THE CITY OF SAN DIEGO

Report to the City Council

DATE ISSUED: May 11, 2016 REPORT NO: 16-052

ATTENTION: Charter Review Committee

SUBJECT: Review and Prioritization of Charter Review Committee Actions

REFERENCE:

REQUESTED ACTION: Review and prioritize which items the committee would like to forward to the City Council in order to give direction to the City Attorney to prepare the ballot language and ordinances for placement on the November 2016 ballot.

STAFF RECOMMENDATION:
Recommend forwarding the following items to Council:

- Item 1- creation of a proposed new Charter Section 2.5 called Elected Officials,
- Item 4- Charter Section 43(d) Citizens' Review Board on Police Practices, and
- Item 5- Purchasing and Contracting- Consideration of proposed amendments to Charter provisions related to City contracting, including sections 35 – Purchasing Agent, 94 – Contracts, 94.1 – Job Order Contracts, 94.2 – Design Build Contracts, 94.3 – Bond Reimbursement Program, 94.4 Construction Manager at Risk Contracts, 97 – Collusion in Building,98 – Alteration in Contracts, 99 – Continuing Contracts, 100 – No Favoritism in Public Contracts, 102-Continuance of Contracts, and 113-Official Advertising

EXECUTIVE SUMMARY OF ITEM BACKGROUND:
After 18 months of reviewing various Charter sections and approving and directing amendments, this report synthesizes those actions. The goal is for the Committee to review and prioritize which items the Committee recommends for placement on the November 2016 ballot. These items should be forwarded to the Council for further review.

Those items not prioritized for placement on the November 2016 ballot due to funding limitations and other considerations will be included within a final wrap-up report prepared by the Committee Consultant and reviewed by the Committee before the end of the calendar year. This report will include all actions and recommendations taken by the committee in order to facilitate the ability of future committees to continue with this Charter review work and place additional Charter amendments on future ballots.

FISCAL CONSIDERATIONS: The cost to place Charter amendments on the November 2016 ballot has yet to be determined.

EQUAL OPPORTUNITY CONTRACTING INFORMATION (if applicable): N/A

PREVIOUS COUNCIL and/or COMMITTEE ACTIONS:

Each previous committee action can be found within the matrix attached to this report.

COMMUNITY PARTICIPATION AND OUTREACH EFFORTS: 18 months of Charter Review Committee meetings with participation of several community stakeholders.

Diana Jurado-Sainz,
Director of Legislative Affairs

Attachment(s):

1. Matrix of all Charter Review Committee Actions that have yet to be placed on a ballot from January 2017-present
2. City Attorney Report to the City Council: 2014 San Diego Charter Legal Review dated February 5,2014
2. All committee back-up for the items reflected in the Matrix. (Tabs 1-20)

	Item	Committee Date	Summary	Committee Recommendation
1	NEW-CH SEC 2.5- Elected Officials	5/18/16	Proposal to create a new charter section addressing cause for removal, process for succession to elected office, and interim authority for all elected offices.	Yet to be determined
2	Reorganization of Charter Sections III- Legislative Power	5/18/16	Proposal to move sections addressing legislative activity to Article III, including but not limited to sections 270-The Council; 275-Introduction and Passage of Ordinances and Resolutions; 280-Approval or Veto of Council Actions by Mayor; 280-Enactment Over Veto; 290-Council Consideration of Salary Ordinance and Budget: Special Veto Power; and 295-When Resolutions and Ordinances take effect; Emergency Measures.	To return to the Committee with a rewritten Article III that includes sections 270,275,280,285,290, and 295; and also a determination if the title change to "THE COUNCIL" can be combined under the "single subject rule" as one ballot measure. (3/2/16) Final recommendation is yet to be determined.
3	NEW- Charter Article to address independent, non-mayoral departments	5/18/16	Proposal to create a new Charter Section that would consolidate independent, non-mayoral departments administrative service, including but not limited to sections 37 – Personnel Director, 38 – City Clerk, 39.1 - Audit Committee, 39.2 - Office of City Auditor, 39.3- Independent Budget Analyst, 40 - City Attorney, 40.1 – Concurrent Jurisdiction of City Attorney with District Attorney and 41 – Commissions	To return to the Committee with a new Article that includes sections 37, 38, 39.1, 39.2, 39.3, 40, 40.1 and 41; and also ask the affected departments if they have any objection to the action. (3/2/16) Final recommendation is yet to be determined.
4	CH SEC 43(D) Citizens' Review Board on Police Practices	4/20/16	Proposal to amend section 43(d) – Citizens' Review Board on Police Practices.	Motion to Approve the recommendations of the PSLN Committee and the Citizens' Review Board. The proposed Charter Amendments are: (1)Rename the Citizens' Review Board as the Community Review Board on Police Practices, (2)Replace references to the City Manager with Mayor and City Council, and (3)Add to the Charter that the Review Board shall review all cases involving in-custody deaths and officer-related shootings.

*These items must complete "Meet and Confer" before being placed on a ballot.

	Item	Committee Date	Summary	Committee Recommendation
5	Purchasing and Contracting-Consideration of proposed amendments to Charter provisions related to City contracting, including sections 35 – Purchasing Agent, 94 – Contracts, 94.1 – Job Order Contracts, 94.2 – Design Build Contracts, 94.3 – Bond Reimbursement Program, 94.4 Construction Manager at Risk Contracts, 97 – Collusion in Building, 98 – Alteration in Contracts, 99 – Continuing Contracts, 100 – No Favoritism in Public Contracts, 102-Continuance of Contracts, and 113-Official Advertising	4/20/16	Proposal to streamline the purchasing and contracting provisions of the Charter allowing for flexibility in the city's procurement practices in order to obtain the best value for our tax dollars, while still protecting competitive bidding and forbidding favoritism and collusion in bidding.	Motion to approve Mayor's proposed language with the amendment to change Charter Section 97 to "NO COLLUSION IN BIDDING" instead of "COLLUSION IN BIDDING". Motion to repeal Charter section 113 and request that the City Attorney's Office conduct legal review to evaluate if the repeal can be included within the proposed ballot measure to update the Charter sections on Purchasing and Contracting.
6	CH SEC 26.1: Public Services Required	3/23/16	Proposed language lists broad categories that are timeless and essential city services.	Motion to accept the proposed language as presented by the Mayor's Office, subject to legal review
7	CH SEC 32.1: Responsibility of Manager and Non-Managerial Officers to Report to Council/ CH SEC 270 (H) Council re: summoning power	3/23/16	Proposed language repeals CH SEC 32.1 and incorporates it into CH SEC 270 (H) plus creates a process for summoning Mayoral and Non-Mayoral Departments for the Council and Committees.	Motion to accept the proposed language as presented by the Mayor's Office, subject to legal review. (committee) Approved by Council 4/26 to direct the CAO to prepare the necessary ballot language and ordinances.
8	Reorganization of Charter Sections IV- The Mayor, and XV- Strong Mayor Trial Form of Governance	3/23/16	Proposal to move sections addressing primarily executive/mayoral activity to Article IV, including but not limited to sections 260 – Integration of Article with Charter and 265 – The Mayor	Motion to direct the City Attorney to return to the City Council with a rewritten Article 4 that includes sections 260 and 265
9	CH SEC 118-Rules	12/3/2015	Proposal to amend the language to comply with state law.	Motion to amend the section to comply with state law, Meyer-Millias-Brown Act, as proposed by the City Attorney in their 2/5/2014 memo. Refer it to the full Council.
10	CHSEC 129.1 Removal of Striking Employees*	12/3/2015	Consideration of language conforming the section to state law.	Motion to approve amending the section to comply with state law, refer it to the Labor Relations negotiating team for meet and confer as proposed by the City Attorney in their 2/5/2014 memo, and then refer it to the full Council, subject to legal review.

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	Item	Committee Date	Summary	Committee Recommendation
11	SDCERS AMENDMENTS TO ARTICLE IX- The Retirement of Employees *	8/6/2015 12/3/2015	CH SEC 140 Establishment of Separate Retirement Pension Systems: Definitions; CH SEC 141 City Employees' Retirement System; CH SEC 141.1 Reform of Sworn Officer Defined Benefit Plan; CH SEC 141.2 Full and Fair Employee Contributions for the Defined Benefit Pension Plan; CH SEC 142 Employment of an Actuary; CH SEC 142.1: Add a new section for SDCERS to hire and retain its own legal counsel; CH SEC 144 Board of Administration; CH SEC 145 Retirement Fund	**CHSEC140 Establishment of Separate Retirement Pension Systems: Definitions-** Motion to accept the recommendation and request the City Attorney draft revised language for the section accordingly. (8/6/2015) **CH SEC 141 City Employees' Retirement System-** Motion to accept the recommendation placing it as sub item (e) in section 141 and using broad, timeless language that does not reference specific entities other than the Board of Administration (Expand the coverage of the defined benefit pension plan to include police recruits participating in the City's Police Academy as well as sworn police officers.) (8/6/2015)**; Motion** to approve the proposed language, refer it to the Labor Relations negotiating team for meet and confer, and then refer it to the full Council, subject to legal review (12/3/2015); **CH SEC 141.1 Reform of Sworn Officer Defined Benefit Plan-** Motion to accept the recommendation and request the City Attorney draft revised language for the section accordingly **CHSEC 141.2 Full and Fair Employee Contributions for the Defined Benefit Pension Plan-** The sub-item was continued until the San Diego City Employees' Retirement System can return with a completed analysis of future over/under payment costs.(12/3/2015) **CH SEC 142 Employment of an Actuary -** Motion to accept the City Attorney's option as described in their 2/5/2014 memo.**CH SEC 142.1 Add a new section for SDCERS to hire and retain its own legal counsel-**Motion to accept the recommendation placing it as sub item (g) in section 144 and using plain-talk language (8/6/2015**). Motion** to approve the San Diego City Retirement System's language proposed as a new section 142.1, to be placed where the City Attorney determines appropriate in Article IX. (12/3/2015) **CH SEC 144 Board of Administration-**Motion to change the references from "City Manager" to "Mayor," end sub-section (f) with "to serve at the pleasure of the Mayor," delete the remainder of the sub-section (f) and refer it to the full Council. (12/3/2015) **CHSEC145 Retirement Fund**-Motion to accept the City Attorney's option as described in their 2/5/2014 memo.

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	Item	Committee Date	Summary	Committee Recommendation
12	CH SEC41(D) Ethics Commission	5/14/2015 12/3/2015	Proposal to formalize the Ethics Commission in the Charter.	**Motion** by Councilmember Cate to request the City Attorney and Ethics Commission return with language formalizing the Ethics Commission in the Charter. (5/14/2015) **Motion** by Councilmember Kersey to change the name of "The City of San Diego Ethics Commission" to "The City of San Diego Fair Political Practices Commission," approve a legally sufficient, high level version of the proposed language with details placed in the Municipal Code, and refer it to the full Council, subject to legal review. (12/3/2015)
13	CH SEC 41(C) Planning Commission	2/5/2015 7/2/2015 12/3/2015	Proposal of language formalizing the Planning Commission in the Charter, but placing the duties, membership composition, selection and terms of the Commission in the Municipal Code.	**Motion** to refer the City Attorney's options, as described in their 2/5/2014 memo, to the Planning Commission staff, Planning Department, Development Services Department, City Clerk and Independent Budget Analyst; to return with recommended amendments, or a recommendation to remove the charter section. (2/5/5015) **Motion** to request that the City Attorney return with a proposal to address the duties, membership composition, selection and terms of the Planning Commission in the Municipal Code; seeking any and all input in the process, including that of the Planning Commission, Mayor's Office and the Planning Department. (7/2/2015) Consideration of language formalizing the Planning Commission in the Charter, but placing the duties, membership composition, selection and terms of the Commission in the Municipal Code. (12/3/2015)
14	CH SEC 42-Membership Selection	11/3/2015	Proposal to use appropriate use of classification language based on state and federal law.	Motion to remove "sex, race" from the list of considerations when selecting appointees to City boards, commissions, committees, and panels.

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	Item	Committee Date	Summary	Committee Recommendation
15	Article X-Transfer of Police and Fire Department Employees in the Retirement System	8/6/2015	Proposal to repeal Article X, which in 1946 transferred the members of the City's Police and Fire departments from their independent retirement system into the CERS retirement system described in Article IX. The language is no longer needed.	Motion to repeal Article X.
16	CH SEC 215- Publicity of Records	8/6/2015	Proposal to repeal this section since mandates are already covered by state law (PRA) and this section may conflict with state law.	Motion to repeal this section, per the City Attorney's recommendation in their 2/5/2014 memo, as it is no longer necessary, due to the California Public Records Act.
17	CH SEC 216-Copies of Records	8/6/2016	Proposal to repeal this section since mandates are already covered by state law (PRA) and this section may conflict with state law.	Motion to repeal this section, , per the City Attorney's recommendation in their 2/5/2014 memo, as it is no longer necessary, due to the California Public Records Act.
18	CH SEC 58-Fire Department	7/2/2015	Proposal to clean up language in this section.	Motion to remove the words "from fire" from the last sentence of paragraph two in the section and remove the last sentence stating the effective date from the final paragraph in this section.
19	CH SEC 64-Support of Educational and Cultural Institutions	7/2/2016	Proposal to remove section because it is redundant with established practices.	Motion to accept the Mayor's recommendation to remove the section.
20	CH SEC 110-Claims Against the City	4/16/2015	Proposal to update language in accordance to state law.	Motion to approve the City Attorney's recommendation per their 2/5/2014 memo that all claims against the City shall be submitted in accordance with state law.

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	NON-CHARTER AMENDMENTS	Committee Date	Summary	Committee Recommendation
1	Fire House Bonds –CPPT Emerald	4/11/16	Proposal to issue general obligation bond to build 17 fire stations per the Citygate Report	Motion to forward the proposed General Obligation Bond Measure to the full City Council for discussion and vote, requesting the City Attorney to draft language for the Firehouse Bond to be placed on the November 2016 ballot.
2	Housing Authority-Increasing the City of San Diego's Capacity to Construct Affordable Housing	3/23/16	Proposed Ballot Measure Increasing the City of San Diego's Capacity to Construct Affordable Housing as defined by Art 34 of the California Constitution	Motion to forward the item to the City Council with a recommendation to increase the requested number of 10,000 units to 38,680. Direct the City Attorney to work with the Housing Commission to prepare the necessary ballot materials for the November 8, 2016 ballot
3	Open Government Ordinance*	3/23/16	Proposed ordinance to require disclosure of public business conducted on private/personal devices, subject to the California Public Records Act	Motion to request the City Attorney to update their draft ordinance for disclosure of public business conducted on private/personal devices to apply to both classified and unclassified employees. Once the revised draft ordinance is completed and meet and confer is conducted and complete, the draft ordinance can be considered by the City Council. Request that before the Council hearing the City Clerk and Mayor's Office provide input on the length of time that the records should be maintained on personal devices so that it is consistent with the City's email and records retention policies. Additionally, place the new ordinance on the November 2016 ballot for voter approval. (4-0)
4	POA-Proposed Ballot Measure Related to Eligibility of Industrial Disability Retirement for Mental or Nervous Disorder by Violent Attack	None	This measure would restore a provision in the MOU related to Industrial Disability for psychological or mental incapacity. One of the steps is to submit the matter for a Charter Section 143.1 vote of the electorate in November 2016	Matter must be placed on the November ballot per the Council approved MOU and side letter agreement.

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February 5, 2014

REPORT TO THE CITY COUNCIL

2014 SAN DIEGO CHARTER LEGAL REVIEW

INTRODUCTION

On October 22, 2013, our Office provided the Council with a draft plan for a complete review of the San Diego Charter. A copy of the draft plan is attached. The review is necessary because our Charter contains provisions that are ambiguous, outdated and incomplete. This Report represents the completion of the first stage of the review outlined in my draft plan. It identifies sections of the Charter needing legal review and discusses possible options.

The legal issues we identified were provided by attorneys throughout the Civil Division to ensure we had a comprehensive list based upon impacts in all practice areas. Some Charter sections, especially those adopted with the original Charter in 1931, are outdated or superseded by State laws and can be repealed. Other provisions may be more appropriate as an ordinance codified in the San Diego Municipal Code. Many provisions may benefit from more public discussion and debate, especially if the proposal has both legal and policy considerations.

The Charter sections are listed in chronological order and include options prioritized for upcoming elections: Level 1 (November 2014), Level 2 (June 2016), or Level 3 (November 2016). In evaluating the timing, keep in mind that some proposals may require compliance with the Meyers-Milias-Brown Act (MMBA) before placing an amendment on the ballot. Also, amendments that alter any procedural or substantive protection, right, benefit, or employment status of any City employee, retiree, or employee organization must be submitted to the voters at a statewide general election.

We look forward to working with the Council and/or a Charter Review Commission to provide ongoing legal advice to improve the Charter. It is up to the Council to determine the process for considering these options.

DISCUSSION

Charter § 5.1 Redistricting Commission

Issues: During the redistricting process in 2010 and 2011, Charter section 5.1 required constant legal interpretation. After the redistricting process ended, a grand jury suggested the City clarify ambiguities and eliminate archaic provisions. The section needs greater clarity regarding how Commissioners are to be appointed, how many Appointing Authority members must be present to make the appointments, when the map takes effect, when the district boundaries change, what is the role of the City Council in the process, and how the Commission's budget is set. The section also needs to be amended to delete archaic references to the non-existent "Municipal Court." A detailed list of suggested changes can be provided in a report to City Council.

Options: Amend Charter section 5.1 to clarify ambiguous language, eliminate archaic provisions, and provide greater clarity for the issues identified above.

Level: 3

Charter § 14 Council Rules, § 94 Contracts, § 108 Forfeiture of Office for Fraud, § 217 No Payment for Office, § 218 No Contributions for Employment

Issue: Various sections of the Charter provide for the removal of officers under certain circumstances, but do not provide a uniform or consistent way for handling the removal of officers. Instead, in a patchwork quilt of provisions, the Council is sometimes tasked with adjudicating grounds for removal from office, and other times the Charter is silent, meaning the City must look to the courts to adjudicate the basis for removal. *See* City Att'y MOL No. 2013-13 (Aug. 14, 2013).

Charter section 14, for example, empowers the Council to decide disputes related to Council elections and the qualifications of Council members, and makes that decision subject to the review of the courts. This provision no longer applies to the Mayor as the Mayor is not a member of the Council. Other Charter sections provide the option of either an internal or a court process. Sections 217 (No Payment for Office) and 218 (No Contributions for Employment) both state that any officer or employee found guilty of the provision "by the Council or a court of competent jurisdiction shall thereby forfeit his office or position." Section 94 (Contracts), contains forfeiture language very similar to that contained in Section 108 (Forfeiture of Office for Fraud), but unlike Section 108, it states that violation of the section is a misdemeanor, thereby referencing a court process.

Options: Amend the Charter to clarify the means for adjudication of the grounds for forfeiture of elected office, whether exclusively by the Council, or by application to the courts, or both. A list of options for Council consideration would be provided as part of the ongoing review.

Level: 2

Charter § 18 Authentication and Publication of Ordinances and Resolutions

Issue: Charter section 18 requires that ordinances and resolutions "of a general nature" be published within 15 days after final passage in "such manner as may be provided by this Charter or by ordinance." San Diego Municipal Code section 22.0102 restates the Charter language and provides that "the City Clerk shall cause . . . to be published" in the official city newspaper all ordinances or resolutions of a general nature within fifteen days of their final passage. The publication requirement for ordinances not subject to referendum has been held to be directory, rather than mandatory. (*See* 2009 City Att'y MS-753 (09-4; Mar. 16, 2009). Most resolutions are not subject to referendum and publication in the official city newspaper seems unnecessary as resolutions are made available online both before and after final passage.

Options: Amend section 18 to remove the requirement to publish resolutions in the official city newspaper.

Level: 3

Charter § 23 Initiative, Referendum, and Recall (Removal of Elected Officials)

Issue: Charter section 23 reserves the right of recall to the people of the City. However, the recall process can be lengthy and take several months. There are some occasions when an elected official should be removed from office more quickly, for example, when the official has engaged in misconduct or is incapacitated.

Options: Amend section 23 to provide a removal process for elected officials for misconduct or incapacity. The removal process could be combined with a recall initiated by the Council after due process to the elected official. Another option would be to have the decision to remove the elected official subject to review by the courts. (*See* section 14 above for discussion on forfeiture of office.) Attached is a preliminary review of what some other cities have on this issue.

Level: 1

Charter § 26 Administrative Code

Issue: Charter section 26 requires the Council adopt an "administrative code providing for the detailed powers and duties of the administrative offices and departments of the City." Thereafter, any change in the ordinance requires a two-thirds vote of the Council. In 1997, this Office issued a Report indicating that the Manager (Mayor) has the power to reorganize departments under Charter section 27 and 28, however, such power is subject to any contrary or additional action by the Council if it chooses to act under Charter section 26.

Options: Amend to clarify whether reorganization of departments, including detailed duties is authority Council can delegate to Mayor or City Manager and review whether to keep the two thirds vote requirement.

Level: 3

Charter § 32.1 Responsibility of Manager and Non-Managerial Officers to Report to Council

Issue: Charter section 32.1 requires the Manager (Mayor) and "non-managerial officers" to inform the Council of all material facts or significant developments relating to all matters within the jurisdiction of the Council. It appears that this duty is self-executing and the Council does not have to make a request for information. However, the Charter is not explicit on this point. It also is not clear when the information must be provided to Council. Finally, there is no mechanism for enforcing the requirement to provide material facts.

Options: Amend section 32.1 to clarify that the duty to provide information is self-executing and information must be provided to the Council prior to its decisions to help ensure that they are fully informed. Consider whether to provide a mechanism for enforcement and if this mechanism could be placed in the Municipal Code instead of the Charter.

Level: 3

Charter § 35 Purchasing Agent and § 94 Contracts

Issues: These sections are outdated in a number of areas, specifically not in keeping with the current prevalent use of the Internet and with procurement practices, such as cooperative procurement. For example, the references to advertising in newspapers and "sealed proposals" does not take into account the direction in which the City is moving with electronic bidding.

Options: Amend to allow flexibility to comply with current technology and procurement practices.

Level: 3

Charter § 39.1 Audit Committee

Issues: This section provides that the three public members shall be appointed by the Council from a pool of at least two candidates for each vacant position, to be recommended by a majority vote of a screening committee. Except for the initial appointments, it has been difficult to find public members that are qualified and willing to serve, especially when a public member is seeking reappointment.

Options: Amend the section to eliminate the requirement that at least two candidates be recommended by the screening committee.

Level: 3

Charter § 39.2 Office of the City Auditor

Issue: Charter section 39.2 provides that the City Auditor reports to and is accountable to the Audit Committee. Upon recommendation of the Audit Committee, the City Auditor may be removed for cause by two-thirds vote of the Council. The Charter does not specifically provide that the Audit Committee may take lesser forms of discipline against the City Auditor for conduct that does not amount to cause for termination.

Options: Clarify that the Audit Committee may take lesser forms of discipline (warning, suspension, etc) against the City Auditor if necessary.

Level: 3

Charter § 40 City Attorney

Issues:

(1) Contracts: Section 40 requires the City Attorney to prepare in writing all contracts and "endorse on each approval of the form or correctness thereof." The City enters into hundreds of contracts each year, including purchase orders and credit card purchases. It is not practical or reasonable to require the City Attorney to review and approve each separate contract if every purchase order is considered a "contract."

(2) Other Instruments: Section 40 also requires the City Attorney to prepare and approve all "other instruments in which the City is concerned." The term "other instruments" is not defined in the Charter. As a legal term of art, it is subject to multiple variations in meaning.

(3) Inconsistency on Review: There is an inconsistency between the City Attorney's duties in section 40 and section 280(b). Section 40 says the City Attorney signs for "form or correctness" and section 280 says "form and legality." The sections should be consistent.

(4) Non-City Entities: This section states that the City Attorney is the chief legal adviser to the City and its departments and cannot engage in private legal practice. The issue has arisen on occasion whether the City Attorney can represent the interests of a non-City entity if that entity's interests are closely aligned with the City's interests.

(5) Outside Counsel: Section 40 states that the Council is authorized to employ "additional competent technical legal attorneys" when such assistance or advice is necessary. The practice of requesting Council approval to hire outside counsel is inconsistent with the hiring of other City consultants. For example, the Council has delegated this authority to the City Manager for consultant contracts under $250,000.

(6) Counsel for SDCERS: Section 40 states that the City Attorney is the chief legal adviser and attorney for the City and all its departments and offices, "except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney." It does not address independent legal counsel for SDCERS which was recognized as necessary to fulfill its fiduciary obligations under the State constitution.

(7) Qualifications: Charter section 40 does not include any qualifications for the City Attorney or require that the City Attorney be a member of the California State Bar. This issue was raised by the prior Charter Review Committee.

Options:

(1) Review the contract approval process and provide recommendation for amendment to section 40 to clarify intended scope.

(2) Amend to either delete reference to "other instruments" or provide clarification to establish intended scope, for example "financial instruments."

(3) Correct inconsistency with section 280(b) regarding approval as to form or legality.

(4) Amend the section to clarify whether, and under what circumstances, the City Attorney may represent the interests of a non-City entity. For instance, assuming there is no conflict of interest in the representation, the City may be able to realize substantial cost savings if the City Attorney represents a non-City entity in a matter of public interest where that entity's interests are closely aligned with the City's interests or where the City has contractually agreed to defend and indemnify the entity.

(5) Amend section 40 to provide that SDCERS may have its own legal counsel independent of the City Attorney, in recognition of its fiduciary duties under article XVI, section 17 of the California Constitution, and the potential for conflicts of interest between SDCERS and the City.

(6) Amend section 40 to require that the City Attorney be a member of the California State Bar in good standing. Consider adding a requirement that the candidate have a minimum number of years as an attorney.

Level: 3

Charter § 41(c) Planning Commission

Issues: With respect to the Planning Commission: (1) the list of duties is outdated and inconsistent with current ordinances and practice; and (2) since Planning and DSD sit with the Planning Commission consider whether they should be designated as ex officio members.

Options: Review duties and ex officio membership and determine appropriate amendments to the Charter or Municipal Code.

Level: 3

Charter § 41(d) Ethics Commission

Issues: With respect to the Ethics Commission, Charter section 41 provides that the Mayor appoints the members, subject to Council confirmation. Over the last few years, Councilmembers have suggested that these appointments should be done by someone other than the elected officials who are subject to the jurisdiction of the Ethics Commission. This has been especially problematic when a Councilmember is the subject of a confidential investigation and must confirm the appointment of members.

Options: Amend the Charter to allow appointments be made by a panel of retired judges or some other independent individuals or group. (*See*, 2009 City Att'y MOL 282 (09-14; Sep. 10, 2009).

Level: 3

Charter § 41.1 Salary Setting Commission

Issue: The Civil Service Commission appoints members of the Salary Setting Commission. When making the appointments, section 41.1 requires that the Civil Service Commission "take into consideration sex, race and geographical area so that the membership of such Commission shall reflect the entire community." Using sex and race as a factor may be prohibited by state and federal discrimination laws.

Options: Amend section 41.1 to delete the requirement to consider sex and race in making appointments and provide more appropriate language regarding appointments.

Level: 3

Charter § 42 Membership Selection

Issue: When making appointments to commissions, boards, committees or panels, the appointing authority is required to "take into consideration sex, race and geographical area so the membership of such commissions, boards, committees or panels shall reflect the entire community." Using sex and race as a factor may be prohibited by state and federal discrimination laws.

Options: Amend section 42 to delete the requirement to consider sex and race in making appointments and provide more appropriate language regarding appointments.

Level: 3

Charter § 69 Fiscal Year and Manager's Estimate

Issue: This provision is dated with respect to the Mayor-Council form of government and requiring the printing of the proposed budget. The City's budget process and relationship between the Mayor and Council should be codified in Article XV. This would obviate certain annual actions such as the adoption of the Statement of Budgetary Principles and locate all relevant budget provisions in one place.

Options: Repeal Charter section 69 and add a modernized budget section or sections in Article XV. The Los Angeles City Charter may be a useful model.

Level: 2

Charter § 70 Power to Fix Salaries

Issue: This section relates to preparation of the annual Salary Ordinance. It states that all increases and decreases of salary or wages of officers and employees must be determined at the time of preparation and adoption of the Salary Ordinance and modifications during a fiscal year may only occur based upon required specific determinations by the Council. However, this limitation does not recognize that the meet and confer obligations of the City under the MMBA may not have been met by the time of adoption of the Salary Ordinance. Section 290(a) recognizes that the Salary Ordinance must be proposed by the Mayor in a form consistent with any existing memoranda of understanding or otherwise in conformance with the MMBA.

