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MEMORANDUM OF LAW

DATE: November 3, 2015

TO: The Charter Review Committee

FROM: City Attorney

SUBJECT: The Legality of Appointment Language in San Diego Charter Section 42

INTRODUCTION

In November 1973, San Diego voters approved Proposition K to amend Charter section 42 to read: "The appointing authority in selecting appointees to commissions, boards, committees or panels shall take into consideration sex, race and geographical area so the membership of such commissions, boards, committees or panels shall reflect the entire community." San Diego Charter § 42.

New legal developments call into question the legality of the appointment language in Charter section 42. On February 5, 2014, our Office published a Report to the City Council identifying sections in the Charter that need legal review. We opined that the language in Charter section 42 that requires appointing authorities to take into consideration "sex and race" in selecting appointees to City commissions, boards, committees or panels "may be prohibited by state and federal discrimination laws." City Att'y Report 2014-3 (Feb. 5, 2014). We suggested that the Charter Review Committee consider the option of amending Charter section 42 "to delete the requirement to consider sex and race in making appointments and provide more appropriate language regarding appointments." *Id.* Upon further review, the Charter Review Committee requested a definitive conclusion on whether the directive in Charter section 42 to take into consideration the sex, race and geographical area of appointees to City commissions, boards, committees or panels violates the law.

QUESTIONS PRESENTED

1. Does Article 1, section 31 of the California Constitution (Section 31) apply to the appointment of members to City commissions, boards, committees or panels?

2. Is the directive in Charter section 42 to take "sex and race" into consideration in selecting appointees to City commissions, boards, committees or panels lawful?

3. Is the directive in Charter section 42 to take "geographical area" into consideration in selecting appointees to City commissions, boards, committees or panels lawful?

SHORT ANSWERS

1. Section 31 likely does not apply to the appointment of members to City commissions, boards, committees or panels. Section 31 prohibits the City from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin – but only in the operation of public employment, public education, or public contracting. Members of the City commissions, boards, committees and panels contemplated in Charter section 42 hold a public office, not public employment, and therefore likely fall outside the reach of Section 31.

2. No. The requirement to take sex and race into consideration in selecting appointees to City commissions, boards, committees or panels violates the California equal protection clause. This Office advises that the language in Charter section 42 should be amended to eliminate sex and race as attributes for appointing authorities to consider.

3. Yes. Appointing authorities may lawfully take into consideration geographical areas when selecting appointees to City commissions, boards, committees or panels. Additionally, appointing authorities may consider the racial and gender demographics of geographical areas, provided that all individuals from the same geographical area are treated equally regardless of his or her race or gender

ANALYSIS

I. ARTICLE 1, SECTION 31 OF THE CALIFORNIA CONSTITUTION PROHIBITS THE CITY FROM DISCRIMINATING AGAINST OR GRANTING PREFERENTIAL TREATMENT TO INDIVIDUALS ON THE BASIS OF RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN.

Effective August 28, 1997, Proposition 209 banned government affirmative action programs that give preferential treatment based on race, sex, color, ethnicity or national origin. Proposition 209 amended the California Constitution to read, "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a). Proposition 209 (hereafter referred to as "Section 31") was intended to end government sponsored discrimination and, specifically, all governmental affirmative action programs and preferential hiring, contracting and university admissions practices. *Id*; *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 562 (2000).

Although the prohibitions in Section 31 are absolute, they are limited in the scope to "the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a). Therefore, the prohibitions in Section 31 will apply to appointments to City commissions, boards, committees and panels only if a court finds such appointments constitute

public employment, public education, or public contracting. These appointments do not concern public education or public contracting, and likely do not amount to "public employment" as the term is used in Section 31.

A. Members of City Commissions, Boards, Committees and Panels Appointed Pursuant to San Diego Charter Section 42 are Public Officers, Not Public Employees.

Courts have distinguished public officers from public employees. The leading opinion on this distinction is *Coulter v. Pool*, 187 Cal. 181 (1921). In *Coulter*, the Court defined a public office as follows:

> A public office is ordinarily and generally defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public.

Id. at 186-187.

More recently, in *Dibb v. County of San Diego*, 8 Cal. 4th 1200 (1994), the California Supreme Court adopted this definition to determine whether members of San Diego County's Citizens' Law Enforcement Review Board (CLERB) were public officers rather than public employees. Applying the *Coulter* analysis, the Court held that members of CLERB are public officers rather than public employees because they are "appointed under the law for a fixed term of office and are delegated a public duty to investigate specified citizen complaints against county sheriff and probation department employees, and to make recommendations to the board of supervisors." *Dibb*, 8 Cal. 4th at 1213.

