

CITY OF OAKLAND

Office of the City Attorney

TO: LaTonda Simmons, City Clerk

FROM: Barbara J. Parker
City Attorney

DATE: April 30, 2012

RE: Applicability of Ranked Choice Voting to Tabulation of Votes to Replace a Recalled Municipal Official

I. Question Presented

Is the City required to use ranked choice voting (RCV) to tabulate votes to replace a recalled official?

II. Summary Conclusion

Yes, Charter Section 1105 requires that the City use its RCV method to tabulate votes in an election to replace a recalled official.

III. Factual Background

Currently members of the public are circulating petitions to recall Mayor Jean Quan. If the proponents collect the required number of signatures before the deadline, there will be a recall election. The recall ballot will include the names of candidates running to replace Mayor Quan, if the voters remove her from office.

IV. Analysis

Charter Section 1104 (“Initiative, Referendum, and Recall”) provides that the recall of elected officials will be “exercised in the manner prescribed by general law of the State.” State Elections Code §11385 provides that in recall elections: (1) the candidates running to replace the recalled official will appear on the same ballot as the recall question; and (2) if the recall succeeds, the candidate receiving the “highest number of votes” will replace the recalled official.

Charter Section 1105 (“Ranked Choice Voting”) provides in pertinent part:

“Elections for all city offices, including but not limited to Mayor, Councilmember, City Attorney, City Auditor, and School Director, shall be conducted using ranked choice voting...”

RCV is a system that tabulates votes based on voters' ranking of up to three candidates. The first-choice votes are tabulated first; if no candidate receives a majority of first-choice votes, then the candidate(s) receiving the lowest number(s) of first-choice votes are eliminated from contention. The ballots that marked votes for those lowest ranking candidates are then redistributed among the remaining candidates, in accordance with the second- and third-choice votes on those ballots. Candidates are eliminated, and ballots are redistributed, until one candidate receives a majority of the votes. Oakland City Charter §1105(a), (d).

Before the voters approved Charter Section 1105 (Measure O) in November 2006, candidates for Mayor and other city offices ran in a municipal nominating election in June of an election year. If no candidate received a majority of votes cast, the Charter required a general (runoff) municipal election between the two candidates who received the highest number of votes. One of the purposes of RCV, also known as “instant runoff voting” or “IRV” was to eliminate the need for runoff elections. When the voters approved Measure O, the June municipal, nominating election was eliminated, and the City holds a single general, municipal election using RCV in November of an election year.

Charter Sections 1104 and 1105 appear to provide different procedures to select a successor when the voters recall an elected official. Section 1104 allows for a city candidate to be elected with the highest number of votes, even if that candidate does not receive a majority. Section 1105, by contrast, requires that if no candidate receives a majority of first-choice votes, ballots are re-tabulated until one candidate receives a majority.

To resolve this conflict, we look to other sections of the Charter pertaining to the relationship between state and local law. Charter Sections 106 and 1103 declare the voters' intent to follow the general law of the State of California unless the Charter or an ordinance provides a different procedure. Section 106 (“General Powers”) provides in pertinent part:

...that where the general laws of the State provide a procedure for the carrying out and the enforcement of any rights or powers belonging to the City, said procedure shall control and be followed unless a different procedure shall have been provided in the Charter or by ordinance.

Section 1103 (“Election Procedures”) provides in relevant part:

Except as may be otherwise provided by ordinance or by this charter, declarations of candidacy, nominations for election, all elections and all procedures relating thereto shall be in accordance with the applicable provisions of state law. (Emphasis added.)

Both Charter Sections 106 and 1103 provide that the Charter's modifications of state procedures will control in case of a conflict with state law. Accordingly, since the Charter and the general law of the state provide different procedures for tabulating votes to replace a recalled official, the Charter therefore would control.

In determining whether RCV applies to municipal recall elections, a court's sole objective is to ascertain and effectuate legislative intent. *Kreeft v. City of Oakland*, 68 Cal.App.4th 46 (1998). To reconcile Charter sections 1104 and 1005, we look to the intent behind each section, based on the language of each, as well as its legislative history. *Kreeft*, 68 Cal.App.4th 54; *Mays v. City of Los Angeles*, 43 Cal.4th 313, 321 (2008).

A. The plain language of Charter §1105 provides that ALL city elections be conducted by RCV, including recalls.

In order to ascertain the intent behind the statute, a court reviewing the statute must first give its words their plain meaning. *Kreeft*, 68 Cal.App.4th 54; *People v. Smith*, 110 Cal.App.4th 492 (2003). A plain language reading of the Oakland City Charter shows that voters intended that the City employ RCV for all elections for city offices, including recalls. Section 1105 reads: "Elections for all city offices, including but not limited to Mayor, Councilmember, City Attorney, City Auditor, and School Director, shall be conducted using ranked choice voting..." (Emphasis added.) This Charter section makes no exception for recall elections. And succession elections as a result of a recall are "elections for... city offices." The plain meaning of the statute is clear that RCV is intended to apply to recall elections as well as all other municipal elections.

B. Charter §1105 prevails over §1104 because a charter city's municipal law regarding recall elections prevails over state law.

As we discussed, the Charter and general state law provide different procedures for replacing recalled officials. In such cases the Charter provides that the Charter provision governs. (See City Charter sections 106 and 1103.)

