



REPORT TO COUNCIL City of Sacramento

915 I Street, Sacramento, CA 95814-2604
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Staff Report
September 15, 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(s) 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 expressing an intent 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: City Council should consider and discuss the legal issues arising from the Strong Mayor Initiative.

Environmental Considerations: None

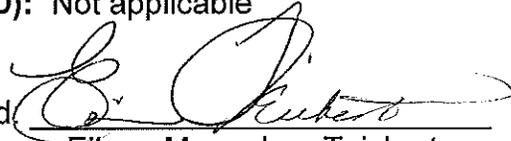
Commission/Committee Action: None.

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

Financial considerations: The cost for placing a competing 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

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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 expressing their intent 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. When mayoral conflict of interest issues arose, this report was continued until those issues were resolved.

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 addressing or 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.

With the passage of time additional legal issues continue to surface. The latest legal issue included in this report is that of the questionable constitutionality of using the initiative process to "revise" the charter. This report is not intended to be a complete discussion of all SMI's legal issues as additional legal issues are expected to emerge over time.

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

- Changes Sacramento's form of government from Council-Manager to Strong Mayor-Council
- 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 with limited exceptions¹

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

- All City employees are subject to removal by the Mayor²
- 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 may veto all Council actions except as provided by Charter or the law
- Mayor votes on matters before City Council, including votes to override his vetoes, 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 are similarly categorized.

1) Pivotal Legal Issues

A. Unconstitutional Use of Initiative Process for Charter “Revision”

California Constitution

The California Constitution, and statutes enacted pursuant to the Constitution, govern the procedures for adoption, repeal, revision, and amendment of city charters. Constitution article XI, section 3, grants to the electorate the power to propose *amendments* of a city charter by initiative, but grants power to propose charter *revisions* only to the city governing body or a charter commission.³ Under the California Constitution, charter “revisions” may not be made through the initiative process.

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 directly removable by the Mayor, 80 of these employees are indirectly removable by the Mayor who may directly remove the Charter Officers at his pleasure.

3 The governing body may also propose charter amendments. (Hernandez v. County of Los Angeles (2008) 167 Cal. App. 4th 12, 21 [“Under the California Constitution there are only two methods for proposing an amendment to a city charter: (1) an *initiative* qualified for the ballot through signed voter petitions; or (2) a *ballot measure* sponsored by the governing body of the city.”].)

The difference between amendment and revision is pivotal and of Constitutional and statewide magnitude.⁴ An exhaustive treatment of cases and comprehensive analysis of the SMI under the cases is beyond the scope of this report. Nevertheless, the following discussion supports the conclusion that there is substantial risk a court would find the SMI unconstitutional because it proposes to revise, rather than simply amend, the City's charter in violation of article XI section 3 of the Constitution.

California Constitution article XI, section 3, subdivision (b), states:

(b) The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body.

In other words, only the governing body or a charter commission may propose a city charter "revision". Either the governing body or an initiative may propose a city charter "amendment."⁵

The text of the Constitution does not define the terms "amendment" or "revision." Although research has not revealed a California court decision that examines the distinction between *charter* amendment and revision, there are many court cases that discuss the difference between a state constitutional revision and constitutional amendment.

However, the California Constitution's proscription against revision of a charter by initiative generally mirrors the California Constitution's proscription against revision of the Constitution by initiative.⁶ When the Constitution Revision Commission drafted the current language of article XI for revision of city charters and the California Legislature voted to place the language change on the ballot in the form of 1970's Proposition 2, adopted by the electorate, the law deems they knew established law defining amendment versus revision and acceded to the courts' interpretation.⁷ It follows that for guidance on the meaning of the terms "amendment"

4 Cal. Const. art. XI, § 3 (b) ["The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body"]; see, e.g., Rossi v. Brown (1995) 9 Cal.4th 688, 698 [legislature retains exclusive jurisdiction over city charter amendment process].

5 The term "propose" in this sense means to place before the voters on an election ballot.

6 Cal. Const. art. XVIII, § 1 (Legislature by two-thirds vote of each house may propose an amendment or revision of the Constitution); § 2 (Legislature by two-thirds vote of each house may submit at a general election the question whether to call a convention to revise the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention.); § 3 (electors may amend the Constitution by initiative).

