

CITY COUNCIL

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Reso No. _____ File No. _____

Ord No. _____

Agenda Item No.: 13

Date: March 9, 2011

TO: Honorable Mayor and Members of the City Council

FROM: Jeffrey R. Epp, City Attorney
Jennifer K. McCain, Assistant City Attorney

SUBJECT: Charter City Proposal

Deputy Mayor Marie Waldron and Councilmember Ed Gallo requested a City Council agenda item to consider the subject of becoming a charter city. This staff report provides general background information regarding charter cities and the procedures required for adopting a charter for the City Council's review and consideration.

RECOMMENDATION:

None.

BACKGROUND:

In California, there are two kinds of cities: charter cities and general law cities. See Cal. Gov't Code §§ 34100-34102. General law cities derive their corporate powers from general laws enacted by the legislature. See generally *Irwin v. City of Manhattan Beach* (1966) 65 Cal. 2d 13. Charter cities, on the other hand, derive their corporate powers directly from the constitution, subject to limitations of their respective charters and enactments of the legislature on matters of statewide concern. See *Johnson v. Bradley* (1992) 4 Cal. 4th 389, 394. The City of Escondido is a general law city and was incorporated in 1888. Of the 482 cities in the state, 120 are charter cities. In North County, Carlsbad (adopted 2008), Oceanside (adopted 2010), Del Mar (adopted 1960), Vista (adopted 2007) and San Marcos (adopted 1994) are charter cities.

Charters can be drafted to be very broad or narrowly tailored to address a few specific local needs. For instance, the City of San Diego's charter is 121 pages and addresses many issues, including, corporate powers, nominations and elections, legislative power, the mayor, executive and administrative service, board of education, finance, civil service, retirement of employees, transfer of police and fire department employees into the retirement system, fireman's relief and pension fund, labor on public work, city police court, and the strong mayor form of governance.

By contrast, Vista and other north San Diego County cities have all tended toward using shorter, simplified charter documents which address specific issues including public works contracts, prevailing wage, public financing, and retirement benefits. Charters for Carlsbad, Oceanside,

Del Mar, Vista and San Marcos have been provided for your review and comparison. Because it is so lengthy, San Diego's City Charter can be found at www.sandiego.gov/city-clerk/officialdocs/legisdocs/charter.shtml. The San Diego Grand Jury studied the issue of charter cities in 2002 under its watchdog responsibility for the purpose of investigating methods to improve the organization and efficiency of city government operation within San Diego County. The Grand Jury's report is entitled "Home Rule" Is Chartering A City A Good Idea? This report can be found at http://www.co.san-diego.ca.us/grandjury/reports/2001_2002/charter.html or made available upon your request.

The authority provided in the state constitution to organize as a charter city is extended only to an existing city. An advantage of the charter form of government stems from the potential breadth of local authority which may be exercised. Since the powers of a charter city are not restricted to only those outlined in the general state municipal law, a city can adopt a charter and customize its organization and elective offices to provide for unique local conditions and needs.

A charter is a written document, approved by the electorate, which operates as a "constitution" for the adopting city. The provisions of Cal Const art. XI, § 3(a) authorize the adoption of a city charter and provide that such a charter has the force and effect of state law. Charter cities have the power to make and enforce all ordinances and regulations with respect to municipal affairs, including those relating to the creation and regulation of a police force and sub-government within the city, the conduct of city elections, and the dealings with municipal officers and employees. Cal Const art. XI, § 5(b). Charters act as instruments of limitation on the broad power of charter cities over matters of municipal affairs. *City of Glendale v. Trondsen* (1957) 48 Cal. 2d 93, 98. A charter can only be adopted and/or changed by a majority vote of the city residents.

The provisions of Cal Const art. XI, § 5(a), the "home rule" provision, affirmatively grant charter cities supremacy over "municipal affairs." However, the California Constitution does not define the term "municipal affair." The home rule provision of the California Constitution authorizes a charter city to exercise plenary authority over municipal affairs, free from any constraint imposed by the general law and subject only to constitutional limitations. See Cal Const art. XI § 5(a); *Ex Parte Braun* (1903) 141 Cal. 204, 209; *Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 61; *Comm. of Seven Thousand v. Super. Ct. (City of Irvine)* (1988) 45 Cal. 3d 491. The primary advantage of a charter is that it allows greater authority for a city's governance than that provided by state law. A city charter is subject only to conflicting provisions in the state or federal constitutions and preemptive state law on matters of statewide concern.

