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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

RESOLUTION OF INTENT ON MANAGED COMPETITION

INTRODUCTION

On October 9, 2006, the City Council will consider a "resolution of intent" stating that if Proposition C is approved by the voters, services provided by City police, fire and lifeguard safety service members will not be subject to Managed Competition. The resolution was proposed because Proposition C does not expressly exclude these safety service members. However, the intent of the Mayor and Council, as demonstrated by the representations made at the time the language of the ballot measure was approved by the Council, was that these safety service members not be included in Managed Competition. This proposed resolution will help clarify the intent of the Mayor and Council should Proposition C be approved by the voters on November 7, 2006.

DISCUSSION

I. Managed Competition Would Allow the City to Contract Out Services Traditionally Performed by Civil Service Employees.

The language of Proposition C was approved by the Council on March 27, 2006. The ballot measure will be submitted to voters in the November 7, 2006 election. The ballot question reads as follows:

**PROPOSITION C. AMENDS THE CITY CHARTER TO
ALLOW FOR CONTRACTING OUT OF CITY SERVICES**

Shall the Charter be amended to allow the City to contract services traditionally performed by City civil service employees if determined to be more economical and efficient while maintaining the quality of services and protecting the public interest?

If approved by voters, the measure would amend Article VIII, section 117 of the San Diego City Charter to permit the Mayor, with City Council approval, to contract with independent contractors to provide certain City services now performed by classified employees.

Questions have been raised about whether the ballot measure would allow the City to “contract out” services provided by police, fire and lifeguard safety service members. While this issue may ultimately need to be decided by the courts, this Office has concluded that Charter sections 57 and 58 arguably would prohibit the contracting out of these services.

II. The Charter Intent is that Police and Fire Services be Provided by Public Sector Employees.

Most large cities provide police and fire services through employees protected by civil service. Government functions commonly provided by cities include the maintenance of peace and order by providing a police force, and the maintenance of public safety by providing fire protection. 2A McQuillin Mun. Corp. § 9.05 (3rd ed. 2006). California charter cities also have express power under the California Constitution to provide police functions for their cities. Cal. Const. art. XI, § 5.

The City of San Diego has provided police and fire protection to its citizens since 1889. The San Diego City Charter makes special provisions for a Police Chief and Fire Chief who are given “all power and authority necessary for the operation and control” of their departments. See, Charter §§ 57 and 58. This broad grant of authority is also reflected in Charter section 28 which limits the City Manager’s power to transfer employees of the Police and Fire Departments or to direct the performance of work of those departments. See, Charter § 28.

Police and fire safety members are also unique and integral to the municipal services provided by the City. For example, Charter section 11.1 provides that in establishing salaries, the Council “shall give priority in the funding of municipal service to the need of the citizens for police protection. . . .” Further, police and fire safety service members historically have been provided more generous retirement, disability, and death benefits than general service employees. (See, for example, Charter section 141 that permits police officers, firefighters and full-time lifeguards to retire at age 50 with 20 years of service). City police officers are also peace officers and lifeguards are public officers, both with the powers of arrest. See, Cal. Pen. Code §§ 830.1 and 836.5; SDMC § 63.20.8.

While the City Charter and ordinances have provided unique benefits to the safety service members, California law has provided benefits to agencies that employ them. In particular, California Code of Civil Procedure section 1299 finds a statewide interest in protecting the health and welfare of the public by prohibiting strikes by police officers and firefighters. Section 1299 states in relevant part:

The Legislature hereby finds and declares that strikes taken by firefighters and law enforcement officers against public employers are a matter of statewide concern, are a predictable consequence of labor strife and poor morale that is often the outgrowth of sub-standard wages and benefits, and are not in the public interest. . . . It is the intent of the Legislature to protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the

opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers. Cal. Code of Civil Proc. § 1299.

Strikes by firefighters are also prohibited by Labor Code section 1692.

Given the City's historical perspective, the relevant Charter provisions, state laws dealing with police officers and firefighters and the need to provide protection to citizens, we conclude that the Charter intends that these services be provided by public sector employees.¹

III. The City Attorney has Previously Advised that the Charter Arguably Prohibits the Contracting Out of Police and Fire Services.

