

Proposition E: Chula Vista- Amendment to the Charter of Chula Vista

**Board Recommendation:**

**OPPOSE**

**Rationale:**

The principal role of any City Attorney is to represent and advise his client, the municipal government. The changes proposed by the measure compromise the duty of Chula Vista’s City Attorney by requiring that he represent both the interests of the City Government and the disparate “will of the people.” This impractical and unethical task of serving two often rival clients diminishes the ability of the City Attorney to serve either effectively, and increases the likelihood that taxpayers will incur the cost of employing outside attorneys who can provide unconflicted representation to the City.

Furthermore, the measure’s intent to make the City Attorney the public’s “watchdog” undermines the critical collegial attorney-client relationship that allows for officials and employees to discuss sensitive legal issues with, and seek advice from, the City Attorney. Additionally, electing the City Attorney jeopardizes the professionalism and political impartiality of the office as it may lead to the position being filled by individuals who prove to be more talented politicians than they are attorneys.

The City Attorney must be a professional position that provides legal advice that guides and protects the City. If Chula Vistans feel that they need a “watchdog” it would be more effective to create a modest department, that deals specifically with that function, rather than changing Chula Vista’s Charter in a way that compromises the duties of a critical government office.

**Background:**

The election of City Attorneys is rare in the United States. As noted in the 1998 Los Angeles Charter Reform Commission’s report, “no major U.S. city outside of California elects its City Attorney....” However, within California 11 cities of the State’s 478 elect their City Attorney (see Table 1), including the two largest cities: Los Angeles and San Diego. When examining the history of and powers granted to the City Attorneys of these two cities it can be seen that although they share a method of selection, the two offices are structured differently with unique responsibilities and limitations.

<b>City</b>	<b>Population*</b>	<b>Year Incorporated</b>
Albany	16,787	1908
San Rafael	57,224	1874
Redondo Beach	67,325	1892
Compton	98,802	1888
San	199,803	1869

Bernardino		
Huntington Beach	200,763	1909
Oakland	412,318	1852
Long Beach	491,564	1897
San Francisco	799,263	1850
San Diego	1,305,736	1850
Los Angeles	3,957,875	1850
*Population estimates taken from <a href="http://www.cacities.org">http://www.cacities.org</a>		

### Los Angeles:

Los Angeles has elected its City Attorney since its incorporation in 1850. Since then many changes have been made to the office through amendments to the City’s Charter; however, today the office remains popularly elected. The most significant changes were<sup>1</sup>:

- 1911 The duties of the City Attorney concerned with criminal litigation were transferred to the newly created office of “City Prosecutor”, which was appointed by the Mayor and confirmed by the City Council.
- 1925 The City Prosecutor’s responsibility to oversee criminal litigation was defined by an amendment to the City’s Charter stating that the office would “institute, attend, and conduct on behalf of the people, all criminal cases arising upon violations of the provisions of this charter or the ordinances of the city, in the court of original jurisdiction, and on appeal<sup>2</sup>.” The City Attorney’s function to advise and handle the City’s civil litigation was amended and instructed him to “prosecute and defend for the city in all actions at law or in equity, and special proceedings, for or against the city, or in which it may be legally interested, or for any officer of the city in any action or proceeding, when directed to do so by the Council<sup>3</sup>. ”
- 1933 The Office of the City Prosecutor was abolished and its duties transferred back to the Office of the City Attorney.
- 1970 The Reining Commission noted that giving the Mayor the power to appoint the City Attorney would “tip the intended balance of power between the executive and legislative branches.” The Commission went on to state “Within the present weak mayor-council system, consideration should be given to making the City Attorney’s position appointive by the Mayor subject to Council approval. Many cities have appointive City Attorneys and have seen no need to have this essentially staff position filled by an election.” Ultimately, though, the commission’s recommendation to appoint the City Attorney was not followed.

