

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

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

Michael J. Aguirre
CITY ATTORNEY

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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

SUPPLEMENTAL REPORT REGARDING MEASURES TO AMEND THE CITY CHARTER

INTRODUCTION

On January 14, 2008, the City Council directed the City Attorney to prepare draft language for ballot measures to amend the City Charter and to submit to voters in June 2008. The Council discussed nine matters raised in a January 11, 2008 memorandum from Council President Scott Peters, Council President Pro Tem Jim Madaffer, and Councilmember Kevin Faulconer. The memorandum incorporated nine of eleven recommendations from the Final Report of the Charter Review Committee (CRC), with certain modifications.

The Council is scheduled to discuss the measures on February 4, 2008. We previously raised concerns about certain language proposed by the CRC in the City Attorney Report to Council RC-2008-1 (Jan. 14, 2007). This supplemental report includes the language this Office recommends be used to achieve the Council's goals. We recommend four measures that combine related matters in compliance with the Separate Vote Rule, and explain material changes from phrasing that had been suggested by the CRC or the Council.

DISCUSSION

I. Compliance with the Separate Vote Rule.

The City Council expressed a desire that the nine matters it discussed on January 14, 2008 be consolidated and presented to voters in two measures. Mindful of the Separate Vote Rule, however, this Office has concluded that the nine matters under consideration are better submitted to voters in four measures.

We recently explained the Separate Vote Rule is a limitation on a legislature's power to submit constitutional amendments to the voters. *See* City Att'y Rept. to Council RC 2007-17 (Nov. 2, 2007); *Californians for an Open Primary v. McPherson*, 38 Cal. 4th 735 (2006). The rule requires that all the proposed changes submitted in one measure must be "reasonably germane" to each other. "Germane" means "closely related" or "relevant." Webster's New Universal Unabridged Dictionary 767 (2nd ed. 1979).

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

The importance of complying with the Separate Vote Rule was explained by the Court in *McPherson*. Violations of the Rule can result in a pre-election court order that bars submission of the matter to the voters, or post-election invalidation of a measure improperly submitted to the voters in a single package. The lower court in *McPherson* had entertained a preelection challenge, and had then ordered that the two measures it found improperly joined be severed and presented to the voters separately. The California Supreme Court expressly disapproved the pre-election challenge remedy of bifurcation, holding that “bifurcation is not a remedy for violation of the separate-vote provision. . . .” *McPherson*, 38 Cal. 4th at 782. This means that if the City Council were to improperly combine measures, and that action was successfully challenged in court before the election, the combined measure could not be submitted to voters at all.

The Council has indicated a desire to act as expeditiously as possible to enact the charter changes that will permit greater financial responsibility and clarity in the roles of City financial officers. This Office advises a cautious approach to compliance with the Separate Vote Rule in order to avoid any delay in submitting those reforms to the voters.

The four measures this Office recommends are:

1. A measure to require the Council to place before voters on the June 2010 ballot a single measure to decide the permanency of Article XV, the creation of a ninth Council district, and an increase in the number of Council votes required to override a mayoral veto.
2. A measure that permits greater fiscal responsibility by creating a separate Office of the Independent Budget Analyst (IBA) to advise the City Council; separating responsibilities for the accounting and auditing functions of the City into two separate officers- a Chief Financial Officer (CFO) and City Auditor; creating an Audit Committee to oversee the City Auditor; and expressly requiring the City budget be balanced.
3. A measure to exempt the services provided by City police officers, firefighters and lifeguards from the Managed Competition process permitted by section 117.
4. A measure to change the way the salaries of elected officials are established.

II. Amending Charter Section 255 to require a vote on the permanency of a Mayor-Council form of government and related issues on the June 2010 ballot.

On January 14, 2008, the Council indicated that a ninth Council seat should be linked to the permanency of the Mayor-Council form of government, and the increase in the number of veto-override votes should be linked to the creation of that district. In June 2010, those and other changes related to the Mayor-Council form of government could be enacted in a single, although lengthy, measure.

