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MEMORANDUM OF LAW

DATE: October 12, 2006

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Legal Considerations Regarding the Enactment of Ordinances Related to Proposed Ballot Measures

INTRODUCTION

On March 27, 2006, at the request of the Mayor, the City Council approved two ballot measures for the November 7, 2006 election, San Diego Ordinances O-19473 [Proposition B] and O-19474 [Proposition C]. Proposition B would amend San Diego Charter section 143.1 to require voter approval for certain increases to City employees' retirement benefits. Proposition C would add section 117(c) to the Charter to permit the Mayor, with City Council approval, to contract out City services to independent contractors, assuming certain conditions are met.

Proposition C expressly provides that, if passed by the voters, "The City Council shall by ordinance provide for appropriate policies and procedures to implement this subsection." Proposition B does not expressly require an implementing ordinance, however, the Mayor has recommended that one be adopted if the ballot measure passes.

For the last several months, the Mayor's representatives and the City's labor union representatives have been meeting to discuss the implementing ordinances. Now that negotiations are reaching their conclusion, the question has arisen about when these ordinances may be introduced and adopted by the City Council.

QUESTION PRESENTED

What is the legally appropriate time to adopt ordinances related to Propositions B and C?

SHORT ANSWER

Charter amendments approved by the voters take effect when they are accepted and filed by the California Secretary of State. We estimate that will be early in January 2007. Usually, the City would begin the process of enacting the ordinances related to Propositions B and C after the respective charter amendments become effective. If the City Council desires to expedite the process, it could introduce the ordinances after it certifies the election results. The City Council could then pass the ordinances at a second reading in January 2007, after both Charter amendments have been approved by the Secretary of State.

ANALYSIS

I. City Charter Amendments are not Effective Until Accepted and Filed with the Secretary of State.

Unless a later effective date is set by the terms of a new charter provision, a charter amendment passed by the voters does “not take effect until accepted and filed by the Secretary of State” of California. Cal. Gov’t Code § 34459. Before the Secretary of State may accept and file an amendment to the City Charter, that Office must receive specific documents from the City Clerk. The required documents include the certified abstract of the vote for the measure; copies of all publications and notices connected with calling an election to amend a charter; and various ballot materials used by the electorate. Cal. Gov’t Code § 34460. The typical chronology of events is described below.

After the election, the Registrar of Voters must canvass the votes. This process begins no later than the Thursday following the election, and must be completed no later than the fourth Friday after the election. Cal. Elec. Code §§ 10262 and 15301. The last date to complete the canvass for the November 7, 2006 consolidated election would be December 1, 2006.

After the canvass, the Registrar certifies the election results and provides the information to the City Clerk, who in turn certifies those results to the City Council. SDMC § 27.0411. State law requires the City Council to adopt a resolution declaring the results of the election “no later than the next regularly scheduled city council meeting following presentation of the 28-day canvass of the returns, or at a special meeting called for this purpose.” Cal. Elec. Code §§ 10262(b) and 10263(b). Assuming there are no delays in certification of the results, the City Council could adopt the resolution at the regularly scheduled meeting on December 4-5, 2006.

Once the results are declared by the City Council, the City Clerk can begin the process of gathering the information for approval by the Secretary of State. Neither state law nor the San Diego Municipal Code provide time limits in which the City Clerk must act. The City Clerk’s Office indicates it acts as expeditiously as possible in sending the required materials to the Secretary of State.

State law also does not require the Secretary of State to act within set time limits. However, that Office indicates it generally completes the acceptance and filing within 10 business days, assuming it receives the necessary documents. If the election and other required procedures run smoothly, it is possible that the Charter amendments would be approved and deemed effective by early January 2007. If for some reason the amendments are approved by the Secretary of State before December 31, 2006, Proposition B would not be operative until January 1, 2007 due to express language of the measure.

II. The City May Not Enact an Ordinance that Conflicts with the Charter.

The usual procedure is to begin the process of introduction *and* passage of ordinances that relate to new charter provisions *after* the charter sections become effective. To enact an ordinance before the approval of a Charter amendment would put the “cart before the horse.” The California Supreme Court has stated that “[n]o ordinance is valid unless the mandatory prerequisites to its enactment and performance are substantially observed.” *Sullivan v. McKinley*, 14 Cal. 2d 113, 117 (1939). Enacting an ordinance in anticipation of passage of a ballot measure may be a void act because the specific authority for the ordinance, the charter amendments, has not been approved by the voters.

