MEMORANDUM OF LAW

DATE: December 13, 1990

TO: Charles G. Abdelnour, City Clerk
FROM: City Attorney
SUBJECT: Effect of Redistricting on Recall Effort/Eligibility to Vote in Recall Election and Eligibility to Run as Successor-Candidate

By Opinion No. 90-3 issued on August 28, 1990, we responded to your memorandum dated August 8, 1990, in which you asked who is eligible to sign petitions for recall of an incumbent Council member in light of a proposed redistricting ordinance. A copy of that opinion is enclosed for your convenience.

Because they were not ripe for determination at the time we issued the August 28th opinion, two other questions relating to recall that you raised in your August 8th memorandum were reserved for response until such time as they became relevant, if indeed they did become relevant. Briefly, these two questions are: 1) who is eligible to vote in the recall election; and, 2) who is eligible to run as successor-candidate on the recall ballot. These two questions now appear to be relevant in view of your December 6th report to the Mayor and City Council concerning the sufficiency of the recall petition, and this memorandum of law will address both issues.

BACKGROUND FACTS

Many relevant facts are recited in the attached copy of City Attorney Opinion No. 90-3. However, some circumstances have changed since that opinion was issued, which we describe here.

First, the map known as Map No. 20, adopted by the San Diego City Council as part of the redistricting ordinance on August 27, 1990 (Ordinance 0-17517 N.S.), was the subject of litigation at the time of adoption in the case of Perez, et al. v. City of San Diego, et al. (S.D. Cal. No. 88-0103-R-(M) filed Jan. 26, 1988). Pursuant to settlement agreement in the Perez case, that ordinance and map have since been repealed and replaced by a new redistricting ordinance (Ordinance No. 17539 N.S.) and map, known as Map 23a, adopted by the Council on October 15, 1990. On November 15, 1990, U.S. District Judge John S. Rhoades, Jr., entered an order approving the settlement in the Perez case. The order, among other things, approves Map 23a as it pertains to Districts Nos. 4 and 8, but not as it pertains to the other six (6) districts.

Second, Map 23a is the subject of other litigation in Abbott v. City of San Diego (S.D. Cal. No. 90-1428-R-(M) removed to United States District Court, Oct. 17, 1990). Assuming the plaintiffs' allegations in the Abbott case have any merit, which we do not believe to be true, the redistricting ordinance and map may be subject to further amendments and district boundaries may again be altered.

Third, the City may undergo further redistricting if soon-to-be-released federal decennial census figures require it. In fact, section 5 of the San Diego City Charter was amended by vote of the people on June 5, 1990, to create a one-time waiver of the four (4) year minimum between redistricting to permit redistricting prior to the 1993 municipal election should federal decennial census figures so require. This possibility was specifically acknowledged in the settlement and order entered in the Perez case, cited above.

Meanwhile, pursuant to San Diego Municipal Code ("SDMC") section 27.2715, on October 9, 1990, recall proponents filed a petition with the City Clerk to recall the incumbent Council member of Council District 5 as it then existed. Pursuant to SDMC section 27.2721 certain persons submitted letters withdrawing signatures from the recall petitions. After verification of both signed recall petitions and withdrawn signatures, the City Clerk issued a "notice of insufficiency" pursuant to SDMC section 27.2718 and sent a copy of the notice to a representative of the recall proponents.

In accordance with SDMC section 27.2719, the recall proponents filed one supplemental petition with the City Clerk on November 23, 1990. Pursuant to SDMC sections 27.2720 and 27.2717, on December 6, 1990, the City Clerk verified the signatures on the supplemental petition and reported that the recall petition, including the supplemental petition filed on November 23rd, contained the requisite number of signatures to force a recall election.