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

The Council also suggested that Charter sections 28 and 270 be amended to clarify the role of the IBA, and to authorize creation of that Office even in the absence of Article XV. Instead, this Office suggests that a separate section be enacted in conjunction with the creation of other City fiscal officers. This would permit Council establishment of the IBA as a separate City office, setting out certain minimal qualifications and duties for the Office currently now found in section 270 and portions of the Municipal Code. (See below.)

III. Financial Responsibility Measure.

This measure includes sections designed to increase the City's financial responsibility, such as permitting the Council to establish an Office of the Independent Budget (IBA) to advise the Council; separating the City's accounting and auditing functions into two separate offices- a Chief Financial Officer (CFO) and City Auditor; creating an Audit Committee to oversee the City Auditor, independent of other City fiscal management; removing the need for Council confirmation of the City Treasurer; and expressly requiring the City budget be balanced.

A. Chief Financial Officer.

The establishment of this office involves amendment of section 39 to change the name of the Office of Auditor and Comptroller to the CFO and to transfer to this office the bulk of the Charter responsibilities previously held by the Auditor and Comptroller.

Related changes include adding the CFO (and IBA and new City Auditor) to the list of officers in the unclassified service by amending section 117 (a)(7); deleting section 265(b)(10) as duplicative; and modifying section 265 (b)(11) to remove references to section 39 and the Auditor and Comptroller for the duration of Article XV. This last change removes from the CFO the right of appeal upon dismissal formerly held by the Auditor and Comptroller. It is consistent with the new structure that separates the former single office into two offices, with the CFO under the authority of the City Manager (Mayor), and the City Auditor under the authority of the new Audit Committee and City Council.

This Office has replaced use of the title "Chief Financial Officers" suggested by the CRC in the sentence midway through section 39 with the more generic term "chief municipal fiscal officers" to ensure duties imposed on other municipal fiscal officers are imposed upon this City's CFO.

The CRC's proposed change to section 45 to remove the need for Council confirmation of the City Manager's (Mayor's) appointment of City Treasurer is included without change.

B. Audit Committee

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

This proposal adds section 39.1, creating an Audit Committee to oversee the City Auditor and audit functions of the City as suggested by the CRC. This version deletes the City Attorney as a member of the screening committee as the Council requested. It addresses legal concerns raised in our January 14, 2008 report by incorporating the following changes to the proposed section for the Council's consideration:

- To ensure the Council, not the screening committee, controls the appointment of the public members of the Audit Committee, the draft sets a suggested minimum number of five candidates as the pool from which the Council must select the three public members of the Audit Committee, and establishes that the City Council appoint the public members of the screening committee as follows: “The three (3) public members of the Audit Committee shall be appointed by the City Council from a pool of at least five (5) candidates to be recommended by a majority vote of a screening committee comprised of a member of the City Council, the Chief Financial Officer, the Independent Budget Analyst and two (2) outside financial experts appointed by the City Council.”
- This draft modifies the CRC's proposed language in section 39.1 to avoid conflict with section 39 as follows: “The Audit Committee shall have oversight responsibility regarding the City's ~~accounting~~, auditing, internal controls and any other financial or business practices required of this Committee by this Charter or City ordinance.”
- The CRC intended that the Council have the authority to impose additional duties and responsibilities upon the Audit Committee by ordinance, as proposed at page 78 of its final report. The proposed last sentence of the new section provided: “The Council shall specify the powers and duties of the Audit Committee.” Instead, we have included the following new language which more closely mirrors the intent of the CRC and avoids potential future conflicts. “The Council may specify additional responsibilities and duties of the Audit Committee by ordinance as necessary to carry into effect the provisions of this section.”
- As section 39.1 is phrased, the Audit Committee only recommends the Auditor's salary and budget, but does not set that salary or budget. Accordingly, we have deleted the legally unnecessary sentence from section 39.1 that provides: “~~This section shall not be subject to the provisions of section 11.1.~~”