Options: Delete limiting language and conform to Charter section 290 and the MMBA.

Level: 2 or 3

Charter § 71 Preparation and Passage of Annual Appropriation Ordinance

Issue: The Appropriation Ordinance enacts the adopted budget and delegates certain authorities to the Chief Financial Officer to administer the budget during the fiscal year. There is no particular reason why this action is separate from the adoption of the budget. Moreover, any necessary authorities could be specified in the Charter or the Municipal Code. Adoption of the Appropriation Ordinance adds at least two weeks to the City's budget process.

Options: Repeal Charter section 71 and incorporate appropriation language into Charter section 290 or nearby.

Level: 2

Charter § 71A Reappropriations at Beginning of Fiscal Year for Salaries and Maintenance and Support Expenses

Issue: This section allows for the continuing appropriation of funds from the prior year's budget if the Council fails to adopt the Appropriation Ordinance on time. This does not need to be a stand-alone section and should be incorporated with the other appropriation provisions.

Options: Repeal Charter section 71A.

Level: 2

Charter § 75 Annual Tax Levy

Issue: This provision has generally been superseded by Proposition 13. The only tax levy imposed citywide by the City is the Zoo tax.

Options: Provision could be simplified to state any legally authorized taxes shall be levied not later than July of each fiscal year and transmitted to the tax collector.

Level: 3

Charter § 76 Limit of Tax Levy

Issue: This provision has been superseded by Proposition 13 and can be removed.

Options: Repeal provision.

Level: 3

Charter § 76.1 Special Taxes

Issue: This provision restates the requirements of the California Constitution and can be removed.

Options: Repeal provision.

Level: 3

Charter § 77B Public Transportation

Issue: This provision allows for an ad valorem property tax to be imposed to fund public transportation. Because the City did not levy this tax in Fiscal Year 1982, the City is now prohibited from doing so.

Options: Repeal provision.

Level: 3

Charter § 77 Capital Outlay Fund

Issue: This provision requires funds from the "sale of city owned real property" to be deposited in the Capital Outlay Fund. It does not define what is City owned property and there is no legislative history to provide further guidance. Under general real property law principles, it could be interpreted to apply only to property owned in fee or to other lesser interests in real property, such as easements. The interpretation has potentially significant impacts on departmental budgeting. Therefore clarification is recommended.

Options: Revise to clarify the intended scope of real property interests intended to be affected.

Level: 1

Charter § 84 Money to be Drawn from Treasury in Accordance with Appropriation

Issue: This provision refers to other Charter sections that have since been repealed or amended.

Options: Provision could be simplified to reflect City's current practice, which also conforms with existing requirements.

Level: 3

Charter § 86 Disposition of Public Moneys

Issue: There is a conflict between Charter section 86 and Government Code section 50050 with regard to the time period that the City must hold unclaimed money before it escheats to the City's General Fund. Charter section 86 requires that such funds be held for only one year and does not require that notice be provided. Government Code section 50050 requires that such funds be held for at least three years and requires published notice. It is unclear whether the amount of time that unclaimed public funds must be held constitutes a municipal affair or is a matter of statewide concern. Apparently, in the abundance of caution, the City is currently following the process under state law.

Options: (1) Amend Charter section 86 to eliminate the one year period for unclaimed City funds to escheat to the City's General Fund; or (2) Maintain the existing language regarding the one year holding period, but amend Charter section 86 to include an appropriate notice provision before such funds escheat to the City's General Fund. If the latter option is implemented and challenged, a court would determine whether the matter of unclaimed public money held by a City is a municipal affair or a statewide concern.

Level: 3

Charter § 90.1 Waterworks and § 90.2 Sewer

Issue: These provisions deal, respectively, with the issuance of water bonds and sewer bonds. Each is approximately six pages long. Neither is actually used by the City to issue water or sewer bonds. These bonds are generally revenue bonds issued by a Joint Powers Authority or other applicable law.

Options: Both of these sections could be repealed.

Level: 3

Charter § 91 General Reserve Fund

Issue: This section is internally contradictory as it speaks of a "revolving fund" that can be expended only in case of emergency. Changes made to the section in 1962 made it less clear.

Options: This section should revert to the pre-1962 language or be revised to more clearly state that the purpose is to require the City maintain sufficient cash on hand to meet all demands against the treasury until receipt of property taxes. The name could also be changed to avoid confusion with other reserve funds.

Level: 3

Charter § 99 Continuing Contracts

Issue: The following language in this provision has presented multiple issues of legal interpretation and confusion over the years:

> 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 after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.

It has been generally settled that the provision applies only to contracts creating a financial obligation on the part of the City although clarification of this interpretation would be helpful.

Options: Deputies have recommended clarification in a number of areas:

(1) Provide an exception for license and software maintenance agreements and for music/motion picture license agreements. This suggestion was based upon unique issues associated with software and music licenses and with software maintenance contracts (hundreds of which were inherited from San Diego Data Processing Corp upon its dissolution).

(2) To read consistent with City Attorney memos, revise "no contract, agreement, or obligation extending for a period of more than five years may be authorized except by . . ." to state only those contracts, agreements, or obligations creating

financial expenditure obligations (versus, for example, standard City leases where City is lessor and there is no public expenditure).

(3) Consider further clarification to provide that the limitation only applies to those contracts, agreements, or obligations with financial obligations that will arise/become due in more than five years.

Level: 3

Charter § 110 Claims Against the City

Issue: Charter section 110 provides a 100-day time limit in which to file claims for damages for injuries to person or property due to City or City officer negligence, and claims for money the City may be obligated to pay a person by contract or operation of law. By contrast, Government Code section 911.2(a) of the Claims Act provides that claims "shall be presented . . . not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented . . . not later than one year after the accrual of the cause of action." The City's 100-day limit raises a possible state preemption issue. *See, Helbach v. City of Long Beach*, 50 Cal. App. 2d 242, 246-247 (1942) (charter provision specifying longer time limit than provided in Claims Act was preempted).

Options: Amend section 110 to provide that claims shall be submitted in accordance with state law.

Level: 3

Charter § 113 Official Advertising

Issue: Charter section 113 deals with official advertising for bids. The section should be reviewed to see if print advertising should be replaced with internet advertising on the City's website. See section 114 below regarding using the "City Bulletin" for official advertising and possible changes to internet communications.

Options: Amend section 113 to update advertising for bids. Also consider issues related to sections 35 (Purchasing Agent) and 94 (Contracts) discussed above.

Level: 3

Charter § 114 Bureau of Information and Publicity

Issue: This section provides that the Council *may* establish a Bureau of Information and Publicity to be given a number of duties – many of them similar to a public information officer and overlapping with functions currently carried out by the City Clerk. This section also allows for the "City Bulletin" as a means of providing information relating to the affairs of the City and official advertising. Because the establishment of the Bureau and its duties is permissive, it is not a direct legal issue. Nonetheless, the section should be reviewed in light of open data and other open government policies.

Options: Consider elimination or clarification with respect to other transparency laws.

Level: 3

Charter § 117(c) Unclassified and Classified Services

Issue: This section was added by Charter amendment in 2006 to provide authority for the City to hire an independent contractor as an alternative to employees in the classified service when the Mayor determines, and the Council agrees, that the City services can be provided more economically and efficiently by an independent contractor than by persons in the classified service while maintaining service quality and protecting the public interest. However, the Charter-mandated process is ambiguous. The section should be clarified to address issues, including whether there are circumstances in which the Mayor may make the required determination by using other means to compare City forces to the cost and efficiency of a contractor (such as budget figures), and whether the Mayor has to use the Managed Competition Independent Review Board.

Options: Resolve ambiguities and propose amendments through meet and confer process with the City's impacted employee organizations.

Level: 3

Charter § 118 Rules

Issue: There is no discussion or recognition in this section as to how the Civil Service Commission, in recommending new Civil Service Rules (Rules) or modifications to Rules, interacts with the meet and confer process required under the MMBA. Language in Charter section 118 that explains that any rule change that relates to a mandatory subject of bargaining under the MMBA is subject to the MMBA would be appropriate. However, this is not necessarily a legal problem because under clear California authority, the City's Charter must be read in conjunction with the MMBA. Therefore, section 118 and the Civil Service Commission process for recommending Civil Service Rule changes must recognize the MMBA, whether it says so in the Charter or not.

Options: Add the following language: "The City Council must ensure compliance with the Meyers-Milias-Brown Act or other state or local law related to collective bargaining before it adopts any new rule or amendment to an existing rule that involves a mandatory subject of bargaining."

Level: 2 or 3

Charter § 129.1 Removal of Striking Employees

Issue: Charter section 129.1 provides limitations on the ability of City employees to engage in "strike" activities. This provision, which was adopted in 1976, is not consistent with current California law. Given the current state of California case law, Charter section 129.1 is overly broad and likely subject to challenge. *See, City of San Jose v. Operating Engineers Local Union No. 3*, 49 Cal. 4th 597, 601 (2010), stating that common law "allows public employees to go on strike to enforce their collective bargaining demands unless the striking employees perform jobs that are essential to public welfare." The Court further explained that a threatened strike may be unlawful if it creates "a substantial and imminent threat to public health and safety." *Id.* at 606. Closer review of this provision should be done to conform to controlling state law.

Options: Recommend engaging in meet and confer to develop revisions narrowing the language to conform to state law.

Level: 2 or 3

Charter § 140 Establishment of Separate Retirement Pension Systems; Definitions

Issue: This section was added by Proposition B. It provides that all officers and employees who are initially hired or assume office after the effective date of this section (July 20, 2012) may participate only in defined contribution plans and not in SDCERS (the defined benefit plan), with the exception of sworn police officers. As a result, police recruits participating in the City's police academy must participate in an alternate defined contribution plan for the six months they are in the academy, and must move to the defined benefit plan when they become sworn officers. It is inefficient to have them contribute for such a short period of time in a defined contribution plan.

Options: Amend section 140 to allow police recruits participating in the City's police academy to participate in the defined benefit plan.

Level: 3

Charter § 142 Employment of Actuary

Issues: Section 142 references "subdivision (k) of Section 118 of Article VIII of this Charter." Due to amendments to section 118 in the 1940's, subdivision (k) was removed from the Charter.

Options: Amend to delete the reference to section 118(k).

Level: 3

Charter § 144 Board of Administration

Issues:

Section 144 provides that seven of the 13 members of the SDCERS Board be appointed by the Mayor and confirmed by the Council, and that these Board members have the following qualifications: "a college degree in finance, economics, law, business, or other relevant field of study or a relevant professional certification. In addition, such appointees shall have a minimum of fifteen (15) years experience in pension administration, pension actuarial practice, investment management, real estate, banking, or accounting." Currently, all seven Board members in the category have a financial background, and none have an investment background.

Options:

Amend section 144 to require more diversity of backgrounds of the appointed trustees, possibly requiring that some number of appointed trustees have a background in institutional investing.

Level: 3

Charter § 145 Retirement Fund

Issue: The first sentence of section 145 states that all employee and employer contributions under this Article "shall be placed in a special fund in the City Treasury to be known as the City Employees' Retirement Fund, which said fund is hereby created." However, California Constitution, article XVI, section 17, subsection (a) gives the board of a public retirement system "the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system."

Options: Delete the first sentence of section 145 and add a statement, consistent with the California Constitution, recognizing the Board's sole and exclusive authority over the assets of the retirement system.

Level: 3

Charter Article X Transfer of Police and Fire Department Employees into the Retirement System

Issue: This Article consists of one section, which in 1946 transferred the members of the City's Police and Fire Departments from their independent retirement system into the CERS retirement system described in Article IX. This language is no longer needed.

Options: Repeal Article X.

Level: 3

Charter § 215 Publicity of Records and § 216 Copies of Records

Issue: These sections were adopted with the original Charter. Since then, the California Public Records Act was enacted and requires that the City allow the public to inspect and copy documents unless an exception applies. Sections 215 and 216 are no longer necessary and may conflict with state law.

Options: Consider repeal as the sections are no longer required.

Level: 3

Charter § 219 Pueblo Lands

Issue: Currently, the language in section 219 is unclear and reads too broadly. Recommend revising the last sentence ("No lease shall be valid for a period of time exceeding 15 years.") to state the section only applies to leases of those Pueblo Lands covered by the section. Also, the section should be revised to limit applicability of the section to only those Pueblo Lands north of the San Diego River actually City-owned when the predecessor of Section 219 was adopted in 1909, and which have remained in continuous City ownership since that time. *See,* 1999 Op. City Att'y 40 (99-2; Jul. 15, 1999).

Options: Clarify language to read consistent with City Attorney memos.

Level: 3

Charter § 225 Mandatory Disclosure of Business Interests

Issue: Charter section 225 requires that the person applying or bargaining for any right, title or interest in the City's real or personal property, or any right, title or interest arising out of a contract, or lease, or any franchise, right or privilege may be granted pursuant to section 103 or 103.1, must make a full and complete disclosure of the name and identity of any and all persons directly or indirectly involved in the application or proposed transaction and the precise nature of all interests of all persons therein. The term "person" means any natural person, joint venture, joint stock company, partnership, association, firm, club, company, corporation, business trust, organization or entity. The City has had difficulty complying with this provision given the large number of contracts and leases the City enters into each year. Also, the requirement to disclose "any and all persons directly or indirectly involved" is extremely broad.

Options: Review section 225 to clarify intent and scope of the terms to help ensure compliance with the provision. Consider amending to include only persons with a direct and substantial interest in the application.

Level: 3

Charter § 226 Super Majority Vote Requirements

Issue: Charter section 226 was ordered reformed by the court in *Howard Jarvis Taxpayers Assn. v. City of San Diego,* 120 Cal. App. 4th 374 (2004). The court ordered section 226 to read as follows:

> (a) Notwithstanding any other provision of this Charter, any ballot proposal, initiative, statute, law or regulation of any type, except amendments of this Charter whether proposed to be adopted by the electorate, the City Council, or any other body acting pursuant to this Charter or the Municipal Code, that requires a vote of the electorate in excess of a simple majority for any matter, must itself be approved by a vote of the electorate in the same proportion as proposed, in order to be adopted, valid or otherwise effective.
>
> (b) This section may be adopted by a simple majority vote.

Options: Amend section per court order.

Level: 3

Charter § 265(b)(8) The Mayor (Role of the City Manager)

Issue: Charter section 260 states that "all executive authority, power, and responsibilities conferred upon the City Manager . . . shall be transferred to, assumed, and carried out by the Mayor." However, the Charter contemplates a role for the City Manager who is appointed by the Mayor, subject to Council confirmation.

The Charter section 260 reference to the City Manager's "executive" authority rather than "administrative" authority causes some ambiguity about Mayor's role in the day-to-day administration of the City. Charter section 265(b)(8) states that the Mayor has sole authority to "direct and exercise control over the City Manager in managing those affairs of the City under the purview of the Mayor." This implies that the City Manager manages the day-to-day affairs of the City with oversight and direction from the Mayor. The requirement that the Council confirm the Manager's appointment suggests that the Manager plays an important role in the day-to-day administration of the City.

Options: Amend section 265(b)(8) to clarify the City Manager's role.

Level: 3

Charter § 265(i) The Mayor (Council President's Duties and Authority During Mayoral Vacancy)

Issue: This section is unclear as to the authority of the Council President in exercising discretion during a Mayoral vacancy. Although couched in terms suggesting a "caretaker" role, authority to direct and control the City Manager is arguably inconsistent with such a role. The Council President's authority to make Mayoral appointments also should be clarified.

Options: Clarify scope of authority to be given to Council President in the event of Mayoral vacancy.

Level: 3

Charter § 275 Introduction and Passage of Ordinances and Resolutions

Issue: Charter section 275(d) states: "Each ordinance shall be read in full prior to passage unless such reading is dispensed with by a vote of five members of the Council, and a written copy of the ordinance was made available to each member of the Council and the public prior to the day of its passage." The requirement of a written copy for each Council member is outdated as the City moves to electronic Council agendas. Also the reading requirement is routinely waived as the reading of an ordinance during a Council meeting is impractical in most cases.

Options: Amend section 275(d) to eliminate the requirement that the ordinance be read in full. Add the words "or electronic" to allow written or electronic copies of ordinances be provided to the Council and public.

Level: 3

Charter § 280 Approval or Veto of Council Actions by Mayor

Issue: Charter section 275(c) provides that certain ordinances may be passed by the Council on the day of their introduction: (1) ordinances making the annual tax levy; (2) the annual appropriation ordinance; (3) ordinances calling or relating to elections; (4) ordinances recommended by the Mayor or independent department heads transferring or appropriating moneys already appropriated by the annual appropriation ordinance; (5) ordinances establishing or changing the grade of a public highway; and (6) emergency ordinances as defined by section 295 of this Charter. These ordinances are not subject to the 30-day referendum period.

Charter section 280 makes all of these ordinances subject to veto, except for the annual appropriation ordinance and emergency ordinances. The veto process can extend the timeline for final passage of these ordinances by 14 to 44 days if Council reconsideration is required. This is especially problematic for ordinances calling or relating to elections. These election items are subject to other election deadlines, are within the Council's purview, and often are ministerial (e.g. calling elections and certifying the results of an election). Also, state law prohibits the Mayor's veto of a proposed Charter amendment.

The ordinance making the annual tax levy is a matter within the legislative power to tax. The annual levy is tied to the annual appropriation ordinance and the Mayor will have already had an opportunity to present the budget and veto the budget resolution. Giving the Mayor an additional chance to veto the annual tax levy would send the Council back to the beginning of the budget process. This could cause uncertainty within the City.

Options: Amend the Charter to provide that ordinances that take effect on the day of introduction are not subject to Mayoral veto.

Level: 2

Charter § 290 Council Consideration of Salary Ordinance and Budget; Special Veto Power

Issue: Changes discussed above in sections 69 and 71 regarding budget and appropriations would require additional changes here.

Options: See above.

Level: 2

CONCLUSION

The Charter sections identified above would require a fuller legal analysis to determine appropriate language for any amendments. As the Charter review process continues, it is anticipated that other sections may be identified for legal review. Given the number of potential amendments the Council may want to consider adopting a more streamlined and modern Charter. In either case, we are available to provide assistance upon further direction from the Council.

JAN I. GOLDSMITH, CITY ATTORNEY

By *__/s/Paul E. Cooper_____*
Paul E. Cooper
Executive Assistant City Attorney

PEC:PMD:CB:sc
Attachments
RC-2014-3
Doc. No. 713088

TAB 1

THE CITY OF SAN DIEGO

REPORT TO THE CITY COUNCIL

DATE ISSUED: March 23, 2016 REPORT NO: 16-031

ATTENTION: Charter Review Committee

SUBJECT: Clarification of What Constitutes Cause for Removal from Elected Office.

REFERENCE:

REQUESTED ACTION: Review and give feedback on this partial report in preparation for considering a complete report on May 18, 2016.

STAFF RECOMMENDATION: Staff requests the Committee give feedback regarding the recommended suggestion in the summary.

SUMMARY:

This discussion arises from the mayor's resignation in 2013 that raised questions and suggestions regarding what constitutes cause for removal from elected office, the succession process and scope of interim authority.

This report addresses preliminary thought and suggestions regarding what constitutes cause for removal from elected office. Future, cumulative reports will add the issues of process of succession (April 20, 2016) and the scope of interim authority (May 18, 2016).

The accompanying chart summarizes what constitutes causes for removal for the mayor, councilmembers and city attorney for California's eight largest cities, and eight of the nation's fifteen largest cities.

It is suggested that cause for removal be such that it is determined by a neutral, detached, objective entity or standard. Such independently determined cause would be free of the political will of other elected officials or their staffs. Once it was independently determined that cause existed, the remaining elected officials would have discretion to respond on behalf of and in the best interest of the City.

It is suggested that a list of independently determined cause for removal include:

1. Fails to qualify within thirty (30) days after commencement of their term.
2. Moves from the City.
3. Absents themself continuously for 30 calendar days from the duties of their office without the consent of Council.
4. Convicted of violating any provision of the City Charter or Municipal Code.

5. Conviction of or settling to charges of a felony.
6. Judicially declared incompetent as defined by statue.
7. So permanently disabled as to be unable to perform the duties of their office.

FISCAL CONSIDERATIONS: None

PREVIOUS COUNCIL and/or COMMITTEE ACTION: February 2, 2016, the Charter Review Committee unanimously requested the Independent Budget Analyst, Mayor's Office, Committee Consultant and Director of Legislative Affairs work with the City Attorney to study similarly situated jurisdictions and return with:

1. A comprehensive list of what constitutes "cause" for removal from office.
2. Clear line and process of succession for the Mayor and City Attorney similar to what currently exists for Councilmembers.
3. Complete outline of authority and operations for a succeeding Mayor and City Attorney like currently exists for the City Council.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: None

KEY STAKEHOLDERS AND PROJECTED IMPACTS: None

Originating Department: Council District 1

THE CITY OF SAN DIEGO

Report to the City Council

DATE ISSUED: April 14, 2016 REPORT NO: 16-040

ATTENTION: Charter Review Committee

SUBJECT: Removal from and Succession to Elected Office

REFERENCE:

REQUESTED ACTION: Review and give feedback on this partial report addressing removal from and succession to elected office in preparation for considering a complete report on May 18, 2016.

STAFF RECOMMENDATION: Staff recommends the Committee give feedback regarding the recommended suggestions in the Summary.

EXECUTIVE SUMMARY OF ITEM BACKGROUND: This staff report follows up on the March 23, 2016, Charter Review Committee discussion regarding cause for removal. It also suggests a process for succession to elected office. These two topics, along with the scope of interim authority, will be presented in a final report to the Charter Review Committee on May 18, 2016.

Regarding cause for removal:
In response to Committee input, the staff suggests that causes for removal be divided into two categories. First, automatic removal from office would occur under any of the following circumstances: when there is a conviction of a felony; when the Mayor or City Attorney moves out of the city or the Councilmember moves out of the District; or the Mayor, City Attorney or Councilmember is judicially declared incompetent as defined by statute.

Again, it is suggested that automatic removal be such that it is determined by a neutral, detached, objective entity or standard. Such an independently determined cause would be free of the political will of other elected officials or their staff.

Second, the Council, by a 2/3 vote, may initiate a recall and special election for other causes, such as dereliction of duty or violation of the law.

Regarding succession to office:
Staff recommends clarity and uniformity for succession to all elected offices.

First, continue to conduct a special election when an elected official leaves office with more than one year remaining on his or her term.

Additionally, clarify that the interim designee for each office is the following person:

- For the Mayor: the Council President

- For each Councilmember: the chief of staff, under the authority of the Council President, to manage the office for the departing Councilmember.
- For the City Attorney: the Deputy City Attorney previously designated by the City Attorney and recorded with the City Clerk

Again, the final report on May 18, 2016, will address the scope of interim authority.

Second, for all offices, appoint a replacement when the elected official leaves office with one year or less remaining on their term. [The staff considered recommending extending the time period for appointment to two years.]

The City Council shall, within 30 days of the resignation [Staff also considered 45.], by a 2/3 vote, appoint a replacement official who is ineligible to be a candidate in the next regular election. This succession process is currently used for the City Council, and this would bring the Mayor and City Attorney into uniformity with this process.

FISCAL CONSIDERATIONS: The cost to place this measure on the ballot has yet to be determined.

EQUAL OPPORTUNITY CONTRACTING INFORMATION (if applicable):

PREVIOUS COUNCIL and/or COMMITTEE ACTIONS:
February 2, 2016, the Charter Review Committee unanimously requested the Independent Budget Analyst, Mayor's Office, Committee Consultant and Director of Legislative Affairs work with the City Attorney to study similarly situated jurisdictions and return with:

1. A comprehensive list of what constitutes "cause" for removal from office.
2. Clear line and process of succession for the Mayor and City Attorney similar to what currently exists for Councilmembers.
3. Complete outline of authority and operations for a succeeding Mayor and City Attorney similar to what currently exists for the City Council.

March 23, 2016, the Charter Review Committee reviewed Report to the City Council 16-031, Clarification of What Constitutes Cause for Removal from Elected Office, and provided feedback to staff.

COMMUNITY PARTICIPATION AND OUTREACH EFFORTS:

KEY STAKEHOLDERS AND PROJECTED IMPACTS:

Council District 1	Steven Hadley, Committee Consultant
Originating Department	Name-Title

Attachment(s): 1.
2.

TAB 2

THE CITY OF SAN DIEGO

REPORT TO THE CITY COUNCIL

DATE ISSUED: March 2, 2016 REPORT NO: 16-023

ATTENTION: Charter Review Committee

SUBJECT: Relocating Legislative Activity Found Throughout the Charter to Article III – The City Council.

REFERENCE:

REQUESTED ACTION: Move Charter sections addressing legislative activity to Article III, including but not limited to sections 270 – The Council, 275 – Introduction and Passage of Ordinances and Resolutions, 280 – Approval or Veto of Council Actions by Mayor, 285 – Enactment Over Veto, 290 – Council Consideration of Salary Ordinance and Budget: Special Veto Power and 295 – When Resolutions and Ordinances Take Effect; Emergency Measures.

STAFF RECOMMENDATION: Approve the requested action.

SUMMARY:
The requested action is to relocate and consolidate primarily legislative activity found throughout the Charter in Article 3 – The City Council. March 23, 2016 Charter Review Committee will consider relocating and consolidating primarily executive activity found throughout the Charter in Article 4 – The Mayor.

Charters and constitutions typically describe the activities of their legislative and executive branches in those branches' respective articles. Until 2006, the City of San Diego's legislative and executive activities were located in Article 3 – Legislative Power and Article 4 – The Mayor.

In 2005, the authors and proponents of the Strong Mayor form of government presented that new form of governance to the voters in one complete new Article 15 – Strong Mayor. A decade later, the Mayor – Council form of government is established and relocating primarily legislative and executive activities to their historically assigned Articles would be less confusing and more appropriate.

FISCAL CONSIDERATIONS: None

PREVIOUS COUNCIL and/or COMMITTEE ACTION: None

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: None

KEY STAKEHOLDERS AND PROJECTED IMPACTS: None

Originating Department: Council District 1

TAB 3

THE CITY OF SAN DIEGO

REPORT TO THE CITY COUNCIL

DATE ISSUED: March 2, 2016 REPORT NO: 16-022

ATTENTION: Charter Review Committee

SUBJECT: Creation of a Charter Article for Independent, Non-Mayoral Departments and Offices.

REFERENCE:

REQUESTED ACTION: Move the following independent, non-mayoral administrative services from Article 5 to a new Article: Sections 37 - Personnel Director, 38 – City Clerk, 39.1 - Audit Committee, 39.2 - Office of City Auditor, 39.3 - Independent Budget Analyst, 40 - City Attorney, 40.1 – Concurrent Jurisdiction of City Attorney with District Attorney and 41 – Commissions.

STAFF RECOMMENDATION: Approve the requested action.

SUMMARY:

The requested action helps better communicate to the Charter's readers the separation of powers that exists in our City's governance.

Every student in American civics class learns that democracy works in large part because the Federal government operates as a "three-legged stool" of shared authority among the Executive, Legislative and Judicial branches. The third branch, Judicial/courts, does not play an immediate role in the governance of local cities like it does in the federal government. The third, independent, daily voice of checks and balances for city government resides not in one institution, but in a cluster of independent departments and offices. The City of San Diego's independent departments and offices are described in Charter Article 5.

From 1931 when the Charter was first approved until 2006 when the Strong Mayor form of government was implemented, all departments and offices in Article 5 – Executive and Administrative Service were independent of the Mayor and City Council. The Article 5 departments were under the direction of the City Manager and the independent offices described there were directed by their respective head. (e.g. City Attorney, City Clerk, etc.) San Diego's "three-legged stool" consisted of a Mayor, Council and City Manager.

With the implementation of the Strong Mayor form of government in 2006, many of the departments listed in Article 5 came under the direction of the Executive branch/Mayor for the first time. The City of San Diego continues to work in a triangle of shared authority; Mayor, Council and the independent offices listed in this requested action. However, the independent departments/offices are still described in Article 5 and may appear to the Charter's readers to also come under the direction of the Mayor when in fact they do not.

The requested action to move these independent department/offices to their own Charter Article will reaffirm their independence, accurately depict the City's governance by separation of powers, and more clearly distinguish the independent departments from Mayoral departments.

FISCAL CONSIDERATIONS: None

PREVIOUS COUNCIL and/or COMMITTEE ACTION: None

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: None

KEY STAKEHOLDERS AND PROJECTED IMPACTS: The Departments/Offices involved are the only stakeholders and should not be impacted negatively by the action.

