ESCONDIDO
City of Choice

CITY COUNCIL

For City Clerk's Use:
☐ APPROVED ☐ DENIED
Reso No. _____ File No. _____
Ord No. _____

Agenda Item No.: 15
Date: May 23, 2012

TO: Honorable Mayor and Members of the City Council

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

SUBJECT: Second Public Hearing on Proposed City Charter

RECOMMENDATION:

Council is requested to hold a second public hearing on the proposed city charter for the City of Escondido (attached) including the method of elections and listen to public comments and suggestions and provide direction on any changes to the proposed city charter. Council may also direct staff to return to the Council on June 13, 2012 to approve the submission of the proposal to adopt a charter to the voters of Escondido.

FISCAL ANALYSIS:

If the proposed charter is placed on the November 2012 ballot, the City Clerk has provided revised cost estimates in an estimated range of $35,000 to $40,000 for six pages. Staff also estimates a cost of $13,200 for an informational community mailer.

PREVIOUS ACTION:

Deputy Mayor Marie Waldron and Councilmember Ed Gallo originally requested a City Council agenda item to consider the subject of becoming a charter city on March 9, 2011. The City Council discussed becoming a charter city and on April 13, 2011, Deputy Mayor Marie Waldron presented a draft charter to the Council for public discussion. A public workshop to discuss the proposed charter and receive input from the public was held on September 28, 2011. A draft charter was placed on the City's website on September 29, 2011. A revised draft charter was posted on the City's website on January 12, 2012.

The first public hearing to consider becoming a charter city was held on April 18, 2012. City staff presented background information regarding charter cities, a brief summary of issues raised at the September 28, 2011 public workshop and recent legal developments which affect both the content and the adoption requirements for a charter ballot measure. Thereafter, at a noticed public meeting, the City Council directed staff to present an evaluation and analysis regarding a change to the current election method of Councilmembers in conjunction with the proposed charter.

BACKGROUND:

The staff report submitted at the first public hearing on April 18, 2012 is attached and incorporated fully into this report to provide background regarding charter cities in general as well as background regarding the draft charter presented to the City Council.

Municipal Election Matters/District Elections. Since the last hearing, the City Council has requested further evaluation of different methods of conducting municipal elections. Since the City's incorporation in 1888, Escondido has been subject to the general laws regulating the structure of elections for municipalities. Currently, there are no districts in the City of Escondido and Councilmembers are elected at-large. In 1988, a majority of the voters of the City of Escondido approved Proposition L providing for a directly elected Mayor with a term of 2 years. Thereafter, the electorate changed the Mayoral term to 4 years.

District elections, or any other type of voting system, may be provided for in a city charter. (Cal. Const. art. XI, § 5(b).) A charter must be adopted though a vote of the electorate. (Gov. Code § 34450 *et seq.*) Many cities, school districts and other special districts (i.e. Rincon del Diablo Municipal Water District and Vista Irrigation District) use district elections. A proposed charter that provides for a change from at-large elections to district elections need *not* include actual district boundaries or other details.

A district-voting system could be adopted without the adoption of a charter. However, general law cities have no voting system options other than district elections or at-large elections. Additionally, a district-voting system can be established in a general law city only through a vote of the people (Gov. Code § 34871); and (unlike under a charter) the exact district boundaries must be approved by the voters (Gov. Code § 34872). Thus, this option entails significantly more lead time than implementing a change to district-voting through a city charter, as districts would have to be drawn *before* the issue is taken to the electorate.

The charter process enables the form of election system, but not the specific details, to be developed and included in the charter fairly quickly, using models from other charter cities that utilized some form of district election. Draft language has been included in the proposed charter for your review.

District Elections for the City Council with the Mayor Elected At-Large. A number of charter cities, including Modesto and Compton,[1] utilize district elections, but still elect their mayor at-large (as opposed to the Council appointing the mayor).

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[1] The City of Compton's charter amendment implementing district-voting has not yet been approved by its electorate. As part of a settlement of litigation, the City of Compton agreed to seek voter approval of district elections.

