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MEMORANDUM OF LAW

DATE: March 4, 2015

TO: Charter Review Committee

FROM: City Attorney

SUBJECT: Applicability of Single Subject Rule to Charter Amendments Proposed by the City Council

INTRODUCTION

The Council's Charter Review Committee is considering potential amendments to the San Diego Charter, encompassing numerous topics ranging from housekeeping items to substantive changes. Charter amendments require approval by San Diego voters. Cal. Const. art. XI, § 3; San Diego Charter § 223.

Once the full Council determines which potential amendments it wishes to submit to a future ballot, the amendments would be drafted and included in ordinances for the Council's review. The Council then would vote on ordinances that place individual measures on the ballot. This Office has been asked whether such Charter amendment measures are subject to the limitations of the single subject rule, which would require a ballot measure to embrace only one subject. This could affect the number and content of the Charter amendment measures the Council ultimately submits to voters. This Memorandum of Law considers that issue.

QUESTION PRESENTED

Does the single subject rule of the California Constitution apply to Charter amendments proposed by a legislative body, as opposed to initiative measures that result from voter petitions?

SHORT ANSWER

No, but the analysis does not end there: A California appellate court has held that the California Constitution does not impose a single subject rule on Charter amendments sponsored

by a governing body such as the City Council, as opposed to initiative measures that result from signed voter initiative petitions. *Hernandez v. County of Los Angeles,* 167 Cal. App. 4th 12, 22-23 (2008). This Office last formally opined on this issue before the *Hernandez* case provided that direction.[1] Significantly, however, the *Hernandez* court indicated that the Council is authorized "to group technical changes of disparate but *reasonably related provisions* and statutory amendments into one measure to achieve a *common theme or purpose*." *Id.* at 23 (emphasis added).

Prior to *Hernandez*, this Office opined that the San Diego Charter requires imposition of a single subject rule through the language of Charter section 223 ("Amendment of Charter") and section 275(b)'s requirement that all ordinances "shall be confined to one subject." (*See* n. 1 and attachments, 2007 City Att'y Report 302 (2007-17; Nov. 2, 2007) and 2008 City Att'y Report 241 (2008-3; Jan. 29, 2008)). The earlier opinions noted that a California court had yet to rule directly on the issue of whether the single subject rule in the California Constitution applied to Council-sponsored Charter amendment measures.

To harmonize these laws and minimize the risk that the substance of a measure is not clear to voters, this Office concludes that potential Charter amendments are to follow the standard set by *Hernandez*, and if grouped must be in measures in which the content is "reasonably related" to the same subject and will "achieve a common theme or purpose." Such amendments can be drafted to also satisfy any Charter requirements that do not directly conflict with the Constitution. Significantly, the *Hernandez* standard could ensure that ballot materials (such as the ballot question, arguments, impartial analysis and fiscal impact analysis) better inform voters of the reach of a particular measure. This could minimize the risk of lawsuits regarding a given ballot measure, including those brought to prevent a successful measure from taking effect.

ANALYSIS

I. THE CALIFORNIA CONSTITUTION DOES NOT IMPOSE A SINGLE SUBJECT RULE ON CHARTER AMENDMENTS PROPOSED BY THE LEGISLATIVE BODY AND NOT SUBMITTED BY THE VOTERS.

Charter amendments are governed by the California Constitution and state law. There are two ways to propose an amendment: Voters can submit signed petitions to qualify a measure for the ballot, or the governing body of the city can sponsor a Charter amendment.[2] Cal. Const. art.

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[1] Attached to this Memorandum of Law are two previous reports from the City Attorney's Office that provide helpful background on the topic. (*See* 2007 City Att'y Report 302 (2007-17; Nov. 2, 2007), Report to the Committee on Rules, Finance and Intergovernmental Relations, "City Ballot Measures Submitted to Voters are Subject to the Separate Vote (Single Subject) Rule"; and 2008 City Att'y Report 241 (2008-3; Jan. 29, 2008), Report to the Mayor and Council, on "Supplemental Report Regarding Measures to Amend the City Charter.")

