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JUDICIAL LIMITATIONS ON THE INITIATIVE AND REFERENDUM IN CALIFORNIA MUNICIPALITIES

The initiative and referendum are reserved to the electors of counties and municipalities by article IV, section 1 of the California Constitution.¹ Three types of legislation, however, are placed by specific exemption beyond reach of a referendum of the general electorate of the state: acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the state, and urgency measures necessary for the immediate preservation of the public peace, health, or safety, passed by a two-thirds vote of the state legislature.² These constitutional limitations on exercise of the referendum extend to chartered cities,³ in

¹ In CAL. CONST. art. IV, § 1 the people of California have reserved to themselves the powers of initiative and referendum. Under the initiative provisions of the Constitution, a law or amendment to the Constitution proposed in a petition signed by a small percentage of the electorate must be submitted to a vote of the entire electorate. A law may be similarly proposed to the legislature, which must enact or reject it within forty days. If the law is rejected or no action is taken within forty days, it must be submitted to the people for approval or rejection.

The power of referendum may be exercised to reject acts passed by the legislature. No act passed by the legislature, except for those mentioned in the text, goes into effect until ninety days after the final adjournment of the session of the legislature which passed the act. If a petition signed by the required percentage of electors is presented to the Secretary of State asking that the act be submitted to the electorate, the law cannot go into effect until approved by majority vote in an election.

It should also be noted that any law which has gone into effect may subsequently be repealed by initiative—though measures adopted by initiative can be repealed or amended only by a vote of the electors.

² CAL. CONST. art. IV, § 1.

³ *Hunt v. Mayor & Council of City of Riverside*, 31 Cal. 2d 619, 191 P.2d 426 (1948). The CAL. CONST. art. XI, § 6, authorizes the legislature to provide for the incorporation, organization, and classification of cities and towns. It is also provided that cities and towns may organize under charters framed and adopted under the authority of the constitution by a board of freeholders chosen by their electors for that purpose. CAL. CONST. art. XI, § 6. Chartered cities may draw up or amend their charters

the absence of a special charter provision,⁴ and also to counties⁵ and general law cities.⁶ Besides these constitutional restrictions on the referendum, a number of judicial limitations on both the initiative and referendum have evolved. The subject of this note is those judicial limitations about which there seems to be the greatest uncertainty in California: (1) limitation of both the initiative and referendum to legislative, as opposed to administrative, decisions of local councils; (2) limitation of both to matters of "city-wide" concern, as opposed to those which affect only a portion of the local electorate; and (3) limitation of the initiative to such measures as the legislative body itself could pass.

The Legislative-Administrative Limitation

In California there is generally no division of legislative and executive responsibilities between separate local governmental departments as there is at the state and federal level. The powers to make legislative and administrative decisions frequently coexist in the local council.⁷ Where this is the case, the courts hold that only legislative decisions may be initiated by, or referred to, the local electorate.⁸ Since the exercise of the initiative and referendum by the state electorate is constitutionally confined to determinations of the legislative branch of the state government,⁹ this limitation, on its face, is no more than a logical application to inferior governing bodies of the same limitation already existing at the state level.

so as to become empowered to make and enforce laws and regulations in respect to municipal affairs, subject only to restrictions and limitations contained in their respective charters. In all other matters they remain subject to and are controlled by general state laws. CAL. CONST. art. XI, §§ 6, 8.

⁴ *Hunt v. Mayor & Council of City of Riverside*, *supra* note 3.

⁵ *Geiger v. Board of Supervisors*, 48 Cal. 2d 832, 313 P.2d 545 (1957).

⁶ *Cf. Hunt v. Mayor & Council of City of Riverside*, 31 Cal. 2d 619, 191 P.2d 426 (1948); *Dye v. Council of City of Compton*, 80 Cal. App. 2d 486, 182 P.2d 623 (1947). Although these cases dealt with chartered cities, the statements of the applicable law were not restricted to such cities. In *Hunt* the court said that the Constitution reserved no power of referendum to the people over a city ordinance levying a sales tax for the purpose of meeting the usual and current expenses of the city. *Hunt v. Mayor & Council of City of Riverside*, *supra* at 623-24, 191 P.2d at 428. In *Dye* the court, in holding that CAL. CONST. art. IV, § 1 allowed the referendum to be invoked against sections and parts of ordinances although the charter contained no such provision, said that "the constitutional power of referendum possessed by the electors of a city is identical with that reserved in the Constitution by the people of the State." *Dye v. Council of City of Compton*, *supra* at 489, 182 P.2d at 625. See CAL. ELECTIONS CODE § 4050.