Seat Based Voting. Under a seat-based voting system, the four council positions remain at-large, however, candidates are allowed to designate which particular seat they are running for, depending on which seats are open. Seats are often denominated by number. Voters are allowed to vote for a candidate for each available seat. Such a method arguably allows candidates a greater chance of being elected because they are running only against other candidates for that same seat; however, there is no assurance as to how many candidates may choose to run for which particular seats. Such a system is still an "at-large" voting system.[2]

Cumulative Voting. With cumulative voting, a ballot has two or three columns listed next to each candidate, depending on whether there are two or three seats open in that election. Each voter could cast his or her votes for separate candidates, casting one vote in each column, or could cast all of his or her votes for a single candidate. Cumulative voting purportedly helps minority candidates because their supporters can "single-shot" all their votes behind one candidate, while majority voters typically spread out their votes among several candidates.

Cumulative voting is still considered at-large voting, however, and its implementation would not prevent future challenges based on the California Voting Rights Act (CVRA). (*See* Elec. Code § 14026; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 670 [defining cumulative voting as an alternative at-large voting method].) Furthermore, election experts have argued that cumulative voting could be problematic because it typically causes more vote-splitting than a traditional system. Parties or groups are more likely to limit their nominees to avoid such vote-splitting, and voting becomes more strategic to ensure the election of a preferred candidate. We are not aware of any cities in California that use cumulative voting.

Instant Runoff Voting. Four cities in California (all in the San Francisco Bay area) currently use some form of instant runoff, or ranked, voting: Berkeley, San Francisco, Oakland, and San Leandro. In instant runoff voting, voters rank the candidates in order of preference. The ballots are initially counted as one vote for the voter's first choice candidate. If a candidate secures a majority of votes cast, that candidate wins. Otherwise, the candidate with the fewest votes is eliminated, and a new round of counting takes place, with each ballot counted as one vote for the highest ranked candidate that has not been eliminated. The process continues until the winning candidate receives a majority of the votes against the remaining candidates. When a candidate receives a majority of the votes, the process ends and that candidate wins.

Proponents of instant runoff voting argue that it eliminates the "spoiler" effect, where votes are diluted by long-shot candidates, and that the system ensures a candidate receives an actual majority of the votes cast.

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[2] If Council is inclined toward such an approach, please see cautionary notes on page 4 in the discussion on the pending Gomez litigation.

Opponents of instant runoff voting argue it is overly complicated, and can create a "no show paradox," where voters assume they may be better off not voting at all, rather than being forced to rank undesired candidates.[3] Furthermore, they assert that instant runoff voting does not in fact eliminate the "spoiler" effect. Burlington, Vermont once used an instant runoff voting method, but the voters repealed that procedure after it produced somewhat bizarre results where an unpopular mayor was elected, largely based on second and third place votes.

Impact on Gomez Litigation. Councilmembers have previously expressed concern that the City's active consideration of alternative voting methods could jeopardize the City's position in *Demetrio Gomez v. City of Escondido*, Superior Court Case No. 37-2011-00060480-CU-CR-NC. We do not believe this would be the case. The charter city process was undertaken quite some time before the *Gomez* litigation was initiated. If anything, we believe that if district based elections were included in the charter and placed on the ballot for the voters in November, it would have the effect of holding the litigation in abeyance. Indeed, the Plaintiffs' counsel has indicated to the Superior Court that plaintiffs would agree to stay the pending litigation if the City Council were to place a Charter that included district elections before the City voters on the November ballot. If the charter passed, it would be quite likely that the litigation would be subject to complete dismissal. Indeed, Plaintiffs' counsel has tentatively agreed to this. The impact of adopting alternatives other than district elections (i.e., seat based, or cumulative) would likely not result in the lawsuit being dismissed, as these alternative systems are not "district" elections within the meaning of the CVRA.

As noted above, additional provisions in the proposed City charter regarding the election process would allow for more flexibility and increase efficiency in adopting a change in the method of election for Councilmembers. A city charter may establish the structure for the election of councilmembers by providing for an election method. The change would take effect utilizing the same ballot measure, thus utilizing an ongoing process and eliminating duplicative costs. The establishment of the boundaries of the district would occur after the adoption of the proposed charter, prior to the following election in 2014.

