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MEMORANDUM OF LAW

DATE: August 24, 2015

TO: Judy von Kalinowski, Human Resources Department Director
Karen DeCrescenzo, Human Resources Department Deputy Director

FROM: City Attorney

SUBJECT: Roles of the San Diego City Council and the Mayor in Approving and Modifying Collective Bargaining Agreements

INTRODUCTION

You have asked this Office to analyze whether the San Diego City Council (Council) can delegate authority to the Mayor to enter into side letter agreements, to amend Council-approved memoranda of understanding between the City of San Diego (City) and its recognized employee organizations, without Council involvement. You have also asked whether the Mayor has authority to negotiate side letter agreements between the City and its recognized employee organizations, without Council involvement.

On November 2, 2004, City voters approved Proposition F, which amended the San Diego City Charter (Charter), by adding Article XV, to implement a Strong Mayor form of government, for a trial period beginning January 1, 2006. Prop. F, Gen. Elec. (Nov. 2, 2004).[1]

On June 8, 2010, City voters approved Proposition D, making the Strong Mayor form of government permanent. Prop. D, Primary Elec. (June 8, 2010).[2]

Under the Strong Mayor form of government, the Mayor assumes all executive authority, power, and responsibility previously conferred upon the City Manager. The Mayor also assumes additional rights, powers, and duties, as set forth in the Charter. *See* San Diego Charter art. XV. The Mayor is the City's chief executive officer, and chief budget and administrative officer.

The Council is the legislative body of the City, responsible for making public policy decisions, including decisions about raising and spending public money and compensating and governing City employees. *See* San Diego Charter art. III. The Mayor is not a voting member of

[1] http://www.sandiego.gov/city-clerk/pdf/pamphlet041102.pdf
[2] http://www.sandiego.gov/city-clerk/pdf/pamphlet100608.pdf

the Council, but has veto power over most Council actions, which can be used to force Council reconsideration of decisions. With sufficient votes, the Council has authority to override a mayoral veto. San Diego Charter §§ 280, 285, 290.

This Office discussed the role of the Mayor and the Council in impasse resolution related to collective bargaining in 2009 City Att'y MOL 8 (2009-2; Jan. 26, 2009). As explained in that memorandum of law, the Mayor and the Council are both involved in labor negotiations.

The collective bargaining process required by Meyers-Milias-Brown Act (MMBA) is procedural and administrative, in that it requires the City to exchange information and proposals with its recognized employee organizations in an effort to resolve disputes and reach agreement, prior to modifying wages, hours, or other terms and conditions of employment. Throughthe budget process, the Council has established the Labor Relations Office in the Human Resources Department (Labor Relations Office), and delegated to its staff the administrative process of collective bargaining. The Labor Relations Office serves as the primary contact for the City's six recognized employee organizations on labor issues.[3]

Collective bargaining also involves policy decisions, related to the compensation and benefits the City pays its employees, and the rules that govern employment, including the qualifications, method of appointment, tenure of office, and removal process. *See* Cal. Const. art. XI, § 5(a), (b) (stating, generally, that plenary authority is granted to charter cities to determine the compensation, method of appointment, qualifications, number, tenure of office, and removal process of city employees). These policy decisions are discretionary and legislative, under the authority of the Council.

The specific questions addressed in this Memorandum of Law relate to the use of side letters to a Council-approved collective bargaining agreement. A side letter agreement is an agreement that is ancillary to another agreement. *See* Black's Law Dictionary 82 (10th ed. 2014). An agreement is a "mutual understanding between two or more persons about their relative rights and duties regarding past or future performances." *Id*. at 81.

The MMBA does not use the terms "side letter agreement" or "side agreement." *See* Cal. Gov't Code §§ 3500-3511.[4] The MMBA uses the term "memorandum of understanding" (MOU) to refer to the document that is drafted once tentative agreements are reached in the collective

[3] *See* http://www.sandiego.gov/fm/proposed/pdf/2016/vol2/v2humanresources.pdf.

[4] Courts, in the context of private sector collective bargaining, have described a side agreement or side letter agreement as a collective bargaining agreement that is separate from the underlying or primary collective bargaining agreement (CBA). *See United Steelworkers of America v. Cooper Tire & Rubber Co.*, 474 F.3d 271, 274 n.3 (2007). A side letter agreement may be collateral to the primary collective bargaining agreement, meaning it is set apart and distinct from it. *Cornell University v. UAW Local 2300*, 942 F.2d 138, 140 (1991). Or it may be integrated into the primary agreement. *Id.*

bargaining process. Cal. Gov't Code § 3505.1.[5] "Memorandum of understanding" or MOU is also the term set forth in the Charter, which provides that the Council approves MOUs. San Diego Charter § 11.2.

Under the MMBA, an MOU is between the City, as a public agency employer, and a recognized employee organization, and it sets forth the terms of employment for those employees represented by the recognized employee organization. *Valencia v. County of Sonoma*, 158 Cal. App. 4th 644, 652-53 (2007). As discussed more fully below, the MOU is binding on the City, including the Mayor and all other officers and employees of the City, once it is approved by the Council. *Id.*

QUESTIONS PRESENTED

1. Can the Council delegate authority to the Mayor to enter into side letter agreements between the City and its recognized employee organizations, without subsequent Council approval, when the side letter agreements amend the terms of an approved MOU?

2. Can the Council delegate authority to the Mayor to enter into side letter agreements between the City and its recognized employee organizations, without subsequent Council approval, when the side letter agreements involve administrative issues?

SHORT ANSWERS

1. Generally no, unless the agreement is necessary to clarify a provision in an approved MOU or to implement the Council-approved MOU or a Council policy. By definition, an amendment to an approved MOU means a change or revision to the MOU, by addition, deletion, or correction. *See* Black's Law Dictionary 98 (10th ed. 2014). Under the Charter and state law, it is the role of the Council, not the Mayor, to approve MOUs, which bind the City, and amending an MOU is also a legislative act, under the purview of the Council. The Mayor's role in the legislative process is to make recommendations to the Council and to approve or veto legislative acts, which force Council reconsideration of a decision. The Council can override a mayoral veto. If the Mayor desires an amendment to an approved MOU, then the Mayor must make the recommendation to the Council, and the Council must determine the parameters of any required collective bargaining and approve any necessary amendments to the approved MOU. However, in his role as the City's chief executive and administrative officer, the Mayor is required to implement approved MOUs, and may be required to clarify an MOU provision. This process may require further meet and confer with an impacted employee organization on the clarification or implementation. The Mayor or his staff may memorialize the meet and confer process in a side letter agreement, without subsequent Council approval, as long as the terms set

[5] The State Employer-Employee Relations Act (Ralph C. Dills Act or Dills Act) has a provision on side letters, appendices, and other addendum to a ratified memorandum of understanding. Cal. Gov't Code § 3517.63. It provides that certain side letters that require the expenditure of $250,000 or more related to salary and benefits and that is not already contained in the original MOU or the legislative Budget Act must be presented to the Joint Legislative Budget Committee to determine if the side letter "presents substantial additions that are not reasonably within the parameters of the original memorandum of understanding." Cal. Gov't Code § 3517.63(a). If not, then the side letter must be ratified by the California Legislature. *Id.* It further provides that the California Department of Human Resources must expressly identify if a side letter that does not require expenditure of funds is to be incorporated in a subsequent MOU submitted to the Legislature for approval. Cal. Gov't Code § 3517.63(b).

forth in the amendment are consistent with and contemplated by the approved MOU. Further, the Mayor and his staff must not infringe upon the Council's nondelegable legislative authority to establish employee compensation and benefit schedules, make decisions regarding the expenditure of public money, establish the terms and conditions upon which City services are provided, and set public policy through legislation.