Originating Department: Council District 1

TAB 4

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: March 23, 2016

TO: Public Safety and Livable Neighborhoods Committee of the City Council of the City of San Diego

FROM: City Attorney

SUBJECT: City Council Authority to Adopt Ordinances Pertaining to the Citizens' Review Board on Police Practices

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The Office of the City Attorney was asked by Councilmember Gloria's staff whether the San Diego City Council has authority to adopt an ordinance (or ordinances) pertaining to the Citizens' Review Board on Police Practices (CRB).

San Diego City Charter (Charter) section 43(d) provides that:

> Notwithstanding any other provisions of this Charter, the City Manager shall have the exclusive authority to create and establish a citizen's review board on police practices 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.

Charter section 43(d) further provides that "[t]he City Manager shall establish such rules and regulations as may be necessary for this board to carry out its functions; provided, however, that such rules and regulations shall be consistent with the laws of the State of California concerning citizen's complaints against peace officers."

The City's Charter is its governing law. The Charter is the City's constitution, and the City, acting through its officers and employees, must comply with it. *Miller v. City of Sacramento*, 66 Cal. App. 3d 863, 867 (1977); *City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102 (1988).

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); *Powers v. City of Richmond*, 10 Cal. 4th 85, 91 (1995). 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; *Bowens v. Superior Court*, 1 Cal. 4th 36, 48 (1991). 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." *Woo*, 93 Cal. App. 4th at 976. 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 also Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 894 (2001).

Charter section 43(d) is clear in its designation of the City Manager, now Mayor, as possessing the exclusive power to both create the CRB, and to establish its rules and regulations necessary to operation of the Board and discharge of its duties.[1] It does not grant any authority to the City Council to adopt ordinances pertaining to it. To do so would be inconsistent or in conflict with Charter, and thus would likely be held by a court to be void. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171(1994) (citations omitted).

Since the language of Charter section 43(d) is clear in vesting exclusive authority in the City Manager, now Mayor, with regard to both the creation and the operation of the CRB, the rules of statutory construction require no further analysis. Nonetheless and of note, are the November 8, 1988 ballot arguments in favor of Proposition G and against Proposition F, which further support the conclusion that the authority to create the CRB and manage its operations is exclusively vested in the City Manager, now Mayor.[2]

The ballot argument in favor of Proposition G stated:

> WILL TAKE THE **POLITICS** OUT OF POLICE REVIEW.
>
> . . . .
>
> **WILL NOT** CREATE A BOARD STAFFED BY **POLITICAL APPOINTEES.**
>
> . . . .

---

[1] 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.

[2] Proposition G and Proposition F were competing ballot measures relating to the creation and governance of the CRB placed on the ballot in November, 1988. Proposition G creating the CRB in its present state passed and Proposition F failed.

> **WILL NOT** CREATE A BOARD DESIGN BASED ON THE **BERKELEY MODEL**[3]
>
> . . . .

Ballot Pamp., Gen. Elec. (Nov. 8, 1988), argument in favor of Prop. G.

The ballot argument in opposition to Proposition F stated:

> Proposition F is modeled after the Police Review Board in Berkeley. It is a radical move that places politics in the middle of law enforcement in San Diego.
>
> . . . .

Ballot Pamp., Gen. Elec. (Nov. 8, 1988), argument against Prop. F.

These ballot arguments are consistent with the plain language of Charter section 43(d), which vests in the City Manager, now Mayor, the sole authority to create the CRB and promulgate rules and operating procedures governing its operation.

The foregoing does not completely exclude a role for the City Council with respect to the operations of the CRB. The City Council can propose to the Mayor recommendations regarding the rules and operating procedures of the CRB, which the Mayor may incorporate into the CRB Bylaws or written procedures as appropriate.

JAN I. GOLDSMITH, CITY ATTORNEY

By */s/William Gersten*
William Gersten
Deputy City Attorney

WG:hm:ccm
MS-2016-10
cc: City Councilmembers
Mary Ann Wallace, Committee Consultant
Sharmaine Moseley, CRB Executive Director
David Graham, Deputy Chief Operating Officer
Chris Pearson, Committee Consultant
Doc. No.: 1248669

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[3] The Berkeley model was based on shared authority amongst the Mayor and City Council with regard to both appointments and operating procedures.

THE PUBLIC SAFETY AND LIVABLE NEIGHBORHOODS COMMITTEE OF THE CITY COUNCIL OF THE CITY OF SAN DIEGO

Councilmember Marti Emerald, Chair
Councilmember Chris Cate, Vice Chair
Councilmember Todd Gloria
Councilmember Myrtle Cole

ACTIONS FOR THE COMMITTEE MEETING OF
WEDNESDAY, MARCH 23, 2016 AT 2:00 P.M.
CITY ADMINISTRATION BUILDING
COMMITTEE ROOM-12TH FLOOR
202 "C" STREET, SAN DIEGO, CA 92101

For information, contact Marisa Berumen, Council Committee Consultant
Email: MBerumen@sandiego.gov or (619) 236-7754

Committee members present: Emerald, Cole, Gloria and Cate

APPROVAL OF COMMITTEE ACTIONS

The Committee Record of Actions of the following meetings were approved by Unanimous Consent:

March 2, 2016

NON-AGENDA PUBLIC COMMENT: Martha Welch commented on Proposition B.

Francine Maxwell commented on the San Diego Unified School District and immigration-related issues with students.

Sally Smith commented on the memorandum of understanding between the San Diego Unified School District and the schools police.

COMMITTEE MEMBERS, MAYOR, INDEPENDENT BUDGET ANALYST, CITY ATTORNEY: None.

CONSENT AGENDA:

ITEM-1: Review report from the San Diego Police Department requesting Council approval of the SIXTH AMENDMENT TO THE AGREEMENT WITH TEGSCO, LLC (DOING BUSINESS AS AUTORETURN) FOR THE MANAGEMENT OF THE COMPUTER OPERATED TOWING DISPATCH CENTER

Motion by Councilmember Gloria to recommend Council introduce the ordinance and approve the agreement. Second by Councilmember Cole.

Passed by the following vote:
Yea: Emerald, Cate, Gloria and Cole
Nay: None
Recused: None
Absent: None

INFORMATION AGENDA:

ITEM-2: Review report from the San Diego Police Department regarding UPDATE ON BODY WORN CAMERAS

Information only. No action taken by the Committee.

DISCUSSION AGENDA

ITEM-3: Consideration of a ballot measure proposal by Women Occupy San Diego regarding the CITY OF SAN DIEGO'S CITIZEN'S REVIEW BOARD ON POLICE PRACTICES (CRB)

Motion by Councilmember Gloria to: (1) amend the city charter section 43(d) to rename the Citizens' Review Board the Community Review Board, replace references to "City Manager" with "Mayor and City Council", require that the Review Board review all cases involving in-custody deaths and officer-related shootings, and replace references to "citizen" with "community member"; and (2) recommend the Mayor's Office extend the terms of members from one year to two years, develop a process by which Citizens' Review Board members can audit category II complaints and pull specific cases for review, and include funding for an independent counsel to provide additional advisory capacity to the Citizens' Review Board and recommend that the City Attorney retain outside counsel for this purpose. Second by Councilmember Cole.

Passed by the following vote:
Yea: Emerald, Cate, Gloria and Cole
Nay: None
Recused: None
Absent: None

Marti Emerald
Chair

TAB 5

THE CITY OF SAN DIEGO

Report to the City Council

DATE ISSUED: April 13, 2016 REPORT NO: 16-039

ATTENTION: Charter Review Committee

SUBJECT: Streamlining of Contracting & Procurement Charter Sections

REFERENCE: Charter Sections 35, 94.1, 94.2, 94.3, 94.4, 98, 99, 100, and 102

REQUESTED ACTION: Consideration of updates and/or removal of Charter Sections 35, 94, 94.1, 94.2, 94.3, 94.4, 98, 99, 100 and 102.

STAFF RECOMMENDATION: Approve changes to the proposed Charter Sections and forward to full Council to consider placing on the November 2016 ballot.

SUMMARY:

The proposed changes to the purchasing and contracting related sections of the Charter are intended to harmonize and remove duplication between the Charter, Municipal Code, and State Government Code. The recommended changes to these sections will provide greater flexibility to city departments to procure goods and services to meet the needs of the city in a timely and cost effective manner.

The proposed changes provide the following:

- Update restrictions against city personnel who may seek an improper personal benefit through the city's purchasing and contracting process.
- Incorporate state requirements by reference which will provide for consistency and greater clarity on restrictions on certain activities regarding purchasing and contracting.
- Provide flexibility to the departments to ensure the best value and service to the taxpayers.

Furthermore, the changes proposed are consistent with the stated goals of the Charter Review Committee to make provisions within the Charter less proscriptive and easier to comprehend for the citizens of San Diego.

FISCAL CONSIDERATIONS: The cost of placing measures on the November 2016 ballot is unknown at this time.

PREVIOUS COUNCIL and/or COMMITTEE ACTION: February 3, 2016, the Charter Review Committee unanimously requested the Independent Budget Analyst, Mayor's Office, Committee Consultant and Director of Legislative Affairs work with the City Attorney to return with some short, plain, introductory and overarching language for the Charter that says we will do what it takes to deliver the best value to the City and citizens we serve; and move whatever specific language we need to implement improvements and efficiencies in our purchasing and contracting process to the Municipal Code.

Felipe Monroig,
Deputy Chief of Staff for Community
Engagement, Mayor's Office

Attachment(s):

1. Strike-Out of Purchasing and Contracting proposed Charter Amendments
2. Clean Copy of Purchasing and Contracting proposed Charter Amendments
3. Purchasing and Contracting Charter Sections cross referenced with the Municipal Code

~~Section 35: Purchasing Agent~~

~~The Purchasing Agent shall make all purchases of supplies, materials, equipment, and insurance required by the various Departments or offices of the City, except as may be otherwise provided by the Council or this Charter. He shall prepare in consultation with the administrative officers of the City standard specifications for all supplies, materials, equipment, and insurance necessary for use by the various Departments or offices of the City.~~

~~In purchasing any supplies, materials, equipment and insurance required by the various Departments or offices of the City, if the cost of said supplies, materials, equipment and insurance exceeds a sum to be established by ordinance of the City Council, no such purchase shall be made without advertising for sealed proposals therefor. Notices calling for such sealed proposals shall be published for one day in the official newspaper of the City, and a contract let for such purpose only after the expiration of ten days following said advertising. If the cost of the said supplies, materials, equipment and insurance required by said City falls within a dollar range also established by ordinance of the City Council, the said purchase may be made by said Purchasing Agent without advertising for sealed proposals, but not until said Purchasing Agent has secured competitive prices from merchants or other persons interested in making the sale to said City and not until the Purchasing Agent has been authorized by the Council to make such purchase. Purchases of supplies, materials, equipment and insurance required by the various Departments or offices of the City which do not exceed in cost a sum established by ordinance of the City Council may be made by the Purchasing Agent directly upon the request of the department interested.~~

~~The Council shall by ordinance provide for the sale, exchange or other disposal by the Purchasing Agent of any surplus, used, obsolete or depreciated personal property belonging to the City.~~

~~The Council by resolution may order the purchase without advertising for bids of surplus commodities from the United States of America, or any agency thereof, or from any other public corporation, state or municipal, or any agency thereof. The Council may authorize the Purchasing Agent to participate in joint and cooperative purchasing with any other public corporation, state or municipal, or agencies thereof. The Council may also authorize said Purchasing Agent to sell to any other public corporation, state or municipal, any supplies, material and equipment which said City may have been able to purchase in quantity at a reduced price.~~

~~Supplies shall be furnished upon requisition either from the stores under the control of the Purchasing Agent or by purchase, and whenever so purchased shall be paid for by the Department or office furnished therewith. It shall be the duty of the Purchasing Agent to inspect or cause to be inspected all purchases, and reject any of those which are not up to the standard specifications provided therefor, and he shall not approve any bid or voucher for articles which are not in conformity with specifications, or which are at variance with any contract. The Purchasing Agent shall not furnish supplies to any Department or office unless there be to the credit thereof an available unencumbered balance sufficient to pay for such supplies.~~

~~Materials, supplies or equipment not needed by a Department or office, but necessary to another Department or office, may be transferred by the Purchasing Agent and a proper record made of the transaction. He shall have charge of such storerooms and warehouses of the City as the Manager may provide or the Council by ordinance may authorize. The Council may, upon recommendation of the Manager, authorize the Purchasing Agent to purchase materials, supplies, or equipment in common use by the Departments and offices in large quantities and store the same until requisitioned by the Departments or offices for use. The Council shall provide a sufficient revolving fund in the annual appropriation ordinance of an adequate amount for the purpose of creating a store's account and stock for future supply of the Departments and offices when needed.~~

~~The Purchasing Agent shall keep a record of all sources of supply, of all quotations received, of all awards made, of all inspections, of all requisitions filed, and of all vendors furnishing commodities to the City. He shall perform such other duties as may be prescribed by general law or ordinance or by the Manager.~~
~~*(Amendment voted 03-10-1953; effective 04-20-1953.)*~~
~~*(Amendment voted 11-04-1958; effective 02-19-1959.)*~~
~~*(Amendment voted 11-04-1975; effective 12-1-1975.)*~~
~~*Prior Language*~~

Section 94: Contracts

Contracts for~~In~~ the construction, reconstruction or repair of public buildings, streets, utilities and other public works, for the provision of goods or services, and the hiring of architects, engineers, and other consultants, shall be competitively bid pursuant to rules ~~when the expenditure therefor shall exceed the sum~~ established by ordinance of the City Council.~~, the same shall be done by written contract, except as otherwise provided in this Charter, and the Council, on the recommendation of the Manager or the head of the Department in charge if not under the Manager's jurisdiction, shall let the same to the lowest responsible and reliable bidder, not less than ten days after advertising for one day in the official newspaper of the City for sealed proposals for the work contemplated. If the cost of said public contract work is of a lesser amount than the figure established by ordinance of the City Council, the Manager may let said contract without advertising for bids, but not until the Purchasing Agent of the City shall have secured competitive prices from contractors interested, which shall be taken under consideration before said contract is let. The Council may, however, establish by ordinance an amount below which the Manager may order the performance of any construction, reconstruction or repair work by appropriate City forces without approval by Council. When such Council approval is required, the Manager's recommendation shall indicate justification for the use of City forces and shall indicate whether the work can be done by City forces more economically than if let by contract.~~ The City Council may establish by ordinance contract amounts below which competitive bidding is not required. Unless otherwise required by ordinance, competitive bidding is not required for work done by City forces, services provided by non-profit organizations, in an emergency, or where competitive bidding is not required by state law.

~~In case of a great public calamity, such as extraordinary fire, flood, storm, epidemic or other disaster the Council may, by resolution passed by a vote of two-thirds of the members elected to the Council, determine and declare that the public interest or necessity demands the immediate expenditure of public money to safeguard life, health or property, and thereupon they may proceed, without advertising for bids or receiving the same, to expend, or enter into a contract involving the expenditure of any sum required in such emergency, on hand in the City treasury and available for such purpose. All contracts before execution shall be approved as to form and legality by the City Attorney.~~

~~Each bidder shall furnish with his bid such security or deposit insuring the execution of the contract by him as shall be specified by the Council or as provided by general law.~~

~~For contracts exceeding $100,000.00, the Council shall require each contractor to insure the faithful performance of his contract by delivering to the City a surety bond in an amount specified by the Council, executed by a surety company authorized to do business in the State of California; provided, however, that in all contracts the Council shall require the retention of sufficient payments, under the contract to insure the protection of the City against labor or material liens.~~

~~The Council, on the recommendation of the Manager, or the Head of the Department not under the jurisdiction of the Manager, may reject any and all bids and readvertise for bids. The Council may provide that no contract shall be awarded to any person, firm or corporation if prison or alien labor is to be employed in performing such contract, or if the wage schedule for employees engaged in performing such contract is based on more than eight hours of labor per day. Any contract may be let for a gross price or on a unit basis and may provide for liquidated damages to the City for every day the contract is uncompleted beyond a specified date. It shall be competent in awarding any contract to compare bids on the basis of time completion, provided that when any award has been made in consideration, in whole or in part, of the relative time estimates of bidders for the completion of the work, the performance in accordance with such time limits shall be secured by a surety bond as hereinabove provided with adequate sureties and penalties, and provided further, that for any contract awarded solely or partially on a specified time for completion the Council shall not extend such time limits unless such extension be recommended by the Manager and the Head of the Department concerned.~~

Pursuant to state law, ~~N~~no officer of the City, whether elected or appointed, ~~of The City of San Diego~~ shall be ~~or become directly or indirectly~~financially interested in~~, or in the performance of,~~ any contract made by them in their official capacity. ~~with or for The City of San Diego, or in the purchase or lease of any property, real or personal, belonging to or taken by said City or which shall be sold for taxes or assessments or by virtue of legal process or suit of said City.~~ Any officer who ~~person~~ willfully violate~~sing~~ this ~~section of the Charter~~ paragraph shall be guilty of a misdemeanor and shall immediately forfeit his or her office and be thereafter forever barred and disqualified from holding any elective or appointive office in the service of the City. ~~No officer, whether elected or appointed, shall be construed to have an interest within the meaning of this section unless the contract, purchase, lease, or sale shall be with or for the benefit of the office, board, department, bureau or division with which said officer is directly connected in the performance of his duties and in which he or the office, board, department, bureau or division he represents exercises legislative, administrative or quasi-judicial authority in the letting of or performance under said contract, purchase, lease or sale.~~

All contracts entered into in violation of this Section shall be void and shall not be enforceable against said City; provided, however, that officers of this municipality may own stock in public utility service corporations and the City permitted to contract for public utility service when the rates for such service are fixed by law or by virtue of the Public Utilities Commission of the State of California; and provided further, that no officer shall be prohibited from purchasing the services of any utility whether publicly or privately owned, whether or not the rates are fixed by law or by the Public Utilities Commission of the State of California; and provided further, that in designating any bank as a depository for the funds of said City, any officer interested as a stockholder or otherwise in such bank shall not be deemed to have an interest in such City contract within the meaning of this section, and in each of the cases enumerated herein such contracts shall be valid and enforceable obligations against the municipality.
(Amendment voted 03-13-1945; effective 04-09-1945.)
(Amendment voted 03-11-1947; effective 03-24-1947.)
(Amendment voted 03-10-1953; effective 04-20-1953.)
(Amendment voted 09-17-1963; effective 02-11-1964.)
(Amendment voted 11-04-1975; effective 12-01-1975.)
(Amendment voted 11-02-1976; effective 01-12-1977.)
(Amendment voted 09-20-1977; effective 11-18-1977.)
(Amendment voted 11-03-1998; effective 12-04-1998.)
Prior Language

~~**Section 94.1: Job Order Contracts**~~

~~Notwithstanding any provisions of this Charter to the contrary, the City is not prohibited from awarding public works contracts on a unit cost basis for all necessary labor, materials, and equipment provided such contracts are secured on a competitive basis as otherwise required by this Charter. The City Council shall establish by ordinance guidelines for the award and use of such unit cost contracts, and may set an amount below which the City Manager may award such contracts.~~
~~*(Addition voted 11-03-1998; effective 12-04-1998.)*~~

~~**Section 94.2: Design-build Contracts**~~

~~Notwithstanding any provisions of this Charter to the contrary, the City is not prohibited from awarding contracts for the combined design and construction of public works pursuant to a process of competitive negotiation, provided the process of competitive negotiation is conducted as may otherwise be required by this Charter or the Municipal Code. The City Council shall establish by ordinance guidelines for the award, use, and evaluation of such design-build contracts, and may set an amount below which the City Manager may award such contracts.~~
~~*(Addition voted 11-03-1998; effective 12-04-1998.)*~~

~~**Section 94.3: Bond Reimbursement Program**~~

~~Nothing in this charter shall prohibit the City Council from creating a program by ordinance to reimburse contractors for all or a portion of the premium paid by a contractor for a surety bond required under Section 94 of this Charter. If it creates a bond reimbursement program, the Council shall by ordinance establish eligibility criteria for contractors, levels and thresholds of reimbursement, the process for seeking reimbursement, and other requirements for operation of, and participation in, the program.~~
~~*(Addition voted 11-03-1998; effective 12-04-1998)*~~

~~Section 94.4: Construction Manager At Risk Contracts~~

~~Notwithstanding any provisions of this Charter to the contrary, the City is not prohibited from awarding contracts for the construction of public works using a combination of: (1) design review and management services; and (2) construction management services procured from a single person or entity for a guaranteed maximum price pursuant to a process of competitive negotiation, provided the process of competitive negotiation is conducted as may otherwise be required by this Charter or the Municipal Code. The City Council shall establish by ordinance guidelines for the award, use, and evaluation of such construction manager at risk contracts, and may set an amount below which the City Manager may award such contracts.~~
~~*(Addition voted 3-2-2004; effective 07-15-2004)*~~

Section 95: Preference in Accepting Bids
(Amendment voted 04-22-1941; effective 05-08-1941.)
(Repeal voted 09-21-1965; effective 02-10-1966.)
Prior Language

Section 96: Progressive Payments
(Amendment voted 03-23-1937; effective 04-14-1937.)
(Repeal voted 09-17-1963; effective 02-11-1964.)
Prior Language

Section 97: Collusion in Bidding

If at any time it shall be found that any party or parties to whom a contract has been awarded has, in presenting any bid or bids, been guilty of collusion with any party or parties in the submission of any bid or for the purpose of preventing any other bid being made, then the contracts so awarded may be declared null and void by the Council and the Council shall thereupon re-advertise for new bids for said work or the incomplete portion thereof. The Council shall debar from future bidding all persons or firms found to be in violation of this Section, or any future firm in which such person is financially interested.

~~Section 98: Alteration in Contracts~~

~~Whenever it becomes necessary in the opinion of the City Manager to make alterations in any contract entered into by the City, such alterations shall be made only when authorized by the Council upon written recommendation of the Manager, whenever the cost of such alterations increases the amount of the contract by more than the amount authorized by ordinance passed by the Council. No such alterations, the cost which exceeds the amount authorized by ordinance, shall be valid unless the new price to be paid for any supplies, materials, or work under the altered contract shall have been agreed upon in writing and signed by the contractor and the Manager prior to such authorization by the Council. All other alterations shall be made by agreement in writing between the contractor and the Manager.~~
~~*(Amendment voted 06-07-1966; effective 06-29-1966.)*~~
~~*(Amendment voted 11-04-1975; effective 12-01-1975.)*~~
~~*Prior Language*~~

Section 99: Continuing Contracts

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. 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 ~~after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance~~.
(Amendment voted 04-22-1941; effective 05-08-1941.)
(Amendment voted 06-04-1968; effective 07-22-1968.)
Prior Language

Section 99.1: Sports Stadium

For the purpose of acquiring, constructing and completing on a site in Mission Valley not to exceed 200 acres and lying westerly of Murphy Canyon Road, northerly of Highway 80 and southerly of Friars Road, and maintaining and operating thereon a coliseum, stadium, sports arena, sports pavilion or other building, or combination thereof, and facilities and appurtenances necessary or convenient therefor, for holding sports events, athletic contests, contests of skill, exhibitions and spectacles and other public meetings, the City may, in addition to other legal methods, enter into contracts, leases or other agreements not to exceed fifty years with any other public agency or agencies, and the provisions of Sections 80 and 99 of this Charter shall not be applicable thereto.
(Addition voted 11-02-1965; effective 02-10-1966.)

Section 100: No Favoritism in Public Contracts

No officer or employee of the City ~~shall aid or assist a bidder in securing a contract to furnish labor, or material, or supplies at a higher price or rate than that proposed by any other bidder, or~~ shall favor one bidder over another, by giving or withholding information, or shall willfully mislead any bidder in regard to the character of the material or supplies called for, or shall knowingly accept materials or supplies of a quality inferior to that called for by the contract, or shall knowingly certify to a greater amount of labor performed than has actually been performed, or to the receipt of a greater amount of material or supplies than has actually been received. Any officer or employee found guilty of violation of this Section shall forfeit his position immediately.

Section 101: When Contracts and Agreements Are Invalid

All contracts, agreements or other obligations entered into, all ordinances and resolutions passed, and orders adopted, contrary to the provisions of Sections 97 and 100 of this Article may be declared null and void by the Council and thereupon no contractor whatever shall have any claim or demand

against the City thereunder, nor shall the Council or any officer of the City waive or qualify the limitations fixed by such section or fasten upon the municipality any liability whatever; provided that all persons who have heretofore furnished material for and/or performed labor on the job shall be protected by the contractor's surety bonds. Any willful violation of these Sections on contracts shall constitute malfeasance in office, and any officer or employee of the City found guilty thereof shall thereby forfeit his office or position. Any violation of these Sections, with the knowledge, expressed or implied of the person or corporation contracting with the City shall render the contract voidable by the Council.

Section 102: Continuance of Contracts

All contracts entered into by the City, or for its benefit, prior to the taking effect of the Charter, shall continue in full force and effect. ~~All public work begun prior to the taking effect of the Charter shall be continued thereunder. Public improvements for which legislative steps shall have been taken under laws or Charter provisions existing at the time this Charter takes effect may be carried to completion in accordance with the provisions of such existing laws and Charter provisions.~~

Section 94: Contracts

Contracts for the construction, reconstruction or repair of public buildings, streets, utilities and other public works, for the provision of goods or services, and the hiring of architects, engineers, and other consultants, shall be competitively bid pursuant to rules established by ordinance of the City Council. The City Council may establish by ordinance contract amounts below which competitive bidding is not required. Unless otherwise required by ordinance, competitive bidding is not required for work done by City forces, services provided by non-profit organizations, in an emergency, or where competitive bidding is not required by state law.

Pursuant to state law, no officer of the City, whether elected or appointed, shall be financially interested in any contract made by them in their official capacity. Any officer who willfully violates this paragraph shall be guilty of a misdemeanor and shall immediately forfeit his or her office and be thereafter forever barred and disqualified from holding any elective or appointive office in the service of the City.

All contracts entered into in violation of this Section shall be void and shall not be enforceable against said City; provided, however, that officers of this municipality may own stock in public utility service corporations and the City permitted to contract for public utility service when the rates for such service are fixed by law or by virtue of the Public Utilities Commission of the State of California; and provided further, that no officer shall be prohibited from purchasing the services of any utility whether publicly or privately owned, whether or not the rates are fixed by law or by the Public Utilities Commission of the State of California; and provided further, that in designating any bank as a depository for the funds of said City, any officer interested as a stockholder or otherwise in such bank shall not be deemed to have an interest in such City contract within the meaning of this section, and in each of the cases enumerated herein such contracts shall be valid and enforceable obligations against the municipality.
(Amendment voted 03-13-1945; effective 04-09-1945.)
(Amendment voted 03-11-1947; effective 03-24-1947.)
(Amendment voted 03-10-1953; effective 04-20-1953.)
(Amendment voted 09-17-1963; effective 02-11-1964.)
(Amendment voted 11-04-1975; effective 12-01-1975.)
(Amendment voted 11-02-1976; effective 01-12-1977.)
(Amendment voted 09-20-1977; effective 11-18-1977.)
(Amendment voted 11-03-1998; effective 12-04-1998.)
Prior Language

Section 95: Preference in Accepting Bids
(Amendment voted 04-22-1941; effective 05-08-1941.)
(Repeal voted 09-21-1965; effective 02-10-1966.)
Prior Language

Section 96: Progressive Payments
(Amendment voted 03-23-1937; effective 04-14-1937.)
(Repeal voted 09-17-1963; effective 02-11-1964.)
Prior Language

Section 97: Collusion in Bidding

If at any time it shall be found that any party or parties to whom a contract has been awarded has, in presenting any bid or bids, been guilty of collusion with any party or parties in the submission of any bid or for the purpose of preventing any other bid being made, then the contracts so awarded may be declared null and void by the Council and the Council shall thereupon re-advertise for new bids for said work or the incomplete portion thereof. The Council shall debar from future bidding all persons or firms found to be in violation of this Section, or any future firm in which such person is financially interested.