PROPOSED LANGUAGE:

The attached draft charter includes proposed language regarding the elected officers of Escondido. The proposed language would allow for a "by district" method of voting for City Councilmembers instead of the current at-large method of voting for City Councilmembers. If adopted by the voters, the changes would commence at the 2014 election.

Similar language is currently being proposed by the City of Compton. The City of Compton has recently put an amendment to their charter on the ballot to approve a change from an at-large method of election to a "by district" method of election. The amendment is the most recent charter considering

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[3] *See* http://victor-kaplan.suite101.com/the-pros-and-cons-of-the-alternative-instant-runoff-vote-a315772

a change from an at-large election method to a "by district" method and provides the most relevant example for the City of Escondido.

Districts are developed using the factors set forth in the California Elections Code, including topography, geography, cohesiveness, contiguity, integrity and compactness of territory, and community of interest.

The proposed charter amendment by Compton was a change to the previous at-large system. Compton already had districts in place and councilmembers were required to be residents of those districts. Although each councilmember had to reside in a particular district, they were elected at-large. Under the proposed Compton approach, residents will only vote for candidates within their district. This latter approach satisfies the requirements of the CVRA whereas the former approach did not.

There are several differences between the amended charter from Compton and the proposed charter language for Escondido. Compton already had established districts prior to the charter amendment. The proposed charter language for Escondido allows the initial establishment of the district boundaries following the adoption of the proposed charter. Compton's charter provides for a change from a four council member district to a six council member district if population increases. The proposed charter language for Escondido does not contain this type of process.

Compton outlines compensation for their Councilmembers in the charter. The proposed Escondido language requires mayoral and council salaries to be set within limits according to general law. Compton also requires a thirty day residency requirement prior to nomination or appointment to office. The proposed Escondido language allows for Council to make that determination (shorter or longer) by ordinance.

CONCLUSION:

Council is requested to hold a second public hearing on the proposed city charter for the City of Escondido (attached) including the method of elections and listen to public comments and suggestions and provide direction on any changes to the proposed city charter. Council may also direct staff to return to the Council on June 13, 2012 to approve the submission of the proposal to adopt a charter to the voters of Escondido.

Respectfully submitted,

JEFFREY R. ERP
City Attorney

JENNIFER K. MCCAIN
Assistant City Attorney

Attachment (Proposed Draft Charter)

CHARTER
OF THE
CITY OF ESCONDIDO

PREAMBLE

WE THE PEOPLE of the City of Escondido declare our intent to restore to our community the historic principles of self governance inherent in the doctrine of home-rule. Sincerely committed to the belief that local government has the closest affinity to the people governed and firm in the conviction that the economic and fiscal independence of our local government will better serve and promote the health, safety and welfare of all of the citizens of Escondido, we do hereby exercise the express right granted by the Constitution of the State of California to enact and adopt this Charter for the City of Escondido.

CHARTER

Article 1
Municipal Affairs

Section 100. Municipal Affairs
Each of the responsibilities of governance set forth and described in this Charter, and as established by the Constitutional, statutory and judicially defined law of the State of California, is hereby declared to be a municipal affair or concern, the performance of which is unique to the benefit of the citizens of the City of Escondido.

Section 101. Powers
The City shall have all powers that a City can have under the Constitution and laws of the State of California as fully and completely as though they were specifically enumerated in this Charter. The enumeration in this Charter of any particular power, duty or procedure shall not be held to be exclusive of, or any limitation or restriction upon, this general grant of power.

Section 102. Incorporation and Succession
The City shall continue to be a municipal corporation known as the City of Escondido. The boundaries of the City of Escondido shall continue as now established until changed in the manner authorized by law. The City shall remain vested with and shall continue to own, have, possess, control and enjoy all property rights and rights of action of every nature and description owned, had, possessed, controlled or enjoyed by it at the time this Charter takes effect, and is hereby declared to be the successor of same. It shall be subject to all debts, obligations and liabilities, which exist against the City at the time this Charter

takes effect. All lawful ordinances, resolutions, rules and regulations, or portions thereof, in force at the time this Charter takes effect and not in conflict with or inconsistent herewith, are hereby continued in force until the same have been duly repealed, amended, changed or superseded by proper authority.