2. Yes. The Council may delegate authority to the Mayor to oversee the meet and confer process and reach binding side letter agreements on administrative issues under the purview of the Mayor. Further, the Mayor has independent authority under the Charter to promulgate administrative regulations, which may require collective bargaining. The Mayor must administer the mayoral departments, in a manner consistent with any Council-adopted ordinances, resolutions, and policies, including the Council-approved budget and appropriation ordinance, employee compensation schedules, Civil Service Rules, and other Council policies. The Mayor also must ensure that the City's obligations to meet and confer are satisfied, and any dispute or impasse regarding a negotiated matter must be submitted to the Council for resolution.

DISCUSSION

I. THE CITY IS A PUBLIC AGENCY EMPLOYER THAT MUST COMPLY WITH STATE-MANDATED COLLECTIVE BARGAINING PROCEDURES.

The MMBA, at California Government Code (Government Code) sections 3500 through 3511, is the state collective bargaining law applicable to the City as a public agency employer. Cal. Gov't Code § 3501(c). *See Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.*, 35 Cal. 4th 1072, 1077 (2005) (the MMBA governs collective bargaining and employer-employee relations for most California local public entities, including cities, counties, and special districts); *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591, 601-02 (1984) (the meet and confer requirements of the MMBA do not conflict with the constitutional power of charter cities to propose charter amendments); *Los Angeles County Civil Serv. Comm'n v. Superior Court*, 23 Cal. 3d 55, 59 (1978) (holding that requiring charter county to meet and confer with employee organizations before amending its civil service rules does not offend home rule provisions of California Constitution).

The MMBA provides state law rights to municipal employees, including employees of this City. *See County Sanitation District No. 2 v. Los Angeles County Employees Ass'n, Local 660*, 38 Cal. 3d 564, 571-72 (1985). The MMBA protects the right of City employees "to form, join, and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations." Cal. Gov't Code § 3502. *See County Sanitation District No. 2*, 38 Cal. 3d at 571-72. The MMBA is intended to promote improved personnel relations by "'providing a uniform basis for recognizing the right of public employees to join organizations of their own choice.'" *County Sanitation District No. 2*, 38 Cal. 3d at 572 (quoting Government Code section 3500).

The MMBA mandates the process that the City must follow to resolve disputes between the City and its recognized employee organizations regarding terms and conditions of employment and employer-employee relations. Cal. Gov't Code §§ 3500(a), 3504, 3504.5, 3505, 3505.1. *See also County Sanitation District No. 2*, 38 Cal. 3d at 572. The MMBA requires the City, through its governing body or properly designated representatives, to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of the City's recognized employee organizations prior to arriving at a determination of policy or course of action. Cal. Gov't Code §§ 3504, 3504.5, 3505, 3505.1.

Under the MMBA, "meet and confer in good faith" means that the representatives of a public agency and the representatives of a recognized employee organization must meet "promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals" and "endeavor to reach agreement on mattes within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." Cal. Gov't Code § 3505.

The City must bargain with its recognized employee organizations with "the objective of reaching binding agreements . . . over the relevant terms and conditions of employment." *Indio Police Command Unit Ass'n v. City of Indio*, 230 Cal. App. 4th 521, 536 (2014) (internal quotations and citations omitted). If agreements are not reached in the meet and confer process, the MMBA mandates specific impasse procedures, including factfinding when requested by a recognized employee organization. Cal. Gov't Code §§ 3505.2, 3505.4, 3505.5, 3505.7.

The MMBA defines mandatory subjects of bargaining, to include "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." Cal. Gov't Code § 3504. Collective bargaining is required when a proposed action or policy has a significant effect on the wages, hours, or working conditions of bargaining unit employees. *Building Material & Construction Teamsters' Union, Local 216 v. Farrell*, 41 Cal. 3d 651, 659 (1986).

The scope of collective bargaining does not include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Cal. Gov't Code § 3504. While the City generally does not have a duty to meet and confer prior to fundamental managerial or policy decisions, it may have a duty to meet and confer on the impacts or effects of the managerial or policy decision prior to implementation. *See Claremont Police Officers Ass'n v. City of Claremont*, 39 Cal. 4th 623, 632-34, 638 (2006) (stating three-part test a court will apply to determine whether there is a duty to meet and confer on implementation of a fundamental managerial or policy decision).

Government Code section 3507 allows a public agency to "adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations." Cal. Gov't Code § 3507(a). The Council has adopted Council Policy 300-06 as the City's Employee-Employer Relations Policy, to implement the MMBA. Council Policy 300-06 (amended by San Diego Resolution R-301042 (Nov. 14, 2005) (Council Policy 300-06)). Council Policy 300-06 describes "matters of general legislative or managerial policy" to include:

> The exclusive right to determine the mission of [the City's] constituent departments, commissions and boards; set standards of service; determine the procedures and standards of selection for employment; direct its employees, take disciplinary action; relieve its employees from duty because of lack of work or for other lawful reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; take all necessary actions to carry out its mission in emergencies; and complete control and discretion over its organization and the technology of performing its work.

Council Policy 300-06, § I.A.

These management rights are enumerated in the City's MOU with each of its six recognized employee organizations.[6]

While the MMBA establishes the procedures the City must follow in the collective bargaining process and defines what matters are subject to collective bargaining, the MMBA does not dictate the policies or positions the City must pursue in bargaining. *Voters for Responsible Retirement v. Board of Supervisors*, 8 Cal. 4th 765, 781 (1994). The California Supreme Court has recognized the distinction between the "*substance* of a public employee labor issue" and the "*procedure* by which it is resolved." *Id.* (quoting *People ex rel. Seal Beach Police Offices Ass'n*, 36 Cal. 3d at 600-01, n.11). Therefore, the decisions of what compensation and benefits to offer City employees and what local rules will govern the employment relationship are generally within the discretion of the City. *See* Cal. Const. art. XI, § 5(a), (b). The questions presented here relate to who has the authority in the meet and confer process to make these policy decisions for the City. To answer these questions, we must look to the Charter as well as state law.

II. UNDER THE MMBA, THE COUNCIL, AS THE CITY'S GOVERNING BODY, SETS BARGAINING PARAMETERS AND APPROVES AGREEMENTS.[7]

Under the MMBA, the duty to engage in meet and confer rests with the "governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body." Cal. Gov't Code § 3505. The

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[6] *See* Art. 11, MOU with American Federation of State, County and Municipal Employees Ass'n, Local 127, San Diego Resolution R-308480 (Oct. 15, 2013); Art. 30, MOU with California Teamsters Local 911, San Diego Resolution R-308479 (Oct. 15, 2013); Art. 10, MOU with the Deputy City Attorneys Association, San Diego Resolution R-308477 (Oct. 15, 2013); Art. 16, MOU with San Diego City Firefighters, International Ass'n of Firefighters, Local 145, San Diego Resolution R-308478 (Oct. 15, 2013); Art. 31, MOU with San Diego Municipal Employees Ass'n, San Diego Resolution R-308481 (Oct. 15, 2013) (MEA MOU); Art. 9, MOU with San Diego Police Officers Ass'n, San Diego Resolution R-309613 (Apr. 22, 2015).

[7] Note, to the extent that the conclusions in this Memorandum of Law differ from the conclusions set forth in 2008 City Att'y MOL 167 (2008-18; Sept. 18, 2008) (ML-2008-18), regarding the role of the Mayor and the Council in labor negotiations, this Memorandum of Law supersedes the legal analysis and conclusions in ML-2008-18. The earlier Memorandum of Law did not address the Charter provisions or controlling California law on the principles of legislative and executive or administrative authority, or California law interpreting the MMBA.