[2] The California Constitution provides that a Charter Review Commission can also be formed to propose revisions to a Charter, but the revisions would need to be placed on a ballot by the governing body. Cal. Const. art. XI, § 3.

XI, § 3(b); *See Hernandez,* 167 Cal. App. 4th at 21. San Diego's Charter confirms that it may be amended in accordance with the California Constitution. San Diego Charter § 223.

Voter initiatives to amend a charter "must conform to a wide range of stringent procedural requirements before they can be placed on the ballot." *Hernandez,* 167 Cal. App. 4th at 21. Among those requirements is a provision in the California Constitution that imposes a single subject rule on such measures. The Constitution states:

> An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.

Cal. Const. art. II, § 8(d).

The ballot measure considered in *Hernandez*, Measure R, was a City Council-sponsored measure, submitted to the Council by the Los Angeles Area Chamber of Commerce and League of Women Voters of Los Angeles. *Hernandez,* 167 Cal. App. 4th at 16. The Council made several alterations to the proposal before placing it on the ballot, which the court stated was "a further indication that Measure R was not, and was not treated as, a voter initiative." *Id.* at 22. The measure did not result from voter-signed petitions. Measure R combined Charter amendments regarding term limits, lobbyists, campaign contributions, and ethics laws. A trial court noted that the measure's content violated the "single subject rule," designed "to prevent politicians and special interests from manipulating the initiative process by bundling together measures to force voters to accept all or none of them," rather than submit them to separate votes. *Id.* at 17. The trial court held, however, that the single subject rule did not apply to Measure R because it was not an initiative.

The appellate court agreed that the single subject rule did not apply to a Charter amendment sponsored by a legislative body. *Id.* at 22-23. The appellate court thus did not consider whether the content of Measure R encompassed more than one subject. *Id.* at 23, n. 6.

The *Hernandez* court considered the purpose of the single subject rule, stating that it was added to the Constitution by voters to protect "the integrity of this 'most precious right'" of the voter initiative process. *Hernandez,* 167 Cal. App. 4th at 22, citing *Senate of the State of Cal. v. Jones,* 21 Cal. 4th 1142, 1168 (1999). The Court then distinguished the voter initiative process of amending a charter from a legislative body's action to draft Charter amendments and place them on a ballot. The court held that the people's power of initiative is "fundamentally distinguishable from the power of the legislative body." *Hernandez*, 167 Cal. App. 4th at 22. The court then provided direction to Charter cities by addressing the governing body's authority when it drafts Charter amendments:

> The California Constitution contains specific provisions regulating charter amendments sponsored by the governing body of a charter city in article XI. The provisions do not contain any single subject requirement on charter amendments sponsored by such governing bodies. Specifically, as noted, *article XI, section 3, authorizes the governing body of a charter city to sponsor a charter amendment, and those provisions contain no single subject requirement.* (*See*

> Cal. Const. art. XI, § 3, subd. (b).) Nor does article XI, section 7.5, which sets forth certain constraints on city council sponsored charter amendments, include any single subject requirement. (*See* Cal. Const. art. XI, § 7.5.) By not encumbering governing bodies of charter cities with a single subject requirement, the framers enabled charter cities to sponsor measures aimed at accomplishing comprehensive reform at the ballot box. Charter cities are also able to group multiple technical amendments into one ballot measure. Since every ballot question carries significant administrative costs, substantial efficiencies can be achieved by *a city council's authority to group technical changes of disparate but reasonably related provisions and statutory amendments into one measure to achieve a common theme or purpose."*

Hernandez, 167 Cal. App. 4th at 22-23 (emphasis added).

