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January 8, 2016

REPORT TO HONORABLE MAYOR AND CITY COUNCILMEMBERS

PROPOSED AMENDMENTS TO COUNCIL POLICY 600-33 – CITY COUNCIL DOCKET ITEM 332 ON JANUARY 12, 2016

On December 8, 2015, the San Diego City Council considered proposed amendments to Council Policy 600-33 “Community Notification and Input for City-wide Park Development Projects.” At that meeting, City staff and the Office of the City Attorney were asked to evaluate a “fast track” process proposed in a memorandum dated June 22, 2015, from Council President Pro Tem Emerald, Councilmember Alvarez, Councilmember Cate, and Councilmember Sherman. The “fast track” process proposed in that memorandum was designed to “allow an existing or new General Development Plan to be streamlined as quickly as possible” and “would be exercised solely on the request, by written memorandum, of the affected Councilmember.”

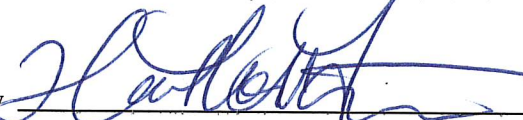
This Report is intended to provide the Councilmembers with the legal framework relevant to the proposed amendments to Council Policy 600-33 as provided in the San Diego City Charter and included in the attached Memorandum of Law and City Attorney Report. 2000 City Att’y MOL 151 (2000-1; Jan. 4, 2000); 2010 City Att’y Report 808 (2010-30; July 26, 2010). The Charter mandates a separation of powers between the Mayor as the executive branch and the Council as the legislative branch. *See* 2010 City Att’y Report 808 (2010-30; July 26, 2010). A “fast track” process that allows the City Council to mandate the administrative operations of the Park and Recreation Department with respect to the Department’s interactions with a Recreation Council, for example, would likely be inconsistent with this requirement.

The Charter also limits the ability of individual Councilmembers to act alone in an official capacity. *See* 2000 City Att’y MOL 151 (2000-1; Jan. 4, 2000). “A review of every provision and section of the Charter discloses not one provision that can be construed as authorizing any role by the Council in any role other than as a legislative body, acting in concert.” *Id.* at 2. A “fast track” process that allows an individual Councilmember to streamline public hearings for a park development project would likely be inconsistent with this requirement.

Both of the forgoing legal concepts are discussed at length in the attachments. This Office is available to analyze additional amendments to Council Policy 600-33, if desired.

JAN I. GOLDSMITH, CITY ATTORNEY

By



Heather M. Ferbert
Deputy City Attorney

HMF:nja:als

RC-2016-1

Doc. No. 1200711

Attachments: Report No. RC-2010-30 dated July 26, 2010

Memorandum of Law No. ML-2000-1

cc: David Graham, Deputy Chief Operating Officer
Herman Parker, Park and Recreation Department Director
Andrea Tevlin, Independent Budget Analyst

ATTACHMENTS

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Jan I. Goldsmith
CITY ATTORNEY

July 26, 2010

REVISED REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES

INTENDED MINIMUM STAFFING FOR FIRE ENGINES AND FIRE TRUCKS

INTRODUCTION

On June 30, 2010, the Public Safety and Neighborhood Services Committee (Committee) considered a proposed Council Policy to require staffing of four personnel on all San Diego Fire-Rescue fire engines and fire trucks and requested the Office of the City Attorney to review the proposed Council Policy and draft a resolution for City Council action.

Several issues were raised by staff as well as members of the Committee and directed to this Office for response. Specifically: (1) whether the promulgation of the proposed Council Policy was subject to the meet and confer requirement under the Meyers-Milias Brown Act (MMBA); (2) whether the proposed Council Policy would impermissibly interfere with the executive and administrative powers of the Mayor and Fire Chief as set forth in the San Diego City Charter; and (3) whether the proposed Council Policy, as drafted, could be read to mandate any reversal of the "brown out" present practice of the City, and, if so, whether that similarly interferes with the exclusive executive and administrative powers of the Mayor and Fire Chief as set forth in the Charter.

DISCUSSION

I. MEET AND CONFER

Ordinarily, staffing is a managerial decision and not subject to decisional bargaining. However, staffing level changes that affect employee safety are excepted and, thus, subject to meet and confer. *Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608, 618 (1974). Necessarily, staffing of fire engines and trucks could affect the safety of employees. As such, changes in these staffing levels would be subject to meet and confer. The proposed Council Policy mandating setting forth minimum levels of staffing on trucks and engines at four personnel does not,

however, result in a staffing change. Current organizational practice is to staff trucks and engines with four people.¹ As the proposed Council Policy does not result in a change of present staffing, there is no duty to meet and confer.²

II. POTENTIAL INTERFERENCE OF PROPOSED COUNCIL POLICY WITH EXECUTIVE AND ADMINISTRATIVE FUNCTIONS OF THE MAYOR AND FIRE CHIEF

The City Council or any standing committee thereof may originate draft Council Policy proposals for formal consideration by the City Council. Council Policy 000-01. The stated purpose for a Council Policy is "to guide the various functions of the City and, where necessary, to establish procedures by which functions are performed." *Background*, Council Policy 000-01.

The proposed Council Policy seemingly mandates, or minimally dictates, staffing levels of the Fire-Rescue Department, specifically the staffing of engines and trucks. This proposed mandate or dictate would violate the City Charter as usurping the exclusively executive function of the Mayor and Fire Chief. Therefore, the Council Policy as proposed would not be enforceable.

The Charter changes occasioned by the "Strong Mayor" form of government provide a separation of powers between the executive branch and the legislative branch, including a system of checks and balances. The Charter gives the Mayor broad administrative authority in planning the activities of the City government and for adjusting such activities to the finances available. Under this "Strong Mayor" form of government, all powers and duties of the previously appointed City Manager were transferred to the Mayor. San Diego Charter §§ 28 and 260. The Mayor is now the City's chief executive officer, and chief budget and administrative officer. San Diego Charter §§ 260 and 265. The Mayor holds all of the City's administrative power, and is solely responsible for the day-to-day operations of the City. San Diego Charter §§ 28, 260 and 265. "Administration" is defined as "1. The management or performance of the executive duties of a government, institution, or business. 2. In public law, the practical management and direction of the executive department and its agencies."³ "Chief Executive Officer" is defined as "[t]he highest-ranking executive in a company or organization, responsible for carrying out the policies of the board of directors on a day-to-day basis."⁴

¹ It was stated at the Committee meeting that the minimum four-person staffing level was set forth in the applicable MOU between the City and Local 145. Review of the presently governing MOU does not reveal such a provision. Rather, the MOU only provides for "two in/two out"-when two firefighters are inside a structure, two others will be outside the structure. San Diego City Fire Fighters, I.A.F.F. Local 145 Memorandum of Understanding, Article 37I (July 1, 2009-June 30, 2011).

² However, materials and reasonable notice were provided to Local 145.

³ Black's Law Dictionary (9th Ed. 2009).

⁴ See The American Heritage Dictionary of the English Language (4th Ed. 2000).

In addition to the Charter provisions vesting the Mayor with exclusive administrative functions and powers which would include general departmental staffing, the Charter provides that the Chief of the Fire-Rescue Department "shall have all power and authority necessary for the operation and control of the Fire Department and the protection of the lives and property of the people of the City from fire." San Diego Charter § 58. Additionally, "[t]he Chief of the Fire Department, with the approval of the City Manager, shall direct and supervise the personnel." San Diego Charter § 58. These specific provisions reinforce that the staffing of the Fire-Rescue Department is the administrative responsibility of the Fire Chief and Mayor, not the City Council.

The Charter-mandated separation of powers between the Mayor as the executive branch and the City Council as the legislative branch has been the subject of prior opinions by this Office. These opinions make clear that day-to-day operations of City departments are within the executive branch of government. In City Attorney Opinion 86-7 (November 26, 1986), this Office opined that engaging in contract negotiations, mediation, and resolution of disputes were administrative functions within the exclusive province of the City Manager (now Mayor). In City Attorney Opinion 86-2 (June 23, 1986), this Office opined that the specific allocation and utilization of personnel was within the exclusive province of the executive powers of the City Manager (now Mayor). In City Attorney Opinion 2007-1 (April 6, 2007), this Office opined that direction of day-to-day operations and all administrative matters of the City are exclusively the responsibility of and within the Charter-provided powers of the Strong Mayor.

Although the City Council may not, through a Council Policy, mandate or dictate the administrative operations of a City department, it can nonetheless make its intent and desire clear through one. An example of such accompanies this report.

Further, the City Council can commit to providing, through the budgetary process, resources for staffing to a level consistent with its stated intent.

III. LANGUAGE OF PROPOSED COUNCIL POLICY

A question has also arisen regarding the actual language of the Council Policy and specifically whether that language mandates or otherwise interferes with the "brown outs" of various fire stations.

In several sentences, the proposed Council Policy sets forth language that can be construed as referring to, and expressing dissatisfaction of, the "brown outs."⁵ Inclusion of this language in the proposed Council Policy would not create a legal mandate for the reasons set forth above – that the administrative operations of the Fire-Rescue Department are within the exclusive authority of the Mayor and Fire Chief.

⁵ This Committee previously addressed the issue of "brown outs" on June 30, 2010, as a separate item.

CONCLUSION

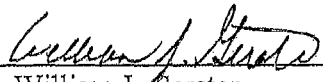
In sum, the promulgation of a Council Policy regarding the staffing of Fire-Rescue engines and trucks with four personnel would not trigger the meet and confer requirement under the MMBA since it would not result in a change in current staffing levels.

The proposed Council Policy cannot be read as a mandate of staffing Fire-Rescue trucks and engines with four personnel as it would violate the Charter by interfering with the executive branch of the City.

While the City Council cannot mandate the staffing, it may state its desire and intent regarding same. In that vein, an alternative proposed Council Policy accompanies this report.

Additionally, the City Council, in the exercise of its legislative and appropriations function, can provide for the funding and resources necessary to facilitate its stated intent of the staffing of Fire-Rescue trucks and engines with four personnel.

JAN I. GOLDSMITH, City Attorney

By 
William J. Gersten
Deputy City Attorney

WJG:ccm
Attachments
RC-2010-30

**CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY**

SUBJECT: INTENDED MINIMUM STAFFING FOR FIRE ENGINES AND
FIRE TRUCKS
POLICY NO.: 500-09
EFFECTIVE DATE: JULY 23, 2010

BACKGROUND

As of June 30, 2010, the City of San Diego has forty-seven (47) fire engines and twelve (12) fire trucks. Presently, it is the City policy to staff each fire engine and truck with four personnel, which is consistent with professional standards within the firefighting industry.

PURPOSE

This policy is intended to reflect Council's desire that the City continue to staff all fire engines and trucks in a manner which is consistent with the professional standards within the firefighting industry, subject to future modification as permitted by the San Diego Charter, including but not limited to, sections 28 and 58, and applicable ordinances and resolutions.

POLICY

The City Council is committed to providing reasonable public safety throughout the City of San Diego. Through the budgetary process, the City Council is also committed to providing resources and staffing to strive for appropriate and timely emergency response by the San Diego Fire-Rescue Department. Given the City's present environment of continued development of dwelling units and associated population increases, it is the Council's desire to ensure the provision of resources necessary to facilitate the staffing consistent with the professional standards within the firefighting industry. The Council desires that all future budgets submitted by the Mayor take into account such staffing.

This policy is not intended to create a legal duty where one does not exist.

OPINION NUMBER 86-7

DATE: November 26, 1986

SUBJECT: City Council; Its Role in City
Government

REQUESTED BY: Mayor Maureen O'Connor

PREPARED BY: John W. Witt, City Attorney
C. M. Fitzpatrick, Assistant City Attorney

QUESTION PRESENTED

What role, if any, does the City Charter provide for the City Council in the administrative affairs of the City including, but not limited to, the negotiation of contracts, participation in mediation and the resolution of disputes?