The City commissions, boards, committees and panels referenced in Charter section 42 are not expressly defined, but the legislative history suggests that this section only applies to those citizen oriented bodies created by local law to advise local officials. *See* City Ballot Pamphlet, General Election (Nov. 6, 1973), argument for Proposition K at 30 ("Only by providing a method for airing the widest views and divergent opinions in our community, can these citizen oriented commissions, boards, committees and panels effectively perform their advisory functions, which have been so important to City officials over the years.") Similar to San Diego County's CLERB, members appointed to the positions contemplated in Charter section 42 generally embody the traditional characteristics of a public officer; they are appointed under local law for a fixed term of office and delegated with a public duty "to exercise a part of the governmental functions of the political unit for which [they are] acting." *Dibbs*, 8 Cal.4th at 1212.

This conclusion is germane only to appointments to City commissions, boards, committees and panels that qualify as a "public office." Our Office has not reviewed the characteristics of every City commission, board, committee or panel. Therefore, an individualized inquiry should be done to ensure that members of any particular City commission, board, committee or panel qualify as "public officers" as defined in *Coulter* and *Dibbs*.

B. Appointments to a Public Office Fall Outside the Scope of the Prohibitions in Article 1, Section 31 of the California Constitution.

In construing constitutional provisions, "courts look first to the language of the constitutional text, giving the words their ordinary meaning." *Powers v. City of Richmond*, 10 Cal. 4th 85, 91 (1995). Where a text is "clear and unambiguous" courts "need look no further." *Bowens v. Superior Court*, 1 Cal. 4th 36, 48 (1991). Section 31 limits its reach to the "operation of public employment" and there is no support to inflate this term to include public office.

Because the California Supreme Court had established a distinction between public office and public employment prior to voter approval of Proposition 209, the absence of any mention of public office in Proposition 209 is significant. Voters are deemed to have been aware of existing laws and judicial constructions of laws when they enact an initiative measure such as Proposition 209. *Wilson v. John Crane, Inc.*, 81 Cal. App. 4th 847, 855 (2000); *Hill v. National Collegiate Athletic* Assn. 7 Cal.4th 1, 23 (1994) ("When an initiative contains terms that have been judicially construed, the presumption is almost irresistible that those terms have been used in the precise and technical sense in which they have been used by the courts."). Thus, a court would likely presume that the voters intended Section 31 to be consistent with existing law, and did not intend the language "operation of public employment" to include the selection of public officers.

Likewise, interpreting Section 31 to apply to public officers would conflict with other California constitutional provisions that require the consideration of racial, ethnic, and gender diversity in the appointment of public officers. For instance, the California Constitution directs the Governor to "strive insofar as practicable to provide a balanced representation of the geographic, gender, racial, and ethnic diversity of the State" in appointing members to the Citizens Compensation Commission. Cal. Const. art. III, § 8(c).[1] The California Constitution also provides that the Governor's selection of the Regents of the University of California "shall be able persons broadly reflective of the economic, cultural, and social diversity of the State, including ethnic minorities and women." Cal. Const. art. IX, § 9(d). The only way to harmonize these constitutional provisions with Section 31 is to limit Section 31 to the operation of public employment, and not extend its reach to the appointment of public officers. *Greene v. Marin County Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277, 290 (2010) ("Rudimentary principles of construction dictate that when constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted.")[2]

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[1] Although not binding as precedent there, a trial court in Sacramento recently held that Section 31 does not apply to the appointment of public officers to the Citizens Compensation Commission. *See Connerly v. State*, 229 Cal. App. 4th 457 (2014).

[2] Although a court need not look to voter intent to interpret Section 31, its historical context reaffirms the notion that it was intended to cover only conventional public employment. The Legislative Analyst – the only ballot material that provides any insight into the type of "public employment" covered under Section 31 – specifies that the measure "would eliminate affirmative action programs used to increase hiring and promotion opportunities for state and local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions." Ballot Pamp. analysis for Proposition 209 by the Legislative Analyst, p. 31, prepared for the voters, Gen. Elec. (Nov. 5, 1996) (emphasis added). The appointment of a members to City commissions, boards, committees and panels, does not neatly fall within these categories of hiring, promotion, training, or recruitment for public employment.

