Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: March 10, 2016

TO: Hadi Dehghani, Personnel Director

FROM: City Attorney

SUBJECT: Salary Setting Commission Use of City Resources

You asked whether City staff and resources could be used for the Salary Setting Commission (SSC) to continue to meet following the submission of its biennial report of recommended salary levels for the Mayor and City Council (Council) pursuant to San Diego City Charter (Charter) section 41.1. The SSC submitted its report to the Mayor and Councilmembers on February 12, 2016. Subsequently, the SSC directed Personnel Department staff to prepare an agenda for a meeting for March 11, 2016.

Charter section 41.1, approved by voters in 1973, established the SSC. This section provides, in relevant part:

> . . .The Salary Setting Commission shall recommend to the Council the enactment of an ordinance establishing salaries for the Mayor and Council as provided by this Charter. The Council shall provide the funds necessary to enable the Commission to perform its duties. . .

Charter sections 12.1 and 24.1 further specify that the SSC make its recommendation before February 15 of every even year, for the Council and Mayor, respectively. The Charter is the only legal authority for the SSC and nothing in the San Diego Municipal Code or Council Policy applies to their activities.

As explained in 2010 City Att'y MOL 312 (2010-12; June 10, 2010), attached:

> San Diego is a charter city. As such, the City charter creates and forms our municipal government, "distribut[ing] the powers and

> duties of the various departments, boards and officers, and provid[ing] the manner in which the "'powers shall be exercised." 2A McQuillin Mun. Corp. § 9:3 (3rd ed. 2010). This means that when a charter creates a public office or body, ***the charter is the source of the body's or officer's authority and responsibilities***. For example, the San Diego Charter creates and establishes the City Council, the Treasurer, the City Auditor, the Audit Committee, the Mayor, and the CFO among other Charter officers or bodies. Each body or officer has designated responsibilities and authority given to them by the Charter. However, unless the Charter expressly permits it, one Charter officer or body may not limit or impede the performance of another. *See* City Att'y MOL-2006-2 (Jan. 23, 2006) [Mayor may not interfere with Auditor and Comptroller Charter duties.] (Emphasis added.)

See also 2010 City Att'y MOL 360 (2010-18; Sept. 21, 2010), attached.

From the plain language of Charter section 41.1, the SSC has only one duty: recommending the Mayor and the Council salaries every other year. The City is obligated to provide funding for the SSC to complete that duty, but the SSC has no authority beyond its Charter-mandated duty to recommend salary levels to be enacted by ordinance. Historically, the City has funded the SSC by providing staff support from the Personnel Department and the use of City facilities.

With the fulfillment of its duties under Charter section 41.1, the SSC does not have further authority under the Charter to pursue any other proposed legislative reform in its capacity as a City commission. Commission members are, of course, free to pursue such legislative reform, either individually or as a group.

Absent a request from the Mayor or the Council for input beyond the SSC's limited Charter-mandated duty, the City is not obligated to provide staff support or facilities for ultra vires work initiated by members of the SCC.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Jennifer L. Berry
Jennifer L. Berry
Deputy City Attorney

JLB

cc: Honorable Mayor Kevin Faulconer
City Councilmembers

Attachments: 2010 City Att'y MOL 312 (2010-12; June 10, 2010)
2010 City Att'y MOL 360 (2010-18; Sept. 21, 2010)
2011 City Att'y MS 628 (2011-2; Apr. 1, 2011)

Doc No.: 1242950
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ATTACHMENT 1

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MEMORANDUM OF LAW

DATE: June 10, 2010

TO: City of San Diego Audit Committee

FROM: City Attorney

SUBJECT: Proposed Transfer of the Functions of the Revenue Audit Division of the Treasurer's Office to the City Auditor's Office.

INTRODUCTION

As part of the Fiscal Year 2011 budget considerations, Councilmember Anthony Young, as Chair of Council's Committee on Budget and Finance, suggested that the Mayor and City Auditor "review and take action on transferring the functions of the Revenue Audit and Appeals division of the City Treasurer's Office into the Office of the City Auditor" as a cost saving measure. Councilmember Young Memorandum at 1 (Apr. 30, 2009). The Audit Committee of the City of San Diego (Committee) considered this proposal at its May 10, 2010 meeting, reviewing a number of reports.[1]

The proposed transfer of functions will affect the City Auditor's budget, which the Committee recommends to the City Council. The Committee requests the City Attorney provide it with a formal opinion assessing the legality of the proposed function transfer.

QUESTION PRESENTED

May the City Council transfer the functions of the Revenue Audit and Appeals Division (Revenue Audit Division) from the City Treasurer's Office to the City Auditor's Office?

[1] The Committee considered a Report from the Independent Budget Analyst (IBA) dated May, 7, 2010 (IBA Report No. 10-39); a Memorandum from the City Auditor dated May 7, 2010; a Memorandum from the City Treasurer dated May 10, 2010; and an outline from the City Attorney of potential legal issues involved in the transfer.

SHORT ANSWER

No. The City Council may not legally transfer the functions of the Revenue Audit Division of the City Treasurer (Treasurer) to the City Auditor's Office. San Diego Charter section 45 places an express duty on the Treasurer to maintain a continuous inspection over special revenues she must collect from businesses, in order to effectuate collection of the revenue. The Treasurer meets this Charter duty through the Revenue Audit Division, which conducts periodic inspections of the records of businesses which remit the special revenues to the City, to ensure the revenues remitted are correct. The Treasurer is part of the City's financial management and reporting structure. The collection of revenue is a management function.

The independent City Auditor was established in 2008 by Charter section 39.2. The City Auditor is tasked with auditing City departments and offices to provide the public and City officials with objective, nonpartisan assessment of the stewardship, performance, or cost of the City's policies, programs, and operations. To ensure independence from management, the City Auditor reports to the Audit Committee. A transfer to the City Auditor of a management (collection-of-revenue) function, which the Auditor must audit, conflicts with the Charter and Government Auditing Standards' requirements for Auditor independence.

BACKGROUND

The City reformed its auditing and financial management systems in 2008 in the wake of a Securities and Exchange Commission (SEC) investigation of the City's debt financing disclosures occurring in the early 2000's. The 2008 reforms generally followed the remediation recommendations of the Kroll Report (Report),[2] issued in 2006 after an eighteen month review of the City's governance.[3] The Report frankly assessed the City's failures "to adhere to principles of sound governance and financial reporting" leading to the investigation. Kroll Report at 1. The City lacked internal controls necessary to ensure accuracy in the City's accounting and financial reporting. Kroll Report at 240-42. The Report recommended reorganization of the financial reporting structure to ensure greater accountability.[4]

In January 2006, the trial Strong Mayor form of government placed the City's financial management system, including the City Auditor and Comptroller, directly under Mayoral control.[5] This improved accountability in the reporting system. The City's accounting, financial reporting *and* internal auditing duties were still combined in the single office of Auditor and Comptroller. The Report found that retaining the internal audit function within the management

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[2] "Report of the Audit Committee of the City of San Diego" (August 8, 2006).