Article 2
Form of Government

Section 200. Form of Government
This municipal government established by this Charter shall be known as the "Council-Manager" form of government. The City Council will establish the policy of the City and the City Manager will carry out that policy.

Article 3
ELECTED OFFICERS

Section 300. Enumeration and Term
The elected officers of the City shall consist of:
A City Council composed of five members who are registered voters of the City, four to be residents of their respective Districts and nominated and elected only by the residents of their respective Districts. The fifth shall be nominated and elected from the City at large and shall hold the office of Mayor.

Other elected officer(s) of the City shall be:

A City Treasurer.

All of the elected officers shall serve for a term of four years following their election. The terms of all elected officers shall commence upon installation and each shall serve until the officer's successor is elected and installed.

Section 301. Districts
For the purpose of electing the members of the Council, excepting the Mayor, the City shall be divided into four Districts. The City Council shall, by ordinance, establish four Districts that shall be used for the elections of Council members, excepting the Mayor. Said Districts shall be in compliance with applicable laws.

The ordinance establishing the boundaries of the Districts shall be adopted on or before December 31, 2013.

Section 302. Redistricting
District boundaries shall be altered when necessary as shown by the most recent federal decennial census, or by more current data certified by the City Council as sufficiently reliable and detailed to serve as a basis for district boundary alteration, or by annexation or consolidation of territory.

Section 303. Eligibility
An elected officer of the City shall be a resident and voter in the City.

In addition, every Council member or candidate shall be and remain a qualified voter in the District from which the Council member or candidate is nominated, as required by the California Elections Code. No change in the boundary or location of any district shall abolish or terminate the term of office of any Council member prior to expiration of the term of office for which the member was elected, notwithstanding any other provision of this Section. Each Council member will, during the duration of the member's term, represent the District by which the member was elected.

Section 304. Vacancies
A vacancy in any elective office, from whatever cause, shall be filled by appointment by the City Council, such appointee to hold office for the remainder of any unexpired term, and until a successor is elected and installed.

In the event the City Council shall fail to fill a vacancy by appointment within thirty days after such office is declared vacant, it shall cause an election to be held to fill such vacancy.

Article 4
Fiscal Matters

Section 400. Economic and Community Development
The City shall encourage, support, and promote economic development and community development in the City.

Section 401. Public Works Contracts
The City is exempt from the provisions of all California statutes regulating public contracting and purchasing except as provided by ordinance or by agreement approved by the City Council. The City shall establish all standards, procedures, rules or regulations to regulate all aspects of the bidding, award and performance of any public works contract, including but not limited to, the compensation rates to be paid for the performance of such work.

Section 402. Prevailing Wage
No City contract shall require payment of the prevailing wage schedule unless: the prevailing wage is legally required, and constitutionally permitted to be imposed, by federal or state grants pursuant to federal or state law; or the project is considered by the City Council not to be a municipal affair of the City; or payment of the prevailing wage schedule is authorized by resolution of the City Council. Payment of the prevailing wage schedule, if authorized hereunder, shall use the pertinent rates published by the State of California.

Section 403. Fair and Open Competition
The City will promote fair and open competition for all City construction projects so that all contractors and workers, whether union or non-union, are treated equally in the bidding and awarding of City construction contracts.

Section 404. Definition of Public Works
For purposes of this Article, the term "public works" means: (1) A building, road, street, sewer, storm drain, water system, irrigation system, reclamation project, redevelopment project, or other facility owned or to be owned or to be contracted for by the City of Escondido or the Escondido Community Development Commission, that is paid for in whole or in part with tax revenue paid by residents of the City of Escondido; or (2) Any other construction service or nonconstruction service.

Section 405. Voluntary Employee Political Contributions
Unless otherwise required by law, neither the City, nor its agents, shall deduct from the wages, earnings or compensation of any City employee any political contributions unless the employee has first presented, and the City has received, a signed written authorization of such deductions, which authorization must be renewed annually and may be revoked by the employee at any time by giving written notice of such revocation to the City.

Article 5
Revenue Retention

Section 500. Reductions Prohibited
Revenues raised and collected by the City shall not be subject to subtraction, retention, attachment, withdrawal or any other form of involuntary reduction by any other level of government.