CONCLUSION

The City Charter makes absolutely no provision for any role for the City Council in the administrative affairs of the City, including, but not limited to, the negotiation of contracts, participation in mediation and the resolution of disputes. The City Charter provides that the City Council, including the Mayor, is the legislative body of the City. The City Charter places the sole responsibility for administering the affairs of the City in the City Manager and certain other officers of the City and specifically prohibits individual members of the Council with interfering with the administrative service on penalty of removal from office.

BACKGROUND

On September 9, 1986 you sent us a memorandum indicating that your office had recently received several inquiries regarding the relationship between the City Council and the City Manager. You stated that there seemed to be a perception from the public that the members of the City Council and the City Manager's office were not working together in the manner prescribed by law.

You cited as matters about which you had received public inquiry and comment, certain incidents in the recent past such as

an individual Councilperson calling publicly for the dismissal of particular employees who work directly under the City Manager's supervision; and an individual Councilperson negotiating directly with private sector parties concerning the contractual resolution of a delicate and environmentally sensitive project.

You pointed out the provisions of City Charter section 28 providing that the Manager's duty is to supervise the administration of the City's affairs, calling our attention to

the broadness of that charge. You alluded to the potential for confusion and serious consequences in the absence of definitive guidelines and you requested our views with respect to the issue.

ANALYSIS

It seems to us that the Charter of The City of San Diego is abundantly clear on the question of the respective roles of the members of the City Council, including the Mayor, and the City Manager and we are pleased to furnish you with our analysis and views on this subject. As recently as June 23, 1986 we had occasion to opine to the Deputy Mayor and Council with respect to the role of the Council in its adoption of the annual budget and appropriation ordinance (Opinion No. 86-2) and this analysis will incorporate and refer at times to that opinion for continuity.

(A copy of City Attorney Opinion No. 86-2 is attached as Enclosure (1)).

The City Council-City Charter Provisions

The Charter of The City of San Diego contains several references concerning the appropriate role of the members of the City Council. Section 11 of the Charter provides, in pertinent part, that all legislative powers of the City shall be vested, subject to the terms of the Charter and of the State Constitution, in the Council. Section 12 states very clearly that the Council shall be composed of nine (9) Council members, including the Mayor; that it shall be the legislative body of the City; that each of the members, including the Mayor, shall have the right to vote upon all questions before it and the duty to attend all Council meetings. Section 13 provides that all legislative action shall be by ordinance or as otherwise provided by the State Constitution or State law.

A review of every provision and section of the Charter discloses not one provision that can be construed as authorizing any role by the Council in any role other than as a legislative body, acting in concert. For example, Section 15 provides that a majority of the members elected shall constitute a quorum to do

business and that the affirmative vote of a majority of the members elected is necessary for passage of any ordinance, resolution, order or vote.

The City Manager-City Charter Provisions

By the same token, we submit to you that the Charter of The City of San Diego is abundantly clear as to the appropriate role of the City Manager as it pertains to the affairs of this City. Section 27 provides that the City Manager shall be elected by the City Council and that he shall be the chief administrative officer of the City, serving at the pleasure of the Council.

Section 28 states that the City Manager shall supervise the administration of the affairs of the City except as otherwise specifically provided in this Charter.

It continues by providing that all other administrative powers conferred by State law shall be exercised by the Manager and his designated representatives. Section 29 requires the City Manager to properly administer all the affairs¹ of the City placed in his charge and be responsible to the City Council for the conduct of those affairs. As alluded to earlier in this opinion, our views with respect to the mutual responsibilities of the City Council and Manager with respect to budget preparation and approval and its relationship to the administration of the City is more fully set out in Enclosure (1), and we respectfully refer you to it for further analysis in this regard. How we view the City Council-City Manager relationship on an ongoing basis.

Having indicated to you what the Charter says so explicitly on this subject, one could suggest that this opinion need not go further in exploring the question, but we recognize that in this vibrant and growing community, with its environment of challenges and change, problems and opportunities arise almost daily which tend to test the clear dichotomy which we believe that the Charter describes. So we will spend a few moments examining the appropriate legislative role as we view it, especially with regard to the proper role, if any, in contract negotiation and dispute mediation and resolution.

¹ The Charter places certain other administrative functions in the hands of the City Purchasing Agent, (Section 35); the Personnel Director, (Sections 37 and 116); the City Clerk, (Section 38); the Auditor and Comptroller, (Section 39); the City Attorney, (Section 40); Funds and Planning Commissions, (Section 41); the Treasurer, (Section 45); the Chief of Police, (Section 57); the Fire Chief, (Section 58); the Civil Service Commission, (Sections 41 and 115); the Retirement Board, (Section 144).

As we emphasized in Opinion No. 86-2 a City Charter is an instrument of limitations on the exercise of powers by the municipality and its officers *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 212 P.2d 849 (1949). In other words, it is the governing rule under which this City should and must conduct its affairs. It has been analogized as a sort of municipal constitution by some writers and indeed it seems to us to fall into that category.

This being the case and the Charter being clear on the exclusively legislative role of the City Council, what does this

tell us? The legislative power and role was very early in California described as being the power to make, alter and repeal laws. *People v. Seymour*, 16 Cal. 332 (1860). With reference to our general law cities, the State legislature says only that the legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States. (Title 4, division 3, chapter 3, section 37100, California Government Code).

At this point one might ask, then, what possible connection could the legislative role have with the administrative role in contract negotiation? Let's look at that example for a moment. On the administrative side (role of City Manager and his staff), the terms and conditions of a contract are negotiated between the parties with the City represented by the City Manager's representative assisted by the attorney. These terms and conditions are then memorialized in writing; the document is executed by the other party and subsequently presented to the City Council, (possibly through a standing committee of the Council) for the purpose of legislative action, i.e., an ordinance (or resolution) authorizing its execution by the City Manager. At this time the terms and conditions of the proposed agreement are explained to the members of the Council (Committee). If a member of the legislative body does not believe the terms and conditions are appropriate under the circumstances or in the best interests of the City, he or she will urge for a revision or defeat of the measure. Is this improper "negotiation"? Of course not. It is a true part of the legislative process. If the councilmember can convince a majority of the Council to the wisdom of his/her views, direction by the majority of the Council to amend the terms can be given or the proposed agreement rejected in its entirety.

However, what if the legislator-Councilmember says, in effect, bring that document and the other contracting party to me and I'll restructure the terms and conditions to meet my concerns, etc. Is this improper? We think it is. This is not the role of the legislator.

What if a councilmember decides that in order to avoid what he/she perceives to be an erroneous approach by the City Manager in his negotiations, that he/she should participate directly in the negotiations to avoid this perceived error? We think this clearly is improper and would constitute a violation of Section 28.

However, there have been rare occasions where members of the City Council did participate in the negotiating process. In 1980

at the request of the (then) City Manager, Ray Blair, two sitting members of the City Council did participate in negotiating sessions with the City Manager, the City Attorney and their staffs and representatives of the San Diego Padres. On that occasion the participation was (i) requested by the Manager and (ii) duly authorized by the City Council. The lengthy negotiations led to an amended agreement with the Padres which resolved some quarrelsome issues which had been unresolved for some time (use of Director's Box, etc.) and fostered a new and more wholesome relationship with that organization. Thus, this extraordinary effort resulted in a benefit to the City, but it should be noted that the legislator participation was requested by the Manager and duly authorized by the City Council. In 1970 similar requested and duly authorized participation by the (then) Mayor, Frank Curran, eventually resulted in new gas and electric franchises with San Diego Gas and Electric Company.

What about your other example, participation in mediation and resolution of disputes? Again we believe the appropriate and correct legislative role is to participate by the collective action of the City Council in agreeing with (or disagreeing with) a City Manager recommended resolution. However, again there have been times when, at the request of the City Manager and the concurrence of a majority of the City Council, the participation in the mediation and settlement of a dispute has occurred. Most recently the City Council authorized (then) Mayor Roger Hedgecock and Councilmember Bill Cleator to participate in the attempts to settle long-pending litigation with San Diego Gas and Electric Company regarding the status of a parcel of company-owned property in Sorrento Valley. We think it is fair to say that their roles (especially that of Mr. Cleator) were significant in arriving at an equitable solution to that thorny issue. Thus, again, there was a departure from the traditional legislative role which resulted in a major benefit to this City and its citizens. How do we gainsay that? But again, there was a direct request by the Manager and the City Attorney and concurrence by the City Council.

These rare exceptions are cited to reflect the need for some flexibility in these areas. But they are definitely exceptions to the rule and should remain so.

From time to time, the view is expressed that the Charter, having been adopted substantially in its present form 55 years ago, is seriously out of date, particularly with respect to the strict separation of administrative and legislative powers it imposes. Particularly it is argued that Councilmembers must act

in areas traditionally viewed as administrative because their failure to do so somehow renders City government less "respon-sive" to its citizens. In other words, critics urge that Councilmembers must be active in the operational affairs of the City, particularly as those affairs impact their respective districts, serving as the point of contact for private citizens seeking municipal action and directing administrative services when necessary to obtain the desired action.

The legislative administration the critics suggest looks suspiciously like the form of municipal government which prevails in large American eastern cities where administrative decisions are typically made for political reasons, rather than as matters of sound management. While sound management and political motivation may often coincide, such a system operates most favorably in behalf of political supporters of legislators and most unfavorably both to opponents and to the large segment of the public which, for lack of power, is neutralized by such a system.

The framers of the 1931 Charter were well aware of this argument. Agreeing with the best thinkers in the discipline of public administration at the time, they rejected a form of government in which the legislative body controlled administrative activity, choosing instead the popular and efficient council-manager form enjoyed by San Diego for the past 55 years.

Despite occasional charges of managerial aloofness and lack of popular response, the City has been served well by competent professional administration and a legislative body strictly limited to a legislative role. The people of San Diego apparently agree, since every time amendments have been proposed to alter the Council-Manager relationship significantly, they have been soundly rejected by the voters, most recently in the major changes proposed in 1973 by the Charter Review Commission chaired by (now) Justice Edward T. Butler.

Admittedly, over the past 13 years, the demarcation line between administrative and legislative functions has become increasingly blurred. A more aggressive legislative body pitted against a less assertive administrative authority has resulted in the gradual usurpation by the former of some of the duties of the latter. The administrative/legislative distinction raises natural confrontations on two levels, legal and political. Should the City Manager, as chief administrative officer of the City challenge this usurpation as a matter of law, there is little doubt, in our view, who would win the legal

confrontation. But there is also little doubt who would win the political confrontation which would follow. For this reason and at this particular time, we think your inquiry and our opportunity to respond in this vein is well-timed. We trust our response here will be carefully considered by the Mayor and Council and acted upon accordingly.

CONCLUSION

In conclusion, then, we are of the view that there is no role for individual councilmembers in the administrative affairs of this City. The framers of our Charter intended a clear distinction between the necessarily political legislative arm of City government and the administrative arm. Absent a Charter amendment, we strongly advise that the distinction be strictly observed.

Respectfully submitted,
JOHN W. WITT
City Attorney

CMF:js:012(x043)
Enclosure (Opn. No. 86-2)
LO-86-7

DATE: June 23, 1986

SUBJECT: Authority of City Council in
Administrative Matters

REQUESTED BY: Deputy Mayor and Council

PREPARED BY: C. M. Fitzpatrick, Assistant City
Attorney and Jack Katz, Chief Deputy

QUESTION PRESENTED

May the City Council adopt an annual appropriation ordinance which mandates a particular number of personnel to be utilized for any particular program under any and all circumstances and precludes the use of those personnel for any other purpose?

