

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** March 16, 2009

**TO:** Elizabeth Maland, City Clerk

**FROM:** City Attorney

**SUBJECT:** Requirement to Publish Amendments to the Annual Appropriation Ordinance

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**INTRODUCTION**

The City occasionally amends its annual Appropriation Ordinance during a fiscal year, usually to permit reallocation of funds to meet the City's budgetary needs. The City Clerk has asked whether the ordinances amending the annual Appropriation Ordinance must be published. For reasons explained in more detail below, this Office concludes that such ordinances amending the annual Appropriation Ordinance should be published in the same manner as the annual ordinance.

**ANALYSIS**

San Diego is a charter city under the California Constitution, permitting it to "make and enforce all ordinances and regulations in respect to municipal affairs" subject only to its charter's restrictions and limitations. Cal. Const. art 11, § 5. It is well established that the manner and mode of enacting a municipal ordinance is a municipal affair. *Brougher v. Board of Public Works*, 205 Cal. 426, 438-439 (1928); *Adler v. City Council of City of Culver City*, 184 Cal. App. 2d 763, 768 n.1 (1960). Accordingly, our City Charter and Municipal Code govern the requirements for validly enacted City ordinances.

Charter section 71, entitled "Preparation and Passage of Annual Appropriation Ordinance" provides that "[u]pon final passage, the appropriation ordinance shall be published in the manner provided for the publication of other ordinances." The Charter also contemplates changes to the annual ordinance during a current fiscal year. Charter § 73. Generally speaking, such changes (amendments) to an ordinance may be accomplished only by another ordinance. 6 McQuillin Mun. Corp. § 21:4 (3rd ed. 2008). The Charter does not expressly require that ordinances amending the annual Appropriation Ordinance be published. However, it is reasonable to

conclude that the same procedural rules that apply to enactment of the annual Appropriation Ordinance apply to an ordinance amending it.

Charter section 18 governs the publication of other City ordinances. It provides that “[w]ithin fifteen days after final passage the title and number of each ordinance . . . of a general nature, together with a digest thereof prepared by the City Attorney, shall be published at least once in such manner as may be provided by this Charter or by ordinance.” San Diego Municipal Code section 22.0102 provides that “the City Clerk shall cause to be published” in the official city newspaper all ordinances of a general nature within fifteen days of their final passage.

The Charter and Municipal Code sections use the word “shall” to describe the Clerk’s duty to publish these ordinances. “Shall” implies a mandatory duty. However, when the charter or other applicable law does not make the publication of an ordinance a precondition to its effectiveness, California courts do not find them to be ineffective simply because they have not been published. Absent a precondition that publication is necessary before the ordinance takes effect, a requirement for post-enactment publication is considered to be a ministerial task and “directory” only. *Sacramento v. Dillman*, 102 Cal. 107, 111 (1894); *also see* 5 McQuillin Mun. Corp. § 16:77 (3rd ed. 2008).

This general rule was found applicable to the San Diego City Charter’s publication requirements for ordinances in *Hollander v. Denton*, 69 Cal. App. 2d 348 (1945). Mr. Hollander sued Mr. Denton, claiming he had unlawfully lowered the grade of the street. Mr. Denton provided certified copies of the ordinance setting the grade, resolutions permitting him to grade, and evidence of his compliance. Mr. Hollander lost at trial, and on appeal claimed the ordinance and resolutions were invalid because they had not been published as required by the City Charter.<sup>1</sup> The court disagreed, finding the San Diego Charter did not require the effective date of ordinances and resolutions to depend on their publication. The ordinance and resolution in the case had been lawfully enacted and took effect in accord with other Charter requirements. *Id.* 351-352. The court held that the charter requirements for publication were “merely directory.” *Id.* at 351. “The ordinance and resolutions were therefore, on their face, valid without publication.” *Id.* at 352. *See also*, *People v. Crittenden*, 93 Cal. App. 2d Supp. 871, 876 (1949).<sup>2</sup>

A determination that a law’s provisions are “directory” or “mandatory” does not decide whether the particular requirement is “permissive” or “obligatory.” It “ . . . simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating

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<sup>1</sup> Charter section 18 then required publication within 10 days after final passage of an ordinance. *Id.* at 351. Charter section 20 then provided that the City Council “shall cause to be printed in book form all ordinances ‘of a general nature in force at the time of such publication’ . . .” *Ibid.*

<sup>2</sup> The *Crittenden* case involved a San Diego City ordinance requiring a City license to practice law. The court held the ordinance was properly admitted into evidence, even though there was no proof the ordinance had been published pursuant to then Charter section 20, relying on the *Denton* case holding such requirement to be merely directory. *Crittenden*, 93 Cal. App. 2d Supp. at 876.

the governmental action to which the procedural requirement relates.’ ” *Edwards v. Steele*, 25 Cal. 3d 406, 409 (1979), citing *Morris v. County of Marin*, 18 Cal. 3d 901, 908 (1977).

Accordingly, this Office interprets the Charter’s use of the word “shall” to impose an obligation on the Clerk to publish amendments to the Annual Appropriation Ordinance. However, a failure to meet this obligation does not impair the effectiveness of those amendments under the legal principles set forth above.<sup>3</sup>

### CONCLUSION

The City Clerk should publish amendments to the Annual Appropriation Ordinances in the same manner the Office publishes the annual ordinance.

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By

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Deputy City Attorney

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<sup>3</sup> We caution that this analysis applies *only* to the post-enactment publication requirements of the Annual Appropriation Ordinance and its amendments. Publication requirements for other ordinances could impact their effectiveness if the requirements are not met.