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February 8, 2016

## REPORT TO CITY COUNCIL

### REPEAL OF CHARTER SECTIONS PROPOSED BY THE CHARTER REVIEW COMMITTEE AND PROPOSAL FOR GENDER-NEUTRAL CHARTER LANGUAGE

#### INTRODUCTION

On December 7, 2015, the City Council (Council) requested legal review of the effects of repealing eleven sections and one full article of the City of San Diego Charter (Charter) recommended for repeal by the Charter Review Committee (Committee). The sections recommended for repeal listed in the December 7, 2015 Council agenda item are sections 26.1<sup>1</sup>, 64, 71A, 76, 76.1<sup>2</sup>, 77B, 81, 112, 114, 215, 216, and Article X. This Report discusses legal effects of each repeal and considerations for inclusion in specific ballot measures. Additionally, the Council requested that this Office determine the number of pages of the Charter that would need to be amended in order to make the Charter gender-neutral.

#### DISCUSSION

##### I. LEGAL ANALYSIS OF PROPOSED CHARTER SECTION REPEALS

###### Repeal of Charter section 64: Support of Education and Cultural Institutions

The Mayor's office recommended the repeal of Charter section 64 at the July 2, 2015 meeting of the Committee, stating the section is redundant of current practice. The Committee voted to repeal the section pursuant to the Mayor's recommendation.

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<sup>1</sup> The proposal to repeal Charter section 26.1 requested that a mandate to provide certain services be included in a new preamble to the Charter. After hearing proposals for a new preamble and legal analysis of including required services in the preamble, the Committee requested revised language for Charter section 26.1, rather than repeal. *See* City Att'y MOL No. 2016-2 (Jan. 12, 2016). Accordingly, legal effects of repealing Charter section 26.1 are not included in this Report.

<sup>2</sup> Repeal of Charter section 76.1 was not a part of the final proposals passed by the Committee and forwarded to the Council for its consideration. At its October 8, 2015 meeting, the Committee approved a proposal for amending the taxation portions of Article VII, retaining the language of Charter section 76.1, and not repealing, but renumbering the section as Charter section 76. Accordingly, the legal effects of repealing Charter section 76.1 are not included in this Report.

Charter Section 64 has been a part of the Charter since 1931 and states:

The Council shall annually make appropriations for the support of all institutions of an educational, scientific, historical and cultural character, and which have a tendency to promote the welfare of the City and its inhabitants, which are now or which may hereafter be controlled by The City of San Diego and partially or wholly operated and maintained by said City for the benefit of its inhabitants.

San Diego Charter § 64. Charter section 64 is vague as to the organizations that can be supported. This Office previously called for clarifying its intent in the Charter. *See* 1939 Op. City Att’y 271 at 273-274 (Aug. 9, 1939) (section “might well be clarified and made more definite and specific.”).

The City originally relied on this section in order to support institutions in Balboa Park. 1940 Op. City Att’y 231 (July 5, 1940). This Office analyzed Charter section 64 several times, opining that appropriations made to Balboa Park institutions for maintenance must remain under the control of the City and that the institutions could not legally obligate the City to pay for services for which the institution had independently contracted. *See* 1936 Op. City Att’y 201 (May 19, 1936), 1940 Op. City Att’y 231 (July 5, 1940).

Currently, the City funds organizations that would be funded pursuant to Charter section 64 through Transient Occupancy Tax (TOT) revenues. SDMC §§ 35.0101 to 35.0138; Council Policy 100-03. TOT revenues support the operations and capital improvements of organizations that are “partially or wholly operated and maintained” by the City as well as other non-profit groups promoting tourism and culture in the City.

The legal effect of repealing Charter section 64 is that the City would no longer be required to make appropriations for “partially or wholly operated and maintained” educational, scientific, historical and cultural organizations.” The City may still make appropriations for such organizations without a mandate in the Charter so long as the appropriations serve a public purpose. *Albright v. City of South San Francisco*, 44 Cal. App. 3d 866, 869 (1975). What constitutes a public purpose is a decision for the legislative body; courts presume the validity of a legislative body’s determination of public purpose and only overturn it if “illegality clearly and unmistakably appears.” *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 190 (2002).

