

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

MEMORANDUM

DATE: May 1, 2020
TO: Elizabeth Maland, City Clerk
FROM: City Attorney
SUBJECT: Council Policy 000-21 Submission for November 2020 Ballot

In accordance with San Diego City Council (Council) Policy 000-21, the Office of the City Attorney (CAO) is proposing Council consideration of proposed amendments to San Diego Charter (Charter) sections 39, 41, 42, 99, 110, 117, 129.1, and 303, and Council consideration of a new Charter section 43.2, for placement on the November 2020 ballot. These amendments are intended to clarify and update existing Charter provisions and to resolve outstanding legal issues.

The CAO has prepared the attached Report to the Rules Committee, which discusses the proposed amendments.

Thank you for your assistance in forwarding these materials to the Rules Committee members.

JFD:jvg
Doc. No.: 2377045_2
Enclosure

SANNA R. SINGER
ASSISTANT CITY ATTORNEY
PRESCILLA DUGARD
SENIOR CHIEF DEPUTY CITY ATTORNEY
JOAN F. DAWSON
SENIOR DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
MARA W. ELLIOTT
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

May 1, 2020

REPORT TO THE RULES COMMITTEE

2020 SAN DIEGO CHARTER LEGAL REVIEW

INTRODUCTION

The Office of the City Attorney (Office) regularly reviews the San Diego Charter (Charter) to identify provisions that need to be updated to clarify ambiguities or to conform to changes in federal and state law. As part of our ongoing work advising City departments, this Office also provides recommendations to conform the Charter to changes in City policies and practices.

In 2015, this Office submitted a number of suggested Charter amendments to the City's Charter Review Committee. Some of those suggested Charter amendments were subsequently submitted to City voters. Others were referred to the Rules Committee, which took over the Charter review process, after the expiration of the Charter Review Committee. While the majority of the City Attorney's suggested amendments have been addressed, a few are still outstanding. In addition, changes in federal and state law necessitate further review of existing Charter language.

In accordance with City Council Policy 000-21, the Office submits this Report to the Rules Committee, outlining proposed Charter amendments for the Committee and the City Council (Council) to consider. This Report includes the more pressing proposals not yet addressed, as well as new issues that have arisen.

We have prioritized our recommendation as we recognize that budget constraints may limit the Council's ability to submit measures for the November 2020 ballot. These recommendations have been fully vetted by the Office and are ready to proceed should the Council wish to address them at this time. This Office is available to provide additional review and analysis, as requested.

PROPOSED CHARTER AMENDMENTS

I. PRIORITY PROPOSALS FOR NOVEMBER 2020 ELECTION

The following proposals should be prioritized because they are needed to allow for updating of critical City business practices or to resolve potential ambiguities affecting day-to-day City matters.

REPORT TO THE RULES COMMITTEE	-2-	May 1, 2020
-------------------------------	-----	-------------

A. Charter section 39: Chief Financial Officer and Charter section 80: Money Required to be in Treasury, Related to Certification of Funds by the City’s Chief Financial Officer

Issue: The current language of Charter sections 39 and 80, related to certification of funds by the City’s Chief Financial Officer, impose a requirement for an individual written certification before a City contract or obligation can be approved. This outdated method is not consistent or needed with the City’s use of modern computer systems and internal controls. These Charter sections also have the potential to cause confusion and slow the contracting process, as a contract cannot be let until the Office confirms compliance with this archaic Charter requirement.

Options: This Office recommends that the Council present to City voters the proposed changes to these Charter sections submitted by the City’s Chief Financial Officer in a separate memorandum to the Rules Committee. The proposed amendments include edits, as well as adding language to the Charter, stating that the Chief Financial Officer must “certify annually that budgetary controls exist to ensure that the City operates within the approved budget” and that the Chief Financial Officer must “establish sufficiency of funds by certifying annually that budgetary controls exist to ensure that the City operates within its approved budget.” These proposed Charter amendments are intended to update the Charter to reflect the modern-day cash flow management and accounting practices that have replaced the antiquated approach described above.

These changes will bring the Charter in line with more modern business practices, while also ensuring necessary financial controls. The proposed changes, if adopted, will also help streamline this Office’s review of contracts for compliance with Charter provisions governing finance.

B. Charter Section 41(a): Funds Commission

Issue: The Funds Commission is presently composed of one bank official, two unclassified citizens, and the City Attorney and City Treasurer, who serve as ex officio voting members. An "ex officio" member serves on a board or commission "because of the public offices they hold." *People ex rel. Deputy Sheriffs' Assn. v. County of Santa Clara*, 49 Cal. App. 4th 1471, 1483 (1996). The Funds Commission has “supervision and control over all trust, perpetuity, and investment funds of the City and such pension funds as shall be placed in its custody.” San Diego Charter §41(a). This provision may require the Funds Commission members to serve in a fiduciary role under federal and state law. *See, e.g., Hodges v. County of Placer*, 41 Cal. App. 5th 537, 546-48 (2019) (discussing fiduciary relationships).

