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REPORT TO THE COMMITTEE ON RULES, FINANCE
AND INTERGOVERNMENTAL RELATIONS

PROPOSED AMENDMENTS TO THE CITY'S ELECTIONS CODE

This report is intended to accompany City Clerk's Report No. 99-01 and proposed amendments to the City's Election Code. Its purpose is to inform you of major legal questions posed by the Clerk's proposed amendments. No significant legal issue emerges that would prevent adoption of the Clerk's proposed amendments.

Constitutional Authority for City to Adopt Its Own Elections Code

Article XI, section 5 of the state Constitution sets out the general principle of local self-governance. Subdivision (a) states that cities governed under a charter may adopt and enforce all ordinances and regulations in respect to municipal affairs. Subdivision (b) sets out a nonexclusive list of four "core" categories that are "municipal affairs," including the conduct of city elections and the manner in which municipal officers are to be elected.

Charter Authority for City to Adopt Its Own Elections Code

This City has implemented article XI, section 5 of the state Constitution by adopting its own Charter. San Diego Charter section 8 requires the City Council to adopt an election code that provides an "adequate and complete procedure" to govern municipal elections. This Charter section further specifies that nominations for all elective [City] offices, selection of candidates, and submission of ballot measures to the voters are to be conducted in the manner prescribed by the elections code. Several other Charter sections also deal in some fashion with city elections: section 4 establishing council districts; section 5 on redistricting; section 5.1 establishing a redistricting commission; section 6 defining qualified electors; section 7 establishing residency requirements for elective officers; section 9 on nominating candidates; section 10 on elections generally, section 12 on the City Council, including their term of office; section 23 on initiative, referendum and recall; section 24 on selection and duties of the Mayor; and, section 40 on selection and duties of the City Attorney.

U.S. Constitution Prohibits Laws Requiring Petition Circulators To Be Registered Voters

The Clerk's draft removes the existing requirement that petition circulators be registered voters. See new San Diego Municipal Code [SDMC] sections 27.1014 (formerly section 27.2510) and 27.1112 (formerly section 27.2609). This change is in keeping with the recent U.S. Supreme Court case of *Buckley v. American Constitutional Law Foundation, Inc.*, — U.S. —, 119 S. Ct. 636 (1999), which held that a Colorado statute requiring that initiative petition circulators be registered voters violated First Amendment free speech guarantees.

Statements of Candidate Qualifications

There have been several challenges over the last few years to what candidates say in their statements of qualifications, which are printed in voters' information pamphlets. In the face of a First Amendment challenge, the California Supreme Court upheld a law that limited a candidate's statement of qualifications to recitation of the candidate's own personal background and qualifications and that prohibited references to other candidates or their qualifications, character, or activities. *Clark v. Burleigh*, 4 Cal. 4th 474 (1992). The Clerk's draft retains prior Municipal Code provisions, which recite the law at issue in the *Burleigh* case. See SDMC § 27.0620 (former SDMC § 27.2204). Persons who wish to challenge a Clerk's ruling under this section may file a writ of mandate under new SDMC section 27.0404.

Ballot Arguments

Among several additions to the City's Elections Code that are essentially borrowed from state law and adapted to this City, the Clerk has proposed several sections governing ballot arguments. See new SDMC §§ 27.0508—27.0514. New SDMC section 27.0508(e) prohibits a ballot argument from being false, misleading, or inconsistent with the City's Elections Code. Similar language was upheld in the face of a First Amendment challenge in the case of *Patterson v. Board of Supervisors*, 202 Cal. App. 3d 22 (1988). A person who believes a ballot argument violates this section may file a writ of mandate under SDMC section 27.0404.

Effect of Redistricting On Filling a Vacancy in City Elected Office

For the first time in the City's law, the Clerk's draft specifies what boundaries will govern if a redistricting has taken place just before a vacancy in office occurs for whatever reason. See proposed SDMC § 27.0708. This new section conforms to the applicable case law. *See Sloan v. Donoghue*, 20 Cal. 2d 607 (1942); 1990 City Att'y MOL 1719; 1990 Op. City Att'y 52.

Police Background Checks of Potential Appointees to Fill Vacant Office

The Clerk's draft retains the law that police background checks be conducted on potential appointees to fill vacancies in City elected offices, but eliminates the requirement for credit checks. See proposed SDMC § 27.0805. This change reflects the law on the eligibility of a person to hold public office in this state. A person convicted of certain crimes may not hold public office (Cal. Const. art. VII, § 8; Cal. Gov't Code § 1021). We conclude that there is legal support to require police background checks for potential appointees to fill vacant C ity elective offices.

There is no basis in law, however, to support requiring a credit check of potential appointees to fill a vacancy. One's wealth, or lack thereof, cannot be a criterion for voting or holding public office. See, for example, 1988 City Att'y MOL 173 (concluding that person who lives in a car may run for Mayor); *Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984) (upholding voter registration of class of "homeless" people in New York City, one of whom listed his residence as park bench); *Collier v. Menzel*, 176 Cal. App. 3d 24 (1985) (holding that couple who listed a Santa Barbara park as their residence, even though residing illegally in the park, were legally entitled to register to vote). The courts recognize that there is a close interlocking conceptual and functional relationship between voter and candidate. *Johnson v. Hamilton*, 15 Cal. 3d 461, 470 (1975).

Summary

This report is intended merely to highlight the key legal issues raised by the City Clerk's proposed amendments to the City's Elections Code. The City Attorney believes all major legal issues have been resolved in the draft proposed for your consideration.

Respectfully submitted,

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City Attorney

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