C. City Auditor

This proposal adds section 39.2, creating the Office of City Auditor, and amends section 111 to clarify that responsibilities of the Auditor and Comptroller to annually audit the accounts of City Departments, and to investigate and audit the accounts of City officers who die, resign or are removed, are transferred to the City Auditor. The language proposed by the CRC regarding the termination of the City Auditor has been modified to reflect the Council's motion. The section 111 changes also permit the Audit Committee to audit the accounts of the City Auditor

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

upon his or her death, removal or resignation. The measure includes the Council request that the Auditor comply with Government Audit standards; other changes to section 39.2 to address the legal issues mentioned in our January 14, 2009 report; and provides the City Auditor with investigatory authority like that provided to the CFO.

Addressing the Council's request that the City Auditor have control over the appointment and dismissal of subordinates, we have provided the Auditor with appointing authority. Section 30 provides the Auditor with removal authority. In addition, we have amended section 117(a)(11) to include as unclassified employees of the City generically described staff of the City Auditor.

- This measure adds language to section 39.2 to provide investigatory authority to the City Auditor like that provided the CFO under section 82 as follows: “The City Auditor shall have access to, and authority to examine any and all records, documents, systems and files of the City and/or other property of any City department, office or agency, whether created by the Charter or otherwise. It is the duty of any officer, employee or agent of the City having control of such records to permit access to, and examination thereof, upon the request of the City Auditor or his or her authorized representative. It is also the duty of any such officer, employee or agent to fully cooperate with the City Auditor, and to make full disclosure of all pertinent information. The City Auditor may investigate any material claim of financial fraud, waste or impropriety within any City Department and for that purpose may summon before him any officer, agent or employee of the City, any claimant or other person, and examine him upon oath or affirmation relative thereto.”
- Upon the City Council's motion, the following modifications have been made to the CRC's recommended language for section 39.2:

The City Auditor shall be appointed by the City Manager, in consultation with the Audit Committee, and confirmed by the Council. The City Auditor shall be a certified public accountant or certified internal auditor. The City Auditor shall serve for a term of ten years. The City Auditor shall report to and be accountable to the Audit Committee. Upon the recommendation of the Audit Committee, the City Auditor may be removed for cause by a vote of ~~four-fifths~~ two-thirds of the members of the ~~Audit Committee~~ subject to the right of the City Auditor to appeal to the Council to overturn the ~~Audit Committee's~~ decision. Any such appeal must be filed with the City Clerk within 10 calendar days of receiving the notice of dismissal or termination from the ~~Audit Committee~~. The City Clerk shall thereafter cause the appeal to be docketed at a regular open meeting of the Council no later than 30 days after the appeal is filed with the Clerk. The Council may override the decision of the ~~Audit Committee~~ to remove the City Auditor by a vote of six members of the Council. The City Auditor shall be the appointing authority of all City personnel authorized in the department through the normal annual budget and appropriation process of the City, and subject to the Civil Service provisions of this Charter.

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

- For the reasons given in our January 14, 2008 report, we have deleted the legally irrelevant and misleading sentence at the end of the first paragraph in the CRC's proposed section 39.2 that provides: ~~“Nothing herein prevents the Council or the Audit Committee from meeting in closed session to discuss matters that are required by law to be discussed in closed session pursuant to State law.”~~
- Because these proposed sections do not involve setting compensation, enacting legislation, or setting City policy, they need not be exempted from section 11.1, and the sentences should be deleted in the CRC versions of proposed section 39.2 *and* amended section 111 that provide ~~“This section shall not be subject to the provisions of section 11.1.”~~
- The change to section 117(a)(11) would provide: “(11) Industrial Coordinator All assistants and deputies to the Independent Budget Analyst; all assistants and deputies to the City Auditor.”

