

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: October 18, 2018

TO: Aimee Faucett, Chief of Staff, Office of the Mayor

FROM: City Attorney

SUBJECT: San Diego Charter section 23: Council Action on Qualified Citizens' Initiatives

INTRODUCTION

On November 8, 2016, San Diego voters considered and approved a ballot measure labeled "Measure L" to amend San Diego Charter (Charter) section 23 regarding the timing of elections for citizens' initiative and referendum measures. This memorandum responds to your question about Measure L and its impact. We understand that this question specifically relates to the pending "For A Better San Diego" initiative petition.

QUESTION PRESENTED

Now that voters have amended the Charter through Measure L, what does the Charter require the San Diego City Council (Council) to do when it receives a qualified citizens' initiative and considers its placement on a ballot?

SHORT ANSWER

Generally, the Council must decide between adopting a qualified initiative measure or submitting it to a citywide vote. *See* San Diego Municipal Code (SDMC or Municipal Code) §§ 27.1034 and 27.1035. If the Council chooses to submit a measure to City of San Diego (City) voters, the Council must place the measure on the next regularly scheduled general election ballot (held in November of even-numbered years), unless it chooses to send it to an earlier ballot.

The "For A Better San Diego" initiative measure includes a tax increase proposal and thus cannot be adopted directly by the Council, but must be submitted to voters. On October 8, 2018, the Council adopted a resolution of intention to send the measure to the voters. The Office of the City Attorney will prepare an ordinance to place the measure on the November 2020 ballot

after that election has been called, unless the Council directs this Office to prepare the ordinance for an earlier ballot.

DISCUSSION

Citizens' initiative ballot measures are governed by the California Constitution, the Charter, and the Municipal Code, the latter of which constitutes the City's Election Code Ordinance. These laws govern when a citizens' initiative measure qualifies for submission to the City's voters.¹

Prior to the Charter amendments enacted through Measure L, the Charter required the Council to place a qualified citizens' initiative on the *next* regularly scheduled Citywide ballot on which the measure legally could be placed. The "next" election could be a primary or a general election. The Council also had the ability to call a special, standalone election – before the next regularly scheduled election – if it wished to submit a measure to voters earlier.

Measure L amended the Charter to state, in relevant part:

Initiative measures and referendum measures that qualify for the ballot after the people's petition process, and in compliance with provisions of this Charter and the City's Election Code Ordinance, shall be submitted to the electorate at a Municipal Special Election consolidated *with the next City-wide Municipal General Election ballot on which the measures legally can be placed, or at a City-wide Municipal Special Election held prior to that general election.*

Charter § 23 (emphasis added); *see also*, SDMC § 27.1037.

Thus, if a measure is qualified, the Council must submit it to voters on a ballot heard at the next *general* (November) election unless the Council chooses to submit it to the voters at the same time as an earlier primary election, or on a special, stand-alone ballot.

¹ This memorandum does not address when a qualified citizens' initiative measure alternatively may be adopted outright by the Council. Once a petition has qualified with valid signatures of 10 percent of the City's voters as of the last Municipal General Election, the Municipal Code directs the Council to either: (1) adopt the measure outright, without amendment; or (2) submit the measure to voters. *See* SDMC §§ 27.1034 and 27.1035. The pending "For A Better San Diego" initiative petition, which includes a proposal to increase the City's Transient Occupancy Tax, must be submitted to the voters. The Council has no legal authority under the California Constitution to approve a tax.

The Charter does not require the Council to consider an earlier election. The decision is solely within the Council's discretion.²

The Charter does not set forth prerequisites that would limit which initiative or referendum measures could be considered for an earlier election. For example, a ballot measure is not required to be characterized as an "emergency measure" in order to be submitted to voters earlier than the next general election.

