 4th at 1381. If there is no ambiguity, the plain meaning of the words govern. *Curle v. Superior Court*, 24 Cal. 4th 1057, 1063 (2001). 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. *Conrad v. Medical Bd. of California*, 48 Cal. App. 4th 1038, 1046 (1996). Additionally, in interpreting a statute, a court is required, if possible, to give significance and effect to each word and phrase and to avoid a construction that makes any part of the statute superfluous or meaningless. *Curle*, 24 Cal. 4th at 1063.

The term "expeditious" is a term of common meaning, and not defined in the Charter. Black's Law Dictionary defines the term as follows: "Possessed of, or characterized by, expedition or efficiency and rapidity in action; performed with, or acting with, expedition; quick;

speedy.” *Black’s Law Dictionary* 400 (6th ed. 1991). Merriam-Webster similarly defines the adjective as “acting or done in a quick and efficient way; marked by or acting with prompt efficiency.” *Expeditious*, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/expeditious> (last visited September 9, 2014).

Assuming “expeditious” means “quick” or “speedy,” the proposed amendment could be subject to legal challenge if a particular measure qualifies in time to be heard at the primary election but its placement on the ballot is postponed five months to the general election. To the extent referendary measures are analogous to initiative measures, courts have emphasized the importance of having them heard quickly:

The desirability of having initiative measures, particularly those of such importance as the present one, reach the ballot without delay or excessive expenditures of time, money, and effort is a factor of which the courts are ever mindful. All doubt as to the construction of pertinent provisions is to be resolved in favor of the initiative and such legislation is to be given the same liberal construction as that afforded election statutes generally.

Gage v. Jordan, 23 Cal. 2d 794, 799 (1944), citing *Ley v. Dominguez*, 212 Cal. 587 (1931).

The Charter’s use of the word “expeditious” is not ambiguous and must be given its plain meaning.¹ Thus, if the primary election were eliminated as an option, the Council might need to consider calling a special election prior to the next primary or general election to hear a qualified referendary matter, rather than wait for the next Citywide general election. This could ensure the City meets the Charter requirement that referendary measures are heard “expeditiously.”

IV. THE TIMING OF A REFERENDARY ELECTION ALSO AFFECTS WHEN A MEASURE MAY TAKE EFFECT OR SIMILAR LEGISLATION CAN BE ENACTED.

If a referendum qualifies for a primary election ballot, but is postponed until the general election, the resulting five-month delay might not sound significant. However, in some cases, a referendary measure could qualify for the ballot up to two-and-one-half years before the referendary matter could be heard. Any discussion of eliminating the Citywide primary election as a ballot for referendary petitions thus must also consider the impact on the underlying legislative act: The filing of a referendary petition stays the legislative act. SDMC §§ 27.1130, 27.1140. It prevents the underlying legislative act from taking effect – if at all – until after the vote is held and certified. *In re Stratham*, 45 Cal. App. 436, 439-40 (1920); Cal. Const. art. II, § 10(a); *Assembly v. Deukmejian*, 30 Cal. 3d 638, 654–57 (1982). It also prevents the Council from enacting similar legislation for one year. Cal. Elec. Code § 9241; City Att’y MOL No. 2011-9 (July 21, 2011). Any proposal to delay submitting a referendary matter to a vote thus has additional ramifications, to the legislation itself.²

¹ Even if the term “expeditious” is construed to be ambiguous, a court would likely rule in favor of voters’ constitutional power of referendum by holding a qualified measure should be submitted to voters without delay.

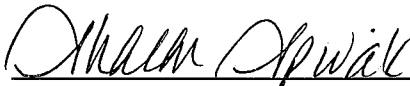
² If the proposed amendment were adopted, it is also worth noting that the Council might end up in the position of calling a Municipal Special Election for the purpose of hearing *other* ballot measures at a regularly scheduled

CONCLUSION

The U.S. Constitution, California Constitution and City Charter reserve power to City voters to exercise their right to the referendum of a legislative act of the City Council. The Charter requires an "expeditious" process for voters to exercise this power. Under rules of statutory construction, words are given their intended meaning and not interpreted to be superfluous. The Municipal Code implements this Charter requirement by directing the Council to take swift action to decide if it will repeal the legislative act and, if not, requiring the Council to place the matter before voters at the next regularly scheduled Citywide election or call a special election prior to that time.

If the Council were to eliminate a regularly scheduled election as one in which a referendary petition could be heard, the action could be subject to legal challenge and may violate the Charter. A court would rely on a plain reading of the Charter requirement. A court thus would likely resolve any resulting challenge in favor of voters' reserved constitutional powers and against any delay in their ability to vote.

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By 
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Citywide primary election, while holding back a qualified referendary petition that could have been heard at the same time. This arguably could complicate a legal challenge.