

MEMORANDUM OF LAW

DATE: August 9, 1991

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Does State or Local Elections Law Apply to Initiative
Petitions to Amend the City's Charter and Initiative
Petitions to Amend the City's General Plan?

Both Councilmember McCarty and City Clerk Charles Abdelnour have asked the City Attorney to review and respond to issues raised by John Kern's letter of May 16, 1991. A copy of Mr. Kern's letter is attached as Exhibit A. This memorandum of law responds to the issue raised by Mr. Kern of whether state or local elections law applies to the Parks and Wildlife Initiative (Parks Initiative) and Prevent Los Angelization Now Initiative (P.L.A.N. Initiative) currently being circulated in The City of San Diego.

The other legal issues raised in Mr. Kern's letter pertaining to alleged defects in City documents and their effect, if any, on the Parks Initiative are addressed in a separate memorandum. Although we understand that the Parks Initiative was officially withdrawn by the proponents by written notice to the City Clerk dated August 2, 1991, it is important to resolve the issue of whether state or local elections law applies to initiatives purporting to amend the City's Charter. Therefore, we discuss the Parks Initiative, even though the issue as to whether state or local elections law applies to charter amendment initiatives is moot as to that particular initiative.

BACKGROUND

The P.L.A.N. Initiative was published on March 15, 1991, and became eligible for circulation in The City of San Diego on April 5, 1991. A copy of the P.L.A.N. Initiative is attached as Exhibit B. This initiative, if adopted, would amend the City's Progress Guide and General Plan.

The Parks Initiative was published and qualified for circulation in The City of San Diego on April 16, 1991. A copy of the Parks Initiative is attached as Exhibit C. This initiative, if it had been adopted, would have amended the San Diego City Charter to place additional restrictions on parklands.

Neither the Parks Initiative nor the P.L.A.N. Initiative bear the following notice in 12-point type:

THIS PETITION MAY BE CIRCULATED BY A PAID

SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE A RIGHT TO ASK.

QUESTIONS PRESENTED

1. Does the California Elections Code, in particular section 41.5, apply to an initiative petition amending the City of San Diego's Progress Guide and General Plan?
2. Does the California Elections Code, in particular section 41.5, apply to an initiative petition amending the San Diego City Charter?
3. Assuming state law applies to charter amendment initiative petitions, does the fact that a petition to amend the San Diego City Charter omits the notice required by California Elections Code section 41.5 invalidate that petition?

ANSWERS TO QUESTIONS PRESENTED

1. State Elections law does not apply to initiative petitions to amend the City's Progress Guide and General Plan.
2. State Elections Code provisions on charter amendment initiatives, including section 41.5, apply to initiatives to amend the San Diego City Charter.
3. The fact that an initiative petition to amend the San Diego City Charter is circulated without the notice required by California Elections Code section 41.5 does not invalidate the petition.

ANALYSIS

A. Does State or Local Law Apply to Initiatives to Amend the City's Progress Guide and General Plan?

The authority for charter cities to establish procedures for their own elections, including initiative elections, flows directly from the California Constitution through local charters and ultimately through local ordinances.

The power of the people to adopt, repeal or amend legislation directly at either the state or local level is exercised by powers known as the initiative or referendum. In California, the powers of initiative and referendum are powers reserved to the people, not granted to them, by the state constitution.F

Article II, Section 11 (formerly Article IV, Section 25), reserves the initiative and referendum powers to the people for action on local measures and declares that the Legislature will specify the procedures to be used. It specifically states that it does not affect charter cities. Article XI, Section 3, authorizes cities and counties to adopt charters. In addition, Article XI, Section 5, specifically authorizes city charters to provide for the conduct of city elections. Historically, Article II, Section 11 and its predecessors are relied upon by charter cities to provide in their charters for the exercise of the initiative and referendum process with respect to legislative acts such as ordinances. See District Election Etc. Committee v. O'Connor, 78 Cal. App. 3d 261, 271 and n.13 (1978).

Martin v. Smith, 176 Cal. App. 2d 115, 117 (1959).

Consequently, these powers are construed liberally in favor of their exercise. Hunt v. Mayor & Council of Riverside, 31 Cal. 2d 619, 628 (1948); Ortiz v. Board of Supervisors, 107 Cal. App. 3d 866, 870 (1980); Martin, 176 Cal. App. 2d at 117. If there is a conflict between a city charter and the state constitution, that which reserves the greater power of initiative or referendum prevails. Hunt, 31 Cal. 2d at 622-23; Atlas Hotels, Inc. v. Acker, 230 Cal. App. 2d 658, 661 (1964).

Generally, initiative and referendum powers may be exercised for all types of legislative acts, except for certain types of tax and spending ordinances. A city charter may, however, expand the area in which its electors have the power of direct legislation as compared with general law cities. Atlas Hotels, 230 Cal. App. 2d at 661; 38 Cal. Jur. 3d Initiative and Referendum, section 56, pages 433-435, and section 61, page 440 (1977).

In San Diego, legislative power is vested generally in the City Council, but is reserved also to the people:

All legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California, in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the State.

San Diego City Charter, article III, section 11.

Article I, section 2 of the Charter contains another expression of the grant of legislative power to the City. Both sections 2 and 11 of the Charter were adopted in 1931 and have not been amended since.

The Charter of The City of San Diego provides for the initiative and referendum process to be exercised in the City through two separate Charter sections: 8 and 23. San Diego City Charter section 8 requires the City Council to adopt procedures governing municipal elections and place them in an "election code ordinance." It specifically provides that "all elections provided by this Charter, . . . including submission of questions to the voters, shall be conducted in the manner prescribed by said election code ordinance." This the City Council has done. The City's election code appears in the San Diego Municipal Code (SDMC sections 27.2001 through 27.3211). SDMC sections 27.2501 through 27.2531 set forth the manner of exercising the initiative power within the City.

