

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: July 8, 2016

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Proposed Amendments to San Diego Charter Section 40

INTRODUCTION

Item 152 on the Discussion Agenda for Monday's City Council (Council) meeting is consideration of proposed changes to San Diego Charter (Charter) section 40 for placement on the November ballot. Charter section 40 governs the role and duties of the City Attorney. This amendment was presented for discussion for the first time at the Rules Committee meeting on June 20, 2016.

At the June 20 meeting, the Rules Committee voted to forward certain changes recommended by the Council President to the Council for its review. *See* Report to Council No. 16-064 (June 16, 1016) (Council President's Report). The proposed changes include:

- Adding basic qualifications for the elected City Attorney. We recommend that should Council desire to include this change, it be included in the measure addressing elected officials' removal, succession, and interim authority.
- Amending the duties of the City Attorney to allow Council to define the City Attorney's duties and procedures by ordinance. The proposed language is vague and ambiguous, as we explained at the June 20 meeting. We expand on these concerns below and recommend that additional thought and analysis be conducted, including whether the changes require meet and confer.
- Reducing from two to one the number of years of employment required for a Deputy City Attorney to move from "at will" to "good cause" status. One of the listed actions for Item 152 is direction to meet and confer on this issue.

- Specifying that the San Diego City Employees Retirement System Board of Administration (SDCERS Board) uses independent legal counsel. The Rules Committee requested analysis on whether including this amendment creates a single subject rule issue; that analysis is provided below. We recommend that should Council desire to include this change, it be included with other proposals relating to SDCERS.

This memorandum focuses primarily on the proposed changes to the City Attorney's duties. The broad, vague and ambiguous language proposed, for purposes that are not clear, is of particular concern. If not changed, the language will lead to unintended consequences and impacts. It is our opinion and recommendation that the Council afford appropriate time and attention for analysis and discussion of these substantive changes.

ANALYSIS

I. THE PROPOSAL'S VAGUE AND AMBIGUOUS LANGUAGE IS PRONE TO MULTIPLE INTERPRETATIONS AND UNINTENDED CONSEQUENCES

The proposed changes to Charter section 40 proposed in the Council President's Report include new language that goes beyond the stated intent and purpose of the proposal. The proposal adds the phrase, "as determined by Ordinance of the Council," in two places, both of which are problematic.

A. First Added Clause

The proposal adds the phrase, "as determined by Ordinance of the Council," immediately following the statement that it is the City Attorney's duty to "perform all services incident to the legal department," resulting in this clause: "It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department and *as determined by Ordinance of the City Council; . . .*"

The insertion of the new phrase leads to at least two different interpretations, neither of which fit the stated purpose.

First, the inserted phrase can be read as qualifying the words directly preceding it, such that the legal services to be performed by the City Attorney are those that are both incident to the legal department *and* determined by Council Ordinance. Interpreted this way, the Council would decide by ordinance which of the necessary legal services are to be provided by the City Attorney. This interpretation would enable the Council to take legislative action to eliminate or interfere with the authority of a separately elected official, or to hide the Council's actions from legal review. Read in this way, the proposal invites political meddling, raises legal issues of consistency with the Charter and San Diego Municipal Code (Municipal Code), and potentially interferes with the Mayor's Charter mandated duties to carry out and enforce the City's laws and to responsibly administer City departments.

Second, the inserted phrase can be read as adding to “all services,” meaning that the legal services to be performed by the City Attorney are those services that are incident to the legal department and, in addition, those services, legal or non-legal that may be requested by the Council from time to time by ordinance. However, there is already a provision in Charter section 40 that says this. After the paragraphs stating the City Attorney’s duties, a stand-alone paragraph states:

The City Attorney shall perform such other duties of a legal nature as the Council may by ordinance require or as are provided by the Constitution and general laws of the State.

Accordingly, if the second interpretation – to allow Council to add duties – is intended, then the added language is of no practical effect and serves no purpose, unless it is to add services that are non-legal in nature.