Although the court confirmed that the single subject rule does not apply to Charter amendments sponsored by the Council, the court nonetheless also confirmed that the Council is to "group" those with "technical changes of disparate but reasonably related provisions," and to draft measures that "achieve a common theme or purpose." *Id.* Thus, this standard must be followed when the Council considers Charter amendment measures for the ballot.

II. THE SAN DIEGO CHARTER REQUIRES THAT ORDINANCES ENCOMPASS ONLY A SINGLE SUBJECT AND THAT CHARTER AMENDMENTS FOLLOW CONSTITUTIONAL REQUIREMENTS.

The Charter represents the supreme law of the City, subject only to conflicting provisions in the United States and California Constitutions or to preemptive state law. *Domar Electric, Inc. v. City of Los Angeles,* 9 Cal. 4th 161, 170 (1994). Prior to *Hernandez*, this Office opined in two Reports to Councilmembers that San Diego's Charter requires the single subject rule to apply to Charter amendments proposed by the legislative body. The Reports noted, for example, that all ballot measures are included in ordinances, and ordinances must be "confined to one subject" under Charter section 275. These issues are fully considered in the attached Reports (*see* n. 1) and thus are not detailed here.

Post-*Hernandez*, this Office concludes that if technical changes must be "reasonably related," and Charter amendments must be drafted to "achieve a common theme or purpose" when amendments are grouped, the ordinances including such ballot measures can be drafted to comply with the Charter. Once the Council has decided which amendments it seeks to place before the voters, this Office is prepared to assist with drafting measures to meet legal requirements.

CONCLUSION

The *Hernandez* case confirms that the California Constitution authorizes the City Council of a Charter city to sponsor Charter amendment ballot measures that do not need to be confined to a single subject. The court directed, however, that ballot measures may group amendments if

they are "technical changes of disparate but *reasonably related provisions*" and amendments that will "achieve a *common theme or purpose*." *Hernandez*, 167 Cal. App. 4th at 23 (emphasis added). The *Hernandez* standard provides the Council with some flexibility in drafting measures, and may allow for fewer measures that combine different Charter amendments.

This legal standard can be harmonized with Charter requirements, keeping in mind paramount goals of providing voters with clear direction about the measures before them, and minimizing the risk that a measure will be contested in court. Thus, once the Council determines which amendments it wishes to submit to voters, this Office can assist the Council in determining which amendments may be grouped and drafted to meet legal requirements.

JAN I. GOLDSMITH, CITY ATTORNEY

By

Sharon B. Spivak
Deputy City Attorney

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Attachments

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November 2, 2007

REPORT TO THE COMMITTEE ON RULES, FINANCE AND INTERGOVERNMENTAL RELATIONS

CITY BALLOT MEASURES SUBMITTED TO VOTERS ARE SUBJECT TO THE SEPARATE VOTE (SINGLE SUBJECT) RULE

INTRODUCTION

The San Diego City Council Rules, Open Government, and Intergovernmental Relations Committee is scheduled to consider the final report of the 2007 San Diego Charter Review Committee, issued on October 4, 2007 [CRC Report]. The report proposes that the City Council submit a series of amendments to the voters during 2008. CRC Report at 8-9. The report broadly separates the changes into three major groups: interim strong mayor and legislative tightening; financial reform and the Kroll report; and duties of elected officials. This Office anticipates the Committee and the Council may request advice on whether these measures may be combined in a single ballot measure. This Report discusses the requirement that each measure submitted to voters address only a single subject so that each subject may be voted on separately.

DISCUSSION

I. The Separate Vote and Single Subject Rules.

The separate vote rule is expressed in the last sentence of Article XVIII, section 1 of the California constitution, which provides: "Each amendment [to the state constitution] shall be so prepared and submitted that it can be voted on separately." Although this provision has existed in one form or another in the state constitution since 1879,[1] it was only in 2006 that the California Supreme Court interpreted its scope and construction. In *Californians for an Open Primary v. McPherson,* 38 Cal. 4th 735 (2006) [*McPherson*], the court decided the separate vote rule limited the authority of the state legislature to package disparate proposed constitutional amendments in a single measure, and that it should be construed consistently with single subject rule, a kindred provision governing voter-originated constitutional initiatives under Article II, section 8(d) of the constitution. *Id.* at 738.