C. San Diego Charter Section 117 Likely Does Not Change The Status Of Members On City Commissions, Boards, Committees or Panels From Public Officers to Public Employees.

As a charter city, the City is empowered under article XI, section 5 of the California Constitution to regulate, control, and govern its internal affairs, including its role as an employer. *Johnson v. Bradley*, 4 Cal. 4th 389, 395–96 (1992). A court will look to the City's Charter for guidance on the parameters and employment rights of City employees. *Estrada v. City of Los Angeles*, 218 Cal. App. 4th 143, 152 (2013*); Williams v. Department of Water & Power*, 130 Cal. App. 3d 677, 680 (1982).

There is an argument that Charter section 117 creates a public employment relationship between the City and members on City commissions, boards, committees and panels because it provides that "members of all boards and commissions" are part of the "unclassified service" of City employment. San Diego Charter §117(a)(2). Further, our Office has previouslyadvised that members of certain boards and commissions are entitled to limited benefits such as indemnification and workers' compensation similar to public employees. *See* 2010 City Att'y MS 919 (2010-2; Apr. 8, 2010); City Att'y MS 2014-23 (Nov. 17, 2014) (The city would likely be required to indemnify the City's Airport AdvisoryCommittee members as "employees" under the California Government Claims Act).

Although Charter section 117 may confer some members of boards and commissions with certain limited protections traditionally provided to public employees, it does not change the crucial terms or conditions that distinguish these members as public officers. Specifically, Charter section 117 does not change the fixed tenure of these positions, the incumbent terms of its members, or the delegated public duty to advise the Mayor, Council, or Civil Service Commission. *See Spreckels v. Graham*, 194 Cal. 516 (1924). Since these terms and conditions remain intact, Charter section 117 cannot transform an otherwise clear public office into an "operation of public employment" within the scope of Section 31.

As public officers, the appointment of members to City commissions, boards, committees, and panels, as prescribed in Charter section 42, likely fall beyond the scope of Section 31.

II. THE EQUAL PROTECTION CLAUSE REQUIRES LIKE PARTIES TO BE TREATED EQUALLY UNDER THE LAW.

The equal protection clause of the California constitution requires that governmental decision makers treat parties equally under the law if those parties are alike in all relevant respects. Cal. Const. art. I, § 7; *Las Lomas Land Co., LLC v. City of L.A.*, 177 Cal. App. 4th 837, 857 (2009).[3] In considering whether legislation violates the equal protection clause, courts apply different levels of scrutinydepending on the classifications used to treat two or more similar parties differently.

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[3] The Fourteenth Amendment to the United States Constitution similarly provides that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. However, since the directive in Charter section 42 to consider race and gender in the appointment of a public office violates the California equal protection clause, this Memorandum will not conduct a separate federal equal protection clause analysis.

Legislative classifications are presumptively valid and may not be rejected by the courts unless they are palpably unreasonable. *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 33 (2001). But legislative acts that treat similarly situated parties differently on the basis of "suspect classifications" or "fundamental rights" are not presumptively valid and must pass strict judicial scrutiny – which means such acts will only survive an equal protection challenge "if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available." *Id*; *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 298 (2007).

A. The City Must Survive Strict Judicial Scrutiny to Consider Gender and Race in the Appointment Process of Charter Section 42.

In California, a classification based on gender or race is considered "suspect" for purposes of an equal protection analysis. *See Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17–20 (1971) ("classifications based upon sex should be treated as suspect")[4]; *C & C Const., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284, 298 (2004) (discussing race); *State Pers. Bd.*, 92 Cal. App. 4th at 34 ("the core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions"). Likewise, the opportunity to participate in public office, such as a City commission, board, committee or panel, is a "fundamental right." *Bay Area Women's Coal. v. City & Cnty. of S.F.*, 78 Cal. App. 3d 961, 969 (1978).