Council is the "governing body" of the City, within the meaning of Government Code section 3505, and the Mayor is an administrative officer. *See* San Diego Charter §§ 11, 11.1, 11.2, 12 (the Council is the legislative body of the City). *See also* San Diego Charter §§ 28, 260, 265. A designation "by law," within the meaning of Government Code section 3505, is in accordance with the Charter or any applicable state or federal law, because any designation by the Council, as the City's governing body, must be consistent with the Charter and controlling state and federal law. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994) (stating that the Council cannot act in violation of the Charter).

The Council, by formal action, regularly designates the City's representatives for labor negotiations. *See, e.g.*, San Diego Resolution R-309568 (Mar. 27, 2015). This designation is contemplated in Council Policy 300-06, which states that the City's management team, upon completion of the meet and confer process, prepares and signs the memorandum of understanding, and presents it to the Council for approval, or to the Civil Service Commission when it involves a matter under the authority of the Civil Service Commission. Council Policy 300-06, § VIII.

The Council's designated management team includes the City's Chief Operating Officer and members of his staff, the City's Chief Financial Officer, the Human Resources Department Director and her staff, among others. This designation is not a delegation of legislative authority. The designated representatives serve as agents of the Council, as the policy maker in the collective bargaining process, and the Mayor, as the City's chief executive and administrator.[8] As explained more fully below, the Mayor and his staff make recommendations to the Council regarding terms and conditions of employment for represented employees, but the decision to approve a negotiated agreement is a legislative decision, for the Council to make.[9]

The MMBA requires the governing body of a public agency or its designated representatives to "give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions" and the opportunity to meet. Cal. Gov't Code § 3504.5. The process of providing notice and opportunity to negotiate is procedural and administrative, in that it involves exchanging information, opinions, and proposals. *See* 2009 City Att'y MOL 8. The California Attorney General has described the administrative functions of a local agency's bargaining team:

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[8] By resolution, the Council authorizes the representatives to participate in meet and confer, taking Council-approved bargaining positions; to execute any tentative agreements and memoranda of understanding reached in meet and confer; and to present all tentative agreements and memoranda of understanding reached in meet and confer to the Council for final determination and approval by the Council as to policy and the City Attorney as to form or correctness. San Diego Resolution R-309568 (Mar. 27, 2015).

[9] Under the Charter, the Civil Service Commission also advises the Council on employment conditions. Charter section 118 requires the Civil Service Commission to recommend to the Council all rules and amendments related to the "government, supervision and control of the classified service." The Charter requires a noticed, public hearing before Council adoption, by ordinance, of any Civil Service rule or amendment. San Diego Charter § 118.

> Though admittedly it cannot bind the local agency to a "labor contract," its functions are more administrative in nature than advisory in nature. It has the duty to negotiate to the point of attempting to reach and reduce to writing a "memorandum of understanding" which will be submitted to the legislative body for consideration and possible adoption.

61 Ops. Cal. Atty Gen. 1, 6 (Jan. 4, 1978).

The City's management team is responsible for this process.

Collective bargaining also involves policy decisions under the purview of the legislative body. The MMBA requires the City to memorialize agreements with its recognized employee organizations in writing and present them to the governing body, which is the Council, for determination. Cal. Gov't Code § 3505.1. Once the MOU is approved by the governing body, under the MMBA, the public agency is bound to comply with its terms. *Glendale City Employees' Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 332, 335 (1975); *City of Los Angeles v. Superior Court*, 56 Cal. 4th 1086, 1092-93 (2013).

The California Supreme Court has described Government Code section 3505.1 as "a 'reservation of rights' to the governing body to approve or disapprove any agreement emerging from the meet and confer process." *Voters for Responsible Retirement v. Board of Supervisors*, 8 Cal. 4th 765, 783 (1994). *See also Long Beach City Employees Ass'n, Inc. v. City of Long Beach*, 73 Cal. App. 3d 273, 277-78 (1977) (MOU signed by city manager, but rejected by city council is not binding and city council did not act in bad faith in rejecting MOU); *City & County of San Francisco v. Cooper*, 13 Cal. 3d 898, 926-27 (1975) (stating that, under the Winton Act, the statutory scheme for regulation of employee relations in school districts prior to adoption of the Educational Employment Relations Act, a written memorandum of understanding executed by the meeting and conferring representatives in itself creates no legally binding rights against the school district, until it is approved by a school board).

The MMBA, at Government Code section 3505, mandates that the governing body of the public agency "conduct or supervise the meet and confer process leading up to the agreement" to ensure the effectiveness of the collective bargaining process. *Voters for Responsible Retirement*, 8 Cal. 4th at 782-83. The MMBA's purpose is to resolve disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations through the negotiation of binding agreements, and the governing body that approves the MOU must also oversee negotiations. *Id.* at 782. The California Supreme Court has explained:

> Why negotiate an agreement if either party can disregard its provisions? What point would there be in reducing it to writing, if the terms of the contract were of no legal consequence? Why submit the agreement to the governing body for determination, if its approval were without significance? What integrity would be left in government if government itself could attack the integrity of its own agreement? The procedure established by the act would be

> meaningless if the end-product, a labor-management agreement ratified by the governing body of the agency, were a document that was itself meaningless.

Glendale City Employees' Ass'n, Inc., 15 Cal. 3d at 336.

Bargaining without proper authority from the principal can be indicative of bad faith bargaining, if the intent is to delay or thwart the bargaining process. *See Oakland Unified School District*, PERB Dec. No. 326 (1983). To ensure the City is approaching bargaining in good faith, the City's negotiating team must receive bargaining parameters from the Council because the negotiators must bargain with the intent to reach agreement, and the agreement must be approved by the Council. The negotiators must also consider the Mayor's support for bargaining proposals because the Mayor has veto authority over a Council decision to approve an MOU, which, if exercised, forces Council reconsideration of its approval. San Diego Charter §§ 280(a), 285. Further, the Mayor may make proposals and recommendations to the Council. San Diego Charter § 265(b)(3). Therefore, the City's negotiating team must measure the support of both the Council and the Mayor for bargaining proposals. Ultimately, however, approval of an MOU is a legislative act, under the purview of the Council.

Further, California courts have made it clear that, after the legislative body approves an MOU, it may not be rewrittenor modified, except through further collective bargaining and with the approval of the legislative body. In *Voters for Responsible Retirement*, the California Supreme Court held that once approved by a county board of supervisors, voters may not alter a collective bargaining agreement through a referendum. *Voters for Responsible Retirement*, 8 Cal. 4th at 782. "If the bargaining process and ultimate ratification of the fruits of this dispute resolution procedure by the governing agency is to have its purpose fulfilled, then the decision of the governing body to approve the MOU must be binding and not subject to the uncertainty of referendum." *Id*. The Court said that power to negotiate a collective bargaining agreement and the power to approve an agreement must rest with a single decision maker so that the bargaining process under the MMBA is not undermined. *Id*.

