

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Michael J. Aguirre
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

September 1, 2006

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

RE: REMEDIATION MEASURES REQUIRING CHANGES TO THE CITY CHARTER
AND RELATED MATTERS

INTRODUCTION

The “Report of the Audit Committee of the City of San Diego” [Kroll Report] was presented to the San Diego City Council at its meeting on August 8, 2006. The report suggests serious deficiencies in the City’s financial reporting obligations and proposes numerous remediation measures.

On August 24, 2006, the Mayor issued a plan to implement certain remedial measures. [Mayor’s Report]. The Mayor’s plan will be considered by the City Council at a special meeting on September 6, 2006.

The Kroll recommendations incorporated in the Mayor’s plan include some items that would significantly change the City’s auditing and financial reporting structure. The Mayor’s report acknowledges that some Charter changes will be required to implement the recommendations.

Among other concerns, the recommendations to the Council suggest new committees and outside individuals be vested with decision making authority previously exercised by, and legally reserved to, elected officials. These types of changes conflict with the City Charter and, prior to implementation, will require a vote of the electorate on specific Charter amendments.

Failure to obtain the required Charter modifications prior to implementation would result in actions taken in excess of the jurisdiction of the offices of the Mayor and/or City Council (*Ultra vires* acts) rendering all such acts “void” from inception. Such actions could subject the City to liability for actions taken, or not taken, by persons asserting authority where none has been legally granted; subject persons acting under such deficient authority to exposure for which there would be none of the immunities associated with government service; and further complicate the ability of the City to resolve its issues with federal regulators and to re-enter the capital markets.

This initial report will highlight, by example, some of the suggested remediation measures that require changes to the City Charter and will provide recommendations for further action. In particular, this report focuses on:

1. Changes to the composition of the San Diego City Employees' Retirement System Board of Administration;
2. Changes to the Office of the City Auditor and Controller;
3. Creation of an "Audit Committee";
4. Appointment of a "Monitor"; and
5. Changes to the jurisdiction of the Office of the City Attorney to eliminate that office as attorney for the Retirement System.

DISCUSSION

I. The City Council may not Impact, by Ordinance, Charter-Established City Departments or Charter-Established Duties of City Officials.

A charter is the supreme law of a city, subject only to constitutional limitations and preemptive state law. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994). "[I]t is well settled that a charter city may not act in conflict with its charter," and that "[a]ny act that is violative of or not in compliance with the charter is void." *Id.* at 171. This means that the City Charter's authority is greater than the authority of any ordinance enacted by the City's legislative body, the City Council. Should an ordinance or other action by a City Council conflict with what the charter provides, the City Council's action is void and unenforceable.

The City Council has the authority to place measures before the voters that propose changes to the City Charter, either at its own discretion, or as mandated after the presentation of certain certified voter petitions. *See, Howard Jarvis Taxpayers Assn. v. City of San Diego*, 120 Cal. App. 4th 374, 377-380 (2004). The actual changes to a City Charter may only occur by a vote of the electorate.

Established legal authority and City Charter section 26 preclude any Council action by ordinance that seeks to change a charter-established *department* of the City or a charter-established *duty* of a city official. Charter section 26 provides in pertinent part:

The Council shall by ordinance, by majority vote, adopt an administrative code providing for the detailed powers and duties of the administrative offices and departments of the City Government, based upon the provisions of this Charter. Thereafter,

except as established by the provisions of this Charter, the Council may change, abolish, combine, and rearrange the departments, divisions and boards of the City Government provided for in said administrative code, but such ordinance creating, combining, abolishing or decreasing the powers of any department, division or board shall require a vote of two-thirds of the members elected to the Council. The Council may by ordinance, if authorized so to do by the general law of the State, provide that any function of the City may be performed by the County or that any function of the County may be performed by the City, provided the respective legislative bodies authorize and approve such transfer and assumption of function. There may also be established a combined City and County district for the performance of any function. [Emphasis added].

