

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Michael J. Aguirre
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: May 20, 2005
TO: The Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Jurisdiction Over Misdemeanor Prosecutions

QUESTION PRESENTED

May the City Council require the transfer of state law prosecutorial duties from the City Attorney to the District Attorney without a vote of the City electorate?

SHORT ANSWER

Pursuant to Charter §§2, 26, 40, and 40.1, the City Council may not transfer state law prosecutorial duties from the City Attorney to the District Attorney unless authorized to do so by an amendment to the Charter enacted by a majority vote of the electorate.

ANALYSIS

By a vote of the people, a city may adopt a charter for its government. Once adopted, a charter is the supreme law of the city, construed to permit the city to exercise all powers not expressly limited either by the document itself,¹ by preemptive state law, or by constitutional constraints. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 394-397; *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170.)² Moreover, a city charter may be amended, revised, or repealed only by the electorate. (Cal. Const., art. XI, §§ 3, 5; Gov. Code, §§ 34450-34462.)³ Through a long line of cases beginning with *City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, the California Supreme Court has held that a charter operates not as a grant of power but rather as an instrument of limitation and restriction on the exercise of power over all municipal affairs that the city is assumed to possess. In other words a charter city may exercise all powers relative to municipal affairs unless specifically and explicitly limited by its charter.⁴

In this opinion we are concerned both with Charter §40, which directs the City Attorney to prosecute not only violations of the city's ordinances but also, when required by law, state

misdemeanor offenses committed within city limits, and with Charter §40.1, which specifies that the City Attorney's jurisdiction over these misdemeanors shall be concurrent⁵ with that of the District Attorney. We consider whether the City Council may transfer this jurisdiction to the County District Attorney without a Charter amendment approved by City voters. After reviewing relevant Constitutional, statutory, and case law, we determine that a vote of the electorate is necessary to authorize such a transfer.

Although the prosecution of city ordinances is a local matter, the prosecution of all state laws, including state misdemeanors, is a matter of statewide concern, wherever the offenses are committed. Accordingly, only pursuant to legislative authorization may a city prosecutor, whether in a general law or charter city, prosecute state misdemeanors.⁶ The prosecution of state misdemeanors is assigned generally to the district attorney of each county. (§26500; 20 Ops.Cal.Atty.Gen. 234 (1952).) However, city attorneys may also be authorized to prosecute such offenses within their respective cities. Section 41803.5 (a), applicable to both general law and charter cities, provides:

With the consent of the district attorney of the county, the city attorney of any general law city or chartered city within the county may prosecute any misdemeanor committed within the city arising out of violation of state law.

Section 72193, applicable only to charter cities, states:

Whenever the charter of any city creates the office of city prosecutor, or provides that a deputy city attorney shall act as city prosecutor, and charges such prosecutor with the duty, when authorized by law, of prosecuting misdemeanor offenses arising out of violations of state laws, the city prosecutor may exercise the following powers:

(a) The city prosecutor shall prosecute all such misdemeanors committed within the city, and handle all appeals arising from it. The city prosecutor shall draw complaints for such misdemeanors, and shall prosecute all recognizances or bail bond forfeitures arising from or resulting from the commission of such offenses.

In a 1952 opinion, the Attorney General discussed the predecessor statute to §72193 as follows:

In comparing and harmonizing the statutes here involved, so as not to work the repeal of any of them, it was evidently the intent of the Legislature to place the duty primarily upon the city prosecuting attorney to file complaints and conduct the prosecution of state misdemeanor offenses in the municipal and justice courts without relieving the district attorney of such duty if and when it may be necessary or advisable for him to act as the public prosecutor. For instance, a city prosecuting attorney may be disqualified or for

some reason be unable to conduct the prosecution of a particular criminal action involving the commission of a state penal law, then it would be the duty of the district attorney to conduct such prosecution. Likewise, it would be his duty to prosecute in the municipal and justice courts when the laws of this state are not being uniformly and adequately enforced. (20 Ops.Cal.Atty.Gen., *supra* at 237.)

Consequently, when the provisions of section 72193 are implemented by a charter city, the city attorney has the primary duty of prosecuting state misdemeanors within the city, with the district attorney acting in a subsidiary role. (See *Menveg v. Municipal Court for the Los Angeles Judicial District* (1964) 226 Cal.App.2d 569, 571-572.)⁷

In interpreting a charter, the California Supreme Court has stated,

we construe the charter in the same manner as we would a statute. Our sole objective is to ascertain and effectuate legislative intent. We look first to the language of the charter, giving effect to its plain meaning. Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history. (*Domar Electric, Inc., supra* at 171-172. (Citations omitted.))

As with statutes, if the words of the charter are clear, no construction is necessary, and the plain language should be given effect. (*Caminetti v. Pac. Mutual L. Ins.* (1943) 22 Cal.2d 344, 353-354.)⁸ Returning to the Charter sections now under consideration, we note that §40 directs the city attorney “to prosecute for all offenses against the ordinances of the City and for such offenses against the law of the State as may be required of the City Attorney by law” This provision has been part of the Charter since 1931, when San Diego voters determined that the City Attorney should be an independently elected official. (City Attorney of San Diego website.) Section 40.1, which was enacted by the voters in 1953, reads:

The City Attorney shall have concurrent jurisdiction with the District Attorney of the County of San Diego to prosecute persons charged with or guilty of the violation of the state laws occurring within the city limits of The City of San Diego for offenses constituting misdemeanors. (Addition voted 03-10-1953. Effective 04-20-1953.) (Emphasis added.)

