November 6, 1991

REPORT TO THE COMMITTEE ON RULES, LEGISLATION AND INTERGOVERNMENTAL RELATIONS

PROPOSED CHARTER AMENDMENTS AND ORDINANCES

By memorandum dated October 28, 1991, Mayor O'Connor asked the City Attorney to prepare draft charter amendments and ordinances for consideration by the Rules Committee at its November 6, 1991, meeting. This report is in response to that request. Although the City Attorney recognizes, and as the Mayor acknowledges on the face of her October 28 memorandum, that some of the proposed charter amendments have already been placed on the ballot and have either been adopted or defeated, this report
sets forth all proposed charter amendments noted in the October 28 memorandum's attachments with a notation of their current disposition.

Request No. 1 (Proposed Charter Amendment):

* Adds mayoral veto to Section 24 (Mayor) for all actions of the Council subject to a Council override by two-thirds vote of its members.

(AND)

Amends Section 25 (Deputy Mayor) to provide that the Deputy Mayor shall not have power to veto Council action, unless and until appointed to fill a vacancy in the office of Mayor.

These amendments were proposed by the City's Charter Review Commission ("Commission") in its Final Report of March 1989. Draft language of these proposed amendments is located at pages 47-48 of the Commission's Final Report, a copy of which is attached.

Request No. 2 (Proposed Charter Amendment):

* Amends Section 4 (Districts Established) and Section 12 (The Council) to increase the number of Council districts from eight to ten no later than 1993.

These amendments were placed on the ballot in June 1990 and were defeated.

Request No. 3 (Proposed Charter Amendment):

* Creates a new Section 41(d) (Redistricting Commission) appointed by the Mayor and Council, to redraw Council districts and affects that redistricting by filing a map with the City Clerk.

This amendment was proposed by the Commission and draft language appears at pages 51-52 of their Final Report, attached.

Request No. 4 (Proposed Charter Amendment):

* Amends Section 12 (The Council) to provide for the election of a

Council member within a district if the full Council fails to fill a vacancy by appointment within 30 days of the vacancy. The individual receiving the highest number of votes in the district is elected to fill the vacancy until the next regularly scheduled Council election.

This amendment was placed on the ballot in November 1990 and approved by the voters. It became effective on February 19, 1991.

Request No. 5: (Proposed Charter Amendment):

* Amends Section 4 (Districts Established) and Section 12 (The Council) to provide for the election of Mayor and City Attorney in odd-numbered years, at the same time as Council district elections, commencing in 1995 for the City Attorney and 1997 for the Mayor.

This amendment was proposed by the Commission and draft language appears at pages 54-57 of its Final Report, attached.

Request No. 6: (Proposed Charter Amendment):

* Adds a new Section 221 (Sale of Real Property) requiring voter approval of the sale or exchange of 80 acres or more of contiguous City owned land.

This amendment was placed on the ballot and approved by the voters in November 1990. It became effective on February 19, 1991.

Request No. 7: (Proposed Charter Amendment):

* Amends Section 55 (Park and Recreation) 55.1 (Mission Bay Park - Restriction upon Commercial Development) to require master plans for resource-based parks and imposes a 120 day referendum period on City actions proposing the construction of any permanent structure in excess of 5,000 square feet in resource-based parks and the placement of streets and roads through park lands. Adds open space to the list of real property under the City Manager's control and management. Deletes the phase "or later ratified."

This amendment was proposed by the Commission and draft language appears at pages 59-64 of its Final Report, attached.

Request No. 8 (Proposed Charter Amendment):

* Adds a new Section 100.1 (Participation of Minority and Women Business Enterprises) to create opportunity for Council to adopt a minority and women business enterprise plan by ordinance.

This amendment was proposed by the Commission and draft language appears at page 63 of its Final Report, attached.

Request No. 9 (Proposed Charter Amendment):

* Amends Section 92 (Borrowing Money on Short Term Notes) to strengthen the City's market position regarding short term borrowing by the City Treasurer.

This amendment was placed on the ballot and approved by the voters in November, 1990. It became effective on February 19, 1991.