The California Supreme Court analyzed Government Code section 25123(e), which states that ordinances adopted by a county board of supervisors that relate to the adoption or implementation of a memorandum of understanding between a countyand an employee organization take effect immediately, ratherthan 30 days fromthe date of final passage, which prohibits the opportunity for a referendum. *Id*. at 783. The California Supreme Court concluded that the Legislature's restriction of the local referendum right for ordinances adopting or

implementing employer-employee MOUs is "wholly consistent with the overall purpose of the MMBA in promoting definitive resolution of labor-management disputes through the collective bargaining process." *Id.*[10]

In another example of the binding nature of legislative approval under the state's collective bargaining laws, a California appellate court held that an arbitrator exceeded her authority when she changed the terms of an MOU after it had been ratified and approved by the California Legislature, under the Dills Act, which governs collective bargaining between the State of California and its employees.[11] *Department of Personnel Administration v. California Correctional Peace Officers Ass'n*, 152 Cal. App. 4th 1193 (2007). The appellate court affirmed the trial court's order to vacate an arbitrator's award on the ground that the arbitrator exceeded her powers. *Id.* at 1195-96.

The case involved a dispute between the California Correctional Peace Officers Association (Employee Organization) and the Department of Personnel Administration (Employer) related to a term in the MOU on a "release time" bank, which permitted employees to contribute hours of paid leave for the use of other employees. The MOU included a 10,000-hour cap on the total accumulated leave in the bank. *Id.* at 1196-97.

During the term of the MOU, the Employer conducted a review and discovered that the release time in the bank exceeded the agreed-upon cap. *Id.* at 1197. The Employer notified the Employee Organization that further requests for donations and use of release time would be denied, and employees on release time must return to work. *Id.* The Employee Organization asserted that the cap did not apply on the grounds that the cap had been lifted pursuant to a side letter agreement, and demanded arbitration of the dispute. *Id.* at 1198.

At the arbitration hearing, the Employee Organization argued that the parties agreed to eliminate the cap but, due to a scrivener's error, it was not removed from the MOU approved by the California Legislature. *Id.* The Employee Organization argued that several years prior, during a period when there was no collective bargaining agreement in place, the Employer permitted the Employee Organization to accumulate more than 10,000 hours release time in the bank. *Id.* The Employee Organization drafted a side letter to the MOU, in which the parties agreed that the cap would not be enforced. The Employer's negotiator testified that the parties discussed lifting the cap, and she recalled agreeing to the Employee Organization's demand to do so. *Id.*

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[10] Government Code section 25123(e) applies to counties, not to charter cities. And the California Supreme Court stated that it did not decide whether city ordinances or resolutions that adopt or implement MOUs pursuant to the MMBA are subject to referendum. *Voters for Responsible Retirement*, 8 Cal. 4th at 784 n.6. Generally, collective bargaining agreements in this City are adopted by Council resolution, which is not expressly excluded from the citizens' right of referendum. *See* San Diego Charter § 23; SDMC § 27.1101. This Office is not analyzing the impact of the *Voters for Responsible Retirement* opinion on the local right of referendum, except to note that the California Supreme Court has established that the MMBA is intended to promote certainty in labor-management relations, and the meet and confer process is complete once the legislative body has adopted an MOU.

[11] We can look to court interpretations under one of California's public sector labor relations statutes as instructive under another. *See, e.g., Redwoods Community College District v. Public Employment Relations Bd.*, 159 Cal. App. 3d 617, 623-24 (1984) (relying on MMBA cases to interpret the Educational Employment Relations Act or EERA).

The side letter was signed, but the MOU was never amended to eliminate the cap. *Id.* The Employer later argued that "it might have been remiss in enforcing the cap in the past but that did not preclude it from insisting on compliance with the contract language, which unambiguously establishes a cap." *Id.*

The arbitrator ruled that the weight of the evidence demonstrated that the parties mutually agreed at the bargaining table to remove the 10,000-hour cap, and she concluded that elimination of the cap was consistent with the parties' practice and with the earlier side letter agreement. *Id.* at 1199. The arbitrator found that the unequivocal testimony of the chief negotiators for the Employer and the Employee Organization showed that the failure to remove the cap from the MOU was an error that did not reflect the parties' intent, and the parties' agreement was incorrectly reduced to writing as the result of a mutual mistake or inadvertence. The arbitrator ruled that the 10,000-hour cap was not part of the MOU and ordered the parties to return to the status quo existing before the Employer issued its letter to the Employee Organization, stating that the cap would be enforced. The arbitrator also ordered the Employer to reimburse the Employee Organization for any out-of-pocket expenses associated with the curtailed use of the leave bank after issuance of the Employer notice. *Id.*

The Employer filed a petition in superior court to vacate the arbitration award on the ground that the arbitrator exceeded her authority by altering the terms of the MOU based on parol evidence, which is evidence of an oral agreement outside of the approved, written MOU. The Employer also argued that the arbitrator's decision enforced a version of the MOU that was never submitted to the California Legislature for approval, as required by the Dills Act. *Id.* The Employee Organization argued that the arbitrator had authority to enforce the agreement actually reached by the parties, which agreement was inadvertently memorialized incorrectly in the written MOU. *Id.*

The superior court ruled that the MOU stated it was the parties' entire agreement, and the MOU expressly precluded the arbitrator from adding to, deleting, or altering any of the MOU's provisions. *Id.* Thus, in using parol evidence to reform the integrated MOU, the arbitrator exceeded the power granted to her by the parties' arbitration agreement. *Id.*

The appellate court affirmed the decision of the trial court. The court concluded that "altering the MOU after approval by the Legislature would undermine the [Dills] act's purpose." *Id.* at 1201. The Dills Act "requires legislative approval of collective bargaining agreements." *Id.* at 1200. "[T]he elimination of the 10,000-hour cap has significant fiscal consequences that must be approved unequivocally by the Legislature." *Id.* at 1203. "In sum, by reforming the written MOU in a manner that changed the provisions approved by the Legislature, the arbitrator violated the Dills Act and the important public policy of legislative oversight of employee contracts. Consequently, the arbitrator exceeded her powers, and the superior court properly granted the petition to vacate the arbitration award." *Id.*

The governing body's role in collective bargaining negotiations is further reinforced by Government Code section 54957.6, which provides an exception to the open meeting requirements of the Ralph M. Brown Act when the governing body meets "with the local agency's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees and, for

represented employees, any other matter within the statutorily provided scope of representation." Cal. Gov't Code § 54957.6. The California Supreme Court has explained: "This statute, by permitting the governing body to meet in secret with its negotiating team during collective bargaining, underscores the Legislature's intent to assign the governing body the central role in directing the meet and confer process so as to achieve binding labor-management agreements." *Voters for Responsible Retirement*, 8 Cal. 4th at 783 n.5.

These cases, analyzing state law, establish that the Council, as the City's governing body, has the authority to bind the City in the collective bargaining process, and that no other decision-maker can modify an agreement approved by the legislative body. This authority is also established in the Charter, as discussed below.

III. THE CHARTER MANDATES THAT THE COUNCIL ESTABLISH THE COMPENSATION SCHEDULES FOR CITY EMPLOYEES, INCLUDING SALARY SCHEDULES AND BENEFITS, AND THE RULES GOVERNING CITY EMPLOYMENT.

The Council's ability to delegate its decision-making authority in the collective bargaining process is limited by the Charter. The Charter is the City's constitution, and the City, acting through its officers and employees, must comply with it. *Miller v. City of Sacramento*, 66 Cal. App. 3d 863, 867 (1977) ("A city charter is like a state constitution but on a local level; it is a limitation of, not a grant of power."). *See also City & County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102 (1988) (the charter is to the city what the state constitution is to the state). The Council cannot act in conflict with the Charter. "Any act that is violative of or not in compliance with the charter is void." *Domar Electric, Inc*., 9 Cal. 4th at 171.