In applying the rules of statutory construction cited above, we determine that, when San Diego voters adopted Charter §40.1, they intended to convey a mandate for the City Attorney to prosecute misdemeanors in the City of San Diego. Because the word *shall* leaves no room for discretion, no other interpretation could effectuate the plain language of the Charter. Charter §40.1 may not be reasonably interpreted to mean that the Council has the power to transfer the City Attorney’s prosecutorial duties to the District Attorney.⁹

If the plain language were not sufficient, the intent of the voters would be clear from the section's legislative history alone. As stated in the 1953 ballot argument,¹⁰ the purpose of Proposition F, which enacted §40.1, was to legalize "procedure which has been followed for many years." (San Diego Municipal Official Ballot, Prop. F (March 10, 1953).)¹¹ According to the June 19, 1952 minutes of the Charter Review Committee, which had been established "to study the City Charter for revision," (The San Diego Union, April 9, 1952, a-11), the impetus for placing Proposition F on the ballot was an Attorney General opinion¹² "that unless the charter is changed, the City Attorney and District Attorney do not have concurrent jurisdiction to prosecute State misdemeanor violations with the city limits" (Minutes of the Meeting of the Charter Review Committee Held on Thursday, June 19, 1952, at 3:30 P.M. in the Directors Room of the Bank of America, p.1.)

In the course of studying a response to the opinion, the committee arranged "an informal meeting [between the City Attorney and the District Attorney], with the conclusion that the District Attorney desired a charter amendment to authorize the city attorney to continue the practice of prosecuting misdemeanors, as a means of saving of time. The City Attorney apparently [had] no objection to such a procedure." (Minutes of the Meeting of the Charter Review Committee Held on Thursday, October 2, 1952, at 3:00 P.M. in the Board of Directors Room of the Bank of America, p.3.) Obviously, committee members saw their proposal as "conform[ing] with present practice" (Minutes of the Meeting of the Charter Review Committee Held Thursday, August 21, 1952, at 3:00 PM in the Directors Room of the Bank of America, p.1),¹³ and on October 9, 1952, they decided to place the language that is now §40.1 on the March 10, 1953 ballot. (Minutes of the Meeting of the Charter Review Committee Held on Thursday, October 9, 1952, at 3:00 P.M. in the Board of Directors Room of the Bank of America, p.3.)¹⁴

The above history of Charter §40.1 reveals no evidence that the electors of 1953 wanted or decided to empower the Council to independently transfer the duty to prosecute all misdemeanors to the District Attorney. Moreover,

[i]t is clear that the charter provisions have been interpreted to mean that the power of the council to "change, abolish, combine, and rearrange the departments, divisions and boards of the City Government provided for in said administrative code" is limited by the words "except as established by the provisions of this Charter."¹⁵

The only way in which any change to the Charter-created Office of the City Attorney could be made is through the enactment of another Charter amendment repealing §40.1 and granting the Council explicit authority to effectuate the change. Thus any attempt by the Council to transfer or abolish the City Attorney's prosecutorial duties without submitting the issue to the voters would be invalid. (*Hubbar, v. City of San Diego* (1976) 55 Cal.App. 3d 380, 387-88.) Neither the Charter nor state law permits the Council to transfer the function of the City Attorney to the District Attorney by their own vote.¹⁶

This position is strengthened by cases holding that local legislative bodies may not by indirection accomplish that which they are precluded from accomplishing directly. For example,

in *Scott v. Common Council*, 44 Cal.App 4th 684 (1996), the court held that the city council could not impair the city attorney in the performance of his charter-defined prosecutorial duties by instituting staff cuts that were touted as necessary budgetary measures. Interestingly, in this case the city attorney alleged that his staff was cut “in retaliation for this office’s investigation into allegations of Political Reform Act violations [by certain councilmen] . . . and an effort to prevent any further such investigation in the future.” (*Id.* at 694.)

When the Attorney General considered this issue in 1996, and determined that the Council has the authority to mandate such a transfer, he based his decision on Charter §2, which grants the City the authority to “exercise any and all rights, powers and privileges . . . prescribed by General Laws of the State.” He opined that, at least under State law, this section is sufficiently encompassing to permit the Council to transfer prosecutorial functions to the District Attorney under §51330, which reads in part:

If authorized by the city charter and approved by a resolution of the board of supervisors, a city organized under a freeholders’ charter may transfer any of its functions and any of the functions of an officer, board, or commission to an officer, board, or commission of the county in which the city is situated.

In reaching this decision, the Attorney General did not consider either all the language in Charter §2 and or the existence of Charter §26. The former circumscribes the City’s authority to exercise power by making it subject “only to the restrictions and limitations provided in [the] Charter.” And the latter reads in part: “[E]xcept as established by the provisions of this Charter, the Council may change, abolish, combine, and rearrange the departments, divisions and board of the City Government provided for in [the] administrative code” Moreover, the Attorney General did not reference Charter §40.1, which, as discussed above, is clearly a limit on the Council’s power to abrogate the City Attorney’s prosecutorial duties absent a vote of the people.¹⁷

Regardless, any consideration of this or any other opinion of the Attorney General must be made in light of the fact that his office does not construe city charters and that his opinions are advisory only on issues of State law. As Attorney General Bill Lockyer pointed out in a May 17, 2005 letter to the City Attorney: “It has long been the policy of this office to refrain from interpreting local charter provisions or ordinances.”¹⁸

CONCLUSION

After reviewing all relevant Charter and state code sections and all applicable case law, we conclude that the City Attorney’s duty to prosecute state law misdemeanors is derived from neither ordinance, resolution, nor funding decision but rather from the Charter itself and state law. As such, this duty may be modified only by an amendment to the Charter ratified by a majority vote of the electorate. Because the San Diego City Attorney is an independently elected official, so long as Charter §40.1 remains in force, the decision to deploy resources against state law misdemeanants is entirely his or her own.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

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