7 See, e.g., McFadden v. Jordan (1948) 32 Cal.2d 330, 334 [drafting and adoption of 1911 initiative provisions of California Constitution implicitly accepted the high court's decisions recognizing the amendment/revision distinction for changing the Constitution].

and “revision” under article XI for city charters we first turn to court cases discussing the distinction between amendment and revision of the Constitution itself.

Given the numerous statewide initiatives attempting to amend the California Constitution over the past several decades, a frequent legal issue raised during challenges to these initiatives is whether the initiative “revises” versus “amends” the Constitution. There are a number of published California court decisions on this issue.

The California Supreme Court has established the following test for determining whether a change to the Constitution is an amendment or a revision.

[I]n resolving the amendment/revision question, a court carefully must assess (1) the meaning and scope of the constitutional change at issue, and (2) the effect—both quantitative and qualitative—that the constitutional change will have on *the basic governmental plan or framework* embodied in the preexisting provisions of the California Constitution.⁸

Each situation involving question of amendment, as contrasted with revision, of the Constitution must...be resolved upon its own facts.⁹

The California Constitution sets out identical proscriptions against use of the initiative process to revise charters and the California Constitution. It follows that a California court of first impression would apply the same principles to distinguish a charter revision from a charter amendment.

Other states’ constitutions provide similar distinctions between the means by which their constitutions and city charters may be revised versus amended. The published opinions from those states are instructive as several address the issue in the context of home rule city charters and adopt the California Supreme Court principles in distinguishing between revisions and

8 Strauss v. Horton (2009) 46 Cal.4th 364, 387 [initiative process may not be used to revise constitution], opin. mod. with no change in judgment 2009 Cal. LEXIS 5416.

9 Strauss v. Horton, *supra*, 46 Cal.4th 364, 424 [citation and internal quotes omitted] [Prop. 8 not a revision of Constitution where it modified constitutional definition of marriage]; see McFadden v. Jordan, *supra*, 32 Cal. 2d at 348 [measure delegating far reaching and mixed powers to a state pension commission was a revision because it “places such commission substantially beyond the system of checks and balances which heretofore has characterized our governmental plan”]; Raven v. Deukmejian (1990) 52 Cal.3d 336, 355 [Prop. 115, the “Victims Justice Reform Act,” was a qualitative revision because it vested judicial power in another entity, and thus was “certainly a fundamental change in our preexisting plan”]; California Assn. of Retail Tobacconists v. State of California (2003) 109 Cal. App. 4th 792 [Prop. 10 not a revision of Constitution where imposed tax on cigarettes and allocated tax revenues for public education and anti-smoking programs]; Amador Valley Jt. Union H.S. District v. State Board of Equalization (1978) 22 Cal.3d 208 [Prop. 13 not a revision of Constitution].

amendments.¹⁰ Applying such principles those courts have articulated the proposition that a change in the form of government of a home rule city may be made only by revision of the city charter, not by amendment, and have simply expressed that revision suggests fundamental change, while amendment is a correction of detail.¹¹

In an effort to resolve the amendment/revision question we apply these same principles to the SMI.

Meaning and Scope of Charter Change

SMI's stated purpose is to change Sacramento's form of government from Council-Manager to Strong Mayor-Council. The changes encompass the essential Articles of the Charter that address distribution of powers and duties of the three central figures in Sacramento's government structure-- the Mayor, City Council and City Manager. The scope of these Articles and the meaning of SMI's changes include:

- Article III-The City Council (reduced to Legislative/Quasi Judicial body)
- Article IV-The Mayor (granted many appointive, removal, budgetary and executive powers formerly held by Council and City Manager)
- Article V—City Manager (loses prior powers, becoming an administrator)
- Article VI—Other Appointive Officers (Mayor appoints Charter Officers)
- Article VII—Civil Service (shifts city manager's powers to Mayor)
- Article VIII-Certain Departmental and Personnel Provisions (creates Mayoral power over fire and police departments)
- Article IX--Fiscal Administration (shifts city manager's powers to Mayor)
- Article XIV—Public Contracts and Supplies (shifts city manager's powers to Mayor)
- Article XVII—Sacramento City Employees' Retirement System (shifts powers to Mayor to control majority of Administration, Investment and Fiscal Management Board and appoint Retirement system manager).