This City, as a charter city, has broad authority over municipal affairs, "subject only to the clear and explicit limitations and restrictions contained in the charter." *See City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598 (1949). Limitations and restrictions must be expressly stated in the charter, and may not be implied. *Id.* at 599. *See also Taylor v. Crane*, 24 Cal. 3d 442, 450-51 (1979); *Miller*, 66 Cal. App. 3d at 867.

The Charter establishes the authority of City officers. It sets forth a separation of authority between the legislative authority of the Council and the executive and administrative authority of the Mayor, similar to the separation of powers between the executive and legislative branches in the federal and state constitutions. *See* 2007 Op. City Att'y 347 (2007-1; Apr. 6, 2007). "The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." *Carmel Valley Fire Protection Dist. v. State of California*, 25 Cal. 4th 287, 297 (2001) (citations omitted).

The separation of powers doctrine is intended to prevent the combination of the basic or fundamental powers of the government in the hands of a single person or a group. *Id.* However, the doctrine recognizes that the branches of government are interdependent, and the actions of one branch may affect the actions of another. *Id.* at 298. "The purpose of the doctrine is to prevent one branch of government from exercising the *complete* power constitutionally vested in

another; it is not intended to prohibit one branch from taking action properlywithin its sphere that has the *incidental* effect of duplicating a functionor procedure delegated to another branch." *Younger v. Superior Court*, 21 Cal. 3d 102, 117 (1978) (citations omitted).

Whether an act is legislative or administrative depends on the character and effect of the act. *Community House, Inc. v. City of Boise*, 623 F.3d 945, 960 (9th Cir. 2010). As a practical matter, the distinction between a legislative matter under the authorityof the Council and an administrative matter under the authority of the Mayor must be considered on a case-by-case basis, using the well-established legal distinctions set forth here.

A legislative decision is a decision that prescribes a new policy or plan. *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 399-400 (2001). "Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power." *Lindelli v. Town of San Anselmo*, 111 Cal. App. 4th 1099, 1113 (2003) (internal quotations and citations omitted); *Worthington v. City Council*, 130 Cal. App. 4th 1132, 1142-43 (2005). "The essentials of the legislative function are the determination and formulation of the legislative policy." *Kugler v. Yocum*, 69 Cal. 2d 371, 376 (1968) (internal quotations and citations omitted). The exercise of legislative power involves determination of "the questions of public good, public interests, and public policy." *Hopping v. Councilof City of Richmond*, 170 Cal. 605, 615 (1915).

An amendment of a legislative decision is itselflegislative in nature because the "power to legislate includes by necessary implication the power to amend existing legislation." *Yesson v. San Francisco Municipal Transportation Agency*, 224 Cal. App. 4th 108, 119 (2014) (citation omitted). *See also City of Sausalito v. County of Marin*, 12 Cal. App. 3d 550, 563-64 (1970) ("The amendment of a legislative act is itselfa legislative act.").

An act is administrative in nature if it "pursues a plan alreadyadopted by the legislative body itself, or some power superior to it." *City of San Diego*, 86 Cal. App. 4th at 399 (internal quotations and citations omitted). "Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessaryto be done to carry out legislative policies and purposes already declared by the legislative body." *Id.* at 400 (internal quotations and citations omitted); *Valentine v. Town of Ross*, 39 Cal. App. 3d 954, 957-58 (1974).[12]

All legislative authorityof the City is vested in the Council, subject to the terms of the Charter and the California Constitution, except for legislative powers that are reserved to the people under the Charter and the California Constitution. San Diego Charter §§ 11, 11.1, 12. The core functions of the Council include adopting laws, approving the expenditure of public funds, and formulating legislative policy. *See* San Diego Charter art. III, including §§ 11, 11.1, 11.2, 12.

[12] Note that the distinction between legislative and administrative or executive decisions is not always clear. This Memorandum sets forth the general framework for future resolution of specific issues on a case-by-case basis. For further discussion regarding the distinction between legislative and administrative powers, *see* City Att'y MOL No. 2015-7 (Apr. 23, 2015).

The Charter expressly prohibits the delegation of the Council's legislative authority, including the authorityto adopt "any ordinance or resolution which raises or spends public monies, including but not limited to the City's annual budget ordinance or anypart thereof, and the annual ordinance setting compensation for City employees, or anyordinance or resolution setting public policy." San Diego Charter § 11.1.[13] *See Miller*, 66 Cal. App. 3d at 869 (the legislative body cannot delegate its authorityto "legislate" or make decisions on how to spend public money).

The term "public policy," as used in Charter section 11.1, is not defined. In interpreting the term "public policy" in other contexts, the California Supreme Court has said that the term is not subject to precise definition, although a determination of public policy is primarily for the legislative body. *Safeway Stores, Inc. v. Retail Clerks International Ass'n*, 41 Cal. 2d 567, 574-75 (1953). Public policy generally affects the public interest or societyat large. *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66, 75-76 (1998). It is "that principle of law which holds that no citizen can lawfullydo that which has a tendency to be injurious to the public or against the public good." *Safeway Stores, Inc.*, 41 Cal. 2d at 575. Although generally a legislative concern, public policy may also be stated in an administrative regulation that serves a legislative purpose. *Green*, 19 Cal. 4th at 71.

Under the Charter, the Council, by ordinance, determines the terms and conditions for providing public services. San Diego Charter § 26.1. The Council has authorityto adopt an administrative code "providing for the detailed powers and duties of the administrative offices and departments of the City Government, based upon the provisions of [the] Charter." San Diego Charter § 26.[14]

Each year, the Council sets the compensation schedules for employees through adoption of the annual salaryordinance, and the plans for payment of benefits and overtime through related actions. *See* San Diego Charter §§ 11.1, 70, 290(a). When establishing the salary schedules for City employees, the Council must consider "all relevant evidence including but not limited to the needs of the citizens of the City of San Diego for municipal services, the abilityof citizens to pay for those services, local economic conditions and other relevant factors as the Council deems appropriate." San Diego Charter § 11.1.

The Council also adopts "all rules and amendments thereto for the government, supervision and control of the classified service." San Diego Charter § 118. The City's Civil Service Rules are recommended by the City's Civil Service Commission, but may only be adopted by the Council by ordinance after a noticed public hearing. *Id*. The Council may, by ordinance, exempt City positions from the classified service, if the positions are not expressly exempt under the Charter. San Diego Charter § 117(a)(17). The Council also establishes, by ordinance, retirement benefits for City employees. *See* San Diego Charter, art. IX.

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[13] Charter section 11.1 was approved by City voters in 1980, who voted for a Council-proposed alternative to an initiative measure, proposed by the POA, which would have replaced the Council as the decision-making body for police officer salaries, with final and binding arbitration in the event of an impasse in labor negotiations. *See* 1980 Op. City Att'y 65 (80-5; May 19, 1980); Ballot Pamp. PrimaryElect. (June 3, 1980).

[14] The Administrative Code is set forth in Charter 2, Article 2, Divisions 1 through 47 of the San Diego Municipal Code.

Courts have long recognized that establishing employee salaries and benefits schedules and employment-related rules are legislative matters. *See Kugler*, 69 Cal. 2d at 374 (in dealing with wage rates, a city council acts in its legislative rather than its administrative capacity); *People ex rel. Harris v. Rizzo*, 214 Cal. App. 4th 921, 940-41 (2013) (setting officer and employee compensation is an exclusively municipal matter, over which the legislative body of a charter city has exclusive control); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952). *See also* Cal. Const. art. XI, § 5(b)(4).

Most, if not all, employment-related matters relate to or impact the City's budget and the expenditure of public funds. "The exercise of the board's legislative power in budgetary matters entails a complex balancing of public needs in many and varied areas with the finite financial resources available for distribution among those demands . . . it is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available." *County of Sonoma v. Superior Court*, 173 Cal. App. 4th 322, 343 (2009) (internal quotations and citations omitted).

