

Memorandum

To: Julie Dubick
From: James Ingram
Re: Proposed language regarding appointments to outside organizations
Date: July 25, 2007

The following straw language is being submitted pursuant to a request by the Subcommittee on Duties of Elected Officials for proposed charter language regarding a nomination procedure for City representatives on outside organizations. The following language has been modified to account for the Subcommittee's request for a more practical nomination period, reflective of the City's actual workings at present. The language also provides explicitly that the City Council may play a role in recommending nominees for the Mayor's consideration.

Proposed Charter Language

"A) For all agencies, boards, commissions, committees, or other entities for which state or federal law requires or authorizes the City Council to act as the appointing authority, the following appointment procedure shall be employed:

- 1) The Mayor shall nominate each member of the agency, board, commission, committee or other entity, subject to confirmation by the City Council.
- 2) The City Council may recommend individuals to be nominated, subject to the Mayor's consideration of any nomination to be made.
- 3) If the City Council fails to act upon the Mayor's nominee within forty five (45) days after submission of the nomination to the City Council, the City Council's failure to act shall constitute confirmation of such nominee.
- 4) If the Mayor fails to nominate a member within ninety (90) days after a vacancy first exists, the City Council shall appoint the member.
- 5) If the Mayor submits a nomination to the City Council within said ninety (90) day period and the City Council rejects the nominee, the Mayor shall make a new nomination and the ninety (90) day nomination period shall commence on the date of said rejection.

B) The nomination procedure set forth in section A, above, shall not apply to a redevelopment agency or housing authority established under state law where the City Council has declared itself to be the agency or authority."

Staff Analysis of Proposed Language

This language avoids a conflict with the Redevelopment Agency issues being discussed by the Interim Strong Mayor Subcommittee. It is drawn narrowly enough that it should only affect those organizations that the City Attorney's Opinion of February 28, 2006 categorizes as subject to Council appointment with a Mayoral veto.

The City Attorney's representative to our Subcommittee has contended that this language may be problematic in that it may conflict with the state law that establishes some of the outside organizations that would be included. Of course, the Subcommittee would want to include provisions for severability in all Charter proposals offered, so that no other new Charter section would be jeopardized in the event that any individual Charter section is overturned. This applies to any and all Charter change recommendations made by a Subcommittee or our full Committee.

However, the staff has made an extensive review of the City Attorney's relevant opinions, state law and prior court action, and concluded that the proposed language should stand judicial scrutiny. The City Attorney's representative has not yet offered possible corrections to the previously proposed language, and therefore the staff has attempted to ensure its congruity with the provisions of state law.

Council Policy 13 currently includes provisions related to Mayor-appointed representatives that resemble the nomination process described above. Council Policy 13 also provides the Mayor with a role in the appointment of those representatives that the City Council is authorized to appoint. If a Council Policy is permitted to supplement the workings of state law-mandated bodies, then why could the Charter not do the same? Council Policies are lower in status than ordinances and resolutions, and ordinances and resolutions are trumped by the Charter itself. If a Council Policy is permitted to establish a process for appointments required by state law, then how could Charter sections not be allowed to do this much, or even more? If it is legal for Council Policy 13 to include the Mayor in the nomination process for positions that state law authorizes the Council to appoint, then it must be permissible for a Charter section to do so.

The City Attorney opined on February 28, 2006 that there are several bodies for which the Council holds responsibility of appointment, in which the Mayor must be given a role. Three of these are corporations that the City incorporated pursuant to California's Corporations Code—Centre City Development Corporation (CCDC), San Diego Convention Center Corporation (SDCCC) and Southeast Economic Development Corporation (SEDC). For the three City corporations whose bylaws specify that the Council is the appointing authority, the City Attorney has contended that the City must "harmonize" corporate bylaws with the post-Prop F Strong Mayor Charter. Consequently, the City Attorney has classified these three agencies as bodies whose members the Mayor may appoint, subject to Council confirmation. The City Attorney thus held that the bylaws provided by the state Corporations Code were trumped by the City Charter in the case of these three corporations.

For agencies whose City members state law directs to be appointed by the Council or its President (rather than indirectly through corporate bylaws), the City Attorney opined on February 28, 2006 that the Mayor may veto appointments. There are eight of these entities—Horton Plaza Theatres Foundation, Inc., Local Agency Formation Commission (LAFCO), Otay Valley Regional Park Policy Committee (JEPA), San Diego Metropolitan Transit System Board (MTS), San Diego River Conservancy, San Dieguito River Valley Regional Open Space Park Joint Powers Authority, San Diego Unified Port District, and the Local Enforcement Agency Hearing Panel, Waste Management. The state's controlling law has vested appointment power for all of these agencies in the hands of someone other than the Mayor. The City Attorney has ruled that since all of these "appointments are accomplished by City Council resolution in open session," they are "subject to Mayoral approval or veto. San Diego Charter §§ 265(b)(5), 280(a)." State law does not provide a Mayoral role in the appointment of any of these eight entities, yet the City Attorney contended that implementation of the controlling law must take account of the City Charter.

The City Attorney stood on safe legal ground in granting the Mayor a role in the appointments process for those agencies that state law makes the Council the appointing authority. The reason is that appointment of officials by the City is clearly a municipal affair, and in terms of municipal affairs a city charter trumps the provisions of state law (See *Johnson v. Bradley* 4 Cal 4th 389 (1992)). Even for

matters that the State of California has assumed virtually all responsibility, such as education, the selection of City representatives remains a municipal affair that a City Charter is competent to address (California Constitution, Article 9, Section 16). The California Constitution provides that: "City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith" (California Constitution, Article 11, Section 5(a)). There is an extensive case law through which California has enunciated the meaning of "municipal affairs," going all the way back to the 1890 *Davies* case that followed Los Angeles' adoption of the state's first home rule charter back in 1889. The City Attorney's opinion implicitly rests upon the premise that the appointment of City representatives is a municipal affair, or otherwise it would not be permissible to alter the controlling law by giving the Mayor a veto over such appointments by the Council or its President.

If it is permissible to alter controlling law by awarding the Mayor the right to veto Council appointments based on City Charter provisions, then how could it be illegal to grant the Mayor a nomination role in such appointments? If the City Charter were to specify that the Mayor is to have the power of nomination where controlling law vests appointment authority in the Council, then why would this be prohibited? The City Attorney's own opinion is that the Mayor has a role in such appointments. What would be the problem with putting the Mayor's action at the initial phase rather than at the final phase? The nomination and appointment process described in the proposed language above continues to place the Council in the position of the appointing authority; the Council is never forced to accept the Mayor's nominee, so long as it votes against appointing that person. If the language proposed above is prohibited by state law, then so is the Mayoral veto that the City Attorney opined is permissible. In fact, if the language above is prohibited by state law, then so was Council Policy 13, through the many years that it provided for such appointments.

To sum up: How can the City Attorney argue that when the state law makes the Council the appointing authority the Mayor may still veto, and then argue that a charter process for Mayoral nomination of Council appointees is a violation of state law? Either the Charter can specify a process to be used for filling appointments or it can not. If a Mayoral nomination of a Council appointee breaches the state law, then so must a Mayoral veto of a Council appointment.