Section 99: Continuing Contracts

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. 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.
(Amendment voted 04-22-1941; effective 05-08-1941.)
(Amendment voted 06-04-1968; effective 07-22-1968.)
Prior Language

Section 99.1: Sports Stadium

For the purpose of acquiring, constructing and completing on a site in Mission Valley not to exceed 200 acres and lying westerly of Murphy Canyon Road, northerly of Highway 80 and southerly of Friars Road, and maintaining and operating thereon a coliseum, stadium, sports arena, sports pavilion or other building, or combination thereof, and facilities and appurtenances necessary or convenient therefor, for holding sports events, athletic contests, contests of skill, exhibitions and spectacles and

other public meetings, the City may, in addition to other legal methods, enter into contracts, leases or other agreements not to exceed fifty years with any other public agency or agencies, and the provisions of Sections 80 and 99 of this Charter shall not be applicable thereto.
(Addition voted 11-02-1965; effective 02-10-1966.)

Section 100: No Favoritism in Public Contracts

No officer or employee of the City shall favor one bidder over another, by giving or withholding information, or shall willfully mislead any bidder in regard to the character of the material or supplies called for, or shall knowingly accept materials or supplies of a quality inferior to that called for by the contract, or shall knowingly certify to a greater amount of labor performed than has actually been performed, or to the receipt of a greater amount of material or supplies than has actually been received. Any officer or employee found guilty of violation of this Section shall forfeit his position immediately.

Section 101: When Contracts and Agreements Are Invalid

All contracts, agreements or other obligations entered into, all ordinances and resolutions passed, and orders adopted, contrary to the provisions of Sections 97 and 100 of this Article may be declared null and void by the Council and thereupon no contractor whatever shall have any claim or demand against the City thereunder, nor shall the Council or any officer of the City waive or qualify the limitations fixed by such section or fasten upon the municipality any liability whatever; provided that all persons who have heretofore furnished material for and/or performed labor on the job shall be protected by the contractor's surety bonds. Any willful violation of these Sections on contracts shall constitute malfeasance in office, and any officer or employee of the City found guilty thereof shall thereby forfeit his office or position. Any violation of these Sections, with the knowledge, expressed or implied of the person or corporation contracting with the City shall render the contract voidable by the Council.

Section 102: Continuance of Contracts
All contracts entered into by the City, or for its benefit, prior to the taking effect of the Charter, shall continue in full force and effect.

Section 35: Purchasing Agent

The Purchasing Agent shall make all purchases of supplies, materials, equipment, and insurance required by the various Departments or offices of the City, except as may be otherwise provided by the Council or this Charter. He shall prepare in consultation with the administrative officers of the City standard specifications for all supplies, materials, equipment, and insurance necessary for use by the various Departments or offices of the City.

In purchasing any supplies, materials, equipment and insurance required by the various Departments or offices of the City, if the cost of said supplies, materials, equipment and insurance exceeds a sum to be established by ordinance of the City Council, no such purchase shall be made without advertising for sealed proposals therefor. Notices calling for such sealed proposals shall be published for one day in the official newspaper of the City, and a contract let for such purpose only after the expiration of ten days following said advertising. If the cost of the said supplies, materials, equipment and insurance required by said City falls within a dollar range also established by ordinance of the City Council, the said purchase may be made by said Purchasing Agent without advertising for sealed proposals, but not until said Purchasing Agent has secured competitive prices from merchants or other persons interested in making the sale to said City and not until the Purchasing Agent has been authorized by the Council to make such purchase. Purchases of supplies, materials, equipment and insurance required by the various Departments or offices of the City which do not exceed in cost a sum established by ordinance of the City Council may be made by the Purchasing Agent directly upon the request of the department interested.

The Council shall by ordinance provide for the sale, exchange or other disposal by the Purchasing Agent of any surplus, used, obsolete or depreciated personal property belonging to the City.

The Council by resolution may order the purchase without advertising for bids of surplus commodities from the United States of America, or any agency thereof, or from any other public corporation, state or municipal, or any agency thereof. The Council may authorize the Purchasing Agent to participate in joint and cooperative purchasing with any other public corporation, state or municipal, or agencies thereof. The Council may also authorize said Purchasing Agent to sell to any other public corporation, state or municipal, any supplies, material and equipment which said City may have been able to purchase in quantity at a reduced price.

Supplies shall be furnished upon requisition either from the stores under the control of the Purchasing Agent or by purchase, and whenever so purchased shall be paid for by the Department or office furnished therewith. It shall be the duty of the Purchasing Agent to inspect or cause to be inspected all purchases, and reject any of those which are not up to the standard specifications provided therefor, and he shall not approve any bid or voucher for articles which are not in conformity with specifications, or which are at variance with

Commented [DM1]: SDMC §22.3003

Commented [DM2]: AR 35.11

Commented [DM3]: SDMC §22.0503

Commented [DM4]: SDMC §22.3203

Commented [DM5]: SDMC §22.3206 <$3M

Commented [DM6]: SDMC §22.3203

Commented [DM7]: SDMC §22.3208 <$25K
SDMC §22.3203(a) $25K - $50K

Commented [DM8]: SDMC §22.0506(a)-(c)

Commented [DM9]: Definition of Agency in SDMC §22.3003

Commented [DM10]: Definition of Cooperative Procurement Contract in SDMC §22.3003

Commented [DM11]: No mention of this

Commented [DM12]: §22.0517, but missing "without advertising"

Commented [DM13]: SDMC §22.0502

Commented [DM14]: Nothing for inspection, but see SDMC §22.0516
Also in City's General Terms and Provisions

Commented [DM15]: Handled in contractual document (RFP or ITB)

any contract. The Purchasing Agent shall not furnish supplies to any Department or office unless there be to the credit thereof an available unencumbered balance sufficient to pay for such supplies.

Materials, supplies or equipment not needed by a Department or office, but necessary to another Department or office, may be transferred by the Purchasing Agent and a proper record made of the transaction. He shall have charge of such storerooms and warehouses of the City as the Manager may provide or the Council by ordinance may authorize. The Council may, upon recommendation of the Manager, authorize the Purchasing Agent to purchase materials, supplies, or equipment in common use by the Departments and offices in large quantities and store the same until requisitioned by the Departments or offices for use. The Council shall provide a sufficient revolving fund in the annual appropriation ordinance of an adequate amount for the purpose of creating a store's account and stock for future supply of the Departments and offices when needed.

The Purchasing Agent shall keep a record of all sources of supply, of all quotations received, of all awards made, of all inspections, of all requisitions filed, and of all vendors furnishing commodities to the City. He shall perform such other duties as may be prescribed by general law or ordinance or by the Manager.
(Amendment voted 03-10-1953; effective 04-20-1953.)
(Amendment voted 11-04-1958; effective 02-19-1959.)
(Amendment voted 11-04-1975; effective 12-1-1975.)
Prior Language

Commented [DM16]: SDMC §22.3015 speaks to "best interests" instead of "conformity with specifications"

Commented [DM17]: SDMC §22.0506

Commented [DM18]: SDMC §22.0501

Commented [DM19]: Nothing stating this

Commented [DM20]: SDMC §22.0501

Commented [DM21]: Records Disposition Schedule

Comments Regarding San Diego Charter's Coverage within the San Diego Municipal Code

Provided below are the citations where selected portions of the Charter—as it applies to contracts—are addressed in the San Diego Municipal Code.

By [i]

Al Rechany
Deputy Director
Public Works Contracts

Section 94: Contracts

In the construction, reconstruction or repair of public buildings, streets, utilities and other public works, when the expenditure therefor shall exceed the sum established by ordinance of the City Council, the same shall be done by written contract, except as otherwise provided in this Charter, and the Council, on the recommendation of the Manager or the head of the Department in charge if not under the Manager's jurisdiction, shall let the same to the lowest responsible and reliable bidder, not less than ten days after advertising for one day in the official newspaper of the City for sealed proposals for the work contemplated. If the cost of said public contract work is of a lesser amount than the figure established by ordinance of the City Council, the Manager may let said contract without advertising for bids, but not until the Purchasing Agent of the City shall have secured competitive prices from contractors interested, which shall be taken under consideration before said contract is let. The Council may, however, establish by ordinance an amount below which the Manager may order the performance of any construction, reconstruction or repair work by appropriate City forces without approval by Council. When such Council approval is required, the Manager's recommendation shall indicate justification for the use of City forces and shall indicate whether the work can be done by City forces more economically than if let by contract.

Commented [RA1]: Covered in SDMC § 22.3008 Invitations to Bid, Requests for Qualifications and Proposals

Commented [RA2]: Covered in SDMC § 22.3106 Advertising of Public Works Contracts

Commented [RA3]: Covered in SDMC §22.3102 City Manager's Authority to Award Public Works Contracts

Commented [RA4]: Covered in SDMC § 22.3105 Use of City Forces

In case of a great public calamity, such as extraordinary fire, flood, storm, epidemic or other disaster the Council may, by resolution passed by a vote of two-thirds of the members elected to the Council, determine and declare that the public interest or necessity demands the immediate expenditure of public money to safeguard life, health or property, and thereupon they may proceed, without advertising for bids or receiving the same, to expend, or enter into a contract involving the expenditure of any sum required in such emergency, on hand in the City treasury and available for such purpose. All contracts before execution shall be approved as to form and legality by the City Attorney.

Each bidder shall furnish with his bid such security or deposit insuring the execution of the contract by him as shall be specified by the Council or as provided by general law.

For contracts exceeding $100,000.00, the Council shall require each contractor to insure the faithful performance of his contract by delivering to the City a surety bond in an amount specified by the Council, executed by a surety company authorized to do business in the State of California; provided, however, that in all contracts the Council shall require the retention of sufficient payments, under the contract to insure the protection of the City against labor or material liens.

The Council, on the recommendation of the Manager, or the Head of the Department not under the jurisdiction of the Manager, may reject any and all bids and readvertise for bids. The Council may provide that no contract shall be awarded to any person, firm or corporation if prison or alien labor is to be employed in performing such contract, or if the wage schedule for employees engaged in performing such contract is based on more than eight hours of labor per day. Any contract may be let for a gross price or on a unit basis and may provide for liquidated damages to the City for every day the contract is uncompleted beyond a specified date. It shall be competent in awarding any contract to compare bids on the basis of time completion, provided that when any award has been made in consideration, in whole or in part, of the relative time estimates of bidders for the completion of the work, the performance in accordance with such time limits shall be secured by a surety bond as hereinabove provided with adequate sureties and penalties, and provided further, that for any contract awarded solely or partially on a specified time for completion the Council shall not extend such time limits unless such extension be recommended by the Manager and the Head of the Department concerned.

No officer, whether elected or appointed, of The City of San Diego shall be or become directly or indirectly interested in, or in the performance of, any contract with or for The City of San Diego, or in the purchase or lease of any property, real or personal, belonging to or taken by said City or which shall be sold for taxes or assessments or by virtue of legal process or suit of said City. Any person willfully violating this section of the Charter shall be guilty of a misdemeanor and shall immediately forfeit his office and be thereafter forever barred and disqualified from holding any elective or appointive office in the service of the City. No officer, whether elected or appointed, shall be construed to

Commented [RA5]: Covered in SDMC §22.3108 Exceptions to Advertisement and Competitive Award of Public Works Contracts

Commented [RA6]: Covered in SDMC § 22.3005 Insurance and Bonds

Commented [RA7]: Covered in SDMC § 22.3015 Rej of Bids and Proposals

Commented [RA8]: Partially covered under:
§ 22.3500: Nondiscrimination in Contracting
§ 22.4200 Living Wage Ordinance
§22.4400 Fair and Open Competition in Construction

Commented [RA9]: Covered by SDMC:
§22.3003 [Contract] Definitions
§22.3100 Public Works Contracts

Commented [RA10]: Covered in SDMC § 22.3005 Insurance and Bonds

have an interest within the meaning of this section unless the contract, purchase, lease, or sale shall be with or for the benefit of the office, board, department, bureau or division with which said officer is directly connected in the performance of his duties and in which he or the office, board, department, bureau or division he represents exercises legislative, administrative or quasi-judicial authority in the letting of or performance under said contract, purchase, lease or sale.

All contracts entered into in violation of this Section shall be void and shall not be enforceable against said City; provided, however, that officers of this municipality may own stock in public utility service corporations and the City permitted to contract for public utility service when the rates for such service are fixed by law or by virtue of the Public Utilities Commission of the State of California; and provided further, that no officer shall be prohibited from purchasing the services of any utility whether publicly or privately owned, whether or not the rates are fixed by law or by the Public Utilities Commission of the State of California; and provided further, that in designating any bank as a depository for the funds of said City, any officer interested as a stockholder or otherwise in such bank shall not be deemed to have an interest in such City contract within the meaning of this section, and in each of the cases enumerated herein such contracts shall be valid and enforceable obligations against the municipality.
(Amendment voted 03-13-1945; effective 04-09-1945.)
(Amendment voted 03-11-1947; effective 03-24-1947.)
(Amendment voted 03-10-1953; effective 04-20-1953.)
(Amendment voted 09-17-1963; effective 02-11-1964.)
(Amendment voted 11-04-1975; effective 12-01-1975.)
(Amendment voted 11-02-1976; effective 01-12-1977.)
(Amendment voted 09-20-1977; effective 11-18-1977.)
(Amendment voted 11-03-1998; effective 12-04-1998.)
Prior Language

Section 94.1: Job Order Contracts

Notwithstanding any provisions of this Charter to the contrary, the City is not prohibited from awarding public works contracts on a unit cost basis for all necessary labor, materials, and equipment provided such contracts are secured on a competitive basis as otherwise required by this Charter. The City Council shall establish by ordinance guidelines for the award and use of such unit cost contracts, and may set an amount below which the City Manager may award such contracts.
(Addition voted 11-03-1998; effective 12-04-1998.)

Commented [RA11]: Covered in SDMC §22.3104 City Manager's Authority to Award Task Orders Under Job Order Contracts and
22.3103-4 City Manager's Authority to Award Job Order Contracts

Section 94.2: Design-build Contracts

Notwithstanding any provisions of this Charter to the contrary, the City is not prohibited from awarding contracts for the combined design and construction of public works

pursuant to a process of competitive negotiation, provided the process of competitive negotiation is conducted as may otherwise be required by this Charter or the Municipal Code. The City Council shall establish by ordinance guidelines for the award, use, and evaluation of such design-build contracts, and may set an amount below which the City Manager may award such contracts.
(Addition voted 11-03-1998; effective 12-04-1998.)

Commented [RA12]: Covered in SDMC §22.3300 Design-Build Contracts

Section 94.3: Bond Reimbursement Program

Nothing in this charter shall prohibit the City Council from creating a program by ordinance to reimburse contractors for all or a portion of the premium paid by a contractor for a surety bond required under Section 94 of this Charter. If it creates a bond reimbursement program, the Council shall by ordinance establish eligibility criteria for contractors, levels and thresholds of reimbursement, the process for seeking reimbursement, and other requirements for operation of, and participation in, the program.
(Addition voted 11-03-1998; effective 12-04-1998)

Section 94.4: Construction Manager At Risk Contracts

Notwithstanding any provisions of this Charter to the contrary, the City is not prohibited from awarding contracts for the construction of public works using a combination of: (1) design review and management services; and (2) construction management services procured from a single person or entity for a guaranteed maximum price pursuant to a process of competitive negotiation, provided the process of competitive negotiation is conducted as may otherwise be required by this Charter or the Municipal Code. The City Council shall establish by ordinance guidelines for the award, use, and evaluation of such construction manager at risk contracts, and may set an amount below which the City Manager may award such contracts.
(Addition voted 3-2-2004; effective 07-15-2004)

Commented [RA13]: Covered in SDMC §22.3401 Alternative Procurement of Design-Build Contracts for Qualifying Complex Public Facilities

Section 95: Preference in Accepting Bids
(Amendment voted 04-22-1941; effective 05-08-1941.)
(Repeal voted 09-21-1965; effective 02-10-1966.)
Prior Language

Section 96: Progressive Payments
(Amendment voted 03-23-1937; effective 04-14-1937.)
(Repeal voted 09-17-1963; effective 02-11-1964.)
Prior Language

Section 97: Collusion in Bidding

If at any time it shall be found that any party or parties to whom a contract has been awarded has, in presenting any bid or bids, been guilty of collusion with any party or parties in the submission of any bid or for the purpose of preventing any other bid being made, then the contracts so awarded may be declared null and void by the Council and the Council shall thereupon re-advertise for new bids for said work or the incomplete portion thereof. The Council shall debar from future bidding all persons or firms found to be in violation of this Section, or any future firm in which such person is financially interested.

Commented [RA14]: Covered in § 22.3009 Timely and Responsive Submission of Bids and Proposals

Section 98: Alteration in Contracts

Whenever it becomes necessary in the opinion of the City Manager to make alterations in any contract entered into by the City, such alterations shall be made only when authorized by the Council upon written recommendation of the Manager, whenever the cost of such alterations increases the amount of the contract by more than the amount authorized by ordinance passed by the Council. No such alterations, the cost which exceeds the amount authorized by ordinance, shall be valid unless the new price to be paid for any supplies, materials, or work under the altered contract shall have been agreed upon in writing and signed by the contractor and the Manager prior to such authorization by the Council. All other alterations shall be made by agreement in writing between the contractor and the Manager.
(Amendment voted 06-07-1966; effective 06-29-1966.)
(Amendment voted 11-04-1975; effective 12-01-1975.)
Prior Language

Commented [RA15]: Covered in SDMC § 22.3018 Alterations in Contracts

Section 99: Continuing Contracts

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. 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 after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.
(Amendment voted 04-22-1941; effective 05-08-1941.)
(Amendment voted 06-04-1968; effective 07-22-1968.)
Prior Language

Section 99.1: Sports Stadium

For the purpose of acquiring, constructing and completing on a site in Mission Valley not to exceed 200 acres and lying westerly of Murphy Canyon Road, northerly of Highway 80 and southerly of Friars Road, and maintaining and operating thereon a coliseum, stadium, sports arena, sports pavilion or other building, or combination thereof, and facilities and appurtenances necessary or convenient therefor, for holding sports events, athletic contests, contests of skill, exhibitions and spectacles and other public meetings, the City may, in addition to other legal methods, enter into contracts, leases or other agreements not to exceed fifty years with any other public agency or agencies, and the provisions of Sections 80 and 99 of this Charter shall not be applicable thereto.
(Addition voted 11-02-1965; effective 02-10-1966.)

General Comments

The Charter is well represented in the Municipal Code with respect to Public Works construction.

However, applicable sections of the Charter are not appropriately included in the Municipal Code with respect to applicable sections in Chap 02 Art 02 Div. 32, Contracts for Services, Goods, and Consultants; specifically, as it applies to Consultant Contracts.

TAB 6

Language for 26.1

It shall be the obligation and responsibility of the City of San Diego to provide services for the safety, health and welfare of the citizens of San Diego under such terms and conditions as may be authorized by the Council by ordinance.

TAB 7

REMOVE 32.1 (current)

Section 32.1: Responsibility of Manager and Non-managerial Officers to Report to Council The City Manager and all non-managerial officers of the City shall inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council as provided under this Charter except as may be otherwise controlled by the laws and regulations of the United States or the State of California. The Manager and all non-managerial officers shall also comply promptly with all lawful requests for information by the Council.

Current 270(h)

Any City official or department head in the administrative service may be summoned to appear before the Council or any committee of the Council to provide information or answer any question.

Updated 270(h) to incorporate 32.1 plus process for summons

The Mayor and all non-mayoral departments of the City shall inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council as provided under this Charter, including but not limited to Article III, consistent with applicable provisions of law.

(H)(1) The Council President may summon a City official or staff member in the administrative service to appear on any subject before the City Council. Such request shall be by memorandum to the Mayor, who shall determine appropriate staff, at his/her sole discretion, to appear before the Council 45 calendar days after the request by the Council President or at the next regular meeting.

(H)(2) Four Councilmembers may summon a City official or staff member in the administrative service to appear on any subject before the City Council. Such request shall be by memorandum to the Mayor, who shall determine the appropriate staff at his/her sole discretion, to appear before the Council 45 calendar days after the request by the four Councilmembers or at the next regular meeting.

(H)(3) A committee of the Council may summon a City official or staff member in the administrative service to appear on any subject before the Committee. Such request shall be made upon the affirmative vote of two or more committee members to the Mayor, who shall determine the appropriate staff at his/or her sole discretion, to appear before the committee of the Council at its next regularly scheduled meeting.

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

JENNIFER L. BERRY
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

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CITY ATTORNEY

CIVIL ADVISORY DIVISION
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SAN DIEGO, CALIFORNIA 92101-4178
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FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: January 29, 2016

TO: Charter Review Committee

FROM: City Attorney

SUBJECT: San Diego Charter section 32.1 and Subpoena Power

INTRODUCTION

At the November 4, 2015 meeting of the Charter Review Committee (Committee), the Committee requested the City Attorney provide a legal analysis of the City Council's (Council) power to subpoena information from the Mayor or other city officers, including how subpoena power would or would not change the current legal relationship between the Council and the Mayor and his staff; and if Council desires subpoena power, whether an ordinance or amendment to the San Diego Charter (Charter) is necessary to provide subpoena power.

QUESTIONS PRESENTED

1. What are the current obligations of the Mayor and other City officers to provide information to the Council under the Charter?

2. Is subpoena power necessary to require officials to comply with current Charter requirements?

3. If the Council wishes to exercise subpoena authority more broadly than currently provided in the Charter or the California Government Code (Government Code), can they do so by ordinance or is a Charter amendment necessary?

SHORT ANSWERS

1. Charter section 32.1 requires the Mayor and non-managerial officers to inform the Council of material facts or significant developments of matters within the Council's jurisdiction. This duty is self-executing and thus does not require the Council to first request information. The Mayor and non-managerial officers must provide material facts or significant

developments that may affect the Council's ability to make an informed decision prior to any Council decision on a matter within its jurisdiction. In addition, Charter sections 265(b)(13) and 270(h) require the Mayor to respond to requests for budget information and give the Council the authority to summon any City official or department head to appear before the Council or committee to provide information or answer questions.

2. Subpoena power is not necessary because the Council can summon an official or department head to provide information or answer questions. Furthermore, the Council has subpoena power as provided for in the Government Code.

3. If Council desires subpoena authority broader than what is currently provided in the Charter or the Government Code, that authority must be included in the Charter.

ANALYSIS

I. THE CHARTER REQUIRES OFFICERS TO PROVIDE THE COUNCIL INFORMATION

The Charter defines the roles of the Mayor and the Council. In general, the Mayor is responsible for the day-to-day administrative affairs of the City. San Diego Charter §§ 28 and 265. The Council is the legislative body and sets policy. San Diego Charter §§11 and 11.1. Because the Council does not have an administrative role, it must rely on the Mayor and administrative staff for information and advice.

Voters added Charter section 32.1 to the Charter in 1992. It requires the City Manager and all non-managerial officers of the City of San Diego (City) to inform the Council of "material facts or significant developments" on matters before the Council. Charter section 32.1 states:

> **Section 32.1: Responsibility of Manager and Non-managerial Officers to Report to Council**
>
> The City Manager and all non-managerial officers of the City shall inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council as provided under this Charter except as may be otherwise controlled by the laws and regulations of the United States or the State of California. The Manager and all non-managerial officers shall also comply promptly with all lawful requests for information by the Council.

San Diego Charter § 32.1.

The ballot argument in favor of the Charter amendment stated that the section: "is necessary to assure the citizens and taxpayers of this City that its elected officials are fully and completely informed by the City staff concerning all material and significant developments under the City Council's jurisdiction."[1] The argument referenced the City Manager's failure to disclose to the Council allegations of sexual harassment in the Planning Department and noted: "[u]nless the Mayor and Council members are fully informed about all material circumstances, how can they be expected to diligently and intelligently make those hard decisions?"[2]

The responsibilities are two-fold: (1) inform the Council of all material facts or significant developments related to matters under the Council's jurisdiction, and (2) comply promptly with all lawful requests for information by the Council.[3] The responsibility to inform of significant developments is self-executing and thus requires no request from Council.

Charter section 32.1 applies to the Mayor and all "non-managerial officers."[4] "Non-managerial officers" refers to those City officers who do not report to the Mayor. Several Council Policies refer to "non-managerial" departments as those separate from the departments under the City Manager's authority. *See* Council Policies 300-10 and 700-37; San Diego Charter §§ 38, 39.2, 39.3, 40, 41(c).

II. THE CHARTER REQUIRES THE MAYOR TO PROVIDE INFORMATION UPON REQUEST TO THE COUNCIL

The Committee requested an analysis of providing the Council subpoena power to request information under Charter section 32.1. Black's Law Dictionary defines subpoena as, "A writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply." Black's Law Dictionary 1654 (10th ed. 2014). Section 32.1 is silent regarding subpoena power, but the Council already has several methods to request information.

The Mayor is required to respond to requests for information regarding the budget process and the fiscal condition of the City pursuant to Charter section 265(b)(13). The Council also has the power to summon the Mayor, other officials, or department heads pursuant to section 270(h). The Charter provides, "Any City official or department head in the administrative service may be summoned to appear before the Council or any committee of the Council to provide information or answer any question." San Diego Charter § 270(h).[5,6] The San Diego Municipal Code (Municipal Code) reinforces this requirement by providing that the Mayor or appropriate department is, upon a request by a standing committee, to "cooperate fully in

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[1] *See*, Ballot Pamp., Primary Elec. (June 2, 1992), argument for Prop. D.

[2] *Id.*

[3] *See* 2009 City Att'y Report 613 (2009-27; Oct. 27, 2009), pp. 3-4, attached, for analysis of what constitutes "material" and "prompt." "Material" means information that could influence Council decisions. What is considered "prompt" is dependent on the nature and circumstances of a specific request.

[4] The City Manager's responsibilities in Charter section 32.1 were transferred to the Mayor on January 1, 2006 as part of the new Strong Mayor form of government. *See* San Diego Charter § 260.

[5] To the extent Council summons officers with Charter mandated duties, the power to summon may be subordinate to a particular duty; for example, Council would not be able to interfere with the Auditor's duty to conduct audits under Charter section 39.2.

[6] Charter section 270(h) allows the Council to summon department heads, but department heads have no individual duty to inform Council of developments pursuant to Charter section 32.1, apart from the Mayor's duty to inform.

providing the information required by the committee." SDMC § 22.0101, Rule 6.5.3. Rule 6.5.3 also requires the committee consultant to "make inquiry of the Mayor or appropriate department" to determine the fiscal impact of a proposal referred to the committee before acting on the matter. *Id.* [7,8]

Broad legislative subpoena power has long been recognized as essential to enforce a legislative body's power of inquiry. *Connecticut Indem. Co. v. Superior Court*, 23 Cal. 4th 807, 813 (2000), *citing McGrain v. Daugherty,* 273 U.S. 135 (1927). While there is no procedure for general legislative subpoena power either in the Charter or in the Municipal Code, Charter section 2 provides that the City "is authorized to exercise any and all rights, powers and privileges heretofore or hereafter granted by General Laws of the State." As the legislative body of the City, the Council can exercise general legislative subpoena power according to the procedure provided by the Government Code. Cal. Gov't. Code §§ 34000, 37104.

A "legislative body may issue subpoenas requiring the attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding before it." Cal. Gov't. Code § 37104. Courts broadly interpret "action or proceeding before it" to encompass all investigations within the legitimate functions of a legislative body, requiring no pending formal proceedings. *City of Vacaville v. Pitamber*, 124 Cal. App. 4th 739, 748 (2004). This procedure would allow Council to subpoena members of boards and commissions, as well as outside parties, for information pertaining to a Council investigation.

III. THE COUNCIL CAN PROVIDE FOR SUBPOENA POWER IN CONFLICT WITH STATE LAW BY CHARTER

The Council may wish to exercise subpoena power as opposed to a request under Charter section 265(b)(13) or a summons under Charter section 270(h). A legislative subpoena issued pursuant to the Government Code requires the Mayor's signature, so it may not be an effective tool for the Council to require the Mayor or Mayoral departments to provide information. Cal. Gov't. Code § 37105. However, subpoena power regarding issues before the Council is a municipal affair, so general law provisions governing legislative subpoenas do not bind the City. *Brown v. City of Berkeley,* 57 Cal. App. 3d 223, 236 (1976).

If the Council wished exercise legislative subpoena power under different terms than provided by the Government Code, it should provide for legislative subpoena power in the Charter. The powers and duties of public officers are derived by charter and ordinances passed pursuant to the charter. *Wilbur v. Office of City Clerk of City of Los Angeles*, 143 Cal. App. 2d 636, 643 (1956). "When a charter creates a public office or body, the charter is the source of the body's or officer's authority and responsibilities." 2010 City Att'y MOL 312 (2010-12; Jun. 10, 2010), *citing* 2A McQuillin Mun. Corp. § 9:3 (3rd ed. 2010). Currently, the Charter provides the

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[7] Rule 6.5.4 gives the Mayor and other officials the right to attend and participate in committee meetings, whether they choose to attend or attend by Council request. SDMC § 22.0101. This rule does not relieve officials of any Charter obligations, including the duty to provide information pursuant to Charter section 32.1. Nor does this rule relieve officials of cooperating fully to provide information pursuant to Rule 6.5.3.