To the extent that there is a conflict between Charter sections 1105 and 1104, the conflict is between the general law of the state regarding recalls and the Charter's provisions pertaining to RCV. In such a case, state law makes it clear that the Charter section pertaining to RCV would prevail over the general state law pertaining to recalls. Article XI, Section 5 of the California Constitution provides that when a city has adopted a charter, the charter shall supersede all

inconsistent laws with respect to municipal affairs. Indeed, the California Elections Code recognizes the supremacy of a city's charter provisions; section 11000 of the California Elections Code states that Division 11, in which the recall provisions are found, does not "supersede any provisions of a city charter."

It is well established that the recall of city officials is a municipal affair, to be governed by the city charter. *Muehleisen v. Forward*, 4 Cal.2d 17 (1935). In *Muehleisen*, the charter of San Diego provided that recall elections would be conducted "in the manner provided by the Constitution and general laws of the State of California." *Muehleisen*, 4 Cal.2d 17, 19. The charter went on to provide rules for the circulation of a recall petition that differed from the requirements of the state's recall laws. The court ruled that the inconsistent provisions of the city charter would prevail over the state law, holding, "It requires no citation of authority to justify the conclusion that in such a situation the recall proceedings must conform to the general law, as modified by the charter provisios." *Muehleisen*, 4 Cal.2d 17, 20. The question in *Muehleisen* is analogous to the question here. In both cases, the cities' charters prescribe that recall elections are administered in accordance with the general law of the state, and then go on to describe specific election procedures that directly conflict with the state law.

As in *Muehleisen*, the RCV provisions in Section 1105 modify the general state law provisions referenced in Section 1104.

C. Charter §1105 is more specific than §1104, and therefore prevails.

Under California law, courts have long held that, when there is an irreconcilable conflict between two statutes, the specific statute prevails over the general one. *Mello v. Great Seneca Financial Corp.*, 526 F. Supp.2d 1024 (2007); *Bailey v. Superior Court of Kern County*, 140 Cal.Rptr.669 (1977); *Marsh v. Edwards Theaters Circuit, Inc.*, 134 Cal.Rptr.844 (1976). Here, Charter Section 1105 pertaining to the application of RCV to municipal elections is clearly more specific than Section 1104, which is brief and refers the reader to provisions of state law.

Measure O – which included only Charter Section 1105 - was approved by the voters in November 2006. It is written in a robust 108 lines, and includes details about the mechanics of the vote tabulation, procedures to be used if the County Registrar is unable to use RCV, the frequency of reporting of results, the requirement that the City conduct a voter education campaign about RCV, etc. It is by far the most specific of the Charter provisions pertaining to elections.

Charter Section 1104, by contrast, refers generally to the application of the state's Government Code to the powers of initiative, referendum and the recall of elected officials, all within a single sentence:

“The People of the City reserve to themselves the powers of initiative and referendum and the recall of elected officials, to be exercised in the manner prescribed by general law of the State.”

This Charter section was approved by the voters in November 1988, along with dozens of other changes to the Charter, including provisions pertaining to terms of office for City officers, powers of the City Council, vacancies in City offices, qualifications and powers of the City Attorney, etc. While Charter Section 1105 was the sole focus of Measure O in November 2006, Section 1104 was merely one of many sections of the Charter that the voters added or amended in a single ballot measure.

Because of these factors, it is clear that Section 1105 is the more specific statute, and therefore it prevails over the more general Section 1104.

D. Charter §1105 was approved later in time than §1104, and therefore prevails.

Courts have long held that when two laws on the same subject that were passed at different times, are inconsistent with each other, the later act prevails. *People v. Bustamante*, 67 Cal.Rptr.2d 295 (1997); *Lazar v. Hertz Corporation*, 82 Cal.Rptr.2d 368 (1999); *Gray v. Gieseke*, 292 P. 656 (1930). In *People v. Bustamante*, the Court of Appeal held that initiative-based statute making it a felony to manufacture, distribute or sell false documents to conceal a person’s immigration status impliedly repealed an earlier statute making it a misdemeanor to engage in the same activity. In that case, the court held, “When a later statute supersedes or substantially modifies an earlier law but *without expressly referring to it*, the earlier law is repealed or partially repealed by implication. The courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes.” *People v. Bustamante*, 67 Cal.Rptr.2d 295, 299, quoting *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 263 Cal.App.2d 41, 54-55 (1968).

Measure O, enacting Charter Section 1105, was approved by the voters in November 2006, eighteen years after the voters approved Charter Section 1104. In keeping with *Bustamante*, a court must assume that in enacting Charter Section 1105, the voters were aware of Charter Section 1104, and intended that ranked choice voting integrate within the existing law, so as to maintain internal consistency within the Charter. Internal consistency is maintained if the City uses the procedures of State Elections Code §11385 for the administration of a recall election and applies RCV to the selection of a replacement.

Conclusion

A municipal recall election in Oakland must be conducted using RCV. The plain language of Section 1105 applies to all municipal elections, including recalls; no exception was

made in Section 1105 for recall elections. Because Section 1105 is more specific, more robust, and was approved by the voters later in time, a court should find that, in approving Measure O, the voters intended to apply RCV in recall elections.

In keeping with the court's ruling in *Muehleisen v. Forward*, we advise the City to follow Charter Section 1104 in the administration of a recall election, allowing Section 1105 to modify the manner in which the candidates replacing the recalled officer are elected. The City should conduct a recall election as follows:

- (1) The candidates running to replace the recalled official will appear on the same ballot as the recall question.
- (2) On that ballot, voters will be given the opportunity to rank their top three choices, as they would in any other municipal election.
- (3) If the recall succeeds, the first-choice votes for candidates will be counted.
- (4) If no candidate receives a majority of first-choice votes, then the RCV tabulation should be utilized as described in Charter Section 1105, until one candidate receives a majority and may be declared the winner.

Very truly yours,



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