Section 501. Mandates Limited
No person whether elected or appointed, acting on behalf of the City, shall be required to perform any function which is mandated by any other level of government, unless and until funds sufficient for the performance of such function are provided by said mandating authority.

Article 6
General Laws

Section 600. General Law Powers
In addition to the power and authority granted by the terms of this Charter and the Constitution of the State of California, the City shall have the power and authority to adopt, make, exercise and enforce all legislation, laws, and regulations and to take all actions and to exercise any and all rights, powers, and privileges heretofore or hereafter established, granted or prescribed by any law of the State of California or by any other lawful authority. In the event of any

conflict between the provisions of this Charter and the provisions of the general laws of the State of California, the provisions of this Charter shall control.

Section 601. Council Member Compensation
Notwithstanding the previous paragraph, the salary of the Mayor and the Council Members will continue to be set pursuant to California Government Code sections 36516 and 36516.1 where the formula considers city population and state law.

Article 7
Interpretation

Section 700. Construction and Interpretation
The language contained in this Charter is intended to be permissive rather than exclusive or limiting and shall be liberally and broadly construed in favor of the exercise by the City of its power to govern with respect to any matter which is a municipal affair.

Section 701. Severability
If any provision of this Charter should be held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, the remaining provisions shall remain enforceable to the fullest extent permitted by law.

Article 8
Amendment

Section 800. Amendment to Charter, revised or repealed
This Charter, and any of its provisions, may be amended by a majority vote of the electors voting on the question. Amendment or repeal may be proposed by initiative or by the governing body.

AUTHENTICATION
AND
CERTIFICATION

Authenticated and certified to be a true copy by Mayor Sam Abed and City Clerk Diane Halverson.

Date of Municipal Election: _____ ATTEST:

_____ _____

Sam Abed, Mayor Diane Halverson, City Clerk

ESCONDIDO
City of Choice

CITY COUNCIL

For City Clerk's Use:
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Reso No. _____ File No. _____
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Agenda Item No.: 13
Date: April 18, 2012

TO: Honorable Mayor and Members of the City Council

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

SUBJECT: Public Hearing on Proposed City Charter

This staff report provides general background information regarding charter cities, a brief summary of issues raised at the September 28, 2011 public workshop and recent legal developments which affect both the content and the adoption requirements for a charter ballot measure.

RECOMMENDATION:

Council is requested to hold a public hearing on the proposed city charter for the City of Escondido (attached) and listen to public comments and suggestions and provide direction on any changes to the proposed city charter.

FISCAL ANALYSIS:

If the proposed charter is placed on the November 2012 ballot, the City Clerk has provided revised cost estimates in an estimated range of $35,000 to $40,000 for six pages. Staff also estimates a cost of $13,200 for an informational community mailer.

PREVIOUS ACTION:

Deputy Mayor Marie Waldron and Councilmember Ed Gallo originally requested a City Council agenda item to consider the subject of becoming a charter city on March 9, 2011. The City Council discussed becoming a charter city and on April 13, 2011, Deputy Mayor Marie Waldron presented a draft charter to the Council for public discussion. A public workshop to discuss the proposed charter and receive input from the public was held on September 28, 2011. A draft charter was placed on the City's website on September 29, 2011. A revised draft charter (attached) was posted on the City's website on January 12, 2012.

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. According to the League of California Cities, 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 previously been provided to you for review and comparison.

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. These include:

- 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.

September 28, 2011 Charter Proposal Workshop

Much of the discussion at the workshop revolved around Section 303 of the proposed charter concerning Project Labor Agreements (PLA's). There was some confusion on the definition of a PLA and what, if any impact, Section 303 would have on the City's ability to enter into a PLA. In addition, questions arose regarding how becoming a charter city would affect the City's statutory obligation to pay prevailing wages on public works projects. Further, some members of the public questioned why the City should become a charter city after such a long history of being a general law city. Public and Councilmember comments included suggestions for the draft charter. These suggestions included: adding a requirement that Mayor and City Council salaries and benefits be subject to state law; Council district only elections; balanced budget and free enterprise provisions.