[8] This Office has previously recommended the creation of a mutually agreeable policy or procedure to handle the dissemination of information required by the Charter. 2009 City Att'y Report 613 (2009-27; Oct. 27, 2009), p. 4, attached.

Council subpoena power only for judging the "election and qualification of its members," and to conduct investigations relating to the Civil Service provisions of the Charter and Civil Service rules. San Diego Charter §§ 14, 128. The Council can further exercise legislative subpoena power as provided by the Government Code pursuant to its authority to exercise powers granted under California General Law. San Diego Charter § 2. Since the Charter defines the Council's authority, voters may grant Council authority to subpoena upon terms that differ from the Government Code via Charter amendment.

CONCLUSION

The Mayor and non-managerial officers have a duty to inform the Council of material facts or significant developments regarding matters within the Council's jurisdiction. This duty is self-executing and does not require Council to first request information. If the information is not forthcoming, the Council may summon any City official or department head to answer questions and provide information. If the Council wishes to have subpoena authority broader than currently provided in the Charter or state law, the authority would need to be provided in the Charter.

JAN I. GOLDSMITH, CITY ATTORNEY

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

JLB:sc:ccm
Attachment
ML-2016-4
Doc. No. 1215146

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October 27, 2009

REPORT TO THE COMMITTEE ON RULES, OPEN GOVERNMENT AND INTERGOVERNMENTAL RELATIONS

PROPOSED CHARTER AMENDMENTS RELATING TO THE MAYOR-COUNCIL FORM OF GOVERNANCE.

INTRODUCTION

On October 14, 2009, the Committee on Rules, Open Government, and Intergovernmental Relations [Committee] began discussions of the June 2010 ballot measure to continue the Mayor-Council form of governance. During the meeting, questions were raised about other possible amendments to the Charter relating to the relationship between the Mayor and the Council. This report answers these questions as more fully set forth in an October 14, 2009 memorandum from Council President Ben Hueso.

DISCUSSION

I. HOUSEKEEPING

The Committee suggested that the Charter be amended to change "City Manager" to "Mayor" as appropriate. This suggestion was raised in our October 9, 2009 report to the Committee. This would require an integrated version of the ballot measure that would remove Article XV from the Charter and move its provisions into other sections of the Charter.

The "short version" provided to the Committee contains a provision that states: "All executive authority, power, and responsibilities conferred upon the City Manager in Article V, Article VII, and Article IX shall be transferred to, assumed, and carried out by the Mayor during the period of time this Article is operative." If the "short version" is used, it is not necessary to make the suggested housekeeping changes. On the other hand, an integrated version of the ballot measure would make changes to replace "City Manager" to "Mayor" throughout the Charter. Our Office will provide an integrated version of the ballot measure to the Committee if requested to do so.

II. TITLE

The Committee has suggested that the title of Article XV be changed from "Strong Mayor Form of Governance" to "Strong Mayor/Strong Council Form of Governance." The purpose of Article XV was to: "modify the existing form of governance for a trial period of time to test implementation of a new form of governance commonly known as a Strong Mayor form

of government." Charter § 250.[1] The Charter requires the Council to place a measure on the ballot to make Article XV permanent. Charter § 255(c). Currently, the "short form" ballot measure shows the title of Article XV as: "Strong Mayor ~~Trial~~ Form of Governance." In order to fulfill the direction in the Charter, we recommend that the title of Article XV remain as suggested in the "short version."

There are two options to resolve this issue. First, if the Council decides to use an integrated ballot measure, Article XV would be removed and there would be no title to modify. The provisions in Article XV would be moved to other portions of the Charter. Second, a separate ballot measure may be placed before the voters in June 2010 or at a later time to amend the title of Article XV.

III. APPOINTMENTS

The Committee has suggested that the Charter be amended to give the Council power to make appointments of Councilmembers to outside organizations. With respect to appointments to these non-City boards, Charter section 265 states:

> (b) . . . [T]he Mayor shall have the following additional rights, powers, and duties:
>
> (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.

An amendment to section 265(b)(12) would need to be presented in a ballot measure separate from the measure considering the continuance of the current form of government. Although additional research may be necessary, the following language is provided for discussion:

> (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. <u>If the controlling law requires the appointee to be a Councilmember, the Council shall make the appointment unless the controlling law vests the power in the Mayor or a City Official other than the Council.</u>

This language provides that the Council will make appointments when the controlling law requires the appointee to be a Councilmember, unless the appointment authority is otherwise provided for by law. The Mayor will have the authority to veto a resolution making these

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[1] The "Strong Mayor" form of government is also commonly referred to as a "Mayor-Council" form of government. See 2A McQuillin Mun. Corp. § 9:20 (3rd ed.) (2009).

appointments if it is determined that the appointment is not exclusively within the purview of the Council and does not affect the administrative service of the City under the control of the Mayor. Charter § 280(a).

IV. COMMUNICATION

The Committee has asked for guidance on the Mayor's obligation to provide information to the Council under Charter sections 28 and 32.1. The relevant portion of Charter section 28 requires the City Manager to: "keep the Council advised of the financial condition and future needs of the City; to prepare and submit to the Council the annual budget estimate and such reports as may be required by that body." Charter section 32.1 is less specific about the type of information the Manager must provide to the Council:

> The City Manager and all non-managerial officers of the City shall *inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council* as provided under this Charter except as may be otherwise controlled by the laws and regulations of the United States or the State of California. The Manager and all non-managerial officers shall also *comply promptly with all lawful requests for information by the Council.* [Emphasis added].

The responsibility of the Manager to provided information under sections 28 and 32.1 has been transferred to and assumed by the Mayor during the 5 year trial period of the Mayor-Council form of governance. Charter § 260(b).

The Committee has asked various questions about these sections: (1) how long after learning of all material facts or significant developments should the Council be informed of such information; (2) how long after Council makes a lawful request should the Mayor and/or department heads be required to provide the information; and (3) can the Council require that information be given to the Council within a reasonable time before the information is disseminated to outside parties.

As discussed below, we cannot recommend any specific time period for the Mayor to provide information to the Council. In each case, the length of time to respond or provide information will be dependent on the specific facts and circumstances.

One of the circumstances that could affect the Mayor's obligation to provide information is whether the matter is within the Council's jurisdiction. The separation of powers doctrine applied to federal and state governments is not generally applicable to mayor-council plans of government. *Casamasino v. City of Jersey City*, 158 N.J. 333, 343, 730 A.2d 287, 293 (1999) However, *principles* of separation of powers are applicable where the source of the powers, in our case the City Charter, has specifically delegated to the Mayor and to the Council separate functions. Where one branch of government has been specifically vested with the authority to act in a prescribed manner, neither of the other branches may usurp that authority. *Ibid.*

The Mayor is in charge of the day to day activities of the City. He is required to prepare the budget and other financial information for Council consideration. He also supervises the administration of the City's affairs. Charter § 28. While the Council has oversight and makes final decisions on legislative and budgetary matters, the requests for information must be within the Council's jurisdiction.

Another factor to consider is whether the information is "material." "Material" is defined as: "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Blacks Law Dictionary 1066 (9th ed. 2009). Applying this definition to section 39.1, it appears that the Mayor must inform the Council of material facts or significant developments when the Council is making a decision where knowledge of such facts would affect the decision. To apply a broader interpretation would place the Mayor in the difficult position of constantly determining whether an event is significant enough to disclose to the Council even though there may be no decisions pending at that time. Nonetheless, we recommend that the Mayor use his best judgment to keep the Council informed of significant matters as appropriate, even if no decision is contemplated at that time.

Second, Blacks Law Dictionary states that the meaning of "promptly" depends largely on the facts in each case. What is "prompt" in one situation may not be considered such under other circumstances or conditions. Blacks Law Dictionary 1214 (6th ed. 1990). We note that the California Public Records Act requires that an agency "make records promptly available". Cal. Gov't Code § 6253(b). However, the Act allows 10 days to respond to a request for records, which timeline may be extended up to 14 days in unusual circumstances. Cal. Gov't Code § 6253(c). Accordingly, it would not be appropriate to specify a particular length of time for the Mayor to provide requested information. Instead, the obligation to "promptly" comply with a request for information will depend on the nature and circumstances of the request.

Third, the question of the timing of the release of information to the public and the Council may also depend on the circumstances. There may be situations where the nature of the matter is such that simultaneous release of information to the Council and the public may be necessary or appropriate.

The Charter gives the Council the ability to request information from the Mayor. In addition, Council committees may request any City official or department head to provide information or answer any questions. Charter § 270(h). Accordingly, we do not recommend any changes to the Charter. However, the Mayor and Council may wish to discuss a mutually agreeable policy or procedure to handle the dissemination of information.

CONCLUSION

The Committee has suggested amendments to the Charter relating to the current Mayor-Council form of government. It is also suggested that these amendments be included in the ballot measure required under Charter section 255(c). As we noted in our October 9, 2009 report, this provision is intended to have the voters determine whether to continue the Mayor-Council form of government, add a Council district, and increase the veto override. It does not authorize

additional amendments to the Charter in the ballot measure. Accordingly, if the Council wants the voters to consider further alterations or refinements to this form of governance, a second companion ballot measure would be necessary.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By Catherine M. Bradley
Catherine M. Bradley
Chief Deputy City Attorney

CMB:lkj
RC-2009-27

TAB 8

THE CITY OF SAN DIEGO

REPORT TO THE CITY COUNCIL

DATE ISSUED: March 23, 2016 REPORT NO: 16-030

ATTENTION: Charter Review Committee

SUBJECT: Relocating Executive Activity Found Throughout the Charter to Article IV – The Mayor.

REFERENCE:

REQUESTED ACTION: Move Charter sections addressing Executive activity to Article IV, including but not limited to sections 260 – Integration of Article with Charter and 265 – The Mayor.

STAFF RECOMMENDATION: Approve the requested action.

SUMMARY:
The requested action is to relocate and consolidate primarily executive activity found throughout the Charter in Article 4 – The Mayor. March 2, 2016 Charter Review Committee considered and approved relocating and consolidating primarily legislative activity found throughout the Charter in Article 3 – The City Council.

Charters and constitutions typically describe the activities of their legislative and executive branches in those branches' respective articles. Until 2006, the City of San Diego's legislative and executive activities were located in Article 3 – Legislative Power and Article 4 – The Mayor.

In 2005, the authors and proponents of the Strong Mayor form of government presented that new form of governance to the voters in one complete new Article 15 – Strong Mayor. A decade later, the Mayor – Council form of government is established and relocating primarily legislative and executive activities to their historically assigned Articles would be less confusing and more appropriate.

FISCAL CONSIDERATIONS: None

PREVIOUS COUNCIL and/or COMMITTEE ACTION: None

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: None

KEY STAKEHOLDERS AND PROJECTED IMPACTS: None

Originating Department: Council District 1

TAB 9

Options: Consider elimination or clarification with respect to other transparency laws.

Level: 3

Charter § 117(c) Unclassified and Classified Services

Issue: This section was added by Charter amendment in 2006 to provide authority for the City to hire an independent contractor as an alternative to employees in the classified service when the Mayor determines, and the Council agrees, that the City services can be provided more economically and efficiently by an independent contractor than by persons in the classified service while maintaining service quality and protecting the public interest. However, the Charter-mandated process is ambiguous. The section should be clarified to address issues, including whether there are circumstances in which the Mayor may make the required determination by using other means to compare City forces to the cost and efficiency of a contractor (such as budget figures), and whether the Mayor has to use the Managed Competition Independent Review Board.

Options: Resolve ambiguities and propose amendments through meet and confer process with the City's impacted employee organizations.

Level: 3

Charter § 118 Rules

Issue: There is no discussion or recognition in this section as to how the Civil Service Commission, in recommending new Civil Service Rules (Rules) or modifications to Rules, interacts with the meet and confer process required under the MMBA. Language in Charter section 118 that explains that any rule change that relates to a mandatory subject of bargaining under the MMBA is subject to the MMBA would be appropriate. However, this is not necessarily a legal problem because under clear California authority, the City's Charter must be read in conjunction with the MMBA. Therefore, section 118 and the Civil Service Commission process for recommending Civil Service Rule changes must recognize the MMBA, whether it says so in the Charter or not.

Options: Add the following language: "The City Council must ensure compliance with the Meyers-Milias-Brown Act or other state or local law related to collective bargaining before it adopts any new rule or amendment to an existing rule that involves a mandatory subject of bargaining."

Level: 2 or 3

TAB 10

Charter § 129.1 Removal of Striking Employees

Issue: Charter section 129.1 provides limitations on the ability of City employees to engage in "strike" activities. This provision, which was adopted in 1976, is not consistent with current California law. Given the current state of California case law, Charter section 129.1 is overly broad and likely subject to challenge. *See, City of San Jose v. Operating Engineers Local Union No. 3*, 49 Cal. 4th 597, 601 (2010), stating that common law "allows public employees to go on strike to enforce their collective bargaining demands unless the striking employees perform jobs that are essential to public welfare." The Court further explained that a threatened strike may be unlawful if it creates "a substantial and imminent threat to public health and safety." *Id.* at 606. Closer review of this provision should be done to conform to controlling state law.

Options: Recommend engaging in meet and confer to develop revisions narrowing the language to conform to state law.

Level: 2 or 3

Charter § 140 Establishment of Separate Retirement Pension Systems; Definitions

Issue: This section was added by Proposition B. It provides that all officers and employees who are initially hired or assume office after the effective date of this section (July 20, 2012) may participate only in defined contribution plans and not in SDCERS (the defined benefit plan), with the exception of sworn police officers. As a result, police recruits participating in the City's police academy must participate in an alternate defined contribution plan for the six months they are in the academy, and must move to the defined benefit plan when they become sworn officers. It is inefficient to have them contribute for such a short period of time in a defined contribution plan.

Options: Amend section 140 to allow police recruits participating in the City's police academy to participate in the defined benefit plan.

Level: 3

Charter § 142 Employment of Actuary

Issues: Section 142 references "subdivision (k) of Section 118 of Article VIII of this Charter." Due to amendments to section 118 in the 1940's, subdivision (k) was removed from the Charter.

Options: Amend to delete the reference to section 118(k).

Level: 3

TAB 11

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: September 18, 2015

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Interest Payments to the San Diego City Employees' Retirement System Associated with Underpaid Contributions or Overpaid Benefits

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INTRODUCTION

The San Diego City Council (Council), through its San Diego Charter (Charter) Review Committee, has asked for legal analysis related to the authority of the City of San Diego (City) to pay interest to the San Diego City Employees' Retirement System (Retirement System or SDCERS), on behalf of active employees, who unknowingly underpay their employee contributions to SDCERS, and on behalf of retired employees, who unknowingly receive overpaid benefits. The interest is charged by SDCERS in association with the underpayments or overpayments.

The SDCERS Board of Administration (Board) has submitted a proposal to the Council's Charter Review Committee. *See* Attachment 1. The Board is requesting placement of a proposed Charter amendment on a future ballot to allow the City to pay the interest and other amounts associated with errors by SDCERS staff members. The Charter Review Committee has asked whether the City can pay this interest, without the proposed Charter amendment.

QUESTIONS PRESENTED

1. Based on current law, can the City pay interest to SDCERS on behalf of active employees, who must make up underpaid employee contributions?

2. Based on current law, can the City pay interest to SDCERS on behalf of retired employees, who must repay overpaid benefits?

SHORT ANSWERS

1. No, unless the Charter is amended, as suggested by the Board, at Attachment 1. Charter section 141.2, which was added by voters approving Proposition B in 2012, states, in part: "The City shall not pay, cap the employee contribution rate, or otherwise compensate for any portion of a contribution to the Retirement System by a City Officer or employee." If an employee underpays a required contribution, then no interest is earned on that contribution. When the underpayment is discovered, the Retirement System fund must be made whole, which means both the underpaid contribution and the associated interest must be paid into the fund. The interest is associated with the employee contribution, and cannot be paid by the City because of the prohibition set forth in Charter section 141.2. Voter approval of the Board's proposal at Attachment 1 would be necessary to enable the Council to consider paying interest on behalf of employees who must make up contributions.

2. Yes, but the Council must first determine that there is a public purpose served by the payment of interest on behalf of retired employees who are overpaid benefits and must repay the Retirement System, with interest. There is no language in the Charter prohibiting the payment of interest; however, the Council must find that the payment of interest on behalf of retired employees serves a public purpose, and is not a gift of public funds, in violation of Charter section 93.

BACKGROUND

The Charter provides that the Council may, by ordinance, establish a defined benefit pension plan (DB Plan or Plan) for certain eligible employees. San Diego Charter § 141. Through the adoption of a series of ordinances, the Council has established the DB Plan, which includes the conditions of eligibility for and benefits of the Plan. *See* San Diego Charter § 141; San Diego Municipal Code (SDMC) §§ 24.0100 – 24.1905. The Council's ordinances must comply with the Charter, which, at article IX, sets forth the parameters of the DB Plan. *See* San Diego Charter, art. IX, §§ 140-151. The City's DB plan is set forth in the Charter and the ordinances adopted by the Council.

The City sponsors the DB Plan, and has specific obligations under it, including making an annual required contribution. SDMC § 24.0801. *See generally* San Diego Charter §§ 140-151. The Board administers the DB Plan and invests the DB Plan funds. San Diego Charter § 144. The costs and expenses of administering the Retirement System come from the DB Plan fund, which is composed of employee contributions, City contributions, and interest earned on the contributions. SDMC §§ 24.0906, 24.1501, 24.1502. *See also* San Diego Charter § 145. Pursuant to its duties, the Board may establish rules and regulations it deems proper, within the parameters of the Charter. San Diego Charter § 144.

The Board has established an Underpayments Policy and an Overpayments Policy, consistent with Internal Revenue Service (IRS) regulations and procedures. *See* Attachment 2. The Underpayments Policy addresses situations where a City employee has underpaid contributions to the DB Plan. The Overpayments Policy addresses situations where SDCERS overpays a

retired City employee. The City has never voluntarily paid interest on behalf of employees. However, prior to adoption of the Underpayments and Overpayments Policies, the Board recovered funds due to errors through the Unfunded Actuarial Liability (UAL).[1]

SDCERS has advised that it can no longer correct the underpaid contributions or overpaid benefits by charging the City through the amortized UAL. *See* Attachment 1. Therefore, SDCERS presently collects the full underpaid contribution or overpaid benefit, plus interest at the DB Plan's earnings rate, from the active or retired member, not from the City.

SDCERS is proposing that a Charter amendment be presented to voters, providing enabling language for the Council, if it desires, to enact an ordinance, authorizing City payment to SDCERS of any portion of an overpayment of benefits to or underpayment of contributions by members and the associated interest, when the overpayment or underpayment is caused by the fault or negligence of SDCERS employees. In the July 13, 2015 letter to the Charter Review Committee Consultant, SDCERS Chief Executive Officer Mark Hovey writes: "The SDCERS Board of Administration would like for the City to consider playing a role in resolving such underpayments/overpayments." Attachment 1.

DISCUSSION

I. SDCERS HAS A LEGAL DUTY TO CORRECT ITS ERRORS AND MAKE THE RETIREMENT SYSTEM "WHOLE" WHEN THERE ARE OVERPAID BENEFITS TO RETIRED EMPLOYEES OR UNDERPAID CONTRIBUTIONS BY ACTIVE EMPLOYEES.

The questions presented here relate to situations where SDCERS commits an error, resulting in an active member, who is a City employee, underpaying his or her contribution, or a retired employee receiving an overpaid benefit. In his July 13, 2015 letter, Mr. Hovey explains: "SDCERS works diligently to make zero mistakes, and while we successfully and accurately process hundreds of thousands of transactions each year, our staff members are not perfect. When the mistakes have been made, the error is usually the results [sic] of a step or process not done correctly by an SDCERS staff member, rather than due to an error made by the member, or the City." Attachment 1.

The Board has the duty to administer the Retirement System within the parameters of the Charter, ordinances adopted by the Council, and applicable federal and state laws, including the Internal Revenue Code and article XVI, section 17(a) of the California Constitution, which sets forth the fiduciary duties of public retirement systems in California. *See City of San Diego v. San Diego City Employees' Retirement System*, 186 Cal. App. 4th 69, 72 (2010) (holding that SDCERS actions to charge the City for underfunded pension service credits purchased by City

[1] In 2008, the Board amended the Underpayments and Overpayments Policies to require the City, as Plan sponsor, to pay the difference between an interest rate of two percent charged to members and the actuarial assumed rate in effect when the underpayment or overpayment is resolved. The City objected to the 2009 amendments because the City is not legally required to pay employee's contributions or to pay interest on overpaid benefits. In 2009, SDCERS revised its policies to recover the entire interest amount from the active or retired members.

employees was "contrary to law" and SDCERS "exceeded its authority to administer the pension system's assets"). SDCERS does not have "plenary authority to evade the law." *Id.* at 78-79. Therefore, SDCERS must correct its errors. *In re Retirement Cases*, 110 Cal. App. 4th 426, 450-51 (2003). Further, employees do not have a right to erroneous or improper benefits. *Id.*

The Board adopted its Underpayments and Overpayments Policies to ensure compliance with IRS correction procedures, which require that the Retirement System be made whole when there is an error resulting in underpaid contributions or overpaid benefits. *See* IRS Revenue Procedure 2008-50, § 6.06(3), and Appendix B, § 2.04(1). Under IRS regulations, the error must be corrected; SDCERS must collect the underpaid contribution or the overpaid benefit and "appropriate interest" from the active or retired employee, or from the City or another person. Revenue Procedure 2008-50, § 6.06(3), and Appendix B. *See* Attachments 1, 3. Mr. Hovey explains that SDCERS collects interest from the Retirement System member, at a rate equal to the SDCERS assumed rate of investment return, which is currently 7.25 percent, when an active member underpays a contribution or when a retired member is overpaid a benefit. The City's ability to offset the funds owed the Retirement System when there is an error is limited by the Charter.

II. THE CHARTER PROHIBITS THE CITY FROM PAYING ANY PORTION OF AN EMPLOYEE'S CONTRIBUTION TO THE RETIREMENT SYSTEM, WHICH INCLUDES INTEREST ON UNDERPAID CONTRIBUTIONS.

As a charter city, the City must act within the limitations and restrictions set forth in the Charter. *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598 (1949). *See also Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994). The Charter is the City's constitution, and the City, acting through its officers and employees, must comply with it. *Miller v. City of Sacramento*, 66 Cal. App. 3d 863, 867 (1977) ("A city charter is like a state constitution but on a local level; it is a limitation of, not a grant of power."). *See also City & County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102 (1988) (the charter is to the city what the state constitution is to the state). The Council cannot act in conflict with the Charter. "Any act that is violative of or not in compliance with the charter is void." *Domar Electric, Inc.*, 9 Cal. 4th at 171.

As established by the Charter, the DB Plan is a contributory plan, meaning the City contributes funds jointly with the employees who will receive benefits when they retire. San Diego Charter § 143. All money contributed to or earned by SDCERS must be placed in a special trust fund to be held and used only for the purpose of carrying out the provisions of the Charter related to the DB Plan. San Diego Charter § 145. The trust fund is composed of employee contributions, City contributions, and investments earnings. *Id.* The Board invests the City's and employees' contributions and credits interest to the contribution accounts of active employees and the City at a rate determined by the Board. SDMC § 24.0904.

The Charter provides that employees must contribute according to actuarial tables adopted by the SDCERS Board. San Diego Charter § 143. Employees make regular contributions based on their age at their birthday closest to the date when they join SDCERS. SDMC §§ 24.0201(a),

24.0301(a).[2] Employee contribution rates are established by the Board, based on advice of the Retirement System's actuary "according to the age at the time of entry into the Retirement System." SDMC §§ 24.0202, 24.0302. The Board also establishes maximum and minimum rates of contribution. SDMC §§ 24.0203, 24.0303. Employees' contributions are deducted from their biweekly paychecks and transferred to SDCERS for crediting to the individual employee's account. SDMC §§ 24.0204, 24.0304. The employees' contributions are credited with interest, at a rate determined by the Board. SDMC §§ 24.0902, 24.0904.

The City must contribute annually "an amount substantially equal to that required of the employee for a normal retirement allowance, as certified by the Actuary . . . but shall not contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employee." San Diego Charter § 141.2. *See also* San Diego Charter § 143. In calculating annual contributions for the City and City employees, the Board must divide equally between the City and City employees "all costs except those costs explicitly and exclusively reserved to the City." San Diego Charter § 141.2. This section also states: "The City shall not pay, cap the employee contribution rate, or otherwise compensate for any portion of a contribution to the Retirement System by a City Officer or employee." *Id.* Charter section 141.2 was added by City voters, who approved Proposition B, in June 2012.

If employees are regularly contributing to SDCERS through payroll deductions, their contributions are invested by SDCERS in a timely manner and their retirement accounts are regularly credited with the interest, which is drawn from investment earnings. SDMC § 24.0904. However, if SDCERS staff make a mistake in entering an employee's birthdate or other clerical error that results in the employee underpaying the required normal contribution, then the employee must, when the error is discovered, make up the contribution and associated interest, under the Underpayments Policy.

Given the limitations set forth in the Charter, it is clear that employees must make up their underpaid contributions and the City cannot offset them. However, the question of whether the City can pay the interest associated with an underpayment turns on whether the interest is included in the prohibition against the City offsetting employee contributions, as set forth in Charter section 141.2.

Construction of a written law is a legal issue for a court to determine. *Woo v. Superior Court*, 83 Cal. App. 4th 967, 974 (2000). A court reviews a measure adopted by voters, like Proposition B, in the same manner as it interprets statutes. *Howard Jarvis Taxpayers Ass'n v. County of Orange*, 110 Cal. App. 4th 1375, 1381 (2003). *See also City of San Diego v. Shapiro*, 228 Cal. App. 4th 756, 790 (2014). The voters' intent in approving a measure is a court's "paramount concern." *Woo*, 83 Cal. App. 4th at 975. In interpreting a charter provision, a court

[2] It is this Office's understanding that a number of the errors SDCERS makes are related to incorrect data entry or reporting of birth year, which can change the contribution rate.

will look first to the words of the adopted provision. *Id.* "We construe the words from the perspective of the voters, attributing the usual, ordinary, and commonsense meaning to them; we do not interpret them in a technical sense or as terms of art." *Howard Jarvis Ass'n,* 110 Cal. App. 4th at 1381.

If the language is clear and unambiguous, there is no need for further interpretation. "[w]e presume that the voters intended the meaning apparent on the face of the measure, and our inquiry ends." *Woo,* 83 Cal. App. 4th at 975.

As the California Supreme Court (Supreme Court) recently explained, a reviewing court will look first to the plain meaning of the relevant language, "affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context." *Poole v. Orange County Fire Authority*, 61 Cal. 4th 1378, 1384 (2015). The plain meaning controls if there is no ambiguity. *Id.* at 1385 (citing *People v. Cornett*, 53 Cal. 4th 1261, 1265 (2012)).

The Supreme Court explained that the task of a reviewing court is "to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results." *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1291 (2006).

But, if the words of a statute or charter provision are not clear, then a court will look to the overall context of the provision and extrinsic evidence if necessary. "We do not interpret statutes (or charter provisions) in isolation. Rather, we must construe every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." *Mason v. Retirement Bd.*, 111 Cal. App. 4th 1221, 1229 (2003) (citations and internal quotation marks omitted).

"The information and arguments contained in the official ballot pamphlet may indicate the voters' understanding of the measure and their intent in passing it." *Woo*, 83 Cal. App. 4th at 976. "The historical context in which the provision was adopted also is relevant." *Id.* at 976-77.

Applying these rules of interpretation to the current issues, the term "contribution" is not defined in Charter section 141.2. It is unclear what is meant or included in a "contribution." The word "contribution" is generally defined as "[s]omething that one gives or does in order to help an endeavor be successful." *Black's Law Dictionary* 402 (10th ed. 2014). Another definition is "[a]n amount of money one gives in order to help pay for something." *Id.* A third definition is a "regular payment one makes to one's employer or to the government to help pay for one's future benefits such as social security, a pension, etc." *Id.*

The plain meaning of contribution does not resolve what is included in the offsetting prohibition under Charter section 141.2. Therefore, a court will look to the overall provision in context, and the voters' intent.