Request No. 10 (Proposed Charter Amendment):

* Amends Section 143.1 (Approval of Amendments by Members) to provide that retired City employees shall vote on benefits that affect their retirement.

This amendment was placed on the ballot and approved by the voters in November 1990. It became effective on February 19, 1991.

Request No. 11 (Proposed Charter Amendment):

* Amends Section 4 (Districts Established) and Section 5 (Redistricting) to strike the terms "registered voter," "qualified voters," and "registered voting" and replaces them with the term "population."

These amendments were placed on the ballot and approved by the voters in November 1990. They became effective on February 19, 1991.

Request No. 12 (Proposed Charter Amendment):

* Amends Section 141 (City Employees'/Retirement System) to remove the requirement for mandatory retirement at age 65.

This amendment was placed on the ballot and approved by the voters in November 1990. It became effective on February 19, 1991.

Request No. 13 (Proposed Charter Amendments):

* Strikes gender-specific words such as "he" that are throughout the Charter and replaces them with non-sexist terms.

This proposal would require amending fifty-four (54) sections of the Charter. Final ballot language and strikeout versions were not prepared for this report, but proposed amendments to relevant passages of each affected Charter section appear at pages 76-89 of the Commission's Final Report, attached.

The City Clerk through his Deputy Director in charge of elections, Mikel Haas, reports that it will cost the City approximately $50,000 per measure to place a proposition on the ballot in the June 1992 election. It should be noted, however, that this estimate is based on a proposition of "average" length, that is, one that takes up four to five pages - including arguments pro and con - in the sample ballot. More lengthy propositions would incur additional costs, up to perhaps $4,000 per sample ballot page. The cost of a 20-page proposition, for example, would approach $110,000.

Request No. 14 (Proposed Charter Amendment Relating to Section 103 - Franchises):

* This would require that franchise agreements could only be made with businesses whose securities are regulated by the Securities and Exchange Commission. The Council currently has the power to grant to any person, firm or corporation, franchises . . . for the use of any public property under the jurisdiction of the City. If the securities are not regulated by the SEC the City has no way of knowing what purpose these securities serve or that they are legitimate.

This proposed charter amendment was discussed in Rules Committee in April 1990, at which time the Committee asked the City Attorney for his legal opinion on this proposal. The City Attorney responded to this request at pages 1 and 2 of his June 19, 1990, Report to the Rules Committee (hereafter "June 1990 Report to Rules Committee"), copy attached as C-1 to City Attorney's Report to Rules of November 1990 (copy attached). The City Attorney continues to have the same legal questions about this proposal.

Request No. 15 (Proposed Charter Amendment Relating to Section 103 - Franchises):

* Since our citizens have a vital interest in what kind of companies will provide essential services, the City has the power to grant franchises. We need amendments that will make explicitly clear the original intent of the Council -- Franchises in this City must be granted specifically by the Council and franchises granted by the City cannot be passed around from one company to another without the Council's approval.

This charter amendment was discussed in Rules Committee in April 1990, at which time the Committee asked the City Attorney for his legal opinion on the proposal. The City Attorney gave his legal opinion at pages 2 and 3 of the June 1990 Report to Rules Committee (Item 16), copy attached as C-1 to City Attorney's Report to Rules Committee of November 1990. The City Attorney continues to have the same legal questions about this proposal.

Request No. 16 (Question Relating to Manner of Setting Mayor's and Councils' salaries - Charter Sections 12.1 and 24.1):

* Since adopted in 1973 . . . on or before February 15 of every even year, the Salary Setting Commission recommends to the Council the enactment of an ordinance establishing the salary of members of the Council and the Mayor for the period beginning July 1 of that even year and ending two years later. The Council may adopt the salaries as recommended, or a lesser amount. Since we are "public servants" shouldn't the public have a direct say with regard to any pay increase?

Although phrased as a question, this appears to be a proposal to submit the Mayor and Council's salaries to a vote of the people and it would require an amendment to Charter sections 12.1 and 24.1. The City Attorney stands ready to prepare this draft charter amendment once he receives direction from the Rules Committee to do so.

