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REPORT TO THE RULES, OPEN GOVERNMENT,
AND INTERGOVERNMENTAL RELATIONS COMMITTEE

MAYORAL INCAPACITY AND THE VETO POWER

INTRODUCTION

The City Attorney has received a request from Council President Scott Peters on behalf of the Rules, Open Government, and Intergovernmental Relations Committee of the City Council to assess the effect of Mayoral incapacity on the Mayor's power to approve or veto Council actions under the Charter, and to determine whether the Council may take action to redress any perceived limitations in this area, or whether any changes must occur by amendment of the City Charter.

SUMMARY ANSWER

The City Charter provides the Mayor with the authority to expressly approve or to veto Council resolutions or ordinances. The Charter also provides alternative procedures to *approve* Council actions when the office of the Mayor is vacant, or in the event the Mayor does not act in timely manner, which would include a period of temporary incapacity. There is no provision for anyone other than the Mayor to exercise the veto power at any time. When the office of the Mayor is vacant, or the Mayor cannot act in timely fashion, the veto power is suspended. Because the Mayoral right to approve or veto matters is governed exclusively by the terms of the Charter, any change to the existing processes must proceed by charter amendment.

DISCUSSION

I. BACKGROUND

Effective January 1, 2006, the City's Council-Manager form of governance changed to a Mayor-Council form of governance for a five-year experiment. San Diego Charter art. XV. The implementation of article XV divides City government into two parts: an executive-administrative branch headed by the elected Mayor and a legislative branch headed by the City Council. The City Charter vests all legislative power in the City Council, which must act by ordinance or resolution in all substantive matters. San Diego Charter §§ 11 and 270 (c).

The Mayor is now the Chief Executive and Chief Administrative Officer. San Diego Charter §§ 260(b), 265(b)(1). For the duration of the experiment, the office and duties of a Deputy Mayor are suspended. San Diego Charter § 260 (a); see former § 25.

II. THE CITY CHARTER IS THE SOURCE OF THE VETO POWER.

A Mayor in the City's new form of government has only the authority that is expressly or impliedly conferred upon the office by charter. 3 McQuillin Mun. Corp. § 12.43 (3rd ed. 2001) p. 266; *See, Bartlett v. Bell*, 58 Cal. App. 357 (1922) [Mayor has no power to compel Auditor to act in matter to benefit a third party]. *Harrington v. City of Portland*, 698 F. Supp. 209, 211-212 (D. Or. 1988) [Mayor, with power to appoint and remove officer, could not bind City to promised early retirement package for removed officer. Charter gave that authority to the Council.]

How the charters of different cities address Mayoral veto powers varies considerably from city to city within any state, including California. In California, however, it is settled that "[t]he veto power is not an inherent power of the mayor and the terms of the charter define the extent to which it may be exercised by him. Such power exists only to the extent that it is clearly granted and is not to be enlarged by any strained construction. (*Jacobs v. Board of Supervisors*, 100 Cal. 121 [34 Pac. 630]; *McDonald v. Dodge*, 97 Cal. 112 [31 Pac. 909]; *Brooks v. Fischer*, 79 Cal. 173 [4 L. R. A. 429, 21 Pac. 652]; 18 Cal. Jur. 913, sec. 203; 2 Dillon on Municipal Corporations, 5th ed., p. 910)." *Belli v. Board of Supervisors*, 123 Cal. App. 44, 47 (1932).

It is also settled law that a municipality's legislative body may not delegate its legislative power unless the law conferring the power expressly authorizes it. *See*, 2A McQuillin Mun. Corp. § 10.40 (3rd ed. 2005). In cities like San Diego, the city's charter is the law that confers legislative power on a legislative body. *See*, San Diego Charter § 11. A Mayor with approval or veto authority acts in a legislative capacity when considering whether to exercise his or her discretion to approve or veto a Council action. *Pulskamp v. Martinez*, 2 Cal. App. 4th 854, 862 (1992). To the extent a charter provides a Mayor with the power to act in this limited legislative capacity, it follows that the charter also decides how this power may be delegated, or used by others. Accordingly, we conclude that the San Diego City Charter controls the Mayor's veto and approval power over Council actions, and how, when, and by whom, these powers are to be exercised. The pertinent City Charter provisions creating and governing the Mayoral veto and approval power in the City of San Diego are discussed below.