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[1] The 1879 version provided: "Should more than one amendment be submitted at the same election, they shall be so prepared and distinguished, by numbers or otherwise, that each can be voted on separately." *Id.* at 747.

Both the separate vote rule and the single subject rule serve the same purpose—to bar submission of measures that "might cause voter confusion or might constitute 'logrolling'- that is, the practice of combining two or more unrelated provisions in one measure, thereby forcing a single take-it-or-leave-it vote on matters that properly should be voted upon separately." *Id.* at 749 (citations omitted) and 765-766. The goal in classic logrolling is to bundle a provision attractive to the voters with one that is less attractive, "simply to increase the likelihood that the proponent's desired proposal will be adopted." *Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1142, 1151 (1999).

II. Charter Measures Submitted by the City Council to the Voters Are Subject to the Separate Vote (Single Subject) Rule.

Courts have not yet determined that the separate vote rule of the California Constitution is a matter of statewide concern, applicable to the submission of charter amendments to city voters by their legislative bodies. In San Diego's case, the wait for such decision is unnecessary because the Charter requires the City Council to comply with the separate vote rule in submitting charter amendments to the voters.

Charter section 223 was adopted with the 1931 City Charter. It provides the Charter "be amended in accordance with the provisions of Section Eight, Article Eleven, of the Constitution of the State of California, or any amendment thereof or provision substituted therefor in the State Constitution." The 1931 version of Article XI, section 8 of the California Constitution, incorporated by section 223 of the City Charter, permitted city legislative bodies to submit multiple proposals to amend a City charter that were ". . . to be voted upon by the electors separately. . . ." Former Cal. Const. Art XI § 8 (Cal. Stats. 1931).[2]

The virtually identical language of these provisions indicates the intent to incorporate the separate vote rule from the California constitution into the City Charter, making it applicable to charter amendments submitted by the City Council to the voters. This interpretation is also consistent with Charter section 275(b) that requires City ordinances: ". . . shall be confined to one subject, and the subject or subjects of all ordinances shall be clearly expressed in the title," [3] and section 27.0503 of the San Diego Municipal Code, requiring the City Council to "decide by ordinance the content of the ballot question for each ballot measure. . . ."

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[2] The full sentence in former Article XI, section 8 refers both to amendments proposed by the legislative body and the electors. It provides: "In submitting any such charter or amendment separate provisions, whether alternative or conflicting, or one included in the other, may be submitted at the same time *to be voted on by the electors separately,* and, as between those so related, if more than one receive a majority of votes, the proposition receiving the larger number of votes shall control as to all matters in conflict."

[3] Superceded Charter section 16 also provides: "All ordinances . . . shall be confined to one subject, and the subject or subjects of all ordinances shall be clearly expressed in the title."

III. The "Reasonably Germane" Test.

The test of whether a particular measure submitted to the voters meets or violates the separate vote rule is the same test used to determine a violation of the single subject rule. *McPherson,* 38 Cal. 4th at 763. The court construes both in an "accommodating and lenient manner so as not to unduly restrict the Legislature's or the people's right to package provisions in a single bill or initiative." *Id.* at 764.

The court has "found the single subject rules to have been satisfied so long as challenged provisions meet the test of being reasonably germane to a common theme, purpose, or subject." *Ibid.* The court went on to note that, "[i]n setting forth the 'reasonably germane' test, several of our prior decisions have stated or repeated language suggesting the standard requires that each of a measure's parts be reasonably germane *to one another* as well as reasonably germane *to a common theme, purpose, or subject*. . . . In *applying* the reasonably germane test, however, our decisions uniformly have considered only whether each of the parts of a measure is reasonably germane to a common theme, purpose, or subject, and have not *separately* or *additionally* required that each part also be reasonably germane to one another." *Id.* at 764 n. 29. (citations omitted, emphasis in original.)