⁷ *Hopping v. Council of City of Richmond*, 170 Cal. 605, 610, 150 Pac. 977, 978 (1915).

⁸ See, e.g., *Dwyer v. City Council of Berkeley*, 200 Cal. 505, 253 Pac. 932 (1927); *Hopping v. Council of City of Richmond*, 170 Cal. 605, 150 Pac. 977 (1915); *Reagan v. City of Sausalito*, 210 Cal. App. 2d 618, 26 Cal. Rptr. 775 (1962); *Martin v. Smith*, 184 Cal. App. 2d 571, 7 Cal. Rptr. 725 (1960); *Knowlton v. Hezmalhalch*, 32 Cal. App. 2d 419, 89 P.2d 1109 (1939); *Burdick v. City of San Diego*, 29 Cal. App. 2d 565, 84 P.2d 1064 (1938); *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 203 Pac. 132 (1921). See generally 5 MCQUILLIN ON MUNICIPAL CORPORATIONS §§ 16.55, 16.57 (3d ed. 1949); Comment, *Limitations on Initiative and Referendum*, 3 STAN. L. REV. 497, 502-04.

⁹ CAL. CONST. art. IV, § 1, *Hopping v. Council of City of Richmond*, *supra* note 8.

Decisions of California courts, however, indicate that this limitation has actually been used to achieve two completely different objectives: (1) to confine the initiative process to determinations of municipal policy, in contrast to the methods of carrying it out; and (2) to insulate certain kinds of state legislation from local interference except as such legislation specifically authorizes. The courts have been fairly successful in using this limitation to reach the first objective, but the limitation can and should be abandoned in pursuit of the second.

In order to understand the difficulties into which the California courts have fallen by using the legislative-administrative distinction for these two different purposes, it is necessary to consider the origin of the limitation and then its application in confining the initiative to policy determinations. The first California case to use the compass of the legislative power of a local council as a limit to the scope of the initiative process was *Hopping v. Council of City of Richmond*,¹⁰ in which the California Supreme Court held that the decision to accept an offer of land as the site for a city hall was legislative and therefore subject to referendum. The court reasoned that under the constitution the initiative and referendum can only be applied to overrule decisions made by the legislative branch of the state government, and thus only legislative decisions of the local governing body came within the scope of the local initiative process. Holding that acceptance of land for a city hall was in effect a selection of its site, the court went to great length to describe decisions of the state legislature which were analogous to the selection of a site for a city hall.

By this decision the limitation was established that only local legislative decisions could be made by the electorate through the initiative or cancelled by referendum. In determining whether a local decision was legislative or administrative, the test was whether analogous action was taken by the legislative or administrative branch of the state government.

The courts in subsequent decisions,¹¹ however, have altered this test. The limitation of the initiative and referendum to legislative decisions remains; however, the courts have now redefined the term "legislative" so that it includes only those decisions which establish new local policies.¹² The crucial question has become whether the effect of the act of the local council is to set a new policy or merely to carry out one pre-existing. Denomination of decisions as "legislative" or "administrative" according to their similarity to action taken by either the legislative or executive branch of the government has become unimportant, but the terms have not. Thus the act of accepting an offer of land as the site for a municipal park may be "legislative" when two previous resolutions allegedly setting the policy of creating such a park have been repealed,¹³ but "administrative" when

¹⁰ 170 Cal. 605, 150 Pac. 977 (1915).

¹¹ E.g., *Reagan v. City of Sausalito*, 210 Cal. App. 2d 419, 26 Cal. Rptr. 775 (1962); *Martin v. Smith*, 184 Cal. App. 2d 571, 7 Cal. Rptr. 725 (1960).

¹² "Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body" *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 124, 203 Pac. 132, 136 (1921).

