



REPORT TO COUNCIL City of Sacramento

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Staff Report
June 15, 2010

**Honorable Mayor and
Members of the City Council**

Title: Report Back: Elected Charter Commission

Location/Council District: All

Recommendation: Receive and file; provide direction to staff

Contact: Eileen Teichert, City Attorney

Presenters: Jeffrey C. Heeren, Sr. Deputy City Attorney

Department: City Attorney

Division: N/A

Organization No: 03001011

Description/Analysis

Issue: On Tuesday May 25, 2010, Councilmember McCarty asked the City Attorney to report back June 15, 2010, on the state legal and timing considerations for election and governance of a charter commission.

Policy Considerations: City Council consideration of elected charter commission.

Environmental Considerations: None

California Environmental Quality Act (CEQA):

The California Environmental Quality Act (CEQA) does not apply to ballot measures.

Sustainability Considerations: Not applicable

Other: None

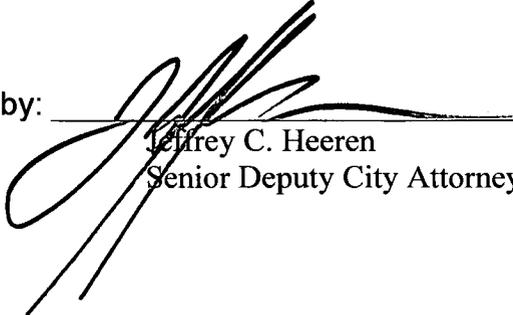
Commission/Committee Action: None

Rationale for Recommendation: N/A.

Financial Considerations: The estimated cost calling an election for a charter commission on a consolidated election is at least \$175,000 (ONE-HUNDRED SEVENTY-FIVE THOUSAND DOLLARS). The estimated cost for calling an election for a charter commission on an unconsolidated election is over \$1,000,000 (ONE MILLION DOLLARS).

Emerging Small Business Development (ESBD): Not applicable

Respectfully Submitted by: _____


Jeffrey C. Heeren
Senior Deputy City Attorney

Report Approved:


Eileen M. Teichert
City Attorney

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BACKGROUND

A. INTRODUCTION

On Tuesday May 25, 2010, Councilmember Kevin McCarty asked the City Attorney to report back by June 15, 2010, on the state law election and governance of a charter commission.

The California Constitution provides that the processes necessary for an election to determine whether to revise a charter and elect a charter commission may be started by initiative or by the governing body.¹ The California Government and Elections Codes have provided the basic procedural framework by which a charter commission is elected.

Under state law, the vote to elect a charter commission is called for either by a majority vote of the City Council or by a petition signed by not less than fifteen percent of the registered voters within the city. State law prescribes the applicable election process and timing.

Regardless of the timing or the makeup of a charter commission, it will have certain meeting rules and disclosure requirements. It is likely a court would determine that an elected charter commission is subject to the Brown Act's open meeting laws. In addition, because of the breadth of an elected charter commission's authority and constitutional, statutory, and electorate provenance, it is more likely than not that the FPPC would conclude that the commissioners would be subject to the conflict of interest provisions of the Fair Political Reform Act. Finally, records created by or for an elected charter commission would almost certainly be subject to the California Public Records Act.

Once elected, the charter commission has two years to make a charter proposal and upon expiration of the two-year period the commission is automatically abolished. A majority of the charter commissioners must sign charter proposal. Under the California Government Code procedure, the City Council must decide whether to call a special election, or an election at any established City election date, or a regular election date established by Elections Code 1000.

Whether the charter commission process is started by initiative or a majority vote of the Council, the City Council will have the option of (1) calling an election consolidated with a statewide election, or (2) not consolidated with a statewide election, and for which the City would bear full election costs for a citywide election.

B. CANDIDATE NOMINATION AND ELECTION

After a petition is certified, or a majority of the council has voted to put the election of a

1 "An election to determine whether to draft or revise a charter and elect a charter commission may be required by initiative or by the governing body." (Cal Const, Art. XI § 3, subd. (c).) The California Constitution and statutes 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 *amendment* of city charter by initiative, but grants power to propose charter *revision* only to the city governing body or a charter commission. The governing body may also propose charter amendments.