### **Repeal of Charter section 71A: Reappropriations at Beginning of Fiscal Year for Salaries and Maintenance and Support Expenses**

At its April 16, 2015 meeting, the Committee voted to repeal Charter section 71A and include the operative language of the section in a revised Charter section 71. The Committee approved a revised Charter section 69 at its July 2, 2015 meeting, which included the operative language of Charter section 71A. The Committee did not intend to repeal the substance Charter section 71A; rather just to include it in another revised section.

Voters added Charter section 71A to the Charter in 1943. Charter section 71A allows the Chief Financial Officer (CFO) to approve payments for salaries, maintenance, and support expenses in the event the Council fails to pass the annual appropriation ordinance prior to the

beginning of a fiscal year.<sup>3</sup> San Diego Charter § 71A. Charter section 39 requires the CFO to certify that the Council has made an appropriation prior to approving payments for obligations. San Diego Charter § 39. Absent the language of Charter section 71A, the CFO would have no authority to approve payments prior to the passage of the appropriations ordinance.

The repeal of Charter section 71A must be included in a ballot measure that approves the revised Charter section 69. The language of Charter section 71A is required to continue City operations in the event the Council fails to pass an appropriation ordinance. If voters were to vote on those proposals separately, Charter section 71A could be repealed without its operative terms being included in another section of the Charter. This repeal was not included with other Article VII revisions on the Council's agenda, but must be included in any ballot measure addressing budget revisions.

### **Repeal of Charter section 76: Limit of Tax Levy**

The Committee initially voted to repeal Charter section 76 at its February 5, 2015 meeting. This Office noted in its February 5, 2014 report to Council that Charter section 76 is superseded by Proposition 13, passed by California voters in 1978. City Att'y Report 2014-3 (Feb. 5, 2014). The Committee ultimately voted to repeal Charter section 76 at its October 8, 2015 meeting as part of a group of proposals amending various Charter sections concerning taxation.

Charter section 76 was included in the 1931 Charter and limited the tax levy passed by the Council to \$1.34 on each \$100.00 of assessed real and personal property in the City. San Diego Charter § 76. It also allowed the Council to levy an additional tax in a sum sufficient to fund pension liabilities, prohibited special taxes other than those authorized by the Charter<sup>4</sup>, and provided authority to levy taxes in case of emergency. *Id.*

Proposition 13 added article XIII A to the California State Constitution in 1978, limiting taxes assessed on the value of property, known as ad valorem taxes, to 1% of the cash valuation of property. Cal. Const. art. XIII A, § 1. This constitutional provision supersedes contrary city charter provisions. *City of Rancho Cucamonga v. Mackzum*, 228 Cal. App. 3d 929, 945 (1991). Article XIII A of the Constitution provides some exceptions for taxes used to pay indebtedness incurred by voters prior to 1978, including taxes to pay for pension costs, but those taxes can only be imposed if they were imposed the 1982-83 or 1983-84 fiscal years. Cal. Rev. & Tax. Code § 96.31. This City did not impose the pension tax in either of those years. Furthermore, Charter section 76.1 negates the Charter section 76 prohibition on special taxes and reserves the City's right to impose special taxes as authorized by the California Constitution.

Because the City can only levy ad valorem taxes pursuant to the California State Constitution, Charter section 76 can be repealed without affecting the City's taxing authority. This repeal was also included on the Council's agenda with other Article VII revisions and should be included in a ballot measure with other taxation revisions.

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<sup>3</sup> Charter section 39 transfers the duties of the Auditor and Comptroller to the CFO.

<sup>4</sup> Charter section 76.1 allows special taxes as authorized by article III A of the California Constitution, notwithstanding the restriction of Charter section 76.

