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MEMORANDUM OF LAW

DATE: August 29, 2013

TO: Honorable Councilmembers

FROM: City Attorney

SUBJECT: Role of Council President During Mayoral Vacancy

INTRODUCTION

On August 23, 2013, Mayor Bob Filner submitted his resignation effective August 30, 2013, thereby creating a vacancy in the Mayor's Office. This is the first time since the 2006 change to a Mayor-Council form of governance that there has been a vacancy in the Mayor's Office. The purpose of this memorandum is to provide a general overview of the role of the Council President during the vacancy in the Office of the Mayor and to anticipate some of the questions that will likely arise moving forward. Further analysis will be necessary as circumstances arise and based upon the specific facts of those circumstances.

QUESTION PRESENTED

What is the role of Council President during a vacancy in the Office of the Mayor?

SHORT ANSWER

The San Diego Charter (Charter) describes the powers vested in the Council President "during the time when an appointment or election is pending to fill a vacancy in the Office of the Mayor." In general, the Council President has authority to: (1) supervise the staff remaining in the Office of the Mayor; (2) direct the City Manager in managing those affairs of the City that are under the purview of the Mayor; and (3) exercise other powers of the Mayor when required by law, including circumstances where the expeditious approval of a legislative action is necessary to meet a legal requirement imposed by a court or another governmental agency. The Council President's authority is described as "limited" and does not include the power of veto or any other discretionary privilege enjoyed by the Mayor. During this time, the Council President does not lose his or her rights as a Councilmember.

ANALYSIS

I. OVERVIEW OF THE COUNCIL PRESIDENT'S ROLE WHEN THERE IS A VACANCY IN THE OFFICE OF THE MAYOR.

On January 1, 2006, the City changed from a Manager-Council form of governance to a Mayor-Council (Strong Mayor) structure. The Mayor assumed the executive authority, power, and responsibility conferred upon the City Manager in Articles V, VII, and IX of the Charter. San Diego Charter § 260. The Mayor also assumed the responsibility for the administrative affairs of the City, including the authority to direct and control the City Manager. San Diego Charter § 265(b). The Mayor was no longer a member of the City Council, but was given the power to approve or veto resolutions and ordinances passed by the Council. San Diego Charter § 280.

Under the previous Manager-Council structure, if there was a vacancy in the Office of the Mayor, the Deputy Mayor assumed the duties of the Mayor. San Diego Charter § 25 (repealed July 30, 2010). At that time, the Mayor served as the head of the City Council, much like the Council President today, and did not have veto power or authority to supervise the City Manager. In that context, the Deputy Mayor filled the position of Mayor during the vacancy. Along with the changes to the Mayor's role under the new Mayor-Council structure, the handling of a vacancy in the Office of the Mayor also changed significantly. There is no longer a Deputy Mayor. Instead, the Charter provides that the Council President is vested with certain powers and authority of the Mayor during the vacancy but does not take on the full mantle of the Mayor's powers and authority. San Diego Charter § 265(i).

Charter section 265(j) provides that a vacancy in the Office of the Mayor may result from "death, resignation, or recall." If the vacancy is due to resignation, the date of the vacancy is the date specified in the written letter of resignation. *Id.* During the period of time when an appointment or election is pending to fill the vacancy, the Council President assumes some of the authority of the Mayor. San Diego Charter § 265(i). Charter section 265(i) lists the Mayoral authority to be exercised by the Council President during the vacancy in the first sentence, and explains the limits of that authority in the second and third sentences. The fourth sentence makes clear that the Council President retains the right to participate as a member of the City Council during this time.

Accordingly, the Council President is vested with the authority to:

(1) "supervise the staff remaining employed in the Office of the Mayor";

(2) "direct and exercise control over the City Manager in managing the affairs of the City under the purview of the Mayor"; and

(3) "exercise other powers and authority of the Mayor when the exercise of such power and authority is required by law."

