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MEMORANDUM OF LAW

DATE: April 14, 2014

TO: Judy von Kalinowski, Human Resources Director

FROM: City Attorney

SUBJECT: Applicability of the California Minimum Wage Law to the City of San Diego

INTRODUCTION

You have requested that this Office analyze whether the City of San Diego (City) must comply with California Assembly Bill 10 (AB 10), signed by Governor Jerry Brown on September 25, 2013, which amended California Labor Code (Labor Code) section 1182.12 to raise minimum wage in California to $9.00 per hour beginning July 1, 2014, and $10.00 per hour beginning January 1, 2016.

This question relates to the Mayor's preparation of, and the San Diego City Council's (Council) consideration of, the Salary Ordinance for Fiscal Year 2015. Currently, six classifications of City employees in the proposed Fiscal Year 2015 Salary Ordinance have salary ranges or initial steps that begin below $9.00 per hour. Under San Diego Charter (Charter) section 290(a), the Mayor proposes the Salary Ordinance for Council consideration "in a form consistent with any existing Memorandum of Understandings with recognized labor organizations, or otherwise in conformance with procedures governed by the Meyers-Milias-Brown Act or any other legal requirements governing labor relations that are binding upon the City." San Diego Charter § 290(a). You have informed this Office that the Mayor has made a policy determination to propose in the Salary Ordinance that, during Fiscal Year 2015, no City employee receive less than the California minimum wage in effect on July 1, 2014. The Mayor's proposal has been integrated into the proposed Salary Ordinance, which is before the Council for consideration on April 15, 2014.

QUESTION PRESENTED

Is the City, as a charter city, legally required to pay its employees California's minimum wage?

SHORT ANSWER

There is no case on point that legally requires the City to pay its employees California's minimum wage, as recently increased by AB 10. The California Legislature adopted AB 10 pursuant to its constitutional authority under article XIV, section 1 of the California Constitution. However, article XI, section 5 of the California Constitution expressly includes employee "compensation" as a municipal affair within the plenary authority of charter cities. The rules of constitutional construction provide no clear insight into which competing constitutional provision – article XIV, section 1 or article XI, section 5 – should prevail. Without any clear precedent directly on the minimum wage issue, this Office will rely upon the City's constitutional authority related to "compensation," but recognize that a lawsuit on the issue would be a case of first impression.

ANALYSIS

I. AB 10 RAISES MINIMUM WAGE TO AN AMOUNT ABOVE THE WAGES ESTABLISHED BY THE COUNCIL THROUGH COLLECTIVE BARGAINING UNDER PROPOSITION B

In June 2013, the City and each of its six recognized employee organizations agreed to incorporate the Fiscal Year 2011 salary tables into five-year labor agreements, which are in effect until June 30, 2018. *See* San Diego Resolutions R-308250 (June 18, 2013) (San Diego Municipal Employees' Association (MEA)); R-308251 (June 18, 2013) (Teamsters Local 911 (Local 911)); R-308252 (June 18, 2013) (San Diego Firefighters, Local 145 (Local 145)); R-308253 (June 18, 2013) (American Federation of State, County and Municipal Employees, Local 127 (Local 127)); R-308254 (June 18, 2013) (Deputy City Attorneys Association (DCAA)); R-308255 (June 18, 2013) (San Diego Police Officers Association (POA)).[1]

In July 2013, the Council amended the Fiscal Year 2014 Salary Ordinance to incorporate the terms of the negotiated labor agreements. San Diego Ordinance O-20272 (July 11, 2013). Pursuant to each agreement with the City's recognized employee organizations, negotiated under the parameters of Charter section 70.2,[2] the Fiscal Year 2014 Salary Ordinance carries over the

[1] *See also* San Diego Resolutions R-308476 (POA); R-308477 (DCAA); R-308478 (Local 145); R-308479 (Local 911); R-308480 (Local 127); R-308481 (MEA) (Oct. 15, 2013) (approving five-year memorandum of understanding with each recognized employee organization).