During the discussion at the June 20 Rules Committee meeting, the Council President alluded to this saying that the phrase, “as the Council may by ordinance require,” is used elsewhere in Charter section 40, and therefore, its addition in other places in Charter section 40 should not pose a problem. Of course, the meaning of the same phrase in a different sentence and paragraph depends upon the other words surrounding it. As used in the sentence quoted above the language is clear because what “the Council may by ordinance require” refers directly to “such other duties of a legal nature.” This is a catch-all provision that allows Council to add duties; it is not a limitation on the powers or duties of the City Attorney.

The intended interpretation may be somewhere in between. The Council President’s proposal states that the change is to “refer intended scope of contracts, other instruments, and procedure regarding legal opinions and other matters to the Municipal Code.”¹ In other words, the intent may be not to empower the Council to narrow the City Attorney’s legal advice, or add to the existing scope of legal services, but rather to address the language in the third clause of the paragraph regarding the preparation in writing of “all . . . contracts, bonds or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness thereof.” San Diego Charter § 40. Again, the intended scope of this authority is not clear from the added language or the proposal.

B. Second Added Clause

The proposal includes a second insertion closer to the “contracts, bonds or other instruments” language. It adds “as determined by the Ordinance of the Council” after “or other instruments,” to read: “to prepare in writing all ordinances, resolutions, contracts, bonds or other instruments

¹ The entire explanation provided in the Council President’s Report for these two substantive changes is: “Correct the inconsistency with Charter § 280(b) and refer intended scope of contracts, other instruments, and procedure regarding legal opinions and other matters to the Municipal Code. This would allow the City to capture best practices along with the flexibility required in a growing city with technological advancements.” No further explanation is provided.

as determined by Ordinance of the Council in which the City is concerned, and to endorse on each approval of the form or correctness thereof.” The placement of this change works more directly to the stated purpose, but also leads to unintended consequences.²

The added language creates an ambiguity as to the duty of the City Attorney to approve the City’s contracts. Currently, based on the existing Charter, failure to obtain the City Attorney’s approval of a contract renders that contract void. *See* City Att’y MS 2012-1 (Jan. 17, 2012). The proposed language creates uncertainty as to whether the City Attorney is obligated to prepare only those contracts or other documents as determined by Council and approve all as to form or correctness, or whether the Council determines both which documents shall be prepared and which shall be approved by the City Attorney.

The proposal would provide a means for defining or limiting “all ordinances, resolutions, contracts, bonds or other instruments,” by legislation adopted by the Council and codified in the Municipal Code; however, as with the first insertion of this language, it also invites political meddling, opening the door to broad or expansive action to limit review of the City’s legal documents and otherwise limit the authority of the City Attorney, including matters initiated or subject to approval by the Council. The proposal does not explain why this is necessary and does not provide any parameters for future Council action. While it may be desirable to further define existing language, the Council should carefully consider any change proposed to the Charter. A first step to addressing any issue raised by the “contracts, bonds or other instruments” clause would be to request an analysis from this Office on the meaning of the language based on the laws of statutory interpretation and informed by the City’s current practices. After such an analysis, the Council will be in a position to consider an appropriate solution.

II. THE PROPOSED LANGUAGE IS BROADER THAN THE STATED PURPOSE AND WOULD UNDERMINE THE INDEPENDENCE OF THE CITY ATTORNEY

Based on its current language, the proposal would undermine the independence of the City Attorney by allowing the Council to define the duties of the City Attorney and, according to the stated intent, adopt procedures to be followed by the City Attorney’s Office “regarding legal opinions and other matters.” This broad language goes far beyond an intent to clarify; it includes no limits on the Council’s actions in dictating procedures to be followed in the rendering of legal advice, identifying types of documents, subject matters, departments or officials for which or to whom legal services could be restricted, and for whatever reasons. The Council could substitute its own judgment for that of the City Attorney in how and when to provide legal advice. This would be a fundamental change in the City’s government structure.

² Note also that the new language splits “other instruments,” from its modifier “in which the City is concerned,” such that the modifier now appears to apply to the “Ordinance of the Council.”

The independent City Attorney is a hallmark of the City's municipal government structure.