A. THE CHARTER LIMITS VETO USE TO THE MAYOR.

Article XV of the City Charter is the source of the general veto power, providing that the Mayor may expressly approve or may veto eligible resolutions and ordinances by signing them within ten business days after receipt. San Diego Charter § 280(c)(3). If the Mayor does not act within that time period, article XV provides that the Mayor's failure to return the resolution or ordinance in the specified time period "shall constitute approval" of the action. San Diego Charter § 280(c)(4).

When a vacancy¹ in the office of Mayor occurs by death, resignation, or recall, article XV provides the Council President with limited authority to exercise Mayoral *approval* powers: "This limited authority would include circumstances where the expeditious approval of a legislative action is necessary to meet a legal requirement imposed by a court or another governmental agency." San Diego Charter § 265(i)

Significantly, article XV expressly precludes the Council President from exercising the veto power under the same circumstances. "Such limited authority would not include the exercise of the power of veto or any other discretionary privilege which is enjoyed by a person appointed or elected to the Office of Mayor." *Id.* The express prohibition of the use of the veto power by the person acting as interim Mayor during a vacancy in the office is telling. We believe the only permissible inference to be drawn from the Charter is that no one other than a duly elected or appointed Mayor may exercise the veto power.

Additionally, article XV gives no person the right to exercise all the powers of a duly elected or appointed Mayor in this new form of governance. Indeed, as part of the governance change article XV suspended the office of Deputy Mayor, the only office previously authorized "to perform all the duties of the Mayor" in the Mayor's absence. See San Diego Charter § 260(a); former § 25.

Article XV is silent as to what should occur if the Mayor is unable to exercise the veto power because he or she is absent for an extended period or becomes temporarily disabled. And article XV does not give the Mayor the authority to transfer his or her discretionary powers during a period of absence or temporary incapacity. This silence contrasts with other parts of article XV which do provide alternative methods to *approve* City Council actions that are applicable during any temporary disability or a vacancy in the office of the Mayor. For example, resolutions and ordinances subject to veto are deemed approved under the Charter if the Mayor fails to act on such matters in a timely manner. During a vacancy in the office of Mayor, the Council President also may approve matters which require expeditious approval.

Considering the entirety of article XV, and the uniqueness of the Mayoral veto power,

¹ See California Government Code sections 1770, 1770.1, and 1770.2 for an expanded definition of what may constitute a vacancy in public office.

the City Attorney concludes that the provisions of article XV do not permit anyone other than the Mayor to exercise the Mayor's veto power during any temporary disability of the Mayor or during a vacancy in that office. In effect, the use of the veto power is suspended during those time periods.

B. ANY MODIFICATIONS MUST OCCUR BY CHARTER AMENDMENT.

Although the charter is silent on whether others might exercise the Mayor's veto power in the Mayor's temporary or permanent absence, this does not mean the Council may act to fill the gap. The unique nature and the source of this Mayoral power foreclose that action.

"[I]t is well settled that a charter city may not act in conflict with its charter. (Citations)" *Domar Electric, Inc., v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994). The Council has not suggested what action they might wish to take. However, this Office concludes that any action affecting the exercise of the Mayor's veto or approval powers must occur by charter amendment. Otherwise the Council may run afoul of the rule that "[a]ny act that is violative of or not in compliance with the charter is void." *Id.*

For example, the City Council might wish to propose a policy or ordinance to provide someone other than the Mayor with the veto or approval power during a period when the Mayor might be temporarily disabled. However, it is likely such an action would be considered void by a court. As we have seen, only a charter may authorize someone other than the legislative body to act in legislative capacity, and that is how a Mayor acts when considering whether to approve or veto an action. Additionally, such action might conflict with article XV provisions, which set forth specific methods to approve ordinances or resolutions by the Mayor or otherwise, and provide *only* the Mayor with the power to veto Council actions.