Section 26 was assessed in *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380 (1976). The court found that: “. . . the power of the council to ‘change, abolish, combine, and rearrange the departments, divisions and boards of the City Government provided for in said administrative code’ is limited by the words ‘except as established by the provisions of this Charter.’” *Id.* at 387. The court then held, most unequivocally that:

We face the problem whether the council, under the charter, may create a department of city government not provided for by the charter and remove it from the supervision and control of the manager by designating that department a legislative department without regard to the powers and duties attempted to be given to it.

We hold that the council cannot do so.

The council may not create a department of the city government, by whatever name it is given, which duplicates or infringes upon the specific powers or duties assigned by the charter to another department or, generally, to the manager.” Id. at 388. [Emphasis added].

Another San Diego case, *Dadmun v. City of San Diego*, 9 Cal. App. 549 (1908), prohibits the City Council from transferring the duties given to a city officer by the charter to another by ordinance. In *Dadmun*, the City Council passed an ordinance creating the office of special prosecutor to prosecute only municipal ordinance violations. The City Charter at that time provided that the prosecution of municipal ordinances was the duty of the City Attorney. The Court held that “the city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter and designate another to perform those duties It follows, then, that the action of the city council in appointing a special prosecutor whose duty it should be to prosecute criminal violations of ordinances was unauthorized and void” *Id.* at 551.

These court decisions and City Charter section 26 limit the City Council's ability to take action by ordinance to implement the suggested "remediation measures" that conflict with existing Charter provisions establishing or assigning duties to City departments or officials. They similarly preclude the Mayor's office from implementing those changes administratively prior to Charter revision by the electorate.

II. Changes to the Composition of the San Diego Retirement Board of Administration.

The Kroll report recommends several changes involving the San Diego City Employee Retirement System. One of the proposals is to change the size and composition of the Board that administers the System. Kroll Report, Appendix M-8. City Charter section 144 governs the composition of that Board. This proposed change conflicts with the existing charter. A change to the City Charter is required in order to change the composition of that Board.

III. Changes Impacting the Office of Auditor and Comptroller.

The Kroll report recommends several changes that will impact the Office of the Auditor and Comptroller as it now exists. The duties of the Auditor and Comptroller are broad and varied under the City Charter and the San Diego Municipal Code. A partial summary of those duties is included in a memorandum prepared by this Office entitled "The Relationship between the City Offices of the Mayor and the Auditor and Comptroller under the Mayor-Council Form of Government" (January 23, 2006), a copy of which is attached. The proposed remedial measures eliminate the position of the Auditor and Comptroller and create five (5) new offices: an Auditor General, a separate City Comptroller, a Director of Financial Reporting, a Director of Financial Management, and a Director of Debt Management. It may also be appropriate to amend the Charter to clarify the role of the Chief Financial Officer.

The suggested restructurings in these offices will require amendments to the City Charter.

IV. Creation of an Audit Committee.

The Kroll Report recommends the creation of a three-member Audit Committee, consisting of two citizen members and one member of the City Council. The two citizen members are to be appointed by the Mayor with Council confirmation, and will receive compensation. Appendix M-6. The Kroll report recommends that the City's independent auditors "should be retained by, report to, and take direction from, the Audit Committee." *Ibid.* The Committee is to be given the power to select and retain independent auditors, who will report only to it. *Ibid.* The City's Financial Oversight Board is to be eliminated as redundant to the Audit Committee. *Ibid.*

The Kroll Report recommends that the proposed new Auditor General report to the Audit Committee. The Audit Committee would set this official's annual compensation and the annual budget of this official's new department. The Auditor General can be removed from office for

cause by the Audit Committee or upon the vote of three-quarters of the City Council. Appendix M-5.¹

The suggestion that the Audit Committee have the authority to set salaries and/or budgets conflicts with City Charter section 11.1, and related sections. Section 11.1 expressly forbids the City Council from delegating its responsibility to adopt ordinances to raise or spend public money, including “the annual budget ordinance, or any part thereof, and the annual ordinance setting compensation for City employees.” *Also see* § 290 [City Council must set and adopt the terms of the salary ordinance and the City Budget]. The City Charter requires the City Council to approve the range of compensation for all City officials and the budget for all City departments. As noted in Part I above, the City Council may not by ordinance create an Audit Committee and provide it with powers that conflict with the Council’s charter-required duties. This may only be accomplished by a change to the Charter.