D. Independent Budget Analyst

This measure adds new section 39.3 to the Charter that permits the Council to establish by ordinance a new City Office of Independent Budget Analyst independent of the permanency of Article XV. It is intended to supersede the decision in *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380 (1976). Section 39.3 clarifies the duties of the Office, and incorporates some eligibility requirements for the Office currently found in the Municipal Code. See SDMC § 22.23003. We recommend repeal of what would be a duplicative section 270(f) (and renumbering the rest of that section) in conjunction with the addition of section 39.3.

As with the City Auditor, the section gives the IBA appointing authority. Section 30 provides the IBA with removal authority. In addition, we have amended section 117(a)(11) to include as unclassified employees of the City generically described staff of the IBA. *See* report section III (D) above for language.

The new section 39.3 that we recommend provides:

Section 39.3. Independent Budget Analyst.

Notwithstanding any other provision of this Charter, the City Council shall have the right to establish by ordinance an Office of Independent Budget Analyst to be managed and controlled by the Independent Budget Analyst. The Office of the Independent Budget Analyst shall provide budgetary and policy analysis for the City Council. The Council shall appoint the Independent Budget Analyst, who shall serve at the pleasure of the Council and may be removed from office by the Council at any time. Any person serving as the Independent Budget Analyst shall have the professional qualifications of a college degree in finance, economics, business, or other relevant field of study or relevant professional certification. In addition, such appointee shall have

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

experience in the area of municipal finance or substantially similar equivalent experience. The Independent Budget Analyst shall be the appointing authority of all City personnel authorized in the department through the normal annual budget and appropriation process of the City, and subject to the Civil Service provisions of this Charter.

E. Balanced Budget

This measure also amends section 69 to require the City to enact a balanced budget and revised budgets throughout the fiscal year. In response to concerns raised in our January 14, 2008 report and Council's request, this version provides the Council with authority to adopt its alternatives to any proposed budgetary revisions submitted by the City Manager (Mayor). As we suggested in our January 14, 2008 report, the need for this change to the Charter is unclear in light of the section's existing language that requires the budget summary "to show the balanced relations between the total proposed expenditures and the total anticipated income and other means of financing the budget for the ensuing year," and other rules requiring municipal budgets be balanced.

However, if the amendment is to be submitted to the voters, we conclude it would be reasonably germane to the other changes proposed in *this* broad measure, which addresses a number of methods for the City to improve its fiscal responsibility. Council members suggested the change to section 69 could be joined with the measure changing how the salaries of elected officials are to be established. But that proposal (see below) removes Council discretion in setting such salaries and does not appear relevant to matters in this measure.

- We revise the suggested CRC language for section 69 to ensure the Council may adopt its alternates to any proposed revised budget as follows: "No longer than 60 days from the date of submittal by the Manager of said revised budget to the Council, the Council shall adopt the proposed revisions or it offer alternative revisions to ensure the budget is balanced."
- We also revise the final proposed new sentence of section 69 to include posting of any budget revisions as follows: "The City shall post copies of the budget and any revisions on appropriate electronic media, such as the internet, to allow the public full access to the document."

As phrased, there is still a question whether the process established with the changes to section 69 was intended to apply to *every* proposed modification of the budget or amendment to the appropriation ordinance, or only to major budget revisions that might impact a number of departments, such as a mid-year adjustment. Because the section uses words such as "revisions to the budget" and "revised budget," we may assume the intent of this new paragraph is to encompass significant budget revisions arising out of insufficient funding for the City's operations. It is unclear whether a court would agree with that assessment. We also note that use of the word "budget" in the proposed new paragraph implies any proposed budget revisions

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

would be subject to the “back and forth” provisions of the special veto process described in Charter section 290(b), for so long as Article XV is effective.

Last, if Council decides to submit the change to section 69 to the voters we also recommend section 290 (b)(2)(B) be amended to replace the reference to section 71 with section 69 as follows:

(2) If modified by the Council, the budget shall be returned to the Mayor as soon as practicable.

(A) The Mayor shall, within five business days of receipt either approve, veto, or modify any line item approved by the Council.