¹³ *Reagan v. City of Sausalito*, 210 Cal. App. 2d 419, 26 Cal. Rptr. 775 (1962).

the city previously has established that policy by accepting funds in trust to create the park.¹⁴ Similarly a decision which sets a new policy is not beyond direct action by the electorate even though the city council attempts, by proceeding by resolution, to make an allegedly "administrative" determination.¹⁵

There are no patent evils in the continued use of this limitation to confine the initiative and referendum to local policy-making decisions. Although the terms are a relic of a forgotten rationale, the courts have applied them consistently to achieve their objective. Moreover, the application of the "policy-making" rationale has not resulted in radically different decisions, since most decisions of the state legislature, toward which the *Hopping* court looked, set new policy. It is important, however, to keep in mind present judicial use of the limitation to achieve the first objective, because the courts have used it with less success to achieve the second.

The second objective of the courts in applying the legislative-administrative limitation has been to insulate certain state legislation from local interference except as such legislation specifically authorizes. This legislation has been of two kinds: (1) enactments by which the state places an absolute duty on a local governing body to perform certain functions for the state; and (2) enactments which represent a comprehensive legislative scheme designed to be uniform throughout the state, but as part of which severely restricted discretion has been left to local legislative bodies. Within the first class is the statute¹⁶ which makes it mandatory for county boards of supervisors to provide courtroom facilities for the state courts. In cases where the board has chosen a site¹⁷ or approved plans,¹⁸ and changes are sought to be made by the electorate, the courts have refused to sanction popular interference. Within the second class, the courts have refused to allow the initiative process to apply to the decision to declare a need for the activation of a local housing authority¹⁹ or to approve the authority's application for a federal loan after such a declaration²⁰ under the state Housing Authorities Law,²¹ to pass a zoning ordinance pursuant to a cooperation agreement executed between the housing authority and a municipality²² under the Housing Authorities Cooperation Act,²³ or to declare a need for a redevelopment agency²⁴ under the

¹⁴ *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 203 Pac. 132 (1921).

¹⁵ *Hughes v. City of Lincoln*, 232 Cal. App. 2d 743, 43 Cal. Rptr. 306 (1965).

¹⁶ CAL. GOV'T CODE § 68073.

¹⁷ *Simpson v. Hite*, 36 Cal. 2d 125, 222 P.2d 225 (1950).

¹⁸ *Mueller v. Brown*, 221 Cal. App. 2d 319, 34 Cal. Rptr. 474 (1963).

¹⁹ See CAL. HEALTH & SAFETY CODE § 34240. Cf. *Housing Authority of the City of Eureka v. Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950); *Kleiber v. City & County of San Francisco*, 18 Cal. 2d 718, 117 P.2d 657 (1941).

²⁰ *Housing Authority of the City of Eureka v. Superior Court*, *supra* note 19.

²¹ CAL. HEALTH & SAFETY CODE §§ 34200-380.

²² *Lockhart v. City of Bakersfield*, 123 Cal. App. 2d 728, 267 P.2d 871 (1954).

²³ CAL. HEALTH & SAFETY CODE §§ 34500-521.

²⁴ *Andrews v. City of San Bernardino*, 175 Cal. App. 2d 459, 346 P.2d 457 (1959). The version of § 33201 (Cal. Stat. 1951, ch. 710, § 1, at 1928) at issue in *Andrews* was subsequently amended (Cal. Stat. 1961, ch. 2149, § 3, p. 4434) to provide for referendum on the ordinance activating the local redevelopment agency. Present CAL. HEALTH & SAFETY CODE § 33101 replaced former § 33201 and retains this provision.

Community Redevelopment Law.²⁵ In all of these cases the courts reasoned that the state legislature has set the appropriate policy by its enactment, and the local council becomes, for the purposes of implementing that policy, an administrative agency of the state. Hence a local decision which merely effectuates state policy is administrative and not subject to the initiative and referendum.

This use of the legislative-administrative limitation in connection with such legislation is undesirable. It is clear that the distinction developed to confine the initiative and referendum to local policy-making decisions, and it seems unreasonable to hold that the decision to activate the housing authority in a municipality or to choose the site for a courthouse does not establish a municipal policy of the first magnitude. In the case of housing authorities, cases in other jurisdictions have indicated that it does and that their activation is a legislative determination subject to the initiative and referendum.²⁶ In fact, to say that such a decision is administrative because the local governing body is carrying out a previously established state policy simply does not indicate *why* state policy precludes application of the initiative and referendum to these decisions.