[3] The City Council retained Kroll Inc., a group led by Arthur Levitt, former Chairman of the SEC, to independently assess City governance and recommend solutions to the City Council to remediate problems leading to the SEC investigation.

[4] The reorganization included creating a Chief Financial Officer (CFO), who reported to the Mayor, or CEO, of the City, and a City Treasurer reporting to the CFO. Kroll Report at 245-46.

[5] Under the City Manager form of government, the City Auditor and Comptroller was the City's chief fiscal officer, appointed by the City Council. Former San Diego Charter § 39. In January 2006, former Charter section 265(b)(10) and (11) gave the Mayor sole authority to appoint and to dismiss the Auditor and Comptroller, subject to the officer's right to appeal to the City Council.

structure lacked "the requisite level of independence widely viewed as essential for a sound financial reporting system." Kroll Report at 250; also 246, n. 1273. The Report expressly recommended the City create a "separate internal auditing function" distinct from the Mayor in a new officer called an Auditor General, who would report to an Audit Committee, and serve for a term of ten years. *Id.* at 250-51. This would leave the City Departments responsible for financial reporting and accounting, such as a CFO, Comptroller, and Treasurer, in management's organizational structure, and the City's internal auditing and independent oversight functions in a separate one. *Id.* at 245-46.

A Charter Review Committee recommended Charter changes to the City Council in 2007, to implement the financial reforms.[6] At the June 3, 2008 Municipal Primary Election, voters approved Proposition C, amending the Charter to comprehensively change the City's financial reporting and accounting structure. The Charter changes: 1) supplanted the previous title of Auditor and Comptroller with a new title of CFO; 2) created a CFO appointed by the Mayor and confirmed by City Council; and 3) formally transferred all "[t]he authority, power and responsibilities conferred upon the Auditor and Comptroller by this Charter . . . to . . . the Chief Financial Officer." San Diego Charter § 39. The measure placed the Treasurer under CFO supervision, removing the requirement the Treasurer's appointment be confirmed by the City Council. San Diego Charter §§ 39, 45. It created an Audit Committee, independent of management, to supervise the new Charter office of City Auditor, created to assume the City's internal audit functions. San Diego Charter §§ 39.1, 39.2 and 111.[7]

ANALYSIS

I. THE CHARTER DUTIES OF THE CITY TREASURER AND CITY AUDITOR.

San Diego is a charter city. As such, the City charter creates and forms our municipal government, "distribut[ing] the powers and duties of the various departments, boards and officers, and provid[ing] the manner in which the . . . powers shall be exercised." 2A McQuillin Mun. Corp. § 9:3 (3rd ed. 2010). This means that when a charter creates a public office or body, the charter is the source of the body's or officer's authority and responsibilities. For example, the San Diego Charter creates and establishes the City Council, the Treasurer, the City Auditor, the Audit Committee, the Mayor, and the CFO among other Charter officers or bodies. Each body or officer has designated responsibilities and authority given to them by the Charter. However, unless the Charter expressly permits it, one Charter officer or body may not limit or impede the performance of another. *See* City Att'y MOL-2006-2 (Jan. 23, 2006) [Mayor may not interfere with Auditor and Comptroller Charter duties.]

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[6] The Mayor's Charter Review Committee provided most of the language for the Charter amendments in Proposition C. *See* 2007 San Diego Charter Review Committee, Final Report (October 4, 2007). The City Council incorporated its modifications during January and February 2008. *See* City Att'y Reports RC-2008-1 at 5-9 (Jan. 14, 2008), and RC-2008-3 at 4-6 (Jan. 29, 2008).

[7] Proposition C also created the IBA as a new Charter officer, giving the City Auditor and IBA full control over the hiring and dismissal of their assistants and deputies. San Diego Charter §§ 39.3 and 117(a)(11).

Charter provisions are construed in the same manner by courts as are constitutional provisions. *Woo v. Superior Court,* 83 Cal. App. 4th 967, 975 (2000). The principal determination is what voters intended in approving the charter provisions. Courts look first to the actual words of the provisions, giving "the usual, ordinary, and commonsense meaning to them." *Howard Jarvis Taxpayers Ass'n v. County of Orange*, 110 Cal. App. 4th 1375, 1381 (2003). If the language is clear and unambiguous, the courts will presume the voters intended the meaning apparent on the face of the measure and end their inquiry. *Woo,* 83 Cal. App. 4th at 975. If there is some ambiguity in the language, courts may look to extrinsic aids, such as the information and arguments contained in the official ballot pamphlet, to indicate the voters' understanding of the measure and their intent in passing it. *Id.* at 976.

A. San Diego Charter Section 45 Requires the Treasurer to Continually Inspect Certain Revenues To Effectuate Collection.

The Treasurer is part of the financial management of the City under Mayoral control. The Treasurer performs management and administrative functions pursuant to the Charter, generally involved in collecting, holding, and disbursing City funds. The Treasurer must keep the usual "books and records as are necessary for the recording of all receipts and expenditures" connected with these general duties. San Diego Charter § 45.[8]

The Charter also contemplates the Treasurer will be assigned to collect other special types of revenues, such as "special assessments . . . , charges for permits for private use of public streets, and such other miscellaneous taxes, fees, assessments, licenses and privilege charges . . . ." San Diego Charter § 45. Once assigned to collect these revenues, the Charter places additional duties on the Treasurer to "maintain a *continuous inspection* of the records and accounts of such taxes, licenses and privilege charges *in order to effectuate their collection.*" *Id.* (emphasis added).

This particular and express duty to "maintain a continuous inspection" "to effectuate . . . collection" is undefined in the City Charter, and this precise language is rarely seen elsewhere.[9] The Treasurer meets this duty using the Revenue Audit Division[10] to periodically inspect the records of the tax-regulated businesses and those businesses remitting percentage-based franchise fees, and rents for City-leased lands. If deficiencies are found during these inspections, appropriate collection actions are initiated. "[F]inance/revenue related departments" of other California cities also perform these periodic inspections, which are often called revenue compliance audits. *See* IBA Report No. 10-39 at 4. The Treasurer's process is also consistent

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[8] Since 2008, the Treasurer is directly responsible to the CFO, the City's chief fiscal officer in the management structure. San Diego Charter §§ 39, 260(b) and 265(b). The CFO must report monthly to the Mayor/Manager and Council on the City's "revenue and expenses" so as "to show the exact financial condition of the City," its Departments and offices. San Diego Charter § 39. The CFO receives the City revenue information for these reports from those reporting to her, including the City Treasurer.

[9] In a brief online search, we found the Tulsa, Oklahoma Municipal Code similarly directs its Director of Finance to "maintain a continuous inspection of all taxes, assessments, licenses, and fees and other revenues due the City in order to effectuate their collection." Tulsa Mun. Code § 601.

[10] The Division consists of five accountants employed in the City's classified service and one manager in the unclassified service.

with periodic inspection processes of regulated businesses or their records at all levels of government to ensure compliance with applicable regulations.

