



# REPORT TO COUNCIL

## City of Sacramento

915 I Street, Sacramento, CA 95814-2604  
www. CityofSacramento.org

Staff Report  
August 25, 2009

Honorable Mayor and  
Members of the City Council

**Title:** Strong Mayor Initiative Legal Issues and Options

**Location/Council District:** Citywide

**Recommendation:** Review Strong Mayor Initiative legal issues and options for correcting legal issues, and provide staff direction on option selected.

**Contact:** Eileen Teichert, City Attorney, 808-5346

**Presenters:** Eileen Teichert

**Department:** City Attorney's Office

**Division:** N/A

**Organization No:** 03001011

### Description/Analysis

**Issue:** On August 6, 2009, the City Council voted to place the Strong Mayor Initiative on the June 8, 2010 ballot after receiving certification of the sufficiency of the initiative petition signatures. At the same meeting the City Council directed the City Attorney to report back with an analysis of legal issues in the Strong Mayor Initiative and of the means by which any legal issues in the initiative may be remediated. This report provides that analysis and options available to address some of the legal issues.

**Policy Considerations:** While the City Council supports the people's right of initiative, the City Council must consider whether such support compels the City Council to submit a companion measure to the voters to remediate an initiative with legal infirmities.

**Environmental Considerations:** None

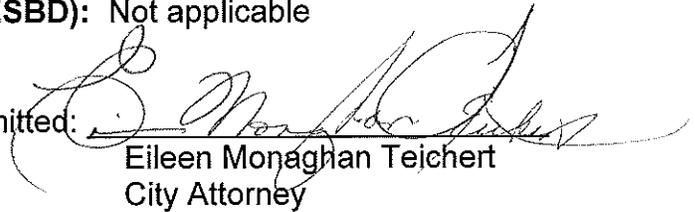
**Commission/Committee Action:** None.

**Rationale for Recommendation:** Options are provided with no recommended action.

**Financial considerations:** The cost for placing a companion charter amendment measure on the June 8, 2010 ballot is \$25,000 in addition to the \$175,000 cost of the Strong Mayor Initiative.

**Emerging Small Business Development (ESBD):** Not applicable

Respectfully Submitted:



Eileen Monaghan Teichert  
City Attorney

Table of Contents:

Report

pg. 1

Attachments:

1 Background

pg. 3

## ATTACHMENT 1

**BACKGROUND:**

On August 6, 2009 the City Clerk presented to the City Council a Certificate of Sufficiency verifying that the Government Accountability and Charter Reform Measure of 2009 (Strong Mayor Initiative or SMI) petition contained adequate signatures to require the City Council to place it on a ballot. On that same date, the City Council voted to place the Strong Mayor Initiative on the June 8, 2010 ballot.

Concurrently with deciding the election date for the Strong Mayor Initiative, the Council noted that the Strong Mayor Initiative as drafted raised at least one pivotal legal issue potentially causing the Strong Mayor Initiative to be declared unconstitutional or otherwise unlawful. The Council directed the City Attorney to report back in two weeks on this pivotal legal issue and any other legal issues identified in the initiative. The Council also requested the City Attorney address possible means of remediating these legal issues. This is that report back directed by the City Council.

This report first briefly summarizes the SMI's pertinent Charter changes or omissions. The legal issues arising out of the SMI are addressed next. Then options for remediating those legal issues are discussed. No recommendation is provided as to which option(s) the Council should select as this is outside the scope of the City Council's direction.

**BRIEF SUMMARY OF STRONG MAYOR INITIATIVE**

In order to understand the legal issues it is necessary to briefly summarize germane charter changes expressly stated in the Strong Mayor Initiative and essential charter provisions that the Strong Mayor Initiative either deletes from or fails to include in the charter.

Express Charter Changes

- Mayor becomes Chief Executive Officer of City of Sacramento
- Mayor assumes powers formerly held by City Manager
- Mayor prepares and presents budget to City Council for approval, with mayoral budget becoming effective if not timely approved by City Council.
- Mayor appoints City Manager, and appoints the City Clerk, City Treasurer and City Attorney with the City Council's advice and consent
- Mayor appoints all other employees<sup>1</sup>
- All City employees are subject to removal by the Mayor<sup>2</sup>

1 Approximately 100 employees in the Council members', City Treasurer's, City Clerk's and City Attorney's Offices are appointed by the respective Council members and Charter Officers.