Prior to the Council's approval of the measure, the Mayor's representatives met with representatives of the City's labor unions. One of the questions that arose was whether police officers, firefighters and lifeguards would be subject to Managed Competition. In that regard, the Office of the City Attorney advised the Mayor of a 1997 opinion prepared by this Office on the legality of the City's Competition Program in light of a California Supreme Court decision in the case entitled *Professional Engineers in California Government v. Department of Transportation*, 15 Cal.4th 543 (1997). The memorandum noted that the Charter arguably prohibits the contracting out of police and fire services. In relevant part, the memorandum stated:

However, whether the public interest is protected by having the functions performed by government employees or private sector employees, is not easily determined by any bright line test. There are those who would argue that it is imperative for the City to retain the responsibility for performing certain functions, for example, police and fire services. Indeed, *the City Charter supports this interpretation by providing that the respective chiefs shall have supervision over the personnel of the department and all members of the departments shall be subject to the civil service provisions*. Similarly, the City Charter provides that subordinates of the City Auditor and Comptroller, and the City Attorney (except deputy city attorneys) be appointed under the auspices of the civil service provisions. City Att'y MOL No. 97-18, p. 6 (June 27, 1997).

The present City Attorney has considered the above conclusions and has advised the Mayor and City Council that he concurs.

The Police and Fire Departments are Charter-created departments. Charter §§ 57, 58.

¹ Charter section 26 allows "any function of the City" to be performed by the County of San Diego, and only the county, if authorized by the general law of the state of California and approved by both the City Council and County Board of Supervisors. This memorandum does not address whether Proposition C might impact the City's ability to transfer City functions to the County.

These departments are solely controlled by their Charter officers – the Police Chief and the Fire Chief – who are each vested with “all power and authority necessary for the operation and control” of their departments. Both sections provide that the Chiefs, with the approval of the City Manager (now the Mayor), “shall direct and supervise the personnel” of that department. Sections 57 and 58 further provide that police and fire personnel are subject to Civil Service regulation or provisions of the Charter.

These Charter sections, read as a whole, implicitly prohibit the “contracting out” of police and fire safety services to an independent contractor. To contract out such services would eviscerate the authority and powers granted to the Fire and Police chiefs by the Charter. The Charter vests the chiefs with “all power and authority necessary for the operation and control” of their departments. The Charter gives both chiefs full authority to “direct and supervise” the personnel of those departments. Contracting out such services also would render meaningless the references to “civil service” regulations applicable to Police and Fire safety employees and undermine the legislative intent of these sections.

There is no parallel Charter or Municipal Code section similarly empowering the lifeguard chief or creating protections for lifeguards from transfers or supervision by an outside contractor. However, lifeguard services are now part of the Fire and Life Safety Services Department, reporting to the Fire Chief. (See City Organization Chart, listing “Lifeguard Services” as an entity within the Fire and Life Safety Services Department). Further, lifeguards are classified as “safety members” under the City’s Retirement System.²

Because lifeguards are employees of the Fire Department, they are technically encompassed within Charter section 58, which states the Fire Chief “shall direct and supervise the personnel.” The Charter section, however, contemplates a chief with authority necessary to run a department to protect “the lives and property of the people of the City from fire.” Charter § 58. Again, the section predates any inclusion of lifeguards in the department. Despite this, the Charter’s clear intent is that the Mayor and Council not be allowed to interfere with the Fire Chief’s authority and duties. Although the Charter section has not been amended to include the lifeguard services within the Fire Department, the Charter has recognized full-time lifeguards as part of the safety services provided by the City. (See, Charter § 141). Accordingly, we interpret these sections together to mean that the services provided by full-time lifeguards recognized as safety service members and reporting to the Fire Chief also may not be contracted out to an independent contractor.

² Specifically, the lifeguard chief, lifeguards I, II and III, lifeguard sergeants and marine safety captains and lieutenants are classified as “safety” personnel for purposes of the Retirement System. San Diego Municipal Code section 24.0103 defines “safety” members to include all “full-time City lifeguard(s)” but not other employees of the lifeguard service.

IV. Discussions Related to Council Approval of the Ballot Measure on Managed Competition.

Prior to presenting the ballot measure for Council approval, the Mayor stated his intent that Managed Competition not apply to services performed by sworn members of the police, fire or lifeguard service. The Mayor's Report to City Council dated February 1, 2006 stated:

The proposed amendment [to the Charter] does not apply to work or services that the Charter, state or federal law requires to be performed by officers or employees of the city. It will not apply to services performed by sworn members of the police, fire, or life guard service where those can only be provided by sworn members as a matter of law. Mayor's Report, No. 06-017, p. 3 (Feb. 1, 2006).