**Repeal of Charter section 77B: Public Transportation**

The Committee voted to repeal Charter section 77B at its February 5, 2015 meeting. As noted by this Office in its February 5, 2014 report, the City can no longer levy the tax authorized by the section. City Att’y Report 2014-3 (Feb. 5, 2014). The section now serves no further purpose.

Voters added Charter section 77B in 1966 to allow the City to raise funds with a special tax to purchase a failing privately owned transit system. Ballot Pamp., Special Municipal Elec. (June 7, 1966) argument for Prop. D at 2. The City owned and operated the San Diego Transit System as a non-profit corporation until it transferred ownership to the Metropolitan Transit Development Board in 1985. The City has not levied the tax since 1979 and has not operated a transit system since 1985.

The City can no longer levy the tax in Charter section 77B because it did not levy the tax in either the 1982-83 or 1983-94 fiscal year. The California Revenue and Taxation code states that “a jurisdiction shall not impose a property tax rate . . . in excess of the rate it imposed in the 1982-83 or 1983-84 fiscal year.” Cal. Rev. & Tax. Code § 96.31. Since the rate of the Charter section 77B tax was zero in those years, it cannot be levied in any amount.<sup>5</sup>

Since the City cannot levy the tax provided for in Charter section 77B, the section can be repealed without limiting the City’s taxing authority. This repeal was not included with other Article VII revisions on the Council’s agenda reviewing Charter review items, but should be included in a ballot measure with other taxation revisions.

**Repeal of Charter section 81: Allotments**

The Committee approved the repeal of Charter section 81 at its May 14, 2015 meeting as proposed by the CFO in a Memorandum to Scott Chadwick, Chief Operating Officer of the City dated April 5, 2015. The CFO recommended the repeal, stating that the section is obsolete and the term “internal budgetary allotment” as used in the section has no clear meaning or relevancy with the City’s current budgeting process.

Charter section 81, as included in the 1931 Charter, provided detailed provisions for the City Manager’s duty to require department heads to provide a work plan for expending annual appropriations including “allotments of all appropriations by quarter.” In 1969, voters deleted those provisions, merely requiring the City Manager to establish “internal budgetary allotments” based on the appropriations ordinance. Ballot Pamp., Gen. Elec. (Nov. 4, 1969), argument for Proposition L at 32. The amendment was intended to provide “improved fiscal management procedures.” *Id.*

Without the language deleted from Charter section 81 in 1969, the remaining language provides a mandate to establish “allotments” with no reference to what is intended to be included in the allotments. Previously, it was clear that the annual appropriations were intended to be

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<sup>5</sup> This Office published 2010 City Att’y MOL 196 (2010-4; Feb. 25, 2010) opining that the tax authorized by Charter section 77B constituted indebtedness allowable by Proposition 13 and the tax could be levied. However, that memorandum did not consider the impact of California Revenue and Taxation Code section 96.31.

allotted by quarter. There is no indication that department budgets provided for in the appropriation ordinance are currently allotted by quarter, or any other time period, as required by this section. Whether the department budgets should be allotted by time is a policy decision rather than a legal requirement. This repeal was not included with other Article VII revisions on the Council's agenda reviewing Charter review items, but should be included in the ballot measure with those revisions.

### **Repeal of Charter section 112: Appraisal of City Assets**

The Committee approved the repeal of Charter section 112 at its April 16, 2015 meeting. The CFO suggested repealing the section or, at a minimum, amending the section to make it consistent with modern accounting practice. Memorandum from Mary Lewis, Chief Financial Officer, City of San Diego, to Scott Chadwick, Chief Operating Officer, City of San Diego (April 2, 2015) (on file with the Office of the City Clerk). The Committee voted to repeal the section because the CFO explained that the Center for Financial Research and Analysis (CFRA) standards and Generally Accepted Accounting Principles (GAAP) that the City follows already require the appraisals of assets called for in this section. This information is published in the City's audited Comprehensive Annual Financial Report (CAFR), required by Charter section 111. Since the City includes the information required by Charter section 112 in reports required by Charter section 111, Charter section 112 is unnecessary.

