Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: January 12, 2016

TO: Salary Setting Commission

FROM: Prescilla Dugard, Chief Deputy City Attorney

SUBJECT: Authority to Recommend a Decrease of Mayor and Council Salaries

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This memorandum is in response to a question from Mr. Robert Ottilie, a member of the Salary Setting Commission[1] (Commission) as to "any legal impediments to the Commission recommending a salary that is *lower than* the salary in the prior year's [salary] ordinance."

San Diego Charter (Charter) section 12.1 provides:

> On or before February 15 of every even year, the Salary Setting Commission shall recommend to the Council the enactment of an ordinance establishing the salary of members of the Council for the period commencing July 1 of that even year and ending two years thereafter. The Council may adopt the salaries by ordinance as recommended by the Commission, or in some lesser amount, but in no event may it increase the amount. The ordinance shall be subject to the referendum provisions of this Charter and upon the filing of a sufficient petition, the ordinance shall not become effective and shall be repealed by the Council or shall forthwith be submitted to a vote of the people at the next general statewide election.

Charter section 24.1 provides virtually identical language with respect to the salary of the Mayor.

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[1] See letter from Robert P. Ottilie, Attorney at Law, to Ms. Prescilla Dugard, Chief Deputy City Attorney (Dec. 10, 2015) (on file with author). The question was received prior to the convening of the Salary Setting Commission. Understanding that the Commission has now convened and is beginning its process of review for salary recommendations pursuant to Charter sections 12.1 and 24.1, we have determined to provide a response to the Commission.

As noted previously by this Office, the 1973 ballot argument in favor of adoption of Charter sections 12.1, 24.1, and 41.1 creating the Commission to establish Mayor and Council salaries, stated that the provisions would allow for salary increases for the Mayor and Council.[2] However, neither Charter section 12.1 nor 24.1 specifically references increase or decrease in the salary, only "establishing."

Any reduction proposed by the Commission would have to be legally supportable to be adopted by the Council. Principles that should be considered in the event of a recommended decrease include, among other things, whether current Councilmembers have a contractually vested right to the compensation in effect when they took office.

Our Office can provide further legal advice should a specific proposal to reduce salaries be recommended by the Commission.

JAN I. GOLDSMITH, City Attorney

By *\/s/ Prescilla Dugard*
Prescilla Dugard
Chief Deputy City Attorney

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[2] *See* attached Memorandum from Catherine Bradley, Deputy City Attorney, City of San Diego, to the Salary Setting Commission, City of San Diego (Jan. 24, 2014) (on file with Office of the City Attorney); City Att'y Report 2012-1 (Jan. 6, 2012).

Attorney at Law
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December 10, 2015

Ms. Prescilla Dugard, Chief Deputy City Attorney
Office of the City Attorney
1200 Third Avenue, Suite 1620
San Diego, CA 92101

Re: Salary Setting Commission

Dear Ms. Dugard:

I have a salary setting question. I am a member, and long time Chairman, of the San Diego Salary Setting Commission.

The Salary Setting Commission was created by the San Diego Charter. This provision in the San Diego Charter was passed by the voters. It states that the Salary Setting Commission shall recommend a salary for the City Council and Mayor for each year.

Then, based on that recommendation, the City Council votes on the actual ordinance. The ordinance *is only effective for one year*, and no longer. The Mayor and Council have no expectation of a continuation of any specific pay beyond the one year ordinance.

The Council, in voting on the salary ordinance, either adopts the amount recommended by the Salary Setting Commission or, alternatively, can do something less. They cannot raise the recommendation.

Given that the Council's salaries and the salary of the Mayor are only set annually, and only set by ordinance, and that ordinance is dependent upon the recommendation of the Salary Setting Commission, are there any legal impediments to the Commission recommending a salary that is *lower than* the salary in the prior year's ordinance?

The Salary Setting Commission will be convening next week. I would appreciate any input your office can provide on this issue.

Thank you very much.

Sincerely,

Robert P. Ottilie

RPO:mau

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: January 24, 2014

TO: Salary Setting Commission

FROM: Catherine Bradley, Deputy City Attorney

SUBJECT: Authority to Recommend a Decrease of Mayor and Council Salaries

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This memorandum is in response to an inquiry from the Salary Setting Commission: (1) can the Commission recommend a decrease in the salary for the Mayor and Councilmembers; and (2) if so, must the recommendation be adopted by the Council. The memo will briefly highlight potential legal issues surrounding this issue for the Commission's meeting on January 28, 2014.

Charter sections 12.1 and 24.1 state that the Commission shall recommend to the Council the enactment of an ordinance "establishing" the salaries of the Council and the Mayor. The Council may adopt the salaries by ordinance "as recommended by the Commission, or in some lesser amount, but in no event may it increase the amount." The language in sections 12.1 and 24.1 is ambiguous as to whether the Commission may recommend a decrease in the salaries. When language in a Charter or statute is ambiguous, the courts look to legislative intent.

