

MEMORANDUM OF LAW

DATE: March 22, 1993

TO: Councilmember Judy McCarty

FROM: City Attorney

SUBJECT: Whether Award of Paramedic System Management Contract is Subject to Referendum

This is in response to your memorandum of March 1, 1993, to City Attorney John W. Witt regarding the City Council's recent award of the Paramedic System Management Contract.

QUESTION

You ask whether the City Council's award on February 23, 1993, of the Paramedic System Management Contract to American Medical Services is subject to the referendum power. You also ask two related questions:

1. Whether the City Council's action in awarding the paramedic contract constituted a "franchise monopoly," thereby triggering the right to referendum?
2. Assuming the resolution awarding the paramedic contract is subject to referendum, whether someone filing a notice of intent to circulate a referendum, or alternatively, whether submission of the requisite number of referendum signatures, would trigger suspension of the City Council's action to award the contract?

BACKGROUND FACTS

To understand the issues, it is helpful to summarize the process that led up to City Council's awarding the Paramedic System Management Contract.

In August 1992 the City Manager reported that the current paramedic contract with Hartson's was due to expire on June 30, 1993. (City Manager's Report No. 92-258; August 5, 1992.) In that same August 1992 report, the City Manager pointed out four (4) possible types of paramedic services available. The City Manager concluded by asking for City Council direction in pursuing options from among three possible courses of action; 1) to develop a plan for paramedic services to be provided by the Fire Department; 2) to exercise the remaining two-year option under the contract with Hartson's; or, 3) to enter a competitive procurement process.

The matter was heard at Council on August 11 and was continued to September 29, 1992. In a report dated September 9, 1992, the City Manager summarized four (4) main options to provide paramedic services. The City Manager in that report again sought direction from Council to pursue one of the four (4) options (see City Manager's Report No. 92-279.) The matter was heard by Council on September 29, 1992, at which time the City Council adopted Resolution No. R-280756, which among other things, directed the City Manager to prepare a Request For Proposal for a Paramedic System Management Contract.F On that same date, Council adopted Resolution No. R-280757 authorizing the City Manager to expand the shared paramedic/firefighter system. That resolution is not relevant to the issues here.

In October 1992, as directed, the City Manager returned to Council with a proposed Request For Proposal for paramedic services. (See City Manager's Report No. 92-314, October 14, 1992.) The City Manager's Report outlined a three-step process for procurement: 1) Review of credentials; 2) review of proposals; and, 3) review of financial aspects of proposals. The City Manager proposed that he come back to Council with a recommendation for City Council's approval only after this three-step process was complete. On October 19, 1992, the City Council approved the City Manager's recommendations set forth in the October 14 report (Resolution No. R-280907). Among other things, Resolution No. R-280907 authorized issuance of a Request For Proposals as proposed by the City Manager with some minor amendments and approved a proposed procurement timeline.

On January 29, 1993, after completing the above-described procurement process, the City Manager recommended as a first alternative "awarding the contract" to the City's Fire Department provided certain conditions were met (City Manager's Report No. 93-31, January 29, 1993). The City Manager's second alternative was to award the contract to American Medical Services.

On February 23, 1993, following public hearing and debate, the City Council chose the City Manager's second alternative and adopted Resolution No R-281521, which reads as follows: "BE IT RESOLVED, by the Council of The City of San Diego, that this Council hereby authorized the award of the Paramedic Service Management Contract to American Medical Services." The basic issue presented here is whether Resolution No. R-281521 is subject to referendum.

#### ANALYSIS

- A. Exercise of Referendum Under State Constitution, Charter and City's Election Code.

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. The powers of initiative and referendum are powers reserved to the people, not granted to them, by the state constitution.F Article II, Section 8 (formerly Article IV, Section 22), reserves the initiative power to the people to adopt or reject state statutes or constitutional amendments; Article II, Section 9 (formerly Article IV, Section 23), reserves the referendum power to the people to approve or reject state statutes, except certain identified types of statutes; 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.