The Council approves MOUs between the City and its recognized employee organizations. *See* San Diego Charter § 11.2.[15] The Council must approve any multiple-year MOU by a two-thirds vote, with a determination that it is in the best interests of the City to approve the MOU. *Id.* This approval process involves a legislative act.

An amendment of a legislative act is legislative in nature. *Yesson*, 224 Cal. App. 4th at 119. *See also City of Sausalito*, 12 Cal. App. 3d at 563-64 ("The power to legislate includes by necessary implication the power to amend existing legislation."). Therefore, the Council must approve amendments to MOUs and cannot delegate that authority, under the limitations set forth in the Charter. Further, amendments to MOUs must be approved in the same manner in which they were initially approved; specifically, if the amendment covers a multiple-year period, then the vote requirements of Charter section 11.2 apply. *See, e.g., id.* (stating an amendment must be made in the same manner as the enactment).

The Mayor's authority in the legislative process is limited. The Mayor may attend open session meetings of the Council and chair closed session meetings, but may not vote at either. San Diego Charter §§ 265(b)(4), 265(b)(6). The Mayor may recommend to the Council "such measures and ordinances as he or she may deem necessary or expedient, and to make such other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable." San Diego Charter § 265(b)(3). The Mayor must provide information to the Council when requested or necessary. San Diego Charter §§ 28, 32.1, 260(b), 265(b)(14), 270. The Mayor proposes the salary ordinance and the budget, but the Council may modify the proposals. San Diego Charter §§ 11.1, 71, 265(b)(14), 290. The Mayor also has approval and veto authority over most resolutions and ordinances of the Council, including the salary ordinance and the budget resolution, and over ordinances adopting employment-related rules that affect the administrative service. San Diego Charter §§ 265(b)(5), 280, 290. The Mayor's veto authority forces the Council to reconsider the vetoed action. San Diego Charter §§ 280, 285, 290. The Council may override the veto with sufficient votes. San Diego Charter § 285.

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[15] Section 11.2 was added to the Charter by voters in June 1986, with the intent to ensure that City employees could receive multi-year agreements to achieve better employee relations. Prop. E, Primary Elec. (June 3, 1986).

Under the cases cited earlier, related to the binding nature of collective bargaining agreements once approved by the Council, it could be argued that the Mayor's veto authority does not extend to collective bargaining agreements.[16] The Mayor's veto authoritydoes not extend to matters, which are "exclusively within the purview of the Council," including "the establishment of . . . rules or policies of governance exclusive to the Council and not affecting the administrative service of the City under the control of the Mayor." San Diego Charter § 290(a)(1). However, collective bargaining agreements approved by the Council affect the administrative service of the City under the control of the Mayor. Most City employees work in the administrative service, and the employment-related rules established by the Council must be implemented by the Mayor. Because limitations on authorityunder the Charter, including the Mayor's authorityto veto legislative acts, will not be implied by a court, [17] it is this Office's view that the Mayor has veto authorityover collective bargaining-related decisions of the Council.

This Office views the Mayor's veto authorityas part of the legislative enactment process in this City. The Mayor's limited role in the legislative process does not make the Mayor part of the legislative body nor does it give the Mayor authority to act under the exclusive power of the Council. *See Pulskamp v. Martinez*, 2 Cal. App. 4th 854, 862 (1992); *McDonald v. Dodge*, 97 Cal. 112, 114 (1893). The Council has final decision-making authority. If the Mayor vetoes Council approval of an agreement and the Council does not override the veto, then the City must return to the bargaining table with the impacted employee organizations because the meet and confer process will not be completed. In practice, the Mayor and the Council should work together throughout the bargaining process to ensure that the City's negotiators have proper authority at the bargaining table and that the City is approaching bargaining in good faith, as required by the MMBA.[18]

The Charter's prohibition on delegation of legislative power is consistent with a provision in the California Constitution, which prohibits the California Legislature from delegating local legislative authority to others. Cal. Const. art. XI, § 11(a).[19] *See also* 1980 Op. City Att'y 65. The doctrine prohibiting the delegation of legislative authority "rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitlydelegating that function to others or by failing to establish an effective mechanismto assure the proper implementation of its policy decisions." *Kugler*, 69 Cal. 2d at 376-77.

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[16] Arguably, the Mayor's veto authorityunder the Charter is inconsistent with the California cases, discussed above, which analyze the MMBA and conclude that the governing body of the public agencyhas final authorityover approval of collective bargaining agreements. However, it is this Office's view that a court would harmonize the requirements of the MMBA with the Charter. *See Los Angeles County Civil Serv. Comm'n.*, 23 Cal. 3d at 59 (holding that requiring charter county to meet and confer with employee organizations before amending its civil service rules does not offend home rule provisions of California Constitution).

[17] *See City of Grass Valley*, 34 Cal. 2d at 598-99*; Taylor*, 24 Cal. 3d at 450-51; *Miller*, 66 Cal. App. 3d at 867-68.

[18] To engage in good faith bargaining, the City's management team must establish bargaining parameters from the Council because they must bargain with the intent to reach agreement. *Oakland Unified School District*, PERB Dec. No. 326. Bargaining without proper authorityfrom the principal can be an indicia of bad faith bargaining, if the intent is to delayor thwart the bargaining process. *Id.*

[19] Article XI, section 11(a) of the California Constitution states: "The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with countyor municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions."

IV. THE COUNCIL HAS DELEGATED TO THE MAYOR CERTAIN COLLECTIVE BARGAINING DUTIES, THROUGH CREATION OF THE LABOR RELATIONS OFFICE AND APPROVAL OF CERTAIN MOU PROVISIONS

While the doctrine prohibiting the delegation of legislative authority is well established in California and in the Charter, a legislative body, under California law, is able to delegate certain quasi-legislative or rule-making authority. *Carmel Valley Fire Protection*, 25 Cal. 4th at 299; *see also Kugler*, 69 Cal. 2d at 375. After determining the law or public policy, a legislative body may confer upon executive or administrative officers the power to prescribe administrative rules and regulations "'to promote the purposes of the legislation and to carry it into effect.'" *Id.* at 376 (citation omitted). The legislative body may also delegate to an administrative officer the authority to determine whether the facts of a particular case bring it within the rule or standard previously established by the legislative body. *Id.* [20]However, an administrator must not act in a manner that is inconsistent with direction from the legislative body. *Carmel Valley Fire Protection*, 25 Cal. 4th at 300.

Prior to delegation of authorityto implement or enforce a legislative policy, the legislative body must establish sufficient standards or adequate safeguards to ensure its policies are not arbitrarily implemented. *Kugler*, 69 Cal. 2d at 376, 381. A legislative body unlawfully abdicates its authority if it fails to make basic policy decisions or fails to assure that its decisions are implemented as made. The Supreme Court has explained:

> An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authorityto make fundamental policy decisions. This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitlydelegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions. The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse. The Legislature must make the fundamental policy determinations, but after declaring the legislative goals and establishing a yardstick guiding the administrator, it may authorize the administrator to adopt rules and regulations to promote the purposes of the legislation and to carry it into effect.

People v. Wright, 30 Cal. 3d 705, 712-13 (1982) (internal quotations and citations omitted).

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[20] The Council has delegated certain contracting authorityto administrative officers, including the City's Purchasing Agent. *See, e.g.*, SDMC Art. 2, Div. 32. This delegation is consistent with the Charter, which grants the City's Purchasing Agent express authorityto purchase supplies, materials, equipment, and insurance required by the City. San Diego Charter section 35. Further, under the Charter, the City Manager – now the Mayor – has express duties in the award of public works contracts. *See* San Diego Charter § 94.