The Charter section then explains the limits of the authority granted to the Council President. It provides as an example that the "limited authority" includes "circumstances where the expeditious approval of a legislative action is necessary to meet a legal requirement imposed by a court or another governmental agency." San Diego Charter § 265(i). However, it does not include the power of veto or "any other discretionary privilege" enjoyed by the Mayor. Finally, the Council President does not lose his or her rights as a Councilmember, pending the filling of the mayoral vacancy. *Id.*

To understand both the power and the limits of the power that the Charter seeks to place in the Council President during the transition from one mayor to the next, we must look both to the overall purpose of this section of the Charter and the general rules for interpreting statutory language. Taken as a whole, by ensuring that the day-to-day administrative functions and legally necessary acts are covered but otherwise limiting the transfer of the Mayor's veto and high-level decision-making (discretionary) powers, the Charter creates in the Council President the role of a caretaker, ensuring that the City continues to function unimpeded during the temporary vacancy. Thus, the Charter conveys broad authority to the Council President when it comes to managing the affairs of the City, but limits the authority to exercise the Mayor's other discretionary powers to those instances when it is "required by law."

The "required by law" limitation on the Council President's temporary powers is followed by an example that is temporal: "This limited authority would include circumstances where the expeditious approval of a legislative action is necessary to meet a legal requirement imposed by a court or another governmental agency." Said another way, under the Charter, the Council President may exercise the Mayor's authority to approve a resolution or ordinance when the exercise of that power cannot wait because of a legal deadline.

II. THE COUNCIL PRESIDENT MAY SUPERVISE STAFF REMAINING IN THE OFFICE OF THE MAYOR.

Section 265(i) clearly states that the Council President has the authority to "supervise the staff remaining employed in the Office of the Mayor." The Council President's authority to supervise includes the authority to direct employees in their work.[1] The Charter section does not state whether "supervise" includes the ability to hire, transfer, or terminate staff, but also does not preclude the Council President from taking such actions.

When interpreting a provision of the Charter, we look first to the plain meaning of the language used. "Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use." *Lungren* v. *Deukmejian,* 45 Cal. 3d 727, 735 (1988). A general definition of "supervisor" is "[o]ne having authority over others; a manager or overseer." Black's Law Dictionary 1576 (9th ed. 2009). "Supervision" means "[t]he act of managing, directing, or overseeing persons or projects." *Id.* "Supervise" is defined as to "oversee with the powers of direction and decision the implementation of one's own or another's intentions" or to

[1] Note that for classified employees, the employee's work must be consistent with job classifications, and the City's obligations under the Civil Service Rules, Personnel Regulations, and the Meyers-Milias-Brown Act apply. These rules do not apply to the unclassified at-will employees who make up the majority of staff in the Office of the Mayor.

"superintend." Webster's 3rd New International Dictionary (1971). "Supervisor" is also defined as "one that supervises a person, group, department, organization, or operation" and a "person having authority delegated by an employer to hire, transfer, suspend, recall, promote, assign, or discharge another employee or to recommend such action." *Id.* Another definition of "supervision" is "oversight." Dictionary of Modern Legal Usage, 2d ed., Oxford University Press (1995). In the employment law context, the authority to "supervise" often includes the authority to take tangible employment actions, including the authority to hire or select employees, assign work, manage performance, recognize and reward employees, and other associated duties. *Vance v. Ball State University*, 133 S. Ct. 2434, 2443-2446 (2013).

Given the variety of definitions, we cannot rely upon a plain meaning interpretation and therefore apply general rules of statutory interpretation. *Mason v. Retirement Board of City and County of San Francisco*, 111 Cal. App. 4th 1221, 1227 (2003). In interpreting a city charter, the goal is to ascertain voter intent, which should be determined from the language at issue if possible. *Id.* at 1227. Further, charter provisions "must be construed practically rather than technically, and interpreted in a way that will lead to wise policy rather than mischief or absurdity." *Id.* at 1230 (citing *Wise v. Pacific Gas & Electric Co.*, 77 Cal. App. 4th 287, 299 (1999)). Consideration should be given to the consequences that will flow from a particular interpretation." *Id.* (quoting *Dyna–Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1387 (1987)).