The answer to this question is most clearly stated in a growing body of authority in California which avoids using the legislative-administrative limitation in similar cases and instead forthrightly recognizes the state issue involved. The reasoning in these decisions is that the constitutional reservation of the initiative and referendum extends to municipal affairs only. Where the state legislature occupies a field to the exclusion of local regulation, it ceases to be a municipal affair.²⁷ Therefore the initiative and referendum is precluded, unless provided for in the legislative enactment. Representative of these cases is *Mervynne v. Acker*²⁸ where a group of San Diego citizens, in a touching affirmation of individual liberty against the entangling encroachments of modern life, attempted to initiate an ordinance repealing all the parking meter ordinances enacted by the city council pursuant to Vehicle Code section 22508. There the court held that the control of traffic was a matter of statewide concern, and that the state legislature had delegated the narrow authority to locate parking meters to the legislative bodies of cities only. There was no implied power in any municipality to enact legislation in this field beyond what was specifically granted in the Vehicle Code, which included no provision for the initiative and referendum with regard to parking meter ordinances.²⁹ There are numerous other recent decisions³⁰ which, in deter-

²⁵ CAL. HEALTH & SAFETY CODE §§ 33000-673.

²⁶ See *Scroggins v. Kerr*, 217 Ark. 137, 228 S.W.2d 995 (1950); *Barnes v. City of Miami*, 47 So. 2d 3 (Fla. 1950); *W. B. Gibson Co. v. Warren Metropolitan Housing Authority*, 65 Ohio App. 84, 29 N.E.2d 236 (1940); *Bachmann v. Goodwin*, 121 W. Va. 303, 3 S.E.2d 532 (1939). See also opinion by Shenk, J., concurring and dissenting, in *Housing Authority of the City of Eureka v. Superior Court*, 35 Cal. 2d 550, 559, 219 P.2d 457, 462 (1950).

²⁷ See, e.g., *In re Lane*, 58 Cal. 2d 99, 22 Cal. Rptr. 857, 372 P.2d 897 (1962). See generally Comment, 17 HASTINGS L.J. 603 (1966).

²⁸ 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (1961).

²⁹ Shortly after the decision in *Mervynne v. Acker*, *ibid.*, the state legislature amended CAL. VEHICLE CODE § 22508 to read: "An ordinance adopted pursuant to this section shall be subject to local referendum processes in the same manner as if such ordinance dealt with a matter of purely local concern."

³⁰ E.g., *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965)

mining whether the initiative and referendum are available to a local electorate, have sharply differentiated between the questions of whether a decision involves a matter of statewide concern and whether, if the matter is a municipal affair, the decision is legislative or administrative.

It is clear that the courts in these cases are pursuing the same goal as the courts in the cases which used the legislative-administrative distinction as a basis for refusing to allow the initiative process to apply to some local decisions because they carried out state legislative policy; namely, to insulate the implementation of such policy from local tinkering.³¹ The use of the legislative-administrative limitation merely confuses the issue, but it is still with us.³² It can and should be abandoned, as an alternative is available which poses and discusses the real issue involved: when and why does state policy preclude local initiative and referendum?

Matters of Local Concern

Another question which has troubled some courts is whether a decision of the city council to exercise its power to set up assessment districts for the improvement of streets in one area of a city, or for other purposes which similarly affect only a minority of the electors, is within the scope of the initiative process. Admittedly a legislative decision, an early California case, *Chase v. Kalber*,³³ subsequently followed by two others,³⁴ nevertheless placed it beyond initiative and referendum on three grounds: (1) the requirement of the general state law that an unchartered municipal corporation hold hearings after deciding to make district assessments would be avoided if the decision could be invalidated by referendum; (2) the people of the state in delegating the initiative and referendum to local electorates did not intend them to apply where the inevitable effect would be to impair or destroy some other essential governmental power; and (3) district assessments and the like are of primarily local, as opposed to city-wide, concern in that they affect only a portion of the electorate. None of these grounds is very convincing, but discussion of their defects is best postponed to a more appropriate part of this note.

As to general law cities this question is settled, because these early decisions have been codified as an exception to the ordinances which are subject to referendum in general law cities.³⁵ It still arises with regard to chartered cities, however, since such a city can make itself independent, in municipal affairs, of the general

(adoption of general plan a municipal affair and legislative); *Atlas Hotels, Inc. v. Acker*, 230 Cal. App. 2d 658, 41 Cal. Rptr. 231 (1964) (enactment of a transient room tax a municipal affair and legislative); *Fletcher v. Porter*, 203 Cal. App. 2d 368, 21 Cal. Rptr. 452 (1962) (clarification of duties of city planning commission a municipal affair and legislative).