2 Exceptions are the approximately 100 employees in the Council members', City Treasurer's, City Clerk's and City Attorney's Offices who report to the respective Council members and Charter Officers. Unlike the 5,000 other City employees who are direct removable by the Mayor, 80 of these employees are indirectly removable by the Mayor who may directly remove the Charter Officers at his pleasure.

- City Council has legislative and quasi-adjudicative powers
- Mayor is no longer a member of City Council
- City is immediately divided into nine council districts
- Boundaries of Ninth District are established when redistricting occurs
- Mayor votes on matters before City Council until Ninth District created

#### Essential Charter Provisions Deleted or Omitted

- Does not address election timing for the Ninth Council District
- Deletes grant of residual powers to the City Council without making that grant to the Mayor or any other person

### LEGAL ISSUES

The legal issues arising out of these express charter changes and deleted or omitted charter provisions are divided into and discussed under three categories: 1) pivotal legal issues; 2) legal ambiguities; and 3) potential legal issues. The options for remediating these legal issues also follow this categorization.

#### **1) Pivotal Legal Issues—Divestiture of Right to Vote and to Representation**

##### Ninth District Council Member Election

The Strong Mayor Initiative not only transfers the City's executive powers to the Mayor, it also removes the Mayor from membership on the City Council. Ostensibly to address the potential for tie votes with an eight member City Council, the Strong Mayor Initiative also requires creation of a ninth council district.<sup>3</sup> Under the SMI the ninth district boundaries will be drawn when the City's redistricting occurs pursuant to the new census data. Based upon the City's redistricting history over the past two decades, redistricting will likely be effective November 2011. Approximately 55,000 City residents would then reside in the ninth district. At that point the Mayor would no longer vote with the Council.

The SMI-amended charter fails to address when the ninth district election occurs. Article X of the current Charter sets out timing of the election cycle for the Mayor (1992 and every four years thereafter) and Council districts one through eight (1994 for districts 1, 3, 5, 7 and 1992 for districts 2, 4, 6 and 8 and every four years thereafter). Unfortunately, the Strong Mayor Initiative neither amends Article X nor otherwise addresses the elections cycle or term commencement dates for the ninth district seat.

If the City Council had the authority to adopt an ordinance setting the elections cycle and beginning and ending date for the ninth district council member term then this omission in the Strong Mayor Initiative would not be problematic. However, an analysis of the California Constitution, the City Charter language, the history of the current Charter elections language, laws applicable to general law cities, other cities' charters and relevant case law leads us to

---

3 The Mayor would continue voting with the Council on most matters until the ninth district creation.

conclude the City Council has no such authority. Such authority lies only with the electorate.

Due to the lack of authority to call an election for the ninth district council seat, the effect of the Strong Mayor Initiative's passage would be to disenfranchise ninth district voters denying the 55,000 residents their fundamental right to vote and representation.

The following briefly explains how this opinion was reached.

### California Constitution

The California Constitution grants to Sacramento and other charter cities authority over municipal affairs. Subdivision (b) of section 5 of California Constitution article XI sets out a non-exclusive list of "core" municipal affairs over which it is competent for a charter to enumerate and prescribe particulars, including elections.

Sacramento's Charter exercises that constitutional grant of authority over elections in Charter Article X by prescribing particulars concerning elections, including timing of mayoral and districts one through eight council elections.<sup>4</sup> Other election particulars in Article X include: the date elected officials take office as the fourth Tuesday following the first Monday in November in the year of their election;<sup>5</sup> and substantive rules for filling a council vacancy by special election or council appointment depending on the remaining balance of the prior incumbent's unfinished term.<sup>6</sup>

Article X requires the Council to establish election "procedures"<sup>7</sup> and the nominations process<sup>8</sup> by ordinance which the Council has done.<sup>9</sup> Finally, Article X has a catchall section stating that unless otherwise provided for by the procedures ordinance and so long as not in conflict with the Charter elections shall be held in accordance with the general law (California Government Code and Elections Code).<sup>10</sup> This catchall section permits the City to follow the general law on elections procedures, but not substantive elections issues, such as setting starting and ending dates for council member terms. Nothing in the Charter expressly allows for the Council to establish election cycles or terms of office for either existing or additional Council districts.