The remaining ten Articles outside SMI's scope include such matters as the introduction to the charter, home rule powers of city, binding arbitration, boards, commissions and agencies, miscellaneous provisions and elections (which, as noted elsewhere, should have been changed). While each of these unchanged Articles serves a purpose, they do not go to the basic

10 See Midland v. Asbury (1972 Mich.) 197 N.W.2d 134 [held petition unlawful revision of home rule city charter where proposed ability to recall city manager that constituted a change in the form of government that may be made only by revision]; Karytko v. Town of Kennebunk (2006 Maine) 2006 Me. Super. LEXIS 209 [held proposed initiative an unconstitutional charter revision where substantially altered town's budget process]; Albert v. City of Laconia (1991 N.H.) 134 N.H. 355 [held lawful charter amendment where changed 3 of 9 council elections from at-large to ward and changed mayoral election to at-large]; Opinion of the Justices of Delaware Supreme Court (1970 Del.) 264 A.2d 342 [Delaware Supreme Court adopted California's definitions of "revision" and "amendment" set forth in McFadden v. Jordan, supra, 32 Cal.2d 330].

11 Kelly v. Laing (1932 Mich.) 242 N.W. 891 [petition purporting to amend city charter to abolish office of city manager and vest his powers and duties in city commission is a proposal for revision].

governmental plan or framework in the existing Charter. All nine Articles that do address Sacramento's basic governmental plan or framework are changed by the SMI.

Effect on Basic Governmental Plan or Framework in Existing Charter

Quantitative

Quantitatively, the SMI adds, deletes or changes nine of the charter's 19 articles and 45 of the charter's 151 sections. This includes the articles and sections of the existing charter which are not expressly listed in the SMI, but which are included in the omnibus provision substituting "Mayor" for "city manager" throughout the charter to effectuate the substantial shift in powers to the Mayor. The affected sections are:

- Sections in current charter—151
- Sections added—2 (sections 36 & 37)
- Sections deleted—1 (section 63)
- Sections changed—27 (sections 20, 21, 22, 26, 27, 28, 29, 30, 32, 34, 40, 44, 45, 46, 60, 61, 62, 70, 71, 72, 73, 74, 75, 76, 81, 111, 117)
- Sections changed by omnibus provision—15

Total number of sections affected—45, almost one-third of the charter's sections.

Not included in this quantitative analysis are the additional sections in Charter Article X--Elections that must be amended in order to provide for the timing of and initial term of office of the ninth district council member.

Cumulatively, almost all of the Charter provisions addressing the City's governmental structure and foundational power of its branches would be changed or deleted, or new provisions added—highly indicative of a quantitative revision.

Qualitative

"[I]n order to constitute a qualitative revision, a constitutional measure must make a far reaching change in the fundamental governmental structure or the foundational power of its branches as set forth in the California Constitution."¹²

SMI's proponents promise such far reaching changes in Sacramento's city governmental structural and the powers of its branches. The proponents explain they are hoping to change,

12 Strauss v. Horton (2009) *supra*, 46 Cal.4th 364, 444.

through charter reform, Sacramento's government structure. Section 2 of the SMI, Findings and Declaration of Purpose, clarifies that the change sought to be made in the fundamental structure of Sacramento's government is from the council-manager form of government to that of Strong Mayor-Council.

The proponents characterize SMI as a "modernization of the charter that would make the mayor the city's chief executive officer, similar to the governor or the president... establish[ing] broad new power for our City Council, which would function like the legislature and Congress,"¹³ thereby effectuating a far reaching shift in the foundational powers of Sacramento's branches of government.

Some of SMI's qualitative changes to the powers of Sacramento's government branches include the following.

- Removes Mayor from the City Council.
- Creates mayoral veto power--the power of one person to stop a majority council decision to change the status quo, absent a super majority override.
- Limits the city council to legislative and "quasi-judicial" powers whereas under the current charter the council has all city powers except as otherwise provided by the charter.
- Provides the Mayor the authority to act where the city manager previously acted, not only where authorized by the Charter, but also where authorized by ordinance.
- Authorizes the Mayor to vote on all matters pending before the council until the ninth council district is created, including legislative, administrative and quasi-judicial matters, concurrently while exercising executive mayoral powers, and to vote on decisions to override own veto.
- Leaves unaddressed where "residual powers" reside, as discussed below in the "legal ambiguities" section, thus potentially removing many city decisions from the scope of the Brown Act open meetings laws.
- Grants the Mayor power to appoint and remove the City Manager and all Charter officers, power formerly held by the City Council.
- Gives the Mayor power to appoint and remove all city employees, except Council and Charter Officer appointees, subject only to civil service rules.
- Authorizes Mayor to appoint Civil Service Board secretary, and to discipline or remove Civil Service employees.
- Places control in the hands of the Mayor over the board administering and investing SCERS retirement funds.
- Requires the City Council to deal solely and directly through the Mayor, or the city manager if designated by the Mayor, with respect to any part of city government under the direction and supervision of the Mayor.
- Gives Mayor power to propose city budget and veto changes to budget made by City Council, powers formerly held by the city manager and City Council.