In this case, to interpret "supervise" narrowly would be inconsistent with the legislative purpose–to ensure that the City continues to function unimpeded during the vacancy. A vacancy in the Mayor's Office can take several months to fill, especially if there is a primary and run-off election. During that time period, the Council President must have the tools necessary to supervise staff in the Office of the Mayor, including dismissing employees. A strict, narrow reading of the word "supervise" would require the Council President to maintain all remaining staff in the Office of the Mayor until a new Mayor takes office and decides what to do with the staff. A broader reading of "supervisor," which gives the Council President the authority to take any necessary tangible employment action related to the remaining employees in the Office of the Mayor, is more reasonable and protects the interests of the City. Accordingly, a reasonable interpretation of the term "supervise" as used in this section is to give the Council President the same dismissal authority as any other City official charged with the responsibility of overseeing or supervising a department.

Further, the broader interpretation of "supervise" to include the authority to terminate employees is consistent with other Charter provisions related to the status of unclassified, at-will, unrepresented employees. The Mayor's Office is primarily staffed by Mayoral representatives, who are political appointees, working on policy issues. They serve at the pleasure of the Mayor, who is their appointing authority. As a general rule, and with limited exceptions, public employees serving at the pleasure of an appointing authority may be terminated without cause and without notice or a hearing. *Ishimatsu v. Regents of University of California*, 266 Cal. App.

2d 854, 860-861 (1968). If they are not needed for administrative work, and they are at-will, the general rules regarding dismissal of at-will, unclassified employees should apply.[2] *See also* San Diego Charter § 30 (unclassified employees may be removed at any time).

In contrast, because the Charter section only references supervision of the "staff remaining employed" in the Office of the Mayor, based upon a plain reading of the language, it does not appear to include authority to hire and supervise new staff for the Office of the Mayor. While it makes sense in terms of the overall purpose of section 265(i) that staff not be hired into the Office of the Mayor until a new Mayor is in place, this limitation could create a difficult situation where the Council President is unable to properly oversee and continue the City's business in certain areas due to inadequate staffing. However, either the temporary reassignment or addition of administrative staff resources can be requested by the Council President from the City Manager under the second prong of the Council President's transitional authority, "direct and exercise control over the City Manager in managing the affairs of the City." Moreover, the City Council may act to fund and add staffing to the Office of the Council President to support the Council President during this transitional period. The City's existing rules, regulations, and processes pertaining to the hiring and assignment of staff should apply.

III. THE COUNCIL PRESIDENT MAY DIRECT AND CONTROL THE CITY MANAGER IN MANAGING THE AFFAIRS OF THE CITY.

The Council President has the authority to "direct and exercise control over the City Manager in managing the affairs of the City under the purview of the Mayor." This language is identical to the responsibility of the Mayor provided for in Charter section 265(b)(8): "Sole authority to direct and exercise control over the City Manager in managing those affairs of the City under the purview of the Mayor as expressly permitted in the Charter." The "under the purview of the Mayor" language includes all of the City's departments that are currently managed by the City's Chief Operating Officer (COO), as distinguished from independent departments such as the Offices of the Auditor, Independent Budget Analyst and City Attorney. As ratified by the City Council on August 23, 2013, the COO currently serves as the City Manager. In sum, under this Charter language, the COO will report to the Council President during the vacancy.

IV. THE COUNCIL PRESIDENT MAY EXERCISE OTHER POWERS OF THE MAYOR WHEN REQUIRED BY LAW–BUT DOES NOT HAVE THE POWER OF VETO OR ANY OTHER DISCRETIONARY PRIVILEGE HELD BY THE MAYOR.