The timing of an election, however, must comply with state and local laws regarding when elections cannot be held – for example, an election cannot be held the day before, the day of, or the day after, a state holiday. Cal. Elec. Code § 1100. Additionally, there may be other laws that affect the timing of voters' consideration of a given ballot measure; each measure must be considered individually, based upon its specific content. For example, Charter amendments are governed by state law, and amendments regarding certain subjects must appear on November general election ballots.

The Charter empowers the Council to call all elections. Its decision is not subject to veto.

We note that this Office previously addressed related issues in City Att'y MOL No. 2017-7 (Sept. 14, 2017), a copy of which is attached to this memorandum.

CONCLUSION

If the Council chooses to submit a qualified initiative or referendum measure to the voters, the Council must place the measure on the next regularly scheduled general election ballot (held in November of even-numbered years), unless it chooses to send it to an earlier ballot.

When the Council considers a qualified citizens' initiative that includes a proposed tax increase, the Council is required initially to approve a resolution of intention to place the initiative on a ballot. (*See* San Diego Resolution R-311981 (Oct. 8, 2018) for the "For A Better San Diego" initiative measure, attached to this memorandum.) Our Office will return with an ordinance to place the "For A Better San Diego" initiative measure on the November 2020 ballot

² We note that our Office has often been asked about the two meanings of "special election," which can cause confusion. The term "Municipal Special Election" refers to the name of the elections for *all* City ballot measures. The terms "Municipal Primary Election" and "Municipal General Election" refer to elections for candidate races only. Generally, ballot measure and candidate elections are consolidated so they can appear on the same ballot. An "off-cycle" election – one not held at a regularly scheduled time – is also referred to as a "special election."

Aimee Faucett, Chief of Staff, Office of the Mayor
October 18, 2018
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after that election has been called, unless the Council directs this Office to prepare the ordinance for an earlier ballot.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/Sharon B. Spivak
Sharon B. Spivak
Senior Deputy City Attorney

SBS:cm:jdf

MS-2018-13

Doc. No. 1846594_4

Attachments: San Diego Resolution R-311981 (Oct. 8, 2018)

City Att'y MOL No. 2017-7 (Sept. 14, 2017)

cc: Honorable Mayor and Council
Elizabeth Maland, City Clerk
Andrea Tevlin, Independent Budget Analyst

Attachments

RESOLUTION NUMBER R- 311981

DATE OF FINAL PASSAGE OCT 08 2018

A RESOLUTION OF THE COUNCIL OF THE CITY OF
SAN DIEGO DECLARING AN INTENTION TO SUBMIT TO
THE VOTERS A MEASURE REGARDING AN INITIATIVE
PETITION TITLED "FOR A BETTER SAN DIEGO."

WHEREAS, on July 9, 2018, an initiative petition titled "For A Better San Diego" (the initiative petition) was filed with the City Clerk on behalf of the initiative petition's proponents; and

WHEREAS, the initiative petition asks voters to approve an increase to the Transient Occupancy Tax (TOT) paid by visitors to the operators of hotels, campgrounds and other sites in the City of San Diego (City), with revenues raised by the additional TOT reserved for San Diego Convention Center purposes, including expansion and modernization; programs and services to reduce homelessness in the City; and street repairs, improvements, and maintenance in the City; and

WHEREAS, the initiative petition also includes provisions regarding the City's issuance of related bonds; and

WHEREAS, upon completion of a prima facie review, the City Clerk accepted the initiative petition as filed, in compliance with San Diego Municipal Code (Municipal Code) section 27.1021; and

WHEREAS, the City Clerk submitted the initiative petition to the San Diego County Registrar of Voters (Registrar of Voters) for signature verification; and

WHEREAS, on August 8, 2018, the Registrar of Voters completed its verification of three percent of the signatures selected at random from the petition in accordance with Municipal Code section 27.1022, and certified that the sample showed that the projected number of valid

signatures fell between 95 percent and 110 percent of the number of signatures needed to declare the petition sufficient; and