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); 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 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, but not for administrative acts. Atlas, 230 Cal. App. 2d 658, 661; 38 Cal. Jur. 3d Sections 3, 57.

In San Diego, legislative power is vested generally by the Charter in the City Council, but it is reserved also to the people. San Diego City Charter, article III, section 11.F The next Charter section restricts the delegation of some legislative power by the Council. Charter section 11.1 (adopted June 3, 1980; amended November 4, 1980, and June 3, 1986). Although the title of section 11.1 of the Charter implies that all legislative powers of the City are nondelegable, a careful reading of that section reveals that it prohibits delegation of power to adopt, repeal or amend only limited kinds of legislation, namely, ordinances or resolutions which involve raising or spending of public monies. This interpretation is confirmed by reading California Constitution, article XI, section 11(a), which this Charter section expressly parrots. See also City Attorney's Report to the Honorable Mayor and City Council regarding "Ballot Proposition - Nondelegation of Legislative Power," dated April 10, 1980.

In

addition to the general grant of legislative power in Charter section 11, Charter section 2 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.

Charter section 23 deals specifically with referendum powers. As amended in 1988, This Charter section reads in pertinent part as follows:

The . . . powers of the initiative and referendum are hereby reserved to the people of the City . . . 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 referendum . . . . Emphasis added.

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."

The City Council has adopted an election code ordinance, which is codified at San Diego Municipal Code ("SDMC") Sections 27.2001 through 27.3211. SDMC Sections 27.2601 through 27.2620 set forth the manner of exercising the referendum power.

The Municipal Code states which matters are subject to referendum in this City. The relevant San Diego Municipal Code section reads as follows: "Any legislative act, except acts making the annual tax levy, the annual appropriations, calling or relating to elections or relating to emergency measures, shall be subject to the referendum." Emphasis added. SDMC Section 27.2601.

In contrast with Charter section 23, under this Code section any "legislative act," not simply an ordinance, is subject to referendum. Section 27.2601 was added to the San Diego Municipal Code in 1968 (Ordinance No. O-9839 N.S.). Although the legislative history of SDMC Section 27.2601 is not

readily available, the drafters of this section carefully used the word "legislative act, not ordinance, in apparent recognition that the courts of this state have held continuously that legislative acts, whether they be in the form of ordinances or resolutions, are subject to referendum, but administrative acts are not. See, e.g., *Kleiber v. City & County of San Francisco*, 18 Cal. 2d 718 (1941); *Del Mar Terrace Conservancy, Inc. v. City Council*, 10 Cal. App. 4th 712 (1992), rehearing denied, 10 Cal. App. 4th 1872e (1992); *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774 (1965); *Reagan v. City of Sausalito*, 210 Cal. App. 2d 618 (1962).

The question presented then, is whether the City Council resolution of February 23, 1993, is a "legislative act" and therefore subject to referendum, or is an "administrative act" and not subject to referendum. That issue is dealt with in the next section.

B. Is City Council Resolution No R-281521 an Administrative or Legislative Act?

The distinction between legislative and administrative acts is vague and elusive. One of the best descriptions was articulated by the First District Court of Appeal in *Reagan*, 210 Cal. App. 2d at 618, as follows:

The power of referendum may be invoked only with respect to measures that are strictly legislative in character. Citation omitted. Acts constituting a declaration of public purpose, and making provision for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence.

Citing *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 124 (1921); *Martin v. Smith*, 184 Cal. App. 2d 571, 575 (1960); 3 Stan. L. Rev. 497, 502, 504 (1951); 5 *McQuillin, Municipal Corporations* Section 16.55, 253-256 (3d ed.).

In addition, when a local government merely implements a

state policy, the local government's action is an administrative act, and therefore not subject to referendum. See *Simpson v. Hite*, 36 Cal. 2d 125, 130 (1950); 38 Cal. Jur. 3d Section 39.