While the Charter mandates that the Council make the policy decisions in collective bargaining, the Council may – and has – delegated the coordination of the meet and confer process, implementation of MOUs, and other duties under the MMBA to the Mayor and his staff. The Council has authority under Charter section 26 to create City departments, and the Council has created and annually funds the Labor Relations Office to serve as the primary contact to the City's six recognized employee organizations and to coordinate the collective bargaining process for the City.[21]

Through Council Policy 300-06, the City's Employee-Employer Relations (EER) Policy, the Council delegated to the City Manager – now the Mayor – the authority to administer the EER Policy, including performing specific duties in representation proceedings, the determination of bargaining units, and the impasse procedure. Council Policy 300-06, §§V, VI, VII. Council Policy 300-06 has not been updated to incorporate the provisions of the Strong Mayor form of government.[22] This Office recommends the Council undertake that process.[23]

Further, in certain MOUs, the Council has delegated authorityto the Mayor and the Labor Relations Office to coordinate labor-management committees and, when possible, to resolve grievances, which are disputes involving the interpretation or application of an MOU or other employment-related rule or regulation. The Council has also delegated authorityto City management to make changes to employees' work schedules and shifts, and resolve any meet and confer issues related to these changes. *See, e.g.*, Art. 17, MEA MOU.

V. UNDER THE CHARTER, THE MAYOR HAS INDEPENDENT ADMINISTRATIVE AND EXECUTIVE AUTHORITY.

Apart fromdelegation issues, the Charter expresslygrants the Mayor administrative and executive authoritydistinct fromthe Council. Executive or administrative authority is the authorityto see that laws are executed. *Youngstown Sheet & Tube Co.*, 343 U.S. at 587. For example, as the chiefexecutive officer of the United States, the President's authority is limited "in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Id.* at 587.[24]

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[21] *See* http://www.sandiego.gov/fm/proposed/pdf/2016/vol2/v2humanresources.pdf.

[22] The Council most recentlyamended Council Policy 300-06 in 2005 to add section XI, related to Council's review of the impact of proposed employee benefit enhancements on the City's unfunded pension fund liability. San Diego Resolution R-301042 (Nov. 14, 2005). The issues related to the Strong Mayor form of governance were not addressed at that time.

[23] The City must meet and consult with its impacted employee organizations prior to modifications to the EER Policy, at Council Policy 300-06. Cal. Gov't Code § 3507. There are additional modifications to Council Policy 300-06 needed, to incorporate recent amendments to the MMBA related to factfinding upon impasse. Cal. Gov't Code §§ 3505.4, 3505.5, 3505.7.

[24] In the federal government, legislative authorityis vested solelyand exclusivelyin Congress. *Youngstown Sheet & Tube Co.*, 343 U.S. at 588-89. The Supreme Courtheld that the President did not have authorityto issue an order directing the Secretaryof Commerce to take possession of and operate the steel mills in the countryto avert a labor strike that could have stopped steel production. *Id.* at 582. The Supreme Court held that the President's order was unlawful. "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expresslyauthorized the President to take possession of propertyas he did here." *Id.* at 585.

The Mayor assumes the executive authority, power, and responsibility of the City Manager, set forth in the Charter, at articles V, VII, and IX. San Diego Charter §§ 260, 265. Article V relates to the executive and administrative service. Article VII relates to finance. Article IX relates to the City's retirement system. Except as otherwise provided in the Charter, all administrative powers conferred by the state of California on any municipal official must be exercised by the Mayor or the Mayor's designee. San Diego Charter § 28. The duties of the City Manager, which are assumed by the Mayor, include the duty:

- to supervise the administration of the affairs of the City, except as otherwise specifically provided in the Charter;
- to make such recommendation to the Council concerning the affairs of the City as may seem to the Mayor desirable;
- to keep the Council advised of the financial condition and future needs of the City;
- to prepare and submit to the Council the annual budget estimate and such reports as may be required by the Council, including an annual report;
- to see that the ordinances of the City and the laws of the State are enforced;
- and to perform other duties as required by the Charter or required of the Mayor by ordinance or resolution of the Council.

San Diego Charter § 28.

The Mayor is responsible to the Council for the proper administration of all affairs of the City "placed in his charge." San Diego Charter § 29. The Mayor has the responsibility to "inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council." San Diego Charter § 32.1. The Charter authorizes the Council to summon the Mayor and other City officers to the Council or its committees to provide information or answer questions. San Diego Charter § 270(h).

The Mayor proposes a budget to the Council. San Diego Charter § 265(b)(14). The Mayor also proposes the City's salary ordinance, which fixes the salaries of all officers and employees of the City, for Council consideration. San Diego Charter §§ 290(a), 11.1, 70. The Mayor serves as the appointing authority and controls all directors of the City's administrative departments. San Diego Charter § 28. The Mayor also serves as the official head of the City for ceremonial purposes, for service of civil process, for signing legal instruments and documents, and for military purposes. San Diego Charter § 265(a).

In performing the duty to execute and enforce the laws, ordinances, and policies of the City, the Mayor has "the right to promulgate and issue administrative regulations that give controlling direction to the administrative service of the City." San Diego Charter § 265(b)(2). Charter section 28 also provides:

> The Manager may prescribe such general rules and regulations as he may deem necessary or expedient for the general conduct of the administrative Departments. The Director of each Department shall in like manner prescribe such rules and regulations as may be deemed necessary and expedient for the proper conduct of each Department, not inconsistent with the general rules and regulations prescribed by the Manager.

San Diego Charter § 28.

The duties of the Manager, as set forth in Charter section 28, are now assumed by the Mayor. San Diego Charter § 260.

The authority to promulgate regulations is circumscribed by the substantive law adopted by the legislative body; regulations that alter or amend the approved law or that enlarge or impair its scope are void. *Carmel Valley Fire Protection*, 25 Cal. 4th at 300. *See also San Francisco Fire Fighters Local 798 v. City & County of San Francisco*, 38 Cal. 4th 653, 668 (2006). Any rules or regulations adopted pursuant to this authority must be reasonably necessary or appropriate to promote the interests and purposes of the legislative policy. *See Kugler*, 69 Cal. 2d at 382 (citing *First Industrial Loan Co. v. Daughtery*, 26 Cal. 2d 545, 550 (1945)). Legislative determinations related to expenditures are binding on the executive. *Carmel Valley Fire Protection*, 25 Cal. 4th at 299.

Under this authority, the Mayor has promulgated several administrative regulations involving employment-related matters, including the City's substance abuse policy, threat management policy, and weapon-free workplace policy.[25]

Promulgation of these administrative regulations may trigger meet and confer. For example, workplace safety issues are matters within the scope of representation. *State of California* (*Department of Consumer Affairs*), PERB Dec. No. 1711-S (Nov. 23, 2004). To the extent that the Mayor's authority to promulgate administrative regulations triggers duties under the MMBA, the Mayor must assume responsibility for the completion of any required meet and confer process. Any agreements should be memorialized in writing. And if necessary, disputes should be resolved through the established impasse procedures set forth in Council Policy 300-06.

[25] *See* http://www.sandiego.gov/humanresources/resources/ar.shtml. *See also* City Att'y MOL No. 2014-5 (July 9, 2014) (discussing applicability of administrative regulations to non-mayoral departments).