Pursuant to SDMC section 27.2717, the City Clerk must "without delay" present the recall petition, with his certification attached, to the City Council. Following receipt of the City Clerk's certification of results, the Council must immediately call a special election for the purpose of allowing the people to vote on whether to recall the official named in the petition and to vote on a successor. SDMC section 27.2722. We are advised by the City Clerk that he will present the recall petition to the City Council at the next regularly scheduled Council meeting set for January 7, 1991. At that same time, the

ordinance calling for the special election will be on the docket for Council adoption. The special election must be held not less than sixty (60) but not more than ninety (90) days after the ordinance calling the election is adopted. SDMC section 27.2723.

QUESTIONS PRESENTED

1. In light of all the facts surrounding the redistricting ordinances and maps of the last few months, as outlined above, what are the district boundaries for purposes of determining who is eligible to vote in the recall election?

2. In light of all the facts surrounding the redistricting ordinances and maps of the past few months, as outlined above, what are the district boundaries for purposes of determining who is eligible to run as a successor-candidate in the event the people vote to recall the Council member from District 5?

ANALYSIS

Fundamental principles governing recall and redistricting were set forth in the attached City Attorney Opinion No. 90-3 and will not be repeated here. There are few local laws addressing the issues presented by this memorandum; those that exist are discussed herein. The state Elections Code on recall does not address these issues. (Cal. Elections Code sections 27000-27346.) Determining who is eligible to vote in the recall election and determining who is eligible to run as successor on the recall ballot are separate but related questions and they are treated separately below.

To resolve these two issues first requires understanding both the constitutional and historical basis of recall. These principles are described briefly in City Attorney Opinion No. 90-3, but will be amplified here.

I. Constitutional and Historical Basis of Recall

As pointed out in our prior opinion, the principle of recall has been a fundamental right reserved to the people in the California State Constitution since 1911. Just as for the reserved powers of initiative and referendum, the fundamental right of recall should be liberally construed in favor of the ability to exercise it. See 63A Am. Jur. 2d Public Officers and Employees section 190 at 810 (1984); F.L. Bird and F.M. Ryan, The Recall of Public Officers: A Study of the Operation of Recall in California (1930) at 341. Cases in California show that recall has indeed received liberal construction by the courts. See, e.g., Ratto v. Board of Trustees, 75 Cal. App. 724, 727 (1925) (question of sufficiency of grounds for recall stated in petition is for electorate, not for clerk or courts); Laam v. McLaren, 28 Cal. App. 632, 638 (1915) (question of truth and sufficiency of

statement of grounds for recall is for electors, not for courts or clerk to decide). Additionally, a redistricting plan should not be used to defeat a constitutionally based power such as recall. See In re Reapportionment of the Colorado General Assembly, 647 P.2d 191, 199 (Colo. 1982).

It is also helpful to understand and appreciate the historical background of recall. Our research revealed one very useful treatise on the subject of recall in the State of California: The Recall of Public Officers: A Study of the Operation of Recall in California, by Frederick L. Bird and Frances M. Ryan (1930). According to this treatise, recall, along with the initiative and referendum, is a product of the "progressive movement" of the early 1900's in this country. Id. at 2. While initiative and referendum are "modifications of the principle of representative government; . . . recall is an attempt to make government more representative by increasing the responsiveness of public officials to the will of the majority." In brief, recall is "a special election to determine whether an official shall be superseded before the ordinary expiration of his term." Id. at 3-4.

Removal from office before expiration of an official's term is not a unique phenomenon (e.g., impeachment is a commonly accepted method of removing elected and appointed government officials), but placing the power to do so directly in the hands of the people is a relatively recent political tool. Historically, initiatives and referendums are grounded in principles established in the American colonial period with roots in certain European countries (e.g. Switzerland). Id. at 2-3. Recall, however, is a relatively new phenomenon and began in this country with the adoption of recall in the Los Angeles City Charter in 1903. Id. at 3-4. Recall was adopted into many city charters and state constitutions rapidly thereafter.

San Diego was among five (5) California cities to adopt a recall provision in its charter in 1905, six (6) years before it became a part of the California Constitution. Id. at 33. It was first used in San Diego in 1906, and was used four (4) times in this City before 1930. Id. at 191. According to the City Clerk's records, a recall election has not been held in this city since adoption of the current charter in 1931.