Project Labor Agreements (PLA's)/SB 922

The language in Section 303 of the first draft of the charter entitled "Fair and Open Competition" mirrored the language in the Oceanside charter and was very similar to Chula Vista's charter provision.[1] These provisions prohibit the City from requiring contractors on public works contracts to enter into PLA's. In North County, Carlsbad, Del Mar, San Marcos and Vista do not have this provision in their charters.

Just after the charter workshop, the Governor signed SB 922 on October 2, 2011. SB 922 prevents blanket bans on local agencies' use of PLA's and greatly impacts the City's ability to adopt Section 303 of the draft charter. SB 922 authorizes a public entity to use, enter into, or require contractors to enter into a PLA for a construction project, if the agreement contains specific

[1] Proposition G banning PLA's in Chula Vista passed in June, 2010.

provisions. This law also authorizes the City to choose by majority vote of its Councilmembers to use, enter into or require contractors to enter into a PLA for a specific project awarded by the City. Most importantly, however, this law now prohibits a charter provision, initiative, or ordinance from preventing the governing board of a local public entity, other than a charter city, from exercising this authority on a project-specific basis. This law also provides that if a charter provision, initiative, or ordinance of a charter city prohibits the governing board from considering whether to allocate funds to a city-funded project covered by a PLA, then state funding or financial assistance may not be used to support that project.

Based on the adoption of SB 922, the legal landscape has changed since the September 28, 2011 public workshop. In light of the risk of jeopardizing state funding for adopting a provision regarding PLA's, it was decided that this provision be removed from the first draft of the charter and replaced with a revised Section 303 which states as follows:[2]

> **Section 303. Fair and Open Competition**
> The City will promote fair and open competition for all City construction projects so that all contractors and workers, whether union or non-union, are treated equally in the bidding and awarding of City construction contracts.

State Prevailing Wage Requirements: Municipal Affair or Statewide Concern?

Cities more 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. Section 302 of the draft charter would allow the City to exempt itself from paying state prevailing wages on City funded projects. It is important to note that federally or state funded projects remain subject to the state prevailing wage requirements. During the charter workshop, staff identified significant savings that could be achieved if the City was exempt from paying state prevailing wages. Staff's presentation indicated that total construction projects were currently projected at $163 million for the next five years and the estimated savings to the City if exempt from prevailing wage could be as much as $16 million total.[3]

By way of background, California law has included State prevailing wage requirements since 1931, when the Legislature adopted the Public Wage Rate Act. The current requirements are set forth in Labor Code § 1720 *et seq.* State law requires that all workers employed on a public works project of more than $1,000 must be paid the general prevailing rate of per diem wages for the work performed. Labor Code § 1771. This requirement does not apply to work done by a public agency's own forces.

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[2] The public was notified of this change by a news release dated January 12, 2012, and the revised draft charter was placed on the City's website.

[3] Even as a charter city, Escondido will be required to pay prevailing wage for federally or state funded projects. For example, if the City were to receive a grant from the federal Economic Development Agency as a result of the City's CEDS document, the City would have to pay prevailing wages for any public projects funded by these grant monies.

Id. The prevailing wage rates for various job classifications in each locality are set by the State Department of Industrial Relations generally based on wage rates paid in the locality and the nearest market area to a majority or the largest number of workers in a given classification. Labor Code § 1773.9.

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. 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 arguing 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.

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, the California Supreme Court's resolution of *State Building and Construction Trades Council of California, AFL CIO v. City of Vista* (2009) 173 Cal. App. 4th 567 *rev. granted* will be determinative on whether a charter city can exempt itself from prevailing wage laws.

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.*

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 stage house 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 and exempted City funded public works contracts from prevailing wages.

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 projects from the prevailing wage law was valid.

On August 20, 2009, the California Supreme Court granted review of the lower court's decision and the matter has been fully briefed since February 2010, with no activity whatsoever until just recently, when both sides presented oral argument to the California Supreme Court on April 4, 2012. With the matter currently under submission and awaiting decision, 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. The Court's decision should be made within the next ninety days, prior to the deadline to submit a ballot measure to the County Recorder's Office for the November election.

Notwithstanding the California 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 or by specifically limiting the authority of a charter city (as in the case of SB 922). 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.