In the tax or revenue context, these inspections are usually called tax examinations or tax audits.[11] The City's local business tax ordinances mirror this accepted process and give the Treasurer specific collection, inspection, and audit authority consistent with the Treasurer's Charter duties. For example, the Treasurer is required to collect the City's Transient Occupancy Tax (TOT) from City businesses. San Diego Municipal Code (SDMC) §§ 35.0101-35.0138.[12] The TOT is imposed on City visitors renting certain lodgings in San Diego, calculated as a percent of the rent charged by the operator business. Business operators must collect and remit the proper amount of TOT monthly to the City. The tax scheme permits the City to "inspect" and "audit" the business records to cross-check the payments they send to the City with the business records on which they are based. SDMC §§ 35.0116(c) and 35.0121. It gives the Treasurer sole access to these business entities to complete the inspections or audits. SDMC § 35.0121. If a deficiency is found after an audit, the business is invoiced by the Treasurer. SDMC § 35.0116(c). The businesses can either pay the deficiency or appeal the determination. SDMC §§ 35.0117, 35.0118.

The plain language of Charter section 45 is not ambiguous. When the Treasurer is assigned to collect fees, assessments, taxes, or other like matters from outside entities, the Charter requires the Treasurer to continuously inspect the records of those entities to ensure the City collects the proper amount. The Treasurer fulfills this specific charter duty by using the accountants in the Revenue Audit Division to periodically inspect the records of the businesses remitting these fees and taxes, to effectuate collection of the appropriate amounts. *See* Treasurer Memorandum to Chief Financial Officer at 4 (May 15, 2009).

Accordingly, the Treasurer has a legal duty under the Charter to continuously inspect the records of businesses from whom she is assigned to collect special revenues in order to effectuate that collection. She appropriately meets that legal duty by these periodic inspections (revenue compliance audits) of those records to ensure the correct amounts are remitted to the City. These periodic inspections are an integral part of the Treasurer's special revenue collection duties, expressly imposed upon her by the Charter. In addition, these inspections serve management and administrative functions under the Charter as reformed in 2008, providing management with accurate revenue information for required reporting purposes under the Charter.

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[11] The Internal Revenue Service (IRS) indicates: "There is no statutory or common law definition of the term 'examination.' However, an examination, or audit, may be described as the systematic inspection of the books and records of a taxpayer for the purpose of making a determination of the correct tax liability." http://www.irs.gov/govt/fslg/article/0,,id=159772,00.html. Similarly, Black's Law Dictionary indicates a tax audit is "[a]n examination of books, vouchers and records, or other transactions possessing tax consequences, of a taxpayer . . . ." *Black's Law Dictionary* at 131 (6th ed. 1990).

[12] The Treasurer is also required to collect business taxes, and has the same rights of access to those business records. *See* SDMC §§ 31.0301, 31.0128, and 31.0140.

B. Charter Section 39.2 Requires the City Auditor to Be the City's Independent Auditor.

Charter section 39.2 governs the responsibilities and duties of the City's Auditor. In combination with Charter section 39.1, the sections were intended to create a "separate internal auditing function" apart from management control. Kroll Report at 250. Internal audits in general are "performed by personnel of a company to assure that internal procedures, operations, and accounting practices are in proper order." *Black's Law Dictionary* at 131 (6th ed. 1990).

Charter section 39.1 requires the Audit Committee to be "an independent body," whose composition and appointment process "ensure[s] its independence." The Committee has "oversight responsibility regarding the City's auditing, internal controls and any other financial or business practices required of [it] by this Charter." San Diego Charter § 39.1.[13] It is "responsible for directing and reviewing the work of the City Auditor and the City Auditor shall report directly to the Audit Committee." *Id.*

Charter section 39.2 requires the City Auditor to either "be a certified public accountant or certified internal auditor" and to follow "Government Auditing Standards" (GAGAS). GAGAS, as the name suggests, provides legislators, government officials, and the public with "an independent, objective, nonpartisan assessment of the stewardship, performance, or cost of government policies, programs, or operations . . . ." GAGAS § 1.01. Independent auditors use GAGAS to assess whether "(1) government manages public resources and uses its authority properly and in compliance with laws and regulations; (2) government programs are achieving their objectives and desired outcomes; (3) government services are provided effectively, efficiently, economically, ethically, and equitably; and (4) government managers are held accountable for their use of public resources." GAGAS § 1.02.

Charter section 39.2 gives the Auditor access to City officials and records, requiring City officials and employees to cooperate and disclose pertinent information.[14] It permits the Auditor to "investigate any material claim of financial fraud, waste or impropriety within any City Department" and authority to "summon any officer, agent or employee of the City, any claimant or other person, and examine him or her upon oath or affirmation" for that investigation. San Diego Charter § 39.2. It contemplates the City Auditor to have access to the records of some outside entities who voluntarily contract with the City, in order to verify compliance with contract terms. Those are particular City contracts with "consultants, vendors or agencies," and appear generally to involve the spending or use of City revenue, not the receipt of revenue owed the City. *Id.* Charter section 39.2 does not authorize the City Auditor independent access to the

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[13] We have previously interpreted the meaning of the Committee's oversight responsibility. *See* City Att'y Report RC-2009-14 (June 11, 2009).

[14] Charter section 39.2 provides in pertinent part: "The City Auditor shall have access to, and authority to examine any and all records, documents, systems and files of the City and/or other property of any City department, office or agency, whether created by the Charter or otherwise. It is the duty of any officer, employee or agent of the City having control of such records to permit access to, and examination thereof, upon the request of the City Auditor or his or her authorized representative. It is also the duty of any such officer, employee or agent to fully cooperate with the City Auditor, and to make full disclosure of all pertinent information."

records of business entities subject to the City's regulatory or taxation scheme, nor access to the records of franchisees, or entities leasing City property who owe money to the City.[15]

That voters intended the City Auditor to assess City processes and certain businesses contracting with the City is also consistent with information presented to them. The ballot materials specifically stated that "[t]he Mayor's supervision of the Auditor and Comptroller's duty to audit fiscal departments under Mayoral control raised concerns about the independence of internal audits." Ballot Pamp., Municipal Prim. Elect. (June 3, 2008), City Att'y Impart. Anal. Prop. C. Voters also understood that Proposition C would "more clearly separate the City's internal auditing function from supervision of the Manager (Mayor) by creating the new office of the City Auditor, which would be supervised by a restructured Audit Committee . . . . [T]he Auditor would perform the City's internal audits and investigations . . . ." *Id.*

Accordingly, we conclude Charter section 39.2 requires the City Auditor to audit *City* Departments and processes and to do so independent of City management. The independence of the City Auditor's Office is assured by requiring the Auditor report, not to management, but to the independent Audit Committee. This independent City audit system meets necessary GAGAS independence standards because "the audit function is organizationally placed outside the reporting line of the entity under audit and the auditor is not responsible for entity operations." GAGAS § 3.13. It permits the City Auditor to fulfill an *essential* City role: to provide "objective, nonpartisan assessment of the stewardship, performance, or cost of [the City's] policies, programs, or operations." GAGAS § 1.01. This permits the public, City Council, and other City Officials to know how well or poorly the City manages public resources and provides public services, and holds accountable those City Officials who perform poorly.

