

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: September 5, 2018
TO: Honorable Mayor, City Councilmembers, and Audit Committee
FROM: City Attorney
SUBJECT: Appointment of an Interim City Auditor

INTRODUCTION

In response to a resignation letter issued by City Auditor Eduardo Luna effective September 28, 2018, we have received questions from the Chair and one of the public members of the Audit Committee regarding the process for appointing an interim City Auditor.

QUESTION PRESENTED

Does the San Diego Charter (Charter) allow the appointment of an interim City Auditor? If so, what is the appropriate process for such appointment?

SHORT ANSWER

Yes. The Charter does not expressly discuss the appointment of an interim City Auditor. However, such appointment is not only permissible but it is also important, consistent with the 2006 Kroll Report's recommendation,¹ a to ensure the continuity of the City Auditor function while efforts are made to appoint a City Auditor for the full ten-year term. The appropriate process for appointment of an interim City Auditor is the same as the process for appointment of the City Auditor under Charter section 39.2.

¹ Report of the Audit Committee of the City of San Diego, August 8, 2006. The Kroll Report addressed deficiencies in the City's financial reporting obligations and recommended corrections, including an audit function independent of City management. Both the selection process and the ten-year term are intended to ensure that independence.

ANALYSIS

THE CHARTER ALLOWS THE APPOINTMENT OF AN INTERIM CITY AUDITOR

Among other things, Charter section 39.2 sets forth the term and the process for the appointment of the City Auditor. Specifically, the City Auditor serves a ten-year term and is to be appointed by the City Manager [Mayor]² in consultation with the Audit Committee, and confirmed by the San Diego City Council. The Charter is silent on the appointment of an interim City Auditor.

The Charter is to be construed to permit exercise of all powers not expressly limited by the Charter or by superior state or federal law, and restrictions on the City of San Diego's (City) power as a charter city may not be implied. *Canfield v. Sullivan*, 774 F.2d 1466, 1469 (1985) (charter did not expressly prohibit city legislature from creating new executive positions so it was permissible); *Taylor v. Crane*, 24 Cal. 3d 442, 451-52 (1979) (charter did not expressly prohibit arbitration and arbitrator's decision did not result in an unlawful delegation of the city manager's authority to impose discipline under the city charter so arbitrator's ruling was binding). Because there is no state or federal law that prohibits the appointment of an interim City Auditor and it is not prohibited under the Charter, the City may appoint an interim City Auditor.

The City has established a precedent of appointing interim City executives in the absence of express language in the Charter. For instance, the Charter is silent on the appointment of an interim City Manager (i.e. Chief Operating Officer) and an interim Fire Chief. San Diego Charter §§ 28 and 58. Nevertheless, pursuant to the authority under Charter sections 260 and 265, the City appointed Scott Chadwick as interim City Manager from March 2, 2013 to July 14, 2013, and Walt Ekard as interim City Manager from July 14, 2013, until he resigned on October 30, 2013. The City also appointed Kevin Ester as the interim Fire Chief from April 14, 2018, until the appointment of the current Fire Chief, Colin Stowell, on August 10, 2018.

Our interpretation of Charter section 39.2 is consistent with the intent behind its enactment. The primary goal in interpreting a city charter is to ascertain the voter's intent. *Mason v. Retirement Board of City & County of San Francisco*, 111 Cal. App. 4th 1221, 1227 (2003). The city charter should be construed with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness. *Aquilino v. Marin County Employees Retirement Association*, 60 Cal. App. 4th 1509, 1516 (1998). In June 2008, San Diego voters approved the passage of Proposition C, which in pertinent part, enacted Charter section 39.2, establishing the Office of the City Auditor.

The 2008 Charter amendment created the Audit Committee and the Office of the City Auditor in response to the 2006 Kroll Report. In the ballot materials, specifically the argument in favor of Proposition C, the proponents stated that "Prop C strengthens the independence of the City Auditor, who acts as the watchdog over City finances. The Auditor is insulated from political

² With the adoption of the Strong Mayor Charter provisions, the Mayor has all of the authority of the City Manager under Article V of the Charter, including appointment of the City Auditor. Charter § 260.