If the Audit Committee is intended as an advisory committee, its proposed duties also conflict with another Charter section. The Kroll Report recommends the citizen members of this committee receive compensation. This recommendation conflicts with section 43(a) which forbids such compensation: “The members of such boards shall serve without compensation . . .” City Charter § 43(a). However, this may not become an issue as the Mayor’s Report indicates that: “It is anticipated that members of the Audit Committee will not be compensated for serving on the Committee. See, Mayor’s Report, p. 5.

The Kroll Report also recommends the Audit Committee retain and direct the City’s independent auditors; and the Committee is to have ultimate authority over the office of Auditor General, including the absolute right to set the salary for the City Official and the budget for the department, and to remove this City Official for cause. This authority also conflicts with section 43(a) which provides: “The members of such boards shall . . . not . . . direct the conduct of any Department or Division.”

The creation of the Audit Committee requires changes to the City Charter. The Mayor’s suggested timeline for the creation of this committee must necessarily be deferred to coincide with the remainder of the ballot proposals for the November, 2008 election.

V. Appointment of an Independent Monitor to Oversee the City’s Remediation Plan.

The Kroll Report suggests the appointment of an independent “Monitor”, a person who must have “complete and unfettered access to all City and SDCERS personnel and records.” Appendix M-14. The SEC is to be given the right, whenever it chooses, to expand the duties of this Monitor. *Ibid.*

¹ This position was reiterated by the authors of the Kroll report in an article August 30, 2006 in the San Diego Union Tribune “An Opportunity to Move Forward.” They stated: “The audit committee also sets the compensation and budget for the auditor, which should allow them to do their oversight without undue influence from any branch of government.”

The Mayor's Report accepts this recommendation and indicates that the selection process has begun. The Mayor anticipates paying more than a million dollars a year for three years of this individual's services. Mayor's Report, p. 1. The Independent Budget Analyst recommends more public discussion on the necessity of this position, scope of work and funding requirements before the Council approves any contract for this individual. For several reasons, we agree that additional public discussion is essential to this process.

Under existing City Charter provisions, neither the Mayor nor the City Council may contract for the services of an individual that would include such a broad delegation of authority.

The Mayor has the authority under City Charter section 28 to hire certain experts and consultants. Those individuals contract with the City and receive their duties and direction from the City. The Monitor described in the Kroll report is plainly not such an individual.

Although the City would pay for this individual's services, the report contemplates that an outside agency would set the duties of this official, not the City. No aspect of the City Charter provides the Mayor or the City Council with the authority to select a private individual and provide them with "unfettered" access and authority over City affairs.²

Monitors may be appointed to oversee the implementation of court-ordered remediation plans and given jurisdiction over certain affairs of a City in appropriately filed legal proceedings. Likewise, they may be included in certain administrative proceedings, "consent decrees" and the like. The City is in discussions with the Securities and Exchange Commission regarding securities related issues. It is not inconceivable that a "Monitor" will be a required element of the resolution of our efforts with that agency. In such case, the term of service, and the role, of the person serving as the City's Monitor will be tailored to the specifications of services deemed to be required by the SEC and that person will have authority under well established legal authority.

² City Charter section 40 gives broad authority to examine the affairs of the City to only one City Official, the City Attorney. It provides: "The City Attorney shall have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office, and . . . may demand and receive from any officer of the City any book, paper, documents, or evidence . . . required for the purpose of the office." The *Dadmun* and *Hubbard* cases provide that the City Council may not contract for the services of an individual and grant powers that conflict with the powers already given by the City Charter to a City Official. Accordingly, the appointment of an independent Monitor would require a Charter amendment.

Adopting the “Monitor” suggested in the Kroll Report is inconsistent with the grant of jurisdiction required by the City Charter. It also adds nothing to the resolution of the monitoring functions which may be required by the SEC, and may in fact conflict with that process.³

VI. Changes to the City Attorney as Attorney for the Retirement System.

The Kroll Report recommends that the City’s retirement system be free to retain its own independent counsel. Appendix M-12. San Diego Charter section 40 lists the duties it requires of the City Attorney. One of them is that “*The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof* in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney.” [Emphasis added]. San Diego Municipal Code section §22.1801(b) designates “the departments of the City of San Diego within the meaning of the Charter and ordinances of said City.” One of the City Departments is “City Retirement.” The City Retirement System is a City Department. It follows that the City Attorney is the System’s Attorney by City Charter mandate.