On March 27, 2006, at a Council hearing on impasse and the Mayor's ballot measures, it was noted that the labor negotiators had requested that public safety members be excluded from the language in the ballot measure. A representative of the Mayor's Office told the Council, "We have already excluded by Charter the uniformed officers or sworn officers so any mention here of that would be redundant and could lead to confusing interpretations." (Video Archive of March 27, 2006 Council meeting at 02:12). Another representative told the Council, "the Mayor will not consider making public safety a protected class in the pension measure or really muddy up our managed competition measure with something that is already protected within the Charter." (Video Archive of March 27, 2006 Council meeting at 02:13). However, an attorney representing the Police Officers Association, told the City Council that the idea that "the Charter specifies that public safety, as an example, is excluded from any potential contracting out" was "never clarified to us in the bargaining process." (Video Archive of March 27, 2006 Council meeting at 02:18).

In response to these comments, the City Attorney noted that the provisions of Charter section 57 [Police Department] and 58 [Fire Department] provide that the chiefs, with the approval of the City Manager, shall direct and supervise the personnel, subject to civil service provisions or regulations. The City Attorney concluded that this language "means that essentially they have to be civil service and there is no contracting out." (Video Archive of March 27, 2006 Council meeting at 03:25).

At the conclusion of the hearing, the Council approved the measure without any language expressly prohibiting the contracting out of public safety services.

V. Court Challenge to the Ballot Argument.

In August 2006, ballot materials were submitted to the City Clerk and County Registrar of Voters. These materials include the ballot measure title and summary; the impartial analysis drafted by the City Attorney's Office; and signed ballot arguments for and against the measure.

In September 2006, the Superior Court heard a legal challenge to a ballot argument submitted against the measure. (See, *Paul Robinson v. Elizabeth Maland, San Diego City Clerk; Mikal Haas, San Diego County Registrar of Voters*, San Diego Superior Court, Case No. GCI 871925). In particular, the petitioners sought to delete or amend the statement:

Prop. C will put public safety at risk. Under Prop.C. there is no prohibition on contracting out police protection, fire protection and lifeguard services. These essential public safety services should not be managed by private companies who care more about their bottom line than our safety.

The court denied the petition, finding that the first sentence was a true statement because Proposition C does not contain a prohibition on contracting out police protection, fire protection and lifeguard services. The court also ruled that the second sentence was an opinion. Accordingly, the statements at issue were not false or misleading and no changes were required to be made to the ballot argument.

VI. The Rules Committee Meeting on September 20, 2006.

On September 20, 2006, the Mayor's staff provided an update to the Rules, Open Government, and Intergovernmental Relations Committee [Rules Committee] on the ordinance to implement Managed Competition, should Proposition C be approved. As part of the discussion, it was noted that Councilmember Tony Young requested in a September 19, 2006 memorandum to Council President Scott Peters that there be a full Council hearing on the issue of "privatizing law enforcement services with a recommendation that the Council exempt law enforcement services from being contracted out." The memorandum further stated:

As you know, Proposition C on the November ballot would allow the City to contract out services if they are determined to be more economical and efficient. It is unclear at this time as to whether or not Law Enforcement is exempt from contracting out their services to the private sector. We can not continue to erode the confidence and morale of the San Diego Police Department by having officers think that this Council supports outsourcing their jobs to the private sector.

After additional discussion, the Rules Committee directed the City Attorney to develop a resolution that expresses the intent of the City to exclude the possibility of subjecting the services of sworn personnel to Managed Competition if Proposition C should pass. The proposed resolution states:

BE IT RESOLVED, by the Council of the City of San Diego, that the City Council and Mayor hereby declare their intent that services provided by City police, fire, and lifeguard safety service members will not be subject to Managed Competition because it is not in the public interest to contract out these safety services to an independent contractor.

BE IT FURTHER RESOLVED, that if Proposition C is approved by the voters, the City Attorney will include language that reflects the above stated intent in any ordinance introduced to implement Managed Competition.

This Office is ready to assist the Council in making any revisions as may be necessary to appropriately state its intent.

CONCLUSION

Although the ballot measure that was approved by the Council does not expressly state that it prohibits the contracting out of police, fire and lifeguard safety member services, the record reflects the Mayor and City Council's intent that these services not be subject to Managed Competition. Moreover, this Office has advised since at least 1997 that Charter sections 57 and 58 arguably prohibit the contracting out of services performed by civil service employees of the Police and Fire Departments. The proposed resolution will help clarify the intent of the Mayor and Council that, should Proposition C be approved by the voters, services provided by City police, fire and lifeguard safety service members will not be subject to Managed Competition.

Respectfully submitted,

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