II. THE CITY COUNCIL MAY NOT TRANSFER THE TREASURER'S REVENUE AUDIT FUNCTION TO THE CITY AUDITOR.

Charter section 39.2 permits the City Auditor to "perform such other duties as may be required by ordinance . . . ." It is also well-established that a legislative body, like the City Council, has wide discretion, especially in the exercise of its budgetary authority. *Scott v. Common Council,* 44 Cal. App. 4th 684, 693 (1996), citing *Hicks v. Orange County Board of Supervisors*, 69 Cal. App. 3d 228, 235 (1977). This might prompt the belief that if the City Council ordains something, it must occur. But a city council's authority to act in budgetary capacity or by ordinance is not unlimited. A city council's authority in a charter city is limited by the city charter. "[I]t is well settled that a charter city may not act in conflict with its charter . . . . Any act that is violative of or not in compliance with the charter is void." *Domar Electric, Inc. v. City of Los Angeles,* 9 Cal. 4th 161, 171(1994) (citations omitted). Several cases limit a legislative body's authority when it takes actions affecting the functions and duties of charter or statutory officers.

In *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380 (1976), the City Council attempted to create by ordinance a department of legislative analyst with certain specified duties, which the

[15] Whether or not any particular City agreement, lease, or franchise permits the City Auditor independent access to a business' records must be determined on a case by case basis.

court found to be administrative in nature. *Some* of the duties and responsibilities given to the new department duplicated or overlapped those required by the Charter of the City Manager. However, the ordinance removed the new department from managerial or administrative supervision. The court found the ordinance invalid. *Hubbard,* 55 Cal. App. 3d at 384. The legal rule we derive from this case is straightforward. The City Council cannot do something by ordinance, "which *duplicates* or *infringes upon* the specific powers or duties assigned by the charter to another department or, generally, to the manager." *Id.* at 388 (emphasis added).

Similarly, in *Dadmun v. City of San Diego*, 9 Cal. App. 549 (1908), the City Council created by ordinance an Office of Special Prosecutor to handle certain criminal cases, and appointed Mr. Dadmun to fill the position. He prosecuted certain criminal cases, and sued the City for payment when it declined. The Charter then required the City Attorney to prosecute all criminal cases arising from violations of city ordinances. The Court found the actions of the City Council in appointing a special prosecutor to be "unauthorized and void." *Dadmun,* 9 Cal. App. at 551. The rule distilled from this case: "[T]he city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter and designate another to perform such duties." *Id.*

Hicks is a case analogous to the current situation. A county board of supervisors tried to transfer about one third of a district attorney's investigators to the sheriff's office, in an effort to reorganize investigatory activities. The California Constitution and state laws governed the derivation of authority of the various governmental bodies and officers in the *Hicks* case, as the City Charter does in our case. The laws did not give the board of supervisors control over the district attorney. The laws did give control to the district attorney over the institution of criminal proceedings. The investigation and gathering of evidence was inseparable to that function. The question was whether the board could lawfully require the district attorney to perform some of its investigatory function through the sheriff's office. The answer was no. The court held that the county legislative body had no power to control the district attorney, a statutory officer, in the performance of a required function "by requiring that he perform his essential duties through investigators who are subject to the control of another county officer." *Hicks,* 69 Cal. App. 3d at 241. It did not have "authority to transfer control of one officer's statutory function to another officer." *Id.* at 244.

In *Scott v. Common Council,* 44 Cal. App. 4th 684 (1996), the Common Council of the City of San Bernardino by budgetary action eliminated the only two investigators in the City Attorney's Office. The City Attorney sued, claiming the Council had a legal duty to provide the attorney with a sufficient number of investigators to perform his charter-mandated duties. The Court found the Council had acted beyond its budgetary jurisdiction. By eliminating the investigators in the attorney's office, it had eliminated the attorney's ability to carry out a mandatory charter duty. *Scott,* 44 Cal. App. 4th at 698. The court found that legislative bodies may not allocate their dwindling supply of funds during hard time funds among competing government needs "by first eliminating mandatory government functions." *Scott,* 44 Cal. App. 4th at 697.

The question before us is whether the City Council may transfer the functions of the Treasurer's Revenue Audit Division to the City Auditor. We have concluded these functions (consisting of periodic revenue compliance audits or inspections) appropriately meet the Treasurer's express legal duty under the Charter to continuously inspect the records of the businesses remitting the special revenues she must collect, to effectuate that collection. The functions are an integral part of the Treasurer's special revenue collection duties, expressly imposed upon her by the Charter. Under these circumstances, the City Council may not transfer these Charter-required functions from the Treasurer to the City Auditor by ordinance or otherwise.[16]

The Revenue Audit Division's functions are also plainly part of City management's functions under the Charter as reformed in 2008. The City Auditor has the particular duty under our Charter to audit such management functions and processes, assessing how well or poorly they are performed. The City Auditor must follow GAGAS, which place great emphasis on auditor independence. Two overarching independence principles are that "(1) audit organizations must not provide . . . services that involve *performing management functions* or making management decisions and (2) audit organizations *must not audit their own work* . . . ." GAGAS § 3.22 (emphasis added). Services that "directly support the entity's operations" and impair independence of the auditor *cannot be overcome* by compliance with supplemental safeguards. GAGAS § 3.29. They include services that involve "taking responsibility for basic financial or other records that the audit organization will audit." GAGAS § 3.29(a).

Transferring the functions of the Treasurer's Revenue Audit Division to the City Auditor conflicts with the GAGAS independence principles the Auditor must follow under our City Charter. It risks permanent impairment to the Auditor's independence, which voters just approved by adding sections 39.1 and 39.2 to the Charter. The 2008 restructuring of the Charter separated the City's financial accounting and reporting functions under Mayoral control from the independent Auditor function. This proposed transfer of a management function to an officer who may not perform such function under the San Diego Charter conflicts with the Charter. Accordingly, we conclude that a court would likely determine such action by the City Council to be void. *See Domar Electric,* 9 Cal. 4th at 171.

CONCLUSION

The Audit Committee is tasked with recommending potential budgetary changes to the City Auditor's Office to the City Council for action. The proposal to transfer functions of the Revenue Audit Division from the Treasurer's to the City Auditor's Office would impact the budget of the City Auditor and so the Committee has correctly asked for advice on the legal propriety of the proposal.

Under the requirements of the recently-amended Charter and the facts presented to us, the City Council is legally precluded from transferring the functions of the Revenue Audit Division to the City Auditor. The Charter places an express duty on the Treasurer to maintain a

[16] These cases also tell us that the City Council may not duplicate the Treasurer's revenue audit function in the City Auditor's Department; or require the City Treasurer to exercise this function through the City Auditor's Office.

continuous inspection over special revenues she must collect, in order to effectuate their collection, a traditional management function. Maintaining the authority and independence of the City Auditor is critically important to the public and public officials, and is now required of the City Auditor by the Charter. Attempting a transfer to the City Auditor of a management (collection-of-revenue) function also conflicts with Charter requirements for that office and would likely be found legally invalid.