³¹ "The *Simpson* and *Mueller* cases point out that it is a matter of state interest that each county provide suitable quarters for municipal and superior courts, and in furtherance of that state interest the Legislature preempted the field by directing the board of supervisors of each county to provide courthouses and courthouse sites." *Atlas Hotels, Inc. v. Acker*, *supra* note 30, at 665, 41 Cal. Rptr. at 236 (dictum).

³² See, e.g., *Mueller v. Brown*, 221 Cal. App. 2d 319, 34 Cal. Rptr. 474 (1963).

³³ 28 Cal. App. 561, 153 Pac. 397 (1915).

³⁴ *St. John v. King*, 130 Cal. App. 356, 20 P.2d 123 (1933); *Starbuck v. City of Fullerton*, 34 Cal. App. 683, 168 Pac. 583 (1917).

³⁵ CAL. ELECTIONS CODE § 4050.

state law by an appropriate charter provision. The question was litigated in *Alexander v. Mitchell*³⁶ where the issue was the validity of a proposed initiative ordinance which would have made every decision of the city council of Palo Alto (a chartered city) to use district assessment proceedings to create off-street parking facilities subject to referendum. The court held that the ordinance could not be initiated, but the opinion served more to confuse than to clarify the status of such a proceeding with regard to the initiative and referendum in chartered cities. Without any analysis, the court concluded that off-street parking projects are primarily of local (as opposed to city-wide) interest, just as are street and sewer projects, and that all the reasons advanced in *Chase*³⁷ and its offspring to bar the referendum on decisions to initiate such projects in general law cities were applicable in the case of chartered cities. For good measure, the court also added, on dubious authority, that the referendum was precluded because the power to determine the necessity and advisability of parking district proceedings was delegated to the legislative body of a city and not to the people.³⁸

Deeper analysis would not necessarily have led to a decision that the ordinance could be initiated, but it would have indicated that in chartered cities matters of local concern can at least be made subject to referendum. The two important questions presented by such an ordinance must first be stated: (1) Are legislative decisions which do not affect the entire electorate within the scope of the constitutional delegation of the initiative and referendum? (2) If not, can the scope of the initiative and referendum be expanded in chartered cities to include such decisions? Determination of the first issue requires examination of the three grounds offered in *Chase* for denying the referendum to electors in a general law city in the same circumstances.

The statement in *Chase* that allowing the referendum to apply to district assessment proceedings would prevent the city council from holding hearings as required by state law,³⁹ while perhaps a valid objection to referendum in general law cities,⁴⁰ is not relevant here, since a chartered city such as Palo Alto may make itself, in municipal affairs, independent of the general state law. Therefore only the other two grounds advanced in *Chase* to define the constitutional grant of the initiative and referendum apply to a chartered city.

³⁶ 119 Cal. App. 2d 816, 260 P.2d 261 (1953).

³⁷ *Chase v. Kalber*, 28 Cal. App. 561, 153 Pac. 397 (1915).

³⁸ The inconsistency of these two conclusions went unnoticed by the court. Only in matters of statewide concern can the state legislature preclude the initiative and referendum by vesting powers in the city council. *Mervynne v. Acker*, 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (1961). Off-street parking facilities, however, are a purely municipal affair, and a chartered city can proceed under powers granted by state law or under the powers conferred upon the city as a home-rule chartered city without the aid of such legislation. *Larsen v. City and County of San Francisco*, 152 Cal. App. 2d 355, 313 P.2d 959 (1957). The Palo Alto city council in *Alexander* was proceeding under powers granted its own Improvement Code, *Alexander v. Mitchell*, 119 Cal. App. 2d 816, 822, 260 P.2d 261, 264 (1953), and therefore the argument that there could be no initiative and referendum because the power to determine the necessity and advisability of parking district proceedings is vested in the city council was unsound. See also *Fletcher v. Porter*, 203 Cal. App. 2d 368, 21 Cal. Rptr. 452 (1962) (delegation of powers to city council by charter does not preclude initiative and referendum).

³⁹ 28 Cal. App. at 573, 153 Pac. at 401.

⁴⁰ See *Johnston v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958).

