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MEMORANDUM OF LAW

DATE: August 29, 2005

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Retention of Outside Counsel

QUESTIONS PRESENTED

1. Under San Diego Charter §40 may the City Council retain outside counsel to provide legal services to the City in matters involving investigations by the U.S. Securities and Exchange Commission?

2. If the retention of such counsel violates Charter §40, must the City pay invoices submitted for their services?

SHORT ANSWERS

1. Pursuant to Charter §40, the City Council may not retain outside counsel to provide legal services to the City in matters involving investigations by the U.S. Securities and Exchange Commission.

2. The City is under no obligation to pay for the services of outside counsel retained in violation of Charter §40.

ANALYSIS

By a vote of the people, a city may adopt a charter for its government. Once adopted, a charter is the supreme law of the city, construed to permit the city to exercise all powers not expressly limited either by the document itself,[1] by preemptive state law, or by constitutional constraints. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 394-397; *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170.) Through a long line of cases beginning with *City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, the California Supreme Court has held that a charter operates not as a grant of power but rather as an instrument of limitation and restriction

on the exercise of power over all municipal affairs that the city is assumed to possess. In other words a charter city may exercise all powers relative to municipal affairs unless specifically and explicitly limited by its charter.[2]

In this opinion we are concerned specifically with those sections of San Diego Charter §40 establishing the City Attorney as the City's chief legal advisor and permitting the Council to "employ additional competent technical legal attorneys": We consider whether this language permits the City Council to retain outside counsel for representation in U.S. Securities and Exchange Commission (SEC) investigations relating to false and misleading statements in San Diego's offer and sale of municipal securities. In addition we consider whether the City would have to pay for the services of outside counsel retained in this matter.

After reviewing relevant Constitutional, statutory, and case law, we determine that the City Council may not retain outside counsel to represent the City in matters before the SEC and that if the Council does, nevertheless, retain such counsel, the City would not be liable for payment of any services that they might render.

In interpreting a charter, the California Supreme Court has stated,

> we construe the charter in the same manner as we would a statute. Our sole objective is to ascertain and effectuate legislative intent. We look first to the language of the charter, giving effect to its plain meaning. Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history. (*Domar Electric, Inc.*, *supra* at 171-172. [Citations omitted.])

As with statutes, if the words of the charter are clear, no construction is necessary, and the plain language should be given effect. (*Caminetti v. Pac. Mutual L. Ins.* (1943) 22 Cal.2d 344, 353-354.)[3] Returning to the Charter sections now under consideration, we note that §40 provides that the City Attorney:

> shall be the chief legal advisor of, and attorney for the City and all Departments and offices thereof and that the Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith.

This language has been part of the Charter since 1931, when San Diego voters determined that the City Attorney should be an independently elected official. (City Attorney of San Diego website.)

In applying the rules of statutory construction cited above, we determine that, when San Diego voters adopted Charter §40, they intended to convey a mandate for the City Attorney to represent the City of San Diego in all matters except for those that require narrow technical legal expertise. Because the word *shall* leaves no room for discretion, no other interpretation could effectuate the plain language of the Charter. Charter §40 may be interpreted reasonably only to mean that the Council has no power to retain outside legal counsel except when the City Attorney's Office "does not have the expertise or needed personnel to handle the matter" in question.[4]

If the plain language were not sufficient, the intent of the voters in enacting Charter §40 would be clear from the section's legislative history alone. In 1929, the San Diego electorate defeated a proposed new charter containing a provision that the City Attorney be appointed. Following this defeat a Board of Freeholders was elected to write a new charter.

One major point of discussion among the Freeholders was the question of whether the City Attorney should be appointed or elected. In describing this discussion, attorney and board member James G. Pfanstief wrote:

> Some advocated with considerable degree of force that the city attorney should be elected by the people. The argument is that the city attorney is the attorney for the entire city and each and every elective and appointive officer thereof upon all questions pertaining to the municipality, and he should occupy an independent position so that his opinions may be uninfluenced by an appointive power.

And in a proposal that he submitted to the Freeholder Board, labor representative and member Ray Mathewson wrote:

> The duty of the city attorney is to give legal advice to every department and official of the city government on municipal matters. He must also act as the representative of the various departments before the courts. He should occupy an independent position so that his opinions would not be influenced by any appointive powers. For this reason he should be elected by the people. If elected, the city attorney is in a position of complete independence [sic] and may exercise such check upon the actions of the legislative and executive branches of the local government as the law and his conscience dictate.

Seeing the worth of these arguments, on November 12, 1930, a unanimous Board of Freeholders adopted the proposal for an independently elected City Attorney. In doing so, members rejected the concept that the City Attorney would be "only the council's

lawyer." In the general election of April 7, 1931, San Diegans overwhelmingly voted in support of the new charter containing the mandate for an elected City Attorney. A contemporary ballot brochure explaining Section 40 states:

> The city attorney is to be elected by the people. This is a guarantee that the legal head of government will be able to fearlessly protect the interests of all San Diego and not merely be an attorney appointed to carry out wishes of council or manager.