Whether a given activity is a municipal affair over which a city has sovereignty or a statewide concern, over which the legislature has authority, is a legal determination for the courts to resolve. Thus, the determination of whether a given activity is a municipal affair or statewide concern is done on a case-by-case basis. The court's determination will depend on the particular facts and circumstances of each case. See *In Re Hubbard* (1964) 62 Cal. 2d 119, 128. The concept of "municipal affairs" is a

fluid one that changes over time as local issues become statewide concerns. See *Issac v. City of Los Angeles* (1998) 66 Cal. App. 4th 586.

Municipal Affairs

There are some areas that the courts have consistently classified as municipal affairs as set forth below:

- Municipal Election Matters. See *Mackey v. Thiel* (1968) 262 Cal. App. 2d 362.
- Procedures for Initiative, Referendum and Recall. See *Lawing v. Faull* (1964) 227 Cal. App. 2d 23, 29.
- Procedures for Adopting Ordinances. See *Brougher v. Board of Public Works* (1928) 205 Cal. 426.
- Compensation of City Officers and Employees. Cal Const art. XI, § 5(b); See *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal. 3d 296; but see *San Leandro Police Officers Association v. City of San Leandro* (1976) 55 Cal. App. 3d 553 (labor relations is not a municipal affair; Charter cities are subject to the Meyers-Milias Brown Act. Cal. Gov't Code § 3500).
- Processes Associated with City Contracts. See *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal. App. 4th 650; but see *Domar Electric, Inc. v. City of Los Angeles* (1995) 41 Cal. App. 4th 810 (state law establishing employment policy may preempt local regulation of bidding criteria).
- Financing Public Improvements. See *City of Santa Monica v. Grubb* (1996) 245 Cal. App. 2d 718.
- Making Charitable Gifts of Public Funds for Public Purposes. See Cal Const art. XVI, § 6; *Tevis v. City and County of San Francisco* (1954) 43 Cal. 2d 190.
- Term Limits for Council Members. See *Cawdrey v. City of Redondo Beach* (1996) 15 Cal. App. 4th 1212; but see Cal. Gov't Code § 36502(b) (regulating term limits).
- Land Use and Zoning Decisions (with a few exceptions). See *Brougher v. Bd. of Pub. Works* (1928) 205 Cal. 426.

Matters of Statewide Concern

Alternatively, the following have consistently been classified by the courts as matters of statewide concern:

- School Systems. *Whisman v. San Francisco Unified Sch. Dist.* (1978) 86 Cal. App. 3d 782, 789.
- Traffic and Vehicle Regulation. Cal. Veh. Code § 21.
- Licensing of Members of a Trade or Profession. *City and County of San Francisco v. Boss* (1948) 83 Cal. App. 2d 445.
- Tort Claims Against a Governmental Entity. *Helbach v. City of Long Beach* (1942) 50 Cal. App. 2d 242, 247.
- Open and Public Meetings. Ralph M. Brown Act. Cal. Gov't Code §§ 54951, 54953(a).
- Exercise of the Power of Eminent Domain. *Wilson v. Beville* (1957) 47 Cal. 2d 852, 856.

State Prevailing Wage Requirements: Municipal Affair or Statewide Concern?

Escondido holds a considerable advantage in being able to review the experience of other cities adopting the more limited charters. In the area of prevailing wages, there remains great uncertainty pending the resolution of *State Building and Construction Trades Council of California, AFL CIO v. City of Vista* (2009) 173 Cal. App. 4th 567 rev. granted.

