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# Correspondence

## Meeting of August 25, 2009

1. **Item 21 - Strong Mayor Initiative Legal Issues and Options**
  - a. Charter Reform Initiative Letter: Thomas Hiltachk, Bell, McAndrews & Hiltachk, LLP

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August 24, 2009

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The Honorable Kevin Johnson  
& Councilmembers  
City of Sacramento  
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RE: Charter Reform Initiative

Dear Mayor and Councilmembers:

Thank you for voting to place the Charter Reform initiative and the Independent Budget Analyst initiative on the June 8, 2010 ballot. I hope over the course of the next several months, you will carefully examine the twin proposals and conclude that they are worthy of your support.

During the course of the council discussion, city attorney presentation, and public comment period, there was reference to an alleged "flaw" in the Charter Reform initiative concerning the creation of a ninth council district. As indicated more fully below, there is no such flaw. Rather, the initiative fits precisely within the existing Charter without any conflict to any provision therein. While it is true that the Charter initiative does not identify the year in which a full term of office for the ninth council district is to commence, that decision was intentional and is left to your discretion. The reason that this decision was left to your discretion is because we do not know exactly when you will adopt a new reapportionment plan in 2011. The current Charter (§ 24) requires you to adopt a reapportionment plan within six months of the release of certain population data (previously referred to as "Block Data") from the United States Census Bureau. We do not know for sure when you will obtain that data, nor do we know how long you might take to reapportion districts based on that data.

The existing Charter sets forth two options for filling a vacancy on the council depending on when that vacancy occurs. Thus, depending on when you create the new ninth council district, thereby creating a "vacancy," your decisions will be guided by the existing Charter. As indicated more fully below, each choice that could be presented at that time is reasonable and perfectly consistent with the Charter.

As you know, the existing Charter section 150 provides in part:

The city council shall adopt an election code ordinance, providing an adequate and complete procedure to govern city elections, including the nomination of candidate for all elective offices. All elections provided for by this Charter for choice of officers, shall be conducted in the manner prescribed by said election code ordinance or as said code is hereafter amended.

Additionally, existing Charter section 155 provides that both the elections procedures in the state Elections and Government Codes apply insofar as they do not conflict with the city Charter.

You have already enacted municipal code section 1.16.50 which provides the mechanism for calling an election:

Pursuant to Elections Code Section 12101, not earlier than the one hundred twenty-seventh day nor later than the one hundred thirteenth day before any municipal election, the city clerk shall publish a notice of the election.

California Elections Code section 12101 details the elements of a "Notice of Election" and includes not only the date of the election but also, "[t]he offices to be filled, specifying the full term or short term, as the case may be."

Thus, you already have ample legal authority to establish the election date and to determine the commencement date for a full term of office for the newly created ninth district within the existing Charter and both state and municipal law. Below I have described the options that will be available to you depending on the date the ninth council district is created.

#### Ninth Council District Created Before November 6, 2011

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Section 28 of the existing Charter generally provides that a vacancy is to be filled by special election. Section 154 of the existing Charter provides that such a special election to fill a vacancy is to be held at the next regularly scheduled city election.

Based on the existing Charter, the relevant "trigger" date is November 6, 2011 (one year before the city general election in 2012). If the ninth council district is created before November 6, 2011, you might choose to have the full term of the ninth council district commence in either 2012 or 2014 (terms commence in late November following the year of election per existing Charter §153). If you choose 2014, the member elected in the special election on June 6, 2012 (required by § 28) would take office immediately and would serve for approximately two and one-half years until re-elected or a successor is elected in 2014 (i.e. a "short term" as referenced in Elec. Code § 12101(a)(2)). This choice does not conflict with any existing Charter provision.