The ballot question for Proposition B asked, in part: "Should the Charter be amended to: . . . require substantially equal pension contributions from the City and employees . . . ?" Ballot Pamp., Primary Elec. (June 5, 2012).[3] The ballot summary stated that the measure would "[r]equire the City to contribute annually to the defined benefit pension plan an amount substantially equal to that required of the employee for a normal retirement allowance, but not contribute in excess of that amount." *Id.* The argument in favor of Proposition B stated, "YES on Proposition B guarantees that government employees pay a fair share of their pension costs, and it ends the practice of City taxpayers subsidizing the employees' share of pension costs." *Id.* Thus, the voters intended to eliminate any ability of the City to pay for or offset any of an employee's required contribution.

Further, when Proposition B was adopted, the DB Plan treated, as it still does, the biweekly contributions paid by employees and the interest credited to the employees' accounts on investment earnings as interrelated. "Normal Contributions" are defined by Council ordinance as "contributions by a Member at the normal rates of contribution." SDMC § 24.0103.[4] "Accumulated Normal Contributions" are defined by ordinance as "all normal contributions standing to the credit of a Member's individual account and interest thereon." *Id.*

Further, if an employee leaves City service prior to retirement, the employee may withdraw all accumulated contributions, plus compound interest. SDMC §§ 24.0206, 24.0306. Employees' retirement allowances consist of two elements: a service retirement annuity, which is the actuarial equivalent of the member's accumulated normal contributions, meaning actual contributions plus interest, and a creditable service pension, which is derived from the City's contributions. SDMC §§ 24.0402, 24.0403.

It could be argued that the interest associated with an underpaid employee contribution is separate from the contribution and not covered by Charter section 141.2. However, applying the well-established rules of construction described here, it is this Office's view that a reviewing court would find payment of interest associated with an underpaid employee contribution by the City as a violation of Charter section 141.2, because the City would be offsetting a required employee contribution.

The conclusion that a court would likely find that employee contributions, within the meaning of Charter section 141.2, includes interest associated with the contributions is consistent with the holding in the *Barrett v. Stanislaus County Employees Retirement Ass'n*, 189 Cal. App. 3d 1593 (1987). The *Barrett* case involved a dispute over the proper classification of 21 employees in the Stanislaus County sheriff's department. *Id.* at 1597. The employees were classified as miscellaneous members of the Stanislaus County Employees Retirement Association; however, they argued that they should be classified as safety members because they were engaged in

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[3] http://www.sandiego.gov/city-clerk/pdf/pamphlet121221.pdf

[4] A "Member" is "any person employed by the City who actively participates in and contributes to the Retirement System, and who will be entitled, when eligible, to receive benefits from the System." SDMC § 24.0103.

active law enforcement duties as work program staff at the county honor farm. *Id.* The trial court granted the employees' peremptory writ of mandate and directed the retirement system board to reclassify the employees as safety members. *Id.* at 1598. The appellate court affirmed the trial court's decision. *Id.* at 1599.

The retirement system then filed a return to the peremptory writ of mandate, arguing in part that

> an eligible member should not receive credit as a safety member for prior service as a Work Program Supervisor unless the member contributes the additional contributions, including contributions of interest, which the member would have made if he had been treated as a safety member from his initial date of service in that position.

Id. at 1599. The employees contended, in part, that the retirement system had no statutory or common law power to demand arrears contributions for members who were misclassified through no fault of their own and the retirement board was not entitled to any interest on the contributions. *Id.* at 1600.

The trial court agreed with the employees, finding that the retirement system had no legal authority, power, or ability under the County Employees Retirement Law of 1937 (1937 Act) to request arrears contributions of principal and interest in cases where the retirement system erroneously misclassified employees. *Id.* at 1600-01. The trial court also concluded that it would be unfair and inequitable to require the plaintiff employees to make repayments to the retirement system, which was primarily responsible for the alleged arrearage through its own actions. *Id.* at 1601. The appellate court reversed the trial court, and concluded that the retirement system could obtain the arrears contributions and interest. *Id.* at 1600, 1608, 1613-14. The court explained:

> In the instant case, the defendants retroactively reclassified plaintiffs as safety members but have conditioned their higher pension benefits on the deposit of their share of arrears contributions plus applicable interest. Plaintiffs have been deprived of nothing for which they bargained. Rather, they have merely been required, by defendants, to pay their quid pro quo. They will receive the higher pension benefits retroactively but are required, as are all other safety members, to pay retirement contributions commensurate with the formula contributions paid by all other safety members during the entire course of their employment.

Id. at 1608.

In that case, the court of appeal analyzed the 1937 Act, which establishes retirement benefits for county employees throughout California and has a contributory system, funded by both employee contributions and employer contributions, with no requirement that the employer pay the employee's share, which is similar to this City's Retirement System. The *Barrett* court stated:

"A public officer may only collect and retain such compensation as is specifically provided by law and any money paid by a governmental agency without authority of law may be recovered from such officer." *Barrett*, 189 Cal. App. 3d at 1602 (citing *County of San Diego v. Milotz*, 46 Cal. 2d 761, 767 (1956)).

The *Barrett* court explained that, as a general rule, "pension legislation should be liberally construed, resolving all ambiguities in favor of the [member]." *Id.* at 1608. "However, this rule of liberal construction is applied for the purpose of effectuating the *obvious legislative intent* and should not blindly be followed so as to eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended." *Id.* at 1608-09. After concluding that the work program employees in the sheriff's department were eligible for safety member retirement status, the court of appeal further concluded that the reclassified employees must make up the arrears contributions.

> A review of the entire statutory scheme reveals a retirement system based on contributions by both employer and employee. Thus, imposition of an arrears contributions obligation on plaintiffs would place them in the position they would have been had they been properly classified from the date of their employment. Plaintiffs contend such an obligation would result in a "drastic financial impact" because they would have to pay up to 20 years of contributions including interest over a relatively brief period of time. Plaintiffs infer they will have to bear the entire burden of arrears contributions. However, in light of the statutory scheme, the County of Stanislaus would also be required to contribute its share of retroactive contributions to fund the plaintiffs' retirement as safety members.

Id. at 1609.

The court of appeal also found that the payment of interest by the employees for the lost investment earnings was appropriate.

For investment purposes, retirement funds under the 1937 Act are invested as a whole; the contributions of a county and the members are not invested separately. *Id.* at 1611. When a member retires, he or she is entitled to a retirement allowance based on an annuity, which is the actuarial equivalent of the member's accumulated contributions at the time of retirement, meaning the principle contributed and interest credited to the member's account, and a pension, which is composed of the county contributions. *Id.* at 1611-12. "Upon the retirement of a member, a county must match the interest which has been credited upon the member's contributions as well as the contributions themselves." *Id.*

The court agreed with the retirement system that the interest earned on employee contributions was part of the employee contribution. "A review of the entire statutory scheme reveals a retirement system based upon contributions by both employer and employee and the crediting of

interest on contributions by both employer and employee. . . . Thus, both employer and employee will be required to contribute interest." *Id.* at 1612. The court concluded that the retirement system could properly require the employees to pay regular interest on their arrears contributions to obtain their retirement benefits. *Id.*

Likewise, here, an employee who underpays a contribution must make up the contribution and interest on the contribution to obtain benefits. The City cannot offset the payment because of the language in Charter section 141.2, which states: "The City shall not pay, cap the employee contribution rate, or otherwise compensate for any portion of a contribution to the Retirement System by a City Officer or employee." San Diego Charter § 141.2.

Based on the letter submitted by Mr. Hovey, the Board also interprets Charter section 141.2 as a limitation on the City's ability to pay to SDCERS any portion of an underpayment or overpayment and the associated interest. That is why the Board is requesting that the City consider placing an amendment to Charter section 141.2 on the 2016 ballot to provide enabling language for the proposed ordinance, allowing for the City to pay interest on behalf of members. The Board is proposing to amend Charter section 141.2 to add the following language:

> Nothing contained in this Section or in Section 143 shall preclude the City from agreeing to pay to the Retirement System any portion of an overpayment of benefits or underpayment of contributions, and any interest associated with an overpayment or underpayment as assessed by the Board of Administration, where the overpayment or underpayment was proximately caused by the fault or negligence of a City employee acting in the course and scope of his or her employment. The Council of the City is hereby authorized and fully empowered to enact any and all ordinances necessary to carry into effect the provisions of this section and any and all ordinances so enacted shall have equal force and effect with this Article and shall be construed to be part hereof as fully as it drawn herein. Any ordinance enacted pursuant to this section shall not be considered an ordinance affecting or enhancing the benefits of any active or retired Member of the System and shall not be subject to the voting requirements set forth in Section 143.1.

Attachment 1.

A Charter amendment, if approved by voters, would provide enabling authority for the Council to adopt an ordinance to allow the City to pay interest, which is presently prohibited by Charter section 141.2. Conversely, without an amendment to Charter section 141.2, the City is without authority to pay any interest to SDCERS on behalf of active employees.

III. IF THE COUNCIL DESIRES TO INDEMNIFY, OR COMPENSATE, EMPLOYEES WHO ARE ARGUABLY HARMED BY THE ERRORS OF SDCERS, IT MUST ACT WITHIN THE PARAMETERS OF THE CHARTER.

Under the California Government Claims Act, specifically California Government Code section 815.2,[5] a public entity, like the City, may be held vicariously liable for the negligence of its employees acting in the scope of their employment. Employees are defined as officers, employees, or servants, but not agents or independent contractors. Cal. Gov't Code § 810.2.[6] This vicarious liability "flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior." *San Diego City Firefighters, Local 145 v. Board of Administration*, 206 Cal. App. 4th 594, 611 (2012). The City cannot be liable for employees not under its control. Further, there is immunity for discretionary acts or omissions. Cal. Gov't Code § 820.2.[7]

The Council recognizes SDCERS as a City department: "City Retirement." SDMC § 22.1801. But SDCERS is also recognized as a separate legal entity under the provisions of article XVI, section 17, of the California Constitution, with specific fiduciary duties, separate and apart from those of the City, as a municipal corporation and the Plan sponsor.[8] *See* SDMC § 24.0901. *See also Lexin v. Superior Court*, 47 Cal. 4th 1050, 1063 (2010) ("Although established by the City, the [SDCERS] Board is a separate entity."); *City of San Diego v. Haas*, 207 Cal. App. 4th 472, 480 (2012)(SDCERS is separate legal entity).

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[5] California Government Code section 815.2 states:

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

[6] To prevail on a negligence claim, a plaintiff must prove that the public entity owed a legal duty to the plaintiff, breached the duty, and the breach was the proximate or legal cause of the injuries. *Wilson v. County of San Diego*, 91 Cal. App. 4th 974, 979 (2001). The duty must be statutory in nature and obligatory or mandatory, not merely discretionary or permissive. *Id.* at 980.

[7] California Government Code section 820.2 states: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." *See also Nasrawi v. Buck Consultants LLC*, 231 Cal. App. 4th 328, 342 (2014)(immunity for policymaking but not for execution of ministerial tasks).

[8] The Board has "exclusive control" and fiduciary responsibility for administration and investment of the DB Plan funds, as set forth in the Charter section 144 and in article XVI, section 17 of the California Constitution. *See also* SDMC § 24.0901. The Constitution distinguishes between the board of a public retirement system and "the elected legislative body of a jurisdiction which employs participants in a public employees' pension or retirement system." Cal. Const. art. XVI, §17.

SDCERS employees act under the control of the chief executive officer, who is appointed by the Board and serves under the Board. *See* San Diego Charter § 144 (stating the Board may appoint employees as may be necessary). The Board has "exclusive control of the administration and investment" of the retirement fund. *Id.* And the Board has discretion to delegate appropriate responsibilities to staff. *See* SDCERS Board Charter.[9]

Neither the Mayor nor the Council has supervision or control over the SDCERS staff. [10] The City, as a municipal corporation, could only be held vicariously liable for the negligence of SDCERS employees as a joint employer or special employer. But without control over SDCERS staff, a joint or special employment relationship fails to exist. The Supreme Court recently explained: "It is settled that the right to control job performance is the primary factor in determining any employment relationship, including special employment." *State ex rel. Dept. of California Highway Patrol v. Superior Court*, 60 Cal. 4th 1002, 1012 (2015). *See also Jones v. County of Los Angeles*, 99 Cal. App. 4th 1039, 1047 (2002) (county not joint employer of court employees even though paychecks are drawn from county and benefits are similar because the court, not the county, had the right to control the duties the employee performed).

Further, the Council cannot agree to indemnify or compensate City employees allegedly harmed by errors of SDCERS staff, if the agreement violates the Charter, as explained earlier. Claims for equitable relief also will not stand if they are contrary to the express provisions of the Charter. "[N]either the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public." *San Diego City Firefighters, Local 145*, 206 Cal. App. 4th at 610.

In the *Barrett* case, the court of appeal rejected the employees' argument that equitable considerations barred the defendant retirement system from demanding arrears contributions, which included principal and interest. *Barrett,* 189 Cal. App. 3d at 1608. The court stated:

> A fundamental maxim of jurisprudence is that equity must follow the law. Equity is bound by rules of law; it is not above the law and cannot controvert the law. Equity penetrates beyond the form to the substance of the controversy, but is nonetheless bound by the prescriptions and requirements of the law. While equitable relief is flexible and expanding, its power cannot be intruded in matters that are plain and fully covered by positive statute. A court of equity will not lend its aid to accomplish by indirect action what the law or its clearly defined policy forbids to be done directly.

Id. at 1608 (citations omitted).

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[9] https://www.sdcers.org/Sdcers-Documents/Board_CPRR_final_050815.aspx

[10] Staff appointments to SDCERS are made under the provisions of article VIII of the Charter, meaning the City's Civil Service Rules must be followed. San Diego Charter § 144. If a classified employee at SDCERS is terminated for cause, the employee has appeal rights to the Civil Service Commission. San Diego Charter § 115. But this does not mean that the employee is under the supervision and control of City officers or employees.

As explained above, as a matter of law, the Charter prohibits the City's payment of employee contributions, which include interest assessed on underpaid contributions. A court is unlikely to find the City liable for these interest payments based on either legal or equitable grounds.[11]

IV. THE CHARTER DOES NOT PROHIBIT PAYMENT OF INTEREST ON BEHALF OF RETIREES WHO ARE OVERPAID BENEFITS, BUT THE COUNCIL MUST FIND THAT THERE IS A PUBLIC PURPOSE FOR THE PAYMENT.

There is no provision in the Charter expressly prohibiting the City from paying assessed interest on an overpaid benefit to retired employees, who must repay the benefit. However, the Charter prohibits the giving of "credit . . . to or in the aid of any individual, association or corporation." San Diego Charter § 93. This provision is consistent with the prohibition in article XVI, section 6 of the California Constitution on the gift of public funds. Generally, there must be a public purpose established by the legislative body to justify the use of public resources in a specified manner. *See Tevis v. City & County of San Francisco*, 43 Cal. 2d 190, 197 (1954) (charter provision defining gift of public funds prevails over constitutional provision); *City & County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 103-104 (1988). The expenditure of funds to settle a good faith dispute is an appropriate use of public funds; however, the compromise of an invalid claim serves no public purpose. *Page v. Mira Costa Comm. College Dist.*, 180 Cal. App. 4th 471, 495 (2009).

To pay interest on behalf of retired employees who receive overpaid benefits, the Council must determine that there is a public purpose served. If other avenues to obtain repayment of the overpaid benefit and interest have been exhausted, there may be a public purpose served by the City making the Retirement System whole and viable. However, this is for the Council to determine.

CONCLUSION

The Charter prohibits the City from paying interest on behalf of employees who underpay their contributions to SDCERS. If the Council desires to provide an option for employees who unknowingly underpay their contributions and then are faced with the contribution and interest payment later, then the Council must consider placement of a Charter amendment on the ballot, as recommended by SDCERS.

While the City cannot pay contributions, including principal and interest, on behalf of City employees because of the prohibition set forth in the Charter, the City can request that SDCERS resolve errors expeditiously so that errors do not compound. Further, Mr. Hovey suggests that there may be other solutions, such as the purchase of insurance to cover the errors of SDCERS employees.

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[11] This memorandum does not discuss whether individual City employees could state a cause of action against SDCERS for errors committed by SDCERS employees.

There is no express prohibition on the payment of interest on behalf of retired employees who receive overpaid benefits, except that the City must determine that there is a public purpose for the payment, in accordance with Charter section 93. This Office will provide further analysis on any issues set forth in this memorandum, at the request of the Mayor or Council.

JAN I. GOLDSMITH, City Attorney

By *\/s/ Joan F. Dawson*
Joan F. Dawson
Deputy City Attorney

JFD:jdf:ccm
MS-2015-15
Doc. No.: 1111436
Attachments (3)

ATTACHMENT 1

SDCERS
San Diego City Employees' Retirement System

Mark A. Hovey
Chief Executive Officer

July 13, 2015

Mr. Steven Hadley
Charter Review Committee Consultant
for Council President Sherri Lightner
City Administration Building
202 C Street
San Diego, CA 92101

Dear Mr. Hadley:

On January 30, 2015, I provided the enclosed letter to Scott Chadwick providing SDCERS' suggestions for revisions to City Charter Article IX. The Charter Review Committee graciously allowed the SDCERS Board of Administration ("SDCERS Board") additional time to review and provide additional suggestions. The SDCERS Board has now completed its review.

SDCERS has received requests from both the San Diego Unified Port District ("UPD") and the San Diego County Regional Airport Authority ("Airport") to provide Charter language allowing UPD and Airport employees the opportunity to run for the elected seats on the SDCERS Board. The SDCERS Board concurs with this request.

Enclosed are SDCERS' proposed updates and modifications to Article IX of the City Charter. In addition to the suggestions made in my January 30, 2015 letter, the SDCERS Board has requested the following revisions:

- Amend Charter Section 141 to provide that nothing contained in Section 141 or Section 143 of the Charter will preclude the City of San Diego from agreeing to pay to SDCERS any portion of an overpayment or underpayment, and associated interested assessed by the Board, where the overpayment or underpayment was proximately caused by the fault or negligence of a City employee acting in the course and scope of his or her employment. The Council would be empowered to enact any and all ordinances necessary to put this provision into effect. Any ordinances enacted pursuant to this amendment would not be subject to a Charter Section 143.1 vote of the membership or the electorate.
- Amend Charter Section 144 to include in the eligibility requirements for appointment to the Board 15 years of legal experience related to the practice of law in any of the fields listed (i.e., pension administration, pension actuarial practice, investment management, real estate, banking or accounting).

- Amend Charter Section 144 to allow general, safety and retired members of Contracting Public Agencies to run for election and vote in elections for the elected positions on the SDCERS Board of Administration.

SDCERS is suggesting that the Charter be amended to allow the City to enact an ordinance, at its discretion, allowing the City to pay SDCERS for any portion of an overpayment of benefits to or underpayment of contributions from members and associated interest where the overpayment or underpayment was caused by the fault or negligence of a City employee. SDCERS' employees are City employees.

SDCERS works directly with its members to resolve any active member underpayments to the pension system, or retired member benefit overpayments (both collectively referred to as "overpayments"). Due to IRS requirements, SDCERS also collects interest from the members on the overpayment, at a rate equal to the SDCERS assumed rate of return (currently 7.25%). The SDCERS Board of Administration would like for the City to consider playing a role in resolving such underpayments/overpayments.

To provide perspective on this issue, SDCERS works diligently to make zero mistakes, and while we successfully and accurately process hundreds of thousands of transactions each year, our staff members are not perfect. When the mistakes have been made, the error is usually the results of a step or process not done correctly by an SDCERS staff member, rather than due to an error made by the member, or the City.

IRS rules require that in the event of an overpayment, SDCERS resolve the overpayment by collecting the full principal amount, with interest at the plan's earnings rate, to make the system "whole." Consistent tax advice from SDCERS outside counsel advises that we have been following the IRS corrections process accurately since SDCERS received its IRS Determination Letter of plan compliance back in 2008.

Members frequently comment to SDCERS that if the mistake was not due to their (i.e., the member's) error, why are they doubly "penalized" by assessing interest on the amount. Indeed, SDCERS implemented a policy in 2008 to comply with IRS overpayment requirements and decided to charge the member a lower interest rate . . . 2% . . . and have the balance of the interest due be covered by the City. Following correspondence between SDCERS and the City Attorney's office, who clearly conveyed that the City and taxpayers could not be held responsible for resolving overpayments to the member, SDCERS revised its policy in 2009 to recover the entire interest amount from the member and has consistently done so since then.

It has been suggested SDCERS procure insurance to cover such errors, rather than have the member repay the error in full. However, insurers have stated deductibles would be involved that exceed the cost of the overpayment, and even if the overpayments were to exceed the deductible, the insurance company retains subrogation rates to pursue a counter claim against the City. In short, insurance might transfer a portion of the burden off the member, but that burden would be placed back on the City, regardless.

It has also been suggested SDCERS simply fix the overpayment issue prospectively, and historical overpayment amounts be left in the City's Unfunded Actuarial Liability (UAL).

Unfortunately, the IRS explicitly does not allow the plan sponsor to cover overpayments via an amortized UAL phased into the City's annual pension payments. Instead, the City, per IRS rules, must immediately cover any portion of the overpayment not made by the member.

As noted above, the SDCERS Board believes the IRS effectively ties its hands and that full recoupment of the overpayment, with interest, is required from the member. However, the Board also believes that given the underlying cause of the error has traditionally been made by SDCERS, an agent of the City in this case, that it may be prudent for the City to acknowledge the impossibly high standard of perfection placed on its employees and agree to shoulder a portion of the overpayment.

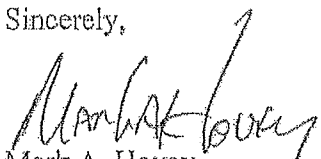
It's difficult to assess the amount of money involved in prospective overpayment corrections to be done by SDCERS (i.e., it is not possible to predict future overpayment errors). However, SDCERS does report annually on the number and amount of overpayments collected from members. In FY 2013, that amount was $701,171, which included $611,501 associated with the PSC Litigation lawsuit the City won against SDCERS. In FY 2014, SDCERS collected $150,788 in member overpayments. There are approximately 300 potential member overpayment issues that SDCERS is researching now, and we expect to resolve those by December 31, 2015; this relatively large number of open matters was primarily driven by the complete data conversion audit when SDCERS covered to its new pension system in May 2014. Going forward, we expect overpayments to be limited in number and not material.

As previously advised, SDCERS believes the majority of the remaining proposed Charter modifications are required to achieve consistency with the Board's fiduciary duties as well as consistency between provisions in other Articles of the Charter. SDCERS is also proposing that the City amend the Charter to allow Police Recruits to join SDCERS upon entering the Police Academy. Not only does SDCERS believe that this was the actual intent of the proposers of Proposition B, but that it will also assist the City in its retention of new police officers.

The SDCERS Board of Administration respectively requests the City review applicable City Charter language to allow for flexibility in resolving member overpayments with the City.

SDCERS would be happy to appear before the Charter Review Committee if requested. Thank you for your consideration.

Sincerely,



Mark A. Hovey
Chief Executive Officer

MAH/er

Enclosure: SDCERS' Proposed Revisions to the City Charter

cc: SDCERS Board of Administration
Elaine Reagan, SDCERS Deputy CEO – Compliance & Legal Operations
Hon. Council President Sherri S. Lightner
Hon. Mayor Kevin Faulconer
Scott Chadwick, Chief Operating Officer
Hon. Jan Goldsmith, City Attorney
Paul Cooper, Asst. City Attorney
Sharon Spivak, Deputy City Attorney
Roxanne Story Parks, Deputy City Attorney

SDCERS

2015 CITY CHARTER REVIEW
SDCERS' PROPOSED REVISIONS TO THE CITY CHARTER
CITY CHARTER ARTICLE IX

Section 140: Establishment of Separate Retirement Pension Systems; Definitions

As of the election at which this Section becomes operative, the electorate of the City of San Diego has found and declared that the fiscal best interests of the City are served by reforming the retirement system authorized by this Charter to be established for City employees.

"Defined Benefit Pension Plan" or "Defined Benefit Pension System" is a system or plan to provide a specified allowance to a city retiree or a retiree's spouse after retirement that is based on a set formula based on factors such as age, years of service, and elements of compensation as established in this Article.

The Defined Benefit Pension Plan in place prior to said election, established by the City Council pursuant to Sections 141 through 149 of this Charter, may remain in place until, for any reason, there remain no participants in the Defined Benefit Plan. The City Council may by ordinance utilize any lawful means for terminating the Defined Benefit Plan. Any closure of the Defined Benefit Plan shall be designed and implemented to protect the employees' vested rights in the Defined Benefit Plan, generate cost savings for taxpayers, and ensure compliance with applicable laws and regulations, including tax regulations.

At such time as there remain no participants in the Defined Benefit Pension Plan, the City shall take such actions as are necessary and appropriate to promptly wind down and terminate the Defined Benefit Pension Plan.

Notwithstanding the foregoing, and except as expressly provided in this Article IX, all Officers and employees, with the exception of sworn police officers and police recruits participating in the City's Police Academy, who are initially hired or assume office on or after the effective date of this Section shall participate only in such Defined Contribution Plans as authorized by Sections 150 and 151 of this Charter.
The provisions of Sections 141 through 149 shall apply only to the Defined Benefit Plan, and those City employees eligible to participate in the Defined Benefit Plan. The provisions of Sections 150 and 151 shall apply only to the Defined Contribution Plan, and those City employees eligible to participate in the Defined Contribution Plan, except as expressly stated.
Notwithstanding the foregoing, and except as provided in this Article IX, the City Council is hereby authorized and empowered by ordinance to enroll sworn police officers hired after the effective date of this section in either the Defined Benefit Plan or the Defined Contribution Plan. This section shall be implemented in a manner consistent with the requirements of applicable labor relations laws.
(Addition voted 06-05-2012; effective 07-20-2012.)

~~Section 141: City Employees' Retirement System~~

The Council of the City is hereby authorized and empowered by ordinance to establish a retirement system and to provide for death benefits for compensated public officers and employees, other than those policemen and firemen who were members of a pension system on June 30, 1946. No employee shall be retired before reaching the age of sixty-two years and before completing ten years of service for which payment has been made, except such employees may be given the option to retire at the age of fifty-five years after twenty years of service for which payment has been made with a proportionately reduced allowance. Policemen, firemen and full time lifeguards, however, who have had ten years of service for which payment has been made may be retired at the age of fifty-five years, except such policemen, firemen and full time lifeguards may be given the option to retire at the age of fifty years after twenty years of service for which payment has been made with a proportionately reduced allowance.

The Council may also in said ordinance provide:

(a) For the retirement with benefits of an employee who has become physically or mentally disabled by reason of bodily injuries received in or by reason of sickness caused by the discharge of duty or as a result thereof to such an extent as to render necessary retirement from active service.

(b) Death benefits for dependents of employees who are killed in the line of duty or who die as a result of injuries suffered in the performance of duty.

(c) Retirement with benefits of an employee who, after ten years of service for which payment has been made, has become disabled to the extent of not being capable of performing assigned duties, or who is separated from City service without fault or delinquency.

(d) For health insurance benefits for retired employees.

Notwithstanding anything to the contrary in this section, the Charter or the Municipal Code, reciprocal service granted under the Uniform Reciprocal Provisions pursuant to the Reciprocity Contract between SDCERS and CalPERS shall be included as service for purposes of establishing eligibility for retirement benefits.

] *(Editor's note: Supplement No. 655)*
(Amendment voted 03-13-1945; effective 04-09-1945.)
(Amendment voted 04-19-1949; effective 05-20-1949.)
(Amendment voted 03-13-1951; effective 03-26-1951.)
(Amendment voted 06-08-1954; effective 01-10-1955.)
(Amendment voted 11-06-1990; effective 02-19-1991.)
(Amendment voted 11-08-1994; effective 01-30-1995.)
(Amendment voted 11-05-1996; effective 02-10-1997.)

Section 141.1: Reform of ~~Sworn~~ Police Officer Defined Benefit Pension Plan

Notwithstanding any other provision of this Charter, or any ordinance or other action taken pursuant hereto, the maximum amount of retirement benefit payable to a sworn police officer or police recruit participating in the City's Police Academy, who is hired after the effective date of this section and who is a participant under the Defined Benefit Pension Plan, shall be an amount equivalent to 80% at age 55 of the average of the participant's highest consecutive 36 months of Base Compensation as defined by Section 70.1. The maximum set by this provision shall decrease by 3% (three percentage points) for each year that such participant retires before age 55.

(Addition voted 06-05-2012; effective 07-20-2012.)