C. ANY CHARTER AMENDMENT SHOULD BE LIMITED IN ITS TERM.

Article XV, the source of the Mayor's discretionary power to approve or veto certain Council actions, is itself a temporary amendment to the City Charter. Enacted in November, 2004 and implemented January 1, 2006, its purpose is "to modify the existing form of governance for a trial period of time to test implementation of a new form of governance" San Diego Charter § 250.

Article XV will cease to exist December 31, 2010 unless the voters take action. If the voters do not continue article XV, the portions of the Charter temporarily superseded by article XV will be revived. *See*, California Government Code § 9611; San Diego Ballot Pamp. General Elec. Nov. 2, 2004, the City Attorney's Impartial Analysis of Prop. F. Those earlier portions of the Charter have no provision for Mayoral veto or approval powers.

Accordingly, we conclude that any charter amendment related to the Mayor's discretionary powers temporarily created by article XV must necessarily be linked to the duration of that article.

D. OTHER CITIES' CHARTER PROVISIONS.

In the event the Committee wishes to consider one or more charter amendments to article XV, we have provided for the Committee's consideration several examples of charter provisions from three other cities with a similar government structure to that now operating in San Diego: Los Angeles, San Francisco, and Oakland.

1. San Francisco

The San Francisco City Charter requires similar Mayoral approval of legislative action to that in San Diego. San Francisco Charter § 3.103.² That city's charter, however, expressly gives the Mayor the authority to delegate³ his or her duties and powers to a legislative body member of the Mayor's choice when a temporary disability or absence is contemplated (§ 3.100 (12)⁴). Alternatively, the charter permits the President of the City's legislative body to assume that office, where the Mayor has not made that designation (§3.102⁵). *Also see*, the discussion in *Affordable Housing Alliance v. Feinstein*, 179 Cal. App. 3d 484, 490-93 (1986). San Francisco's City Charter does not restrict what Mayoral powers the replacement Mayor may exercise.

²San Francisco Charter § 3.103 provides: "Any ordinance or resolution passed by the Board of Supervisors shall be promptly delivered to the Mayor for consideration. If the Mayor approves the ordinance or resolution, the Mayor shall sign it and it shall become effective as provided in Section 2.105 of this Charter. If the Mayor disapproves the ordinance or resolution, the Mayor shall promptly return it to the Board of Supervisors without the Mayor's signature, accompanied by a statement indicating the reasons for disapproval and any recommendations which the Mayor may have. Any ordinance or resolution so disapproved by the Mayor shall become effective only if, subsequent to its return, it shall be passed by a vote of the Board of Supervisors required by Section 2.106 of this Charter. Any ordinance or resolution shall become effective, with or without the Mayor's signature, unless it is disapproved by the Mayor and returned to the Board of Supervisors not more than ten days after the date the ordinance or resolution was delivered to the Mayor's Office for consideration."

³A "delegation" is generally considered equivalent to a "transfer" of powers and responsibilities. *See*, 2A McQuillin Mun. Corp § 10.39 (3rd ed. 2005).

⁴San Francisco Charter section Sec 3.100 provides in pertinent part: ". . . ¶ The Mayor shall have the power to: . . . 12. Designate a member of the Board of Supervisors to act as Mayor in the Mayor's absence from the state or during a period of temporary disability."

⁵San Francisco Charter section 3.102 provides: " If the Mayor is absent from the state or temporarily disabled without designating an Acting Mayor, the President of the Board of Supervisors shall act as Mayor until such time as the Mayor shall return to office. ¶ In case of a disaster in which neither the Mayor nor the President of the Board of Supervisors is able to serve as Mayor, the order of succession shall be as designated by ordinance."