As noted above, cities recently have been chartered based primarily upon potential financial benefits. Avoiding prevailing wage requirements has been a dominant theme, especially among north San Diego County cities. The prevailing wage law requires public works contracts to pay a prevailing per diem wage for construction trades. The prevailing wage law is designed to ensure that private contractors who enter into collective bargaining agreements can compete for public works contracts. However, the law is not applicable to private agreements. Historically, charter cities have not been bound by state law prevailing wage requirements so long as the project is a municipal affair, and not one funded by state or federal grants. *Vial v. City of San Diego* (1981) 122 Cal. App. 3d 346, 348. However, the League of California Cities notes a growing trend on the part of the courts and the Legislature to expand the applicability of prevailing wages to charter cities under an analysis that argues that the payment of prevailing wages is a matter of statewide concern. In 2004, the California Supreme Court described the issue of whether a charter city may exempt itself from compliance with

the prevailing wage law as an "open" and "important" question. See *City of Long Beach v. Dept. of Indust. Relations* (2004) 34 Cal. 4th 942.

The California Supreme Court has now decided to resolve this question in a case involving the City of Vista. In the lower courts, the City of Vista successfully defended its ordinance exempting municipal contracts from prevailing wage laws based on the City's charter status. See *State Building and Construction Trades Council of California, AFL CIO v. City of Vista* (2009) 173 Cal. App. 4th 567 rev. granted. But, the California Supreme Court has since granted review of this decision.

Vista became a charter city on June 13, 2007. At the time of the ballot measure, Vista was anticipating the construction of several capital improvement projects, including a new civic center; two fire stations; a new sports park; and a stagehouse for the Moonlight Theatre. See *State Building and Construction Trades Council of California, AFL CIO v. City of Vista* (2009) 173 Cal. App. 4th 567 rev. granted. Advocating for a vote in favor of the ballot measure, the Vista City Council informed the public that if Vista became a charter city it "could choose when and if it pays 'prevailing wages'" on public works contracts. *Id.* at 573. The voters approved the measure and Vista became a charter city. The Vista City Council then adopted Ordinance No. 2007-9 amending Vista municipal code section 3.08.160 stating, in relevant part:

No City contract shall require payment of the prevailing wage schedule unless:

1. The prevailing wage is legally required, and constitutionally permitted to be imposed, by federal or state grants pursuant to federal or state law; or
2. The project is considered by the City Council not to be a municipal affair of the City; or
3. Payment of the prevailing wage schedule is authorized by resolution of the City Council.

Id.

Thereafter, the City began construction on several capital improvement projects. The State Building and Construction Trade Council of California filed a petition for writ of mandate directing the City to comply with California's prevailing wage law. The Superior Court denied the petition, and the Court of Appeal affirmed.

In the Vista case, the trial court and the Court of Appeal agreed that the prevailing wage law does not qualify as a matter of statewide concern because the legislature has been willing to exclude private agreements and a fairly substantial number of publicly-supported contracts from the law's requirements. The Courts also found that the extraterritorial impact of a municipality's contracting practices was not significant or substantial enough to warrant subordination of a municipality's power over its spending, especially when the legislature did not decide to regulate private contracting which

has an equal or far larger volume of construction. As such, the lower courts held the City's ordinance exempting municipal project from the prevailing wage law was valid.

However, on August 20, 2009, the California Supreme Court granted review of the lower courts' decision. Briefing by all parties has been completed for over a year and oral argument has yet to be scheduled. Procedurally, this means that the lower courts' decision has no effect. There remains a possibility that the California Supreme Court may rule that prevailing wage laws are a matter of statewide concern. Such a ruling would trump the ability of a charter city to use home rule to exempt itself from the prevailing wage laws. This could have an impact on the electorate's willingness, or perceived need to adopt a charter, especially for cities where avoiding the prevailing wage requirements was an objective of having a city charter.

Notwithstanding the state Supreme Court's decision in the Vista case, the state legislature can always react by adopting specific legislation declaring prevailing wage laws to be matters of statewide concern. Indeed, the ability of the legislature to influence which laws become matters of statewide concern will always be a limitation on the authority and control of a charter city.

Process Used to Adopt a Charter

If the City Council wishes to pursue the adoption of a charter, there are two alternative procedures to draft and adopt a city charter. The first is for the City Council, on its own motion, to draft the charter. The other alternative allows for the election of a charter commission which would be responsible for drafting the charter. In either case, the charter is not adopted by the city until it is ratified by a majority vote of the city's electorate.