Since the earliest uses of recall, selection of a successor at the same election as the vote on recall itself was common. In fact, this was the most common method for choosing a successor. Id. at 18.

In short, the principle of recall is a power reserved to the

people to exercise the majority will over an elected official's ability to stay in office. Although a relatively new election tool, it is part and parcel of a largely successful political movement which was active in the early 1900's to place greater power directly in the hands of the electorate.

Against this constitutional and historical backdrop, we examine the question of which boundaries should be used to determine who is eligible to vote in the recall election and who is eligible to run as successor-candidate on the recall ballot.

II. Who is Eligible to Vote in the Recall Election?

The San Diego City Charter reserves the right to recall municipal officers to the people of the City (Charter section 23). It does not specify which electors shall have the right to vote in a recall election in the event redistricting is taking place during a recall campaign.

San Diego Municipal Code section 27.2701 permits recall of an incumbent Council member by a "majority of the voters in the district represented by the Councilmember." But, as pointed out in our prior opinion, there is no Municipal Code section stating which boundaries define the "district represented by the Council-member" after a redistricting ordinance is adopted part way through a recall process.

The California Elections Code also lends no guidance on this issue. Cal. Elections Code section 27004 states that the term "electoral jurisdiction" for purposes of recall means "the area within which the voters reside who are qualified to vote for the officer sought to be recalled."

We have found no further legislative hints to assist us in determining who is eligible to vote in the upcoming recall election. We point out, however, that the actual election itself is merely the culmination of an extended recall process that begins with the date the recall proponents file their "notice of intention" to recall an incumbent Councilmember.

Since recall is essentially an election tool used by the voters to evaluate the effectiveness of an incumbent officeholder, the electors who would have the most stake in that evaluation would be the ones who elected the incumbent. Therefore, common sense and reason dictate that the electors who voted the incumbent into office should be the ones eligible to vote on whether the incumbent should stay in office or be recalled. As Justice Douglas said in Peak v. United States, 353 U.S. 43, 46 (1957), "Common sense often makes good law."

Also, as demonstrated above in the discussion on the historical and constitutional basis for recall, the right of

recall is fundamental and must be preserved as a meaningful tool if at all possible, even during times of redistricting. To say that voters of a newly formed district should have the right to vote on the recall question, even though these voters have no identification with this particular incumbent and even though they had nothing to do with getting this particular incumbent elected in the first place, could arguably render the recall election virtually meaningless. To uphold the validity of the recall process, the electors who voted the incumbent into office should be the ones to decide whether the incumbent should stay in office. This principle is expressly recognized in section 27.2732 wherein, if the recall is successful, the successor only serves the remainder of the "unexpired term," not a new term. Hence, as we pointed out in Opinion No. 90-3 at p. 8, the focus of recall is retrospective and not prospective.

Lastly, facts in the present case strongly support the view that the "old" district boundaries should be used to determine eligibility for all critical stages of recall; namely, to determine eligibility to sign recall petitions, eligibility to vote in the recall election itself, and, eligibility to run as a successor-candidate. The facts here show that the current recall campaign was initiated before the first redistricting ordinance was adopted. That is, the "notice of intention" to recall was published on August 10, 1990, but the "first" redistricting ordinance was not adopted until August 27, 1990. Second, after the recall petition signatures were gathered and filed (October 9, 1990), the City Council rescinded the original redistricting ordinance and adopted a new one with a new map (October 15, 1990). Both ordinances have been or are the subject of litigation and there is always a slight possibility that the October 15th redistricting ordinance and map will not be upheld. Also, new federal decennial census figures are to be released soon, which may require further redistricting in a relatively short time. All of this uncertainty in the district boundaries resulting from numerous redistricting ordinances, maps, lawsuits, and census figures argue for retaining the "old" district boundaries throughout the recall process, including the recall election itself.