WHEREAS, as a result of the random sample, the Registrar of Voters, following California Elections Code section 9115, then conducted a signature-by-signature examination and verification of the petition signatures; and

WHEREAS, on September 20, 2018, the Registrar of Voters certified that the initiative petition contained the valid signatures of ten percent of the City's registered voters at the last general election, sufficient under Charter section 23 to qualify the initiative for direct submission to the voters; and

WHEREAS, on September 20, 2018, the City Clerk certified that the signatures on the petition were sufficient to qualify the initiative for consideration for adoption or submittal to the voters; and

WHEREAS, on September 25, 2018, in compliance with Municipal Code section 27.1027, the City Clerk presented the initiative petition, with its certification attached, to the Council; and

WHEREAS, in compliance with Municipal Code section 27.1034, if the initiative petition presented to the Council contains the signatures of ten percent or more of the voters, the City Council shall, within ten business days of the date of presentation, adopt or reject the legislative act as presented, but may not amend it; and

WHEREAS, in compliance with Municipal Code sections 27.1034 and 27.1035, the Council shall consider the petition and either (1) grant the initiative petition and adopt its provisions in full; or (2) adopt a resolution of intention to submit the matter to the voters at a

special election, and direct the City Attorney to prepare an ordinance calling a special election to place the matter on the ballot; and

WHEREAS, the initiative petition seeks to increase the City's Transient Occupancy Tax, and the Council does not have the legal authority under the California Constitution to increase a tax on its own vote; thus, the Council does not have authority to grant the initiative petition and adopt its provisions in full; and

WHEREAS, initiative measures that seek to increase a tax must be submitted to the voters for approval; and

WHEREAS, on October 8, 2018, the Council considered the initiative petition and now adopts this resolution of intention to submit the initiative petition to the voters, which is a ministerial act now that it has qualified for submission to the voters; and

WHEREAS, Charter section 23 directs that initiated legislative acts that qualify for the ballot "shall be submitted to the electorate at a Municipal Special Election consolidated with the next City-wide Municipal General Election ballot on which the measures legally can be placed, or at a City-wide Municipal Special Election held prior to that general election"; and


WHEREAS, pursuant to Charter section 295(b), the Council's resolution of intention related to matters to submit to City voters at a Municipal Special Election is not subject to veto by the Mayor, and thus the date of its passage by the Council shall be deemed the date of its final passage; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, as follows:

1. The Council declares its intention to submit the "For A Better San Diego Initiative" to the voters of the City of San Diego at a citywide election; and

2. The Council directs the City Attorney to prepare an ordinance placing the matter on the ballot at a Municipal Special Election consolidated with the next City-wide Municipal General Election ballot in November 2020, unless the Council decides to place the matter on the ballot of a City-wide Municipal Special Election to be held prior to that general election.

APPROVED: MARA W. ELLIOTT, City Attorney

By 
Sharon B. Spivak
Senior Deputy City Attorney

SBS:jdf
09/25/18
Or.Dept: City Clerk
Doc. No.: 1842978

Passed by the Council of The City of San Diego on OCT 08 2018, by the following vote:

Councilmembers	Yeas	Nays	Not Present	Recused
Barbara Bry	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lorie Zapf	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Chris Ward	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Myrtle Cole	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mark Kersey	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Chris Cate	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Scott Sherman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
David Alvarez	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Georgette Gomez	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Date of final passage OCT 08 2018

(Please note: When a resolution is approved by the Mayor, the date of final passage is the date the approved resolution was returned to the Office of the City Clerk.)

AUTHENTICATED BY:

KEVIN L. FAULCONER
Mayor of The City of San Diego, California.

ELIZABETH S. MALAND
City Clerk of The City of San Diego, California.