[2] Charter section 70.2 states, in part, that from July 20, 2012, Proposition B's effective date, until June 30, 2018, certain requirements apply to the City's position in collective bargaining. San Diego Charter § 70.2. Specifically, if the City intends to propose increases to pensionable pay for employees, the Council must approve the increases by a

salary tables from Fiscal Year 2011. As a result, there are six employee classifications listed in the salary tables that have starting salaries of less than $9.00 per hour.[3]

Paying any City employee below a $9.00 per hour rate will violate California's minimum wage law, set to take effect on July 1, 2014. Therefore, the question presented is whether the City is legally required to pay the minimum wage as set by AB 10.

II. THE CITY'S AUTHORITY TO SET EMPLOYEE COMPENSATION IS A MUNICIPAL AFFAIR

Article XI, section 5(a) of the California Constitution establishes the broad power of charter cities. Termed the "home-rule" doctrine, this section provides:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

See Cal. Const. art. XI, §5(a).

Article XI, section 5(b) of the California Constitution identifies a nonexclusive list of categories that constitute "municipal affairs." *Johnson v. Bradley*, 4 Cal. 4th 389, 398 (1992). This section expressly grants charter cities the plenary authority to set "compensation" for municipal officers and employees. Cal. Const. art. XI, § 5(b). The California Supreme Court has maintained that "compensation," as used in this Constitutional provision, includes the right to determine employee wages. *See e.g., Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 317 (1979) ("the determination of the wages paid to employees of charter cities as well as charter counties is a matter of local rather than statewide concern."); *County of Riverside v. Superior Court*, 30 Cal. 4th 278, 285 (2003) ("The constitutional language is quite clear and quite specific: the *county*, not the state, not someone else, shall provide for the compensation of its employees . . .[this] express grant of authority to the county necessarily implies the Legislature does not have that authority."); *State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista*, 54 Cal. 4th 547, 556 (2012) (*State Bldg.*) ("the salaries of charter city employees are a municipal affair and not a statewide concern").

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two-thirds majority vote and must obtain and make public an actuarial impact statement prior to any final decision on increases to pensionable pay. San Diego Charter § 70.2.

[3] These classifications include three in the unclassified service, which have pay rates established pursuant to pay ranges: Managerial A, Professional Legal, and Miscellaneous E. These classifications are generally benefitted positions, meaning they are under the City's retirement system or under the City's defined contribution plan as established by Charter sections 140 and 150. One classification is within the unclassified service, but with rates of pay (A though E): student intern. Generally, a student intern is not a benefitted position, meaning it is not under the City's retirement system. Two classifications are in the classified service and both are represented by the San Diego Municipal Employees Association: Recreation Aide and Work Service Aide.

Pursuant to this Constitutional right, the City has adopted charter provisions that establish the parameters of employee compensation. The Charter provides that the Council must annually adopt an ordinance that establishes salaries for all City employees. San Diego Charter § 11.1.[4] Charter section 130 states: "The Council shall by ordinance, prior to the beginning of each fiscal year, establish a schedule of compensation for officers and employees in the Classified Service, which shall establish a minimum and maximum for any grade and provide uniform compensation for like service." San Diego Charter § 130.[5]

III. IT IS UNCLEAR WHETHER CHARTER CITIES ARE LEGALLY REQUIRED TO PAY CALIFORNIA'S MINIMUM WAGE

There is authority to suggest that charter cities are not legally required to comply with the Labor Code provisions establishing minimum wage and that the Industrial Welfare Commission's (IWC) Wage Orders, adopted pursuant to the Labor Code, are not applicable to charter cities. In *Curcini v. County of Alameda*, 164 Cal. App. 4th 629 (2008), and *Dimon v. County of Los Angeles*, 166 Cal. App. 4th 1276 (2008) the California Court of Appeals for the First and Second District held that, as applied to county-employed prison chaplains and probation officers, the overtime and meal-break provisions of Labor Code sections 512, 226.7, and 1194 "are matters of compensation within the County's exclusive constitutional purview." *Dimon*, 166 Cal. App. 4th at 1283. Likewise, in the recent *State Bldg.* decision, the California Supreme Court held that the state's prevailing wage law, which requires that certain minimum wage level be paid to contract workers constructing public works, is not a statewide concern and, therefore, a charter city is not mandated to comply with it. *State Bldg*, 54 Cal. 4th at 566.