Examples of measures that have and have not met this test include:

- In *McPherson,* the California Supreme Court held a two-part legislatively sponsored measure violated the separate vote rule because each part was not reasonably germane to the other. *McPherson,* 38 Cal. 4th at 779. One part of the measure proposed a constitutional amendment to require that a political party's top vote-getter in a primary election be permitted to run in the following general election. The second part proposed a constitutional amendment to provide a new means for the state to pay bond obligations. *Id.* at 739. The scheme was described as "classic logrolling." *McPherson,* 38 Cal. 4th at 791 (Moreno, J., concurring).

- The California Supreme Court upheld Proposition 8, known as the Victims' Bill of Rights, against a single-subject challenge. The Court held each of its several facets was reasonably germane to the general subject of promoting the rights of actual or potential crime victims. The court also cautioned that initiative proponents did not have a blank check to draft measures containing unduly diverse or extensive provisions bearing no reasonable relationship to each other or a general object. *Brosnahan v. Brown*, 32 Cal. 3d 236, 246-253 (1982).

- A trailer bill that amended, repealed or added approximately 150 sections to over 20 codes had as its single subject "fiscal affairs" or "statutory adjustments" and was too broad to comply. *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1100-1101 (1987).

- A proposed initiative to restrict legislative salaries and transfer reapportionment from the Legislature to the Supreme Court could not be upheld under the general subject of voter involvement or voter approval of political issues. *Senate of the State of Cal.,* 21 Cal. 4th at 1162-1163.

CONCLUSION

Our Office will provide advice as to whether any proposed measure might meet the separate vote test when the Council decides which proposed charter amendments should go to the voters. This Office recommends the Committee and Council keep in mind the purpose behind the separate vote rule, namely, to prevent voter confusion and to avoid "logrolling," when considering whether certain measures should be considered separately or together by the voters.

Respectfully submitted,

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JAK:als
RC-2007-17

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January 29, 2008

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

SUPPLEMENTAL REPORT REGARDING MEASURES TO AMEND THE CITY CHARTER

INTRODUCTION

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

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

DISCUSSION

I. Compliance with the Separate Vote Rule.

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

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

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

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

The four measures this Office recommends are:

1. A measure to require the Council to place before voters on the June 2010 ballot a single measure to decide the permanency of Article XV, the creation of a ninth Council district, and an increase in the number of Council votes required to override a mayoral veto.

2. A measure that permits greater fiscal responsibility by creating a separate Office of the Independent Budget Analyst (IBA) to advise the City Council; separating responsibilities for the accounting and auditing functions of the City into two separate officers- a Chief Financial Officer (CFO) and City Auditor; creating an Audit Committee to oversee the City Auditor; and expressly requiring the City budget be balanced.

3. A measure to exempt the services provided by City police officers, firefighters and lifeguards from the Managed Competition process permitted by section 117.

4. A measure to change the way the salaries of elected officials are established.

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

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

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

III. Financial Responsibility Measure.

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

A. Chief Financial Officer.

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

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

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

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

B. Audit Committee

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

- To ensure the Council, not the screening committee, controls the appointment of the public members of the Audit Committee, the draft sets a suggested minimum number of five candidates as the pool from which the Council must select the three public members of the Audit Committee, and establishes that the City Council appoint the public members of the screening committee as follows: "The three (3) public members of the Audit Committee shall be appointed by the City Council from a pool of at least five (5) candidates to be recommended by a majority vote of a screening committee comprised of a member of the City Council, the Chief Financial Officer, the Independent Budget Analyst and two (2) outside financial experts appointed by the City Council."