The second ground urged in *Chase* is that the people of the state in delegating the initiative and referendum to local electorates did not intend them to apply where their inevitable effect would be to impair or wholly destroy some other essential governmental power.⁴¹ This is clearly an erroneous interpretation of the constitutional grant, based on a misunderstanding of the nature of the initiative process. In *In re Pfahler*,⁴² the Supreme Court of California held that the initiative and referendum do not bar, impair, suspend, or destroy any governmental power. The power continues to exist fully intact after the exercise of either the initiative or referendum, the electorate merely having asserted its constitutional right to determine in place of the legislative body whether the power should or should not be exercised. It is true that the people through the initiative process can make it extremely awkward for a governing body to exercise a particular power, but this does not imply that it ceases to exist. The second ground offered in *Chase* is without foundation, and it should not be relied upon in deciding whether to allow referenda on matters of local concern in any city.

There is more substance to the third ground in *Chase*. There is an obvious danger, in allowing matters of local concern to be subject to initiative and referendum, that a majority of the electorate could place the burden of expensive municipal improvements on a small minority of the citizens through initiated district assessment proceedings. Or a majority could by referendum frustrate improvements essential to a few. It is certainly arguable that the constitutional delegation of the initiative and referendum is therefore limited to matters which affect the entire electorate. On the other hand, from the exemption of certain matters from the constitutional reservation of the initiative and referendum to the electors of the state, it would seem to be implied that all other state or local legislation is included.

This latter conclusion, of course, destroys much of the foundation for the argument advanced in *Alexander*. But the inquiry need not end there. Even if the argument in *Alexander* is accepted that the constitutional delegation of the initiative and referendum does not include matters of local concern, the second question posed by the ordinance in *Alexander*, but not answered in the opinion, must be considered: Can the scope of the initiative and referendum be expanded to include decisions on matters of local concern in chartered cities? The answer is that it can be, but by charter amendment only. The rule is stated in *Hunt v. Mayor and Council of City of Riverside*:

The constitutional reservation goes to the full extent expressed by its language. If the charter differs from the Constitution in any respect, it does not thereby diminish the power reserved by the Constitution. On the other hand, if the powers reserved by the charter exceed those reserved in the Constitution, the effect of the charter would be to give the people the additional powers therein described.⁴³

Charter amendments may be initiated, but the amendment must conform to the formal requirements set out in the constitution.⁴⁴ The ordinance sought to be

⁴¹ 28 Cal. App. at 569-70, 153 Pac. at 400.

⁴² 150 Cal. 71, 88 Pac. 270 (1906).

⁴³ *Hunt v. Mayor & Council of City of Riverside*, 31 Cal. 2d 619, 622-23, 191 P.2d 426, 428 (1948).

⁴⁴ CAL. CONST. art. XI, § 8(h).

initiated in *Alexander* did not, and to that extent the court was correct in refusing to force the city council to submit it to a vote of the electorate.

This was not, however, the court's reason for refusing to do so and, this decision therefore must not be taken as authority that the initiative and referendum may not apply to decisions on local matters in chartered cities. The conclusion in *Alexander* that matters of local concern were not included in the constitutional delegation of the initiative process based on *Chase* is debatable and probably unsound. Moreover, the court never discussed the question of whether the scope of the referendum could be expanded in chartered cities. It clearly can be, and there is therefore no reason why the initiative and referendum may not be applied to matters of local concern in chartered cities.

Limitations on the Initiative

At the local level an additional limitation is placed on the initiative: the proposed measure must be such as the legislative body itself could adopt. The initiative process is thus circumscribed by the same limitations as the legislative powers resting in the legislative body concerned.⁴⁵ Such limitations may exist because the state in granting certain powers to a municipality has prescribed certain requirements which must be complied with in exercising these powers. If the exercise of the initiative is incompatible with conformity to these requirements, then its use is precluded. For example in *Hurst v. City of Burlingame*⁴⁶ it was held that an amendment to the local zoning ordinance could not be adopted by initiative where the general state zoning law authorizing municipal corporations to adopt comprehensive local zoning ordinances required public hearings before adoption of amendments. The court reasoned that municipal corporations organized under general law have only those powers delegated to them by the legislature, and the electors can exercise no greater power. Since the city council could not adopt amendments without holding a hearing, and it was impossible for the electorate to hold hearings, the proposed initiative amendment failed. In a later case⁴⁷ an initiative ordinance which would have regulated the height of buildings by prohibiting the local council from granting zoning variances for buildings over fifty feet high was void because the state empowered municipalities to regulate the height of buildings by zoning ordinance only.⁴⁸

