



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

**SUBJECT: CONSIDERATION OF A BALLOT
MEASURE TO AMEND THE CITY
CHARTER AND IMPLEMENTING
ORDINANCE**

DATE: July 17, 2020

REPLACEMENT MEMORANDUM

REASON FOR REPLACEMENT

This replacement memorandum is to correct a typographical error on page 5, footnote 3.

RECOMMENDATION

(a) As directed by Council July 1, 2020, consider the proposed amendments to the City Charter and implementing ordinance to, among other things:

- (1) Transition the mayoral election to the presidential election beginning in 2024;
- (2) Grant the Office of Mayor new powers;
- (3) Enact campaign finance measures similar to Government Code section 84308;
- (4) Add restrictions for registered Lobbyists and contractors; and
- (5) Establish a Blue Ribbon Commission to evaluate these amendments.

(b) Provide further direction for the preparation of a potential ballot measure, including changing the size and composition of the Planning Commission and extending the timeline for redistricting, for Council consideration at the regularly scheduled meeting on August 4, 2020.

BACKGROUND

On July 1, 2020, the Council directed the City Attorney's Office to prepare a measure to amend the City Charter consistent with the June 26, 2020 replacement memorandum of Councilmember Jones and the June 28, 2020 memorandum of Councilmember Khamis and with the additional direction that the requirements akin to Government Section 84308 apply to executive as well as legislative actions and that staff explore designation

of the City Attorney to monitor compliance and inform Councilmembers of potential conflicts. This memorandum explains the proposed measure to amend the Charter and the ordinance implementing the amendments incorporated in the proposed Article XX of the Charter

Furthermore, consistent with Council direction from June 2, 2020, we have also presented an amendment to change the size and composition of the Planning Commission, and we have suggested an amendment to extend the timeline to complete redistricting in 2021 due to potential delay in the Census.

The City Attorney's Office will also give a presentation of the proposed measure at the Special Meeting on July 28, 2020.

ANALYSIS

Consistent with the Council's direction on July 1, 2020, the proposed measure would amend the Charter to: transition the mayoral election to the presidential election beginning in 2024, grant the Office of the Mayor new powers, designate the Clerk's Office as a City department, enact campaign finance measures similar to Government Code section 84308, add restrictions for registered Lobbyists and contractors, and establish a Blue Ribbon Commission to evaluate these amendments. In addition, the proposed measure includes the change in the size and composition of the Planning Commission and revises the timeline for redistricting.

A. Mayoral Election to Presidential Election

The proposed measure would amend the Charter¹ to move the mayoral election in 2022 to the presidential election cycle beginning in 2024 and extend the term for the Office of Mayor beginning January 1, 2019 for two additional years to accomplish this transition. If approved by the voters, the incumbent may serve until December 31, 2024.

B. Additional Powers to the Office of the Mayor

To implement the additional powers to the Mayor, the proposed measure would make a number of technical amendments to the Charter but the substantive amendments would be under Charter Section 502.

1. Appointment of City Manager

Per Councilmember Jones' memorandum, the proposed measure would assign the Office of the Mayor the power to appoint the City Manager beginning January 1, 2021.

¹ See Charter sections 402, 500, and 1600.

However, per Councilmember Khamis' memorandum, before the appointment can take effect, the Mayor must present it to the other members of the Council at the next regularly scheduled closed session in which the other members of the Council may reject the appointment by a vote of seven members. If the Council does not reject the Mayor's appointment, the appointment will take effect.

The City Manager will continue to appoint Department Heads with Council oversight as authorized under Charter Section 411.1.

2. Direction of City Manager and Department Heads

In addition, beginning January 1, 2021, the Mayor will have the power to direct the City Manager and Department Heads, concurrent with any authority the City Manager has over Department Heads. But the Mayor's authority is limited to just the City Manager and Department Heads as the proposed measure would not permit the Mayor to directly order, either publicly or privately, subordinate officers or employees under the direction and supervision of the City Manager or a Department Head.

Further, consistent with Councilmember Khamis' memorandum, the Mayor may not direct the City Manager or any Department Head to withhold material information from Councilmembers, unless required by law, or direct the City Manager or a Department Head to minimize the importance of material information shared with members of the Council. The proposed measure also prohibits the Mayor from directing or otherwise using the City Manager or Department Head to inquire about or solicit the vote of another member of the Council outside of a public meeting.

3. Dismissal of City Manager and Department Heads

Beginning July 1, 2023, the Mayor will have the power to dismiss the City Manager and Department Heads, concurrent with any authority the City Manager has over Department Heads. However, the proposed measure would require the Mayor or City Manager to promptly notify the Council of the dismissal of a Department Head and cause the matter to be heard at the next regularly scheduled closed session within 72 hours following this notification of dismissal. The Council may then reject the proposed dismissal by a vote of seven members of the Council.

The procedure described above is the same for the dismissal of the City Manager by the Mayor, but clarification is needed as to whether the Council would have the same ability to reject the Mayor's dismissal of the City Manager as it can with Department Heads.