VI. SIDE LETTER AGREEMENTS MAY BE USED TO MEMORIALIZE COMPLETION OF COLLECTIVE BARGAINING ON ADMINISTRATIVE MATTERS.

A side letter agreement is an agreement that is ancillary to another agreement. *See* Black's Law Dictionary 82 (10th ed. 2014).

This Office understands that it has been a long-standing practice of the administrative departments of the City to use side letter agreements to memorialize collective bargaining between a department and an impacted employee organization on administrative issues. Further, the City has used side letter agreements to memorialize meet and confer discussions and agreements that occur following Council approval of an MOU.

The MOU is intended to be a comprehensive agreement between the City as a public agency employer and a recognized employee organization, describing all agreed upon terms and conditions of employment. However, the City's meet and confer duties under the MMBA are ongoing and may be triggered during the term of an approved MOU, if the City or a recognized employee organization desires to modify an agreed-upon term and condition of employment and seeks to reopen bargaining on the issue.

Each MOU between the City and its recognized employee organizations, except the MOU with the Deputy City Attorneys Association, has a provision on side letters. The provisions vary in language, but generally provide that, effective July 1, 2013, the Mayor or his or her designee and the President of the employee organization or his or her designee may approve "additional agreements" with the recognized employee organization as long as the agreements are in writing and have specified approvals.[26]

The phrase "additional agreements" is not defined. "Additional" generally means "added" or "further." Webster's Third New Int'l Dictionary 24 (1971). It is a term that "embraces the idea of joining or uniting one thing to another . . . to form one aggregate." Black's Law Dictionary 38 (6th ed. 1990). As one court has explained:

> The word "additional" is in common use, and its meaning is very well understood by people generally, as being something that is added to or put onto a thing already in existence. It embraces the idea of joining or uniting one thing to another so as to form an aggregate; but it has also been said that the word does not serve to amalgamate two things to which it is applied into a single whole

[26] *See* Art. 7, MOU with American Federation of State, County and Municipal Employees Ass'n, Local 127, San Diego Resolution R-308480 (Oct. 15, 2013); Art. 72, MOU with California Teamsters Local 911, San Diego Resolution R-308479 (Oct. 15, 2013); Art. 56, MOU with San Diego City Firefighters, International Ass'n of Firefighters, Local 145, San Diego Resolution R-308478 (Oct. 15, 2013); Art. 76, MOU with San Diego Municipal Employees Ass'n, San Diego Resolution R-308481 (Oct. 15, 2013) (MEA MOU); Art. 59, MOU with San Diego Police Officers Ass'n, San Diego Resolution R-309613 (Apr. 22, 2015).

> but rather relates to them as separate entities. The word has been specifically defined as: added; coming by way of addition; cumulative; further; given with or joined to some other; increased; joined or united with; supplemental.

Ex parte Boddie, 21 S.E.2d 4, 8 (1942).

This Office reads this MOU provision on side letters to mean that the Mayor and the president of an employee organization or their designees may enter into additional agreements, which are not part of the MOU, during the term of the MOU. However, the Mayor, in approving these "additional agreements" may only act within his designated authority, by Charter or by Council delegation, if permitted, because the Mayor has only those powers that are conferred on him by the Charter or by the Council acting within the scope of the Charter. 2007 Op. City Att'y 347 (2007-1; Apr. 6, 2007). *See also* 3 McQuillin Mun. Corp. § 12:73 (3d ed. 2015).

As explained, the Council cannot delegate the legislative authority to establish the schedules for employee compensation and benefits, the rules related to City employment, and other policy matters. The Mayor has authority under the Charter to issue administrative regulations and to control the administrative service of the City, and the duty to implement Council-approved policies. Further, the Council has delegated authority to the Mayor or to the City's various department heads, who work under the Mayor, to implement various provisions of the MOUs, such as provisions related to modification of work hours or shifts.

The Mayor's staff must exercise care in entering into side letter agreements, without Council involvement, to ensure that an agreement does not exceed the administrative authority of the Mayor, and is consistent with Council-approved policies. It is appropriate for the City's Labor Relations Office to use side letter agreements to memorialize the completion of the meet and confer process when it is required on administrative matters or to clarify or implement MOU provisions. However, a side letter agreement cannot amend the MOU to modify Council-approved terms,[27] nor can it alter any existing ordinances of the Council. These ordinances include the annual salary ordinance, which establishes the compensation schedule and benefits for City employees, and any ordinance amending the City's Civil Service Rules or City's retirement benefits. A side letter also cannot bind the City to expend public funds that have not already been approved and appropriated by the Council, or to modify City services or established City policies.

As a practical matter, the distinction between legislative and administrative matters must be analyzed on a case-by-case basis, focusing on the subject matter of a contemplated side letter agreement and using the legal principles discussed in this memorandum. Generally, legislative acts declare a public purpose and make provisions for the ways and means of its accomplishment. Administrative acts pursue a plan or policy already adopted by the legislative body, and they are acts necessary to carry out established legislative policies.

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[27] Similarly, under Charter section 98, the Mayor does not have authority to alter any contract entered into by the City, without Council approval, when the cost of the alteration "increases the amount of the contract by more than the amount authorized by ordinance passed by the Council." San Diego Charter § 98.

This Office recommends that side letter agreements expressly state the authorityunder which they are reached. For example, if the agreement is reached under authorityof a specific provision in the MOU, then that should be stated. Further, assuming that these agreements are still in effect at the time a successor MOU is negotiated, this Office recommends that these agreements be included as exhibits or attachments to the successor MOU, or integrated into the MOU, so there is a record that these agreements have been reached, and the MOU is a comprehensive, integrated document. Any impasse or dispute related to the meet and confer process must be resolved by the Council under the City's existing EER Policy, set forth at Council Policy 300-06.

CONCLUSION

Both the Council and the Mayor perform duties in collective bargaining, under the MMBA, and the authorityto approve MOUs and side letter agreements to MOU is established by state law and the Charter.

Under the MMBA, the Council directs the meet and confer process and approves MOUs. Upon Council approval, an MOU is binding on the City and its officers and employees.

The Charter also requires the Council to approve MOUs. Further, under the Charter, the Council may not delegate to the Mayor the legislative power to raise or spend public money, to set compensation schedules and to determine retirement and other benefits for City employees, and to approve the rules of employment in the City's classified work force. The Council also may not delegate to the Mayor the legislative authorityto determine the terms and conditions upon which the City will provide public services, to adopt an administrative code, and to set public policy.

Under the Charter, the Mayor may make recommendations to the Council prior to Council's determination of the policy issues. The Mayor may use his veto authority to force Council reconsideration of a policy decision. However, the Council makes the final policy decisions for the City, and the Mayor must implement adopted policies. The Mayor may promulgate regulations to direct the administrative service of the City, but these regulations must be consistent with approved Council policies. In adopting regulations or performing other Charter-mandated duties, the Mayor must ensure that the City is complying with the MMBA.

If the Mayor is engaged in meet and confer on administrative matters, the Mayor must ensure the City's obligations have been satisfied. It is this Office's recommendation that anyside letter agreements on administrative issues be included as an attachment or exhibit to any successor MOU between the City and the impacted employee organization, or otherwise incorporated into the MOU, if the terms of the side letter agreements are still in effect, so that documentation of the meet and confer is preserved.

Further, this Office recommends that Council Policy 300-06, the City's EER Policy be updated to recognize the respective roles of the Council and the Strong Mayor in the collective bargaining process, as described in this memorandum of law.

JAN I. GOLDSMITH, CITY ATTORNEY

By */s/Joan F. Dawson*
Joan F. Dawson
Deputy City Attorney

JFD:ccm
ML-2015-13
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