- This draft modifies the CRC's proposed language in section 39.1 to avoid conflict with section 39 as follows: "The Audit Committee shall have oversight responsibility regarding the City's ~~accounting,~~ auditing, internal controls and any other financial or business practices required of this Committee by this Charter ~~or City ordinance~~."

- The CRC intended that the Council have the authority to impose additional duties and responsibilities upon the Audit Committee by ordinance, as proposed at page 78 of its final report. The proposed last sentence of the new section provided: "The Council shall specify the powers and duties of the Audit Committee." Instead, we have included the following new language which more closely mirrors the intent of the CRC and avoids potential future conflicts. "The Council may specify additional responsibilities and duties of the Audit Committee by ordinance as necessary to carry into effect the provisions of this section."

- As section 39.1 is phrased, the Audit Committee only recommends the Auditor's salary and budget, but does not set that salary or budget. Accordingly, we have deleted the legally unnecessary sentence from section 39.1 that provides: "~~This section shall not be subject to the provisions of section 11.1.~~"

C. City Auditor

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

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

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

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

- Upon the City Council's motion, the following modifications have been made to the CRC's recommended language for section 39.2:

  The City Auditor shall be appointed by the City Manager, in consultation with the Audit Committee, and confirmed by the Council. The City Auditor shall be a certified public accountant or certified internal auditor. The City Auditor shall serve for a term of ten years. The City Auditor shall report to and be accountable to the Audit Committee. Upon the recommendation of the Audit Committee, ~~T~~the City Auditor may be removed for cause by a vote of ~~four-fifths~~ two-thirds of the members of the ~~Audit Committee subject to the right of the City Auditor to appeal to the~~ Council ~~to overturn the Audit Committee's decision. Any such appeal must be filed with the City Clerk within 10 calendar days of receiving the notice of dismissal or termination from the Audit Committee. The City Clerk shall thereafter cause the appeal to be docketed at a regular open meeting of the Council no later than 30 days after the appeal is filed with the Clerk. The Council may override the decision of the Audit Committee to remove the City Auditor by a vote of six members of the Council~~. The City Auditor shall be the appointing authority of all City personnel authorized in the department through the normal annual budget and appropriation process of the City, and subject to the Civil Service provisions of this Charter.

- For the reasons given in our January 14, 2008 report, we have deleted the legally irrelevant and misleading sentence at the end of the first paragraph in the CRC's proposed section 39.2 that provides: ~~"Nothing herein prevents the Council or the Audit Committee from meeting in closed session to discuss matters that are required by law to be discussed in closed session pursuant to State law~~."

- Because these proposed sections do not involve setting compensation, enacting legislation, or setting City policy, they need not be exempted from section 11.1, and the sentences should be deleted in the CRC versions of proposed section 39.2 *and* amended section 111 that provide ~~"This section shall not be subject to the provisions of section 11.1."~~

- The change to section 117(a)(11) would provide: "(11) ~~Industrial Coordinator~~ All assistants and deputies to the Independent Budget Analyst; all assistants and deputies to the City Auditor."

D. Independent Budget Analyst

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

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

The new section 39.3 that we recommend provides:

Section 39.3. Independent Budget Analyst.

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

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

E. Balanced Budget

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

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

- We revise the suggested CRC language for section 69 to ensure the Council may adopt its alternates to any proposed revised budget as follows: "No longer than 60 days from the date of submittal by the Manager of said revised budget to the Council, the Council shall adopt the proposed revisions or its~~offer~~ alternative revisions to ensure the budget is balanced."

- We also revise the final proposed new sentence of section 69 to include posting of any budget revisions as follows: "The City shall post copies of the budget and any revisions on appropriate electronic media, such as the internet, to allow the public full access to the document."

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

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

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

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

IV. Exemption from Managed Competition.

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

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

V. Setting the Salary of Elected Officials

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

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

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

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

CONCLUSION

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

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

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