Section 302 of the draft charter exempting the City from paying prevailing wages on local public works projects provides the City with more local authority and cost savings. However, the validity of this section will depend largely on the California Supreme Court's decision in the Vista case.

Adoption of a Charter/AB 1344

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. An election to decide on the adoption of a charter may be called by the City Council. *See* Cal Const art. XI, § 3. 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.

Since the last public meeting regarding the charter, the law regarding the charter adoption process has changed. On October 9, 2011, the Governor signed AB 1344 into law. This law, effective January 1, 2012, significantly changes the public hearing process for a charter proposal and the timelines for submission of ballot language for a charter election. AB 1344 changes the timeframes to submit ballot language to the voters from 88 days before the election to 95 days before an established statewide general, statewide primary, or regularly scheduled municipal election. In addition, state law now mandates that the ballot language contain an enumeration of new city powers as a result of the adoption of the charter, including, but not limited to, whether the city council will, pursuant to an adopted charter, have the power to raise its own compensation and the compensation of other city officials without voter approval.

This legislation also alters the public process required before a charter proposal can be placed on the ballot. The law requires that prior to approving the submission to the voters of a proposal to adopt a charter, the governing body shall hold at least two public hearings on the matter of the proposed charter and the content of the proposed charter. Notice of the public hearings shall be given by publication in a newspaper designated by the governing body and circulated throughout the city and by posting the notice in three public places within the jurisdiction at least 21 calendar days prior to the date of each public hearing. The second hearing shall be held at least 30 days after the first public hearing. At least one of the public hearings shall be held outside of normal business hours to facilitate public participation. The governing body shall not conduct a vote on whether to approve the submission to the voters of the proposal to adopt a charter until 21 days after the second public hearing.

To date, study has taken place and public input has been received through three public City Council meetings held on March 9, 2011, April 13, 2011, and September 28, 2011 (a public workshop devoted solely to the proposed charter). The draft charter was also placed on the City's website on September 29, 2011 and a revised draft was placed on the City's website on January 12, 2012. This public hearing has been properly noticed and the second public hearing is scheduled for May 23, 2012 at 6:00 p.m.

Conclusion

Council is requested to hold a public hearing on the proposed city charter for the City of Escondido (attached) and listen to public comments and suggestions and provide direction on any changes to the proposed city charter.

Respectfully submitted,

JEFFREY R. EPP
City Attorney

JENNIFER K. MCCAIN
Assistant City Attorney

Attachment (Proposed Draft Charter)

CHARTER
OF THE
CITY OF ESCONDIDO

PREAMBLE

WE THE PEOPLE of the City of Escondido declare our intent to restore to our community the historic principles of self governance inherent in the doctrine of home-rule. Sincerely committed to the belief that local government has the closest affinity to the people governed and firm in the conviction that the economic and fiscal independence of our local government will better serve and promote the health, safety and welfare of all of the citizens of Escondido, we do hereby exercise the express right granted by the Constitution of the State of California to enact and adopt this Charter for the City of Escondido.

CHARTER

Article 1
Municipal Affairs

Section 100. Municipal Affairs
Each of the responsibilities of governance set forth and described in this Charter, and as established by the Constitutional, statutory and judicially defined law of the State of California, is hereby declared to be a municipal affair or concern, the performance of which is unique to the benefit of the citizens of the City of Escondido.

Section 101. Powers
The City shall have all powers that a City can have under the Constitution and laws of the State of California as fully and completely as though they were specifically enumerated in this Charter. The enumeration in this Charter of any particular power, duty or procedure shall not be held to be exclusive of, or any limitation or restriction upon, this general grant of power.

Section 102. Incorporation and Succession
The City shall continue to be a municipal corporation known as the City of Escondido. The boundaries of the City of Escondido shall continue as now established until changed in the manner authorized by law. The City shall remain vested with and shall continue to own, have, possess, control and enjoy all property rights and rights of action of every nature and description owned, had, possessed, controlled or enjoyed by it at the time this Charter takes effect, and is hereby declared to be the successor of same. It shall be subject to all debts, obligations and liabilities, which exist against the City at the time this Charter

takes effect. All lawful ordinances, resolutions, rules and regulations, or portions thereof, in force at the time this Charter takes effect and not in conflict with or inconsistent herewith, are hereby continued in force until the same have been duly repealed, amended, changed or superseded by proper authority.

