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APPLICATION OF PENAL PROVISIONS OF CALIFORNIA ELECTIONS CODE TO MUNICIPAL REFERENDUM AND INITIATIVE ELECTIONS

Article XI § 8 of the California Constitution provides that a city may adopt and ratify a charter for the government of that city. This type of municipal government is the so-called "home rule" city as opposed to a city which depends upon the general laws of the state for its government. The "home rule" city's charter may contain provisions for referendum and initiative elections.¹

Division 4, Chapter 3 of the California Elections Code prescribes the method by which a municipality may conduct a municipal initiative or referendum election.² However, the Elections Code states that Division 4, Chapter 3 "does not apply to cities having a charter adopted and ratified under . . . the Constitution, and having in such charter any provision for the direct initiation of ordinances by the voters"³ This makes it clear that the substantive and procedural initiative and referendum provisions may be, but need not be, replaced by the provisions of a "home rule" charter.

The Elections Code also contains penal provisions which are directed toward the prevention of: (1) intimidation of voters, (2) bribes, (3) fraud and deceit, and (4) abuse of and interference with initiative and referendum.⁴

The problem discussed in this note is: Do the penal provisions of the Elections Code apply to a referendum or initiative election conducted under the charter of a "home rule" municipality?

PENAL PROVISIONS OF ELECTIONS CODE

There is no specific section of the Elections Code which directly limits Division 15 (penal provisions) to non-chartered cities. Despite

¹ Cal. Const. art. IV, § 1, "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county and town of the State to be exercised under such procedure as may be exercised by law"; the court in *Brown v. Boyd*, 33 Cal. App. 2d 416, 91 P.2d 926 (1939) states that the constitutional reservation of referendum (Const. art. IV, § 1) is read into and becomes a part of a city charter with the same effect as though it had been expressly incorporated therein in view of Const. art. XI, § 8 permitting a city and county to frame a charter for its own government consistent with and subject to this Constitution.

² Cal. Elect. Code §§ 4000-4057.

³ Cal. Elect. Code § 4057.

⁴ Cal. Elect. Code §§ 29000-29432 (especially Chapter 2, Division 15).

the absence of such a statement certain sections of Division 15 could be construed to achieve such a result.

In defining a "proponent of an initiative or referendum" the penal provisions of the Elections Code state that this is a person who submits a draft of a petition proposing the measure to the Attorney General of California.⁵ Since a "proponent" submits the measure to a state officer, the Attorney General, and since the Attorney General deals primarily with state-wide matters, it can be argued that the penal provisions apply only to a state-wide initiative or referendum.

Section 29212 provides that a person is guilty of a misdemeanor who files a petition "relating to the Constitution or laws of this State . . . regulating the *state-wide initiative or referendum* with the intention of thereby defeating that initiative or referendum"⁶ This section keys the offense designated to a *state-wide* initiative or referendum.

Section 29285, added in 1963, specifically provides that Article 8 of Division 15 is only applicable to "initiative, referendum or recall petition other than such petitions circulated on statewide matters"⁷ Again, it could be argued by implication that the other articles and chapters of Division 15 apply to state-wide initiatives and referendums.

CHARTER PROVISIONS

Charters typically fall into three categories with respect to substantive referendum and initiative provisions. They either adopt the whole California Elections Code;⁸ adopt the Code with slight modification;⁹ or provide almost totally original initiative and referendum provisions.¹⁰

In contrast to the common expression of *substantive* referendum and initiative provisions in the city charters of many California cities, as far as this writer could determine, no city charter of any municipality of the State of California *contains penal provisions* applicable

⁵ Cal. Elect. Code § 29210.

⁶ Cal. Elect. Code § 29212. (Emphasis added.)

⁷ Cal. Elect. Code § 29285.

⁸ Redondo Beach, Cal., Charter art. XVIII (1949); Albany, Cal., Charter § 28 (1927); Merced, Cal., Charter art. X, § 1004 (1949).

⁹ Burbank, Cal., Charter § 30 (1927); Oroville, Cal., Charter art. V, § 1 (1961); Pacific Grove, Cal., Charter art. XVII (1955).