Los Angeles’s City Attorney today is elected to serve as the chief legal advisor and prosecutor for the City. The City’s Charter avoids any confusion or potential conflict of interest by explicitly stating that, although the public elects him, the client of the City Attorney is “the municipal corporation, the City of Los Angeles” and that he is always to

<sup>1</sup> Information used to construct this list was taken from- “History of the Los Angeles City Attorney’s Office”- Professor James Ingram

<sup>2</sup> Quotation taken from Section 52 of the 1925 Los Angeles City Charter

<sup>3</sup> Quotation taken from Section 42 of the 1926 Los Angeles City Charter

“act in the best interests of the City<sup>4</sup>.” As the City’s legal counsel, the City Attorney provides advice, prepares and reviews ordinances and contracts, and litigates on behalf of the City when directed by the appropriate office<sup>5</sup>.

In addition to being the City’s legal counsel, Los Angeles’s Office of the City Attorney is also responsible for enforcing the City’s laws concerning ethics. In order to avoid conflict with the City Attorney’s primary duty of representing and advising the government, the office is divided into specialized units<sup>6</sup>. The Public Integrity Unit enforces laws concerned with ethics, elections, campaign finance, lobbying, and the misuse of government resources while the General Counsel Unit is tasked with providing legal counsel and representation to the offices and individuals that comprise the City’s municipal government.

### San Diego:

Similar to Los Angeles, San Diego’s first elected City Attorney took office in 1850 when the City was incorporated, but after San Diego went bankrupt in 1852 the City Attorney became an appointed post until the approval of the 1931 Charter. Interestingly, before the passage of the 1931 Charter, another charter had been proposed in 1929 that, among other things, continued the practice of appointing of the City Attorney; however, this charter failed to garner enough support with the electorate. It has been suggested, most notably by San Diego City Attorney Michael Aguirre’s 2005 “Report on the Role of the City Attorney as Independent Representative of the People of San Diego” that the success of the 1931 Charter was due to its provision to once again elect San Diego’s City Attorney. Professor James Ingram’s “Report on the City Attorney’s Office”, though, posits that this was not the case and that the 1931 Charter’s success was the result of many other factors as well, including the “harbor, civil service, parks, and planning.”

Today, the City Attorney of San Diego serves primarily as the “chief legal advisor of, and attorney for the City and all Departments and offices<sup>7</sup>.” In a manner similar to that of Los Angeles’s Government Integrity Unit, issues of ethics are delegated to the City’s Ethics Commission, which appoints its own legal counsel<sup>8</sup> and is independent of the City

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<sup>4</sup> Section 272 of the Los Angeles City Charter

<sup>5</sup> Section 272 (a), (b), (c), and (d) of the Los Angeles City Charter states that:

(a) Council. The Council shall make client decisions in litigation involving matters over which the Charter gives the Council responsibility.

(b) Mayor. The Mayor shall make client decisions in litigation involving matters over which the Charter gives the Mayor responsibility.

(c) Boards. The boards of the Proprietary Departments, the Ethics Commission, the Board of Fire and Police Pension Commissioners, the Board of Administration of the Los Angeles City Employees Retirement System, and the Board of Administration of the Water and Power Employees Retirement System shall make client decisions in litigation exclusively involving the policies and funds over which the Charter gives those boards control.

(d) Interpretation of Section. The City Attorney shall have the authority to make the determination regarding who is authorized to make client decisions on behalf of the City in accordance with the principles of this section and accepted principles of representation of municipal entities.

<sup>6</sup> Office of the Los Angeles City Attorney:

[http://www.lacity.org/atty/About\\_the\\_Office/Divisions/Criminal/attycriminal.html](http://www.lacity.org/atty/About_the_Office/Divisions/Criminal/attycriminal.html)

<sup>7</sup> San Diego City Charter Section 40

<sup>8</sup> Ibid.

Attorney's office. Unlike Los Angeles, though, where the City Attorney must get approval before undertaking any litigation, San Diego has given and continues to give its City Attorney relatively unchecked control over litigation stating in its Charter that the City Attorney will have the power:

“To prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law<sup>9</sup>.”

