

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 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. 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