charter commission on the ballot, the City Council must call for a two-part election and adopting the necessary language. Initially, the voters are asked the question: "Shall a charter commission be elected to propose a new charter?"² In the same election, the voters select the commissioners. "If the first question receives a majority of the votes of the qualified voters voting thereon at the election, the 15 candidates for the office of charter commissioner receiving the highest number of votes shall forthwith organize as a charter commission." "However, if the first question receives less than a majority of the votes of the qualified voters voting thereon at the election no charter commission shall be deemed to have been elected."³ A candidate for charter commissioner must be a registered voter of the City.⁴ Mayoral appointment fills any vacancy on the established commission⁵

The manner of nomination for a commissioner position is governed by Government Code section 34454, which provides candidates are nominated either under the City's existing procedures to nominate city officers, or by the petition method outlined in the Elections Code for nomination for a general election.⁶

The City's charter provides that "Nominations of candidates for all elective offices shall be made in the manner prescribed by the election code ordinance."⁷ The Sacramento City elections code is consistent with the state Elections Code for regular or special election nomination periods. The City's nomination petitions may be used for charter commissioner nominations, with minor alterations to describe the office sought.⁸

2 Gov. Code, § 34453.

3 Gov. Code, § 34453.

4 Gov. Code, § 34451.

5 Gov. Code, § 34452.

6 This statutory language has remained unchanged since it appeared in the Constitution, before being removed in 1970. The word manner is not defined, but it cannot exceed the subject to which it belongs. It relates to the word nomination and indicates the usual, ordinary, or necessary details required for nomination. (See, e.g., *People ex rel. Devine v. Elkus* (1922) 59 Cal. App. 396 [The word manner is one of large signification, but it is clear that it cannot exceed the subject to which it belongs. It relates to the word elected. "Manner" as used in the constitutional provision indicates merely that the legislature may provide by law the usual, ordinary, or necessary details required for the holding of the election.]; *Moore v. City Council of Los Angeles* (1922) 58 Cal. App. 555, 559 [Whether the word "manner" shall be construed as including not only the way or mode of doing a thing, but also the time of doing it, depends upon the intention of the lawmakers, to be gathered from the context; that is, the "manner" of doing a thing and the "time" of doing it are distinct things, and ordinarily the word "manner" will not be construed as including the element of "time" unless it shall appear from the context that the lawmakers intended that it should.]]).

7 Sacramento City Charter, § 151.

8 The state law prescribing petition for nomination of candidates to be voted for at general elections provides in pertinent part: "Nomination papers for an office, other than a statewide office, shall be signed by the voters of the area for which the candidate is to be nominated, not less in number than 3 percent of the entire number of registered voters in the area at the time of the close of registration prior to the preceding general election." (Elec. Code, § 8400). This procedure is intended to provide that candidates for any public office for which no nonpartisan candidate or candidate for voter-nominated office has been nominated or elected at any primary election, may be nominated by petition subsequent to or in lieu of a primary

The Sacramento City Charter contains no specific procedural provisions for the election of charter commissioners. The Government Code prescribes that the 15 candidates for the office of charter commissioner receiving the highest number of votes, not a majority of votes, shall organize as a charter commission. Consistent with the state law procedures and in compliance with voters' federal and state constitutional rights, the Council may call for a single City-wide election both on the question of whether to elect a charter commission and to elect charter commissioners. In this model, 15 charter commissioners could be elected City-wide, without reference to Council districts, and allow all individual voters to cast ballots for their preferred candidates.

The dates for calling a charter commissioner election are provided by Elections Code section 1000.⁹ The City Council may, for example, call for one election on one of the dates specified below for 2010, 2011, and 2012. The prospective examples below are premised on the Council's set meeting calendar and the normal time lines for publication and close of nomination.

**Prospective Elections
Citywide Question and List of Candidates**

November 2010
Potential Cost (based on 2008 Mayoral Election \$175,000 +)

Date	Description
06/22/10	Call Election for Charter Commission Question and To Fill Elective Offices
07/02/10	Publish Notice of Measure and Election for Offices in Official Newspaper
07/12/10	Nomination Period for Candidates Opens
08/06/10	Nomination Period for Candidates Closes
11/02/10	Election Day

election. (Elec. Code, § 8300.)