2. Los Angeles

The Los Angeles City Charter also requires similar Mayoral approval of Council actions to that in San Diego. Los Angeles Charter § 250 (b).⁶ Unlike San Francisco, it does not give the Mayor the power to delegate. However, when the Mayor's office is awaiting a successor in that City, or the Mayor is unavailable "due to sickness, absence from the state, or disability of the Mayor, the President of the Council shall act as Mayor of the City." Los Angeles City Charter § 243. The Los Angeles City charter also does not restrict what powers of the Mayor may be exercised by the Council President.

3. Oakland

The Oakland City Charter also permits that city's Mayor to suspend the operation of and to force the City Council to reconsider certain ordinances, a process similar to the veto process. Oakland Charter § 216.⁷ If the Mayor is absent or temporarily disabled, or the office of the Mayor becomes vacant, the Vice-Mayor (elected annually from and by the eight-member City

⁶ Los Angeles Charter section 250 provides in pertinent part: "(b) Presentation to Mayor. Every ordinance passed by the Council shall, before it becomes effective, be signed by the City Clerk or other person authorized by the Council, and be presented to the Mayor for approval and signature. If the Mayor does not approve the ordinance, the Mayor shall endorse on it the date of its presentation to him or her, and return it to the City Clerk with a written statement of objections to the ordinance. The City Clerk shall endorse on the ordinance the date of its return to him or her. If the Mayor does not approve or veto an ordinance in accordance with this section within ten days after its presentation to him or her, the ordinance shall be as effective as if signed by the Mayor."

⁷ Oakland Charter section 216 provides: "An ordinance receiving upon final adoption the affirmative vote of at least six members of the Council shall be effective immediately, unless a later date is specified therein. All other ordinances, unless a different date is required by this Charter, shall be effective upon the seventh day after final adoption; provided, that within three days after said date of final adoption, the Mayor may file in the Office of the City Clerk written notice to the Council that he has suspended the taking effect of the ordinance, stating in said notice the reason or reasons for his action, which notice the City Clerk shall forthwith deliver to the members of the Council. Such notification shall automatically cause the reconsideration of the ordinance by the Council at its regular meeting next following the sixth day after the aforesaid final adoption of the ordinance. If, upon reconsideration, the ordinance is approved by the affirmative vote of at least five members of the Council, it shall take effect immediately; and if not so approved, it shall be ineffective."

Council) performs the duties of the office. Oakland Charter §§ 208,⁸ 303,⁰⁹ and 306.⁰⁰ There are no restrictions on the Mayoral powers the Vice-Mayor may exercise.

CONCLUSION

In this report we address what occurs to the Mayor's veto power in the event the Mayor is not able to exercise it. The answer turns out to be a simple one. Under the provisions of article XV of the San Diego Charter, and for its duration, no one but the Mayor may exercise the veto power. If the Mayor is unable to exercise that power for any period, the veto power is suspended during that period.

If the Committee desires to recommend changes to the procedures required under the Charter, those changes must be accomplished by Charter amendment. Additionally, any such amendment should be limited to the duration of article XV. For the Committee's guidance, we have provided examples from the charters of three other cities that address the temporary incapacity of mayors in those cities.

Respectfully submitted,

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⁸ Oakland Charter section 208 provides in pertinent part that the City "Council shall elect a Vice-Mayor from among its members to serve for a one-year term."

⁰⁹ Oakland Charter section 303 provides in part: "Upon the declaration of vacancy in the office of the Mayor, the office of the Mayor shall be filled by the Vice-Mayor of the Council." This section also details what should happen if the Vice Mayor declines the position, and under what circumstances an election is required.

⁰⁰ Oakland Charter section 306 provides: "In the absence or temporary disability of the Mayor, the Vice-Mayor shall perform the duties of the office."