CONCLUSION

No. The City Council may not adopt an annual appropriation ordinance which mandates a particular number of personnel to be utilized for any particular program under any and all circumstances and precludes the use of those personnel for any other purpose because such mandate would violate the City Manager's administrative authority under the City Charter.

BACKGROUND

On June 2, 1986, the Council Committee of the Whole conducted a review of the Police Department's proposed budget for fiscal year 1987. During that hearing, an issue arose concerning the appropriate role and authority of the City Council as it may relate to the specific allocation and utilization of City personnel. Thus, we view the issue as whether the City Council may adopt an annual appropriation ordinance which specifically mandates the use of a particular number of people to a particular program. At the time we orally expressed our reservations about the legal propriety of such an action. You asked us to express our views in writing. Our reservations remain as indicated above. Our rationale follows.

City of San Diego - Authority for Legal Existence

The City of San Diego is a municipal corporation organized and established pursuant to the then-existing article XI, section 8 of the Constitution of the State of California. The organic statutory authority for the City is set forth in its Charter, approved by the voters on April 7, 1931, and thereafter approved by Senate Concurrent Resolution No. 34, dated April 15, 1931 and filed with the Secretary of State on April 24, 1931. The City is still governed by that 1931 Charter, albeit amended on many occasions.

Charter - Historical Perspective and Development

Source: Report of the Citizens Charter Review Committee, August 1962 (herein referred to as "Chernoff report"); City Manager Government in San Diego; Public Administration Service 1939

A close examination of the history of applicable sections of the City Charter is necessary in our analysis of the question presented.

San Diego was granted its first Charter by the California Legislature in 1850. It lasted only two years and was revoked by the Legislature. San Diego then reverted to a "town" form of government, with a three-member Board of Trustees in charge, that number increasing to five by 1872. In 1872, conditions once again appeared favorable for "cityhood" and a Charter was provided by special act of the Legislature to provide a basis for local government. This municipal authority existed for seventeen years.

In 1889, the City drafted and adopted a freeholders charter, pursuant to provisions of the California Constitution, which provided the framework for municipal government until adoption of the existing (1931) Charter. The 1889 enactment provided for a bicameral Council elected by wards. In 1905, the Charter was amended to provide for a unicameral Council, again elected by wards.

During this period of time, there grew in popularity across the nation the concept of a "commission" plan for local government. San Diego was so enthused with that concept that its 1889 Charter was amended in 1909 to accommodate the commission plan, with five commissioners elected at large. The operation of government under that scheme shortly fell from favor and, in 1915, the Charter was once again amended to provide for what was

loosely referred to as a "Mayor-Council" form of government. That form of government in San Diego existed from 1915 to 1931. Five Councilmen and a Mayor were elected at large and the Mayor was president of the Council but had no vote. The Mayor had veto power and was designated as the Chief Executive Officer.

Though the Mayor's office was designed to be a "strong Mayor" operation, his power over administration was extremely restricted. The Council, through its designated powers, was able to effectively take from the Mayor most of the administrative operations. The Charter called the Mayor the Chief Executive and gave him the responsibility of supervising the departments, yet it did not give him enough authority to do so effectively.

The operation of the City and frequent internal power struggles convinced the Mayor and Council that a new Charter was

needed. More important, the community was very much in favor of immediate action. A complete narration of the troubles and problems that beset City government and the City in general in those days may be found in the "City Manager Government in San Diego" written by Stone, Price and Stone and published by the Public Administration Service, 1939, cited above as source material.

A fifteen-member Board of Freeholders was elected in 1929 and it drafted a brand new Charter. This new Charter proposal encompassed the concept of a "City Manager" in a "Council-Manager" form of government. History tells us that various vested interest factions that produced most of the dissatisfaction with the status quo prior to 1929 banded together to defeat the 1929 Charter proposal because of its radical new concepts and dilution of their authority.

The dissatisfaction of and with San Diego government did not diminish. The internal power struggles and bickering continued. The groups that opposed the 1929 proposal came forward to offer support in drafting another new Charter. Thereafter, a new Board of Freeholders was elected and it drafted a Charter with significant changes as a compromise measure to the 1929 document. The Mayor was to be elected separately and be a member of the Council. The City Attorney was to be elected separately, as well. The "Council-Manager" form of government was retained and reinforced. With the various other modifications as proposed, the 1931 Charter was overwhelmingly approved by the voters.

Referred to as the City Manager Charter, it was the result of four years of effort. The following observations provided an

insight into the legislative history as contemporaneously perceived:

The City adopted the Charter of 1931 by a vote of more than four to one, with no groups or sections of importance holding out against it. ... The mistakes made in the former proposal have been corrected, said the ¶San Diegoσ Union, and the new Charter "offers the City a clear-cut manager form of government, a fair system of representation, and a unified scheme of things. ¶Emphasis added.σ City Manager Government in San Diego, supra at p. 26.

The City Manager was given full administrative authority to manage the departments, subject to the control of the

Civil Service Commission over the appointment and removal of employees except the heads of departments. ... ¶Emphasis added.σ

Id., at p. 26.

History tells us that the first few years of the City Manager form of government in San Diego were somewhat unsteady due to the residual influence of the preexisting vested interests and the general overall state of the nation's economy. Recognizing the need to get on with the business of effective government, a group of civic leaders organized the Civic Affairs Conference and, through community persuasion and political advocacy, breathed new life into the City Manager concept of operation. By 1935, the governmental climate in San Diego was such as to permit the City Manager to effectively perform as the Chief Executive and Administrative Officer, with the attendant powers and duties called forth in the 1931 Charter.

A 1953 revision to the Charter removed a number of Charter imposed administrative constraints upon the Manager with respect to certain operating divisions and in effect gave him plenary administrative authority over those divisions and their structure.

In 1961, the City Council caused the formation of a Citizens Charter Review Committee for purposes of studying the City Charter. This committee (commonly referred to as the "Chernoff

Committee" for its chairman, Howard Chernoff) spent approximately one year in hearings and review of our Charter. Its report in August 1962 commenced its recommendations with the following:

1. Retain the Council-Manager form of government.

Implementing that recommendation, the Charter Review Committee proposed among other things, several Charter changes which relate to the issue at hand. They proposed:

- (a) That the City Manager no longer be referred to as "Chief Executive and Administrative Officer" of the City, but as Chief Administrative Officer. (Voter approval in September 1963.)
- (b) That the City Manager no longer be directed in detail as to the form of his proposed budget, but simply be required to furnish necessary detailed information. (Voter approval in November 1962.)
- (c) That the City Council would no longer be restricted to a reduction or elimination of

items in the City Manager's proposed budget, but could reduce, eliminate or increase any item in its adoption of the annual appropriation ordinance. (Voter approval in November 1962.)

- (d) That the Chief of Police and Fire Chief, acting under the City Manager, would have all power and authority necessary for the operation and control of their respective departments, including the direct right and authority with respect to all personnel matters. (Voter approval in September 1963.)

In November 1973, another substantive Charter proposal was presented to the voters as a proposed amendment to the form of government in San Diego. That proposal was so drawn as to significantly strengthen the office of Mayor and effectively change the form of government to strong Mayor-Council. It would have authorized the Council to appoint a Legislative Analyst to independently scrutinize the Manager's budget proposals and, in effect, dilute most of the Manager's administrative powers. Proposition B was defeated by the voters by a 62% to 38% margin. One can only infer that the citizens of San Diego in 1973 were not ready to change their City Manager form of government.

ANALYSIS

With this historical background, we will now examine the applicable sections of the 1931 Charter, as amended, to analyze and address the issue presented.

City Council

The City Council:

* Is the legislative body of the City, vested with all legislative powers subject to the terms of the Charter. ¶Charter section 11σ. It is solely and exclusively empowered to enact all ordinances and resolutions ¶Charter sections 15, 16 and 17σ and shall determine its own rules and order of business ¶Charter section 14σ.

* Elects the City Manager and the City Manager serves at the pleasure of the Council. ¶Charter section 27.σ No Councilmember may, however, interfere with the administrative service which is vested with the Manager. ¶Charter section 22.σ

* Is solely responsible for enacting an appropriation ordinance to provide the necessary funds for the operation of the City ¶Charter section 71σ and

has the power to fix the salaries of those specified officers under its jurisdiction ¶Charter section 70σ.

Numerous other powers of a legislative nature are vested by the Charter in the City Council, generally relating to funding and imposition of taxes; however, the recitation of those powers are not germane to this analysis.

City Manager

The City Manager is the chief administrative officer of The City of San Diego ¶Charter section 27σ and shall be responsible to the Council for the proper administration of all affairs of the Council placed in his ¶or herσ charge. ¶Charter section 28σ. He ¶or sheσ is empowered to supervise the administration of the affairs of the City, keep the Council advised of the financial condition and future needs of the City, prepare and submit the annual budget estimate and, except as otherwise provided in the

Charter, exercise all other administrative powers conferred by the laws of the State upon any municipal official. The Manager is also designated as the Chief Budget Officer of the City and is responsible for planning activities of the City and adjusting such activities to the finances available. ¶Charter section 28σ.

Addressing one specific Charter-granted power of the Manager which is part of the underlying question at issue, i.e., the authority of the Manager ¶or Department headσ to transfer individuals, section 28 of the Charter provides:

In order to expedite the work of any department or to adequately administer an increase in the duties which may devolve on any Department or to cope with periodic or seasonal changes, the Manager, subject to Civil Service regulations is empowered to transfer employees temporarily from one Department to perform similar duties in another Department. Likewise each Department head shall have power to transfer employees from one Division to another within his Department. ¶Emphasis added.σ

Charter section 28.

Annual Appropriation Ordinance

In addition to its other legislative responsibilities in a home rule city, the process associated with and the enactment of an annual appropriation ordinance to finance the operation of the City is probably the most important duty of the City Council. Granted, the Charter provides for an automatic reappropriation for the new fiscal year, at the same level as the prior year, if

the Council fails to act ¶see Charter section 71aσ. Despite that "plugging the gap" proviso, the approval of the annual budget by enacting annual appropriations ordinance is one of the primary actions vested with Council.

The Manager is directed to prepare and submit to Council a proposed budget for the ensuing year ¶Charter section 69σ and upon receipt of the Manager's estimate, the Council is required to prepare an appropriation ordinance using such estimate as a basis. The form, arrangement and itemization of the appropriation ordinance shall be determined and prescribed by the Auditor and Comptroller and City Attorney. ¶See Charter section

71σ. The Council may reduce or eliminate any item, increase any amount or add any new item for personal services, contractual services, materials, supplies and equipment for any Department. Id.

The annual budget documents ¶as opposed to the annual appropriation ordinanceσ have been so arranged as to show the detail of activities which are authorized as a sum total in the appropriation ordinance. This methodology of display is commonly called a program budget. The programs ¶as approved by Councilσ represent the purpose and intent of the allocation of dollars and people. It is a projected blueprint of operation of the City for the forthcoming year. It is the financial and logistical vehicle which the City Manager uses to administer the affairs of the City.

Reconciliation of Charter Provisions and Summary

The preceding discussion was provided to identify seemingly competing Charter provisions and responsibilities. The historical perspective is intended to reveal what the legal structure of government in San Diego really is (as opposed to the informal process which has gradually evolved) and to illuminate the respective powers of the City Council (as a policymaking body) and the City Manager (as the Chief Administrator).

We confine our analysis and any conclusion drawn therefrom narrowly to the issue of the Council's authority to direct the City Manager in respect to allocation and placement of personnel and the specificity of any adopted appropriation ordinance.

To begin with, we observe that several important sections of the Charter would seem to be at odds with each other. Those sections have been referred to in the above discussion. The resolution, therefore, draws heavily upon historical perspectives which reveal the intent of the framers of the existing Charter and the voters thereon, and the changes (and attempted changes) since 1931.