It is also well established that a city council may not enact an ordinance that conflict with provisions of its charter. San Diego’s current City Charter remains in effect until and unless the voters approve the proposed changes to it. A charter is the supreme law of a city, subject only to constitutional limitations and preemptive state law. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994). “[I]t is well settled that a charter city may not act in conflict with its charter,” and that “[a]ny act that is violative of or not in compliance with the charter is void.” *Id.* at 171; 5 McQuillin Mun. Corp § 15.17 (3rd ed. 2006). A charter city’s ordinances must “conform to, be subordinate to, not conflict with and not exceed the charter” to be valid. 5 McQuillin Mun. Corp. § 15.17 (3rd 3d 2006).

The current City Charter does not generally permit the outsourcing of City services provided by its classified employees. It also does not require the public to vote on increases in retirement benefits. Ordinances implementing these measures would conflict with the City Charter if enacted prior to the election. Accordingly, the City may not enact these implementing ordinances before the charter amendments are approved by the voters.

Moreover, if the City Council enacts such an ordinance *before* the election, the time for the referendum process will begin before the election takes place. Through the referendum process, San Diego City voters reserve to themselves the power to reject ordinances enacted by the City Council. San Diego Charter § 23.¹ The City Charter requires the City’s Elections Code to provide the procedure for this process. *Ibid.* The City’s Elections Code provides a 30-day period

¹ Ordinances which take effect immediately upon passage are not subject to the referendum process. *Ibid*; See San Diego Charter § 275(c) for examples.

after an ordinance subject to referendum is finally passed before it becomes effective, in order to permit exercise of the referendum power. *See*, SDMC §§ 27.1103 and 27.1117. The referendum power is not a right granted to the people of a city or state, but a significant power reserved by them that is “jealously guard[ed]” by the courts. *Rossi v. Brown*, 9 Cal. 4th 688, 695 (1995). Requiring opponents of an ordinance to engage in a costly referendum petition drive *before* or coinciding with an election might be considered an undue burden on the public’s power of referendum.

III. The Implementing Ordinances Should not be Introduced Until After the Results of the Election are Certified to the City Council.

It is unclear what legal effect the *introduction* of an ordinance without charter authorization, or that is in conflict with the existing charter, would have on the ordinance’s final validity. Certainly in general law cities, a failure to comply properly with *all* steps of the procedure to adopt an ordinance will void the final ordinance. *See* Cal. Gov’t Code § 36934; *National Independent Business Alliance v. City of Beverly Hills*, 128 Cal. App. 3d 13, 22 (1982). We recognize the City Council could cure or reenact a void ordinance at some later date. *See* 5 McQuillin Mun. Corp § 16.92 (3rd ed. 2006); *Bienfield v. Van Ness*, 176 Cal. 585, 589-590 (1917). However, this could result in legal challenges and delay the implementation of the ordinances.

To avoid potential assertions that an ordinance is void because it was introduced or adopted before the ballot measures are approved, we recommend that no actions be taken on the implementing ordinances until after the results of the election have been certified to the City Council. As we discussed above, the Secretary of State must accept and file the charter amendments upon receipt of the required documents—a ministerial task. Thus, delaying the introduction of ordinances until after the City Council knows the charter amendments will become effective should substantially comply with any requirement that the charter sections be effective before the ordinance is enacted.

We believe the City Council could *introduce* the ordinance at the same December meeting at which it passes the resolution certifying the voters have approved the measure. The City Council could then *pass* the measure at the second reading at a Council meeting in January 2007, assuming that the measures have been approved by the Secretary of State.

CONCLUSION

A City may not enact an ordinance that conflicts with its charter. The proposed City Charter amendments Proposition B and C, if passed, will take effect when they are accepted and filed by the California Secretary of State. To attempt to introduce or pass an ordinance that conflicts with the City Charter before these measures are approved by the voters would jeopardize the legality of the ordinances and frustrate the referendum process. Accordingly, we recommend that the ordinances be introduced after the City Council certifies the election results.

Honorable Mayor and City
Councilmembers

-5-

October 12, 2006

The City Council could then pass the ordinances at a second reading in January 2007, after the Secretary of State has approved the City Charter amendments.

MICHAEL J. AGUIRRE, City Attorney

By
City Attorney

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