Since 1931, San Diego voters have chosen a form of government that provides for an elected City Attorney, who is an officer of and "chief legal advisor" to the City. This separation of powers and the broad authority afforded the City Attorney under San Diego's Charter contrast with the City Attorney's status in general law cities. Under the state law governing general law cities, the city attorney is appointed by the city council, is a "subordinate" city officer, and performs legal services only as directed by the council. By contrast, San Diego voters have granted different and broader authority to its elected City Attorney, as allowed under a Charter city government.

2008 Op. City Att'y 645 (2008-1; Apr. 10, 2008). That structure, and the independence of the City Attorney, can be changed by amendment of the Charter. If that is the Council's intent, that purpose should be plainly set forth, analyzed, and properly noticed to the public. If that is not the Council's intent, then the intent should be clarified and the proposal pulled for further drafting of a proposal that will appropriately accomplish the Council's intent.

III. OVERBROAD LANGUAGE CREATES MEET AND CONFER ISSUES

The overbroad and ambiguous language of the current proposal creates uncertainty, including uncertainty about future impacts to represented staff in the City Attorney's Office. A change from a City Attorney's Office managed by an elected and independent City Attorney to an office in which the scope of legal services and manner in which legal services are provided is regulated or restricted by the Council would present a dramatic change to current operations and to the working conditions of the employees in the City Attorney's Office. Cal. Gov't Code § 3505; *San Diego Hous. Comm'n v. Public Emp't Relations Bd*, 246 Cal. App. 4th 1, 9 (2016) (duty to bargain applies to a fundamental management or policy decision if the decision directly affects employment and the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit of bargaining); *Int'l Ass'n of Fire Fighters v. Public Emp't Relations Bd*, 51 Cal. 4th 259, 273-74 (2011) (bargaining required for layoffs from reassignment of bargaining unit work to independent contractors); *Claremont Police Officers Ass'n v. City of Claremont*, 39 Cal. 4th 623, 638 (2006).

A clear understanding of the extent of the meet and confer called for by this proposal would be greatly enhanced by clarification of the Council's purpose. As explained above, the current proposal affords a wide range of meaning that may or may not be intended.

IV. INCLUDING THE SDCERS LEGAL COUNSEL CHANGE MAY TRIGGER THE SINGLE SUBJECT RULE

The Rules Committee recommended that Council consider including, as part of the ballot measure, an amendment to Charter section 40 to provide that the SDCERS Board “may have its own legal counsel independent of the City Attorney, in recognition of its fiduciary duties,”³ and asked this Office to analyze whether including this amendment in the proposed Charter section 40 measure would violate the “single subject rule.” The single subject rule as it applies to Charter amendments, is discussed in a Memorandum of Law issued by this Office in 2015. City Att’y MOL No. 2015-4 (Mar. 4, 2015).

The answer to the question depends upon which Charter section 40 amendments the Council ultimately determines to place on the ballot. For example, if the only amendment proposed relates to the two year time period for Deputy City Attorney good cause protection, then the question of independent legal counsel for the SDCERS Board would not relate to the other subject and would need to be a separate measure. If the SDCERS Board proposal were included in a broader measure addressing the duties of the Office, it could be included under the reasoning in *Hernandez v. Cnty. of Los Angeles*, 167 Cal. App. 4th 12, 22-23 (2008), cited and discussed in the memorandum.

CONCLUSION

The proposal to amend Charter section 40 fails to accomplish its stated purpose. It includes language that is unclear, and – although framed as a clean-up measure – would effect a fundamental change in City government and may trigger meet and confer obligations. We recommend that this proposal be reconsidered, and that time and care be taken to define and analyze the issue and fashion an appropriate solution.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/
Carrie G. Townsley
Deputy City Attorney

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Attachment

³ Note that the SDCERS Board, as a legal entity independent of the City, is entitled to independent legal counsel and has independent legal counsel. *See Bianchi v. City of San Diego*, 214 Cal. App. 3d 563, 571-72 (1989); *SDCERS v. City of San Diego*, No. GIC 841845, Cal. Ct. Appeal 4th Dist. (2008). There is no need to amend the Charter to so provide.