The City Council is the legislative body of The City of San Diego, endowed with all powers necessary, subject to the terms of the Charter, to perform as such. California case law is clear that a City Charter is construed as an instrument of limitation on the exercise of powers by the municipality and its officers. *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 212 P.2d 849 (1949). The City of San Diego is a Council-Manager form of

government providing therein a separation of powers; that is, Council as the policymaking body and the Manager as the Chief Administrator. The City Manager is hired by the City Council and serves at its pleasure. In connection therewith, the Council also evaluates the performance of the City Manager.

The City Manager is required to prepare and submit to the Council, at a specified time in May, a budget proposal for the expenses of conducting the affairs of the City for the ensuing year. The City Council is empowered to enact an appropriation ordinance for such purposes and may reduce or eliminate any item, increase any amount or add any new item for personal services contractual services, materials, supplies and equipment for any department.

The format of the budget document reflects programs and projects which Council, in its legislative discretion, determines to be a checklist of projected governmental operation in San Diego for the ensuing year. It is designed with a lowest common denominator specificity. Those specific programs and projects identifying positions and dollars, are parts of the whole which is adopted in generalized sums total in the annual appropriation ordinance.

The question then arises -- Can the Council, in effect, direct that there be no reassignment of personnel for which an appropriation has been made during a fiscal year to accommodate a need as determined by the City Manager as Chief Administrative Officer without first coming before Council? We believe not. That would be in contravention of Charter section 28. We do not mean to imply that the Manager is prohibited from informing the Council of any movements of concern but rather we conclude he is not required by the Charter to obtain the City Council's specific consent or to inform them if he chooses not to inform them.

The City Manager is empowered as Chief Administrator, during any fiscal year, to transfer employees temporarily from one department to another to perform similar duties. Similarly, Department heads may transfer people between divisions within their department. The Charter is quite clear in this regard and it would be our opinion, based upon everything discussed

hereinabove, that such provision exists to enable the Manager and Department heads to address situations that arise during the year which need administrative action and attention, and that the Manager is not required to advise Council prior to any such temporary personnel reassignment. Implicit in Council's discussion giving rise to this matter was the suggestion that the

Council wanted prior notification (of any personnel move) in order to spend time evaluating it -- which leads to the further inference that the Council might abandon its policy role and inject itself into the administrative affairs of the City.

Council will also recall that during the discussion on the matter on June 2, 1986, the City Attorney stated that any "permanent" transfer between departments would amount to an appropriation ordinance change and would require Council action to do so. It follows, a fortiori, that Council would be informed prior to any such action and accorded the opportunity to evaluate and act upon it.

SUMMARY

The 1931 Charter establishes a Council-Manager form of municipal government. The City Manager, as Chief Administrative Officer of the City, is budget officer, as well. The budget is prepared by the Manager for approval by the Council. The Council may increase, reduce or eliminate any budget item amount. Once the budget and appropriation ordinance have been adopted, the Manager may transfer employees between departments temporarily, as may department heads between divisions within their respective departments. Notification of the Council of such temporary transfer is not required. Any permanent transfer, however, would amount to an appropriation ordinance change and would require Council action.

Respectfully submitted,
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Michael J. Aguirre
CITY ATTORNEY

OPINION NUMBER 2007-1

DATE: April 6, 2007

SUBJECT: Respective Roles of the Mayor and City Council in Budget Decisions
Affecting the City's Administration

REQUESTED BY: Mayor and City Council Members

PREPARED BY: City Attorney

INTRODUCTION

Since the current City Charter was adopted in 1931, the City of San Diego has operated under a City Manager form of government. On January 1, 2006, the City began a five-year trial period of a "Strong Mayor" form of governance. Under the new structure, all powers and duties of the appointed City Manager were transferred to the Mayor. The Mayor is now the City's chief executive officer, and chief budget and administrative officer. The City Council retained its legislative powers; however, most resolutions and ordinances passed by the Council are subject to a mayoral veto.

The Charter changes provided a separation of powers between the executive branch and the legislative branch, including a system of checks and balances. This is especially true with respect to the City's budget and appropriations. This Opinion discusses the roles and duties of the Mayor and Council in adopting a budget, making appropriations, and making mid-year changes. It is intended to provide a general framework for future resolution of specific issues on a case-by-case basis. The analysis and discussion are primarily based on the City Charter and general principles of municipal law. We did not find any California case law directly on point. Accordingly, we have cited cases from other jurisdictions for guidance.

QUESTION PRESENTED

What are the respective roles of the Mayor and Council, especially in budget decisions affecting the City's administration?

SHORT ANSWER

The overarching rule is that the Mayor and the Council must act within the powers granted to them under the Charter. As that being the general rule, we make the following observations:

First, the Mayor holds all of the City's administrative power, and is solely responsible for the day-to-day operations of the City. The Mayor is the City's chief executive officer, chief budget officer and supervises the City's financial affairs. However, a Mayor has only those powers that are expressly or impliedly conferred upon him by the Charter or by the Council acting within the scope of the Charter. The Mayor proposes the City's annual budget. The Mayor has special veto power over any changes to that budget proposed by the Council, but the Council has sole power to approve a final budget. The Mayor must implement the budget as adopted by the Council in accordance with objectives set forth in that budget. Further, budgetary appropriations, which are the authorization to incur obligations and spend public funds for a specific purpose, do not represent an absolute obligation for the Mayor to spend the full amount of such appropriation. The Mayor must achieve the budgetary priorities as set forth in the budget. Correspondingly, the Mayor has the discretion in the exercise of his duties to seek economic savings in carrying out the budgetary plan. However, the Mayor may not, through the exercise of such discretion, thwart the legislative aims of the Council in setting budgetary priorities.

Second, all legislative power of the City is vested in the City Council. Using that power, the Council establishes the City's policies. It may *not* delegate any legislative power or responsibility it was elected to exercise that "raises or spends public monies," including but not limited to the City's annual budget ordinance and the salary ordinance, nor its power to set public policy by resolution or ordinance. Under the Charter, the Council is given the authority to ensure its policies, ordinances and resolutions are properly implemented by the Mayor and other public officials, and to permit public review of that implementation. Indeed the Council has the right and duty to request information from the Mayor and City officials to ensure that its policies and procedures are being implemented. However, the Council, through the exercise of its oversight responsibility, must do so in a manner that does not interfere with the Mayor's duty to conduct day-to-day administrative affairs of the City

HISTORICAL CONTEXT

Historically, most U.S. cities were created using the "Strong Mayor" or "Political" system of government. Under the true "Political" system, the elected mayor had broad patronage powers (the power to hire those who supported the mayor during an election, as well as friends and family) and the Council was limited to a part-time role passing laws as recommended by the Mayor.

Beginning in 1912, cities began adopting a "Council-Manager" form of government. This trend continued until the 1930s, slowed during the depression, and boomed during the 1960s and 1970s. George H. Frederickson, Gary A. Johnson, & Curtis H. Wood, *The Adapted City: Institutional Dynamics and Structural Change*, New York: Cities and Contemporary Society, M.E. Sharpe (2004). The true Council-Manager form of governance featured a professional manager chosen by the City Council. Administrative powers were unified under the City Manager while the Council maintained legislative and budgetary authority. One sphere of power was not to meddle in the affairs of the other. *Id.* at 38.

San Diego first experimented with a Strong Mayor form of government from 1915 to 1931. 1986 Op. City Att'y 17, 18-21. Charter changes created a Council-appointed City Manager form of government in 1931. *Id.* at 19-20. Over time, the City Manager's authority strengthened, and the form of government survived an effort in 1973 to return the City to a Strong Mayor system. *Id.* at 21. Charter changes impacted the City Manager's authority over the years, but none diminished the City Manager's authority.¹ Under the Council-Manager form of government, the City Manager was *entitled* to assert full autonomy over administrative affairs and the implementation of the budget approved by the Council. This power was at times theoretical, given the risk to the City Manager's livelihood if such assertion was against the wishes of the Council.

Effective January 1, 2006, voters amended the Charter to test the "Strong Mayor" form of governance for a five-year trial period. The new Article XV of the Charter suspends the operation of certain Charter provisions. It transfers to the Mayor all fiscal and administrative authority previously held by the City Manager, provides the Mayor with appointment and supervisory powers over fiscal officers of the City, and with a veto over certain Council actions including a special veto in the budget and salary ordinance process. The new form of government also includes certain checks and balances with respect to fiscal matters, including authorizing the Council to appoint an Independent Budget Analyst, requiring Council acceptance of any budget before it may be implemented, and an oversight role for the City Council.

GENERAL PRINCIPLES

This Opinion focuses primarily on the issue presently facing the Mayor and City Council with respect to the budget and the annual appropriation ordinance. During the last year, questions have been raised regarding the authority and decision-making powers of the Mayor and the Council relative to the City's budget. The Charter contemplates a system of checks and balances; however, interpretation of these provisions has not been easy. The following is a general discussion of this balance of power.

¹ For example, see Charter §§ 32.1, 94, 94.1, 94.2, 94.4

In general, a mayor has only that authority which is expressly or impliedly conferred upon him by charter or by the council acting within the scope of the charter. 3 McQuillin, Mun. Corp. (3d ed. 2005), § 12.43, p. 249. This principle is illustrated in a case entitled *Detroit Fire Fighters Association v. the City of Detroit*, 449 Mich. 629, 537 N.W.2d 436 (1995). Detroit is a charter city with separate executive and legislative branches. *Id.* at 639-640. In that case, the Mayor submitted a budget proposal to the Detroit City Council. The Council amended the budget to include \$750,000 for a new fire department squad, whose purpose was to provide reserve manpower and to engage in certain specialized functions, such as rescue, extrication, and transport. The city council passed the amended budget, but the mayor vetoed \$500,000 of the \$750,000 appropriated. The council overrode the veto, reinstating the original \$750,000 appropriation. When the mayor did not spend the funds that were appropriated, the fire fighters association sued.

The Court noted that appropriations generally cannot be diverted to any other purpose except as provided by statute or charter. *Id.* at 639, citing 15 McQuillin, Mun. Corp. § 39.69, at p. 233 (3d ed. rev.) In analyzing the facts, the court found that the Detroit City Charter contemplated a separation of powers between the executive branch (the Mayor) and the legislative branch (the City Council). In that regard, the Court stated:

... Just as the city council cannot make unilateral changes in the budget, the mayor cannot single-handedly alter the city council's appropriations. To allow the mayor such power would provide a means for circumventing the legislative branch and essentially render meaningless the powers and duties granted to the city council by charter.

Additionally, although the executive branch is granted some discretion in the expenditure of appropriated funds, it possesses no inherent constitutional power to refuse to spend in the face of clear legislative intent and statutory directive. [citations omitted] Here, the city council clearly earmarked \$750,000 of the appropriation to be used to fund an additional fire squad. Thus, the mayor may not use discretion as a guise for frustrating this intention. *Id.* at 640-641.

The concurring opinions provide further guidance. One justice notes that: "the mayor is not required to spend the entire amount appropriated if he can effect the purpose with less money." *Id.* at 649. Another concurring opinion sums up the issues as follows:

I do not believe that anyone can seriously dispute that an appropriation is not a mandate to the executive branch to spend the full appropriation. Additionally, the executive branch certainly has inherent discretion, if not a duty to seek economic savings.

However, this executive discretion may not extend so far as to usurp legislative authority. Adopting a budget is a legislative function. In contrast, proposing and implementing a budget are executive functions. Everyone here recognizes that the budget is no more than a financial plan, which may be adjusted throughout the fiscal year in order to adapt to changing financial conditions. . .

. . . . The question becomes, how do we strike a balance between the executive branch's discretionary power to operate within the financial plan and the legislative branch's intent and power to adopt the budget and to set fiscal policy. . .

. . . "Appropriation" means an authorization granted by a legislative body to incur obligations and to expend public funds *for a stated purpose* . . .