Request No. 17 (Proposed amendment to City's Campaign Control Ordinance to Establish Spending Limits):

* Currently the San Diego Municipal Election Campaign Control Ordinance (Division 29 of the San Diego Municipal Code) has numerous limits on the amounts of money that may be contributed to political campaigns, prohibitions of contributions by

> organizations, and limits on loans and credit . . . all because inherent to the high cost of campaigning is the problem of improper influence, (real or potential) exercised by campaign contributions over elected officials. In order to further limit this improper influence and open the elected offices to all citizens we should enact realistic spending limits to the Campaign Control Ordinance.

The Rules Committee discussed this proposal at its meeting in April 1990, at which time the Committee asked the City Attorney for his legal opinion on the proposal. The City Attorney responded to this request at pages 2 and 3 (Item 17) of his June 1990 Report to Rules Committee, copy attached. As a general rule, under the federal constitution, as interpreted by the United States Supreme Court in Buckley v. Valeo, 424 U.S. 1, 54 (1976), a government may not place spending limits on candidates or committees unless the spending limits are tied to public financing of campaigns.F

The United States Supreme Court, however, has implied that a total ban on independent expenditures by corporations may withstand constitutional scrutiny if the corporation so regulated is a "traditional corporation organized for economic gain," and not one that was formed to disseminate political ideas. FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986). This case invalidated a portion of the Federal Election Campaign Act on the grounds that it violated first amendment rights of free speech as applied to nonprofit corporations formed to promote political causes.

Current California law purports to prohibit public financing of campaigns. Government Code section 86500. This statute has been challenged in court. It was upheld by the Third District Court of Appeals as applied to charter counties in the case of County of Sacramento v. Fair Political Practices Commission, 222 Cal. App. 3d 687 (1990). However, it was held not to apply to charter cities in the case of Johnson v. Bradley, 229 Cal. App. 3d 80 (1991), review granted, July 25, 1991.

Further background regarding these two cases was reported to you in the City Attorney's Report to Rules Committee dated November 19, 1990 (hereafter "November 1990 Report to Rules Committee"), copy attached. The California Supreme Court has granted a petition to review the ruling in the Los Angeles case cited above. We will keep you informed of the status of that litigation.

Meanwhile, the City Attorney has learned that other jurisdictions have dealt with the problem of trying to achieve a "level playing field" among candidates through mechanisms other than direct regulation of expenditures. Specifically, for example, the County of San Diego has an ordinance that suspends the normal contribution limits for opponents of

persons who spend or contribute more than $25,000 of their personal funds on their own general election campaigns. Relevant excerpts of that ordinance are set forth below:

> SEC. 32.927.5 GENERAL ELECTION EXPENDITURE OR CONTRIBUTION IN EXCESS OF $25,000. No candidate shall expend or contribute more than $25,000 in personal funds in connection with his or her general election campaign unless and until the following conditions are met:
>
> (1) Written notice of the candidate's intent to so expend or contribute in excess of $25,000 shall be provided at least 15 days in advance of the general election to the Registrar of Voters, the District Attorney and all opponent candidates. The notice shall be delivered personally or sent by registered mail and shall specify the amount intended to be expended or contributed; and
>
> (2) All personal funds to be expended or contributed by the candidates shall first be deposited in the candidate's campaign contribution checking account at least 15 days before the election, and the candidate shall in writing notify opponent candidates within 24 hours of the total amount so deposited. The notice shall be delivered personally or sent by registered mail.
>
> If sent by mail, the notice to opponent candidates shall be sent to the last known address of the opponent candidates as shown in the records of the Registrar of Voters.
>
> Each opponent of any candidate who has complied with the above conditions shall be permitted to solicit and receive, and contributors to each such opponent may make, contributions in excess of the limits established in subdivision (a) of Section 32.923 of the County Code until such opponent has raised contributions in amounts above such limits equal to the amount of personal funds deposited by the candidate in his or her campaign contribution checking account.
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> (Added by Ord. No. 7349 (N.S.) Eff. 9-4-87.)