### **Repeal of Charter section 114: Bureau of Information and Publicity**

If Charter section 114 is repealed, the Council will no longer have the option to publish notices online in a City Bulletin in lieu of publishing in an Official City Newspaper.

The Committee voted to repeal Charter section 114 at its February 5, 2015 meeting. This Office noted in its February 5, 2014 legal review that the section allows the City to establish a "Bureau of Information and Publicity" but the duties it prescribes overlap with public information officers and the City Clerk. City Att'y Report 2014-3 (Feb. 5, 2014).

In addition to allowing the establishment of the "Bureau of Information and Publicity," Charter section 114 requires the City Manager to designate an official to publish a City Bulletin. San Diego Charter § 114. The City Bulletin contains "the transactions and proceedings of the Council, the legal advertising for the City and such other information relating to the affairs of the City as shall be determined by ordinance or as the Manager may designate."

Both the Charter and the Municipal Code require certain notices to be published in the Official City Newspaper. Charter section 114 allows the City Bulletin to serve as an alternative to the Official City Newspaper, providing:

. . . The City Bulletin shall be published in lieu of the awarding of a contract for publication of official advertising in a newspaper of the City when the Council shall determine that it is to the best advantage of the City. The City Bulletin shall be published, distributed or sold in such manner and on such terms as the Council may determine. . . .

San Diego Charter § 114.

Charter section 114 provides authority to do away with any requirement to publish in the Official City Newspaper and allows publication via the City Bulletin, published on the Council's terms allowing the Council to specify that the City Bulletin is to be published online. The City Clerk currently publishes a City Bulletin of Public Notices on the Clerk's website. Doing away with the Official City Newspaper and establishing a website as the City Bulletin was discussed at the Rules Committee in 2003, but there is no record of action and no indication that any proposal went to Council. *See* City Mgr. Report No. 03-057 (Mar. 28, 2003). Repealing Charter Section 114 would limit the City's options for publishing public notices.

### **Repeal of Charter section 215: Publicity of Records and Charter section 216: Copies of Records**

The Committee approved the repeal of both Charter sections 215 and 216 at its August 8, 2015 meeting. This Office noted in its February 5, 2014 legal review that in the years since the sections were included in the original Charter in 1931, the California Public Records Act was enacted, providing citizens with the right to inspect and copy documents unless an exception applies, making the sections unnecessary. City Att'y Report 2014-3 (February 5, 2014).

Charter section 215 "Publicity of Records" and section 216 "Copies of Records," were both adopted in 1931. Charter section 215 provides that City records will be open to public inspection unless the disclosure of the records "would tend to defeat the lawful purpose which they are intended to accomplish." Charter section 216 allows the City to charge for copies of the records.

In 1968, the California Public Records Act was enacted and provides that "public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided." Cal. Gov't Code § 6253(a). It also requires that local agencies "make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable." Cal. Gov't. Code § 6253(b).

The Public Records Act provides a general overall scheme for providing the public with access to government records. Cal. Gov't Code §§ 6250 – 6276.48. The provisions apply to Charter cities like the City of San Diego. Cal. Gov't Code § 6252(a). Legal issues can arise to the extent that Charter sections 215 and 216 duplicate or conflict with these requirements. Repealing these sections prevents such issues from arising without limiting the public's right to information as provided by the Public Records Act.

### **Repeal of Article X: Transfer of Police and Fire Department employees into the Retirement System**

The Committee voted to repeal Article X at its August 8, 2015 meeting. This Office noted that Article X was no longer necessary because its sole purpose was to transfer members of the City's Police and Fire Departments from an independent retirement system into the San Diego City Employees' Retirement System. City Att'y Report 2014-3 (Feb. 5, 2014).