9 Government Code section 34451 states a charter commission may be chosen by the voters of the City at a general or special election, and section 34452 provides that the City Council shall call that election pursuant to Sections 1000 and 10403 of the Elections Code. Elections Code section 1000 specifies the following regular dates: "(a) The second Tuesday of April in each even-numbered year. (b) The first Tuesday after the first Monday in March of each odd-numbered year. (c) The first Tuesday after the first Monday in June in each year. (d) The first Tuesday after the first Monday in November of each year. (e) The first Tuesday in February of each year evenly divisible by the number four." Elections Code section 1000 as a general principle need not apply to elections held in chartered cities in which the charter provisions are inconsistent with that chapter of the Elections Code. Nevertheless, as it pertains to charter commissions, through the Government Code the Legislature meant to require elections for a charter commission to be called for at a regularly scheduled election date. Therefore, because of the language of the Government Code, the City is to use the state law prescribed dates available under the state Elections Code.

March 2011

Potential Cost (based on estimates of Strong Mayor citywide stand alone special election \$1M + with the addition of candidates). Likely higher due to County's updated "actual" cost fee schedule.

Date	Description
10/26/10	Call Election for Charter Commission Question and To Fill Elective Offices
11/05/10	Publish Notice of Measure and Election for Offices in Official Newspaper
11/15/10	Nomination Period for Candidates Opens
12/10/10	Nomination Period for Candidates Closes
03/08/11	Election Day

June 2011

Potential Costs (same as March 2011)

Date	Description
01/25/11	Call Election for Charter Commission Question and To Fill Elective Offices
02/04/11	Publish Notice of Measure and Election for Offices in Official Newspaper
02/14/11	Nomination Period for Candidates Opens
03/11/11	Nomination Period for Candidates Closes
06/07/11	Election Day

Nov 2011

Potential Costs (same as March 2011)

Date	Description
06/21/11	Call Election for Charter Commission Question and To Fill Elective Offices
07/05/11	Publish Notice of Measure and Election for Offices in Official Newspaper
07/18/11	Nomination Period for Candidates Opens
08/12/11	Nomination Period for Candidates Closes
11/08/11	Election Day

February 2012

Potential Costs (same as March 2011)

Date	Description
09/20/11 *	Call Election for Charter Commission Question and To Fill Elective Offices
10/04/11	Publish Notice of Measure and Election for Offices in Official Newspaper
10/17/11	Nomination Period for Candidates Opens
11/11/11	Nomination Period for Candidates Closes
02/07/12	Election Day
*	Typically Reserved for Presidential Primary / County May Require Earlier Call and Consolidation / or Restrict Local Consolidation

April 2012

Potential Costs (same as March 2011)

Date	Description
11/15/11	Call Election for Charter Commission Question and To Fill Elective Offices
12/02/11	Publish Notice of Measure and Election for Offices in Official Newspaper
12/12/11	Nomination Period for Candidates Opens
01/06/12	Nomination Period for Candidates Closes
04/03/12	Election Day

June 2012

Potential Cost (based on estimates for 2008 Mayoral Election \$175,000 +)

Date	Description
12/20/11	Call Election for Charter Commission Question and To Fill Elective Offices
01/23/12	Publish Notice of Measure and Election for Offices in Official Newspaper
02/13/12	Nomination Period for Candidates Opens
03/09/12	Nomination Period for Candidates Closes
06/07/12	Election Day

C. PUTTING A COMMISSION'S CHARTER PROPOSAL ON BALLOT

Once the charter commissioners are elected, they must organize as a commission and a charter proposal within two years of their election. Upon expiration of the two-year period the commission is automatically abolished.¹⁰ The charter proposal must be signed by a majority of the charter commissioners. Under Government Code procedures, the charter commission files the charter proposal with the City Clerk. Then, the City Council then must decide whether to submit the charter proposal to the voters at either a special election, any established City election date, or at a regular election date established by Elections Code section 1000.¹¹ In any event, such elections cannot be held sooner than 95 days after the Council calls the election.¹²

To be ratified, a charter proposal must be approved by a majority of voters. After a charter is approved in a valid election, the Mayor and City Clerk must certify that the charter was submitted to the voters of the City and that it was approved by a majority vote.¹³ One copy of the approved charter must be filed with the County Recorder's office and one kept in the City's archive.¹⁴ A third copy of the charter must be submitted to the Secretary of State with (1) copies of all publications and notices in connection with the calling of the election; (2) certified copies of any arguments for or against the charter proposal which were mailed to the voters; and (3) a

10 Gov. Code, § 34455.

11 Gov. Code, § 34457.

12 *Cf. with* Elec. Code, 9255 [alternate procedure for submission of charter proposal: "The following city or city and county charter proposals shall be submitted to the voters at either a special election called for that purpose, *at any established municipal election date*, or at any established election date pursuant to Section 1000, provided that there are at least 88 days before the election (*italics added*)."]; and Elec. Code, § 1415 ["City or city and county charter proposals that qualify pursuant to Section 9255 shall be submitted to the voters at either *the next regular general municipal election* occurring not less than 88 days after the date of the order of election, or at a special election called for that purpose or on any established election date pursuant to Section 1000 occurring not less than 88 days after the date of the order of election (*italics added*)"]. There is a difference between section 9255, subdivision (a), which lists, as among the options, "any established municipal election date" and section 1415, which lists, as among its options, "the next regular general municipal election."