It is unclear whether the City Attorney, as an ex officio member, serves as a voting member, with fiduciary duties, or is a member of this body solely for the purpose of observing the activities of the body. Notably, a Deputy City Attorney attends these meetings to provide legal advice to the Funds Commission. While it is possible that a City Attorney may possess the necessary expertise to advise on financial matters, the City Attorney’s primary role is that of a legal advisor under Charter section 40 and the California Rules of Professional Conduct.

REPORT TO THE RULES COMMITTEE	-3-	May 1, 2020
-------------------------------	-----	-------------

Option: Remove the City Attorney from the Funds Commission, as an ex officio member, and replace the City Attorney with an additional citizen member. In addition, modify the requirements for citizens to serve on the Funds Commission, by clarifying that at least two members must have professional expertise in the banking or financial industries, rather than requiring “one bank official.” This modification will allow for greater flexibility in appointing citizen members. The changes would not prohibit the City Attorney’s Office from continuing to provide legal support to the Funds Commission.

C. Charter Section 117: Unclassified and Classified Services

Issue: There is a lack of clarity in the Charter on how the City is to apply certain state law employment provisions, including provisions in the Fair Employment and Housing Act, to its volunteer members of City boards and commissions. The Charter lists these volunteer members of City boards and commissions as employees, even though they receive no compensation and do not meet the definition of employee under certain state laws. To ensure compliance with certain state law requirements that cover public agency employers and employees, this Office proposes a modification to clarify the status of members of City boards and commissions by defining them as volunteers, but not employees.

Option: Remove “Members of boards and commissions” from the list of employees in the Unclassified Service and remove “Officers and employees of San Diego Unified School District” from the list. Add new language, which properly defines the City’s relationship with its volunteer members of City boards and commissions. Sample proposed language may be:

(c) Members of boards and commissions established by this Charter or by the City Council by ordinance are volunteers, not employees, of the City, who receive no compensation or benefits unless expressly authorized by this Charter or by ordinance of the City Council. These volunteers are entitled to the rights and privileges provided by this Charter, by the City Council by ordinance, or by controlling federal or state law.

D. Charter Section 303: Restrictions on Compensation and Benefits for Elective Officers

Issue: On November 6, 2018, City voters approved Measure L, which modified compensation and benefits for the City’s elected officers. The measure was proposed by a citizen. Among other things, it added a new section 303 to the Charter, which included the following language: “Elective officers are prohibited from giving away any City-held ticket, unless the recipient pays the face value of the ticket to the City. Any seats or similar amenities or services owned or controlled by the City, in part or in whole, within any sports or entertainment venue, must be marketed to the public at fair market value with all revenues received to be directed to the City Treasurer.”

This provision contradicts specific provisions of the Memorandum of Understanding approved with Proposition C by City voters on November 3, 1998, and the implementing contract, titled Joint Use and Management Agreement between the City of San Diego and Padres L.P. (JUMA),

REPORT TO THE RULES COMMITTEE	-4-	May 1, 2020
-------------------------------	-----	-------------

regarding Petco Park. The MOU and the JUMA dictate the voter-approved contractual understanding of the parties regarding the use of private suites at Petco Park. The existing agreements provide which party has the right to sell licenses and tickets and which party has the right to the revenues from such sales. Almost exclusively, the Padres L.P. has these rights, and City voter approval of Charter section 303 did not change these existing agreements. As a result of the conflict between Charter section 303 and the voter-approved contractual agreement between the City and the JUMA, the City’s designated seats at Petco Park cannot be sold.

Option: Amend Charter section 303(c) to exempt Petco Park by adding the following language at the end of subsection (c): “This provision shall not apply to the Ballpark, as that term is defined by the Memorandum of Understanding authorized by Ordinance O-18613.”

II. PROPOSALS TO UPDATE THE CHARTER TO CONFORM TO CONTROLLING FEDERAL AND STATE LAW (MAY BE DEFERRED UNTIL NOVEMBER 2022)

The following proposals are necessary to update the Charter to conform to established controlling federal and state law. As a cost-savings measure, these proposals could be deferred to a future election. Until these proposed amendments are presented to City voters for consideration, the Charter will be interpreted consistent with controlling federal and state law.