Charter section 23 also deals specifically with both the initiative and referendum powers. This Charter section reads as follows:

The right to recall municipal officers and 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; and any elective officer may be recalled from office. 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 initiation of an ordinance for the consideration of the Council shall be three percent of the registered voters of the City at the last general City election; that for the direct submission of a measure to the people it shall require a petition signed by ten per cent of the registered voters of the City at the last general City election; that for a referendum upon an ordinance passed by the Council it shall require a petition signed by five per cent of the registered voters of the City at the last general election; and that for the recall of an elected officer who is elected by all of the electors of the City, it shall require a petition signed by fifteen per cent of the registered voters of the City at the last general City election; and that 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.

This Charter section was adopted in 1941 and was amended in 1988. Charter section 23 requires that, in its election code adopted pursuant to Charter section 8, the City Council include "an expeditious and complete procedure for the exercise by the people of the initiative . . . and referendum" The plain language of this Charter section leaves the task of developing the rules for exercising the initiative to the City Council.

The City's ordinances governing the initiative are set forth in SDMC section 27.2501-27.2531 (copy attached as Exhibit D). These regulations are designed to be full and complete regulations of the initiative power in the City. These sections contain no requirements similar to that contained in California Elections Code section 41.5. (See page 6 of this

memorandum for full discussion of Section 41.5.)

The question remains whether the City's initiative procedures apply to initiatives to amend the City's Progress Guide and General Plan. The answer is "yes." The adoption of an amendment to a general plan must be accomplished by means of a resolution (Government Code section 65356). With certain exceptions, amendments to the general plan are legislative acts that are subject to the initiative and referendum process. See, e.g., *Midway Orchards v. County of Butte*, 220 Cal. App. 3d 765 (1990), reversed in unpublished portion of opinion for other reasons, rev. denied Aug. 1, 1990.

In the present instance, the P.L.A.N. Initiative, if adopted, would amend the City's Progress Guide and General Plan and the proper procedure to be followed by the proponents circulating the petition is that set forth in the Municipal Code. The petition contains no notice as described in the California Elections Code section 41.5. However, no such notice is required by the City's Election Code. Therefore, P.L.A.N.'s failure to contain the notice has no bearing on the initiative's validity.

B. Does State or Local Law Apply to Charter Amendment Initiatives?

The second legal question pertains to whether state or local elections law applies to charter amendment initiatives. This question was posed to the City Attorney in late 1988, and was answered by a Memorandum of Law dated January 4, 1989 (copy attached as Exhibit E). In that Memorandum of Law, the City Attorney concluded that indeed state law governs charter amendment initiatives. That memorandum relies heavily on the case of *District Election Etc. Committee v. O'Connor*, 78 Cal. App. 3d 261 (1978) hearing denied, which arose in the First District Court of Appeal. Although not controlling in this jurisdiction, the case is well reasoned and is persuasive authority for the proposition that, in contrast to other legislative acts of charter cities, regulation of the charter amendment process in California is a matter of statewide concern. Furthermore, this case stands for the proposition that the charter amendment process is governed exclusively by state laws which supersede conflicting provisions, if any, of a city charter. *Id.* at 271-274. To the extent that other City Attorney memoranda reach a different conclusion, they should be disapproved.

The Elections Code was amended in 1990 to add section 41.5. The Code section reads:

Section 41.5 Specific language for state and local petitions

Notwithstanding any other provision of law, any state or local initiative petition required to be signed by voters shall contain in 12-point type, prior to that portion of the petition for voters' signatures, printed names, and residence addresses, the following language:

NOTICE TO THE PUBLIC
THIS PETITION MAY BE CIRCULATED BY A PAID
SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE
THE RIGHT TO ASK. Stat. 1990 ch. 1026 Section
1.

This provision became effective January 1, 1991. If a local charter amendment initiative petition fails to contain this notice as of January 1, 1991, the petition would violate the State Elections Code.

C. Assuming State Law Applies to Charter Amendment Initiatives, Is Violation of the Notice Required by State Law Fatally Defective?

Although there are California cases that would treat failure to contain the type of notice set forth in California Elections Code section 41.5 as fatally defective (see e.g., *Walker v. City of Salinas*, 56 Cal. App. 3d 711 (1976)), the bulk of the cases tend to favor holding initiative, referendum and recall elections even though there may be technical defects in the petition that led to the election. See e.g., *Epperson v. Jordan*, 12 Cal. 2d 61 (1938); *Truman v. Royer*, 189 Cal. App. 2d 240 (1961); *Laam v. McLaren*, 28 Cal. App. 632 (1915). If there is a violation of the state's elections code, the better remedy is to punish the proper party, not the petition signer by invalidating the petition. See *Truman v. Royer*, 189 Cal. App. 2d 240 (1961); see also, Cal. Att'y Gen Op. 80 SOS 1, April 8, 1980 (copy attached as Exhibit F).

Under the holding and reasoning of the O'Connor case, supra, the California State Elections Code, including section 41.5, applies to initiatives that purport to amend the San Diego City Charter. Section 41.5 was enacted in 1990 and became effective on January 1, 1991 (Stat. 101, ch. 1026, section 1). The Parks Initiative should have, but does not contain, the notice required by Elections Code section 41.5. Although circulation of the petition violates state law, a court of law may find that the violation is a mere technical defect that would not invalidate the petition, especially prior to the election. Instead, the proper remedy would be to cite the proponents.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

CCM:jrl:014(x043.2)

Attachments

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