4. City Clerk

The proposed measure would also amend Charter section 804 to establish the Office of the City Clerk as a City department effective January 1, 2021. And the City Clerk, like other Department Heads, would be appointed by the City Manager, would be under the direction of the Mayor and City Manager, and may be dismissed by the Mayor or City Manager in accordance with the dismissal procedures described above.

The Clerk's current Charter duties over matters like recordkeeping, City elections, or publication of notice would not be altered by the proposed measure.

5. Acting City Manager/Vice-Mayor

The proposed measure would permit the City Manager to appoint the Acting City Manager in the temporary absence of the City Manager. But, if the City Manager fails to appoint an Acting City Manager, the Mayor will have the authority to appoint an Acting City Manager.

The Vice-Mayor will continue to be elected by the Council and serve as the Vice-Mayor during the temporary absence or inability of the Mayor to discharge his or her duties. However, the proposed measure does not grant the Vice-Mayor the power to appoint, direct, or dismiss the City Manager or Department Heads in the absence of the Mayor.

C. Campaign Finance and Other Ethics Measures

To incorporate provisions similar to Government Code section 84308 and other ethics regulations into the City Charter, the proposed measure would establish the framework under a new Article XX. An implementing ordinance would accompany the proposed measure to further define the terms of Article XX and enact the specific requirements and limitations generally established under Article XX.

The Council may adopt the implementing ordinance before the November election to be operative upon passage of the proposed measure. The proposed measure would then allow the Council to amend the implementing ordinance to further the purposes of Article XX, to facilitate the effective operation of the Council or City government, or to comply with a lawful court order. And, except when necessary to comply with a lawful court order, any change to the implementing ordinance that lessens an ethical standard would need to be adopted by a two-thirds vote of the Council.²

This approach is similar to how campaign and ethics laws are implemented under California's Political Reform Act. The State Legislature may not repeal the Political Reform Act but the law allows the Legislature to amend the Political Reform Act, with a

² See Charter section 607.

two-thirds vote in each house, to further the stated purpose of the law. This allows flexibility to address new or changing circumstances or issues as they may arise in the future. We recommend a similar approach here.

1. Campaign Finance

i. Contribution Limit

Similar to Government Code section 84308,³ the proposed Article XX would prohibit a Councilmember, including the Mayor, from accepting, soliciting, or directing a contribution of more than \$250.00⁴ from any party or participant while a proceeding involving a license, permit, or other entitlement for use is pending before the City and for three months following the date a final decision is rendered. Under the proposed measure, the Council may increase this limit to provide for changes in the cost of living.

This limit will apply whether the Councilmember accepts the contribution for himself or herself, on behalf of another member of the Council, or on behalf of any candidate or office, or on behalf of any committee (e.g. fundraising for ballot measure committees, political action committees, etc.). It also applies to Councilmembers running for different office as well as re-election.

Presently, the contribution limit in the proposed measure would only apply to Councilmembers, not all candidates for City office, because Government Code Section 84308 only applies to officers of an agency. As an alternative, however, the Council may consider extending this limit to all candidates for City office.

ii. Conflict of Interest

In addition to the contribution limit described above, the proposed measure would prohibit a Councilmember, including the Mayor, from making, participating in the making, or in any way attempting to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use before the City if the member of the Council has willfully or knowingly received a contribution in an amount of more than \$250.00 within the preceding twelve months.⁵

As with Government Code Section 84308, this prohibition would only apply to contributions for the Councilmember's own candidacy or controlled committee. And, as defined in the implementing ordinance, would apply in decisions related to all business,

³ Government Code section 84308 does **not** apply **to** local governmental agencies whose members are directly elected by the voters.

⁴ Amount established in implementing ordinance under new Section 12.07.200.A.

⁵ Amount and time period established in implementing ordinance under new Section 12.07.200.B. The Council may also increase this limit to provide for changes in the cost of living.

professional, trade and land use licenses and permits and all other entitlements for use, including entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises. The prohibition on participation is also broad enough to apply to executive actions of the Mayor. However, consistent with Government Code Section 84308, there would be no conflict in proceedings where general policy decisions or rules are made, where the interests affected are many and diverse, or in ministerial decisions where no discretion is exercised.⁶

Other similarities to Government Code Section 84308 include allowing a conflicted Councilmember to participate in the proceeding if he or she returns the contribution within 30 days from the time he or she knew, or should have known, about the contribution and the proceeding, methodologies for aggregating contributions among related business entities, and requirements to disclose the conflict during the proceeding.

Government Code Section 84308 requires both the affected party or participant and the officer of the agency to disclose whether a contribution above the limit was made or received. The Council discussed exploration of the City Attorney to monitor compliance and inform Councilmembers of potential conflicts. Such a role, however, potentially conflicts with the City Attorney's duties to advise the Board of Fair Campaign and Political Practices in enforcement proceedings (below) and is not consistent with the framework established under Government Code Section 84308.

iii. Enforcement and Other Considerations

As with other campaign and ethics violations, the proposed measure would grant the Board of Fair Campaign and Political Practices jurisdiction to hear complaints alleging violations of Article XX and the implementing ordinance as described above and assess civil penalties where appropriate.