You could also choose to have the full term of the ninth council district commence in 2012. In this case, you would hold both an election to fill the ninth council district vacancy on June 6, 2012 and call for an election to fill a full term for the same seat on the same day. In that

case, the candidate elected to fill the vacancy would serve for about 6 months unless he or she was also elected to fill the full term at the same election (a likely result). This choice does not conflict with any existing Charter provision. Indeed, it is not unprecedented. The most recent example that I recall was the election to fill the vacancy in the 50<sup>th</sup> congressional district in 2006 in which the special election and the election to fill the next full term were held at the same time.

#### Ninth Council District Created After November 6, 2011

In the event that the ninth council district is created after November 6, 2011, you could also choose to have the term for the ninth council district commence in either 2012 or 2014. If you choose 2014, you would call a special election pursuant to Section 28 of the Charter as described above. The person elected would immediately fill the vacancy until a successor was elected in 2014 (approximately two and one-half years).

However, if you decided to have the term for the ninth council district commence in 2012, Section 28 would require you to appoint a person to fill that vacancy rather than hold a special election on June 6, 2012. Thus, you would appoint a person to fill the vacancy almost immediately until a successor was elected and his or her term commenced in late November 2012 (about one year).

Thus, the decision to leave the choice to the council to deal with the unknown (i.e. when will the ninth council district actually be created) is not a “flaw.” Most importantly, it is not a legal issue at all and poses no threat to the validity of the Charter initiative since no part of the Charter initiative nor the decision by council as to the election procedure required for the newly created district conflict in any way with any provision of the current Charter. And if even there was a conflict (which there is not), laws of statutory construction would require that you give full effect to the intent of the Charter initiative as it would have been enacted later in time.<sup>1</sup>

The fact that the current Charter section 152 provides for the election dates for the other eight council districts is of no legal consequence. ~~The Charter initiative changes none of those~~ dates directly or implicitly. Whether the ninth district election is held at the same time as the first, third, fifth, and seventh district in 2014 or whether it is held with the second, fourth, sixth, and eighth districts in 2012 matters not. Either way, five districts will be up for election in one

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<sup>1</sup> California courts have long recognized that “an act adding new provisions to and affecting the application of an existing statute ‘in a sense’ amends that statute....” (Huening v. Eu (1991) 231 Cal. App. 3d 766, 773, quoting Hellman v. Shoulters (1896) 114 Cal. 136, 152.) An implied amendment is an act that creates an addition, omission, modification or substitution and changes the scope or effect of an existing statute. (Huening, supra, at p. 774; Franchise Tax Bd. v. Cory (1978) 80 Cal. App. 3d 772, 776 [court found an implied amendment but invalidated it on constitutional grounds]; see generally, 1A Sutherland, Statutory Construction (5th ed. 1993) Amendatory Acts, § 22.13, p. 215.) In sum, amendment or exception by implication is to be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are “irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation....” (In re White (1969) 1 Cal. 3d 207, 212.)

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election cycle and four districts will be up for election in the other election cycle. The council's choice, no matter what it is, will not conflict with existing section 152.<sup>2</sup>

The intent of the Charter initiative is clear. The ninth council district is to be created at the time you reapportion districts following the United States Census, as provided in the existing Charter. (See proposed Charter § 22). When and how you fill that vacancy is already provided for in the Charter. When you choose to commence a full term for the ninth council district is within your existing power and is a requirement of existing municipal law.

As I stated when I came to the Council in February, I am happy to discuss the Charter initiative with any of you at any time. Please do not hesitate to call.

Sincerely,



Thomas W. Hiltachk

cc: Ray Kerridge, City Manager  
Eileen Teichert, City Attorney  
Shirley Concolino, MMC, City Clerk

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<sup>2</sup> There is no legal requirement that the election dates for any of the council seats are provided for in the Charter. For example, the California State Senate is divided into 40 districts with each member serving a 4 year term. Half are elected each two-year cycle, yet the State Constitution does not provide which districts are elected in one election cycle and which districts are elected in the next election cycle. That decision is made by the Legislature (See, Gov. Code § 9002).