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REPORT TO THE SALARY SETTING COMMISSION

**WHETHER NEWLY ELECTED COUNCILMEMBERS MAY RECEIVE A HIGHER
SALARY THAN THOSE ALREADY IN OFFICE**

INTRODUCTION

In a letter dated March 17, 2014, Robert Otilie, President of the Salary Setting Commission, asked whether there are any legal impediments to a Charter amendment that would increase the salary for only newly-elected Councilmembers. Individual Councilmembers in office at the time the matter is placed on the ballot, would not enjoy a salary increase, even if reelected to a new term. This would result in a salary disparity on the Council until all current Councilmembers leave office.

The exact terms of the proposed ballot measure have not been determined. This report discusses the issue of salary disparities in general. We can provide additional analysis when a specific proposal is available. For the purpose of this report, we consider a ballot measure that could potentially be on the ballot in November 2014.

DISCUSSION

San Diego City Councilmembers serve staggered terms. Council Districts 2, 4, 6, and 8 are scheduled for elections for a four-year term beginning in December 2014. Councilmembers for Districts 1, 3, 5, 7, and 9 will have new terms beginning in December 2016. Councilmembers are limited to two consecutive four-year terms as a Councilmember for any particular district. Charter § 12(f). The current Councilmembers are at various stages with respect to term limits. If Councilmembers are eligible and reelected for additional terms, the staggered salaries could continue for several years.

**I. STAGGERED SALARIES ARE ALLOWED WHEN NECESSARY TO RETAIN
RIGHTS VESTED DURING TERM OF OFFICE.**

In *Olson v. Cory*, 27 Cal. 3d 532 (1980), the California Supreme Court upheld a salary disparity among peer judges where to do otherwise would impair the vested rights of particular judges. In that situation, the state Legislature placed a cap on future cost-of-living increases for judicial salaries. The judges in office sued to retain the provisions providing unlimited cost-of-living increases previously granted by the state. The Court concluded that once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract

obligation. Impairing a granted increase in salary “goes to the heart of the employment contract and is therefore severe and permanent.” *Id.* at 539.

The Court explained that a judge entering office is deemed to do so in consideration of salary benefits then offered by the state for that office. Accordingly, if salary benefits are decreased by the Legislature during a judge’s term, or during the unexpired term of a predecessor judge, the judge is nevertheless entitled to the “contracted-for-benefits” during the remainder of such term. *Id.* at 538-539. *See also*, Cal. Const., art. I, § 9; 89 Op. Cal. Att’y Gen. 135 (2006).

On the other hand, a judge who completes a term during which he or she was entitled to unlimited cost-of-living increases and chooses to enter a new term, has impliedly agreed to be bound by salary benefits then offered by the state for the different term. *Olson*, 27 Cal. 3d at 540.

The proposed ballot measure is distinguishable in that it does not contemplate a decrease in salary during a current Councilmember’s term. However, the proposal would deny an increase in salary to current Councilmembers even if reelected to a new term of office. This is contrary to *Olson*, which recognized that promised compensation applies only during the term of office. Based on the *Olson* case, a court likely would conclude that Councilmembers elected to a new term of office would be entitled to the same salary provided to newly-elected Councilmembers.

II. STAGGERED TERMS DO NOT PREVENT COUNCILMEMBERS FROM RECEIVING A SALARY INCREASE MID-TERM WHEN ANOTHER COUNCILMEMBER BECOMES ELIGIBLE FOR AN INCREASE BY VIRTUE OF A NEW TERM OF OFFICE.

While the *Olson* case analyzed a decrease in salaries, state law provides guidance for an increase in council member salaries. Government Code section 36516.5 states: “[a] change in compensation does not apply to a council member during the council member’s term of office.” However, this principle does not apply to “prevent the adjustment of the compensation of all members of a council serving staggered terms whenever one or more members of the city council becomes eligible for a salary increase by virtue of the council member beginning a new term of office.” *Id.* That is, if one or more council members become eligible for an increase by virtue of a new term of office, all council members become eligible for the increase.

In general, compensation paid to officers and employees of a charter city is a municipal affair governed by the city’s charter. *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296 (1979). As to matters of statewide concern, charter cities remain subject to state law. *Id.* at 315-316. Although Government Code section 36516.5 arguably only applies to general law cities, a ballot measure that authorizes a mid-term salary increase similar to one authorized by state law likely would be upheld by a court.

CONCLUSION

Courts have concluded that new judges may receive a lower salary than currently serving judges that have higher vested salary benefits. However, those judges with vested benefits only receive that benefit until the end of their term. Upon choosing a new term of office, those judges would receive the same reduced salary as their peers. Accordingly, the term of office is a key factor in determining salary benefits.

The proposal to prevent current Councilmembers from ever enjoying a salary increase equal to that of their peers is a novel question. Compensation for a particular elected office usually is based on the office, not on the individual. The proposal contemplates a scenario in which an incumbent seeking reelection would receive a different salary than other individuals seeking the same office. Whether this would be an impairment of contractual or other rights is unclear. Unless there is justification for this difference, a court would likely conclude that Councilmembers reelected to a new term of office should receive the same salary as newly-elected Councilmembers. To avoid these legal issues, a proposal may be structured to provide an increase to all Councilmembers on a date certain in the future or as reelected to a new term of office.

Respectfully submitted,

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