The City Attorney recommends that you refer this matter for further study and preparation of draft language to the City Attorney's Task Force on Campaign Finance Legislation and Enforcement. The City Attorney's Task Force is made up of representatives of both the Civil Advisory and Criminal Divisions of the City Attorney's office, a representative of the District Attorney's office, a representative of County Counsel's office, and representatives from the City Clerk's Elections office and the City Auditor's Audits Division. This task force is currently reviewing other

aspects of the City's campaign finance laws and plans to make recommendations to the City Council in December 1991 to amend some of the City's laws to make them more enforceable.

Request No. 18 (Survey of Other Cities' Public Financing of Campaigns and Vehicles for Voluntary Check-off):

> * To further limit improper influence (real or potential) over elected officials, and to increase the number of citizens able to participate in the process we should consider public financing of campaigns. I would request that the Manager (Clerk) report on other cities attempts to publicly finance municipal elections and the vehicles available for voluntary check-off (property tax bills etc.).

This appears to be a request to the City Manager or City Clerk to conduct a survey of other cities' attempts to finance campaigns publicly and vehicles available for voluntary check-off. This request should therefore be directed to the City Manager or City Clerk.

For a report on the status of public financing legislation in California, see the City Attorney's response to Request No. 17, above.

Request No. 19 (Proposed Amendment to City's Campaign Control Ordinance to Establish a Two-term Limit on City Elected Offices):

> * In order to provide additional opportunities for municipal elected office and to allow new ideas and energy to deal with the peoples agenda I would recommend amending the Campaign Control Ordinance of the Municipal Code . . . adding a section dealing with limits for elective office, and I would recommend a two-term limit.

First, we note that this request is for an amendment to the City's Campaign Control Ordinance to establish a two-term limit on the City's elected offices. However, establishing a two-term limit would require a charter amendment.

We also have asked the Cities of Redondo Beach and San Francisco to send us copies of their term-limit legislation. The City of Redondo Beach has a term limit provision in their Charter. This provision reads as follows:

> Sec. 26. Mayor and City Council.
>
> No person shall serve more than two full terms as councilman from any combination of districts, or Mayor. If a person serves a partial term in excess of two years, it shall be considered a full term for the purpose of this provision. Previous and current terms of office shall be counted for the purpose of applying this provision to future elections although all persons presently in office shall be permitted to complete their present terms.

City of Redondo Beach, Article XXVI, Section 26, added at election held April 15, 1975.

Gordon Phillips, City Attorney for the City of Redondo Beach reports that this provision is currently in litigation. The trial court upheld the provision. It is now on appeal to the Court of Appeal, however, the parties have not yet submitted briefs. The issue on appeal is whether this charter provision establishes qualifications of candidates in violation of the California Constitution.F

On October 11, 1991, the California Supreme Court upheld the bulk of Proposition 140, which was adopted by initiative in November 1990. Legislature of the State of California v. Eu, 91 Daily Journal D.A.R. 12510. Among other things, Proposition 140 established a two term limit on state elected officials. The challenges had asserted that the term-limit impermissibly burdened two fundamental rights, namely, the right to vote and the right to be a candidate for office. The court upheld the term-limit in face of these challenges. The Redondo Beach City Attorney states that the Redondo Beach term-limit quoted above was also challenged on the "right to vote" and "right to run" issues, but the California Supreme Court decision via Proposition 140 settled these issues.

The San Francisco City and County Charter has separate term-limits for its supervisors and mayor. According to San Francisco Deputy City Attorney Randy Riddle, the term-limit for supervisors was adopted fairly recently, whereas the mayoral term limit has existed for many many years. These provisions are not being challenged in court currently.

Relevant portions of the San Francisco Charter pertaining to the term-limit for supervisors reads as follows:

> 9.100 Elective Officers and Terms
>
> . . . .
>
> Notwithstanding any provisions of this section or any other section of the charter to the contrary, from and after the effective date of this section as amended, no person elected or appointed as a supervisor may serve as such for more than two successive four-year terms. Any person appointed to the office of supervisor to complete in excess of two years of a four year term shall be deemed, for the purposes of this section, to have served one full term upon expiration of that term. No person having served two successive four year terms may serve as a supervisor, either by election or appointment, until at least four years after the expiration of the second successive term in office. Any supervisor who resigns with less than two full years remaining until the expiration of the term shall be deemed, for the purposes

of this section, to have served a full four year term.