Under California court precedents there is a substantial likelihood a court would find the SMI's quantitative and qualitative effects to be *revision*, not an amendment, of the charter. This is particularly true if a court takes into account the scale relationship between charter and Constitution changes. Courts would find a change in the fundamental form of California's government structure a revision, however unlikely such a proposed change might seem. Change in the form of city government is more commonly proposed in comparison, and its forms generally do not compartmentalize neatly into the executive, legislative, and judicial branches of a sovereign like the state or federal government. As a result, exemplars of changes in a charter that might not look like a fundamental change in the state government, from a city's perspective could be fundamental. In other words, in terms of scale a change in form of city government from council/manager to the proposed strong mayor form is like changing the fundamental structure and relationship of the state government's three branches.

Moreover, beyond California court precedent, examples of court cases from other states dealing with amendment or revision of a city charter consider a change in the form of city government as revision that requires compliance with revision procedures.¹⁴

Finally, the authorized revision procedures (i.e., through the governing body or a charter commission) provide a more deliberative process, with input through hearings and discussion of drafting the text, as opposed to the take-it-or-leave-it nature of initiative drafting.¹⁵ This principle that sweeping changes may be made only by the revision process underpins the rationale behind the single subject rule that applies to amendments by initiative, but not to legislative body proposed amendment measures.¹⁶

Given the absence of California case law specifically addressing charter revisions versus amendments, it cannot be stated unequivocally that a court would find the SMI violates article XI section 3 of the Constitution by proposing a charter revision by initiative. However, SMI's sweeping changes to the city's government structure, widespread shift of powers, and creation of a powerful executive branch of government, create a substantial risk that if challenged a court would find the SMI is an unconstitutional attempt to revise Sacramento's charter by initiative.

14 See, e.g., *Kelly v. Laing* (1932) 259 Mich. 212, 222 [where statute provides processes for amendment or revision of charter, change in the form of city government may be made by revision process only]; No. 4916 Mich. Atty. Gen. January 22, 1976 [proposal to change charter from city-manager form of government to strong mayor form is charter revision, not amendment, requiring charter commission process].

15 Provisions of the California Constitution have always provided some form of oversight of charter adoption or revision. Beginning in 1879, as part of the first charter City article of the Constitution, and until 1974, state legislature approval of charter adoption was required. Until 1902, amendments could be proposed only by the city governing body. Until 1911, only the governing body could initiate adoption of a charter. Until 1930, there were required time intervals for framing a new charter to replace an existing charter.

16 *Hernandez v. County of Los Angeles*, *supra*, 167 Cal. App. 4th 12, 23.

B. Divestiture of Right to Vote and to Representation

Ninth District Council Member Election

The Strong Mayor Initiative not only transfers the City's executive and other 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.¹⁷ 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.¹⁸ 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 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 potential 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.

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

18 SMI drafter Thomas Hiltachk sent a letter dated August 24, 2009, to the City Council asserting he intentionally did not address election of the ninth district council member in the SMI. Mr. Hiltachk explains he wanted to give the City Council flexibility in setting the election date, and such flexibility was necessary due to uncertainty over the date by which redistricting and creation of district nine's boundaries would occur. He cites Elections Code section 12101 for the proposition that section 12101 empowers the City Council to select any date they desire for the start of the ninth district member term. Section 12101 merely describes the requisite contents of the Notice of Election to be prepared by the City elections official (City Clerk), that include the office to be filled, specifying full or short term and time of the election, and provides no grant of authority to deviate from substantive legal provisions that establish these matters.