We note in passing that, being a legislative act, a redistricting ordinance is subject to the exercise of the referendum power. That is why legislative acts (with few exceptions that are not relevant here) do not become effective until thirty (30) days after adoption - the time period during

which a referendum petition may be circulated. If a referendum petition on a redistricting ordinance is successful, it will operate as a stay on the effective date of the new boundaries. See, e.g., Assembly v. Deukmejian, 30 Cal. 3d 638 (1982). Although not a factor in the present case, the fact that redistricting ordinances are subject to the referendum power underscores the argument that district boundaries tend to be in flux and uncertain during a period of redistricting.

For the above reasons, we conclude that persons eligible to vote in "old" District 5 should be entitled to vote in the upcoming recall election.

III. Who is Eligible to Run as Successor-Candidate on Recall Ballot?

A. Residency and Nomination Requirements of Successor-Candidates Generally

San Diego City Charter section 7 requires that every Council member be an actual resident and elector of the district from which the Council member is nominated. The Charter makes no exception to the residency requirement for successor-candidates in a recall election. Section 9 of the Charter requires nomination for City elective office to be made in the manner prescribed in the City's Election Code, but the Charter does not state what boundaries control for determining who is eligible to run as a successor-candidate when a recall effort is underway during a time of redistricting.

The Municipal Code also provides few clues as to which boundaries count for purposes of determining who is eligible to run as a successor-candidate. SDMC section 27.2724 requires the City Clerk to "conduct the recall election, including the nomination of candidates to succeed the official where recall is sought, in a manner conforming with other municipal elections to the extent practicable." The City's nominating procedures are

set forth in chapter II, article 7, division 21, of the San Diego Municipal Code.

Under section 27.2103, a nominee signs an affidavit which declares, among other things, that the nominee resides in and is a registered voter of the political district for which the nominee seeks office. This section essentially restates the requirements of section 27.2023, which sets forth the residency requirements of all City elective officers. Subsection (b) of that section applies specifically to City Council members. It reads in relevant part:

> No person shall be eligible to or hold the office of a Councilmember, . . .

> either by election or appointment, unless that person is, at the time of assuming such office, a resident and elector of the district from which nomination or appointment is sought and was a registered voter of the district at least thirty (30) days prior to the date nominating papers were filed by the candidate pursuant to Section 27.2111 or 27.3209 of this article . . . .

Section 27.2111 mentioned in the above quote appears in Division 21, which governs nominations generally. Section 27.3209 governs nominating procedures for write-in candidates, including write-in candidates for recall elections. For purposes of this memorandum, the procedures governing nominations for write-in candidates does not apply and therefore will not be discussed further.

As shown above, it is clear from both the Charter and the Municipal Code that a successor-candidate in a recall election must be an elector of and reside in the district for which the candidate seeks nomination at least thirty (30) days before filing his or her nominating papers. But which district boundaries control for making this determination: the ones existing prior to the redistricting map and the ones from which the incumbent was selected; or the ones created by the redistricting map?

B. Effect of Redistricting on Eligibility to Run as Successor Candidate

1. Applicable Charter and Municipal Code Provisions

As shown below, neither the Charter nor the Municipal Code addresses directly the effect of redistricting on eligibility to run as successor-candidate in a recall election. However, the Charter contains brief statements as to the effect of redistricting on incumbent officeholders. As discussed briefly in our prior opinion, the Charter states that "no Council member shall forfeit the office as a result of redistricting." San Diego City Charter section 7. Also section 12 of the Charter states that, upon redistricting, "incumbent Council members will continue to represent the district in which they reside, unless as a result of such redistricting more than one Council member resides within any one district." In that event, section 12 of the Charter further provides that the "City Council may determine by lot which Council member shall represent each district."

The Municipal Code simply does not address the issue of the

effect of redistricting on a successor-candidate's eligibility to run for office in a recall election.

