# MEMORANDUM OF LAW

Date: January 21, 1998

To: The Honorable Mayor and City Council

From: City Attorney

Subject: City's Authority to Hold Successive Recall and Successor Officeholder Elections and to Require a Recall Effort to be Launched within a Specified Time after Recall Committee Begins Fund Raising

At its meeting on November 24, 1997, the City Council asked the City Attorney to report to the Committee on Rules, Finance and Intergovernmental Relations on two questions pertaining to recall elections. This memorandum of law is in response to that request.

## QUESTIONS PRESENTED

1. May the City of San Diego amend its ordinances to require successive elections on (1) the recall, and (2) selection of a successor officeholder?

2. May the City require a recall effort to be launched within a specified period of time after a recall committee begins fund raising?

## SHORT ANSWERS

1. The City has ample authority under both the California Constitution and its own charter to amend City ordinances to require successive elections, first on the recall question, and then to elect a successor officeholder.

2. A Municipal Code provision requiring a recall effort to be launched within a specified time after a recall committee begins fund raising may be constitutionally defective, because such a requirement could be interpreted as an impermissible time limit on campaign fund raising. A recent federal case calls into question the constitutionality of imposing time limits on campaign fund raising. California Prolife Council Political Action Committee v. Jan Scully, No. S-96-1965, — F. Supp. —, 1998 WL 7173 (E.D. Cal. January 6, 1998).

## BACKGROUND

Currently, the San Diego Municipal Code (SDMC) requires that a special election be held for the dual purpose of (1) determining whether an official is to be recalled, and (2) if the recall effort is successful, electing a successor. Once a recall petition is presented to the Council by the Clerk, the Council "shall immediately call a special election for the purpose of submitting to the people the proposal to recall the official named in the petition, and if such official is recalled, to elect a successor." SDMC 27.2722.

Given the clear language of the Municipal Code, section 27.2722 would have to be amended to permit the election of a successor officeholder on a date other than the date of the recall election.

Under the current Municipal Code, a recall proceeding does not commence until someone publishes a notice of intent to circulate a recall petition. SDMC 27.2701-27.2732. The mere fact that someone goes through the formalities of creating a campaign committee to raise funds in furtherance of signature-gathering and to pursue a recall election does not qualify as, or trigger, a recall proceeding. See City Att'y MOL 97-9 (Mar. 20, 1997). Filing a statement of organization (410 Form) is a prerequisite for campaign fund raising in this state. Cal. Gov't Code 84101; see City Att'y MOL 97-9. Under current law, a recall committee has discretion to determine when, if ever, to publish the notice of intent to circulate a recall petition.

The current Municipal Code requires a recall petition to be filed in the Clerk's office within sixty days after the notice of intent to circulate the petition is published. SDMC 27.2715. There is no similar state law or Municipal Code requirement for a recall petition to be filed within a specified time after a recall committee has been formally created and has begun fund raising. The Municipal Code would have to be amended to add that requirement.

In March 1997, one group filed a 410 form declaring itself to be a campaign committee to recall the Councilmember representing District No. 1. In April 1997, another group filed a 410 form declaring itself to be a campaign committee to recall the Councilmember representing District No. 5. Both groups began fund raising in support of their recall efforts, but neither group has ever filed a notice of intent to circulate a recall petition. Under current law, these groups could continue to raise money indefinitely without ever formally launching the recall effort, that is, without ever publishing the notice of intent to circulate the recall petition. Under the proposed change, future groups would be required to formally launch their recall effort within a specified time after they form as campaign committees (that is, file their 410 forms) and begin fund raising.

## ANALYSIS

### I. California Constitution

The California Constitution grants broad authority to charter cities to establish procedures for their own elections, especially 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." Section 5(b) grants plenary authority to provide for the manner in which "municipal officers and employees whose compensation is paid for by the city shall be elected or appointed, and for their removal."

Article II, section 19 of the California Constitution states that "[t]he Legislature shall provide for recall of local officers. This section does not affect counties and cities whose charters provide for recall."

## II. San Diego City Charter

The San Diego Charter governs City elections as allowed by the California Constitution. San Diego Charter section 8 requires the City Council to adopt an election code ordinance, "providing an adequate and complete procedure to govern municipal elections . . . . 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." 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."

The Council has duly adopted an election code by ordinance, which is located in Article 2, Chapter II, of the Municipal Code. SDMC sections 27.2701 through 27.2732 of that article set forth the City's recall procedure. Under current law, the City requires a recall question and selection of a successor to be placed on the same ballot. SDMC 27.2722.

## III. State Elections Law Expressly Does Not Apply to Charter City Recall Elections

Sections 11000-11047 of the California Elections Code pertain to recall of local elected officers. However, the state's elections code expressly applies only to cities and counties not governed by charters. "This division governs the recall of elected officers of all . . . cities . . . . It does not supersede the provisions of a city charter . . . relating to recall." Cal. Elec. Code 11000.

Even if the legislature had not directly stated that California Elections Code provisions do not govern recall elections in charter cities, the courts have consistently held city recall elections to be a matter of local concern. "California courts have already determined that the conduct of municipal elections is a municipal affair and subject to municipal control." Johnson v. Bradley, 4 Cal. 4th 389, 402 (1992) citing Mackey v. Thiel, 262 Cal. App. 2d 362, 365 (1968). "It is settled that in cities operating under such charters, recall of officers is a municipal affair, which may be governed by the provisions of the charter, and that the general law in such cases is superseded." Muehleisen v. Forward, 4 Cal. 2d. 17, 19 (1935).