. . . I think our solution lies with the "stated purpose" objective of an appropriation. If the executive branch has substantially accomplished the stated purpose, then it has legally operated within executive discretionary authority when it economically saved money by not spending the full amount. In other words, the mayor secured a "better deal," or the project did not cost as much as expected. However, if the effect of the "not spending" frustrated or thwarted the stated purpose, then the executive branch has not executed or implemented a legislative authorization. Instead, it has unilaterally adopted its own budget by deviating from if not ignoring, the council's budget. This it cannot do. *Id.*, at 658-660.

The *Detroit Fire Fighters Association* case, though not binding precedent, provides insight that is well-reasoned and instructive. These principles can be equally and appropriately applied to the City Charter and the roles of the Mayor and the City Council.

DISCUSSION

I. The Mayor's Executive, Budgetary, and Administrative Powers

In any form of municipal government, a mayor "has no authority, except what is expressly or impliedly conferred upon him or her by the charter or applicable law, or by the council or governing legislative body acting within the scope of the law." 3 McQuillin Mun. Corp. § 12.43 (3rd ed. 2005). San Diego's Charter gives the Mayor broad administrative authority in planning the activities of the City government and for adjusting such activities to the finances available.

A. Administrative Authority and Day-to-Day Operations are Vested in the Mayor

Article XV of the Charter transfers to the elected Mayor all administrative powers, duties and responsibilities previously held by the City Manager, thus making the Mayor the City's Chief Administrative Officer. Charter §§ 28, 260(b). Black's Law Dictionary, Seventh Edition, defines administration in part as: "1. The management or performance of the executive duties of a government, institution, or business. 2. In public law, the practical management and direction of the executive department and its agencies." The Mayor also has the title of Chief Executive Officer. Charter § 265(b)(1). The title commonly means "The highest-ranking executive in a company or organization, responsible for carrying out the policies of the board of directors on a day-to-day basis."²

The Mayor's Charter-imposed duties are consistent with these definitions. The Mayor supervises the City's administrative affairs. Charter § 28; *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380, 385-386 (1976). Heads of departments reporting to the Mayor are "responsible to him for the efficient administration of their respective Departments." Charter § 28. The Mayor has a corresponding duty to ensure departments under his control function efficiently. Consistent with this duty, the Mayor may "transfer employees temporarily from one Department to perform similar duties in another Department." The Mayor also may "direct any Department or Division to perform work for any other Department or Division" "in order to expedite the work of any department or to adequately administer an increase in the duties which may devolve on any Department or to cope with periodic or seasonal changes." Charter § 28.³

The Mayor has authority to "promulgate and issue administrative regulations that give controlling direction to the administrative service of the City," and to regulate the "general conduct of the administrative Departments." Charter §§ 265(b)(2), 28. However, the Mayor may not issue regulations that conflict with the valid City policies or ordinances enacted by the Council. This would intrude upon the Council's exclusive authority under the Charter to enact legislation.

B. The Mayor is Responsible for Planning and Preparing the Budget

The Mayor is also Chief Budget Officer, which means he is "responsible for planning the activities of the City government and for adjusting such activities to the finances available." Charter § 28. To do so, the Mayor must "prepare annually a complete financial plan for the ensuing year and shall be responsible for the administration of such a plan when adopted by the Council." *Ibid.* The Mayor also is responsible for "bringing together . . . estimates covering the

² See *The American Heritage Dictionary of the English Language: Fourth Edition* (2000) (<http://www.bartleby.com/61/90/C0289050.html>).

³ The authority to move personnel or order departments to work for each other does not apply to certain departments, including the Police and Fire Departments. Charter § 28.

financial needs of the City, with the checking of these estimates against the information relative to past expenditures and income, with the preparation of the budget document and supporting schedules and with the presentation of the budget to the Council." *Ibid.* The Mayor now has authority to appoint, with Council approval, City officers responsible for financial matters, including the City Treasurer and Auditor-Comptroller. Charter §§ 29, 45, 260(b), 265 (b)(10), (11). *See* City Att'y MOL 2006-2 (Jan. 23, 2006).

The Mayor's intimate knowledge of the City's fiscal and administrative condition provides his "ability to propose plans for the council's approval . . . and . . . for which the mayor is uniquely qualified since he is the official in charge of carrying out the plans." *See Brown v. Fair Political Practices Com.*, 84 Cal. App. 4th 137, 148 (2000). Thus, the Mayor has the right and duty to propose legislation or make recommendations to the Council concerning the City's affairs. Charter § 265(b)(3). In addition, the Charter requires the Mayor to propose the budget and salary ordinance, and gives him a special veto over their terms before they become controlling documents for the appropriation ordinance. Charter §§ 28, 69, 265(b)(15), 290(a). The Council finalizes the budget and salary ordinance, and enacts the annual appropriation ordinance. Charter §§ 71, 290. The Mayor then administers the plan and is responsible "for adjusting the activities of the City to the finances available." Charter § 28.

The Mayor has a duty to operate the City within a balanced budget, and must control spending so as to avoid a budget deficit. *Detroit Fire Fighters Association*, 449 Mich. at 655. Consistent with the Mayor's duty to oversee the efficient administration of City Departments, the Charter provides him with specific and implied authority to reduce costs. For example, the Mayor executes the contracts for departments under his control and may contract for certain other City needs below set dollar amounts. Charter §§ 28, 94, 94.1, 94.2, 94.4. The Mayor can alter City contracts, so long as this does not increase the amount of the contract. Charter § 98.⁴

With respect to mid-year budget adjustments, the Charter contemplates that all funds appropriated for a particular purpose may not be spent, while other appropriations may be insufficient to meet actual needs. The Council has authority to transfer unencumbered, appropriated funds to meet those other needs. However, the Mayor must first recommend such fund transfers in writing. Charter § 73. The Mayor is given the power to allocate internal budget amounts for departments under his control. Charter § 81. The Council also may authorize the Mayor to transfer funds between allocated items within the same department. Charter § 73.

The Mayor's responsibility to be fiscally efficient is tempered by the requirement that the Mayor is also required to implement, not contravene, valid and established policies or ordinances of the Council. It is clear that the Mayor is not required to spend the full amount appropriated if the Mayor can find a way to accomplish the purpose of the appropriation without spending the

⁴ The Mayor must seek Council approval when contract costs are to exceed those previously authorized by Council. *Ibid.*

entire amount. However, the Mayor may not completely disregard the Council's policies and programs by not spending appropriated monies.

C. Mayor Has a Duty to Provide Information to the City Council

Although the Mayor no longer serves on the Council (Charter §§ 260(b), 270),⁵ the Mayor is required to provide information to the Council. For example, the Mayor must "keep the Council advised of the financial condition and future needs of the City." Charter § 28. The Mayor must "prepare and submit to the Council . . . such reports as may be required by that body." *Ibid.* Similarly, he must "comply promptly with all lawful requests for information by the Council." Charter § 32.1. Another section requires the Mayor to "cooperate fully with the Council and Independent Budget Analyst" including supplying requested information concerning the budget process and fiscal condition of the City. Charter § 265(b)(14). Even absent a request, the Mayor still has a duty to "inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council." Charter § 32.1. These provisions benefit the Council and the public generally, and are part of the checks and balances contemplated by the Charter.

II. The Council's Legislative Power

The Charter vests all legislative power in the City Council, subject to the terms of the Charter and the Constitution of the State of California. Charter § 11. The Council has the legislative power and responsibility for which it was elected to adopt ordinances and resolutions which raises or spends public monies, including the City's annual budget ordinance and the annual salary setting ordinance, and any ordinance or resolution setting public policy. Charter § 11.1.

A. The Council's Role in the Budget

Under the Strong Mayor form of governance, the Mayor proposes both the salary ordinance and the budget and submits them to the Council. There is a process for public hearings, Council modifications to the budget, mayoral veto, and final passage. Charter §§ 11.1, 71, 265(b)(15) and 290. The budget becomes the controlling document for preparation of the Annual Appropriation Ordinance. Charter § 290(b). After adoption of the appropriation ordinance, the City Council may transfer previously appropriated but unused funds to meet unanticipated needs in different departments, upon the written recommendation of the Mayor,

⁵ The Mayor has limited legislative authority to approve and veto most Council ordinances and resolutions. Charter §§ 265(b)(5), 280 and 290; *See Pulskamp v. Martinez*, 2 Cal. App. 4th 854, 862 (1992); *McDonald v. Dodge*, 97 Cal. 112, 114 (1893) [limited legislative authority does not make Mayor part of legislative body]. The Mayor may attend open sessions and chair closed sessions of the Council, but may not vote at either. Charter § 265(b)(4) and (b)(6).

Charter § 73. Accordingly, the Charter contemplates a joint approval process of amendments to the appropriation ordinance.

The Council has the power to set the policy of spending public money and to allocate the money needed to meet the City's needs. In making its appropriations, the Council should clearly set forth the stated purpose of the appropriations. This will allow the Mayor to implement the Council's goals and objectives in administering the day-to-day operations of the City. In setting budgetary policy, however, the Council must be mindful that it may not interfere with the Mayor's powers under the Charter. That is, the Council may not intrude upon the Mayor's administrative authority to implement the Council's policies in the most efficient manner.

B. The Council May Not Delegate Its Legislative Authority

Charter section 11.1 states that the Council members were elected to exercise their legislative authority and responsibility with respect to the raising and spending of taxpayer money. Accordingly, such responsibility cannot be delegated.⁶ Charter section 11.1 provides, in pertinent part:

The same prohibition against delegation of the legislative power which is imposed on the State Legislature by Article XI, Section 11a of the Constitution of the State of California shall apply to the City Council of The City of San Diego, so that *its members shall not delegate legislative power or responsibility* which they were elected to exercise in the adoption of any ordinance or resolution which raises or spends public monies, including but not limited to the City's *annual budget ordinance* or any part thereof, and the annual ordinance setting compensation for City employees, or any ordinance or resolution setting public policy. . . . (Emphasis added.)

Similarly, California Constitution, article XI, section 11a provides:

The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions.

⁶ Section 11.1 was added to the Charter by the voters in 1980 as an alternative to a proposition (Proposition B) that would have replaced the Council as the decision-making body for the salaries of police officers, in favor of final and binding arbitration in the event of an impasse in labor negotiations. *See* 1980 Op. City Att'y 65; San Diego Ballot Pam. Primary Elect. June 3, 1980.

An unconstitutional delegation of legislative power occurs when the legislative body confers upon any person or body the "unrestricted authority to make fundamental policy decisions." *People v. Wright*, 30 Cal. 3d 705, 712 (1982), citing *Clean Air Constituency v. California State Air Resources Board*, 11 Cal. 3d 801, 816 (1974); *Kugler v. Yokum*, 69 Cal. 2d 371, 376 (1968). "This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions." *Kugler* at 376-377.

Although a legislative body may not delegate its legislative authority, it may properly confer upon administrative or executive officers the authority to implement their legislative enactments. The authority may include the use of some discretion, as long as rules, standards, or guides set the limits under which the authority may be exercised. *See generally* 2A McQuillin Mun. Corp. §§ 10.40.10, 10.43, 10.44 (3rd ed.).

While the Council may not delegate its legislative authority on fiscal matters, it does adopt a budget, salary and appropriations ordinances that set the parameters of City spending for City needs based on the Mayor's recommendations. There is no need for the Council to grant authority to the Mayor to implement the spending guidelines in the appropriation ordinance, as this authority is already granted under the Charter. Moreover, there are rules and guidelines already set forth in the Charter that recognize the Mayor's discretionary authority, including the authority to adjust the City's activities to the finances available, to transfer employees temporarily to cope with periodic or seasonal changes, and to make recommendations to the Council regarding mid-year transfers of appropriations.