The City Attorney’s duty to provide legal services to the City has historically included providing services to the retirement system. However, this issue is currently the subject of litigation, and will ultimately be resolved in that forum. In the meantime, the suggested recommendation to permit this City Department to retain independent counsel conflicts with the plain language of Charter section 40. To transfer that duty to another person would require a change to the City Charter.

CONCLUSION

The recommendations in the Kroll Report involve complicated and interrelated changes to the City Charter and to many related portions of the San Diego Municipal Code. The changes will be more complex than the recent change to our trial Mayor-Council form of government.

The City needs to carefully consider the many ramifications. One of the most significant, for example, is whether these remediation measures should be enacted to coincide only with the duration of our Mayor-Council governance structure, due to expire in 2010.

³ Federal courts can utilize outside monitors to observe, examine and scrutinize public corporations, police departments, unions and even industries entering into comprehensive settlement agreements to avoid further prosecution for wrongdoing. These monitors are given specific direction and duties by the Court. To insure the monitor is fully independent of the entity which it is scrutinizing, the monitor is chosen, employed and subject to replacement only by the Court. The Court appointed monitor is required to provide the utmost of honesty and candor to the Court. Failure to do so could place the monitor itself in contempt. In the typical settlement or remediation agreement, the monitor is required to periodically report its findings to the Court.

This office has only begun to assess the legal ramifications of these recommendations in this initial and preliminary report. We expect there will be other remediation measures that may also require charter changes.

To avoid inadvertent implementation of the remediation measures in a manner precluded by law, we suggest the Council receive the Mayor's Report but take no immediate action on it as a whole. The Council should consider and ultimately decide which specific measures it wishes to move to implementation. Each such item will be the subject of prompt implementation advice from this office.

45678

⁴ All meetings of the Audit Committee, or any two of its members, also will be subject to all the provisions of California's open meeting law (the Ralph M. Brown Act) and the California Public Records Act.

⁵ This position was reiterated by the authors of the Kroll report in an article August 30, 2006 in the San Diego Union Tribune "An Opportunity to Move Forward." They stated: "The audit committee also sets the compensation and budget for the auditor, which should allow them to do their oversight without undue influence from any branch of government."

⁶ City Charter section 40 gives broad authority to examine the affairs of the City to only one City Official, the City Attorney. It provides: "The City Attorney shall have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office, and . . . may demand and receive from any officer of the City any book, paper, documents, or evidence . . . required for the purpose of the office." The *Dadmun* and *Hubbard* cases provide that the City Council may not contract for the services of an individual and grant powers that conflict with the powers already given by the City Charter to a City Official. Accordingly, the appointment of an independent Monitor would require a Charter amendment.

⁷ City Charter section 40 gives broad authority to examine the affairs of the City to only one City Official, the City Attorney. It provides: "The City Attorney shall have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office, and . . . may demand and receive from any officer of the City any book, paper, documents, or evidence . . . required for the purpose of the office." The *Dadmun* and *Hubbard* cases provide that the City Council may not contract for the services of an individual and grant powers that conflict with the powers already given by the City Charter to a City Official. Accordingly, the appointment of an independent Monitor would require a Charter amendment.

⁸⁵ Federal courts can utilize outside monitors to observe, examine and scrutinize public corporations, police departments, unions and even industries entering into comprehensive settlement agreements to avoid further prosecution for wrongdoing. These monitors are given specific direction and duties by the Court. To insure the monitor is fully independent of the entity which it is scrutinizing, the monitor is chosen, employed and subject to replacement only by the Court. The Court appointed monitor is required to provide the utmost of honesty and candor to the Court. Failure to do so could place the monitor itself in contempt.

In the typical settlement or remediation agreement, the monitor is required to periodically

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

-9-

September 1, 2006

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

MJA:JAK:jk
RC-2006-25

Attachment