However the *State Bldg*. decision specifically left open the question of whether state minimum wage laws of broad general application could be superseded by a local enactment that conflicted. *See State Bldg*., 54 Cal. 4th at 564 ("the state law at issue is not a minimum wage law of broad general application; rather, the law at issue here has a far narrower application"). Without any clear precedent directly on the minimum wage issue, this Office will rely upon the City's constitutional authority related to "compensation," but recognize that a lawsuit on the issue would be a case of first impression.[6]

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[4] The Salary Ordinance must be proposed by the Mayor for Council introduction "in a form consistent with any existing Memorandum of Understandings with recognized labor organizations, or otherwise in conformance with procedures governed by the Meyers-Milias-Brown Act or any other legal requirements governing labor relations that are binding upon the City." San Diego Charter § 290(a).

[5] Once the Council establishes the salary schedules through adoption of the Salary Ordinance, individual employees may receive increases in compensation from their appointing authorities, within the parameters of the established schedules and applicable Civil Service and other personnel regulations. Charter section 130 states: "An increase in compensation, within the limits provided for any grade, may be granted at any time by the City Manager or other appointing authority upon the basis of efficiency and seniority record, after having first received the approval of the Civil Service Commission therefore." San Diego Charter § 130.

[6] The City is subject to federal minimum wage law standards, as set forth in the Fair Labor Standards Act (FLSA). *White v. Davis*, 30 Cal. 4th 528, 545, n.7 (2003) ("The state remains obligated to comply with the provisions of the FLSA.").

IV. IF AB 10 APPLIES TO THE CITY, THEN THE CONSTITUTIONAL PROVISION AUTHORIZING THE LEGISLATURE TO SET MINIMUM WAGE LIKELY CONFLICTS WITH THE CONSTITUTIONAL PROVISION GRANTING THE CITY THE RIGHT TO SET EMPLOYEE WAGES

An argument could be made that state minimum wage is applicable to the City, as a charter city, because the California Constitution explicitly authorizes the Legislature to set a base minimum wage of general application. Article XIV, section 1 of the California constitution states: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers." Cal. Const. art. XIV, § 1. Pursuant to its constitutional authority, the Legislature has enacted several provisions in the Labor Code establishing a state minimum wage and created the IWC, the state agency authorized to formulate regulations or wage orders that govern employment. *See Hess Collection Winery v. California Agr. Labor Relations Bd.*, 140 Cal. App. 4th 1584, 1597 (2006) ("The Legislature's authority with respect to wages and the welfare of employees is expressly recognized in our Constitution.").

The Labor Code chapter that establishes state minimum wage provisions expressly applies to "men, women and minors employed in any occupation, trade, or industry, whether compensation is measured by time, piece, or otherwise . . . ." Cal. Lab. Code § 1171.[7] Moreover, Labor Code section 1182.12, which establishes the rate of minimum wage, applies to "all industries."[8] Cal. Lab. Code § 1182.12. ." The IWC also mandates that "*[e]very employer* shall pay to *each employee* wages not less than [minimum wage]." Cal. Code Regs. title 8, § 11000 (emphasis added). This broad and inclusive language suggests that the Legislature intended for state minimum wage to apply to all employees, including charter city employees.[9]

However, if charter cities must comply with the state minimum wage, it limits the broad plenary authority granted to charter cities under the home rule doctrine.

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[7] The only express exemption in the statute is for "any individual employed as an outside salesman or any individual participating in a national service program carried out using assistance provided under Section 12571 of Title 42 of the United States Code." Cal. Lab. Code § 1171.

[8] AB 10 amends Labor Code section 1182.12 to state: "Notwithstanding any other provision of this part, on and after July 1, 2014, the minimum wage for all industries shall be not less than nine dollars ($9) per hour, and on and after January 1, 2016, the minimum wage for all industries shall be not less than ten dollars ($10) per hour."

[9] The specific legislative history in support of AB 10 details that the law was intended to combat income inequality, the shrinking middle class and a decrease in purchasing power throughout California. *See* AB 10, Cal, Assembly Bill 10 (2013-2014 Reg. Sess.), Assembly Committee on Appropriations (May 1, 2013). The Legislature also identified the statewide concern that "[m]inimum wages have not kept pace with the cost of living and has equated to a decrease in purchasing power." AB 10, Cal. Assembly Bill 10 (2013-2014 Reg. Sess.), Assembly Committee on Labor and Employment, Bill Analysis, p. 2 (April 22, 2013).