C. The Council's Oversight Function

The Council may not interfere with the Mayor's administrative authority under the Charter any more than the Mayor may usurp the Council's legislative powers. However, Article XV provides the Council with oversight authority more clearly than in the past, to enable the Council to ensure its policies, ordinances and resolutions are properly implemented by the Mayor and other public officials, and to permit public review of that implementation. In addition, Article XV authorized the Council to establish an Office of Independent Budget Analyst and to determine the powers of that office by ordinance. The Council has taken advantage of this provision by creating the office and providing that the Independent Budget Analyst "assists the Council in the conduct of budgetary inquiries and in the making of budgetary decisions." SDMC § 22.2301. Accordingly, the Independent Budget Analyst regularly evaluates and comments upon the financial matters affecting the City.

One of the checks and balances is the Charter requirement that the Mayor has a duty to cooperate fully with the Council and the Office of Independent Budget Analyst, including supplying requested information concerning the budget process and fiscal condition of the City. Charter § 265(b)(14). Moreover, the Charter places an *affirmative duty* on the Mayor and other

City officials to volunteer any information the Council may require for its proper decision-making. The affirmative duty to provide information about "all material facts or significant developments relating to all matters under the jurisdiction of the Council" is placed on the Mayor and other City officials by Charter section 32.1.

The Charter also provides the Council with the right to request information from the Mayor. Article XV expressly provides the Council with power to summon officials before the Council or its committees, and clarifies those situations when individual Council members may bypass the Mayor and communicate directly with members of the administrative service. Charter § 270(h) and 270(i). These sections provide broad authority for the Council and its committees, and in certain circumstances individual Council members, to ensure the Mayor implements and enforces the Council's policies and ordinances to meet the needs of the City.

RECOMMENDATION

Based on the above, we recommend the creation of an Appropriations Adjustment Committee, to be composed of appropriate representatives of the Council, Independent Budget Analyst, Mayor's Office and City Attorney's Office. The purpose of the Committee would be to consider the process by which the Mayor administers the budget during the fiscal year, and to make recommendations to the City Council for legislative changes to the municipal code that will enable the Mayor to implement the policy of the Council with maximum flexibility to achieve efficiency and cost savings.

CONCLUSION

The Mayor has only that authority that the Charter provides or the Council grants by ordinance or resolution. However, the Mayor has inherent discretion, if not a duty to seek economic savings. This discretion may not extend so far as to usurp legislative authority. Adopting a budget is a legislative function of the Council. In contrast, proposing and implementing a budget are functions granted to the Mayor. Both parties have important roles after adoption of the budget and the appropriation ordinance. Mid-year adjustments are anticipated by the Charter, and both parties must participate. The Mayor must make recommendations to the Council, which must approve and authorize the transfer of appropriations. The parties may not act unilaterally to frustrate the duties and responsibilities of the other.

As this review illustrates, there is no bright line to draw in the absence of specific facts that determine exactly where the Mayor's and the Council's authority begins and ends in all City fiscal matters. Each has specific duties and powers. Yet, for the City to function effectively, both must act in the interdependent manner established by the Charter. Whether one party improperly contravenes the authority of the other necessarily must be determined on a case-by-case basis. Although the Mayor and Council have experienced some challenges under the new system of governance, the answers to most questions are found in the Charter. For the most part, the

Mayor and
City Council Members

-12-

April 6, 2007

Charter provisions contemplate a system that should work - a system of checks and balances, cooperation, oversight and independence. Nonetheless, improvements could be made to the Charter, including clarifying the process for mid-year adjustments to the appropriation ordinance under the strong mayor. These issues will likely be addressed by the Charter Commission and the Council in the next several months. In the meantime, we will assist the Mayor and Council on specific issues as they arise.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

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LO-2007-1

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MEMORANDUM OF LAW

DATE: January 4, 2000
NAME: Honorable Mayor Susan Golding
FROM: City Attorney
SUBJECT: San Diego Police Department Use of Force Policy

INTRODUCTION

On November 17, 1999, you met with City Manager Michael T. Uberuaga, Chief of Police David Bejarano, Deputy City Attorneys Frank Devaney and Gene Gordon, and members of your staff to discuss the scheduling of an open City Council meeting/workshop regarding the San Diego Police Department's Use of Force Policy. During that meeting, you asked for a legal opinion whether the City Council may direct the City Manager and Chief of Police to make specific changes to the Use of Force Policy.

ANALYSIS

The City Charter makes absolutely no provision for any role for the City Council in the administrative affairs of the City including the policies of the San Diego Police Department. The City Charter provides that the City Council is the legislative body of the City. The City Charter places the sole responsibility for administering the affairs of the City in the City Manager and certain other officers of the City. Section 57 of the Charter provides that the Chief of Police shall be appointed by the City Manager and "[t]he Chief of Police shall have all power and authority necessary for the operation and control of the Police Department."

In Opinion Number 86-7, dated November 26, 1986, this Office did an extensive analysis of the respective roles of the members of the City Council and the City Manager. (A copy of that opinion is attached hereto as Attachment A.)

Mayor Susan Golding

-2-

January 4, 2000

Quoting briefly, from that opinion, we stated as follows:

The City Council-City Charter Provisions

The Charter of The City of San Diego contains several references concerning the appropriate role of the members of the City Council. Section 11 of the Charter provides, in pertinent part, that all legislative powers of the City shall be vested, subject to the terms of the Charter and of the State Constitution, in the Council. Section 12 states very clearly that the Council shall be comprised of nine (9) Council members, including the Mayor; that it shall be the legislative body of the City; that each of the members, including the Mayor, shall have the right to vote upon all questions before it and the duty to attend all Council meetings. Section 13 provides that all legislative action shall be by ordinance or as otherwise provided by the State Constitution or State law.

A review of every provision and section of the Charter discloses not one provision that can be construed as authorizing any role by the Council in any role other than as a legislative body, acting in concert. For example, Section 15 provides that a majority of the members elected shall constitute a quorum to do business and that the affirmative vote of a majority of the members elected is necessary for passage of any ordinance, resolution, order or vote.

The City Manager-City Charter Provisions

By the same token, we submit to you that the Charter of The City of San Diego is abundantly clear as to the appropriate role of the City Manager as it pertains to the affairs of this City. Section 27 provides that the City Manager shall be elected by the City Council and that he shall be the chief administrative officer of the City, serving at the pleasure of the Council. Section 28 states that the City Manager shall supervise the administration of the affairs of the City except as otherwise specifically provided in this Charter.

It continues by providing that all other administrative powers conferred by State law shall be exercised by the Manager and his designated representatives. Section 29 requires the City Manager to properly administer all the affairs of the City placed in his charge and be responsible to the City Council for the conduct of those affairs (footnote omitted).

Mayor Susan Golding

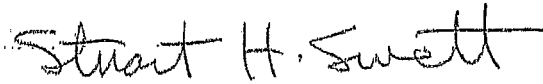
January 4, 2000

CONCLUSION

In conclusion, it is our opinion that the City Council may not direct the City Manager and Chief of Police to make specific changes to the San Diego Police Department's Use of Force Policy.

CASEY GWINN, City Attorney

By



Stuart H. Swett
Deputy City Attorney

SHS:smf:524:(x043.2)
Attachment
ML-2000-1

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OPINION NUMBER 86-7

DATE: November 26, 1986
SUBJECT: City Council; Its Role in City Government
REQUESTED BY: Mayor Maureen O'Connor
PREPARED BY: John W. Witt, City Attorney
C. M. Fitzpatrick, Assistant City Attorney

QUESTION PRESENTED

What role, if any, does the City Charter provide for the City Council in the administrative affairs of the City including, but not limited to, the negotiation of contracts, participation in mediation and the resolution of disputes?

CONCLUSION

The City Charter makes absolutely no provision for any role for the City Council in the administrative affairs of the City, including, but not limited to, the negotiation of contracts, participation in mediation and the resolution of disputes. The City Charter provides that the City Council, including the Mayor, is the legislative body of the City. The City Charter places the sole responsibility for administering the affairs of the City in the City Manager and certain other officers of the City and specifically prohibits individual members of the Council with interfering with the administrative service on penalty of removal from office.

BACKGROUND

On September 9, 1986 you sent us a memorandum indicating that your office had recently received several inquiries regarding the relationship between the City Council and the City Manager. You stated that there seemed to be a perception from the public that the members of the City Council and the City Manager's office were not working together in the manner prescribed by law.

You cited as matters about which you had received public inquiry and comment, certain incidents in the recent past such as an individual Councilperson calling publicly for the dismissal of

Mayor O'Connor

November 26, 1986

particular employees who work directly under the City Manager's supervision; and an individual Councilperson negotiating directly with private sector parties concerning the contractual resolution of a delicate and environmentally sensitive project.

You pointed out the provisions of City Charter section 28 providing that the Manager's duty is to supervise the administration of the City's affairs, calling our attention to the broadness of that charge. You alluded to the potential for confusion and serious consequences in the absence of definitive guidelines and you requested our views with respect to the issue.

ANALYSIS

It seems to us that the Charter of The City of San Diego is abundantly clear on the question of the respective roles of the members of the City Council, including the Mayor, and the City Manager and we are pleased to furnish you with our analysis and views on this subject. As recently as June 23, 1986 we had occasion to opine to the Deputy Mayor and Council with respect to the role of the Council in its adoption of the annual budget and appropriation ordinance (Opinion No. 86-2) and this analysis will incorporate and refer at times to that opinion for continuity. (A copy of City Attorney Opinion No. 86-2 is attached as Enclosure (1)).

The City Council-City Charter Provisions

The Charter of The City of San Diego contains several references concerning the appropriate role of the members of the City Council. Section 11 of the Charter provides, in pertinent part, that all legislative powers of the City shall be vested, subject to the terms of the Charter and of the State Constitution, in the Council. Section 12 states very clearly that the Council shall be composed of nine (9) Council members, including the Mayor; that it shall be the legislative body of the City; that each of the members, including the Mayor, shall have the right to vote upon all questions before it and the duty to attend all Council meetings. Section 13 provides that all legislative action shall be by ordinance or as otherwise provided by the State Constitution or State law.

A review of every provision and section of the Charter discloses not one provision that can be construed as authorizing any role by the Council in any role other than as a legislative body, acting in concert. For example, Section 15 provides that a majority of the members elected shall constitute a quorum to do business and that the affirmative vote of a majority of the members elected is necessary for passage of any ordinance, resolution, order or vote.

Mayor O'Connor

November 26, 1986

The City Manager-City Charter Provisions

By the same token, we submit to you that the Charter of The City of San Diego is abundantly clear as to the appropriate role of the City Manager as it pertains to the affairs of this City. Section 27 provides that the City Manager shall be elected by the City Council and that he shall be the chief administrative officer of the City, serving at the pleasure of the Council. Section 28 states that the City Manager shall supervise the administration of the affairs of the City except as otherwise specifically provided in this Charter.

It continues by providing that all other administrative powers conferred by State law shall be exercised by the Manager and his designated representatives. Section 29 requires the City Manager to properly administer all the affairs¹ of the City placed in his charge and be responsible to the City Council for the conduct of those affairs. As alluded to earlier in this opinion, our views with respect to the mutual responsibilities of the City Council and Manager with respect to budget preparation and approval and its relationship to the administration of the City is more fully set out in Enclosure (1), and we respectfully refer you to it for further analysis in this regard.

How we view the City Council-City Manager relationship on an ongoing basis.

Having indicated to you what the Charter says so explicitly on this subject, one could suggest that this opinion need not go further in exploring the question, but we recognize that in this vibrant and growing community, with its environment of challenges and change, problems and opportunities arise almost daily which tend to test the clear dichotomy which we believe that the Charter describes. So we will spend a few moments examining the appropriate legislative role as we view it, especially with regard to the proper role, if any, in contract negotiation and dispute mediation and resolution.

