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MEMORANDUM OF LAW

DATE: April 18, 2008

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Car Allowances and AB 1234

INTRODUCTION

Recent news accounts have raised questions regarding the legality of the automobile allowance long provided as part of the salaries of the Mayor, City Council and other City officials. Amendments to the California Government Code, the result of Assembly Bill 1234 signed in October 2005, have been construed in news accounts to cast doubt on the continued legality of the practice. The new law allows cities to provide reimbursement to members of a legislative body for the “actual and necessary expenses incurred in performance of official duties,” including travel expenses. In light of this law, our office has been asked to provide an opinion on the current legal status of the City’s flat car allowance.¹

QUESTION PRESENTED

Is the City’s payment of car allowances to various City officials still lawful after AB 1234 amended the California Government Code?

SHORT ANSWER

Yes. The new sections of the Government Code did not operate to repeal or otherwise rescind pre-existing state law that specifically allows a flat car allowance to be paid to City officials as part of their compensation. Although the allowance is legal, a credible argument can be made that continuing to pay car allowances to City Councilmembers with public funds may

¹ The City Council voted April 14, 2008 to eliminate car allowances for Councilmembers and the Mayor and instead to increase their salaries to cover that amount. The Mayor then vetoed the salary increase. Two Councilmembers announced they had changed their minds and will not vote to override the veto. Elimination of the car allowance was tied to the vote on the salary increase. The Council is scheduled to reconsider the matter on April 21, 2008.

violate the spirit of the new law authorizing reimbursement of actual expenses incurred by members of a legislative body. It is worth noting, however, that the new law addresses reimbursement issues regarding members of a “legislative body” (i.e., the City Council or boards and commissions) and does not address the issue with regard to other City officials or City employees who receive the car allowance (including the Mayor and City Attorney). Whether the City Council nonetheless wishes to change the practice of paying a flat car allowance is a policy decision for it to decide.

ANALYSIS

I. Background of Assembly Bill 1234 and Resulting Changes to the California Government Code

As a Charter city, San Diego has control over its municipal affairs. The Legislature cannot control the governance of Charter cities except on matters of statewide concern. However, Assembly Bill 1234 emphasized that its provisions “shall apply” to charter cities and counties because “transparency in the activities of local governments is a matter of statewide concern and not merely a municipal affair,” as the term is used in the California constitution. (See AB 1234 at § 41.)

AB 1234 was signed into law in October 2005 and became effective January 2006. Its provisions are found at California Government Code sections 36514.5, 53232.2 and 53232.3. These sections require local agencies to adopt expense reimbursement policies for City Councilmembers that specify the kinds of activities that will be reimbursable, with additional provisions that requests for reimbursement be for “actual and necessary expenses,” be submitted within a “reasonable time,” be supported by receipts, and be submitted on expense report forms that are public records. At the time the law was enacted, San Diego already had reimbursement policies in place for City officials and employees.

The legislation also required new ethics training every two years for elected and appointed officials who are compensated for their service or reimbursed for their expenses, with detailed objectives and topics that must be covered. This Office and the Ethics Commission provided prior memoranda to Councilmembers regarding the new training requirement and numerous City officials have taken training to comply with the new law.²

II. State of the Law Regarding Car Allowance Payments

Another section of the California Government Code, case law and rules of statutory construction confirm the car allowance may still be paid. Authority for the flat car allowance is found in Government Code section 1223, a law that has been in existence since 1943 and was

² Officials should note that the requirement to complete the ethics training every two years is not tied to the calendar year. That is, if an official’s training was completed on November 15, 2006, for example, the next training must be completed by November 14, 2008.

last amended in 1951. Section 1223 remains unchanged and states in relevant part:

When traveling expenses are allowed by law to any . . .city officer, ***he may contract with appropriate authorities for an allowance*** or mileage rate for the use of vehicles owned or rented and used by him in the performance of duty, in lieu of the usual transportation charges.

Cal. Gov't. Code § 1223 (emphasis added.)