Section 141.2: Full and Fair Employee Contributions for The Defined Benefit Pension Plan

For officers and employees who have the legal right to remain in the established Defined Benefit Pension Plan, the City shall contribute annually an amount substantially equal to that required of the employee for a normal retirement allowance, as certified by the Actuary established in Charter Section 142, but shall not contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employee. The City shall not pay, cap the employee contribution rate, or otherwise compensate for any portion of a contribution to the Retirement System by a City Officer or employee.

To the fullest extent permissible by law, in calculating annual contributions for the City and City employees, the Retirement Board shall divide equally between those two parties all costs those costs explicitly and exclusively reserved to the City in this Section and Section 143. Contributions shall also be governed by Section 143 of this Article. In the event of a conflict between this Section and Section 143, this Section shall prevail. This section is not intended to interfere with vested defined rights of any retiree receiving benefits from the Defined Benefit Retirement System or of any employee enrolled in the Defined Benefit Retirement System as of the effective date of this section.

Nothing contained in this Section shall preclude the City from entering into a settlement of *City of San Diego v. San Diego City Employees' Retirement System* Case No. #37-2010-00091207-CU-WM-CTL_to define responsibilities of the City and employees for unfunded liabilities of the Retirement System even if the settlement includes terms that might otherwise conflict with the above restrictions, as long as the settlement is approved by the court as a good faith settlement and approved by a two-thirds vote of the City Council.

Nothing contained in this Section or in Section 143 shall preclude the City from agreeing to pay to the Retirement System any portion of an overpayment of benefits or underpayment of contributions, and any interest associated with an overpayment or underpayment as assessed by the Board of Administration, where the overpayment or underpayment was proximately caused by the fault or negligence of a City employee acting in the course and scope of his or her employment. The Council of the City is hereby authorized and fully empowered to enact any and all ordinances necessary to carry into effect the provisions of this section and any and all ordinances so enacted shall have equal force and effect with this Article and shall be construed to be a part hereof as fully as if drawn herein. Any ordinance enacted pursuant to this section shall not be considered an ordinance affecting or enhancing the benefits of any active or retired Member of the System and shall not be subject to the voting requirements set forth in Section 143.1.

(Addition voted 06-05-2012; effective 07-20-2012.)

Section 142.1: Employment of Attorneys (New)

The Board of Administration hereinafter provided, may appoint attorneys to advise and represent the Board, as may be necessary. Attorneys hired or retained by the Board shall have duties and responsibilities only to the Retirement System and its Board of Administration and shall not have a duty of loyalty or care to the City of San Diego. Except to the extent that the

Board retains outside counsel as consultants, such appointments shall be made under the provisions of Article VIII of this Charter.

Section 143: Contributions [No Change.]

Section 143.1: Approval of Retirement System Benefit [No Change]

Section 144: Board of Administration

Effective April 1, 2005, the system shall be managed by a newly constituted Board of Administration which shall consist of 13 members. Seven members shall constitute a quorum of the Board and the concurring vote of seven members shall be required for the Board to take any action. Prior to April 1, 2005, in anticipation of the effective date, and thereafter, members shall be selected to serve as follows:

(a) Seven (7) members shall be appointed by the Mayor and confirmed by the Council. No person who is a City employee, participant in the Retirement System, or City union representative may be eligible for appointment in this category. Such appointees shall have the professional qualifications of a college degree in finance, economics, law, business, or other relevant field of study or a relevant professional certification. In addition, such appointees shall have a minimum of fifteen (15) years' combined experience in pension administration, pension actuarial practice, investment management, real estate, banking, ~~or~~ accounting or the practice of law related to any of the preceding fields. Members of the Board serving in this category shall serve staggered terms of four (4) years each. Inaugural appointments occurring after the effective date of this section shall have four (4) members serving two (2) year terms and three (3) members serving three (3) year terms. The Board shall determine which open seats shall serve four (4) and three (3) years terms to achieve staggered terms of four (4) years for all subsequent appointments. ~~(inaugural appointments shall have three (3) members serving two year terms) and m~~Members in this category shall be limited to a maximum of eight (8) consecutive years in office and an interval of four (4) years must pass before such persons can be reappointed. Such appointees shall not have any other personal interests which would create a conflict of interest with the duties of a Board member and trustee.

(b) One (1) police safety member of the Retirement System elected by the active police safety members to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this category shall serve a two (2) year term. For purposes of this section, police safety members eligible to serve and vote shall include any police safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(c) One (1) fire safety member of the Retirement System elected by the active fire safety members to serve a four (4) year term. For purposes of this section, fire safety member eligible to serve and vote shall include any fire safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(d) Two (2) general members of the Retirement System elected by active general members of the Retirement System to serve a four (4) year term. For purposes of this section, general members eligible to serve and vote shall include any general members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(e) One (1) retired member of the Retirement System elected by the retired members of the Retirement System to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this category shall serve a two (2) year term. For purposes of this section, retired members eligible to serve and vote shall include any retired members of a Contracting Public Agency as defined in Section 149 of this Article.

(f) One (1) City management employee in the administrative service appointed by the ~~City Manager~~ Mayor to serve at the pleasure of the ~~City Manager~~Mayor selected from the following: ~~City Manager~~Chief Operating Officer, City Treasurer, Deputy or Assistant ~~City Manager~~Chief Operating Officer, or person in a similar position who reports to the ~~City Manager~~Mayor

The Board of Administration may establish such rules and regulations as it may deem proper; shall elect one of its members president and appoint a secretary and may appoint such other employees as may be necessary. Such appointments, except the actuary, shall be made under the provisions of Article VIII of this Charter.

The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system; shall have all powers and duties provided in the Declaration of Group Trust for the SDCERS Group Trust effective July 1, 2007 and any amendments thereto or successor trusts hereinafter adopted by Resolution of the City Council; ~~and~~ shall have exclusive control of the administration and investment of such fund or funds as may be established; ~~and~~ shall be permitted to invest in any bonds or securities which are authorized by General Law for savings banks; and, further, shall be permitted to invest in such additional classes or types of investments as deemed prudent by the Board consistent with its fiduciary duties. ~~are approved by resolution of the Council of the City of San Diego; provided, however, that individual investments within the classes or types approved by the Council must be approved by independent investment counsel; and, provided, further, the board may place such funds in the hands of the Funds Commission for investment. Provided, however, that the Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller, such retirement allowance has been granted in contravention of this Article or any ordinances passed under the authority granted herein.~~

(Amendment voted 03-13-1951; effective 03-26-1951.)
(Amendment voted 11-08-1960; effective 01-09-1961.)
(Amendment voted 11-04-1969; effective 01-29-1970.)
(Amendment voted 06-04-1974; effective 08-13-1974.)
(Amendment voted 11-2-2004; effective 04-01-2005)
(Effective 07-08-2008, the authority, power, and responsibilities conferred upon the Auditor and Comptroller by this Charter were transferred to the Chief Financial Officer. See section 39.)
Prior Language

Section 145: Retirement Fund

All moneys contributed by employees of the City or appropriated by the Council or received from any other source under the terms of this Article, shall be placed in a special fund ~~in the City Treasury~~ to be known as the City Employees' Retirement Fund, which said fund is hereby created. Such fund shall be a Trust Fund to be held and used only for the purpose of carrying out the provisions of this Article. No payments shall be made therefrom except upon

the order of the Board of Administration. This fund may be placed by the Board under the Funds Commission for investment; but shall not be merged with other funds of the City.

Sections 146 through 151 [No Change]

ATTACHMENT 2

OVERPAYMENTS POLICY

PURPOSE AND SCOPE

In order to preserve the financial integrity of the Retirement System and comply with the Board's fiduciary responsibilities and IRS rules and regulations governing overpayment of benefits, it is the Board's policy to investigate any overpayment promptly and diligently and to recover the overpayment unless circumstances exist that make it unreasonable or futile to do so. The purpose of this policy is to provide guidelines and a process for evaluation and collection of overpayments made to Members and Beneficiaries (collectively "Members," for purposes of this Policy).

POLICY

The CEO may delegate to staff any reporting or investigative responsibilities assigned to the CEO in this policy. Therefore, the term "CEO" as used in this policy refers to the CEO and his/her delegate. When an overpayment is identified, the following guidelines and procedures will be followed:

1. NOTIFICATION

   a. When an overpayment is identified, staff will notify the CEO, who will report any overpayments in excess of $10,000 to the Board at the next regularly scheduled Board meeting. The CEO will report back to the Board on the progress of the investigation and collection of the overpayment within 90 days.

   b. The CEO will provide an annual report to the Board setting forth the final resolution of any overpayments of $10,000 or less.

2. INVESTIGATION

   a. When an overpayment is identified, the CEO will conduct an investigation into the facts and circumstances surrounding the overpayment. Before an overpayment may be resolved for anything less than immediate full payment, the CEO must ascertain the financial situation of the member and the financial hardship, if any, of requiring immediate full payment of the amount owed.

   b. The CEO will establish internal procedures to investigate, collect and resolve overpayments.

3. COLLECTION

   a. Overpayments Exceeding $10,000 – Approval by the Board:

1) Resolution of an overpayment that exceeds $10,000 should be resolved for immediate full payment of the entire amount, plus interest, whenever feasible. For purposes of this Policy, full repayment may include an installment repayment plan for the full amount owed, including interest at the actuarially assumed rate. A resolution on these terms does not need Board approval.

2) Any resolution of an overpayment exceeding $10,000 that does not result in immediate full payment of the entire amount, plus interest, must be approved by the Board.

3) The Board will not approve any resolution that is inconsistent with IRS guidelines in place at the time the overpayment is discovered. The CEO will inform the Board of the current IRS guidelines for settling overpayments when the proposed resolution is presented to the Board for approval.

b. Overpayments of $10,000 or Less – Approval by the CEO:

1) Resolution of an overpayment of $10,000 or less should be resolved for immediate full payment of the entire amount, plus interest, whenever feasible. For purposes of this Policy, full repayment may include an installment repayment plan for the full amount owed, including interest at the actuarially assumed rate.

2) Subject to the procedures in this Policy and IRS guidelines in place at the time the overpayment is discovered, the CEO will have sole discretion to resolve any overpayment of $10,000 or less.

c. Factors to Consider When Resolving Overpayments: Before agreeing to accept something other than immediate full repayment, the Board or CEO will consider the following factors:

1) The amount of the overpayment;

2) The Member's financial position;

3) Whether requiring immediate full repayment will cause a financial hardship to the Member; and,

4) Whether the resolution complies with IRS guidelines for correction of plan errors.

5) Before agreeing to any resolution requiring SDCERS to refrain from collecting any overpayment from a Member that would require recovery from the plan sponsor, the Board or CEO will seek the plan sponsor's consent. The Board or CEO will not agree to

resolve an overpayment with a Member that would require recovery from the plan sponsor without the plan sponsor's consent.

d. Interest:

1) SDCERS will charge the Member interest only if the overpayment is not resolved within the same fiscal year when it occurred. "Resolved" for purposes of charging interest means the date when the Member either tenders to SDCERS the amount owed or signs and returns a payment plan to repay the Overpayment or a combination of the two.

2) Interest will be charged at the actuarially assumed rate in effect when the overpayment is Resolved.

3) Interest on repayment plan: If the Member chooses to repay the overpayment in installments over time, SDCERS will charge interest on the repayment plan at the actuarially assumed rate in effect on the date the Member signs the repayment plan.

e. Offset: The collection of a Retirement System overpayment does not constitute "execution, garnishment, attachment or any other process of any court" under Municipal Code Section 24.1008. The Retirement System may collect an overpayment as an offset from future benefits the System owes to the Member or, where legally permissible, the Member's beneficiaries, whether or not the Member consents to the offset.

4. DUE PROCESS

a. Before collecting an overpayment from the future benefits of a Member without consent, SDCERS will give notice to the affected party of its intent to do so and provide an opportunity for the affected party to request a hearing on the matter should the affected party dispute the fact that an overpayment has occurred or the amount of the overpayment.

b. No overpayment will be collected from the future benefits of a Member unless that person has been given 30 days notice of SDCERS' intent to do so. The notice will include an explanation as to the reason for the offset, the basis for calculation of the amount of the overpayment and an explanation of the Member's right to request a hearing on the matter. The notice will be mailed to the affected person's last known address and will include a proof of service. Service by regular mail will constitute sufficient notice.

c. The Member must request a hearing within 30 days of the mailing of the above notice. Failure to do so will constitute a waiver of the right to a hearing. If the Member requests a hearing within 30 days of the mailing of

the notice, staff will place the matter on the agenda for the Business and Governance Committee meeting.

d. Hearings will be held before the Business and Governance Committee for a recommended final decision by the Board. The Committee will hear all matters, including those arising from disputed facts, although the Committee may recommend referral to a hearing before an Adjudicator if the Committee deems that appropriate. The same procedural requirements for hearings set forth in Board Rule 7.50 through 7.170 will apply to hearings on overpayments before the Business and Governance Committee.

POLICY REVIEW AND HISTORY

5. The Board will review this Policy at least once every three years to ensure that it remains relevant and appropriate.

6. This Policy replaces prior Board Rule 7.50, was adopted by the Board of Administration on June 20, 2008 and amended on October 17, 2008, September 18, 2009 and January 22, 2010 and reviewed and amended on August 19, 2011, and amended on September 20, 2013.

UNDERPAYMENTS POLICY

In order to preserve the financial integrity of the Retirement System, and comply with the Board's fiduciary responsibilities and IRS rules and regulations governing Members' underpayments of contributions, it is the Board's policy to investigate any underpayment promptly and diligently and to recover the underpayment. The purpose of this policy is to provide guidelines and a process for evaluating and recovering underpayments of Member contributions. For purposes of this Policy, Member contributions include amounts paid for purchases of service under the applicable provisions of the Municipal Code and the Board Rules. This Policy does not apply to the correction of Affected PSC Contracts set forth in Board Rule 4.90.

POLICY

The CEO may delegate to a staff member any reporting or investigative responsibilities assigned to the CEO in this policy. Therefore, the term "CEO" as used in this policy refers to the CEO and his/her delegate. When an underpayment is identified, the following guidelines and procedures will be followed:

1. NOTIFICATION

   a. When an underpayment is identified, staff will notify the CEO, who will report any underpayments in excess of $10,000 to the Board at the next regularly scheduled Board meeting. The CEO will report back to the Board on the progress of the investigation and collection of the underpayment within 90 days.

   b. The CEO will provide an annual report to the Board setting forth the final resolution of any underpayments of $10,000 or less.

2. INVESTIGATION

   a. When an underpayment is identified, the CEO will immediately conduct an investigation into the facts and circumstances surrounding the underpayment. Before an underpayment may be resolved for anything less than immediate full payment, the CEO must ascertain the financial situation of the Member and the financial hardship, if any, of requiring immediate full payment of the amount owed.

   b. The CEO will establish internal procedures to investigate, collect and resolve underpayments.

3. COLLECTION

   a. Underpayments Exceeding $10,000 – Approval by the Board:

1) Resolution of an underpayment that exceeds $10,000 should be resolved for immediate full payment of the entire amount, plus interest, whenever feasible. For purposes of this Policy, full repayment may include an installment repayment plan for the full amount owed, including interest at the actuarially assumed rate. A resolution under these terms does not need Board approval.

2) Any resolution of an underpayment exceeding $10,000 that does not result in immediate full payment of the entire amount, plus interest, must be approved by the Board.

3) The Board will not approve any resolution that is inconsistent with IRS guidelines in place at the time the underpayment is discovered. The CEO will inform the Board of the current IRS guidelines for settling underpayments when the proposed resolution is presented to the Board for approval.

b. Underpayments of $10,000 or Less – Approval by the CEO:

1) Resolution of an underpayment of $10,000 or less should be resolved for immediate full payment of the entire amount, plus interest, whenever feasible. For purposes of this Policy, full repayment may include an installment repayment plan for the full amount owed, including interest at the actuarially assumed rate.

2) Subject to the procedures in this Policy and IRS guidelines in place at the time the underpayment is discovered, the CEO will have sole discretion to resolve any underpayment of $10,000 or less.

c. Factors to Consider When Resolving Underpayments: Before agreeing to accept something other than immediate full payment, the Board or CEO will consider the following factors:

1) The amount of the underpayment;

2) The Member's financial position;

3) Whether requiring immediate full repayment will cause a financial hardship to the Member; and,

4) Whether the resolution complies with IRS guidelines for correction of plan errors.

5) Before agreeing to any resolution requiring SDCERS to refrain from collecting any underpayment from a Member that would require recovery from the plan sponsor, the Board or CEO will seek the plan sponsor's consent. The Board or CEO will not agree to

resolve an underpayment with a Member that would require recovery from the plan sponsor without the plan sponsor's consent.

d. Interest:

1) SDCERS will charge the Member interest only if the underpayment is not resolved within the same fiscal year when it occurred. "Resolved" for purposes of charging interest means the date when the Member either tenders to SDCERS the amount owed or signs and returns a payment plan to repay the underpayment or a combination of the two.

2) Interest will be charged at the actuarially assumed rate in effect when the underpayment is resolved.

3) Interest on Repayment Plan: If the Member chooses to repay the underpayment in installments over time, SDCERS will charge interest on the repayment plan at the actuarially assumed rate in effect on the date the Member signs the repayment plan. Repayment Plans may only be made on a post-tax basis.

e. Procedure Where Full Amount Cannot Be Collected:

1) In any case where an underpayment arising from a purchase of service credit cannot be collected in full from the Member, the Member's service credit will be reduced on a pro rata basis or the Member may elect to rescind his or her after tax purchase of service contract and receive a refund of the funds paid for the purchase plus interest.

f. Offset: The collection of a Retirement System underpayment does not constitute "execution, garnishment, attachment or any other process of any court" under Municipal Code Section 24.1008. If the underpayment cannot be collected through any of the above means, the Retirement System may collect an underpayment as an offset from any future benefits the System owes to the Member or, where legally permissible, the Member's beneficiaries, whether or not the Member consents to the offset.

4. DUE PROCESS

a. Before collecting an underpayment from the future benefits of a Member without consent, SDCERS will give notice to the affected party of its intent to do so and provide an opportunity for the affected party to request a hearing on the matter should the affected party dispute the fact that an underpayment has occurred or the amount of the underpayment.

b. No underpayment will be collected from the future benefits of a Member unless that person has been given 30 days notice of SDCERS' intent to do

so. The notice will include an explanation as to the reason for the offset, the basis for calculation of the amount of the underpayment and an explanation of the Member's right to request a hearing on the matter. The notice will be mailed to the affected person's last known address and will include a proof of service. Service by regular mail will constitute sufficient notice.

c. The Member must request a hearing within 30 days of the mailing of the above notice. Failure to do so will constitute a waiver of the right to a hearing. If the Member requests a hearing within 30 days of the mailing of the notice, staff will place the matter on the agenda for the Business and Governance Committee meeting.

d. Hearings will be held before the Business and Governance Committee for a recommended final decision by the Board. The Committee will hear all matters, including those arising from disputed facts, although the Committee may recommend referral to a hearing before an Adjudicator if the Committee deems that appropriate. The same procedural requirements for hearings set forth in Board Rule 7.50 through 7.170 will apply to hearings on underpayments before the Business and Governance Committee.

POLICY REVIEW AND HISTORY

5. The Board will review this Policy at least once every three years to ensure that it remains relevant and appropriate.

6. This Policy was adopted by the Board of Administration on June 20, 2008 and amended on October 17, 2008, September 18, 2009 and January 22, 2010 and reviewed and amended on August 19, 2011, and amended on September 20, 2013.

ATTACHMENT 3

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM
STAFF REPORT
LEGAL DIVISION

DATE: July 27, 2011

TO: BUSINESS AND GOVERNANCE COMMITTEE

FROM: Elaine W. Reagan, General Counsel, Legal

SUBJECT: Staff Recommendation to Adopt Revised Overpayments and Underpayments Policies

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RECOMMENDATION:

Adopt Revised Overpayments and Underpayments Policies

SUMMARY:

Staff is in the process of its triennial review of all Board Charters, Policies, Resolutions and Rules. The Overpayments and Underpayments Policies were adopted by the Board on June 20, 2008 and last amended on January 22, 2010. The Overpayments Policy applies when SDCERS overpays a benefit to a Member or Beneficiary. The Underpayments Policy applies when a Member underpays contributions, including underpayment of contributions for purchase of service.

The Business and Governance Committee reviewed the Policies at its April 2011 meeting as part of the triennial review. At that time, staff recommended that where the Overpayment or Underpayment was not caused by the Member, that the policies be revised to change the interest rate applied to collections from 2% to the non-corporate rate established by the IRS for tax underpayments ("IRS rate") as the interest, which is currently set at 4%. The Committee continued the item and asked staff to discuss this proposed revision with the Plan sponsors. As a result of feedback received from the plan sponsors, staff is no longer recommending that SDCERS use the IRS rate.

Staff is recommending the following substantive revisions to the policies:

- Change the interest rate applied to collections of overpayments and underpayments from 2% to the actuarial assumed rate in effect when the matter is resolved.
- Delete the provision requiring SDCERS to collect from the plan sponsor the difference between the interest rate actually charged the member and the actuarial assumed interest rate.

Currently, the policies require that SDCERS collect interest on overpayments and underpayments at the actuarially assumed interest rate, with 2% interest from the Member and the remainder from the plan sponsor. The policies also require that SDCERS collect the plan sponsor portion of interest immediately. This policy was based on the guidelines for collection of Overpayments provided by the IRS for self-correction of plan errors. The IRS guidelines state:

> *Return of Overpayment Correction Method.* Overpayments as a result of amounts being paid in excess of the limits of §415(b)[1] may be corrected using the return of Overpayment correction method set forth in this paragraph . . . . The Employer takes reasonable steps to have the Overpayment (with appropriate interest) returned by the recipient to the plan . . . . To the extent the amount returned by the recipient is less than the Overpayment, adjusted for earnings at the plan's earnings rate, then the Employer or another person contributes the difference to the plan. (Rev. Proc. 2008-50, Appendix B, section 2.04(1)(a)(i), emphasis added.)

See also, Rev. Proc. 2008-50, §6.06(3).

The guidelines require that interest be collected at the plan's earnings rate (the actuarial assumed rate). There is no provision in the plan documents of the City, Port or Airport that would allow SDCERS to require the plan sponsors to pay this interest without their consent. Because the plan sponsors have not agreed to voluntarily pay any portion of this interest, SDCERS must collect the entire amount from the Member.

Therefore, staff is recommending that the policies be revised to provide that the Member will pay interest on overpayments and underpayments at the actuarial assumed rate so that SDCERS will be in compliance with IRS guidelines.

The remaining revisions are non-substantive, cosmetic changes.

[1] The guidelines also provide if a plan has a different but analogous failure to one set forth in Appendix B, then the analogous correction method is generally available to correct any failure. [Rev. Proc. 2008-50, Section 6.01(2).) Collection of an overpayment of a benefit or underpayment of contributions is analogous to an overpayment of benefits under 415(n) and is thus the appropriate correction method to use in these policies.

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

JOAN F. DAWSON
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JAN I. GOLDSMITH
CITY ATTORNEY

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FAX (619) 236-7215

December 3, 2015

REPORT TO THE CHARTER REVIEW COMMITTEE

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM

INTRODUCTION

This Report is prepared at the request of the Charter Review Committee (Committee). On August 6, 2015, the Committee requested that this Office provide legal analysis related to certain proposals to amend section 144 of the San Diego City Charter (Charter), submitted by the staff of the San Diego City Employees' Retirement System (SDCERS). A copy of the proposal is attached to this Report as Attachment A.

DISCUSSION

I. PROPOSAL TO AMEND CHARTER SECTION 144 RELATED TO POWERS AND DUTIES OF THE SDCERS BOARD OF ADMINISTRATION (BOARD).

SDCERS has recommended that the last paragraph of Charter section 144 be amended to add language and strike language, as follows:

> The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system; shall have all powers and duties provided in the Declaration of Group Trust for the SDCERS Group Trust effective July 1, 2007 and any amendments thereto or successor trusts hereinafter adopted by Resolution of the City Council; ~~and~~ shall have exclusive control of the administration and investment of such fund or funds as may be established; ~~and~~ shall be permitted to invest in any bonds or securities which are authorized by General Law for savings banks; and, further, shall be permitted to invest in such additional classes or types of investments as deemed prudent by the Board consistent with its fiduciary duties. ~~are approved by resolution of the Council of the City of San Diego; provided, however, that individual investments within the classes or types approved by the Council must be approved by independent investment counsel; and provided, further, the board may place such funds in the hands of the Funds Commission for investment. Provided, however, that the~~

> ~~Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller, such retirement allowance has been granted in contravention of this Article or any ordinances passed under the authority granted herein.~~

The Committee asked this Office to provide legal analysis regarding the implications of this proposed Charter amendment.

A. Proposal to Give the Board All Powers and Duties Provided in the Declaration of Trust for the SDCERS Group Trust Effective July 1, 2007, and Naming Specific Trusts in the Charter.

This proposal involves adding language to the Charter, stating that the Board has "all powers and duties provided in the Declaration of Group Trust for the SDCERS Group Trust effective July 1, 2007 and any amendments thereto or successor trusts hereinafter adopted by Resolution of the City Council."

SDCERS staff has informed this Office that this language is necessary to ensure that the Charter and the Group Trust are consistent. However, this Office disagrees that this language is necessary, and advises *against* adding this language to the Charter.

The Declaration of Trust for the SDCERS Group Trust (Group Trust) was not approved by the San Diego City Council (Council). It was approved by the Board on March 16, 2007. *See* San Diego Resolution R-303037 (Oct. 12, 2007) (staff supporting materials). A copy of the Group Trust is attached to this Report as Attachment B.

In addition to administering the City's retirement plan, SDCERS administers the retirement plans for the San Diego Unified Port District (Port) and the San Diego County Regional Airport Authority (Airport Authority).[1] The stated purpose of the Group Trust is "to hold and jointly invest the assets of the Participating Trusts, and make appropriate payments pursuant to directions from the Participating Trusts." Attachment B, art. II, § 2.2. Although the Group Trust was not presented to the Council for approval, the Council approved Participation and Administration Agreements between SDCERS and the Port, SDCERS and the Airport Authority, and SDCERS and the City, on September 25, 2007. San Diego Resolution R-303037.

The Group Trust was prepared for the Board and solely approved by the Board. It names the Board as the Trustee, and describes the powers and duties of the Trustee. Attachment A, art. I, § 1.18; art. III, § 3.2. The powers, as described in the document, are broad, and include the authority to sell property, participate in reorganizations or mergers, borrow money, and settle or compromise claims or debts, among others. *Id.* It is beyond the scope of this Report to analyze whether the powers and duties of the Board, as set forth in the Group Trust, are consistent with applicable law. However, we note that the Board's powers as set forth in the Group Trust are broad.

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[1] Charter section 149 authorizes the participation of other public agencies in the City's retirement trust fund, as long as the Council approves it. A contracting public agency and its employees are "responsible for all costs associated with participation in the [City Employees Retirement Trust] Fund and the administration of the public agency's benefits." San Diego Charter § 149.

The Charter, at section 143, provides that the Board has "plenary authority and fiduciary responsibility for investment of moneys and administration of the system as provided for in article XVI, section 17 of the California Constitution." San Diego Charter § 143. The powers and duties, as set forth in the California Constitution, will control over any conflicting provisions in the Charter.

On November 3, 1992, California voters approved Proposition 162, an initiative measure, known as "The California Pension Protection Act of 1992," which added language to article XVI, section 17 (Proposition 162).[2]

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[2] The relevant language of article XVI, section 17 of the California Constitution is as follows:

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:

(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

(c) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.

(d) The members of the retirement board of a public pension or retirement system shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so.

(e) The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system.

(f) With regard to the retirement board of a public pension or retirement system which includes in its composition elected employee members, the number, terms, and method of selection or removal of members of the retirement board which were required by law or otherwise in effect on July 1, 1991, shall not be changed, amended, or modified by the Legislature unless the change, amendment, or modification enacted by the Legislature is ratified by a majority vote of the electors of the jurisdiction in which the participants of the system are or were, prior to retirement, employed.

(g) The Legislature may by statute continue to prohibit certain investments by a retirement board where it is in the public interest to do so, and provided that the prohibition satisfies the standards of fiduciary care and loyalty required of a retirement board pursuant to this section.

(h) As used in this section, the term "retirement board" shall mean the board of administration, board of trustees, board of directors, or other governing body or board of a public employees' pension or retirement system; provided, however, that the term "retirement board" shall not be interpreted to mean or include a governing body or board created after July 1, 1991 which does not administer pension or retirement benefits, or the elected legislative body of a jurisdiction which employs participants in a public employees' pension or retirement system.