A. Charter Section 42: Membership Selection

Issue: This section requires the City to consider “sex, race and geographical area” in appointing members to City boards, commissions, committees, and panels. This requirement may not conform to equal protection requirements or to article I, section 31 of the California Constitution, added by California voter approval of Proposition 209 in 1996. Proposition 209 included language stating in part that political subdivisions, including cities, “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” This Office discussed state law concerns with Charter section 42 in our November 3, 2015, Memorandum of Law (ML-2015-17).

Option: Redraft the language of Charter section 42 to allow consideration of geographic, social, ethnic, and culture diversity in making appointments, in a manner consistent with controlling federal and state law.

B. Charter Section 99: Continuing Contracts

Issue: Charter section 99 consists of two sentences. The first sentence sets forth an annual debt limitation provision, similar to the provision found in the California Constitution, that generally requires a public vote before the City may incur indebtedness that exceeds the City’s projected income and revenue during the fiscal year in which the indebtedness will become due. The second sentence sets forth a City-specific procedure that is not found in the California

REPORT TO THE RULES COMMITTEE	-5-	May 1, 2020
-------------------------------	-----	-------------

Constitution, as follows: “No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds’ majority vote of the members elected to the Council.”

The annual debt limitation provision in the California Constitution is subject to several court-recognized exceptions.¹ This Office has opined that those court-recognized exceptions apply equally to Charter section 99, which is modeled after the language in the California Constitution. Since the second sentence is unique to the City, accordingly, this Office has opined that the ordinance requirement in the second sentence of Charter section 99 does not apply to City indebtedness contracts that fall within one of the court-recognized exceptions to the annual debt limitation provision. Thus, for example, our opinion, consistent with the City’s long-standing practice, is that the ordinance requirement in the second sentence of Charter section 99 does not apply to City contracts or obligations where the City is not spending money that do not involve expenditure of public funds, such as purely revenue-generating contracts, or multi-year agreements that involve contingent obligations. *See, e.g.,* City Att’y MOL ML-2012-8 (July 16, 2012). We have previously advised: “Charter section 99 is a very close reflection of the debt limitation provisions of California Constitution Article XI, section 18. . . . [T]he two laws are nearly identical in language, purpose, and effect.” City Att’y MOL ML-92-98 (Oct. 19, 1992). Given that Charter section 99 presently contains no specific reference to the debt limitation provision in the California Constitution, an argument could be made that Charter section 99 applies to City contracts and obligations in a manner that is inconsistent with established California law on debt limits, causing more City contracts to become subject to the ordinance requirement in the second sentence of Charter section 99.

¹ A debt limitation is a constraint on discretionary borrowing by governments. The California Constitution requires a two-thirds vote of the electorate before a municipality may incur an obligation in excess of its yearly revenue. *City of San Diego v. Rider*, 47 Cal. App. 4th 1473, 1480 (1996). This debt limitation provision requires local governments to operate with a balanced budget and “pay-as-you-go” principles. *Id.* at 1481. *See also Rider v. City of San Diego*, 18 Cal. 4th 1035, 1045 (1998); 67 Op. Cal. Att’y. Gen. 349, 351-52 (1984) (citing *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641, 642 (1882)). However, there are specific types of agreements excluded from the constitutional debt limitation provision, including contingent obligations. Other exceptions to the rule include obligations that a local government pays from a special fund (*see City of Bakersfield v. W. Park Home Owners Ass’n & Friends*, 4 Cal. App. 5th 1199, 1205 (2016)); obligations imposed by law (*see Rider v. City of San Diego*, 18 Cal. 4th 1035, 1046 (1998)); and certain leases and service contracts (*see City of Los Angeles v. Offner*, 19 Cal. 2d 483, 485-86 (1942)). The exceptions evolved from an early California Supreme Court case that held a contract for services was effectively a current expense and not debt because an annual obligation to pay for services only arose after the city received the services. *See McBean v. City of Fresno*, 112 Cal. 159 (1896) (applying California Constitution article XI, section 18, which is the predecessor to article XVI section 18).

REPORT TO THE RULES COMMITTEE	-6-	May 1, 2020
-------------------------------	-----	-------------

We recommend City voters be asked to consider specific clarifying language, to confirm that Charter section 99 is intended to be interpreted in accordance with the annual debt limitation provision in the California Constitution. This clarifying language would provide legal certainty in applying Charter section 99 and would minimize the City’s legal risk in approving certain indebtedness contracts that fall within court-recognized exceptions to the annual debt limitation.

Option: Add the following sentence to the end of Section 99: Each provision of this section is intended to be interpreted in a manner consistent with the debt limitation provision in article 16, section 18 of the Constitution of the State of California, including all court-recognized exceptions to the debt limitation provision.