## IV. Historical Use of Separate Recall and Successor Elections

Historically, both methods of selecting a successor — doing it in the same election as the recall election versus doing it in a separate election — have been used in California. However, since the earliest uses of recall, selecting a successor at the same election as voting on the recall itself has been the most common method for choosing a successor. 1990 City Att'y MOL 1719, citing The Recall of Public Officers: A Study of the Operation of Recall in California, by Frederick L. Bird and Frances M. Ryan (1930). Until recently, the state allowed general law cities to vote on the recall question separately from the election of a successor officeholder.

Currently, the California Elections Code requires general law cities to use a recall ballot that includes the names of candidates to succeed the public official subject to being recalled. Cal. Elec. Code 11322(a). However, Elections Code section 11322 was only recently amended to impose this requirement on general law cities. 1994 Cal. Stat. ch. 79 (A.B. 2219), 2. Before 1994, in contrast with other types of local governments' recall elections, city recall elections did not have to include the election of a successor to the recalled official. Rather, before 1994, voters in a city recall election were given the option of determining whether the vacancy should be filled by appointment or by a separate election. Cal. Elec. Code 27311 repealed by 1994 Cal. Stat. ch. 79 (A.B. 2219), 2. The 1994 amendment appears to be no more than an effort to achieve uniformity between cities and non-cities.

In sum, the answer to the first question is that the City has ample constitutional and charter authority to amend its ordinances to require successive elections on the recall question and the selection of a successor officeholder. Nothing in state law calls the validity of this authority into question.

## V. Authority to Require a Recall Effort to be Launched within a Specified Time after Campaign Fund Raising Begun

There is more doubt about the City's authority to require a recall effort to be launched within a specified time period after a recall committee is formed and begins fund raising. As stated above, there is currently no Municipal Code requirement to this effect. If the Municipal Code were amended to add this requirement, the provision may be challenged as an impermissible time limit on campaign fund raising, because the provision would link mandatory launching of a recall effort with the date a campaign committee is formed and begins fund raising.

In a case decided January 6, 1998, a federal district court cast doubt on the validity of time limits on campaign fund raising that were adopted in November 1996 by the People of the State of California as part of Proposition 208. California Prolife Council, 1998 WL 7173. Declining to rule on the constitutionality of specific portions of Proposition 208, U.S. District Court Judge Lawrence K. Karlton found the proposition overall did not meet constitutional muster. In support of his lengthy opinion, the judge made 456 specific findings of fact, of which twelve were devoted solely to the issue of Proposition 208's time limits on fund raising, called "blackout periods." Findings of Fact Nos. 363-374, California Prolife Council Political Action

Committee v. Jan Scully, No. S-96-1965 (E.D. Cal. January 6, 1998) (visited Jan. 13, 1998) <http://www.caed.uscourts. gov/208fin.htm>. Among other things, he found that "[t]he blackout period discriminates against those disadvantaged candidates who have the ability to raise significant funds." Findings of Fact No. 373, California Prolife Council (No. S-96-1965). He also found that "[b]ecause candidates are unable to raise any money during the blackout period, only the wealthy will be able to spend in the applicable period." Findings of Fact No. 370, California Prolife Council (No. S-96-1965). Most of the other findings relate to the particulars of the effects of Proposition 208 on state legislative races, as opposed to local recall races, and therefore have only limited applicability to the question raised here.

The point is, however, that a federal court has raised serious constitutional concerns about the validity of establishing certain types of time limits on campaign fund raising. Id.; see also Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312 (9th Cir. 1992), cert. denied, 505 U.S. 1230 (1992) (invalidating time ban on off-year fund raising in California campaigns imposed by Proposition 73, adopted by vote of the people at the June 1988 election). But see Buckley v. Valeo, 424 U.S. 1 (1976) (upholding constitutionality of federal contribution limits based on election cycle).

Because a city law requiring a recall effort to be launched within a specified time period after a recall committee begins fund raising may be judged to be a time ban on fund raising, its validity is questionable.

## CONCLUSION

Article XI, section 5, and article II, section 19, of the California Constitution grant authority to cities to adopt laws governing election and recall of their officers. San Diego Charter sections 8 and 23 require the City Council to adopt an elections code by ordinance and to include procedures governing recall in that code. The City Council has adopted an elections code, which is located in chapter II, article 7, of the Municipal Code.

Currently the City's elections code requires a recall question and the election of a successor to be on the same ballot. Until 1994 state law required general law cities to hold their recall elections and the elections of successor officeholders on successive dates. There is ample authority for this City to amend its Municipal Code to require successive elections on the recall question and selection of a successor officeholder.

There is nothing in current state law or the Municipal Code requiring a recall effort to be launched within in a specific time after a recall committee has begun fund raising. The Municipal Code would have to be amended to create such a requirement. The courts might find a Municipal Code provision requiring a recall effort to be launched within a specified time after fund raising in support of the recall effort begins to be an impermissible time limit on campaign fund raising.

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