(Seal)

By Connie Patterson, Deputy

Office of the City Clerk, San Diego, California

Resolution Number R- 311981

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ASSISTANT CITY ATTORNEY

SHARON B. SPIVAK
DEPUTY CITY ATTORNEY

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MEMORANDUM OF LAW

DATE: September 14, 2017
TO: Councilmember Barbara Bry
FROM: City Attorney
SUBJECT: Timing of Election for Soccer City Citizens' Initiative

INTRODUCTION

On June 19, 2017, the San Diego City Council (Council) adopted a resolution of intent to place the San Diego River Park and Soccer City Initiative (Soccer City initiative) on the November 2018 ballot. San Diego Resolution R-311183 (June 19, 2017). The resolution confirms the Council's intention to submit the initiative to voters on that ballot, but did not operate to place it on the ballot. The Council later will be asked to adopt an ordinance that actually places the measure on the ballot, but it can vote on that ordinance only after the November 2018 election has been called.

You have asked whether the timing of the election for the Soccer City initiative may be affected by Council action on other ballot measures. Your specific question is addressed below. This memorandum considers the timing of the Soccer City initiative election without regard to the specific content of any hypothetical measure. Such measures and their potential content may raise other legal issues that cannot be addressed without more information.¹

QUESTION PRESENTED

If the Council places a convention center measure on the June 2018 ballot, is the Soccer City initiative measure entitled to go on the same ballot or does it have to stay on the November 2018 ballot?

¹ This memorandum does not consider the recent California Supreme Court decision regarding the timing of elections for citizen-initiated tax measures and its potential extension to other citizens' initiative measures. *California Cannabis Coalition v. City of Upland*, No. S234148, 2017 WL 3706533 (Cal. Aug. 28, 2017). We do not anticipate that the opinion will change the following analysis. Our Office will provide any relevant updates.

SHORT ANSWER

No, the Soccer City initiative is not entitled to go on a specific ballot, as long as its placement on a ballot meets Charter requirements. The Council has sole authority to decide when a municipal ballot measure will be submitted to voters, subject to governing law. San Diego Charter (Charter) § 23; San Diego Municipal Code (SDMC or Municipal Code) §§ 27.1034, 27.1035 and 27.1037. The decision regarding when to submit an initiative measure to voters thus is within the discretion of the Council, not initiative proponents.

The Council adopted a resolution of intent to submit the Soccer City initiative to voters on the November 2018 ballot, but left open the possibility that the Council could later decide to place the measure on an earlier ballot. This complies with the Charter. Nothing prevents the Council from docketing an item to rescind the resolution and voting to adopt a new resolution expressing an intent to submit the initiative to voters in June 2018.

The Charter and the City's Election Code do not direct that the timing of an initiative election must be considered in relation to the timing of any other measure. Each ballot measure is considered separately and may be subject to different law (see below). The content of a potential new measure, however, may create other legal issues. Without more information about its content, we cannot opine further as to whether other legal issues may arise that could be argued to affect the timing of a given election.

DISCUSSION

THE COUNCIL DECIDES WHEN TO SUBMIT BALLOT MEASURES TO VOTERS, SUBJECT TO THE CITY'S ELECTION LAWS

The Charter and the City's Election Code (found in the Municipal Code) direct how ballot measures are handled by the Council and the ballots on which they may be placed.²

A. The Charter Expresses a Different Intention for the Timing of Elections on Citizen's Initiative and Referendum Measures than it Does for City-Generated Measures

Article II, section 11(a) of the California Constitution provides that local initiative and referendum powers may be exercised by city and county voters as provided by the Legislature or by charter. Charter section 23 expresses a preference for when an initiative or referendum measure is to be submitted to voters, but leaves the Council other options:

Initiative measures and referendum measures that qualify for the ballot after the people's petition process, and in compliance with provisions of this Charter and the City's Election Code Ordinance, shall be submitted to the electorate at a Municipal Special Election consolidated with the next City-wide Municipal General Election

² This memorandum does not address Charter amendment measures, which are governed by California law. All references to ballot measures are to municipal measures that do not involve Charter amendments.

ballot on which the measures legally can be placed, or at a City-wide Municipal Special Election held prior to that general election.³

Charter § 23.