If the City's Charter allowed the general law to apply under these circumstances, the general law also requires cities to submit to voters substantive issues about municipal elections such as the number of districts, conducting elections at large versus elections from or by districts, and when elections will occur. In short, the general law requires the electorate to make the decisions on timing of council elections.

To understand the policy reasons underpinning the law, i.e., leaving such decisions in the

---

4 Charter Section 152.  
 5 Charter Section 153.  
 6 Charter Section 154.  
 7 Charter Section 150.  
 8 Charter Section 151.  
 9 Sacramento Municipal Code Chapter 1.16.  
 10 Charter Section 155.

hands of the electorate, one need only imagine the mischief that could ensue if council members had the ability to modify their own beginning and ending dates for their terms of office or the terms of office for their cohorts.

### Charter History

The City Charter's history is consistent with this interpretation of the constitutional requirement to address beginning and ending dates for terms of office and timing of City officials' elections in city charters. Sacramento's Charters as amended over the years have long included these issues.

Pre-1989 the Charter set out the election cycles for the mayor and eight district council members during odd-numbered years. The purpose of current Charter section 152 as amended by the voters in 1989 was to move elections for mayor and city council from odd- to even-numbered years consolidating City elections with other state elections on the even-year ballots. The intended result was substantial costs savings and taking advantage of the historically greater turn out for elections in those general election years. To carry this out, the current Charter section 152 provides with great specificity that the terms of office for the mayor and council districts 2, 4, 6 and 8 would be extended one year from 1991 to 1992, when the first even-numbered year elections would be held. Likewise, the council seats for districts one, three, five, and seven had their terms extended for one year so that elections for those seats would be held in 1994.

The history behind section 152 shows the electorate chose to extend incumbent terms to align elections. They could just as well desire to shorten or lengthen the term for the first council seating for a new ninth district to cause the election to line up with either the odd- or even-numbered district election cycle. To presume what the electorate would want based on lack of language in section 152 would both violate the rule of construction that does not allow insertion of words and would make a decision the electorate has reserved for itself.

Neither the text of Charter section 152 nor the history of its creation in 1989 support legislative action by the council to call for an election for a new ninth district.

### Other Charter Cities

Major California cities' charters also follow this interpretation of the constitution by expressly addressing timing of their elected officials' elections.<sup>11</sup> Some charters, such as

---

11 City of Los Angeles Charter Art. II, sec. 204(g): Elections for odd-numbered districts occur on the fourth anniversary of 1997 and for even-numbered districts on the fourth anniversary of 1999; City of Oakland Charter Art. II, sec. 204: districts 1, 3, 5, 7 and at-large councilmember elections in 1992, and districts 2, 4, 6 and 8 in 1990, and every four years thereafter; City of San Diego Charter Art. II, sec.10; and City and County of San Francisco Charter Art. XIII, sec. 13.101 and 13.110: delegates to clerk of board of supervisors duty to determine by lot term ending dates of either January 8, 2003 or 2005 for odd- or even-numbered supervisorial districts.

Fresno's charter, are drafted in a forward-thinking way to address creation of new council districts and elections timing and terms of office for new district council seats.<sup>12</sup> No city charter has been identified that allows the beginning or ending dates for council members terms of office to be established or changed by either the city council or any means not expressly set out in the charter.

## 2) Legal Ambiguities

### Residual Powers

The City of Sacramento is a municipal corporation that can act only through duly authorized persons. One of the most important functions of a city charter is to clearly state who is duly authorized to act for the City. As was discussed in the "Strong Mayor Initiative: A Comparison and Analysis" that was presented to the City Council on February 3, 2009, the Strong Mayor Initiative creates substantial uncertainty regarding who is authorized to act on behalf of the City.

The source of this uncertainty is the deletion of the residual powers clause from section 20 of the Charter by the Strong Mayor Initiative. Section 20 of the City Charter currently provides that "[a]ll powers of the city shall be vested in the city council except as otherwise provided in this Charter." The Strong Mayor Initiative would amend section 20 so that only the legislative and quasi-judicial powers of the City would expressly vest in the City Council; however, it does not state who would possess all of the other the powers formerly expressly possessed by the City Council. The Strong Mayor Initiative creates the troubling question of who is authorized to act on behalf of the City when the charter no longer states who holds that authority.