<u>The Legislative Intent was to Provide the Council and Mayor with Salary Increases.</u>

In the attached report to the Commission dated January 6, 2012, we described the role of the Commission and the legislative history of Charter sections 12.1, 24.1, and 41.1. When these Charter sections were added in 1973, the purpose was to provide for an increase in the salaries of the Mayor and Council:

> Good government requires good officials. San Diego has good government, which is directly attributable to the quality of its officials – your Mayor and Council. These full-time, hard-working officials are not adequately compensated for their efforts. They have been receiving the same salary for the past 17 years.

(*See,* Ballot Materials for the November 6, 1973 General Election, Argument for Proposition E).

Historically, the Commission has not recommended a decrease in the salaries of the Mayor and Council.[1] However, the Charter states that the Commission shall recommend the enactment of an ordinance "establishing" the salaries. The Council may adopt the salaries as recommended, or a lesser amount, but may not increase the amount. This language combined with the ballot materials tends to support a conclusion that the Charter contemplated the recommendation would be to increase the salary. Further research would be necessary to more fully analyze whether the Charter actually precludes a recommendation to decrease the salary.

Constitution and Contractual Considerations May Prohibit a Reduction in Salary During an Elected Official's Term of Office.

In the attached letter to the Council Committee on Rules, Open Government and Intergovernmental Relations dated February 8, 2010, San Diego County Counsel provided the opinion that "promised compensation" may not be eliminated during an elected official's term of office. (*See,* p. 3 of attached letter). Although the opinion analyzed the reduction in benefits of the City Attorney, the authorities cited are relevant to this analysis.

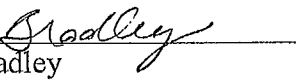
The opinion cited a California Supreme Court case and other authorities to conclude that public employment gives rise to certain rights protected by the contract clause, including the right to "promised compensation." *Olson v. Cory*, 27 Cal. 3d 532, 538 (1980). Once a right to compensation is vested, the right cannot be eliminated without unconstitutionally impairing the contract obligation. Absent a showing that the impairment was warranted by an emergency serving to protect a basic interest of society, the officials were entitled to the compensation offered at the time they entered their term of office.

The Mayor and Councilmembers may have contractual and constitutionally protected rights to compensation they were offered at the time they entered their office that cannot be reduced during their term of office, absent an emergency. The Council would not be required to adopt an ordinance decreasing their salaries if it would impair their right to "promised compensation."

[1] For example, the 2012 Salary Setting Commission recommended significant increases in the salary of the Mayor and Councilmember. *See,* the February 7, 2012 Salary Setting Commission Recommendation. As it had done many times in the past, the Council declined to adopt the recommended increase and maintained their current salaries.

This memo should not be relied upon as a legal opinion or advice from this Office, but is provided as *preliminary legal guidance only*. Upon further refinement or direction from the Commission or the City Council, this Office will provide further in depth legal review and analysis.

JAN I. GOLDSMITH, City Attorney

By 
Catherine Bradley
Deputy City Attorney

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Attachments
Doc. No. 709938

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January 6, 2012

REPORT TO THE SALARY SETTING COMMISSION

PROPOSED RECOMMENDATION TO INCREASE SALARIES OF NEWLY ELECTED COUNCILMEMBERS

INTRODUCTION

At the December 7, 2011 meeting of the Salary Setting Commission, the Commission asked if it may recommend that the City Council approve a salary increase that would be paid only to newly elected Councilmembers. Under this proposal, current Councilmembers would be paid their existing salaries throughout the rest of their terms ending in December 2012 or December 2014, and longer if re-elected to a new four-year term. Councilmembers elected after December 2012 to their first term would be eligible for the higher salary. Eventually, all Councilmembers would receive the higher salary, although this might not occur until 2018 if current Councilmembers whose terms expire in 2014 are elected for a second term.

This proposal would allow the Council to increase salaries without the political ramifications of raising their own pay.[1] As discussed below, the language in Charter section 12.1 is ambiguous as to whether the Commission may recommend different salaries for different Councilmembers. However, our Office has historically interpreted the Charter to require one salary level for all Councilmembers. Charter section 41.1 also provides that the Commission may make recommendations that cover only a two-year period. This proposal would affect salaries far into the future.

DISCUSSION

I. ROLE OF THE COMMISSION

Every two years, the Salary Setting Commission reviews the salaries of the Mayor and Council and makes recommendations for these two elected offices. On or before February 15 of every even numbered year, the Commission recommends to the Council salaries for the Mayor and Council for the period commencing July 1 of that even numbered year and ending two years thereafter. Charter §§ 12.1, 24.1 and 41.1. The Council may adopt the salaries as recommended, or a lesser amount. *Id.* The ordinance establishing the salaries is subject to referendum. *Id.*

[1] The 2010 Salary Setting Commission recommended a Charter amendment to change the process for determining Mayor and Council salaries because "there is tremendous negative political perception attached to the Mayor and City Council taking direct actions to increase their own salaries." 2010 Salary Setting Commission Recommendation, p.3.