Article X was added to the Charter in 1946 to allow the transfer of members, which was subsequently completed by the City. Since this transfer was completed, there is no need for the section in the Charter. In a letter to the Committee, SDCERS staff confirmed that the deletion of Article X would have no impact on beneficiaries.

## II. PROPOSALS FOR A GENDER-NEUTRAL CHARTER

Charter amendments are governed by the California Constitution and state law, preempting any conflicting provisions in the Charter or the San Diego Municipal Code. Cal. Const. art. XI, § 3; *Howard Jarvis Taxpayers Assn. v. City of San Diego*, 120 Cal. App. 4th 374, 389 (2004). This Office has consistently advised that the full text of charter amendment measures, including strike-outs, must be printed in the ballot materials provided to voters. If ballot materials were challenged, a court would determine whether the published materials were false, misleading, or inconsistent with legal requirements. *See* 2008 City Att’y Report 267 (2008-7; Feb. 22, 2008), analyzing the legal standard for invalidating ballot materials. In determining whether content is “false, misleading, or inconsistent,” courts will assume that voters were not misled if “the whole text of which was supplied each of them prior to the election” and “which they must be assumed to have duly considered.” *Brosnahan v. Brown*, 32 Cal. 3d 236, 252 (1982).

Omission of the full text invites a potential legal challenge if voters claim they did not fully understand the amendments they were considering. There is no presumption that voters understand a measure when full text is omitted, especially when the measure involves specific changes to current text. *See Woo v. Superior Court*, 83 Cal. App. 4th 967, 977-78 (2000) (questioning voter intent when new charter language was provided in a separate document with no comparison strikeout provided in the ballot materials). Further, providing voters with unambiguous text of a measure can rebut later challenges to a measure based on other misleading ballot materials. *Delaney v. Superior Court*, 50 Cal. 3d 785, 803 (1990).

The Council specifically requested that this Office determine how many pages of the Charter would need to be amended in order for the whole Charter to be gender-neutral. Sections including gender-specific language account for approximately 36 pages of Charter text. The pages counted are Word-document pages of 12 pt. font, single-spaced Charter language. Strike-outs in the final ballot pamphlet will not be in this format, so this page count only demonstrates the volume of text that will need to be amended and does not correspond with the number of pages a ballot measure actually may take up in the final ballot pamphlet.<sup>6</sup>

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<sup>6</sup> Further, the question regarding page count does not fully account for potential issues regarding the interaction of a gender-neutral proposal with other measures on the same ballot that concern the same Charter sections. This Office is currently reviewing such issues and will be providing additional analysis to the Council prior to final action to approve ordinances placing such measures on the ballot.

## CONCLUSION

The proposals detailed in this report would repeal sections of the Charter for a number of reasons and must be included in specific ballot measures based on the reasons for repealing the section. The repeals described above could be grouped into ballot measures as follows<sup>7</sup>:

- Repeal of Charter-mandated appropriations:
  - Charter section 64
- Repeal of budget provisions of the Charter should be included in a ballot measure with other budget proposals:
  - Charter section 71A
- Repeal of financial management provisions of the Charter should be included in a ballot measure with other financial management proposals:
  - Charter section 81
- Repeal of taxing provisions superseded by Proposition 13 should be included in a ballot measure with other taxation proposals:
  - Charter section 76
  - Charter section 77B

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<sup>7</sup> See City Att’y MOL No. 2015-4 (Mar. 4, 2015) for analysis of the single-subject rule for ballot measures as it applies to Charter amendments. Charter amendment ballot measures can group disparate items if they represent technical changes to reasonably related provisions. *Hernandez v. County of Los Angeles*, 167 Cal. App. 4th 12, 22-23 (2008).



- Repeal of unnecessary Charter sections, assuming they can be described in a way that gives them commonality to be included in one measure:
  - Charter section 112
  - Charter section 114<sup>8</sup>
  - Charter sections 215 and 216
  - Article X

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<sup>8</sup> But see the analysis above explaining that the section provides authority for alternate publication of notices and its repeal should be reconsidered by the Council.