However, under the proposed measure, the failure of any Councilmember to comply with the conflict of interest provision will not affect the validity of any action taken by the Council or Mayor nor support an allegation of or serve as a basis for a claim of potential or actual bias or conflict. This limitation is recommended because campaign contributions do not generally create a bias or a conflict of interest under the law and may not be recognized as a legitimate basis to reconsider or revoke a permit or license or terminate a contract.

Finally, the proposed measure does not prevent a conflicted Councilmember from participating in the decision if his or her participation is legally required. This is modeled after a similar provision in the Political Reform Act and is intended to address a scenario

⁶ See Implementing Ordinance under new Section 12.07.150.

where the Council cannot constitute a *quorum* because a majority of the Council has a conflict in a matter.

2. Restrictions on Lobbyists and City Contractors

In addition to the limits described above, the proposed measure incorporates the prohibitions specified in Councilmember Jones' memorandum:

- Registered Lobbyists⁷ are prohibited from making a campaign contribution to a candidate for City office.
- Registered Lobbyists, Contractors of the City, or any direct beneficiary of a City contract are prohibited from giving any gift, as defined under the Political Reform Act, to a City official.⁸

The implementing ordinance defines these terms in the Charter amendment:

- “Contractor of the City” means any person or entity that is a party to a contract, excluding 501(c)(3) non-profits; and
- “Direct Beneficiary of a City Contract” means any person identified in a City contract as having a direct financial interest in the performance of a contract.

Lastly, the proposed measure prohibits any registered lobbyist from serving on a Board or Commission within two years of any lobbying activity and any person with a contract with the City from serving on a Board or Commission within two years of expiration or termination of the contract. As directed by Council, this prohibition would be prospective in that persons currently serving on a Board or Commission, who would otherwise be prohibited from serving under the measure, may complete the remainder of his or her term.

The implementing ordinance also would create an exception for representatives of 501(c)(3) non-profits, government entities, and entities or specified interests groups whose representation on a Board or Commission may be required by law, as well as advisory bodies without decision-making authority.

⁷ See Implementing Ordinance under new Section 12.06.265.

⁸ Implementing Ordinance under new Section 12.08.300.A, “City Official” would include the mayor and members of the city council; any appointee of the city council; mayoral or council staff member; members of the planning commission, appeals hearing board, civil service commission; any city representative to any joint powers authority to which the city is a party; the city manager and his or her assistant city manager and deputy city managers; and city department heads.

D. Blue Ribbon Commission

Included in the proposed measure is a requirement that the City Council to establish a Blue Ribbon Commission to study the effectiveness of the above amendments.

Once constituted, the Blue Ribbon Commission is to submit a report to the Council by March 2022 with recommendations, if any, for future Charter changes and to consider provisions consistent with the “Mayor-Council” government structure found in other cities in the United States in which the Mayor has executive authority and the Council has legislative authority.

The proposed measure does not establish the composition of the Blue Ribbon Commission or impose any requirements for appointment. The Council may address these matters with the proposed measure or at a later time.

E. Other Amendments in Proposed Measure

1. Planning Commission

Consistent with Council direction on June 2, 2020, the proposed measure amends Charter Section 1000 to increase the size of the Planning Commission to 11 members, appointed from each Council District and one “at-large” representative. Under the proposed measure, the eighth and ninth member would be appointed for a term ending June 30, 2022 and the tenth and eleventh member would be appointed for a term ending June 30, 2024.

2. Redistricting

Finally, the City Attorney’s Office brings forward a proposed amendment to address possible delays in the completion of the 2020 Census caused by the COVID-19 pandemic.

Charter section 403 establishes a specific timeline for redistricting in the year after the decennial census (e.g. 2021), including a requirement to adopt an ordinance by October 31. This timeline assumes the Census will be timely and the redistricting counts will be delivered to the States by the legal deadline of April 1, which may not occur in 2021.

The Census Bureau has presented a revised schedule⁹ stating it will deliver the local counts to each State by July 31, 2021 and a bill has been introduced in Congress, H.R.

⁹ https://2020census.gov/en/news-events/operational-adjustments-covid-19.html?cid=23760:do%20you%20have%20to%20fill%20out%20the%20census:sem.ga:p:dm:en:&utm_source=sem.ga&utm_medium=p&utm_campaign=dm:en&utm_content=23760&utm_term=do%20you%20have%20to%20fill%20out%20the%20census

July 21, 2020

Subject: Potential Ballot Measure to Amend Charter and Implementing Ordinance

Page 9

7034, to acknowledge this revised schedule and extend the deadline. If the results of the 2020 Census are indeed delayed, the Advisory Commission and Council may not have sufficient time to engage in the redistricting process and meet the deadlines and requirements established in the Charter and State law.

Accordingly, the City Attorney's Office has put forward an amendment for Council consideration in the proposed measure that would extend the deadline to complete redistricting if the Census is delayed.

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