

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: December 20, 2007

TO: The Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: Appointment of Chief Operating Officer (**Meting of October 15, 2007, Agenda Item No. 201**)

INTRODUCTION

On October 15, 2007, Agenda Item No. 201 was before the City Council and stated in relevant part on the agenda in the following manner:

“ITEM-201: Appointment of Chief Operating Officer.

MAYOR SANDERS’ RECOMMENDATION:

Take the following action:

Council confirmation of the appointment by the Mayor of Jay Goldstone to Chief Operating Officer of the City of San Diego.”

During City Council deliberation of this item, two issues arose, to wit: (1) Does the Mayor have the authority under the current City Charter to appoint someone to the position of City Manager of the City of San Diego? (2) Is the City Council required to confirm the appointment of the Chief Operating Officer of the City of San Diego?

The City Attorney’s Office, through the City Attorney and the Assistant City Attorney, verbally opined that the answers to both questions were “No.” The City Attorney’s Office was requested to submit a written analysis to those two questions which were raised for the first time at the October 15 City Council meeting.

QUESTIONS PRESENTED

1. Does the Mayor have the authority under the current City Charter to appoint someone to the position of City Manager of the City of San Diego?
2. Is the City Council required to confirm the appointment of the Chief Operating Officer of the City of San Diego?

SHORT ANSWERS

1. No. By virtue of the voters amending various provisions of the City Charter at the election of November 2, 2004, the current City Charter provides “for a trial period of time to test implementation of a new form of governance commonly known as a Strong Mayor form of government” [Article XV, Section 250] whereby “all executive authority, power, and responsibilities conferred upon the City Manager in Article V, Article VII, and Article IX [of the Charter] shall be transferred to, assumed, and carried out by the Mayor during the period of time this Article is operative.” [Article XV, Section 260] Further, the current City Charter states that “in addition to exercising the authority, power, and responsibilities formally conferred upon the City Manager . . . the Mayor shall have the following additional rights, powers and duties . . . to be the chief executive officer of the City.” [Article XV, Section 265]

2. No. There are no provisions in the San Diego City Charter or in the City of San Diego Municipal Code for the requirement of City Council confirmation of the appointment of the Chief Operating Officer of the City of San Diego.

DISCUSSION

On November 2, 2004, the voters of the City of San Diego approved a new Article XV [Sections 250 – 295] to the San Diego City Charter: “Strong Mayor Trial Form of Governance.”

Section 250 states in relevant part as follows:

“The purpose of this Article is to modify the existing form of governance for a trial period of time to test implementation of a new form of governance commonly known as a Strong Mayor form of government.”

Section 260 (a) rendered inoperative for said trial period of time various other sections in the City Charter, including Section 25 [Deputy Mayor], now superseded by Section 265, and Section 27 [City Manager], now superseded by Sections 260 and 265. Specifically, Section 260(b) states as follows:

“(b) All executive authority, power, and responsibilities conferred upon the City Manager in Article V, Article VII, and Article IX shall be transferred to, assumed, and carried out by the Mayor during the period of time this Article is operative.”

Section 265(a) states as follows:

“(a) The Mayor shall be recognized as the official head of the City for all ceremonial purposes, by the courts for purpose of serving civil process, for the signing of all legal instruments and documents, and by the Governor for military purposes.”

Section 265(b) states in relevant part as follows:

“(b) In addition to exercising the authority, power, and responsibilities formally conferred upon the City Manager as described in Section 260(b), the Mayor shall have the following additional rights, powers, and duties:

- (1) To be the chief executive officer of the City;
- (2) To execute and enforce all laws, ordinances, and policies of the City, including the right to promulgate and issue administrative regulations that give controlling direction to the administrative service of the City. Nothing in this section shall be interpreted or applied to add or subtract from powers conferred upon the City Attorney in Charter sections 40 and 40.1;
- (3) To 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;”

In furtherance of the intent of the above-cited Charter sections, the City Council passed and adopted, and the Mayor approved, Ordinance No. O-19430, on October 17, 2005, which amended San Diego Municipal Code Section 11.0102.5. Both the ordinance and the new charter provisions for the strong mayor form of government took effect on January 1, 2006. Section 11.0102.5 now reads as follows:

“§11.0102.5 Mayor-Council Form of Governance

In order to implement the purpose and intent of Article XV of the City Charter which creates a Mayor-Council form of governance, all references to the ‘City Manager’ in the San Diego Municipal Code shall be deemed to refer to ‘Mayor.’ This section becomes operative on January 1, 2006, and shall remain in effect for the period of time that the City operates under the Mayor-Council form of government.”
[Emphasis added]

Despite the afore-mentioned language in Article XV relative to the Mayor being the Chief Executive Officer of the City of San Diego and having the authority, power and responsibilities of the City Manager, and therefore being and acting as the City Manager, there are three conflicting provisions in Section 265(b) [7, 8, and 9] which still refer to a City Manager as being another person other than the Mayor. The weight of the other provisions of Article XV would lead one to reasonably conclude that these three conflicting provisions are not controlling on this issue. This position is further bolstered by the action of the City Council and the Mayor in approving an ordinance which amended San Diego Municipal Code Section 11.0102.5, as noted above, and in the fact that Item No. 201 for the October 15 City Council meeting, prepared by the Mayor's Office, was docketed and noticed as "Appointment of Chief Operating Officer." Accordingly, a couple of statements made by individuals during the October 15, 2007 City Council meeting that Item No. 201 was being presented pursuant to Section 265(b)(7) would appear to be not completely accurate.

There certainly could be more clarity in the wording contained in Section 265 as it relates to the Mayor being the City Manager. This point has been acknowledged by the Independent Budget Analyst in IBA Report Number 07-102 Dated October 18, 2007. Again, however, upon a complete reading of the charter provisions added as a result of the November 2, 2004 election, one would be hard-pressed to conclude that the City Manager could be anyone other than the Mayor.

There are no provisions in the San Diego City Charter or in the San Diego Municipal Code for the requirement of City Council confirmation of the appointment of the Chief Operating Officer of the City of San Diego. The vote by the City Council to confirm the appointment was 7-1. If the City Council had voted 7-1 to deny the appointment, it would not have mattered. The Mayor could and can make the appointment of a Chief Operating Officer without City Council consent. The action of the City Council was followed by a ceremonial swearing in of Mr. Goldstone as the Chief Operating Officer by the City Clerk.

CONCLUSION

The Mayor does not have the authority under the current City Charter to appoint someone to the position of City Manager of the City of San Diego. The City Council is not required to confirm the appointment of the Chief Operating Officer of the City of San Diego.

MICHAEL J. AGUIRRE, City Attorney

By

Huston Carlyle
Chief Deputy City Attorney

cc: Elizabeth Maland, City Clerk