JAN I. GOLDSMITH, City Attorney

By Josephine A. Kiernan
Josephine A. Kiernan
Deputy City Attorney

JAK:jdf:sc
cc: Gail Granewich, City Treasurer
Eduardo Luna, City Auditor
Honorable Mayor Jerry Sanders
City Councilmembers
Andrea Tevlin, Independent Budget Analyst
ML-2010-12

ATTACHMENT 2

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MEMORANDUM OF LAW

DATE: September 21, 2010

TO: Danell Scarborough, Executive Director, Citizens' Review Board on Police Practices

FROM: City Attorney

SUBJECT: Role of the Members of the Citizens' Review Board on Police Practices

INTRODUCTION

The Citizens' Review Board on Police Practices was established by a vote of the people in 1988. It is codified in the San Diego Charter at section 43(d). The Citizens' Review Board on Police Practices ensures public participation in the review of citizens' complaints filed against San Diego Police Department officers. The Citizens' Review Board on Police Practices also provides public input in the evaluation of the complaint process and departmental policies and procedures.

Recently there has been some debate among Citizens' Review Board on Police Practices' members, San Diego Police Department staff, and the Citizens' Review Board on Police Practices' staff regarding the scope of authority of the Citizens' Review Board. You have requested that the City Attorney provide a formal opinion regarding the role and duties of Citizens' Review Board on Police Practices' members.

QUESTION PRESENTED

1. What are the duties of members of the Citizens' Review Board on Police Practices (CRB or Board) with respect to the review of citizens' complaints against San Diego Police Department (SDPD) officers?

SHORT ANSWER

2. The member's role is limited to the authority granted by the San Diego Charter (Charter). That role is to "review and evaluate citizens' complaints against members of the San Diego Police Department and the San Diego Police Department's administration of

discipline arising from such complaints." San Diego Charter § 43(d). The duties of the CRB may be expanded by consent of the Mayor and the Chief of Police, provided that any additional duties do not conflict with the provisions of Charter section 43(d) or other sections of the Charter.

BACKGROUND

The SDPD Internal Affairs Unit (IA) does the initial investigation of a complaint filed against an SDPD officer. At the conclusion of the investigation, IA reaches a finding of sustained, not sustained, unfounded or exonerated. Sustained means the officer committed all or part of the alleged acts of misconduct. Not sustained means the investigation produced insufficient information to prove or disprove the allegation, such as when there are no independent witnesses. Unfounded means the alleged acts did not occur. Exonerated means the alleged acts occurred but were appropriate under the circumstances.

CRB members review and evaluate the findings of IA after IA has completed an investigation prompted by a complaint made by an individual against a SDPD officer. After the team assigned to the case thoroughly reviews the IA investigation, the team recommends to the full Board one of the following findings: (1) agree with IA with no comment; (2) agree with IA with a comment; (3) disagree with IA with a comment; or (4) request additional information. California Penal Code section 832.5(d)(3) states that "'[e]xonerated' means that the investigation clearly established that the actions of the peace or custodial officer that formed the basis for the complaint are not violations of law or department policy." Similarly, SDPD Department Procedure 1.10 defines exonerated to mean "the alleged act occurred but was justified, legal and proper or was within policy." Because of the way exonerated is defined, some members feel it is incumbent upon them to determine the legality of the officer's actions before they can determine whether or not the officer acted within the relevant policies and procedures and the action can, therefore, be exonerated. These members have decided, therefore, that they must do a legal analysis to determine the lawfulness of the officer's action, before they can reach a decision to agree or disagree with an IA finding of exonerated. Although exonerated is the only finding that refers to the legality of an officer's actions, the question of whether or not the officer's actions were legal has also been debated with respect to other IA findings.

Consequently, you have specifically asked if the role of the CRB includes the task of making legal analyses to determine the legitimacy of a particular police action.

ANALYSIS

The CRB gets its grant of authority from Charter section 43(d). The language of the Charter says the CRB is to "review and evaluate citizens' complaints against members of the San Diego Police Department and the San Diego Police Department's administration of discipline arising from such complaints." The Charter also provides that "[t]he board shall submit semiannual reports to the City Manager and City Council concerning its evaluation of the San Diego Police Department's investigation of citizen's complaints." Since 1990, the CRB has

been granted authority by the Chief of Police to review investigations of all in-custody deaths and all police shootings, regardless of whether a complaint has been filed. However, this limited expansion of duties does not alter the fundamental duties of the CRB granted by the Charter.

To determine the extent of the CRB's duties, one must look to the language of the Charter. Charter provisions are construed in the same manner by courts as are constitutional provisions. *Woo v. Superior Court,* 83 Cal. App. 4th 967, 974-75 (2000). The principal determination is what voters intended in approving the charter provisions. Courts look first to the actual words of the provisions, giving "the usual, ordinary, and commonsense meaning to them . . . ." *Howard Jarvis Taxpayers Ass'n v. County of Orange*, 110 Cal. App. 4th 1375, 1381 (2003). If the language is clear and unambiguous, the courts will presume the voters intended the meaning apparent on the face of the measure and end their inquiry. *Woo,* 83 Cal. App. 4th at 975. If there is some ambiguity in the language, courts may look to extrinsic aids, such as the information and arguments contained in the official ballot pamphlet, to "indicate the voters' understanding of the measure and their intent in passing it." *Id.* at 976. The Charter language limits the CRB's role to the review and evaluation of citizens' complaints and any subsequent discipline, and evaluation of the SDPD's investigation of those complaints. None of the language in Charter section 43(d) grants authority to the CRB to determine the legality of a police action. Under ordinary rules of statutory construction, courts have repeatedly said "it is not the court's place to insert words into the statute. 'An appellate court should be 'loathe to construe a statute which has the effect of "adding" or "subtracting" language.'"' *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 826 (2007) (quoting *People v. Pecci*, 72 Cal. App. 4th 1500, 1504 (1999) (footnote omitted)); *see Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 894 (2001). Following these well-established legal principles, it is highly unlikely a court would read into the Charter section a requirement that CRB members reach legal conclusions regarding police actions, particularly since the Charter does not impose a requirement on CRB members that they be members of the state bar or, indeed, a requirement that they have any legal training at all.

Even though the Charter language is clear, the November 8, 1988, ballot argument in favor of Proposition G provides some additional understanding of the legislative intent behind the proposition. The ballot argument said:

> Proposition G creates a citizens' review board on police practices which will evaluate complaints against police officers as well as the administration of discipline arising from those complaints.
>
> Proposition G:
>
> Will assure that complaints are handled in a <u>fair and impartial</u> manner.
>
> . . .
>
> Proposition G will create a citizens' review board on police practices that will assure public participation in the review process.

Both the language of the Charter section and the ballot argument stress that the intent of Proposition G was to provide an avenue for public participation in the evaluation of complaints against officers, and the process by which the complaints are handled. There is no language that supports a legal role for CRB members.