A. Mayoral Powers and Authority.

As discussed above, the Charter states that the Council President shall "exercise *other* power and authority vested in the Office of the Mayor when the exercise of such power and authority is required by law." San Diego Charter § 265(i) (emphasis added). Article XV sets forth the power and responsibilities of the Mayor, and includes the "authority, power, and

[2] For example, Administrative Regulation 96.00 applies to the dismissal of an at-will employee.

responsibilities conferred upon the City Manager in Article V [Executive and Administrative Service], Article VII [Finance], and Article IX [Retirement]." San Diego Charter § 260. In addition, Charter section 265(b) provides that the Mayor shall have the following additional rights, powers, and duties:

> (1) To be the chief executive officer of the City;
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> (2) To execute and enforce all laws, ordinances, and policies of the City, including the right to promulgate and issue administrative regulations that give controlling direction to the administrative service of the City. Nothing in this section shall be interpreted or applied to add or subtract from powers conferred upon the City Attorney in Charter sections 40 and 40.1;
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> (3) To recommend to the Council such measures and ordinances as he or she may deem necessary or expedient, and to make such other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable;
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> (4) To attend and be heard at any regular or special open session meeting of the Council, but not the right to vote at such meetings;
>
> (5) To approve or veto actions passed by the Council in open session, pursuant to sections 280 and 290;
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> (6) To attend and be heard at any closed session meeting of the Council, but not the right to vote at such meetings. When present, the Mayor shall preside over closed session. When the Mayor does not attend closed session, the Presiding Officer of the Council shall chair the closed session meeting;
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> (7) Sole authority to appoint the City Manager, subject to Council confirmation;
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> (8) Sole authority to direct and exercise control over the City Manager in managing those affairs of the City under the purview of the Mayor as expressly permitted in the Charter;
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> (9) Sole authority to dismiss the City Manager without recourse;
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> (10) Notwithstanding contrary language in Charter sections 30, 57 or 58, authority to dismiss the Chief of Police or the Chief of the Fire Department, subject only to a right for these city officials to appeal to the City Council to overturn the Mayor's decision. Any such appeal must be filed with the City Clerk within 10 calendar days of receiving the notice of dismissal or termination

> from the Mayor. The City Clerk shall thereafter cause the appeal to be docketed at a regular open meeting of the City Council no later than 30 days after the appeal is filed with the Clerk;
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> (11) As provided for in Charter sections 41 and 43, the authority to appoint members of City boards, commissions, and committees, subject to Council confirmation;
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> (12) Sole authority to appoint City representatives to boards, commissions, committees and governmental agencies, unless controlling law vests the power of appointment with the City Council or a City Official other than the Mayor;
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> (13) To cooperate fully with the Council and the Office of Independent Budget Analyst, including but not limited to, supplying requested information concerning the budget process and fiscal condition of the City to the Council and the Office of Independent Budget Analyst; and
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> (14) To propose a budget to Council and make it available for public review, no later than April 15.

Charter section 265(c) further provides that:

> On or before the 15th day of January of each year, the Mayor shall communicate by message to the City Council a statement of the conditions and affairs of the City, and make recommendations on such matters as he or she may deem expedient and proper. In time of public danger or emergency, the Mayor shall take command of the police, maintain order, and enforce the law.

B. Determining Whether the Exercise of a Mayoral Power is Required by Law.

The Council President is able to exercise the "other powers and authority of the Mayor" described above when "required by law." San Diego Charter § 265(i). The Charter calls this a "limited authority" and provides the example of the use of the Mayor's authority to approve a legislative action when expeditious approval is necessary to meet a legal requirement imposed by a court or another governmental agency. *Id.* Then, referencing "such limited authority," the Charter states that the Council President's authority does not include exercise of the Mayor's veto power or "any other discretionary privilege" enjoyed by the Mayor. *Id.*

It is unclear how the drafters of section 265(i) intended to reconcile the competing language allowing the Council President "to exercise other power and authority vested in the Office of the Mayor when . . . required by law" with "[s]uch limited authority would not include the exercise of . . . any other discretionary privilege . . . enjoyed by a person appointed or elected to the Office of the Mayor." The example provided in the same section is that of an exercise of

the Mayor's discretion under threat of a legal deadline; *i.e.,* where "expeditious approval of a legislative action is necessary to meet a legal requirement" imposed by another government agency. It appears, based upon the "required by law" qualification in the first phrase, the example of a legal deadline, and the overall purpose to ensure that the City continues to function, that, in addition to the day-to-day administration of the City, the Council President is empowered to act in place of the Mayor when the situation cannot wait for the election of the new Mayor, and when a failure to act would place the City at a legal disadvantage.