These "residual powers" that would no longer be clearly delegated under the Strong Mayor Initiative charter include for example the power to: enter into contracts, negotiate and approve collective bargaining agreements, establish unrepresented employees salary ranges and benefits, and authorize and settle lawsuits and claims.

Use of the initiative process to amend the charter precludes reference to legislative history in interpreting ambiguities and conflicting provisions in the Charter. Therefore, the answers to the questions of who holds the various residual powers of the City will be resolved over time. If these issues arise in the future the City Attorney's analyses and interpretations of the amended Charter language may be challenged in a court of law, with a judge or judges providing the ultimate answers to these questions.

---

<sup>12</sup> See, e.g., City of Fresno Charter sec. 1504 (Expansion of Council Membership), describes how two new council members will be added when a population threshold is reached. Subsection (b) of section 1504 states: "The two seats shall be initially filled in the next regular municipal election held in which City offices are filled. Both Councilmember seats 8 and 9 shall be filled at said next regular municipalelection. Thereafter, Councilmember seat number 8 shall be filled in the same electoral cycle as even-numbered Council seats and Councilmember seat number 9 shall be filled in the same electoral cycle as odd-numbered Council seats. Depending on when the election cycle for filling Councilmember seat numbers 8 and 9 falls, the initial term for one of the two seats shall be a twoyear term."

### Contracting

Contracting authority is one major area of legal uncertainty created by the Strong Mayor Initiative. The power to contract is not granted to any other city officer under the Charter. By virtue of the residual powers clause of current Charter section 20, the City Council now has all powers to award contracts and to authorize their execution. The Strong Mayor Initiative's deletion of the residual powers clause creates ambiguity whether this power to contract lies with the City Council or Mayor.

With respect to certain procurement contracts, the ambiguity might be resolved by harmonizing the Strong Mayor Initiative's amendment of section 40 and section 200. The SMI amends Charter section 40(b)(5) so that the Mayor "shall exercise the authority, power, and duties formerly conferred upon the City Manager as that term is used in this Charter unless otherwise expressly provided." This grants the Mayor the authority to act where the City Manager previously did, not only where authorized by the Charter, but also where authorized by ordinance. Charter section 200 requires the City Manager to purchase, or contract for the purchase of, goods, equipment, materials, supplies, services or undertaking of public projects in accordance with City Council adopted ordinances, except as provided in the Charter. Under the SMI, the Mayor would have the duty to contract for these purchases, but would be subject to the Council ordinances on the manner of contracting.

This issue is further compounded by the proposed amendment of Charter section 61(h). Section 61(h) currently provides the City Manager with the power and duty to execute contracts when authorized to do so by the provisions of the Charter, by ordinance, or by resolution. The SMI would amend Section 61(h) so that the City Manager's power and duty to execute contracts would also arise when authorized to do so by the Mayor. Section 61(h) serves as a delegation of signature authority to the City Manager, and the SMI would not expressly vest contracting authority with the Mayor. Therefore, it is unclear why the SMI provides the Mayor with the authority to direct the City Manager to execute contracts, unless perhaps the intent of the SMI is to provide the Mayor with the power to award and execute contracts that are not otherwise specifically addressed in the City Charter, e.g., contracts where the City provides services to a third parties or grant agreements.

### Labor Agreements and Related Issues

Again, pursuant to operation of the residual powers clause, the City Council currently has the authority and duty to meet and confer in good faith and enter into collective bargaining agreements with the various labor unions representing more than four thousand employees regarding wages, hours, and other conditions of employment. The Meyers-Milias-Brown Act (MMBA) is the state law governing public agency-employee organizations relations. MMBA states that the "governing body" or its administrative officers or representatives have the duty to meet and confer on such issues, and that collective bargaining agreements shall be presented to the "governing body" or its "statutory representative" for determination. If MMBA defined "governing body" as the "legislative body" it would be clear that the City Council retained all

authority over these collective bargaining duties. However, MMBA does not define “governing body”. At least one court has noted that with more than a dozen statutory definitions of “governing body” in the various codes, the term “governing body” has far from a fixed meaning. This leaves unanswered at present whether the Mayor or the City Council would have authority over collective bargaining issues.