The Legislature did not repeal or amend Section 1223 when it passed AB 1234. There is no indication the Legislature intended for Section 1223 to be changed or rescinded. “It is assumed that the Legislature has in mind existing laws when it passes a statute. [internal citations omitted.] The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.” *Estate of McDill*, 14 Cal 3d 831, 837-838 (1975).

Moreover, AB 1234 and the resulting new Government Code sections (36514.5, 53232.2 and 53232.3) never specifically discuss a car allowance. Rather, the sections address how reimbursements are to be made for *actual and necessary* expenses. There is authority for the idea that a flat vehicle allowance can be construed as an “actual and necessary” expense for a public official. In *Citizen Advocates, Inc. v. Board of Supervisors*, 146 Cal. App. 3d 171 (1983), a court held that a county’s payment of a \$100 per month car allowance qualified as reimbursement of “actual and necessary” expenses in the performance of officials’ duties. *Id.* at 178-179. Appellants had argued that compensating officials for having their private vehicles “standing by” for possible use for county business was not an “actual and necessary” purpose. However, the court disagreed, allowing the car allowance to stand and citing Section 1223. The court held that availability of the vehicle “serves an “actual and necessary” purpose.” *Id.* at 179.

To the extent that two laws conflict, they must be harmonized. *Massa v. Southern California Raid Transit District*, 43 Cal. App. 4th 1217, 1221 (1996). If the provisions of a statute are truly inconsistent, “the principle applies that specific statutory provisions relating to a particular subject will govern, as against general provisions, in matters concerning that subject.” *Young v. Haines*, 41 Cal. 3d 883 (1986), citing *Bailey v. Superior Court*, 19 Cal. 3d 970, 977 n.8 (1977). Section 1223 is specific to the car allowance; new Government Code sections resulting from AB 1234 are not, but merely discuss reimbursement of “actual and necessary” expenses. See Govt. Code § 36514.5. Thus, the specific provision, Section 1223, applies.

III. The City’s Car Allowance Payments

According to the City Auditor’s Office, the car allowance is paid to City officials biweekly, included in wages for income tax purposes. The Auditor’s Office confirmed that the allowance is excluded from earnings for the purpose of pension salary calculations. This complies with the mandate of the San Diego Municipal Code. (See Section 24.0103, Definitions, “*Base Compensation*.” “For purposes of calculating retirement benefits, “*Base Compensation*”

shall not include . . . payments made by City to an employee as an Automobile Allowance or for reimbursement of miles driving while using a personal vehicle for work-related duties...”)

The City Auditor’s Office confirmed that the City pays four separate levels of a flat rate auto allowance as follows:

- City Councilmembers and the City Attorney receive \$800 per month (\$369.20 biweekly);
- 14 City officials and employees, including the Chief Operating Officer, Independent Budget Analyst, Chief Financial Officer, Assistant Chief Operating Officer, Deputy Chief Officers and five Assistant City Attorneys, receive \$475 per month (\$219.28 biweekly);
- The Mayor receives \$400 per month (\$184.56 biweekly), a figure that may take into account the fact he has a separate security detail and is often transported by others; and
- 27 City department directors and other managerial employees designated by the Mayor, including the Ethics Commission Executive Director, the Retirement Administrator, the Personnel Director, the City Clerk, the Auditor and Comptroller and the Executive Services Director, each receive \$300 per month (\$138.48 biweekly).

According to the Salary Ordinance, the monthly allowances for the elected officials are based upon the national average costs of operating an automobile as computed by Runzheimer and Company, transportation consultants, for the American Automobile Association, as previously authorized pursuant to Resolution No. R-263924 adopted by the City Council on August 19, 1985.

CONCLUSION

As set forth above, the provisions of AB 1234 relating to reimbursement apply only to members of a legislative body. Although AB 1234 promoted a system of reimbursement of City legislators for actual and necessary expenses, it did not operate to rescind or repeal previously existing state law that provides for payment of a flat car allowance. Thus, the car allowances may still be legally paid to City Councilmembers. To the extent the Council wishes to change

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the car allowance or opt for a straight reimbursement plan, this is a policy issue for the Council to decide.

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cc: Stacy Fulhorst, Ethics Commission
Andrea Tevlin, Independent Budget Analyst