Consideration of suspect classifications in the appointment of public officers triggers strict judicial scrutiny. The recent decision in *Connerly v. State*, 229 Cal. App. 4th 457 (2014), illustrates that, as a matter of law, legislative directives similar to Charter section 42 violate the equal protection clause without justification strong enough to survive strict scrutiny. In *Connerly*, the American Civil Rights Foundation challenged the constitutionality of California Government Code section 8252, which requires the California Citizens Redistricting Commission to be comprised of members that "reflect [California's] diversity, including, but not limited to, *racial, ethnic, geographic, and gender diversity*." *Id.* at 461 (emphasis added). The trial court dismissed the lawsuit as to the alleged violation of Proposition 209 (Cal. Const., art. I, § 31), but the court of appeal permitted the lawsuit to proceed on its merits past a demurrer stage on the legal theory that the selection process for the Citizens Redistricting Commission violated the federal equal protection clause. *Connerly*, 229 Cal. App. 4th at 460, 466. The court held that *Connerly* could show a *prima facie* case of federal equal protection violations because such a selection process "must be subjected to strict judicial scrutiny in its implementation … [and] must be narrowly tailored to meet the goal of diversity without straying into invidious discrimination." *Id.* at 466.[5]

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[4] The federal equal protection clause applies a slightly less strict "intermediate scrutiny" for classifications based on gender, but this does not affect our analysis under the California equal protection clause. *State Pers. Bd.*, 92 Cal. App. 4th at 32; *Molar v. Gates*, 98 Cal. App. 3d 1, 16-17 (1979) ("in light of the repeated affirmations by our [California] Supreme Court that gender-based classifications are suspect and on that basis alone are subject to strict scrutiny, even if the [US] Supreme Court should adopt an intermediate level of analysis, we are satisfied that sex-based classifications will continue to be subjected to the highest level of review.")

[5] Although the California constitutional guarantee is independent of the federal guarantee, "California courts consider decisions of the United States Supreme Court and other federal courts as persuasive authority because the equal protection provision of the California Constitution is substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution." *Walgreen Co. v. City & Cnty. of S.F.*, 185 Cal. App. 4th 424, 434 (2010).

Connerly is currentlyongoing in the Superior Court of Sacramento County where the court will decide whether the challenged selection provisions can survive strict scrutiny.

The selection language in Charter section 42 is similar to the challenged selection language in *Connerly*. Both require appointing authorities to consider gender and race in the appointment process. As such, a court will likely find, as in *Connerly*, that the Charter section 42 selection process violates the California equal protection clause unless the City can provide the justification needed to survive strict judicial scrutiny.

B. The City Has Not Shown a Compelling Reason to Consider Gender and Sex in the Selection Process of Charter Section 42.

Even though Charter section 42 was enacted via voter initiative, it is still subject to the same constitutional limitations that apply to statutes adopted by the Legislature. *In re Marriage Cases*, 43 Cal. 4th 757, 851 (2008) ("our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution.") (superseded on other grounds by Constitutional Amendment); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981) ("It is irrelevant that the voters rather than a legislative body enacted [the challenged law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.") To survive an equal protection challenge, the City must articulate a compelling interest to consider suspect classifications in the appointment of members to City commissions, boards, committees or panels. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). This compelling interest must have existed at the time Charter section 42 was enacted and must be supported, with some degree of specificity, by convincing evidence that the need for such remedial action was necessary. *State Pers. Bd.*, 92 Cal. App. 4th at 37. The language of Charter section 42 and its associated legislative history falls short of this standard.

The ballot language in support of Proposition K provides the only available justification for the consideration of gender and race in the selection process. It reads:

> The proposal includes another requirement aimed at diminishing discrimination and establishing a broader representative base in the appointment of persons to city commissions, boards, committees and panels. The appointing authoritywould be required to take into account such factors as race, sex and residence of appointees to the end that membership on much city organized citizen groups reflects as broad and varied segment of the entire community as is possible.
>
> Only by providing a method for airing the widest views and divergent opinions in our community, can these citizen oriented commissions, boards, committees and panels effectively perform their advisory functions, which have been so important to City officials over the years.

City Ballot Pamphlet, General Election (Nov. 6, 1973), argument for Proposition K at 30.

Clearly, the goal of Proposition K was to "diminish discrimination" and "establish[] a broader representative base in the appointment of persons to city commissions, boards, committees and panels." *Id.* But this generalized assertion of past discrimination is not sufficient

to show a compelling interest needed to survive strict judicial scrutiny. *State Pers. Bd.*, 92 Cal. App. 4th at 38 (Merely "conceding past discrimination" or recognizing "societal discrimination" is not enough to satisfy this criterion.). "Only the most exact connection between justification and classification will suffice." *Woods v. Horton*, 167 Cal. App. 4th 658, 675 (2008).