The City’s handling of salary ranges, benefits and other employment-related issues associated with the City’s 600-700 unrepresented employees is not governed by the Meyers-Milias-Brown Act. The charter is silent on these unrepresented employee issues. Again, at present, the residual powers clause operates to vest this authority in the City Council. Under the Strong Mayor Initiative this is another major area left subject to debate over who holds such power.

#### Settlement Authority, Closed Sessions

Currently, the City Attorney commences and settles civil lawsuits only pursuant to authority received from the City Council.<sup>13</sup> For cases over \$100,000 that authority is received during duly agendaized closed session meetings between the City Attorney and City Council. The Strong Mayor Initiative creates uncertainty over who would authorize entry into and settlement of lawsuits. If it is determined the Mayor holds such power, then the Mayor would meet privately with the City Attorney to discuss the status of litigation cases, approve filing and settlement of lawsuits. Such meetings, of course, would not be subject to the Brown Act, which applies only to meetings of the legislative body. The City Council would rarely if ever meet in closed session over any matter, and as a body likely would not be confidentially apprised of litigation matters by the City Attorney.

If it is determined the City Council would continue to hold such powers, then the Mayor, who would no longer be a City Council member, could no longer attend closed sessions with the City Attorney to discuss such matters. Rather these important litigation decisions would be made by the City Council alone.

#### Redevelopment Agency Board & JPAs

Perhaps an unintended consequence of the Strong Mayor Initiative’s removal of the mayor from the City Council, would be the ineligibility of the Mayor to serve on the boards of the Redevelopment Agency, Housing Authority and City Financing Authority, and other boards of Joint Powers Authorities that require City board members to be members of the legislative body, i.e. the City Council. This would remove the Mayor from any decision-making regarding significant projects, such as Downtown, River District and Railyards redevelopment projects.

### **3) Potential Legal Issues**

#### Mayoral Right to Vote, Veto and Vote not to Override veto

SMI’s inclusion of tri-part mayoral powers to vote, veto and vote whether to override his

---

<sup>13</sup> A limited exception is the City Attorney’s statutory authority to commence civil nuisance cases

own veto has no analog in any city charters inside or outside of California. This ability to vote, veto and vote not to override his veto, combined with the major shift of powers from the City Council to the Mayor, appears at a minimum to constitute a significant dilution of the eight council members voting rights and thereby a significant dilution of representation for each of the council districts. This is potentially violative of the California Voting Rights Act. However, because it does not appear that an attempt has been made in any other public agency to aggregate such voting and other powers in one elected individual, there is a dearth of case law to provide guidance.

The SMI provides for mayoral appointment and removal power over almost all City employees. This includes those employees who participate in City administrative hearing procedures that may grant or divest individuals of certain property rights, as with land use and code enforcement decisions. Exercise by the Mayor of his tri-part voting, veto, and voting not to override the veto power with respect to appeals of any matters decided by his appointees may give rise to significant due process concerns. Again, cases provide no assistance since such powers have never resided in one elected official.

#### Council President's Dual Roles

At present Charter section 45 provides that the vice-mayor shall serve as acting mayor if the mayor is absent from the City or a Council meeting, if the mayor becomes incapable of acting as mayor or delegating duties, or if a vacancy in the office of mayor exists. The SMI amends section 45 to state that the Council President shall serve as acting mayor if the mayor becomes incapable of acting as mayor and incapable of delegating duties, or if a vacancy exists in the office of the mayor. These portions of section 45 are similar with the substitution of the term "Council President" for "vice-mayor".

The present provisions permitting the vice-mayor to temporarily serve as acting mayor are not problematic due to the existing mayoral powers. Enabling the Council President to serve as acting mayor with the full panoply of mayoral powers, appointment and removal of thousands of employees, exercise of tri-party voting, veto and voting not to override powers, etc. could be unintended and therefore problematic. While the SMI does limit the circumstances under which the Council-President becomes acting mayor to only the most grave or extreme circumstances, it is unclear if the absence of limitations on the acting mayor's powers is intentional or oversight.