The Commission considers a number of factors during the salary review process including: the adequacy of the current salaries, cost of living in San Diego, the responsibilities and importance of the positions, and comparable salaries. In 2010, the Commission recommended no change to the Mayor or Council salaries for Fiscal Year 2011 due to the economy and its impacts on reduced City revenues and service levels. For Fiscal Year 2012, the Commission recommended a 15 percent increase for the Mayor and Council "as an initial step toward closing the substantial gap that has materialized between the market value of these important positions, and the actual compensation levels."[2]

II. THE PROPOSAL

In February 2012, the Commission will recommend salaries for the Mayor and Council for the fiscal years beginning July 1, 2012 (FY 2013) and July 1, 2013 (FY 2014). Instead of an increase in salaries for the Council as a whole, the Commission has proposed staggering the salaries by increasing only the salary for new Councilmembers elected after 2012. Current Councilmembers would retain their salary throughout their time on the Council and be ineligible for an increase even if re-elected.

Councilmembers serve staggered terms. Council Districts 1, 3, 5, 7, and 9 are scheduled for elections for a four-year term beginning in December 2012. Council Districts 2, 4, 6, and 8 will have new terms beginning in December 2014. If the Council votes to increase the salaries only for newly elected Councilmembers and no current Councilmember is re-elected in 2012, the five new Councilmembers would receive the higher salary and the four current Councilmembers would receive a lower salary for two years, or longer if re-elected in 2014. If the three incumbents who have declared their candidacy for Districts 1, 3, and 9 are re-elected in December 2012, only the two new Councilmembers for Districts 5 and 7 would serve at the higher salary.

Presumably at some point, Councilmembers would all receive the same salary, but if the trend to stagger salaries continues, Councilmembers could receive different salaries indefinitely. This scenario is not contemplated by the plain language of the Charter. It also might have the unintended consequence of dissuading individuals from seeking office, especially if more experienced Councilmembers receive a lower salary than new Councilmembers.

III. CHARTER REQUIREMENTS

The language in Charter section 12.1 refers to "establishing the "salary of members of the Council" but that the Council may adopt the "salaries" by ordinance. The Charter further refers to "establishing the Mayor's salary;" and "establishing salaries for the Mayor and Council." Charter §§ 12.1, 24.1, and 41.1, respectively. The Charter acknowledges that the salaries for the

[2] The Council declined to adopt the salary increase recommended for Fiscal Year 2012.

Mayor and the Council are set separately. However, the language is ambiguous as to whether the Commission may recommend different salaries for different Councilmembers.

Since 1973, our Office has interpreted the Charter to require one salary level for all Councilmembers. There is no express provision to set different salaries for individual members of the Council and the phrase "establish the salary of members of the Council" implies only one salary for the Council as a whole.

The 1973 ballot materials for Charter sections 12.1, 24.1, and 41.1 support the conclusion that the Commission makes its recommendation for the Council's salary as a whole, not that of individual Councilmembers. The ballot argument in favor of the proposition refers to "the salaries of the Mayor and the Council" and the intent to ensure the officials are "adequately compensated for their efforts." The ballot argument states, in relevant part:

> Good government requires good officials. San Diego has good government, which is directly attributable to the quality of its officials – your Mayor and Council. These full-time, hard-working officials are not adequately compensated for their efforts. They have been receiving the same salary for the past 17 years.
>
> Under this proposal, an independent salary setting commission composed of impartial citizens, selected by the Civil Service Commission would be required to evaluate the salaries of the Mayor and the Council every two years, to determine whether any adjustments should be made. The Council would be empowered to reduce the Commission's recommendations, or adopt them as submitted, but would have no power to set their own salaries higher than recommended by the Commission.

(*See,* Ballot Materials for the November 6, 1973 General Election, Argument for Proposition E).

The proposal to allow different salaries for Councilmembers based on their term of office would not ensure that officials are adequately compensated for their efforts because some Councilmembers would continue to receive a lower salary for several years. This result would be contrary to the intent of the voters.

CONCLUSION

The Commission is charged with recommending the salaries for the offices of Mayor and Council. The Commission's proposal to allow a salary increase to be paid only to newly elected Councilmembers would result in different salaries being paid to different members of the Council. Although the language in Charter section 12.1 is ambiguous, our Office has historically interpreted the Charter to provide only one salary for Councilmembers. We believe this interpretation is consistent with the voter intent in establishing the Salary Setting Commission and salary setting process for the Mayor and the Council. Nonetheless, the Charter language does

not expressly preclude the Commission from recommending different salary levels for different Councilmembers. There may be Constitutional concerns and other legal issues that would require research and review if the Commission should decide to make a specific proposal to recommend different salary levels for Councilmembers.

Also, the Commission is authorized to make salary recommendations for only a two-year period. This proposal would span many more years and potentially interfere with the work of the next Commission.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By _____
Catherine M. Bradley
Chief Deputy City Attorney

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Doc. No. 296245