(B) The Council shall thereafter have five business days within which to override any vetoes or modifications made by the Mayor pursuant to section 290(b)(2)(A). Any item in the proposed budget that was vetoed or otherwise modified by the Mayor shall remain as vetoed or modified unless overridden by the vote of at least five members of the Council a two-thirds vote of the Council as set forth in Section 285. In voting to override the actions of the Mayor, the Council may adopt either an amount it had previously approved or an amount in between the amount originally approved by the Council and the amount approved by the Mayor, subject to the balanced budget requirements set forth in section ~~71~~69.

IV. Exemption from Managed Competition.

The Council has recommended the CRC’s proposal to ensure services provided by City employees who are members of the City’s safety retirement system are not subject to the Managed Competition process. The CRC’s proposal adds subsection (d) to section 117 and mirrors language found in the Municipal Code. *See* SDMC § 22.3702(b). Because only City *services* are subject to Managed Competition, we suggest changes to the proposed language to reflect that, and to amend section 117(c) to include the exemption. These modifications from those previously approved for the Municipal Code may possibly subject the proposal to “meet and confer” requirements. This proposed change is unrelated to any other proposed measure and must be submitted separately to the voters. Our January 14, 2008 report also notes the lack of legal necessity for this Charter amendment so long as the Municipal Code provides this exemption.

Our proposal to amend section 117(c) would add to it this language, showing the variance with the language proposed by the CRC: “The City services provided by Ppolice officers, firefighters, and lifeguards who participate in the City’s Safety Retirement System shall not be subject to Managed Competition.”

V. Setting the Salary of Elected Officials

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

On January 14, 2008, the Council indicated its desire to submit the CRC proposals that the future salaries of all elected officials be set by a reconstituted Salary Setting Commission. The Council suggested deletion of the requirement the Council adopt an ordinance, yet still subject the salaries to the referendum process. Our report of January 14, 2008 provides some background for the CRC's suggestions and proposed an additional amendment to section 280 that we have incorporated into this version of the measure for the Council's approval. *See City Att'y Report RC 2008-1 (January 14, 2008)*. In addition, we deleted the reference to the Mayor in section 12.1; set the appointment date for commission members in section 41.1 at March 1 to more easily accommodate section 12.1's reporting date of February 15; and retained the current requirement that the City Council, consistent with its budget approval authority, provide the necessary funding for the Commission instead of the City Manager as recommended by the CRC.

The Council's request to delete the requirement the Council adopt the ordinance setting the salaries the Commission sets for elected officials, yet retain the referendum process for the decision, is problematic. In pertinent part, the Charter reserves the referendum process *only* to "any ordinance passed by the Council." § 23. There is another section (5.1) that crafted a process that is subject to referendum without adoption of an ordinance. The CRC did not consider that process, and this Office has not had adequate time to study whether it could be a successful model for a salary setting process. Accordingly, the version of this measure submitted for approval retains the requirement Council adopt an ordinance. The measure's language gives the Council no discretion in the process. It *requires* the Council to adopt an ordinance establishing the salaries set by the Commission. It *delegates* the Council's entire authority and discretion in setting the salaries of elected officials, including their own, to this appointed Commission, exempting the process from the Charter limitations of section 11.1.

This measure does not appear to have the same urgency as the fiscal responsibility measure. A delay in submission of the matter would allow the Council and this Office to review alternatives that were not considered by the CRC related to a change in the process of setting the salaries of elected officials.

We have carefully considered the Council's request that this measure and the amendment to section 69 (requiring the City to propose a balanced budget) be submitted to the voters in a single measure. We do not see how changes requiring a balanced budget for the City are reasonably germane to changes delegating to an appointed body the Council's authority to set the salaries of elected officials. We conclude that submitting both items together would violate the Separate Vote Rule and recommend against such action.

CONCLUSION

January 29, 2008

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

We await further direction from the Council regarding these measures and are ready to answer related questions at the February 4, 2008 hearing.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

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RC-2008-3