Thus, the Charter expresses a preference approved by the voters that initiative and referendum measures appear on a November general election ballot, but the Council remains free to submit such measures to voters on an earlier ballot if desired and there is legally sufficient time to do so.

Charter section 23 provides complete flexibility for the timing of elections on all other municipal ballot measures, with the exception of Charter amendment measures (governed by California law). The following provision of section 23 applies to any ballot measure initiated without voter signatures, including all measures drafted and created by the Mayor or Council for submission to voters:

All other municipal ballot measures may be submitted to the electorate at a Municipal Special Election that may be consolidated with the next City-wide Municipal Primary Election or Municipal General Election, or at any City-wide special election held for that purpose.

Charter amendment measures and the timing of their submission to the electorate are governed by California law.

Charter § 23.

B. Resolutions of Intent Do Not Operate to “Place” a Measure on a Ballot

When voter signatures are sufficient to qualify an initiative measure, the Council must decide whether to: (1) grant the initiative petition and adopt its provisions in full, or (2) adopt a resolution of intention to submit the matter to the voters at a special election. SDMC §§ 27.1034 and 27.1035. In the case of the Soccer City initiative, the Council decided to adopt a resolution of intention to submit the matter to voters in November 2018.

Significantly, however, a resolution of intent does not operate to “place” the measure on a ballot, but just expresses an intention to do so. After a given election has been called, the Council adopts ordinances to place individual measures on that ballot. Thus, the measure has not yet been placed on a ballot and additional action will be required to do so. The City Attorney’s Office will prepare an ordinance for Council consideration after the November 2018 election has been called. Until that time, the Council is free to revisit the decision.

³ We note that the term “special election” is used for all ballot measure elections. The term “Municipal Special Election” means an election to consider ballot measures that can be consolidated with a June primary or November general election, or that can be held as a standalone election.

C. Ballot Measures Are Considered Separately with Regard to Their Timing

As set forth above, each ballot measure is considered separately as each may be subject to different law. As discussed, initiatives and referenda are placed on the ballot in compliance with a different provision of Charter section 23 than other ballot measures.

Given the different treatment of ballot measures, San Diego's election laws do not direct that ballot measures be placed on the same ballot as any other particular measure, and each measure is the subject of a separate ordinance placing it on a ballot. The City's Election Code confirms that any number of legislative acts proposed by initiative petitions or directly by the Council may be submitted to the voters at a single election. SDMC §27.1042. The Council's decision to submit a given measure to a given ballot rests in its discretion, so long as the decision complies with the City's election laws.

We also note that initiative proponents may decide to seek court action to attempt to compel a different result. Although your question asked about a convention center measure, we have not seen the content of a potential future measure. This memorandum does not address whether the timing of measures that have overlapping or conflicting provisions may raise other legal issues. For these reasons, we cannot opine further at this time.

CONCLUSION

The Council has sole authority to decide when the Soccer City initiative will appear on a ballot, subject to governing law. Charter § 23; SDMC §§ 27.1034, 27.1035 and 27.1037. The resolution of intent that the Council adopted to submit the Soccer City initiative to voters in November 2018 did not operate to place the measure on the ballot. The Council is free to rescind the resolution and adopt a new resolution expressing an intent to submit the initiative to voters in June 2018. The Soccer City initiative will not be placed on a ballot until the Council has approved an ordinance to do so, which cannot occur until after the given election has been called.

The City's election laws do not require the Soccer City initiative to be heard on a given ballot because another measure will or will not be on the same ballot. The content of a potential new measure, however, may create other legal issues.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Sharon B. Spivak
Sharon B. Spivak
Deputy City Attorney

SBS:jdf
ML-2017-7
Doc. No. 1576930_3
cc: Elizabeth Maland, City Clerk
Honorable Mayor and Councilmembers