While the language of Charter section 43(d) is clear, it provides only the broad parameters of the CRB's duties and lacks specificity about how the duties are to be carried out. However, Charter section 43(d) also provides that the City Manager, now Mayor, is charged with the duty to establish the rules and regulations necessary for the CRB to carry out its functions. This is accomplished by the adoption of the CRB Policies and Procedures Bylaws (Bylaws). Under article III, section 3, the Bylaws state that "[t]hese rules provide for the impartial, independent, prompt review and evaluation of complaints in a manner which protects both the public and the City." Again, there is no mention that a legal analysis of an officer's actions is contemplated as part of the review and evaluation process.

Moreover, Charter section 40 provides that "[t]he City Attorney shall be the chief legal advisor of, and attorney for the City and all departments and offices thereof . . . ." And further, Charter section 40 provides that "[i]t 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 . . . ." Pursuant to this Charter section, the City Attorney has a legal duty to provide all legal services, including giving legal advice, to the City's departments, boards and commissions, either personally or by assistants that he or she designates. The authority to make legal decisions cannot be delegated to a board or department through bylaws drawn up by the Mayor or his designee. To do so would violate the express provisions of Charter section 40. The courts have frequently said "[I]t is well settled that a charter city may not act in conflict with its charter . . . . Any act that is violative of or not in compliance with the charter is void." *Domar Electric, Inc. v. City of Los Angeles,* 9 Cal. 4th 161, 171(1994) (citations omitted).

To carry out the duty to provide legal advice to the SDPD, the City Attorney's Office has several deputy city attorneys who act as police legal advisors. One of the police legal advisor's duties is to review the SDPD's policies and procedures for accuracy and legality. Policies and procedures are revised when necessary to bring them into compliance with any changes in the law that occur as a result of new legislation or court decisions. Officer training regarding police department policies and procedures is based on the City Attorney's analysis of the legal principles involved. It would be inappropriate and unfair to expect officers to act in accordance with legal interpretations made by CRB members that may conflict with advice given to the SDPD by this Office.

Questions regarding the legality of a specific police action, such as whether or not a detention or other action by an officer which leads to an arrest is legal, are also determined by this Office. Criminal Division deputies issue misdemeanor cases received from SDPD officers. If there are questions regarding the legality of any of the officer's actions, the deputy may refuse to issue the case. Otherwise, questions regarding the legality of an officer's action are left to a determination by a court.

The courts have specifically held that requiring an individual to take questions regarding the lawfulness of an officer's actions to the courts for resolution has not "altered or diminished the remedies available against the illegality of an arrest without probable cause; *it has merely required a person to submit peacefully to the inevitable and to pursue the available remedies through the orderly judicial process.*" *People v. Curtis*, 70 Cal. 2d 347, 353 (emphasis added). It would be wholly inappropriate for CRB members to usurp the authority that the legislature and courts have clearly determined is the sole responsibility of the courts.

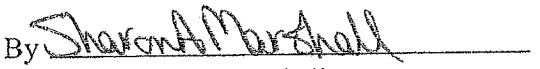
Finally, while the Bylaws do not specifically address the way the CRB is to carry out its duties to "review and evaluate citizens' complaints," the Guidelines for Reviewing Cases in the current CRB Practices Manual (Guideline or Guidelines) are very clear on that issue. Guideline three says the two guiding principles for reviewing cases are: (1) to "[a]ssess the credibility of the complainants, officers and witnesses;" and (2) to "[a]ssess the relevance of the information obtained from the interviews and the information to be presented to the Board." Guideline eight says: "[t]ry to review a case and report on team findings with a logical and practical point of view in mind, *without concentrating on technical legal analysis which often is open to legal arguments, which often clouds the basic issues*." (emphasis added). This language demonstrates that when the Guidelines were developed, those who drafted the Guidelines understood that protracted debate over legal issues, especially by a board that is composed primarily of individuals with no legal background, would unduly hamper the ability of the CRB to function effectively and efficiently.

CONCLUSION

Charter section 43(d) provides that the CRB is to "review and evaluate citizens' complaints against members of the San Diego Police Department and the San Diego Police Department's administration of discipline arising from such complaints." The language of the Charter is clear that the role of the CRB is limited to the review and evaluation of complaints. There is no language, either in the Charter or the Bylaws, that grants CRB members the authority to reach legal conclusions regarding the actions of police officers. That authority is granted solely to the City Attorney and his or her assistants through Charter section 40.

The Bylaws are approved by the Mayor and are the guidelines the CRB uses to assist members in performing their duties. In light of the confusion regarding the role of CRB members, this Office recommends that the Bylaws be amended to more clearly explain the roles of CRB members.

JAN I. GOLDSMITH, City Attorney

By 

Sharon A. Marshall
Deputy City Attorney

SAM:ccm
ML-2010-18

ATTACHMENT 3

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: April 1, 2011

TO: Councilmember Kevin Faulconer & Todd Gloria

FROM: City Attorney

SUBJECT: Establishment of a New Policy for Allocating Maintenance Assessment District Assessment Funds to the Non-profit Corporations that Administer the Districts

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INTRODUCTION

The current process for allocating Maintenance Assessment District (MAD) revenues to the non-profits corporations (non-profits) that administer certain MADs is done via reimbursement. As part of the reimbursement process, the City requires the non-profits to show proof of eligible expenditures through submission of receipts and invoices prior to reimbursement. Due to perceived delays in the reimbursement process, it has been suggested that a new process for allocating MAD assessment revenues be adopted. This new process would involve the City advancing such revenues to the non-profits prior to the non-profits actually incurring expenses. As part of the discussions on the feasibility and legality of the proposed new process, the issue of whether San Diego Charter section 93 prohibited such advancement of revenues was raised.

QUESTION PRESENTED

Does Charter section 93 prohibit advancing money to the non-profits that administer contracts for goods and services on behalf of certain Maintenance Assessment Districts?

SHORT ANSWER

No. Charter section 93 does not prohibit any expenditure that serves a valid public purpose or that is made in performance of a bona fide contract. In the matter at hand, the expenditure would meet both requirements.

BACKGROUND

A MAD is a mechanism by which property owners can elect to assess themselves in order to pay for and receive services beyond what the City normally provides. MADs are governed by California Streets and Highways Code sections 22500 - 22679 (Landscaping and Lighting Act of 1972) and Chapter 6, Article 5, Division 2, sections 65.0201 - 65.0234 of the San Diego Municipal Code. The statutes contain legislative declarations that their purpose and intent is to establish a procedure for making and maintaining certain improvements, as that term is defined in State law, and to provide a method for the City Council to authorize a non-profit to assume responsibility for the administration of certain contracts within a MAD. Cal. Sts. & High. Code § 22502; SDMC §§ 65.0201(a), (e).