V. THE RULES OF CONSTITUTIONAL CONSTRUCTION DO NOT CLEARLY DEMONSTRATE THAT THE LEGISLATURE'S CONSTITUTIONAL AUTHORITY TO SET MINIMUM WAGE WILL PREVAIL OVER THE CITY'S CONSTITUTIONAL AUTHORITY TO SET EMPLOYEE COMPENSATION

When possible, every provision of the California Constitution should be given full effect and related provisions should be harmonized to avoid "the implied repeal of another constitutional provision." *ITTWorld Commc'ns, Inc. v. City & Cnty. of San Francisco*, 37 Cal. 3d 859, 865 (1985). "Rudimentary principles of construction dictate that when constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted." *Izazaga v. Superior Court*, 54 Cal. 3d 356, 371 (1991); *see also Serrano v. Priest* (1971) 5 Cal.3d 584, 596. As a means to avoid conflict, "a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision." *Izazaga*, 54 Cal. 3d at 371; *People v. W. Air Lines*, 42 Cal. 2d 621, 637 (1954); *Serrano*, 5 Cal. 3d at 596 (finding the constitutional provision that "was more specific and was adopted more recently" prevailed.).

However, in the event that it is impossible to harmonize or reconcile portions of the Constitution, the judiciary will decide which constitutional provision prevails. *City & Cnty. of San Francisco v. Cnty. of San Mateo*, 10 Cal. 4th 554, 563 (1995); *Greene v. Marin Cnty. Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277, 291 (2010). To interpret a constitutional amendment, courts "seek to give effect to the intention of the electorate enacting it by looking at the language of the amendment and by examining the ballot argument and other indicia of voter intent." *Voters for Responsible Retirement v. Board of Supervisors*, 8 Cal. 4th 765, 818 (1994).

Here, a court may struggle to harmonize the competing provisions of article XIV, section 1 (minimum wage) and article XI, section 5(b) (charter city compensation) of the California Constitution. Article XIV, section 1 grants the Legislature the authority to set a minimum wage for the "general welfare of employees," but article XI, section 5(b) grants charter cities the specific plenary authority to set employee "compensation." Accordingly, the cannons of constitutional construction suggest that the more recent and specific constitutional provision should carve out an exception to the older, more general provision – but this analysis is unavailing.

Article XI, section 5 of the California Constitution has its origins in former article XI, section 6, which amended the Constitution in 1896 to provide that "[c]ities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of the constitution, except in municipal affairs, shall be subject to and controlled by general laws." Cal. Cont. art. XI, § 6 (amended and adopted as art. XI, § 5 in 1970); *Johnson v. Bradley*, 4 Cal. 4th 389, 395 (1992). The California Supreme Court found that this 1896 amendment "was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws. . ." *Fragley v. Phelan*, 126 Cal. 383, 387 (1899). The "municipal affairs" provision of the Constitution was amended again in November 1914 to give charter cities the power "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." *Johnson*, 4 Cal. 4th at 396 (emphasis omitted). The ballot arguments in favor of this amendment specify that, unlike the existing

constitutional language, this amendment grants to charter cities "jurisdiction in all municipal affairs. . . ." *See* Voter Information Guide for 1914, General Election (1914), p. 24, http://repository.uchastings.edu/ca_ballot_props/82. After this, the "municipal affairs" aspects of these provisions remained essentially unaltered until 1970 when the voters retained in substance but rewrote and renumbered this provision as the current article XI, section 5. *See* Cal. Const. Revision Com. (Feb. 1968) Proposed Revision of the Cal. Const., pp. 59–60; *Johnson*, 4 Cal. 4th at 397.

The impetus to enact the minimum wage provisions in article XIV, section 1 of the California Constitution began in 1911 after the legislature introduced laws prohibiting child labor and regulating work hours for women and children. *Martinez v. Combs,* 49 Cal. 4th 35, 53 (2010). In 1913, "the Legislature addressed these continuing problems by creating the IWC and delegating to it broad authority to regulate the hours, wages and labor conditions of women and minors, and by proposing to the voters a successful constitutional amendment confirming the Legislature's authority to proceed in that manner." *Id.* at 54 (citations omitted).