Although there is no case law exactly on point in California, a recent Oregon case is persuasive authority that award of a contract is an administrative action and therefore not subject to referendum. *Jack Gray Transport v. Ervin*, 113 Or. App. 742, 833 P.2d 1349 (1992), review denied, Or. , 840 P.2d 1295 (1992). In that case, a metropolitan service district's award of a contract to haul the county's solid waste was held to be an administrative action, and not subject to referendum.

Applying these statements of the law to the present facts, we conclude that the City Council's action on February 23, 1993, is an administrative act and not subject to referendum. Our reasons follow: First, the City Council resolution of February 23 contained no general statement of law or policy. Second, the City Council action was merely to award a contract for services, a task which is normally delegated to the City's Chief Administrative Officer, the City Manager, under Charter Section 27 and SDMC Sections 22.0501 through 22.0517. Third, the City Council chose in September 1992 as a matter of policy to follow and implement the policy declared in state law in selecting paramedic services providers (see Health and Safety Code Sections 1797.250 et seq.).

Cal. Health & Safety Code " 1797.250 through 1797.258 declares how local emergency medical services system may be provided in a given local area. In City Manager's Report No. 92-258 of August 1992, the City Manager discussed the state law regarding local paramedic services (Health and Safety Code " 1797.250 et seq.). Although arguably The City of San Diego, a charter city, is not required to follow state law in awarding these types of contracts (City Attorney Memorandum of Law dated October 25, 1985), the City Manager recommended as a matter of policy that this City follow state law in awarding the next paramedic service contract, thereby avoiding direct confrontation with the state and county and also avoiding possible costly and protracted litigation. The City's procedure for selecting a paramedic service system merely implements the broad policy guidelines set forth in the Health & Safety Code " 1797.250 et seq.

Lastly, the resolution by its own terms clearly does no more than award a contract. As shown above, the resolution adopted on February 23 was merely a necessary step in implementing the procurement process for paramedic services. The resolution contains no broad statement of law or policy to push it into the legislative arena.

In conclusion, Resolution No. R-281521 adopted by the City Council on February 23, 1993, awarding the paramedic services contract, is an administrative act and not subject to referendum. To find otherwise would seriously impair the ability of City government to perform essential governmental functions. We believe the courts would not permit the referendum process to be used to allow a vote each time the City chose to enter a contract for services. See 38 Cal. Jur. 3d Section 56. To make awards of contracts subject to referendum means that business in the City would come to a screeching halt.

As a related matter, you ask whether awarding the paramedic service contract amounts to the granting of a franchise, and if so, whether that would trigger the right of referendum of the February 23 resolution. First, it is assumed that you ask this question because the paramedic service contract will permit the contractor to use the 911 telephone system to learn about potential clients. No other ambulance service will be permitted access to the 911 system. Although some would argue that granting such access to the contractor and not to others would constitute a franchise, we think that fact alone does not create a franchise (or monopoly). Although other ambulance services will not be allowed access to the 911 system to obtain clients, other ambulance services will be allowed to operate in the City.

Charter section 103 sets forth the procedures for granting franchises to companies who seek to use City property to operate their businesses (for example, the electric power company and television cable companies). A franchise granted pursuant to Charter Section 103 is expressly subject to the referendum. California case law recognizes that a government's granting a privilege to private parties to conduct a business in some instances constitutes a franchise. See, e.g., *Pacific Rock & Gravel v. City of Upland*, 67 Cal. 2d 666 (1967). Although the paramedic services contract awarded by Resolution No. R-281521 has some characteristics of a franchise, we think on balance that the award of the contract to American Medical Services does not arise to the level of granting a franchise. See, e.g., *Subriar v. City of Bakersfield*, 59 Cal. App. 3d 175, 207-212 (1976); *Copt-Air v. City of San Diego*, 15 Cal. App. 3d 984 (1971); 34 Cal. Jur. 3d Sections 1 through 7. Therefore we stand by our conclusion that award of the paramedic service contract was an administrative act, and therefore the resolution making the award is not subject to referendum.

The last question you ask is whether certain referendum procedures would suspend the Council action of awarding the contract. Since we have concluded that the City Council's action is not subject to referendum, this question is moot.

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By

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