The City of San Diego's charter does contemplate this potential problem by proactively dealing with the dual role issue when a council member takes on the mayor's duties.<sup>14</sup>

---

14 City of San Diego Charter Art. XV sec. 265 (i): (i) During the period of time when an appointment or election is pending to fill a vacancy in the Office of Mayor, the presiding officer of the Council shall be vested with the authority to supervise the staff remaining employed in the Office of the Mayor, to direct and exercise control over the City Manager in managing the affairs of the City under the purview of the Mayor and to exercise other power and authority vested in the Office of the Mayor when the exercise of such power and authority is required by law. This limited authority would include circumstances where the expeditious approval of a legislative action is necessary to meet a legal requirement imposed by a court or another governmental agency. Such limited authority would not include the exercise of the power of veto or any other discretionary privilege which is enjoyed by a person appointed or elected to the Office of Mayor. The presiding officer, while acting under this section pending the filling of a mayoral vacancy, shall not lose his or her rights as a member of the Council.

**OPTIONS TO ADDRESS LEGAL ISSUES****1) Resolving the Ninth Council District Legal Issues**

For the reasons discussed above, the Strong Mayor Initiative may be struck down and not given effect by a court of law, even if approved by a majority of the voters, due to the failure to provide timing in the charter for electing the new Ninth District Council member. If the City Council desires that the Strong Mayor Initiative be legally viable if approved by the voters, another charter amendment should be placed on the same ballot addressing the omission of the ninth district council member election.

A curative charter amendment may appear on the same ballot as the Strong Mayor Initiative either by:

- a. Curative measure proposed and adopted by the City Council; or
- b. Qualified curative initiative for which signatures of at least 15% of the electorate have been timely collected by the Proponent and certified by the City's elections official.

Each of these options has legal and practical issues.

Council Curative Measure

The City Council has never before attempted to cure a legally deficient qualified initiative through a Council adopted measure. The City Attorney's Office has been unable to identify any other city that has taken such an extraordinary step in aid of a flawed initiative. If the City Council so chooses to prepare, adopt and place on the ballot a curative charter amendment measure, the City Council may be legally obligated to provide similar assistance to future defective qualified initiatives, or face and possibly lose denial of equal protection or other legal challenges.

Proponent Curative Initiative

Circulating a curative charter amendment initiative would be costly for the proponent as the proponent would once again be required to obtain and have certified the signatures of at least 15% of the registered voters likely using paid signature gatherers as with the Strong Mayor Initiative. Proponent does have adequate time to gather those signatures and have the curative initiative placed on the June 8, 2010 ballot.

Complementary Measure or Initiative

A complementary measure resolving the Ninth District Seat issue could specify for example:

- The ninth district seat remains empty until the June 2012 primary election
- The ninth district council member would be elected to a two year term by plurality vote just for the June 2012 primary election and take office upon elections official's certification of the vote.
- Thereafter, in 2014, the ninth district council member would be on the same primary & general election cycle, and subject to the same runoff procedures as council members for districts 1, 3, 5, 7.

If narrowly and carefully drafted as set out above, the complementary curative measure or initiative would be effective even if it was approved by the voters with fewer votes than received by the Strong Mayor Initiative. This is because where two measures (or initiatives) are presented to voters as complementary or supplementary, rather than competing, and both pass, courts compare the measures provision by provision. The provisions of the measure receiving the lower number of affirmative votes are operative so long as they do not conflict with the provisions of the measure receiving the higher number of affirmative votes, and so long as those non-conflicting provisions are severable from any that do conflict.

To enhance the likelihood that the curative measure or initiative is not deemed in conflict with the Strong Mayor Initiative, proponents of a complementary or supplementary measure or initiative should include severance language that expressly says the measure is intended to complement the other measure and to the extent there is a conflict, the provisions of the measure receiving the higher number of affirmative votes should be given effect. In addition, proponents may include language that makes effectiveness of the complementary measure contingent on the passage of the measure it intends to complement.