In the November 1914 – the *same* election where voters gave charter cities their current municipal affair powers – the voters approved of former article XX, section 17 1/2 of the California Constitution, which provided, "[t]he legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees." *Sheppard v. N. Orange Cnty. Reg'l Occupational Program*, 191 Cal. App. 4th 289, 302 (2010).

In June 1976, the voters slightly adjusted the language to approve the current version of article XIV, section 1 to state: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers." Cal. Const. art. XIV, § 1.

Since the relevant substance of article XI, section 5 and article XIV, section 1 of the California Constitution were approved by the voters in the same November 1914 election, neither article can be interpreted to "carve out" an exception to the other. Moreover, each article, arguably, concerns a specific, special circumstance. Article XI, section 5 expressly identifies "compensation" as a municipal affair, but, by the same degree, article XIV, section 1 expressly identifies the Legislature's authority to set minimum wage for the "general welfare of employees."[10] Therefore, the rules of constitutional construction do not clearly establish which constitutional provision should prevail.

[10] This circumstance is distinct from the situation discussed in 14 Op. Cal. Att'y Gen. 149 (1949). In that opinion, the attorney general concluded that article XX, section 22 of the California Constitution, which gives the state exclusive control over the liquor business prevails over the general provisions of section of Constitution giving chartered cities control over their municipal affairs. Here, unlike a charter city's right to control liquor businesses, employee "compensation" is specifically identified as a municipal affair and cannot be characterized as a "general provision."

VI. IF COUNCIL DECIDES THAT AB 10 IS CONTROLLING STATE LAW, THEN THE CITY DOES NOT NEED TO MEET AND CONFER WITH LABOR ORGANIZATIONS PRIOR TO COMPLYING WITH THE LAW

There is no case on point that would lead to the conclusion that the City is legally required to comply with California minimum wage laws. The rules of constitutional construction do not clarify which competing constitutional provision – minimum wage or "home rule" authority – should prevail. It is within the discretion of Council, as a legislative act, to decide whether to apply California's minimum wage law, as recently amended by AB 10.

If Council decides, as a policy decision, that AB 10 is applicable state law, then it should be incorporated into the Memoranda of Understanding (MOU) of each impacted employee organization without the need for meet and confer because the MOUs are subject to applicable state law. Each MOU, except the City's MOU with the POA,[11] contains a provision that states the MOUs are subject to current and future applicable state law. [12] If there is not a requirement to meet and confer then the provisions of Charter section 70.2 should not apply.

CONCLUSION

It is not clear under existing legal authority whether the City is required to comply with California's minimum wage law, as recently amended in AB 10. A constitutional analysis of the competing constitutional provisions does not reveal which constitutional provision – minimum wage or "home rule" authority – would prevail upon judicial review. Without any clear precedent directly on the minimum wage issue, this Office will rely upon the City's

[11] All classifications of employees represented by the POA have starting salaries above $9.00 per hour and, thus, are not currently affected by AB 10.

[12] For example, the City's MOU with MEA states in applicable part: "ARTICLE 34: Provisions of Law, A. This MOU is subject to all current and future applicable federal, state and local laws, regulations and the Charter. Provided, however, no local law which is enacted in contravention of the provisions of the MMBA shall affect the provisions of this MOU. B. If any part or provision of this MOU is in conflict or inconsistent with applicable provisions of federal, state, or local laws or regulations, or is otherwise held to be invalid or unenforceable by any tribunal or court of competent jurisdiction, those parts or provisions shall be suspended and superseded by applicable laws or regulations, and the remainder of the MOU shall not be affected." Memorandum of Understanding, approved by San Diego Resolution R-308481 (Oct. 15, 2013).

constitutional authority related to "compensation," but recognize that a lawsuit on the issue would be a case of first impression. If the Council makes the policy determination that AB 10 falls within the category of applicable state law, then AB 10 should be incorporated into the MOUs, without the need to meet and confer.[13]

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Gregory J. Halsey
Gregory J. Halsey
Deputy City Attorney

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cc: Scott Chadwick, Chief Operating Officer

[13] The pay rates of unclassified, unrepresented employees can be adjusted within the existing salary ranges, without consideration of Charter section 70.2 or meet and confer. Under Charter section 70.2, the pay rates of individual employees can be adjusted within the parameters of established ranges.