Accordingly, in analyzing whether the Council President may exercise a power enjoyed by the Mayor, we need to determine if the exercise of that discretionary power is "required by law." While that determination will necessarily depend upon the facts of each particular circumstance, there are a number of examples set forth in the Charter where the Council President may be required to act during the vacancy.

One example in the Charter of action "required by law" is the provision of Charter section 265(c) that the Mayor deliver the state of the City address before January 15 of each year. By comparison, the Mayor has discretionary authority to make appointments to City boards, commissions, and committees under Charter sections 41 and 43. *See also* San Diego Charter § 265(b)(11). While it may appear that the appointment is required by law (the Charter), the Charter states that if the Mayor does not appoint the members of boards and committees within forty-five days after the board or committee has been established or a vacancy occurs, then the City Council shall make such appointments. San Diego Charter §§ 41 and 43(c). Because there is an alternative source of appointments consistent with the purpose of the Charter, the Council President would not have the authority to appoint members of boards and commissions. That authority would be exercised by the City Council during the vacancy in the Office of the Mayor.

As noted above, this memorandum is intended to provide general guidance. Each factual circumstance provides a unique situation that will need to be analyzed as the need arises.

C. Effective Date of Ordinances and Resolutions Pending the Filling of the Mayoral Vacancy.

Charter section 265(i) clearly states that the Council President does not have the Mayoral power to veto ordinances and resolutions passed by the City Council. Usually, ordinances and resolutions subject to Mayoral veto become effective on: (1) the date approved by the Mayor; (2) the date the time for approval or veto by the Mayor has expired; or (3) if the item was vetoed, the date the City Council overrides the veto. San Diego Charter § 295(a). If a resolution or ordinance is not subject to veto, the date of passage by the City Council is deemed the date of its final passage. San Diego Charter § 295(b).

Because only the Mayor has veto authority and Charter section 265(i) clearly provides that the Council President's limited authority does not include veto authority, a logical interpretation would be that there is no veto and therefore resolutions and ordinances would be deemed passed upon final action by the City Council. However, in the example of authority given to the Council President to exercise mayoral discretion when required by law is the example of "circumstances where the expeditious approval of a legislative action is necessary to

meet a legal requirement imposed by a court or another governmental agency." To give this example meaning, it must be interpreted to apply to the authority to approve resolutions and ordinances prior to the expiration of the veto period. Although the need for this language in the event of a vacancy may seem illogical, given the anticipated short term duration of any vacancy, it is logical the provisions would be drafted to minimize disruption in normal City processes and to permit the Council President to exercise discretionary authority only when legally required.

Therefore, resolutions and ordinances would continue to be processed subject to Mayoral veto and would take effect upon the passage of the period for veto or approval with no action taken, as provided in Charter section. If there were a legal need to expedite approval, the Council President would have that authority.

CONCLUSION

Charter section 265(i) provides limited authority to the Council President to ensure that the City continues to function unimpeded by a temporary vacancy in the Office of the Mayor caused by death, resignation, or recall. During such a vacancy, the Council President is responsible for (1) supervising the staff remaining in the Office of the Mayor; (2) directing the City Manager; and (3) exercising other Mayoral powers when required by law. The Council President's authority is limited and should be viewed as such. The Council President may seek additional staffing or the temporary reassignment of staff to his Office to meet his additional responsibilities. The Council President continues to hold the rights, powers, and privileges of his Council Office during this time.

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By *\/s/ Carrie L. Gleeson*
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