This doctrine does not only limit or deny the use of the initiative where it conflicts with state requirements; it also raises other barriers. An initiative ordinance must be within the power of the local council to pass. For example, in *Mitchell v. Walker*⁴⁹ it was held that a proposed ordinance which would have bound the Monrovia city council to set the salaries of policemen and firemen according to those paid by the City of Los Angeles to similar employees could not be initiated because the general law vested the authority to fix municipal salaries in the city council which could not pass an ordinance delegating it to another legislative body. In a later case,⁵⁰ it was held that an ordinance could not

⁴⁵ *Mueller v. Brown*, 221 Cal. App. 2d 319, 34 Cal. Rptr. 474 (1963).

⁴⁶ 207 Cal. 134, 277 Pac. 308 (1929).

⁴⁷ *Laguna Beach Taxpayers' Ass'n v. City Council*, 187 Cal. App. 2d 412, 9 Cal. Rptr. 775 (1960).

⁴⁸ CAL. GOV'T CODE § 65800.

⁴⁹ 140 Cal. App. 2d 239, 295 P.2d 90 (1956).

⁵⁰ *Mueller v. Brown*, 221 Cal. App. 2d 319, 34 Cal. Rptr. 474 (1963).

be initiated which attempted to set up a permanent park and in effect bind future legislative bodies to maintain it. The court reasoned that the Fresno County Board of Supervisors had no power to enact perpetually binding legislation, and therefore neither did the county electorate.

These cases indicate that the constitutional reservation of the initiative does not constitute an independent source of legislative power, but rather authorizes the people to exercise municipal legislative powers derived from other sources. They may legislate in place of their legislative body, but only within the framework of powers granted to municipalities by the constitution and state law. In most cases their legislative power is as great as that of the local legislative body, but it may be less where the initiative conflicts with certain state requirements.

This limitation on the initiative was inadequately discussed in the recent California case of *Hughes v. City of Lincoln*.⁵¹ There a group opposed to fluoridation wished the court to compel the city council to submit to an election an ordinance which was supposed to prevent the council from carrying out a previously passed resolution to fluoridate. This was the text of the measure: "It shall be unlawful for any agent or employee of the City of Lincoln, or any person, firm, or corporation acting in behalf of said City, or otherwise, to mingle or combine any fluorides in any form, or in any quantity or in any manner with the public water supply of the City of Lincoln."⁵² The court concluded that fluoridation involved a municipal legislative decision and therefore could properly be the subject of an initiative ordinance.

For some reason the court did not consider the effect of this ordinance. The text indicates that it was intended to do more than merely repeal the prior resolution to fluoridate. Although drawn in the language of a normal prohibitory ordinance, it was in fact an attempt to remove from the council the power to fluoridate and reserve that decision to the electorate. It does not say in so many words that the council shall not have the power to fluoridate, but in denying it the means to exercise that power, the ordinance effectively accomplishes the same goal. And this was clearly the intention of the proponents of the measure who understandably wished to settle the question and avoid having repeatedly to resort to the referendum.

It is well settled, however, that such a measure could not be passed by the Lincoln city council. A legislative body by ordinance or otherwise cannot divest itself and succeeding legislative bodies of powers vested in it by the general law for the benefit of its constituents.⁵³ Nor can it by contract or legislative enactment delegate or surrender its police power.⁵⁴ One qualification to this general rule of inseparability of legislative power from the legislative body involves the initiative and referendum. As pointed out in *In re Pfahler*,⁵⁵ the exercise of the initiative and referendum removes from the council the power to act on the matter in question and lodges that power in the people. Neither that case nor any other, however, indicates that the delegation of the initiative and referendum gives to

⁵¹ 232 Cal. App. 2d 743, 43 Cal. Rptr. 306 (1965).

⁵² Opening Brief for Appellants, p. 2, *Hughes v. City of Lincoln*, *supra* note 51.

⁵³ *Thompson v. Board of Trustees*, 144 Cal. 281, 283, 77 Pac. 951, 952 (1904).

⁵⁴ *Mott v. Cline*, 200 Cal. 434, 253 Pac. 718 (1927); *Laurel Hill Cemetery v. City & County of San Francisco*, 152 Cal. 464, 93 Pac. 70 (1907).

⁵⁵ 150 Cal. 71, 88 Pac. 270 (1906).