¹ The Charter places certain other administrative functions in the hands of the City Purchasing Agent, (Section 35); the Personnel Director, (Sections 37 and 116); the City Clerk, (Section 38); the Auditor and Comptroller, (Section 39); the City Attorney, (Section 40); Funds and Planning Commissions, (Section 41); the Treasurer, (Section 45); the Chief of Police, (Section 57); the Fire Chief, (Section 58); the Civil Service Commission, (Sections 41 and 115); the Retirement Board, (Section 144).

Mayor O'Connor

-4-

November 26, 1986

As we emphasized in Opinion No. 86-2 a City Charter is an instrument of limitations on the exercise of powers by the municipality and its officers City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 212 P.2d 849 (1949). In other words, it is the governing rule under which this City should and must conduct its affairs. It has been analogized as a sort of municipal constitution by some writers and indeed it seems to us to fall into that category.

This being the case and the Charter being clear on the exclusively legislative role of the City Council, what does this tell us? The legislative power and role was very early in California described as being the power to make, alter and repeal laws. People v. Seymour, 16 Cal. 332 (1860). With reference to our general law cities, the State legislature says only that the legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States. (Title 4, division 3, chapter 3, section 37100, California Government Code).

At this point one might ask, then, what possible connection could the legislative role have with the administrative role in contract negotiation? Let's look at that example for a moment. On the administrative side (role of City Manager and his staff), the terms and conditions of a contract are negotiated between the parties with the City represented by the City Manager's representative assisted by the attorney. These terms and conditions are then memorialized in writing; the document is executed by the other party and subsequently presented to the City Council, (possibly through a standing committee of the Council) for the purpose of legislative action, i.e., an ordinance (or resolution) authorizing its execution by the City Manager. At this time the terms and conditions of the proposed agreement are explained to the members of the Council (Committee). If a member of the legislative body does not believe the terms and conditions are appropriate under the circumstances or in the best interests of the City, he or she will urge for a revision or defeat of the measure. Is this improper "negotiation"? Of course not. It is a true part of the legislative process. If the councilmember can convince a majority of the Council to the wisdom of his/her views, direction by the majority of the Council to amend the terms can be given or the proposed agreement rejected in its entirety.

However, what if the legislator-Councilmember says, in effect, bring that document and the other contracting party to me and I'll restructure the terms and conditions to meet my concerns, etc. Is this improper? We think it is. This is not the role of the legislator.

Mayor O'Connor

November 26, 1986

What if a councilmember decides that in order to avoid what he/she perceives to be an erroneous approach by the City Manager in his negotiations, that he/she should participate directly in the negotiations to avoid this perceived error? We think this clearly is improper and would constitute a violation of Section 28.

However, there have been rare occasions where members of the City Council did participate in the negotiating process. In 1980 at the request of the (then) City Manager, Ray Blair, two sitting members of the City Council did participate in negotiating sessions with the City Manager, the City Attorney and their staffs and representatives of the San Diego Padres. On that occasion the participation was (i) requested by the Manager and (ii) duly authorized by the City Council. The lengthy negotiations led to an amended agreement with the Padres which resolved some quarrelsome issues which had been unresolved for some time (use of Director's Box, etc.) and fostered a new and more wholesome relationship with that organization. Thus, this extraordinary effort resulted in a benefit to the City, but it should be noted that the legislator participation was requested by the Manager and duly authorized by the City Council. In 1970 similar requested and duly authorized participation by the (then) Mayor, Frank Curran, eventually resulted in new gas and electric franchises with San Diego Gas and Electric Company.

What about your other example, participation in mediation and resolution of disputes? Again we believe the appropriate and correct legislative role is to participate by the collective action of the City Council in agreeing with (or disagreeing with) a City Manager recommended resolution. However, again there have been times when, at the request of the City Manager and the concurrence of a majority of the City Council, the participation in the mediation and settlement of a dispute has occurred. Most recently the City Council authorized (then) Mayor Roger Hedgecock and Councilmember Bill Cleator to participate in the attempts to settle long-pending litigation with San Diego Gas and Electric Company regarding the status of a parcel of company-owned property in Sorrento Valley. We think it is fair to say that their roles (especially that of Mr. Cleator) were significant in arriving at an equitable solution to that thorny issue. Thus, again, there was a departure from the traditional legislative role which resulted in a major benefit to this City and its citizens. How do we gainsay that? But again, there was a direct request by the Manager and the City Attorney and concurrence by the City Council.

These rare exceptions are cited to reflect the need for some flexibility in these areas. But they are definitely exceptions to the rule and should remain so.

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From time to time, the view is expressed that the Charter, having been adopted substantially in its present form 55 years ago, is seriously out of date, particularly with respect to the strict separation of administrative and legislative powers it imposes. Particularly it is argued that Councilmembers must act in areas traditionally viewed as administrative because their failure to do so somehow renders City government less "responsive" to its citizens. In other words, critics urge that Councilmembers must be active in the operational affairs of the City, particularly as those affairs impact their respective districts, serving as the point of contact for private citizens seeking municipal action and directing administrative services when necessary to obtain the desired action.

The legislative administration the critics suggest looks suspiciously like the form of municipal government which prevails in large American eastern cities where administrative decisions are typically made for political reasons, rather than as matters of sound management. While sound management and political motivation may often coincide, such a system operates most favorably in behalf of political supporters of legislators and most disfavorably both to opponents and to the large segment of the public which, for lack of power, is neutralized by such a system.

The framers of the 1931 Charter were well aware of this argument. Agreeing with the best thinkers in the discipline of public administration at the time, they rejected a form of government in which the legislative body controlled administrative activity, choosing instead the popular and efficient council-manager form enjoyed by San Diego for the past 55 years.

Despite occasional charges of managerial aloofness and lack of popular response, the City has been served well by competent professional administration and a legislative body strictly limited to a legislative role. The people of San Diego apparently agree, since every time amendments have been proposed to alter the Council-Manager relationship significantly, they have been soundly rejected by the voters, most recently in the major changes proposed in 1973 by the Charter Review Commission chaired by (now) Justice Edward T. Butler.

Admittedly, over the past 13 years, the demarcation line between administrative and legislative functions has become increasingly blurred. A more aggressive legislative body pitted against a less assertive administrative authority has resulted in the gradual usurpation by the former of some of the duties of the latter. The administrative/legislative distinction raises natural confrontations on two levels, legal and political.

Mayor O'Connor


November 26, 1986

Should the City Manager, as chief administrative officer of the City challenge this usurpation as a matter of law, there is little doubt, in our view, who would win the legal confrontation. But there is also little doubt who would win the political confrontation which would follow. For this reason and at this particular time, we think your inquiry and our opportunity to respond in this vein is well-timed. We trust our response here will be carefully considered by the Mayor and Council and acted upon accordingly.

CONCLUSION

In conclusion, then, we are of the view that there is no role for individual councilmembers in the administrative affairs of this City. The framers of our Charter intended a clear distinction between the necessarily political legislative arm of City government and the administrative arm. Absent a Charter amendment, we strongly advise that the distinction be strictly observed.

Respectfully submitted,


JOHN W. WITT
City Attorney

CMF:js:012(x043)
Enclosure (Opn. No. 86-2)
LO-86-7

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OPINION NUMBER 86-2

DATE: June 23, 1986
SUBJECT: Authority of City Council in Administrative Matters
REQUESTED BY: Deputy Mayor and Council
PREPARED BY: C. M. Fitzpatrick, Assistant City Attorney and Jack Katz, Chief Deputy

QUESTION PRESENTED

May the City Council adopt an annual appropriation ordinance which mandates a particular number of personnel to be utilized for any particular program under any and all circumstances and precludes the use of those personnel for any other purpose?

CONCLUSION

No. The City Council may not adopt an annual appropriation ordinance which mandates a particular number of personnel to be utilized for any particular program under any and all circumstances and precludes the use of those personnel for any other purpose because such mandate would violate the City Manager's administrative authority under the City Charter.

BACKGROUND

On June 2, 1986, the Council Committee of the Whole conducted a review of the Police Department's proposed budget for fiscal year 1987. During that hearing, an issue arose concerning the appropriate role and authority of the City Council as it may relate to the specific allocation and utilization of City personnel. Thus, we view the issue as whether the City Council may adopt an annual appropriation ordinance which specifically mandates the use of a particular number of people to a particular program. At the time we orally expressed our reservations about the legal propriety of such an action. You asked us to express our views in writing. Our reservations remain as indicated above. Our rationale follows.

City of San Diego - Authority for Legal Existence

The City of San Diego is a municipal corporation organized and established pursuant to the then-existing article XI, section 8 of the Constitution of the State of California. The organic statutory authority for the City is set forth in its Charter, approved by the voters on April 7, 1931, and thereafter approved by Senate Concurrent Resolution No. 34, dated April 15, 1931 and filed with the Secretary of State on April 24, 1931. The City is still governed by that 1931 Charter, albeit amended on many occasions.

Charter - Historical Perspective and Development

[Source: Report of the Citizens Charter Review Committee, August 1962 (herein referred to as "Chernoff report"); City Manager Government in San Diego, Public Administration Service 1939]

A close examination of the history of applicable sections of the City Charter is necessary in our analysis of the question presented.

San Diego was granted its first Charter by the California Legislature in 1850. It lasted only two years and was revoked by the Legislature. San Diego then reverted to a "town" form of government, with a three-member Board of Trustees in charge, that number increasing to five by 1872. In 1872, conditions once again appeared favorable for "cityhood" and a Charter was provided by special act of the Legislature to provide a basis for local government. This municipal authority existed for seventeen years.

In 1889, the City drafted and adopted a freeholders charter, pursuant to provisions of the California Constitution, which provided the framework for municipal government until adoption of the existing (1931) Charter. The 1889 enactment provided for a bicameral Council elected by wards. In 1905, the Charter was amended to provide for a unicameral Council, again elected by wards.

During this period of time, there grew in popularity across the nation the concept of a "commission" plan for local government. San Diego was so enthused with that concept that its 1889 Charter was amended in 1909 to accommodate the commission plan, with five commissioners elected at large. The operation of government under that scheme shortly fell from favor and, in 1915, the Charter was once again amended to provide for what was loosely referred to as a "Mayor-Council" form of government. That form of government in San Diego existed from 1915 to 1931.

Deputy Mayor
and Council

-3-

June 23, 1986

Five Councilmen and a Mayor were elected at large and the Mayor was president of the Council but had no vote. The Mayor had veto power and was designated as the Chief Executive Officer.

Though the Mayor's office was designed to be a "strong Mayor" operation, his power over administration was extremely restricted. The Council, through its designated powers, was able to effectively take from the Mayor most of the administrative operations. The Charter called the Mayor the Chief Executive and gave him the responsibility of supervising the departments, yet it did not give him enough authority to do so effectively.

The operation of the City and frequent internal power struggles convinced the Mayor and Council that a new Charter was needed. More important, the community was very much in favor of immediate action. A complete narration of the troubles and problems that beset City government and the City in general in those days may be found in the "City Manager Government in San Diego" written by Stone, Price and Stone and published by the Public Administration Service, 1939, cited above as source material.

A fifteen-member Board of Freeholders was elected in 1929 and it drafted a brand new Charter. This new Charter proposal encompassed the concept of a "City Manager" in a "Council-Manager" form of government. History tells us that various vested interest factions that produced most of the dissatisfaction with the status quo prior to 1929 banded together to defeat the 1929 Charter proposal because of its radical new concepts and dilution of their authority.

The dissatisfaction of and with San Diego government did not diminish. The internal power struggles and bickering continued. The groups that opposed the 1929 proposal came forward to offer support in drafting another new Charter. Thereafter, a new Board of Freeholders was elected and it drafted a Charter with significant changes as a compromise measure to the 1929 document. The Mayor was to be elected separately and be a member of the Council. The City Attorney was to be elected separately, as well. The "Council-Manager" form of government was retained and reinforced. With the various other modifications as proposed, the 1931 Charter was overwhelmingly approved by the voters.