California Streets and Highways Code section 22525, defines the type of improvements eligible for funding with MAD assessment revenues. Section 22525 states:

> "Improvement" means one or any combination of the following:
>
> (a) The installation or planting of landscaping.
>
> (b) The installation or construction of statuary, fountains, and other ornamental structures and facilities.
>
> (c) The installation or construction of public lighting facilities, including, but not limited to, traffic signals.
>
> (d) The installation or construction of any facilities which are appurtenant to any of the foregoing or which are necessary or convenient for the maintenance or servicing thereof, including, but not limited to, grading, clearing, removal of debris, the installation or construction of curbs, gutters, walls, sidewalks, or paving, or water, irrigation, drainage, or electrical facilities.
>
> (e) The installation of park or recreational improvements, including, but not limited to, all of the following:
>
> > (1) Land preparation, such as grading, leveling, cutting and filling, sod, landscaping, irrigation systems, sidewalks, and drainage.

(2) Lights, playground equipment, play courts, and public restrooms.

(f) The maintenance or servicing, or both, of any of the foregoing.

(g) The acquisition of land for park, recreational, or open-space purposes.

(h) The acquisition of any existing improvement otherwise authorized pursuant to this section.

(i) The acquisition or construction of any community center, municipal auditorium or hall, or similar public facility for the indoor presentation of performances, shows, stage productions, fairs, conventions, exhibitions, pageants, meetings, parties, or other group events, activities, or functions, whether those events, activities, or functions are public or private.

Cal. Sts. & High. Code § 22525.

Under the San Diego Municipal Code, if a non-profit wishes to establish the right to administer contracts for goods and services on behalf of a MAD, that non-profit must provide written documentation verifying that property owners representing "at least a majority of the parcel area" of the MAD support the non-profit assuming responsibility for administration. SDMC § 65.0212(a). Upon submission of such documentation, the Mayor will docket for City Council review a resolution authorizing the Mayor to enter into an agreement with the non-profit for administration of the MAD. SDMC § 65.0212(c). MADs in which a non-profit administers the contracts for goods and services are referred to in the City as "self-managed" MADs or "self-administered" MADs.

After a MAD is successfully formed, City staff prepares the annual enrollment and delivers it to the County Assessor to be included on property tax statements to property owners within the MAD boundaries. MAD assessment revenues are collected by the County Tax Collector at the same time and in the same manner as property tax revenues. The County receives the majority of MAD assessment revenues in December and April. The County then transfers the MAD revenues to the City approximately one month after the County receives it. Each MAD is separately accounted for in its own City fund. The cash balances of substantially all City funds, including the MAD funds, are pooled and invested by the City Treasurer for the purpose of increasing interest earnings through investment activities.

As the non-profits administer their respective MADs, they submit monthly reimbursement requests to the City. Those requests are reviewed by City Planning and Community Investment Department (CP&CI) staff to ensure that the expenditures are eligible for reimbursement. Once CP&CI staff determines that the expenditure is eligible for reimbursement, staff forwards the request to the Comptroller's office for payment from the appropriate MAD fund. Recently, there have been delays in this process due to, among other things, the City's recent transition to a new accounting system. These delays have led to discussions on advancing assessment revenues to the non-profits in order to streamline the process.

ANALYSIS

I. THE CITY CHARTER GOVERNS THE MANNER IN WHICH THE CITY MAY APPROPRIATE AND EXPEND FUNDS

San Diego is a charter city. *Mira Development Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1214 (1988). City charters, adopted pursuant to the authority of article XI, section 5 of the California Constitution (Constitution), are not grants of power but act as limitations, and a charter city may exercise all powers in regards to municipal affairs unless specifically and explicitly limited by its charter. *See Taylor v. Crane*, 24 Cal. 3d 442, 450 (1979); *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598-99 (1949). The determination of fiscal policies and procedures is a municipal affair. *Cramer v. City of San Diego*, 164 Cal. App. 2d 168, 171 (1958). The exercise of power by a charter city is favored against any limitation or restriction on that exercise "which is not expressly stated in the charter. . . . So guided, reason dictates that the full exercise of the power is permitted except as clearly and explicitly curtailed. Thus, in construing the city's charter, a restriction on the exercise of municipal power may not be implied." *City of Grass Valley*, 34 Cal. 2d at 599. Accordingly, the Charter provides the authority for, and limitations upon, the manner in which the City may appropriate and expend funds.

II. THE CITY MAY MAKE AN EXPENDITURE FOR A VALID PUBLIC PURPOSE OR IN PERFORMANCE OF A BONA FIDE CONTRACT

Several limitations exist in the Charter regarding the City's ability to expend funds. For example, the City may not incur indebtedness beyond its fiscal year without a vote of the electorate nor enter into contracts for more than five years without a two-thirds vote of the City Council. San Diego Charter § 99. These limitations are not applicable to the question presented here. Charter section 93, however, sets forth the relevant limitation that may apply. It provides, in pertinent part: "The credit of the City shall not be given or loaned to or in aid of any individual, association or corporation; except that suitable provision may be made for the aid and support of the poor." The City Attorney has previously opined that this provision is similar to article XVI, section 6 of the Constitution, and the cases interpreting that constitutional provision

are relevant in interpreting the Charter provision.[1] *See* 1979 Op. City Att'y 8 (79-2; Mar. 2, 1979); 1979 City Att'y MOL 168 (Sept. 4, 1979); 1952 Op. City Att'y 23 (Feb 27, 1952).

Article XVI, section 6, is generally referred to as prohibiting a "gift of public funds." *See, e.g, California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 582-83 (1976); *County of Alameda v. Carleson*, 5 Cal. 3d 730, 745 (1971). An exception to this prohibition exists if a "public purpose" is served by the expenditure. "Money spent for public purposes is not a gift. . . ." *Community Memorial Hospital v. County of Ventura*, 50 Cal. App. 4th 199, 207 (1996). *See also White v. State of California*, 88 Cal. App. 4th 298, 311 (2001).

In *Carleson*, one of the leading cases concerning the prohibition against the making of gifts or the lending of credit, the court explained the meaning of the proscription:

> It is generally held that in determining whether an appropriation of public funds is to be considered a gift, the primary question is whether the funds are to be used for a 'public' or 'private' purpose; the benefit to the state from an expenditure for a public purpose is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom. The determination of what constitutes a public purpose is primarily a matter for the Legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis.

Carleson, 5 Cal. 3d at 745-46 (citations omitted).

Carleson has been followed by numerous court decisions (See, e.g., *Elliot*, 17 Cal.3d 575; *Winkelman v. City of Tiburon*, 32 Cal.App.3d 834 (1973)) and courts have been liberal in deciding what constitutes a public purpose for which expenditures may be made. In *Elliot*, the California Supreme Court held that the Housing and Home Finance Act and resolutions promulgated thereunder, which authorizes, among other things, a public agency to make loans to private housing sponsors and mortgage lenders at below-market rates, do not amount to a gift of public funds. Citing *Carleson*, the Court gave great weight to the public purposes found by the Legislature regarding the shortage of housing for low and moderate income families. *Elliot*, 17

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[1]Article XVI, section 6 provides: "The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; . . . ." However, because of a charter city's control over its fiscal affairs, which, as discussed above, are considered solely "municipal affairs," the courts have held that Article XVI, section 6 is not applicable to charter cities. *Tevis v. City & County of San Francisco*, 43 Cal. 2d 190, 196-97 (1954); *Mullins v. Henderson*, 75 Cal. App. 2d 117, 132-33 (1946); *Los Angeles Gas & Electric v. City of Los Angeles*, 188 Cal. 307, 317 (1922).