. . . .

San Francisco Charter Section 9.100 as amended June 1990.

The provision setting term-limits for the Mayor reads in full as follows:

> 9.102 Limit on Terms of Mayor
>
> No person elected as mayor shall be eligible to serve, or serve, as such for more than two successive terms; but such service shall not disqualify any person for further service as mayor for any term or terms which are not successive, nor for any parts of terms which are not successive.

The City Attorney stands ready to prepare a proposed charter amendment to establish a two term-limit once he receives direction to do so from the Rules Committee.

Request No. 20 (Proposed Charter Amendment regarding City Business with Anonymous Parties):

> * The Citizens of San Diego have a vital interest in what kind of companies do business with the City. We cannot have companies which we know little or nothing about doing business with the City. Therefore, I would propose that we amend the City Charter in order to make it explicitly clear that this City will not do business with anonymous parties.

This proposed charter amendment was discussed at the April 1990, Rules Committee meeting, at which time the Committee asked the City Attorney for his legal opinion on the proposal. The City Attorney responded to this request at pages 3-4 (Item 18) of his June 1990 Report to Rules Committee, copy attached. The City Attorney continues to have the same legal questions about this proposal.

Request No. 21 (Proposed State Legislation Regarding Manner of Selection of Port District Officials):

> * Legislation should be enacted to require Commissioners of the San Diego Unified Port District to be elected (or elected officials). Everyone of us has probably received a call or a letter complaining that the Port does not respond to a particular request or need. Until Port Commissioners become accountable to a constituency, they will remain unresponsive and there is little that can be done.

This request appears to be for proposed state legislation to change the manner of selecting San Diego Unified Port District Commissioners. The City Attorney stands ready to work with the Legislative Services Department to draft the proposed legislation, once he receives direction from the Rules Committee to do so.

Request No. 22 (Proposed Charter Amendment Requiring Resignation from

City Elected Office Upon Filing to Seek Another Elected Office):

* Resignation from elected office upon filing to seek another elected office. Currently the City Charter includes a number of Sections dealing with Forfeiture of office. The Citizens elect candidates to fulfill the duties and obligations of a particular office. If an elected official chooses to run for a different office he should be required to resign the elected office upon filing . . . in effect making the playing field level.

Although there may be some question about the legality of this proposal,F

In a recent Pennsylvania case, a taxpayer challenged the Philadelphia District Attorney's right to run for Mayor of the same city in light of the city charter's prohibition against city officers' or employees running for any public office unless having first resigned from his or her then office or employment. McMenamin v. Tartaglione, 590 A.2d 802 (Pa. Cmwlth 1991). Although the validity of the charter provision itself was not at issue directly in the litigation, the Pennsylvania court implied in dictum that the provision was valid because it was conceived in such a way in which to obtain further information which could be available during the selection process. Id. at 809. The court implied the provision would not be valid if it was designed simply as a barrier to seeking public office. Id.

the City Attorney expresses no opinion at this time on whether a charter amendment purporting to require elected officer's to resign from office upon filing to seek another elected office is constitutional. The proposal requires more research than could be done in the time allotted to prepare this report. However, the City Attorney stands ready to conduct the research and to prepare the draft charter amendment language, once he receives directions from Rules Committee to do so.

Request No. 23 (Proposed Ordinance Relating to Campaign Contribution Disclosure):

A. Create a category of individuals known as "Major Contributors" (MC's). MC's are defined as persons who have contributed more than $500 in the aggregate over the previous 12 months to a Member of the City council;

B. Includes in the category of "Major Contributor" those corporations, businesses and partnerships whose principals have contributed a cumulative amount of more than $500 over the previous twelve months.

C. Requires the City Clerk to compile and maintain a list of MC's;

D. Requires the City Clerk, when a project comes before City Council, to note on the Council Docket, with the listing of the item, the MC's of Members of the City Council;

E. Requires a City Councilmember to be disqualified from voting on a project if that individual has received contributions totaling more than $1,000 in the prior 12 months from a MC;

F. Requires any individual who appears before the City Council to actively support or oppose a project to submit a statement to the Council disclosing any contribution of more than $500 to any member of the City Council;

G. Disallows any individual who has a favorable decision rendered by the City Council on their project from contributing more than $500 to any Member of the City Council for the following 12 months.