#### Chula Vista:

The City of Chula Vista was incorporated in 1911 and has a population of approximately 210,000. In Chula Vista the City Attorney is appointed by and serves at the pleasure of the City Council<sup>10</sup>. He is the legal counsel for the City and is officially instructed by the City's Charter to “represent and advise the City Council and all city officers in all matters of law pertaining to their offices<sup>11</sup>.” Much like the Los Angeles City Attorney, Chula Vista's is limited in his ability to prosecute. Section 503(f) states that the City Attorney will have the power to “Prosecute, if so directed by ordinance of the City Council, all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required by law...”[Emphasis added].

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<sup>9</sup> Ibid.

<sup>10</sup> Chula Vista Charter Section 500(a)

<sup>11</sup> Chula Vista Charter Section 503(a)

**Table 2: Comparison of the Duties of City Attorneys**

	San Diego	Los Angeles	Chula Vista with Proposed Amendment
<b>Legal Representation and Advising</b>	The City Attorney provides advice and legal representation to the City's government.	Within the Office of the City Attorney, the General Counsel Unit provides the municipal government with legal representation and advice.	The City Attorney would provide legal representation and advice to the City's officials.
<b>Government Oversight</b>	The City's Ethics Commission is tasked with monitoring and enforcing the City's governmental ethics laws <sup>12</sup> and has its own legal counsel independent of the City Attorney.	The Public Integrity Unit, a subsection of the City Attorney's Office, is responsible for ensuring that the City's ethics and campaign finance laws are followed.	The City Attorney would oversee and investigate the actions of the City's officials.

**Proposal:**

The proposed measure amends and expands sections 503 and 500 of Chula Vista's Charter, which respectively deal with the powers of the City Attorney and the manner in which he is selected. The proposed changes make a number of alterations, but most significantly change the office of City Attorney from one appointed by the City Council to one elected by the people of Chula Vista "in the same manner and at the same election as a member of the City Council<sup>13</sup>."

Additionally, the amendment increases the Charter's discussion of the role and responsibilities of the City Attorney. First, a new subsection is created stating that it is the intent of the voters of Chula Vista that the "City Attorney shall be sufficiently independent of the City Council and other city officials to advise the City while also acting in the best interests of the public." [Emphasis added] The responsibilities of the City Attorney discussed in Section 503(a) are also expanded mandating that the City Attorney shall:

- (1) Represent and advise the City Council and all city officers in all matters of law pertaining to their offices *and advise all boards, commissions, and other agencies of the City on legal matters referred to him or her, and render written legal opinions when the same are requested in writing by the Mayor or a member of the Council or the City Manager or any other officer, board or commission of the City;* (Italics indicate text added to the Charter by Proposition)

Although the current charter already states that the City Attorney will have the power to "Prosecute, if so directed by ordinance of the City Council, all offenses against the

<sup>12</sup> Taken from the San Diego Ethics Commission's website:  
<http://www.sandiego.gov/ethics/about/index.shtml>

<sup>13</sup> Section 503 (8), subsection (c) of the amended charter of Chula Vista

ordinances of the City and for such offenses against the laws of the State,” the measure adds a section that expands the discussion of the City Attorney’s powers concerning civil matters. This section, however, simultaneously grants him the discretion as to when to conduct legal proceedings, while requiring him to obtain the approval of the City Council and follow its directions, stating that the City Attorney Shall:

“Whenever a cause of action exists in favor of the City, exercise discretion as to when to commence or maintain legal proceedings, subject to the approval or ratification by the City Council, when the basis for such action is within the knowledge of the City Attorney, or, he or she shall commence or maintain legal proceedings as directed by the City Council<sup>14</sup>” [Emphasis Added]

Finally, under the proposed changes to the Charter, the City Council has the ability to empower the City Attorney to employ special legal counsel or experts (appraisers, engineers, et cetera) “necessary for the handling of any pending or proposed litigation, proceeding or other legal matter.” Furthermore, the new charter allows in the case of a conflict of interest the retention of special legal counsel at the cost of taxpayers should the City Attorney recommend doing so and the City Council approve.