13 Gov. Code, § 34460.

14 Gov. Code, § 34460

certified abstract of the vote at the election on the charter.¹⁵ The charter will not go into effect until it has been filed with and accepted by the Secretary of State.¹⁶

D. ELECTED CHARTER COMMISSION GOVERNANCE DURING ITS TWO-YEAR TERM

There are at least four salient questions regarding charter commission governance during its term:

1. Would the Brown Act apply to the commission?
2. Would Political Reform Act conflict of interest requirements apply to elected commissioners?
3. Would the Public Records Act apply to an elected commission?
4. Would the City be legally required to fund an elected commission?

Unfortunately, there is scant legal authority on these questions. Nevertheless, based on the authorities it reviewed, the City Attorney's Office opines that the most likely answers are as follows:

1. The Brown Act would apply to the commission.
2. The Political Reform Act's conflict of interest provisions would apply to the commission. However, our opinion is based solely upon our own experience and a conservative approach. A phone consultation with the FPPC bore little fruit, although that agency did indicate an opinion should be requested if necessary.
3. The Public Records Act would apply to the commission.
4. The City would not be legally obligated to fund the commission.

1. The Brown Act

There is no controlling primary authority on whether the Brown Act applies to an elected charter commission. However, it is likely that a court would conclude the Brown Act provision that defines a "legislative body" as including "[] any other local body created by state or federal statute[.]" applies to an elected charter commission.¹⁷ The term "created by state statute" within the meaning of the Brown Act may include local agencies created by choice *under procedures*

¹⁵ Gov. Code, § 34460

¹⁶ Gov. Code, § 34459.

¹⁷ Gov. Code, § 54952.1, subd. (a).

*established by state law.*¹⁸ Because an elected charter commission is brought into existence by the Constitution, the electorate, and under *procedures established by state statute*, it is likely that a court would find an elected charter commission to be a “legislative body” covered by the Brown Act.

This conclusion is supported by the constitutional mandate of Proposition 59, which requires that statutes providing access to meetings be broadly construed if it furthers the people's right of access.¹⁹ The purpose of these laws is also to maintain openness whenever there is a delegation of power. For whether a delegation of power is from a City Council to a City commission, or from the California Constitution and through state procedural statutes to an elected charter commission, the purpose of the Brown Act and Proposition 59 is to keep open access to the body's meetings.

2. The Political Reform Act

As with the Brown Act, there is no controlling authority on whether elected charter commissioners would be subject to the Political Reform Act's conflict of interest provisions. Neither the Political Reform Act nor the City of Sacramento's conflict of interest code expressly list or refer to elected charter commissioners. Given the nature of such a commission and its authority, it is more likely than not the FPPC would find such positions subject to the Act's conflict of interest provisions. FPPC staff advised that this question is unique. An opinion from the FPPC could be requested.

3. Public Records Act

Like the Brown Act and Political Reform Act, the California Public Records Act is controlling if an elected charter commission is a “local agency” within the meaning of the Act. The extent of the coverage is a matter to be developed by the courts on a case-by-case basis. Nevertheless, as with the Brown and Political Reform Acts, the courts must give the Public Records Act its widest interpretation and applicability. As such, it is likely a court would find the records of a charter commission subject to the Public Records Act.

4. Funding an Elected Charter Commission

Neither the Constitution, state statutes, nor the City Charter requires the City to fund an elected charter commission's work. In fact, the City charter provides that “No expenditure of city funds shall be made except for the purposes and in the manner specified by an appropriation of the city council[.]”²⁰

18 See, e.g., The Brown Act, Open Meetings For Local Legislative Bodies, California Attorney General's Office (2003) p. 5 [The board of directors for a joint powers authority would be covered as a governing body of a local agency; *joint powers authorities are also covered because they are created according to a procedure established by state law*].

19 Cal. Const. Art. I § 3.

20 City Charter § 116.