It is clear from reading these materials that San Diegans wanted an independent City Attorney who could, free from control by the City Council, represent their interests. As former City Attorney John Witt opined in 1977: "It cannot be more obvious that Section 40 makes the City Attorney the Chief Legal Advisor of the City and all its departments and offices. The Council does not have the power to retain its own attorney."

In his opinion, Mr. Witt also interpreted the Charter §40 language permitting the City Council "to employ additional technical legal attorneys."

> The only proper construction to be placed on [this] portion of Section 40 is that it gives the Council authority to hire special attorneys when this office does not have the expertise or needed personnel to handle the matter. Such attorneys, of course, work through and with this office.

Fortunately for the taxpayers of San Diego, the current City Attorney's office has such expertise. Not only does the City Attorney have 25 years of securities law experience but he also has the benefit of advice and help from a talented staff led by Executive City Attorney Don McGrath, a civil securities law litigator for more than 27 years.

As discussed above, under Charter §40, the City Council may retain outside attorneys only to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The necessity clause becomes the measure of the City's power to incur any liability beyond the limit fixed by Charter § 40. *City of San Ta Cruz v. Wykes* (1913) 202 F. 357.

When a City's power to make a contract is statutorily limited to a certain prescribed method and a contract is created in violation of the prescribed method, the contract is void:

> [T]he contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all and can be exercised in no other

> manner so as to incur any liability on the part of municipality. Where the statute prescribes the only mode by which the power to contract shall be exercised the *mode* is the *measure* of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract and the doctrine of implied liability has no application in such cases. *Reams v. Cooley* (1915) 171 Cal. 150, 154.

Because under Charter §40, the City Council is without power to retain outside attorneys to represent the City before the SEC,

> neither the officers of the corporation nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; and the law never implies an obligation to do that which it forbids the party to agree to do. *Reams v. Cooley* (1915) 171 Cal. 150, 155 (quoting from *Brady v. Mayor etc. of New York*, 16 How. Pr. 432).

Any contract made without regard to the Charter's limitations and restrictions is void and unenforceable. *Domar Electric, Ind. v. City of Los Angeles* (1994) 9 Cal. 4th 161, 171; *Miller v. McKinnon* (1942) 20 Cal. 2d 83, 88; *Reams v. Cooley* (1915) 171 Cal. 150, 153-154; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal. App. 4th 1178, 1186.

Should the Council retain outside attorneys against the advice of the City Attorney, the Council would do so in violation of Charter §40. The Council's action would be *ultra vires*--that is, beyond the scope or in excess of its legal power or authority. An *ultra vires* act is one "performed without any authority to act . . .[An] *ultra vires* act of a municipality is one which is beyond powers conferred upon it by law." Black's Law Dictionary 1522 (6th ed.1990).

Because those contracting with a municipality are presumed to know the extent of its authority, all who act contrary to those limitations must bear the risk of the contract being deemed void as a matter of law. *Law Offices of Cary S. Lapidus v. City of Waco* (2004) 114 Cal. App. 4th 1361. All parties contracting with the City are required to ensure that liability contracts are made in compliance with the Charter:

> It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglects this, or chooses to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or

> ought to know it, before he places his money or services at hazard.
> *Reams v. Cooley* (1915) 171 Cal. 150, 157.

Therefore, should a law firm enter into a contract with the City Council or its designee, the City Manager, such contract would be void and unenforceable, and the firm would not be entitled to collect its fee for those services.

CONCLUSION

The above history of Charter §40 reveals no evidence that the electors of 1931 wanted or decided to empower the Council to retain outside attorneys whenever they decide to do so. These voters opted instead for an independently elected City Attorney who would be the City's chief legal advisor. The only way to accomplish an abrogation of this duty that the Charter bestows on the City Attorney is through a voter-enacted amendment. This assertion is strengthened by cases holding that local legislative bodies may not by indirection accomplish that which they are precluded from accomplishing by direction. The only time that the Council is permitted to hire attorneys is when the City is in need of technical legal advice.

In addition, those parties contracting with the City of San Diego to represent the City of San Diego over the objection of the elected City Attorney are presumed to have known that such retention was contracted in violation of Charter §40's limits and that they have no means of obtaining payment. *Weaver v. City and County of San Francisco* (1986) 111 Cal. 319. A law firm's ignorance of the law is no excuse: "A party engaging in business relationships with a municipality is presumed to know the law including the procedures necessary to enter into a binding contract." See *Miller v. McKinnon* (1942) 20 Cal. 80, 83; *Seymour v. State* (1984) 156 Cal. App. 3d 200, 205.

San Diegans of 70 years ago decided that they needed the protection of an independently elected City Attorney who would check the power of the City Council and balance the interests of the people with the interests of other elected officials and the bureaucracy that they create. The only control that they gave Councilmembers over the City Attorney was in the traditional budgetary sense. Permitting the Council to hire attorneys in disregard of Charter §40's limitations would "weaken that check and balance seriously by downgrading the independence of the legal advice which may be given the Council at times of critical importance to the City."

MICHAEL J. AGUIRRE, City Attorney

By

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