The more expedient procedure is for the City Council to develop and draft the charter. Study would be necessary to determine which local issues should be included in the charter. An election to decide on the adoption of a charter may be called by initiative or the City Council. See Cal Const art. XI, § 3. On its own motion, the City Council may propose a charter and submit it to the voters for adoption. See Cal. Gov't Code § 34458. With this option, the City Council can call a special election or allow the charter to be voted on at any established election date, as long as that election date is at least 88 days after the proposed charter is filed with the city clerk. See Cal. Gov't Code § 34458. As a practical matter, an election may have to be called earlier than 88 days before the election in order to meet certain noticing deadlines. With regards to timing if the City Council chooses to pursue this option, the City Clerk has advised that the City does not qualify to hold an all-mail ballot election and the November 8, 2011, regular election is the soonest election available, with a deadline of August 12, 2011, for submission to the Registrar of Voters.

Alternatively, if the City Council opted for the charter commission approach, the first step is to elect the commission. The vote to elect a charter commission is called for by either a majority vote of the City Council or by a petition signed by not less than fifteen percent of the registered voters within the

city. See Cal. Gov't Code § 34452. Once it has been decided that a charter commission election will take place, candidates for commissioners must be nominated. Candidates for the office of charter commissioner are nominated either in the same manner as officers of the city or by petition. A candidate for charter commissioner must be a registered voter of the city. After the election of commissioners, any vacancy on the commission will be filled by a mayoral appointment. See Cal. Gov't Code § 34452.

At an election for charter commission members, the voters will vote first on the following question: "Shall a charter commission be elected to propose a new charter?" After voting on this question, the voters will then vote for the charter commission candidates. If a majority of the voters vote for the formation of a charter commission, then the top fifteen candidates for the office of charter commissioner will be organized as the city's charter commission. No commission will be formed if a majority of voters vote against the election of a charter commission. See Cal. Gov't Code § 34453.

Once formed, the charter commission will have the responsibility of developing the city's charter. After a simple majority of commissioners have decided that the proposed charter is appropriate, they file the charter with the city's clerk in preparation for a vote by the city's electorate. See Cal. Gov't Code § 34455. However, instead of sending the whole charter at once, periodically the commission may send portions of the charter to the city's electorate for a vote. See Cal. Gov't Code § 34462.

After the charter has been filed with the city clerk, the City Council must decide whether to call a special election or to wait until the next established municipal election to submit the charter to the voters. If the City Council determines that a special election should be held, then they must call for that special election within 14 days of the charter being filed. The special election must be set at least 95 days after the date from which the special election was called. See Cal. Gov't Code § 34457. In any case, the charter commission must send the charter to the voters within two years of the vote that formed the commission. Upon the expiration of the two-year time period, the commission is abolished. See Cal. Gov't Code § 34462.

Both approaches require that a majority of voters must vote in favor of the proposed charter for it to be ratified. The charter will not go into effect until it has been filed and accepted by the Secretary of State. See Cal. Gov't Code § 34459. After a charter is approved by a majority vote of the voters, the mayor and city clerk shall certify that the charter was submitted to the voters of the city and that it was approved by a majority vote. See Cal. Gov't Code § 34460. One copy of the approved charter shall be filed with the County Recorder's Office and one shall be kept in the city's archive. See Cal. Gov't Code § 34460. A third copy of the charter must be submitted to the Secretary of State with (1) copies of all publications and notices in connection with the calling of the election; (2) certified copies of any arguments for or against the charter proposal which were mailed to the voters; (3) a certified abstract of the vote at the election on the charter. See Cal. Gov't Code § 34460.

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Charters are effective when filed with the Secretary of State; the charter must also be published in the official state statutes. Amendments, revisions, and repeal of a charter are handled in the same manner as adoption of a charter. An amendment or repeal to a charter may be proposed by the governing body or by initiative; the governing body's consent is not needed in the case of an initiative. *Birkenfeld v City of Berkeley* (1976) 17 Cal. 3d 129, 143.

Conclusion

A charter may provide the City with more local authority in specific areas including contracting with parties on municipal projects without complying with prevailing wage laws. However, such an option is not without risk of undue expense and resources, especially in light of the pending court case involving the current challenge to Vista's ordinance exempting the City from complying with prevailing wage laws.

Respectfully Submitted,



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