This proposal is based on what is known as the Orange County TINCUP (Time Is Now, Clean Up Politics) Ordinance. This proposal was discussed at the April 18, and October 3, 1990, meetings of the Rules Committee. At both meetings the Committee asked for the City Attorney's comments on the proposal. The City Attorney's responses to these requests are located at pages 7-9 of his June 1990 Report to Rules Committee (copy attached) and at pages 1-4 and Attachments A-I through A-4 of his November 1990 Report to Rules Committee (copy attached).

The City Attorney notes that the Orange County ordinance specifically provides that partnerships and corporations may be treated as "major campaign contributors" (Sections 1-6-4(e) and (f) of ordinance, Attachment A-1 to November 1990 Report to Rules Committee), whereas The City of San Diego's existing Campaign Control Ordinance (SDMC section 27.2901 et seq.) specifically prohibits contributions by organizations, which would include both partnerships and corporations (SDMC section 27.2942).

The City Attorney therefore recommends that this proposal be referred to the City Attorney's Task Force for further evaluation and synchronization with the City's existing Campaign Control Ordinance.

Request No. 24 (Proposal to Regulate Time When Candidates May Raise Money):

* Candidates cannot begin raising campaign funds until nine months before the election.

This proposal could be enacted as an amendment to the City's Campaign Control Ordinance.F

The City Attorney notes that a federal district court invalidated Proposition 73's fiscal year campaign contribution limits. Service Employees v. Fair Political Practices Commission, 744 F. Supp. 580, 589-590 (E.D. Cal. 1990). The court found that a scheme based on election periods rather than fiscal years was more narrowly tailored to meet the state's asserted intent.

In the time allotted to prepare this Report, the City Attorney was able to obtain only one sample of an ordinance from another jurisdiction that establishes time limits on campaign fund

raising. The City of Los Angeles imposes an eighteen (18) month, rather than nine (9) month, limit on campaign fund raising prior to an election. Relevant excerpts of the Los Angeles ordinance read as follows:

> SEC. 49.7.7. Restrictions on When Contributions May Be Received.
>
> A. No candidate for City Council or the controlled committee of such candidate shall accept any contribution more than eighteen (18) months before the date of the election at which the candidate seeks office . . . . No candidate for Mayor, City Attorney or Controller or the controlled committee of such candidate shall accept any contribution more than twenty-four (24) months before the date of the election at which the candidate seeks office . . . .

The City Attorney stands ready to prepare draft ordinance language, once he receives direction from the Rules Committee to do so. In the alternative, the City Attorney recommends that this proposal be referred to the City Attorney's Task Force for further evaluation and preparation of a proposed ordinance amendment.

Request No. 25 (Proposal Regarding Elimination of All Campaign Debt Within Thirty (30) Days):

* Candidates must eliminate all campaign debt within 30 days of the election. No debt will be permitted after 30 days.

The City's current campaign control ordinance has a provision that purports to accomplish what this proposal suggests (SDMC section 27.2941(b)). The City Attorney has found, however, that the present ordinance poses enforcement problems. Therefore, the City Attorney's Task Force currently has this provision under evaluation. The Task Force plans to prepare draft amendments to the current ordinance to make the debt limitation provision more readily enforceable and to bring those amendments to the Council in December 1991.

Request No. 26 (Proposal to Prohibit Independent Campaign Committees from Participating in City Elections):

* Prohibit independent campaign committees from participating in Mayoral, City Council or City Attorney election campaigns.

This proposal to prohibit independent campaign committees from participating in City elections in essence would operate to prohibit or limit campaign expenditures. As such, it poses the same constitutional problems under Buckley v. Valeo, 424 U.S. 1 (1976), as discussed in our response to Request No. 17, above.

The City Attorney recommends that this proposal be referred to the City Attorney's Task Force to explore legally permissible mechanisms to regulate independent committees' involvement in local elections.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Attachments
RC-91-52