#### **Arguments:**

##### For:

Proponents point to the need for the City Attorney to look out for the public’s interest citing that the City Attorney currently only represents the municipal government and that “the clients of the City Attorney are not the residents of Chula Vista<sup>15</sup>.” In a 2007 article<sup>16</sup> in the *Union Tribune*, Chula Vista resident and financial backer of the proposition, Earl Jentz comments, “The people of Chula Vista deserve an elected city attorney who will represent all residents rather than an appointed city attorney who will only represent the interests of the mayor and City Council.”

Furthering this idea, supporters of the proposition suggest that a City Attorney elected by the people to a fixed term, rather than one appointed by and serving at the pleasure of the City Council, would have the independence necessary to serve as an additional check against potential corruption and misdoings within the municipal government. In the same article mentioned above, Steve Haskins, an attorney involved with the proposition argues:

“Having an elected city attorney will give the residents of Chula Vista a watchdog who will look out for their interests at City Hall...It's clear from the corruption that seems to be prevalent in local government these days that there needs to be someone looking out for the interests of the people.”

##### Against:

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<sup>14</sup> Section 503(b) subsection 7 of the amended Charter of Chula Vista

<sup>15</sup> Chula Vistans for Public Representation- “Rationale for an Elected City Attorney in Chula Vista” <http://www.cvpr.net/2.html>

<sup>16</sup> “Chula Vista group wants city attorney to be elected position”- Tanya Mannes. *Union Tribune* 2007

Although no formal group of opponents has formed, there are many who have opposed similar changes in California before. These critics warn that the election of the City Attorney and the instruction for him to act in the “best interests of the public<sup>17</sup>” can confuse the matter of whom the City Attorney is meant to represent. A 2002 law review by Heather E. Kimmel<sup>18</sup> explores the problems often confronted by City Attorneys when interests within the municipal government vary, noting:

“City charters often require the city attorney and her staff of assistant city attorneys to provide legal advice and representation to the city council, the mayor, and city departments and agencies. When these government bodies have different goals for the city as a whole, a conflict of interest may occur for the city attorney. An attorney in private practice can avoid this conflict of interest situation by declining to represent a potential client if the representation would result in a conflict of interest. The city attorney usually has no such option.”

Kimmel goes on to discuss strategies that have been employed by cities such as Tampa that have tried to address the problem of conflicts of interest by employing separate legal counsels for the Mayor and City Council, while others have attempted to make the voters the client of the City Attorney. Kimmel notes that although making the City Attorney more responsible to the electorate is a pleasing idea to voters, it essentially serves only to further complicate the already tenuous role of the City Attorney by burdening him with the additional duty of representing the shifting, multifarious, and often conflicting notion of the “public interest.”

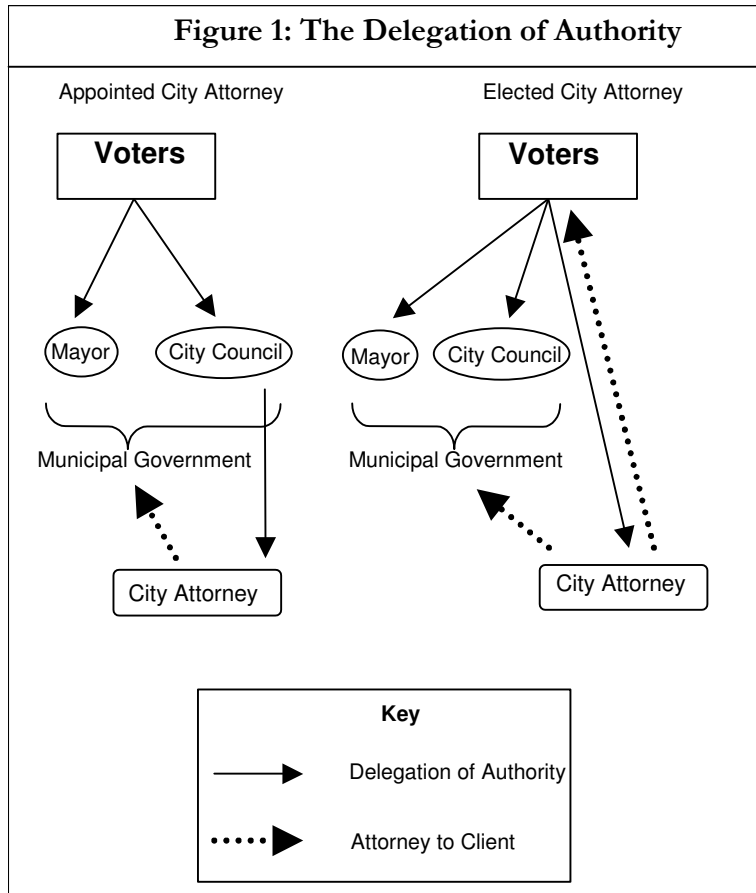
In addition to giving the City Attorney the task of representing the potentially opposing interests of the municipal government and the public (see Figure 1), opponents worry that the measure could also jeopardize the ability of the City Attorney to effectively fulfill his primary duty to act as legal counsel to the City and provide legal advice and aid to municipal workers and officials. As John Kaheny, a 22-year employee of the San Diego City Attorney’s office, suggested in a 2004 *Union Tribune* article, by making the City Attorney a “watchdog”, an “adversarial relationship<sup>19</sup>” can develop between the City Attorney and those in the city government who are meant to be his clients. When this occurs it can lead to city officials and employees becoming hesitant to seek help from the City Attorney out of the legitimate concern that the information will be used against them.