C. Charter Section 129.1: Removal of Striking Employees

Issue: This section, which was added to the Charter in 1976, prohibits classified employees from instigating, participating in, or affording leadership to strikes against the City, and from engaging in any form of concerted action to withhold service. This provision, which gives City management authority to investigate, discipline, and remove striking employees, is inconsistent with more recent, controlling state law set forth in the Meyers-Milias-Brown Act (MMBA) and cases interpreting it.

California courts have held that the right to strike “goes to the essence of labor law,” *Fresno Unified School Dist. v. National Education Ass’n*, 125 Cal. App. 3d 259, 268 (1981). The California Public Employment Relations Board (PERB) has authority to seek an injunction on behalf of public agency employers, if a planned employee strike “creates a substantial and imminent threat to the health or safety of the public.” *City of San Jose v. Operating Engineers Local Union No. 3*, 49 Cal. 4th 597, 605-608, 611 (2010). See also *San Diego Teachers Ass’n v. Superior Court*, 24 Cal. 3d 1, 13 (1979) (recognizing that PERB has “discretion to withhold as well as pursue” a strike injunction); *Ahearn ex rel. NLRB v. International Longshore and Warehouse Union, Locals 21 and 4*, 721 F.3d 1122, 1130 (9th Cir. 2013) (private sector employer seeking to enjoin union activity must pursue injunction through the National Labor Relations Board (NLRB)).

Option: Remove the inconsistent language and incorporate into the Charter the controlling state law provisions regarding the rights and circumstances of public agency employees to strike. This proposed Charter amendment will require discussions with the City’s recognized employee organizations.

D. Charter Section 110: Claims Against the City

Issue: The California Government Claims Act covers state law tort liability as it applies to public agencies, including this City. State law sets forth specific timelines for filing claims and actions against the City. Charter section 110 needs to be updated to conform to state law.

REPORT TO THE RULES COMMITTEE	-7-	May 1, 2020
-------------------------------	-----	-------------

Option: Conform language to applicable state law, similar to the following: Whenever it is claimed that the City of San Diego is liable to any person because of injuries suffered by such person, either to person or property, because of negligence of the City or its officers, a ~~verified~~ claim for damages shall be presented in writing and filed with the designated City official of The City of San Diego ~~within one hundred (100) days after the occurrence giving rise to the claim for damages~~ in accordance with the California Government Claims Act or successor state law. Whenever it is claimed that The City of San Diego is obligated to pay money to any person because of contract or by virtue of operation of law, a demand or claim for such money shall be presented in writing and filed with the ~~Auditor and~~ Comptroller of The City of San Diego within ~~one hundred (100) days~~ after the last item of the account or claim has accrued. Each claim for damages because of tort shall specify the name and address of the claimant, the date and place of the accident, and the extent of the injuries or damages received.

III. POLICY ISSUE: NEW CHARTER SECTION 43.2 RELATED TO RECOGNITION OF COMMUNITY PLANNING GROUPS AND OTHER INDEPENDENT ORGANIZATIONS

The following proposal is a policy decision that we leave to the Mayor and Council’s discretion.

Issue: On December 3, 2019, this Office released its Report to the Land Use & Housing Committee entitled, “Preliminary Legal Analysis of City Council Policy 600-24 Related to City of San Diego Community Planning Groups” (RC-2019-9). In the Report, this Office identified certain legal concerns regarding the City’s current relationship with independent community planning groups and other independent organizations. In addition to our Report, we understand that City administrative staff is preparing options to present to the Council for potential community planning group organization, in response to recent City Auditor’s and Grand Jury reports.

As we identified, one means to resolve the identified legal concerns is to amend the Charter to provide clear authority to the Council to recognize independent organizations to provide formal input on City matters. In our December 2019 Report, we explained that, by expressly authorizing recognition of community planning groups in the Charter, the City could also formalize their organizational structure and governance, including selection of members and express duties to advise the Planning Commission and other City bodies.

Option: Add language to the Charter to provide clear authority for the Council to recognize independent organizations, such as community planning groups, to provide formal input on City matters based on terms and conditions established by the City Council by ordinance.

IV. MISCELLANEOUS

In addition to the proposals described above, our Office has been tracking Charter provisions that should be amended at some point because they are outdated, internally inconsistent, or obsolete. For example, Charter section 41(c), governing the Planning Commission, describes duties that are inconsistent with current City ordinances and practice.

REPORT TO THE RULES COMMITTEE	-8-	May 1, 2020
-------------------------------	-----	-------------

CONCLUSION

This Office is available to provide more in-depth analysis of any of these proposals.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/Joan F. Dawson
Joan F. Dawson
Senior Deputy City Attorney

JFD:jvg
RC-2020-3
Doc. No. 2377050_2