#### Judicial Challenge

If the Strong Mayor Initiative is approved by the voters and a complementary measure or initiative is either not on the ballot or not approved by the voters, the City Council or a member of the public may elect to seek judicial relief against the Strong Mayor Initiative becoming effective. Such relief could be sought by petition for a writ of mandamus, declaratory relief or injunctive relief. A judicial challenge would likely either strike down the Strong Mayor Initiative in its entirety or delay its implementation until a judicial ruling is finalized. Operations and governance of the City could be significantly impaired during the pendency of the litigation.

Rather than invalidating an entire initiative courts sometimes sever unlawful provisions from an initiative. However, courts do so only where it appears the electorate intended that the lawful provisions stand alone (by the initiative's inclusion of a severance clause) and where the unlawful provisions can be easily deleted from the initiative. The Strong Mayor Initiative does not include a severance clause, and the creation of the ninth council district is intertwined with other major provisions of the initiative, such as the mayoral power to vote with the Council ceasing upon creation of the ninth district. Therefore, it appears highly unlikely the ninth council district creation could be severed from the remainder of the initiative.

## 2) Addressing the Ambiguities

### Charter Amendment Measure Conflicting with SMI

A charter amendment measure or initiative to address the ambiguities in the Strong Mayor Initiative would of necessity be in conflict with the Strong Mayor Initiative. The best means of addressing the ambiguities, and other legal issues in the Strong Mayor Initiative, is to redraft it and set it out in full in a competing measure or initiative.

The California Constitution explains how to handle conflicting measures. On adopting or amending charters, it provides that "[i]f provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."<sup>15</sup> In interpreting identical language in the Constitution on statewide elections, the California Supreme Court said that—unless a contrary intent is apparent in the ballot measures—only the conflicting measure receiving the highest number of affirmative votes is enforced.<sup>16</sup> This interpretation of the conflicting measure rule did not completely foreclose operation of a measure that receives an affirmative vote simply because one or more minor provisions happen to conflict with those of another initiative principally addressed to other aspects of the same general subject. In this circumstance, the California Supreme Court suggested, but did not decide, that if the principal purpose will be accomplished notwithstanding the excision of minor, incidental conflicting provisions, the remainder of the measure could be given effect.

Because of this, if proponents of a measure or initiative want to take steps to prevent a provision-by-provision analysis with a passing Strong Mayor Initiative, the proponents should include language that expressly says winner of highest affirmative votes takes all. For example, words to the effect that "In the event that this measure appears on the same ballot as another initiative measure or measures that seek to amend the Charter of the City of Sacramento, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and each and every provision of the other measure or measures shall be null and void."

## 3) Remediation of Potential Legal Issues

Options for fixing the potential legal issues listed are the same as those given for the "Ambiguities Legal Issues" above.

## CONCLUSION

The Strong Mayor Initiative could be subject to successful legal challenge on the grounds

---

15 Cal. Const., art. XI, sec.3, subd.(d) [applicable to city and county charter adoption and amendments].

16 *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm.* (1990) 51 Cal.3d 744, 747 [construing Cal. Const., art. II, sec.10, subd.(b), applicable to statewide elections, where state electorate had, at the same election, approved Propositions 68 and 73, each intended to provide comprehensive regulation of political campaign contributions and spending].

of denial of voting rights and of representation for the Ninth Council District residents. If the Strong Mayor Initiative does survive a legal challenge, the absence of a residual powers clause in the amended charter would likely give rise to debates or may escalate to a power struggle between the Mayor and City Council over who possesses the significant power to contract, negotiate and approve labor contracts, set employee compensation ranges and benefits, settle lawsuits, attend closed sessions, sit on JPA boards, and much more. The multiple ambiguities throughout the Strong Mayor Initiative create a potential of further legal challenges to interpret the meaning of both the new and old charter language.

In summary, to address the legal issues arising out of the Strong Mayor Initiative the City Council presently has three options:

1) Attempt to cure the Strong Mayor Initiative's Ninth District election omission through a complementary, non-conflicting measure on the June 8, 2010 ballot;

2) Place a well-drafted conflicting measure on the ballot clearly delineating the division and balance of powers of the Mayor and Council; or

3) Take no action, leaving it up to the Proponent to circulate a corrective initiative petition curing the SMI's legal infirmities, and decide later whether or not to challenge the Strong Mayor Initiative if approved by the voters.