Cal.3d 575 at 583. The Court also found that other public purposes were served such as increasing safe and decent housing and the avoidance of ethnic, economic, and racial isolation. *Id.* at 583-85. "Given the broad public purposes supporting the program and the close relationship between the elements of the program and these purposes, we conclude that the Act, and the Agency's resolutions thereunder, do not violate the constitutional prohibition against the gift of public funds and extension of public credit." *Id.* at 586

In *Winkelman*, the City of Tiburon proposed to construct an affordable housing project on land it owned and offered to sell the property well below the market-rate to a private non-profit which would build the project. Adjacent property owners challenged that decision on the grounds that the sale of the property to the non-profit corporation constituted an illegal gift of public funds. The trial court rejected that challenge and the appellate court affirmed, stating that so long as the consideration for the sale was plainly substantial and not nominal, there was no gift of public funds. *Winkelman*, 32 Cal.App.3d at 844-45.

Under *Winkelman*, there is no unconstitutional gift if the transfer promotes a public purpose, therefore providing a benefit to the state "in the nature of consideration," or if the consideration given in exchange is "'adequate,' so as to evidence a bona fide contract." *Winkelman*, 32 Cal.App.3d at 844-46. The notion that performance of a "bona fide contract" does not amount to a gift of public funds is consistent with past cases such as *People v. City of Long Beach*, 51 Cal.2d 875 (1959), in which the Supreme Court stated, "[i]t is clear, however, that the performance of a bona fide contract by a public body is not the making of a gift. . . ." *City of Long Beach*, 51 Cal.2d 875 at 881.

Therefore, it appears there are at least two tests to determine whether a particular expenditure is a gift of public funds. The first is whether the expenditure promotes a public purpose. If a public purpose is promoted by the expenditure, the public benefit received amounts to consideration in return for that expenditure, and thus, it is not a gift. The second test is whether the expenditure is performance under a bona fide contract. To be considered a bona fide contract, the public agency must receive adequate consideration in return for the expenditure. When determining whether adequate consideration is received or not, it is not necessary to weigh the expenditure against the benefit on a scale. Instead, the public agency need only receive a benefit that is not nominal and plainly substantial. "The law, however, does not require a weighing of the quantum of benefit received by a promisor or of the detriment suffered by a promisee where the consideration is plainly substantial." *Winkelman*, 32 Cal.App.3d at 845.

As stated above, MADs are formed for the purpose of installing, constructing, and maintaining public improvements, parks, open space, and public facilities beyond what the City normally provides. A strong argument can be made that installing, constructing, and maintaining public improvements, parks, open space, and public facilities at no cost to the taxpayer in this challenging economic environment is a public purpose. Given the deference accorded to legislative bodies, it is unlikely that a court would invalidate a City Council determination that

advancing funds to the non-profits for such improvements constitutes a public purpose. No court has addressed whether the law requires the City to make a formal finding of public purpose. However, this Office advises that City staff include the facts relied upon to determine the public purpose in the staff report, should the City Council decide to adopt a process of advancing revenues to the non-profits. Furthermore, any funds that may potentially be advanced to the non-profits would be in exchange for the non-profits fulfilling their contractual duties to undertake the improvements. Such an undertaking on the part of the non-profits is substantial and more than nominal consideration. Therefore, both tests are met and the advance of funds to the non-profits administering the MADs would not be a violation of Charter section 93.

III. THE CITY RETAINS CONTROL OVER THE ASSESSMENT REVENUES, AND THUS, HAS RESPONSIBILITY FOR THE PROPER EXPENDITURE OF THOSE REVENUES

As a word of caution, it is important to note that no matter what method of allocating MAD assessment revenues to the non-profits is used, those revenues are public funds, and as such, the City is responsible for ensuring that the funds are spent properly. There are only a few court cases which touch upon the issue of assessment district funds being public funds. One such case is *Epstein v. Hollywood Entertainment District II Business Improvement District*, 87 Cal. App. 4th 862 (2001). In *Epstein*, a non-profit corporation administered the funds that the city raised through assessments on businesses in a special assessment district. A property owner within this district brought an action seeking declaratory and injunctive relief to establish that the non-profit was required to comply with the Ralph M. Brown Act and the City's competitive bidding requirements for contracts. The trial court denied plaintiff's motion for a preliminary injunction. The Court of Appeal reversed and remanded, directing the trial court to enter a preliminary injunction in plaintiff's favor. The court held that the non-profit was subject to the Brown Act and stated, in dicta, that the funds involved were public funds. "Very simply, the Brown Act contains no exemptions for decisions about expenditures of *public funds* for 'supplemental services.'" *Epstein*, 87 Cal. App. 4th at 875 (emphasis in original).

The City, as the elected legislative body, retains plenary decision-making authority over the MADs' council activities, in that the City Council may modify any particular contained in the MADs' engineers' reports and budgets. Cal. Sts. & High. Code §§ 22586; 22591; 22623; 22630. This retention of power is not only provided for by California Streets and Highways Code, but it is required by well-established law. The City may only delegate the performance of administrative functions, such as administration of the MADs, to a non-profit if it "retains ultimate control over administration so that it may safeguard the public interest." *Chamber of Commerce v. Stephens* 212 Cal. 607, 610 (1931); *County of Los Angeles v. Nesvig* 231 Cal. App. 2d 603, 616-617 (1965). Advancing funds to the non-profits that administer MADs obviously exposes the City to additional risk by virtue of the fact that the City would have less control to

ensure the proper expenditure of assessment revenues and would restrict its ability to safeguard the public interest.

CONCLUSION

Charter section 93 does not prohibit advancing funds to the non-profits that administer MADs if the City Council finds that a valid public purpose is served by such an advance and a reasonable basis exists to support the finding. A strong argument can be made that the improvements provided by the MADs at no cost to the taxpayer in this challenging economic environment is a public purpose. Given the deference accorded to legislative bodies, it is extremely unlikely that a court would invalidate a City Council determination that advancing funds to the non-profits for such improvements constitutes a public purpose. Furthermore, the advancing of funds would be in performance of a bona fide contract, in that the non-profits' undertaking of those improvements in exchange for the advanced funds is substantial and more than nominal consideration. Therefore, the advance of funds to the non-profits administering the MADs would not be a violation of Charter section 93. However, this Office cautions the City Council that further advancing funds to the non-profits exposes the City to additional risk by virtue of the fact that the City would have less control to ensure the proper expenditure of assessment revenues which could restrict its ability to safeguard the public interest.

JAN I. GOLDSMITH, CITY ATTORNEY,

By

Adam R. Wander
Deputy City Attorney

ARW:js

cc: Beth Murray, Deputy Director,
City Planning & Community Investment

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