In fact, there are very few references to successor-candidates in the Municipal Code. These are outlined briefly here. Section 27.2722 requires that, if a recall petition is sufficient, a special election is to be called to let the voters decide whether to recall the incumbent and, if the answer is "yes," to elect a successor at the same election. Section 27.2723 deals with the time for the special election to be held on the recall proposal and selection of the successor. Section 27.2725 requires that names of candidates nominated to succeed the official whose recall is sought be placed on the recall ballot. Section 27.2726 prohibits voting on a successor-candidate unless the voter has voted on the recall question. Also, SDMC section 27.2731 states that, if the majority approved the recall of the incumbent, the "candidate who receives the highest number of votes for the office shall be the winner whether or not such highest number constitutes a majority of the votes cast." Lastly, the Municipal Code specifies that the "term of office of a successor elected pursuant to this article ┌the City's Election Codeσ shall be for the unexpired term of the successor." SDMC section 27.2732. Aside from provisions in division 32 of the City's Election Code regarding write-in candidates, including write-in successor-candidates, there are no other specific provisions regarding successor-candidate qualifications.

2. New District Boundaries Do Not Apply to Determine Eligibility to Run as Successor-Candidate

With the above-recited summary of Charter and Municipal Code provisions in mind, we turn to the question of which boundaries should be used to determine who is eligible to run as a successor-candidate in a recall election: the "old" district boundaries or the "new" district boundaries? For the reasons set forth in Opinion No. 90-3, read as a whole the Charter contemplates that "new" district boundaries only apply to the next regularly scheduled primary and general election process, not to a recall election process, especially one that is in progress at the time redistricting ordinance(s) are adopted. Specifically, a map associated with a new redistricting ordinance should not be used to determine whether a person may run as a successor-candidate in a recall election.

This view is not only consistent with the constitutional and historical basis of recall, but also lends certainty to the recall process. It allows recall to continue as a meaningful

election tool. To make the recall process subject to ever-fluctuating boundaries will wreak havoc on the process and render it meaningless. This potential phenomenon is borne out by events in the present case. First, we note that the redistricting ordinance and map adopted on August 27, 1990, by the City Council was repealed by the Council on October 15, 1990, and superseded by Map 23a, which was approved by court order on November 15, 1990. Map 23a itself is subject to litigation, which could at least arguably again result in altered district boundaries affecting District No. 5. This litigation may or may not be resolved prior to the recall election being held, but it certainly will not be resolved by the time this memorandum is issued, which marks the time by which the potential successor-candidates must decide (based upon the views expressed in this opinion at least) if they are eligible to run for office.

We also note that federal decennial census figures may require further redistricting in a matter of months, which could require even more alterations to District No. 5 boundaries. This redistricting may occur on or before the recall election will be held. To call a halt to the recall process until all district boundaries are either settled by ordinance or by litigation would make a mockery of the recall process. A redistricting plan that virtually nullifies the constitutional powers of recall cannot be sanctioned. See In re Reapportionment of the Colorado General Assembly, 647 P.2d 191, 199 (Colo. 1982). It seems to us that the only way to logically and sensibly give effect to the City's recall process is to accept the boundaries as they existed prior to the date the first redistricting ordinance was adopted as a basis for determining who is eligible to run as successor.

We conclude, therefore, that the district boundaries of District No. 5 that were in existence as of August 26, 1990, prior to the date the "first" redistricting ordinance was adopted, should be used to determine who is eligible to run as a successor-candidate in the recall election.

SUMMARY

For the reasons set forth in this memorandum of law, we conclude that the Council District No. 5 boundaries as they existed on August 26, 1990, prior to the date the "first" redistricting ordinance was adopted, should be used to determine who is eligible to vote in the upcoming recall election. We also

conclude that the boundaries of Council District No. 5 that were in existence on August 26, 1990, should be used to determine who is eligible to run as a successor-candidate in the recall

election.

JOHN W. WITT, City Attorney
By
Cristie C. McGuire
Deputy City Attorney

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Attachment
ML-90-105