Referred to as the City Manager Charter, it was the result of four years of effort. The following observations provided an insight into the legislative history as contemporaneously perceived:

The City adopted the Charter of 1931 by a vote of more than four to one, with no groups

Deputy Mayor
and Council

-4-

June 23, 1986

or sections of importance holding out against it. ... The mistakes made in the former proposal have been corrected, said the [San Diego] Union, and the new Charter "offers the City a clear-cut manager form of government, a fair system of representation, and a unified scheme of things. [Emphasis added.]

City Manager Government in San Diego, supra at p. 26.

The City Manager was given full administrative authority to manage the departments, subject to the control of the Civil Service Commission over the appointment and removal of employees except the heads of departments. ... [Emphasis added.]

Id., at p. 26.

History tells us that the first few years of the City Manager form of government in San Diego were somewhat unsteady due to the residual influence of the preexisting vested interests and the general overall state of the nation's economy. Recognizing the need to get on with the business of effective government, a group of civic leaders organized the Civic Affairs Conference and, through community persuasion and political advocacy, breathed new life into the City Manager concept of operation. By 1935, the governmental climate in San Diego was such as to permit the City Manager to effectively perform as the Chief Executive and Administrative Officer, with the attendant powers and duties called forth in the 1931 Charter.

A 1953 revision to the Charter removed a number of Charter imposed administrative constraints upon the Manager with respect to certain operating divisions and in effect gave him plenary administrative authority over those divisions and their structure.

In 1961, the City Council caused the formation of a Citizens Charter Review Committee for purposes of studying the City Charter. This committee (commonly referred to as the "Chernoff Committee" for its chairman, Howard Chernoff) spent approximately one year in hearings and review of our Charter. Its report in August 1962 commenced its recommendations with the following:

June 23, 1986

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1. Retain the Council-Manager form of government.

Implementing that recommendation, the Charter Review Committee proposed among other things, several Charter changes which relate to the issue at hand. They proposed:

- (a) That the City Manager no longer be referred to as "Chief Executive and Administrative Officer" of the City, but as Chief Administrative Officer. (Voter approval in September 1963.)
- (b) That the City Manager no longer be directed in detail as to the form of his proposed budget, but simply be required to furnish necessary detailed information. (Voter approval in November 1962.)
- (c) That the City Council would no longer be restricted to a reduction or elimination of items in the City Manager's proposed budget, but could reduce, eliminate or increase any item in its adoption of the annual appropriation ordinance. (Voter approval in November 1962.)
- (d) That the Chief of Police and Fire Chief, acting under the City Manager, would have all power and authority necessary for the operation and control of their respective departments, including the direct right and authority with respect to all personnel matters. (Voter approval in September 1963.)

In November 1973, another substantive Charter proposal was presented to the voters as a proposed amendment to the form of government in San Diego. That proposal was so drawn as to significantly strengthen the office of Mayor and effectively change the form of government to strong Mayor-Council. It would have authorized the Council to appoint a Legislative Analyst to independently scrutinize the Manager's budget proposals and, in effect, dilute most of the Manager's administrative powers. Proposition B was defeated by the voters by a 62% to 38% margin. One can only infer that the citizens of San Diego in 1973 were not ready to change their City Manager form of government.

Deputy Mayor
and Council

-6-

June 23, 1986

ANALYSIS

With this historical background, we will now examine the applicable sections of the 1931 Charter, as amended, to analyze and address the issue presented.

City Council

The City Council:

* Is the legislative body of the City, vested with all legislative powers subject to the terms of the Charter. [Charter section 11]. It is solely and exclusively empowered to enact all ordinances and resolutions [Charter sections 15, 16 and 17] and shall determine its own rules and order of business [Charter section 14].

* Elects the City Manager and the City Manager serves at the pleasure of the Council. [Charter section 27.] No Councilmember may, however, interfere with the administrative service which is vested with the Manager. [Charter section 22.]

* Is solely responsible for enacting an appropriation ordinance to provide the necessary funds for the operation of the City [Charter section 71] and has the power to fix the salaries of those specified officers under its jurisdiction [Charter section 70].

Numerous other powers of a legislative nature are vested by the Charter in the City Council, generally relating to funding and imposition of taxes; however, the recitation of those powers are not germane to this analysis.

City Manager

The City Manager is the chief administrative officer of The City of San Diego [Charter section 27] and shall be responsible to the Council for the proper administration of all affairs of the Council placed in his [or her] charge. [Charter section 28]. He [or she] is empowered to supervise the administration of the affairs of the City, keep the Council advised of the financial condition and future needs of the City, prepare and submit the annual budget estimate and, except as otherwise provided in the Charter, exercise all other administrative powers conferred by the laws of the State upon any municipal official. The Manager is also designated as the Chief Budget Officer of the City and is

Deputy Mayor
and Council

June 23, 1986

responsible for planning activities of the City and adjusting such activities to the finances available. [Charter section 28].

Addressing one specific Charter-granted power of the Manager which is part of the underlying question at issue, i.e., the authority of the Manager [or Department head] to transfer individuals, section 28 of the Charter provides:

In order to expedite the work of any department or to adequately administer an increase in the duties which may devolve on any Department or to cope with periodic or seasonal changes, the Manager, subject to Civil Service regulations is empowered to transfer employees temporarily from one Department to perform similar duties in another Department. Likewise each Department head shall have power to transfer employees from one Division to another within his Department. [Emphasis added.]

Charter section 28.

Annual Appropriation Ordinance

In addition to its other legislative responsibilities in a home rule city, the process associated with and the enactment of an annual appropriation ordinance to finance the operation of the City is probably the most important duty of the City Council. Granted, the Charter provides for an automatic reappropriation for the new fiscal year, at the same level as the prior year, if the Council fails to act [see Charter section 71a]. Despite that "plugging the gap" proviso, the approval of the annual budget by enacting annual appropriations ordinance is one of the primary actions vested with Council.

The Manager is directed to prepare and submit to Council a proposed budget for the ensuing year [Charter section 69] and upon receipt of the Manager's estimate, the Council is required to prepare an appropriation ordinance using such estimate as a basis. The form, arrangement and itemization of the appropriation ordinance shall be determined and prescribed by the Auditor and Comptroller and City Attorney. [See Charter section 71]. The Council may reduce or eliminate any item, increase any amount or add any new item for personal services, contractual services, materials, supplies and equipment for any Department. Id.

Deputy Mayor
and Council

June 23, 1986

The annual budget documents [as opposed to the annual appropriation ordinance] have been so arranged as to show the detail of activities which are authorized as a sum total in the appropriation ordinance. This methodology of display is commonly called a program budget. The programs [as approved by Council] represent the purpose and intent of the allocation of dollars and people. It is a projected blueprint of operation of the City for the forthcoming year. It is the financial and logistical vehicle which the City Manager uses to administer the affairs of the City.

Reconciliation of Charter Provisions and Summary

The preceding discussion was provided to identify seemingly competing Charter provisions and responsibilities. The historical perspective is intended to reveal what the legal structure of government in San Diego really is (as opposed to the informal process which has gradually evolved) and to illuminate the respective powers of the City Council (as a policymaking body) and the City Manager (as the Chief Administrator).

We confine our analysis and any conclusion drawn therefrom narrowly to the issue of the Council's authority to direct the City Manager in respect to allocation and placement of personnel and the specificity of any adopted appropriation ordinance.

To begin with, we observe that several important sections of the Charter would seem to be at odds with each other. Those sections have been referred to in the above discussion. The resolution, therefore, draws heavily upon historical perspectives which reveal the intent of the framers of the existing Charter and the voters thereon, and the changes (and attempted changes) since 1931.

The City Council is the legislative body of The City of San Diego, endowed with all powers necessary, subject to the terms of the Charter, to perform as such. California case law is clear that a City Charter is construed as an instrument of limitation on the exercise of powers by the municipality and its officers. City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 212 P.2d 849 (1949). The City of San Diego is a Council-Manager form of government providing therein a separation of powers; that is, Council as the policymaking body and the Manager as the Chief Administrator. The City Manager is hired by the City Council and serves at its pleasure. In connection therewith, the Council also evaluates the performance of the City Manager.

Deputy Mayor
and Council

-9-

June 23, 1986

The City Manager is required to prepare and submit to the Council, at a specified time in May, a budget proposal for the expenses of conducting the affairs of the City for the ensuing year. The City Council is empowered to enact an appropriation ordinance for such purposes and may reduce or eliminate any item, increase any amount or add any new item for personal services, contractual services, materials, supplies and equipment for any department.

The format of the budget document reflects programs and projects which Council, in its legislative discretion, determines to be a checklist of projected governmental operation in San Diego for the ensuing year. It is designed with a lowest common denominator specificity. Those specific programs and projects identifying positions and dollars, are parts of the whole which is adopted in generalized sums total in the annual appropriation ordinance.

The question then arises -- Can the Council, in effect, direct that there be no reassignment of personnel for which an appropriation has been made during a fiscal year to accommodate a need as determined by the City Manager as Chief Administrative Officer without first coming before Council? We believe not. That would be in contravention of Charter section 28. We do not mean to imply that the Manager is prohibited from informing the Council of any movements of concern but rather we conclude he is not required by the Charter to obtain the City Council's specific consent or to inform them if he chooses not to inform them.

The City Manager is empowered as Chief Administrator, during any fiscal year, to transfer employees temporarily from one department to another to perform similar duties. Similarly, Department heads may transfer people between divisions within their department. The Charter is quite clear in this regard and it would be our opinion, based upon everything discussed hereinabove, that such provision exists to enable the Manager [and Department heads] to address situations that arise during the year which need administrative action and attention, and that the Manager is not required to advise Council prior to any such temporary personnel reassignment. Implicit in Council's discussion giving rise to this matter was the suggestion that the Council wanted prior notification (of any personnel move) in order to spend time evaluating it -- which leads to the further inference that the Council might abandon its policy role and inject itself into the administrative affairs of the City.

Council will also recall that during the discussion on the matter on June 2, 1986, the City Attorney stated that any "permanent" transfer between departments would amount to an

Deputy Mayor
and Council

June 23, 1986

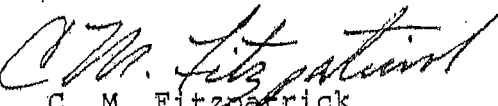
appropriation ordinance change and would require Council action to do so. It follows, a fortiori, that Council would be informed prior to any such action and accorded the opportunity to evaluate and act upon it.

SUMMARY

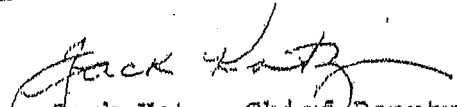
The 1931 Charter establishes a Council-Manager form of municipal government. The City Manager, as Chief Administrative Officer of the City, is budget officer, as well. The budget is prepared by the Manager for approval by the Council. The Council may increase, reduce or eliminate any budget item amount. Once the budget and appropriation ordinance have been adopted, the Manager may transfer employees between departments temporarily, as may department heads between divisions within their respective departments. Notification of the Council of such temporary transfer is not required. Any permanent transfer, however, would amount to an appropriation ordinance change and would require Council action.

Respectfully submitted,

JOHN W. WITT, City Attorney

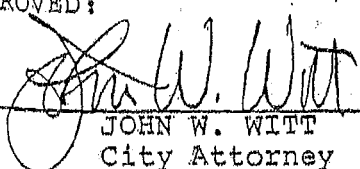
By 
C. M. Fitzpatrick
Assistant City Attorney

and

By 
Jack Katz, Chief Deputy

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APPROVED:


JOHN W. WITT
City Attorney