Article 2
Form of Government

Section 200. Form of Government
This municipal government established by this Charter shall be known as the "Council-Manager" form of government. The City Council will establish the policy of the City and the City Manager will carry out that policy.

Article 3
Fiscal Matters

Section 300. Economic and Community Development
The City shall encourage, support, and promote economic development and community development in the City.

Section 301. Public Works Contracts
The City is exempt from the provisions of all California statutes regulating public contracting and purchasing except as provided by ordinance or by agreement approved by the City Council. The City shall establish all standards, procedures, rules or regulations to regulate all aspects of the bidding, award and performance of any public works contract, including but not limited to, the compensation rates to be paid for the performance of such work.

Section 302. Prevailing Wage
No City contract shall require payment of the prevailing wage schedule unless: the prevailing wage is legally required, and constitutionally permitted to be imposed, by federal or state grants pursuant to federal or state law; or the project is considered by the City Council not to be a municipal affair of the City; or payment of the prevailing wage schedule is authorized by resolution of the City Council. Payment of the prevailing wage schedule, if authorized hereunder, shall use the pertinent rates published by the State of California.

Section 303. Fair and Open Competition
The City will promote fair and open competition for all City construction projects so that all contractors and workers, whether union or non-union, are treated equally in the bidding and awarding of City construction contracts.

Section 304. Definition of Public Works
For purposes of this Article, the term "public works" means: (1) A building, road, street, sewer, storm drain, water system, irrigation system, reclamation project, redevelopment project, or other facility owned or to be owned or to be contracted

for by the City of Escondido or the Escondido Community Development Commission, that is paid for in whole or in part with tax revenue paid by residents of the City of Escondido; or (2) Any other construction service or nonconstruction service.

Section 305. Voluntary Employee Political Contributions
Unless otherwise required by law, neither the City, nor its agents, shall deduct from the wages, earnings or compensation of any City employee any political contributions unless the employee has first presented, and the City has received, a signed written authorization of such deductions, which authorization must be renewed annually and may be revoked by the employee at any time by giving written notice of such revocation to the City.

Article 4
Revenue Retention

Section 400. Reductions Prohibited
Revenues raised and collected by the City shall not be subject to subtraction, retention, attachment, withdrawal or any other form of involuntary reduction by any other level of government.

Section 401. Mandates Limited
No person whether elected or appointed, acting on behalf of the City, shall be required to perform any function which is mandated by any other level of government, unless and until funds sufficient for the performance of such function are provided by said mandating authority.

Article 5
General Laws

Section 500. General Law Powers
In addition to the power and authority granted by the terms of this Charter and the Constitution of the State of California, the City shall have the power and authority to adopt, make, exercise and enforce all legislation, laws, and regulations and to take all actions and to exercise any and all rights, powers, and privileges heretofore or hereafter established, granted or prescribed by any law of the State of California or by any other lawful authority. In the event of any conflict between the provisions of this Charter and the provisions of the general laws of the State of California, the provisions of this Charter shall control.

Section 501. Council Member Compensation
Notwithstanding the previous paragraph, the salary of the Mayor and the Council Members will continue to be set pursuant to California Government Code sections 36516 and 36516.1 where the formula considers city population and state law.

Article 6
Interpretation

Section 600. Construction and Interpretation
The language contained in this Charter is intended to be permissive rather than exclusive or limiting and shall be liberally and broadly construed in favor of the exercise by the City of its power to govern with respect to any matter which is a municipal affair.

Section 601. Severability
If any provision of this Charter should be held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, the remaining provisions shall remain enforceable to the fullest extent permitted by law.

Article 7
Amendment

Section 700. Amendment to Charter, revised or repealed
This Charter, and any of its provisions, may be amended by a majority vote of the electors voting on the question. Amendment or repeal may be proposed by initiative or by the governing body.

AUTHENTICATION
AND
CERTIFICATION

Authenticated and certified to be a true copy by Mayor Sam Abed and City Clerk Diane Halverson.

Date of Municipal Election: _____ ATTEST:

_____ _____

Sam Abed, Mayor Diane Halverson, City Clerk