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<sup>17</sup> Amended Chula Vista Charter Section 503(a)

<sup>18</sup> The following quotes are taken from “Solutions to the City Attorney’s Charter-Imposed Conflict of Interest Problem”- Heather E. Kimmel 2002

<sup>19</sup> Quote by John Kaheny a 22-year employee of the San Diego City Attorney’s Office commenting on City Attorney Michael Aguirre’s investigation of allegations of accounting fraud by city officials in the 2004 San Diego *Union Tribune* article “Outsider moves in for a fight against City Hall- Mixed views greet Aguirre’s ambitious moves on first week” by Matthew T. Hall



Critics also contend that there may be significant costs to making the City Attorney a “watchdog.” When the City Attorney chooses to represent the “public interest” rather than that of the City, it becomes necessary for officials and departments to hire, at the expense of taxpayers, outside and independent legal counsel to represent them. An example of this was seen in 2006 when, as the *Union Tribune* reported<sup>20</sup>, the City of San Diego incurred \$6.4 million in legal fees because dozens of officials required outside attorneys during investigations by the City Attorney into the handling of the City’s pension program.

Opponents of electing City Attorneys have also argued that the professional ability and number of qualified candidates seeking to occupy the office can be diminished if the position becomes popularly elected. Many attorneys may not pursue the post in order to avoid the trouble and immense cost of campaigning. Chula Vista’s current City Attorney, Ann Moore, made it clear in 2007 that she would not compete for the office if it was an elected post, saying: “I respect the community’s ultimate decision, but I have no intention of running for this position, because I am an attorney – not a politician<sup>21</sup>.” Those opposed also note that when the government appoints the City Attorney, it can choose the individual who best fulfills the current and long-term legal needs of the City. However, with elections there

<sup>20</sup> “Aguirre reveals some outside counsel costs”- Jennifer Vigil and Craig Gustafson. *Union Tribune* 2006

<sup>21</sup> “Petition is submitted to elect city attorney”- Tanya Mannes. *Union Tribune* 2007



is the possibility that the public will select a candidate that is a talented politician, but lacks the expertise the City needs.

Finally, opponents argue that electing the City Attorney jeopardizes his objectivity. An appointed City Attorney who is impartial and professional will be valued and likely retained by the City Council regardless of changes to its prevailing political majority<sup>22</sup>. However, because such qualities are not easily communicated or attractive to most voters, a City Attorney facing reelection may instead rely on politically motivated actions to garner support. Moreover, the costs of campaigning that pressure candidates to raise funds, ultimately put the City Attorney at as much risk as any other elected official of being influenced or possibly corrupted by interests within the City.

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<sup>22</sup> The City Attorney's Deskbook 1994 Edition- Section II- City Attorney Practice Issues- A. Knowing the Law is Not Always Enough. Mark C. Allen Jr.