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.¹⁹ 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,²⁰ 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.²¹

Article X requires the Council to establish election “procedures”²² and the nominations process²³ by ordinance which the Council has done.²⁴ 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).²⁵ 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—not governing bodies--to make the decisions on timing of council elections.

To understand the policy reasons underlying the law that leave such decisions in the 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. City Charter Article X was drafted to avoid such mischief by expressly providing timing of election cycles for the Mayor and eight councilmembers.

19 Charter Section 152.
20 Charter Section 153.
21 Charter Section 154.
22 Charter Section 150.
23 Charter Section 151.
24 Sacramento City Code Chapter 1.16.
25 Charter Section 155.

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.

Before 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 the 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 disallows 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 supports 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.²⁶ Some charters, such as 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.²⁷ No city charter

26 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.

27 See, e.g., City of Fresno Charter sec. 1504 (Expansion of Council Membership), which 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 municipal election. Thereafter, Councilmember seat number 8 shall be filled in the same electoral cycle as even-numbered

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 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
- 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.

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 two-year 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-Milius-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.²⁸ For cases over \$100,000 that authority is received during duly agendized 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

The SMI’s inclusion of mayoral power to vote, veto and vote not to override a 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

28 A limited exception is the City Attorney’s statutory authority to commence civil nuisance cases.

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.

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-partite 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 contemplates this potential problem by proactively dealing with the dual role issue when a council member takes on the mayor's duties.²⁹

29 City of San Diego Charter Art. XV sec. 265 (i): "(i) During the period of time when an appointment or under 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) Pivotal Issues

A. Resolving the Unconstitutional Revision by Initiative Issue

A petition to the superior court for declaratory relief or seeking a writ of mandamus may be brought by any resident or by the City to determine whether the SMI is a charter “revision” or an “amendment.”

Pre-election challenges to initiatives are disfavored by courts. It is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity. This general rule applies primarily when a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative.

However, this rule does not preclude pre-election review³⁰ when the challenge is that the proposed initiative may not be submitted to the voters because the initiative amounts to a charter revision rather than an amendment.³¹

B. Resolving the Ninth Council District Legal Issues

For the reasons discussed above, the Strong Mayor Initiative might be struck down and not given effect by a court of law, even if approved by a majority of the voters. If the SMI is not an unconstitutional revision, and 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 Proponents and certified by the City's elections official.

Each of these options has legal and practical issues.

30 See, Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1153.

31 See, e.g., American Federation of Labor v. Eu (1984) 36 Cal. 3d 687, 695-697 [granting pre-election relief when initiative measure violated article V of the federal Constitution and exceeded the scope of the initiative power]; Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 665-667 [granting pre-election relief when initiative measure violated one-reapportionment-per-decade rule]; see also McFadden v. Jordan, *supra*, 32 Cal. 2d 330 [granting pre-election relief when initiative measure in its entirety constituted a constitutional revision rather than an amendment]; Boyd v. Jordan (1934) 1 Cal. 2d 468 [granting pre-election relief when initiative petition failed to contain accurate short title as required by statute].

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.

Proponents 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. While the Proponents do have adequate time to gather those signatures and have the curative initiative placed on the June 8, 2010 ballot, Proponents have stated they do not intend to circulate such a petition.

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.

However, the SMI proponents have stated they have no intention of circulating another petition to fix the ninth district problem and do not want the City to place a curative measure on the ballot. Their reasoning is that they concur with the opinion of SMI drafter, Thomas Hiltachk, that there is no legal problem in the SMI.

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 Legal 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 set out in full 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."³² 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.³³ This interpretation of the conflicting measure rule did not completely foreclose operation of a measure that receives an

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

33 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].

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 "Addressing the Legal Ambiguities" above.

CONCLUSION

The Strong Mayor Initiative could be subject to successful legal challenge either on the grounds of the unconstitutional use of the initiative process to effectuate a charter revision, or the denial of voting rights and of representation for the Ninth Council District residents. If the Strong Mayor Initiative does survive such legal challenges or such challenges are not made, 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) Place a well-drafted conflicting measure on the ballot clearly delineating the division and balance of powers of the Mayor and Council;
- 2) Take under consideration whether to (a) not place the SMI on the ballot, or (b) bring a pre-election challenge to the SMI as an unconstitutional use of the initiative process to effectuate a charter revision; and/or
- 3) Take no action, and decide later whether or not to challenge the Strong Mayor Initiative if approved by the voters.