¹⁰ San Francisco, Cal., Charter §§ 179-180 (1948). See also San Francisco, Cal., Charter art. XI, chs. IV and V (1929); San Jose, Cal., Charter art. V, §§ 34-47 (1916); Oakland, Cal., Charter arts. XXI-XXII (1911).

to such elections.¹¹ On the other hand, some California cities do make a direct or indirect *reference* to the applicability of the penal provisions of the Elections Code to local initiative and referendum elections.

San Francisco expressly adopts the penal laws of the state's general laws regarding elections.¹² The Oakland charter states that California law shall govern the "particulars in respect to management of elections."¹³ The San Jose Charter, in its "Home Rule" section, states:

. . . [T]he city is hereby authorized to exercise any and all rights, powers, and privileges heretofore or hereafter granted or prescribed by the general laws of the state; *provided, also, that where the general laws of the state provide a procedure for the carrying out and 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 this charter or by ordinance.*¹⁴

The San Jose Charter does not specifically provide that the penal provisions of the Elections Code apply but the above quoted section does, by implication, approach such a provision.

The above outlined charter sections are unusual in that most other city charters contain no such direct or indirect statement that the penal provisions of the Elections Code shall apply to municipal referendum and initiative elections.

CAN "APPLICATION" BE CONCLUDED?

In 1919 a defendant was charged with violating section 64 (b)(1) of the Penal Code, "False Affidavit" (now section 29218 of the Elections Code) in a local San Francisco referendum election. He defended on the basis that this section applied to state-wide initiative, referendum and recall elections. The court in *People v. Carroll*¹⁵ held:

¹¹ If such penal provisions were found in either a municipal charter or ordinance there would be a problem of state pre-emption. See *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897 (1962) and 4 *Santa Clara Law.* 188 (1964) for discussion of this principle and its application.

¹² San Francisco, Cal., Charter § 174 (1948). See also San Francisco, Cal., Charter art. XI, Chs. IV-V (1929).

¹³ Oakland, Cal., Charter art. III, § 6 (1): "The provision of the State law relating to the qualifications of electors, the manner of voting, the duties of election officers, the canvassing of returns, and all other particulars in respect to the management of elections, so far as they may be applicable shall govern all municipal elections"

¹⁴ San Jose, Cal., Charter art. I, § 2a (1916). (Emphasis added.)

¹⁵ 39 Cal. App. 654, 180 Pac. 49 (1919).

The section [penal provision] is broad in its terms; and we perceive no reason for holding that it is not as general in its application as any other sections of the Penal Code We may add that a complete answer to this contention of the appellant is found in the San Francisco Charter itself, which expressly provides that, "all provisions of the general laws of the state, including penal laws respecting elections . . . shall be applicable to all elections held in the city and county of San Francisco."¹⁶

The court based its decision on two factors: (1) the terminology of the penal provisions is broad enough to apply to charter governed initiative and referendum elections, and (2) the San Francisco Charter expressly makes the penal provisions applicable.

When a city charter does not expressly, or even impliedly, make the penal provisions applicable, only the "breadth of terminology" criterion of *Carroll* is of significance. This reasoning eliminates the previously mentioned possibility of construing the penal provisions as non-applicable.

In further support of the application of the penal provisions to municipal elections is the common sense rule that when a city charter makes no provision, the general laws of the state are applicable. Although a "city is not subject to (the) general laws in matters concerning municipal affairs except as the charter itself may provide,"¹⁷ the state has "adopted a general scheme of regulation"¹⁸ and has "fully occupied the field"¹⁹ so as to make the penal area a "non-municipal affair."

CONCLUSION

Despite some unfortunate language in Division 15 (penal provisions) of the Elections Code, the better view is that these sections do apply to municipal referendum and initiative elections. Justification for such a conclusion can be based on any of the following: (1) Division 15 is either expressly or impliedly made applicable in the charter, (2) the broad terminology employed in Division 15 indicates general and overall application, and (3) the State's general laws apply because they provide a general scheme of regulation.

Jerome A. Smith

¹⁶ *Id.* at 655-56, 180 Pac. at 49.

¹⁷ *Heilbron v. Summer*, 186 Cal. 648, 650, 200 Pac. 409, 410 (1921).

¹⁸ *In re Lane*, 58 Cal. 2d 99, 102, 372 P.2d 897, 898 (1962).

¹⁹ *Id.* at 105, 372 P.2d at 900.