The ballot language also shows that the voters considered Proposition K the "only" method to end discrimination and achieve a broader representative base. But this assertion, alone, will not provide a compelling interest. The City must prove that it considered nonracial and nongender-based alternative measures and determined that the least restrictive method to achieve the stated goal of the legislation was Proposition K. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 732 (2007). No such legislative record exists. The City cannot cite to any report, study, or testimony to clearly identify any compelling interest to support Proposition K. Thus, a court will likely find the directive in Charter section 42 to consider sex and race in selecting appointees violates the equal protection clause of the California constitution.[6]

C. The City Has a Rational Basis to Consider "Geographical Area" in the Appointment of Members to City Commissions, Boards, Committees or Panels.

The directive to consider "geographical area" in selecting appointees on City commissions, boards, committees and panels does not implicate any suspect classifications. An individual's area of residence is not a "suspect" class. *Ostrager v. State Bd. of Control*, 99 Cal. App. 3d 1, 7 (1979) (status as a "resident" or "nonresident" is not a suspect classification); *Spurlock v. Fox*, 716 F.3d 383, 395 (6th Cir. 2013) ("the requirement that legislative classifications be color-blind does not demand demographic ignorance during the policymaking process"). To survive a federal or state equal protection clause challenge, the City need only show that distinguishing appointees on the basis of geographical area rationally achieves a legitimate purpose. *Warden v. State Bar*, 21 Cal. 4th 628, 642 (1999); *Spurlock*, 716 F.3d at 402. The language in the ballot materials for Proposition K likely satisfies this standard.

The purpose of Charter section 42 was to have members of City commissions, boards, committees and panels fairly represent "all segments of the community." Proposition K. Requiring appointing authorities to consider the geographical area of appointees is a rational

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[6] This requirement also risks violating California anti-discrimination laws. Both Title VII of the Civil Rights Act of 1964 (Title VII) and The California Fair Employment and Housing Act (FEHA) prohibit employers from discriminating against employees or applicants for employment on the basis of certain protected characteristics, including sex and race. 42 U.S.C.A. §§ 2000e – 2000e-17; Cal. Gov. Code. § 12900 - 12907. Appointees to City commissions, boards, committees or panels must be "employees" to receive protection under FEHA and Title VII. It is unclear whether these appointees would be covered under Title VII because this law generally does not cover individuals who render unpaid, volunteer services. *See Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 439-40 (5th Cir. 2013). However, FEHA may cover these appointees. California courts have expressly permitted city charters to create statutory employment relationships for purposes of FEHA liability. *Estrada v. City of L.A.*, 218 Cal. App. 4th 143, 152 (2013). Charter section 117 establishes that "members of all boards and commissions" are within the City's "Unclassified Service." This may be enough to trigger FEHA liability, however, this analysis is beyond the scope of this Memorandum because any consideration of gender or race in the appointment process of Charter section 42 violates the state equal protection clause.

means to achieve this purpose, sufficient to survive an equal protection clause challenge. Moreover, an appointing authority may even consider the demographic makeup of particular geographic areas, provided that all individuals from the same geographical area are treated equally regardless of his or her race or gender. *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207, 217-18 (2009) (School district's use of a student's residential neighborhood demographics, which included consideration of household income, education level of adults, and the racial composition of the neighborhood as a whole, to assign students to schools and academic programs did not violate California Constitution because students in a given residential area were treated equally regardless of the student's individual race or other personal characteristics.)[7]

CONCLUSION

Appointees to the City commissions, boards, committees and panels contemplated in Charter section 42 are public officers likely outside the scope of the prohibitions in Article 1, section 31 of the California Constitution. However, the requirement in Charter section 42 to take race and gender into consideration in selecting appointees violates the equal protection clause of the state constitution because there is no evidence in the legislative record to show a compelling interest to treat similarly situated parties differently based on race and gender; further, there is no evidence to support an argument that the goals of Proposition K are accomplished by the least restrictive means. Appointing authorities may lawfully take into consideration geographical area, and the demographics of such areas, when selecting appointees, provided that all individuals from the same geographical area are treated equally regardless of his or her race or gender. To best comply with these legal requirements and decrease the possibility of costly litigation, it is the opinion of this Office that the language in Charter section 42 should be amended to eliminate "sex and race" as attributes for appointing authorities to consider in selecting appointees to City commissions, boards, committees or panels.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Gregory J. Halsey
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[7] Although this case primarily focuses on whether the challenged school program violated Proposition 209, its analysis of whether the program gave preferential treatment based on race is analogous to the analysis a court would rely on to evaluate an equal protection clause violation.