The stated purpose and intent of Proposition 162 was to, in part,

> [E]nsure that the assets of public pension systems are used exclusively for the purpose of efficiently and promptly providing benefits and services to participants of these systems, and not for other purposes [and] [t]o give the sole and exclusive power over the management and investment of public pension funds to the retirement boards elected or appointed for that purpose, . . . and to prohibit the . . . executive or legislative body of any political subdivision of this state from tampering with public pension funds.

Proposition 162, Section three (d) and (e).[3]

Thus, the California Constitution establishes the nature and scope of the Board's plenary authority and fiduciary duties. The Board has "the sole and exclusive fiduciary responsibility over the assets of the . . . [City's] retirement system" and the "sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries." Cal. Const., art. XVI, § 17(a). The California Constitution also states: "The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system." *Id.*

It is this Office's opinion that the Charter, as presently written, is clear, and expressly incorporates the California constitutional provisions. No further language is needed to describe the powers and duties of the Board; additional provisions may, in fact, conflict or confuse the well-established authority and duties. If the SDCERS staff believes that all of the powers and duties as set forth in the Group Trust should also be set forth in the Charter, then there should be a full discussion at the Council, prior to placement of this language on the ballot.

B. Proposal to Give the Board the Sole Authority to Invest in Classes or Types of Investments it Deems Prudent Beyond Those Investment Options Already Established or Authorized by General Law.

This proposal adds language to authorize the Board to invest in any classes or types of investments "deemed prudent by the Board consistent with its fiduciary duties." It also seeks to repeal provisions that require certain types of investments to be approved by Council resolution and by independent investment counsel and that authorize the Board to place funds "in the hands of the Funds Commission for investment."

SDCERS states that this language is necessary "to achieve consistency with the Board's fiduciary duties as well as consistency between provisions in other Articles of the Charter." See July 13, 2015 Letter from Mark Hovey to Steven Hadley, Attachment A.

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[3] Proposition 162 is available at 1991 Cal. Legis. Serv. Prop. 162 (West), and http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2076&context=ca_ballot_props

It is this Office's view that the proposed modifications are not necessary because the Charter must be read in conjunction with the language added to the California Constitution by Proposition 162. To the extent that the Charter, as presently written, conflicts with the California Constitution, the Constitution will control. The Board has "sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system." Cal. Const., art. XVI, § 17(a). The word "plenary" has been interpreted "to mean that retirement boards would have the sole and complete power to invest their funds and to administer their systems, as opposed to being subject to direction from state and local legislative and executive bodies in these matters." *Singh v. Board of Ret.*, 41 Cal. App. 4th 1180, 1192 (1996). This authority is intended to "insulate the administration of retirement systems from oversight and control by legislative and executive authorities." *Id.*

The Board must "diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return." Cal. Const. art. XVI, § 17(d). The Board also has "sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system." *Id.* at § 17(e). Proposition 162 granted the Board authority to administer the retirement system funds without interference. *Westly v. California Pub. Emps.' Ret. Sys.*, 105 Cal. App. 4th 1095, 1110 (2003).

However, the constitutional powers are not unlimited. *City of San Diego v. San Diego City Emps.' Ret. Sys.*, 186 Cal. App. 4th 69, 79 (2010). The Charter, as presently written, requires the Board to seek approval of investments by independent investment counsel. SDCERS staff is recommending deletion of this language, and has not provided a rationale for this proposed change.

The SDCERS proposal also seeks to repeal the following limitation on the Board's authority: "Provided, however, that the Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller, such retirement allowance has been granted in contravention of this Article or any ordinances passed under the authority granted herein." The responsibilities of the Auditor and Comptroller are assumed by the City's Chief Financial Officer under the strong mayor form of government. San Diego Charter § 39. This language has existed in the Charter since it was originally approved by City voters on April 7, 1931. SDCERS staff has not provided sufficient justification for repeal of this language.

Rather, the language, as presently set forth in the Charter, provides a check on the Board's authority, and must be read in a way that is consistent with the California Constitution. In *Westly*, the Board of Administration for the California Public Employees' Retirement System (CalPERS) attempted to circumvent the authority of the Office of State Controller to audit and determine the legality of claims regarding pay. 105 Cal. App. 4th at 1105. The court analyzed article XVI, section 17 of the California Constitution and concluded that the plenary authority of the CalPERS Board "is limited to actuarial services and to the protection and delivery of the assets, benefits, and services for which the Board has a fiduciary responsibility." *Id.* at 1110. "That authority did not extend to matters within the purview of other branches of government and did not encompass areas not expressly dedicated to the board." *City of San Diego*, 186 Cal.

App. 4th at 79. Plenary power under article XVI, section 17 of the California Constitution "does not mean unreviewable power." *Id.* (*citing and quoting Board of Ret. v. Santa Barbara Cnty. Grand Jury*, 58 Cal. App. 4th 1185, 1193 (1997)). As the court of appeal recently explained, SDCERS has "exclusive authority to administer plan assets," but it does not have "plenary authority to evade the law." *Id.* at 78.

This Office has previously advised that Proposition 162 did not change the responsibilities of the Auditor and Comptroller, now assumed by the Chief Financial Officer, to verify the accuracy of claims made on the City's Retirement Fund. 1998 City Att'y MOL 348 (98-21; Aug. 28, 1998). Further, this Office has also advised that SDCERS may operate its own ledger system, but only within certain parameters, and only if the City retains its ability to audit the system and control payments as required by Charter section 144. 2009 City Att'y MOL 30 (2009-3; Apr. 24, 2009). SDCERS is recommending deletion of the language that authorizes this ability to audit the system. This is a substantive change, and requires policy considerations of its consequences before it is placed on the ballot.

II. PROPOSAL TO AMEND CHARTER SECTION 144 TO CLARIFY WHETHER PORT AND AIRPORT AUTHORITY MEMBERS CAN SERVE IN BOARD SEATS.

SDCERS staff has proposed the following additional amendment to Charter section 144:

> Prior to April 1, 2005, in anticipation of the effective date, and thereafter, members shall be selected to serve as follows:
>
> (b) One (1) police safety member of the Retirement System elected for the active police safety members to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this capacity shall serve a two (2) year term. For purposes of this section, police safety members eligible to serve and vote shall include any police safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.
>
> (c) One (1) fire safety member of the Retirement System elected by the active fire safety members to serve a four (4) year term. For purposes of this section, fire safety member eligible to serve and vote shall include any fire safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.
>
> (d) Two (2) general members of the Retirement System elected by active general members of the Retirement System to serve a four (4) year term. For purposes of this section, general members eligible to serve and vote shall include any general members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(e) One (1) retired member of the Retirement System elected by the retired members of the Retirement System to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this capacity shall serve a two (2) year term. For purposes of this section, retired members eligible to serve and vote shall include any retired members of a Contracting Public Agency as defined in Section 149 of this Article.

The Committee has asked this Office whether this proposed language is necessary to ensure that Port and Airport Authority members are eligible to serve on the Board. SDCERS staff has stated that this language is necessary to ensure that members, as defined in section 144, includes employees of the Port and Airport Authority.

This Office has been informed by SDCERS staff that employees from the Port and the Airport Authority have not previously served on the Board. This Office has previously advised that "members" as used in Charter section 144 means members of the retirement system from this City. 1994 City Att'y MOL 347 (94-41; Apr. 27, 1994). This City's retirement plan is separate and distinct from the retirement plans for the Port and the Airport Authority. To make it clear that Port and Airport Authority members may serve on the Board, the SDCERS staff recommendation would be required. However, because members from the Port and Airport Authority have not previously served on the Board, this is a substantive, policy change, and the Council should consider the policy issues before this proposal is placed on a ballot.

This Office is available to provide any further guidance on these issues, as requested by the Committee.

JAN I. GOLDSMITH, CITY ATTORNEY

By *\/s/ Joan F. Dawson*
Joan F. Dawson
Deputy City Attorney

JFD:ccm
RC-2015-10
Doc. No. 1178648
Attachments

ATTACHMENT A

SDCERS

San Diego City Employees' Retirement System

Mark A. Hovey
Chief Executive Officer

July 13, 2015

Mr. Steven Hadley
Charter Review Committee Consultant
for Council President Sherri Lightner
City Administration Building
202 C Street
San Diego, CA 92101

Dear Mr. Hadley:

On January 30, 2015, I provided the enclosed letter to Scott Chadwick providing SDCERS' suggestions for revisions to City Charter Article IX. The Charter Review Committee graciously allowed the SDCERS Board of Administration ("SDCERS Board") additional time to review and provide additional suggestions. The SDCERS Board has now completed its review.

SDCERS has received requests from both the San Diego Unified Port District ("UPD") and the San Diego County Regional Airport Authority ("Airport") to provide Charter language allowing UPD and Airport employees the opportunity to run for the elected seats on the SDCERS Board. The SDCERS Board concurs with this request.

Enclosed are SDCERS' proposed updates and modifications to Article IX of the City Charter. In addition to the suggestions made in my January 30, 2015 letter, the SDCERS Board has requested the following revisions:

- Amend Charter Section 141 to provide that nothing contained in Section 141 or Section 143 of the Charter will preclude the City of San Diego from agreeing to pay to SDCERS any portion of an overpayment or underpayment, and associated interested assessed by the Board, where the overpayment or underpayment was proximately caused by the fault or negligence of a City employee acting in the course and scope of his or her employment. The Council would be empowered to enact any and all ordinances necessary to put this provision into effect. Any ordinances enacted pursuant to this amendment would not be subject to a Charter Section 143.1 vote of the membership or the electorate.
- Amend Charter Section 144 to include in the eligibility requirements for appointment to the Board 15 years of legal experience related to the practice of law in any of the fields listed (i.e., pension administration, pension actuarial practice, investment management, real estate, banking or accounting).

- Amend Charter Section 144 to allow general, safety and retired members of Contracting Public Agencies to run for election and vote in elections for the elected positions on the SDCERS Board of Administration.

SDCERS is suggesting that the Charter be amended to allow the City to enact an ordinance, at its discretion, allowing the City to pay SDCERS for any portion of an overpayment of benefits to or underpayment of contributions from members and associated interest where the overpayment or underpayment was caused by the fault or negligence of a City employee. SDCERS' employees are City employees.

SDCERS works directly with its members to resolve any active member underpayments to the pension system, or retired member benefit overpayments (both collectively referred to as "overpayments"). Due to IRS requirements, SDCERS also collects interest from the members on the overpayment, at a rate equal to the SDCERS assumed rate of return (currently 7.25%). The SDCERS Board of Administration would like for the City to consider playing a role in resolving such underpayments/overpayments.

To provide perspective on this issue, SDCERS works diligently to make zero mistakes, and while we successfully and accurately process hundreds of thousands of transactions each year, our staff members are not perfect. When the mistakes have been made, the error is usually the results of a step or process not done correctly by an SDCERS staff member, rather than due to an error made by the member, or the City.

IRS rules require that in the event of an overpayment, SDCERS resolve the overpayment by collecting the full principal amount, with interest at the plan's earnings rate, to make the system "whole." Consistent tax advice from SDCERS outside counsel advises that we have been following the IRS corrections process accurately since SDCERS received its IRS Determination Letter of plan compliance back in 2008.

Members frequently comment to SDCERS that if the mistake was not due to their (i.e., the member's) error, why are they doubly "penalized" by assessing interest on the amount. Indeed, SDCERS implemented a policy in 2008 to comply with IRS overpayment requirements and decided to charge the member a lower interest rate . . . 2% . . . and have the balance of the interest due be covered by the City. Following correspondence between SDCERS and the City Attorney's office, who clearly conveyed that the City and taxpayers could not be held responsible for resolving overpayments to the member, SDCERS revised its policy in 2009 to recover the entire interest amount from the member and has consistently done so since then.

It has been suggested SDCERS procure insurance to cover such errors, rather than have the member repay the error in full. However, insurers have stated deductibles would be involved that exceed the cost of the overpayment, and even if the overpayments were to exceed the deductible, the insurance company retains subrogation rates to pursue a counter claim against the City. In short, insurance might transfer a portion of the burden off the member, but that burden would be placed back on the City, regardless.

It has also been suggested SDCERS simply fix the overpayment issue prospectively, and historical overpayment amounts be left in the City's Unfunded Actuarial Liability (UAL).

Unfortunately, the IRS explicitly does not allow the plan sponsor to cover overpayments via an amortized UAL phased into the City's annual pension payments. Instead, the City, per IRS rules, must immediately cover any portion of the overpayment not made by the member.

As noted above, the SDCERS Board believes the IRS effectively ties its hands and that full recoupment of the overpayment, with interest, is required from the member. However, the Board also believes that given the underlying cause of the error has traditionally been made by SDCERS, an agent of the City in this case, that it may be prudent for the City to acknowledge the impossibly high standard of perfection placed on its employees and agree to shoulder a portion of the overpayment.

It's difficult to assess the amount of money involved in prospective overpayment corrections to be done by SDCERS (i.e., it is not possible to predict future overpayment errors). However, SDCERS does report annually on the number and amount of overpayments collected from members. In FY 2013, that amount was $701,171, which included $611,501 associated with the PSC Litigation lawsuit the City won against SDCERS. In FY 2014, SDCERS collected $150,788 in member overpayments. There are approximately 300 potential member overpayment issues that SDCERS is researching now, and we expect to resolve those by December 31, 2015; this relatively large number of open matters was primarily driven by the complete data conversion audit when SDCERS covered to its new pension system in May 2014. Going forward, we expect overpayments to be limited in number and not material.

As previously advised, SDCERS believes the majority of the remaining proposed Charter modifications are required to achieve consistency with the Board's fiduciary duties as well as consistency between provisions in other Articles of the Charter. SDCERS is also proposing that the City amend the Charter to allow Police Recruits to join SDCERS upon entering the Police Academy. Not only does SDCERS believe that this was the actual intent of the proposers of Proposition B, but that it will also assist the City in its retention of new police officers.

The SDCERS Board of Administration respectively requests the City review applicable City Charter language to allow for flexibility in resolving member overpayments with the City.

SDCERS would be happy to appear before the Charter Review Committee if requested. Thank you for your consideration.

Sincerely,

Mark A. Hovey
Chief Executive Officer

MAH/er

Enclosure: SDCERS' Proposed Revisions to the City Charter

cc: SDCERS Board of Administration
Elaine Reagan, SDCERS Deputy CEO – Compliance & Legal Operations
Hon. Council President Sherri S. Lightner
Hon. Mayor Kevin Faulconer
Scott Chadwick, Chief Operating Officer
Hon. Jan Goldsmith, City Attorney
Paul Cooper, Asst. City Attorney
Sharon Spivak, Deputy City Attorney
Roxanne Story Parks, Deputy City Attorney

SDCERS

2015 CITY CHARTER REVIEW
SDCERS' PROPOSED REVISIONS TO THE CITY CHARTER
CITY CHARTER ARTICLE IX

Section 140: Establishment of Separate Retirement Pension Systems; Definitions

As of the election at which this Section becomes operative, the electorate of the City of San Diego has found and declared that the fiscal best interests of the City are served by reforming the retirement system authorized by this Charter to be established for City employees.

"Defined Benefit Pension Plan" or "Defined Benefit Pension System" is a system or plan to provide a specified allowance to a city retiree or a retiree's spouse after retirement that is based on a set formula based on factors such as age, years of service, and elements of compensation as established in this Article.

The Defined Benefit Pension Plan in place prior to said election, established by the City Council pursuant to Sections 141 through 149 of this Charter, may remain in place until, for any reason, there remain no participants in the Defined Benefit Plan. The City Council may by ordinance utilize any lawful means for terminating the Defined Benefit Plan. Any closure of the Defined Benefit Plan shall be designed and implemented to protect the employees' vested rights in the Defined Benefit Plan, generate cost savings for taxpayers, and ensure compliance with applicable laws and regulations, including tax regulations.

At such time as there remain no participants in the Defined Benefit Pension Plan, the City shall take such actions as are necessary and appropriate to promptly wind down and terminate the Defined Benefit Pension Plan.

Notwithstanding the foregoing, and except as expressly provided in this Article IX, all Officers and employees, with the exception of sworn police officers and police recruits participating in the City's Police Academy, who are initially hired or assume office on or after the effective date of this Section shall participate only in such Defined Contribution Plans as authorized by Sections 150 and 151 of this Charter.

The provisions of Sections 141 through 149 shall apply only to the Defined Benefit Plan, and those City employees eligible to participate in the Defined Benefit Plan. The provisions of Sections 150 and 151 shall apply only to the Defined Contribution Plan, and those City employees eligible to participate in the Defined Contribution Plan, except as expressly stated.

Notwithstanding the foregoing, and except as provided in this Article IX, the City Council is hereby authorized and empowered by ordinance to enroll sworn police officers hired after the effective date of this section in either the Defined Benefit Plan or the Defined Contribution Plan. This section shall be implemented in a manner consistent with the requirements of applicable labor relations laws.

(Addition voted 06-05-2012; effective 07-20-2012.)

~~1~~ Section 141: City Employees' Retirement System

The Council of the City is hereby authorized and empowered by ordinance to establish a retirement system and to provide for death benefits for compensated public officers and employees, other than those policemen and firemen who were members of a pension system on June 30, 1946. No employee shall be retired before reaching the age of sixty-two years and before completing ten years of service for which payment has been made, except such employees may be given the option to retire at the age of fifty-five years after twenty years of service for which payment has been made with a proportionately reduced allowance. Policemen, firemen and full time lifeguards, however, who have had ten years of service for which payment has been made may be retired at the age of fifty-five years, except such policemen, firemen and full time lifeguards may be given the option to retire at the age of fifty years after twenty years of service for which payment has been made with a proportionately reduced allowance.

The Council may also in said ordinance provide:

(a) For the retirement with benefits of an employee who has become physically or mentally disabled by reason of bodily injuries received in or by reason of sickness caused by the discharge of duty or as a result thereof to such an extent as to render necessary retirement from active service.

(b) Death benefits for dependents of employees who are killed in the line of duty or who die as a result of injuries suffered in the performance of duty.

(c) Retirement with benefits of an employee who, after ten years of service for which payment has been made, has become disabled to the extent of not being capable of performing assigned duties, or who is separated from City service without fault or delinquency.

(d) For health insurance benefits for retired employees.

Notwithstanding anything to the contrary in this section, the Charter or the Municipal Code, reciprocal service granted under the Uniform Reciprocal Provisions pursuant to the Reciprocity Contract between SDCERS and CalPERS shall be included as service for purposes of establishing eligibility for retirement benefits.

] *(Editor's note: Supplement No. 655)*
(Amendment voted 03-13-1945; effective 04-09-1945.)
(Amendment voted 04-19-1949; effective 05-20-1949.)
(Amendment voted 03-13-1951; effective 03-26-1951.)
(Amendment voted 06-08-1954; effective 01-10-1955.)
(Amendment voted 11-06-1990; effective 02-19-1991.)
(Amendment voted 11-08-1994; effective 01-30-1995.)
(Amendment voted 11-05-1996; effective 02-10-1997.)

Section 141.1: Reform of ~~Sworn~~ Police Officer Defined Benefit Pension Plan

Notwithstanding any other provision of this Charter, or any ordinance or other action taken pursuant hereto, the maximum amount of retirement benefit payable to a sworn police officer or police recruit participating in the City's Police Academy, who is hired after the effective date of this section and who is a participant under the Defined Benefit Pension Plan, shall be an amount equivalent to 80% at age 55 of the average of the participant's highest consecutive 36 months of Base Compensation as defined by Section 70.1. The maximum set by this provision shall decrease by 3% (three percentage points) for each year that such participant retires before age 55.

(Addition voted 06-05-2012; effective 07-20-2012.)

Section 141.2: Full and Fair Employee Contributions for The Defined Benefit Pension Plan

For officers and employees who have the legal right to remain in the established Defined Benefit Pension Plan, the City shall contribute annually an amount substantially equal to that required of the employee for a normal retirement allowance, as certified by the Actuary established in Charter Section 142, but shall not contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employee. The City shall not pay, cap the employee contribution rate, or otherwise compensate for any portion of a contribution to the Retirement System by a City Officer or employee.

To the fullest extent permissible by law, in calculating annual contributions for the City and City employees, the Retirement Board shall divide equally between those two parties all costs those costs explicitly and exclusively reserved to the City in this Section and Section 143. Contributions shall also be governed by Section 143 of this Article. In the event of a conflict between this Section and Section 143, this Section shall prevail. This section is not intended to interfere with vested defined rights of any retiree receiving benefits from the Defined Benefit Retirement System or of any employee enrolled in the Defined Benefit Retirement System as of the effective date of this section.

Nothing contained in this Section shall preclude the City from entering into a settlement of *City of San Diego v. San Diego City Employees' Retirement System* Case No. #37-2010-00091207-CU-WM-CTL to define responsibilities of the City and employees for unfunded liabilities of the Retirement System even if the settlement includes terms that might otherwise conflict with the above restrictions, as long as the settlement is approved by the court as a good faith settlement and approved by a two-thirds vote of the City Council.

Nothing contained in this Section or in Section 143 shall preclude the City from agreeing to pay to the Retirement System any portion of an overpayment of benefits or underpayment of contributions, and any interest associated with an overpayment or underpayment as assessed by the Board of Administration, where the overpayment or underpayment was proximately caused by the fault or negligence of a City employee acting in the course and scope of his or her employment. The Council of the City is hereby authorized and fully empowered to enact any and all ordinances necessary to carry into effect the provisions of this section and any and all ordinances so enacted shall have equal force and effect with this Article and shall be construed to be a part hereof as fully as if drawn herein. Any ordinance enacted pursuant to this section shall not be considered an ordinance affecting or enhancing the benefits of any active or retired Member of the System and shall not be subject to the voting requirements set forth in Section 143.1.

(Addition voted 06-05-2012; effective 07-20-2012.)

Section 142.1: Employment of Attorneys (New)

The Board of Administration hereinafter provided, may appoint attorneys to advise and represent the Board, as may be necessary. Attorneys hired or retained by the Board shall have duties and responsibilities only to the Retirement System and its Board of Administration and shall not have a duty of loyalty or care to the City of San Diego. Except to the extent that the

Board retains outside counsel as consultants, such appointments shall be made under the provisions of Article VIII of this Charter.

Section 143: Contributions [No Change.]

Section 143.1: Approval of Retirement System Benefit [No Change]

Section 144: Board of Administration

Effective April 1, 2005, the system shall be managed by a newly constituted Board of Administration which shall consist of 13 members. Seven members shall constitute a quorum of the Board and the concurring vote of seven members shall be required for the Board to take any action. Prior to April 1, 2005, in anticipation of the effective date, and thereafter, members shall be selected to serve as follows:

(a) Seven (7) members shall be appointed by the Mayor and confirmed by the Council. No person who is a City employee, participant in the Retirement System, or City union representative may be eligible for appointment in this category. Such appointees shall have the professional qualifications of a college degree in finance, economics, law, business, or other relevant field of study or a relevant professional certification. In addition, such appointees shall have a minimum of fifteen (15) years' combined experience in pension administration, pension actuarial practice, investment management, real estate, banking, ~~or~~ accounting or the practice of law related to any of the preceding fields. Members of the Board serving in this category shall serve staggered terms of four (4) years each. Inaugural appointments occurring after the effective date of this section shall have four (4) members serving two (2) year terms and three (3) members serving three (3) year terms. The Board shall determine which open seats shall serve four (4) and three (3) years terms to achieve staggered terms of four (4) years for all subsequent appointments. ~~(Inaugural appointments shall have three (3) members serving two year terms) and m~~Members in this category shall be limited to a maximum of eight (8) consecutive years in office and an interval of four (4) years must pass before such persons can be reappointed. Such appointees shall not have any other personal interests which would create a conflict of interest with the duties of a Board member and trustee.

(b) One (1) police safety member of the Retirement System elected by the active police safety members to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this category shall serve a two (2) year term. For purposes of this section, police safety members eligible to serve and vote shall include any police safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(c) One (1) fire safety member of the Retirement System elected by the active fire safety members to serve a four (4) year term. For purposes of this section, fire safety member eligible to serve and vote shall include any fire safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(d) Two (2) general members of the Retirement System elected by active general members of the Retirement System to serve a four (4) year term. For purposes of this section, general members eligible to serve and vote shall include any general members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(e) One (1) retired member of the Retirement System elected by the retired members of the Retirement System to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this category shall serve a two (2) year term. For purposes of this section, retired members eligible to serve and vote shall include any retired members of a Contracting Public Agency as defined in Section 149 of this Article.

(f) One (1) City management employee in the administrative service appointed by the ~~City Manager~~ Mayor to serve at the pleasure of the ~~City Manager~~Mayor selected from the following: ~~City Manager~~Chief Operating Officer, City Treasurer, Deputy or Assistant ~~City Manager~~Chief Operating Officer, or person in a similar position who reports to the ~~City Manager~~Mayor

The Board of Administration may establish such rules and regulations as it may deem proper; shall elect one of its members president and appoint a secretary and may appoint such other employees as may be necessary. Such appointments, except the actuary, shall be made under the provisions of Article VIII of this Charter.

The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system; shall have all powers and duties provided in the Declaration of Group Trust for the SDCERS Group Trust effective July 1, 2007 and any amendments thereto or successor trusts hereinafter adopted by Resolution of the City Council; ~~and~~ shall have exclusive control of the administration and investment of such fund or funds as may be established; ~~and~~ shall be permitted to invest in any bonds or securities which are authorized by General Law for savings banks; and, further, shall be permitted to invest in such additional classes or types of investments as deemed prudent by the Board consistent with its fiduciary duties. ~~are approved by resolution of the Council of the City of San Diego; provided, however, that individual investments within the classes or types approved by the Council must be approved by independent investment counsel; and, provided, further, the board may place such funds in the hands of the Funds Commission for investment. Provided, however, that the Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller, such retirement allowance has been granted in contravention of this Article or any ordinances passed under the authority granted herein.~~

(Amendment voted 03-13-1951; effective 03-26-1951.)
(Amendment voted 11-08-1960; effective 01-09-1961.)
(Amendment voted 11-04-1969; effective 01-29-1970.)
(Amendment voted 06-04-1974; effective 08-13-1974.)
(Amendment voted 11-2-2004; effective 04-01-2005)
(Effective 07-08-2008, the authority, power, and responsibilities conferred upon the Auditor and Comptroller by this Charter were transferred to the Chief Financial Officer. See section 39.)
Prior Language

Section 145: Retirement Fund

All moneys contributed by employees of the City or appropriated by the Council or received from any other source under the terms of this Article, shall be placed in a special fund ~~in the City Treasury~~ to be known as the City Employees' Retirement Fund, which said fund is hereby created. Such fund shall be a Trust Fund to be held and used only for the purpose of carrying out the provisions of this Article. No payments shall be made therefrom except upon

the order of the Board of Administration. This fund may be placed by the Board under the Funds Commission for investment; but shall not be merged with other funds of the City.

Sections 146 through 151 [No Change]

ATTACHMENT B

DECLARATION OF TRUST
SDCERS GROUP TRUST

Effective: July 1, 2007

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Exhibit A

DECLARATION OF TRUST
SDCERS GROUP TRUST

Preamble

Establishment of SDCERS

WHEREAS, in accordance with California Constitution Article XVI, Section 17, City Charter Article IX, Sections 141 – 149 and San Diego Municipal Code §§ 24.0100 – 24.1809, the City of San Diego (the "City") has established and maintains a governmental defined benefit pension plan for its employees, known as the San Diego City Employees' Retirement System ("SDCERS");

WHEREAS, SDCERS is administered by the Board of Administration (the "Board");

Applicable Law

WHEREAS, City Charter Article IX, Section 149 was amended March 5, 2002, to allow public agencies to participate in SDCERS by contract with the Board and now reads as follows:

> Subject to approval by the City Council, a public agency may participate in the City Employees Retirement Trust Fund. After a finding by the City Council that the public agency is eligible for participation in the Trust Fund and approval by the City Council of a contract between the Board of Administration and the public agency, as provided by ordinance, the Board may administer the benefits adopted by the public agency for its employees. The public agency shall establish its own benefits and vesting schedule. All monies contributed by the public agency and its employees or appropriated by the public agency or received from any other source under the terms of this Article shall be placed in the Trust Fund to be held and used only for the purpose of paying benefits and necessary expenses of administration related to the public agency's participation. The public agency and its employees shall be responsible for all costs associated with participation in the Fund and the administration of the public agency's benefits. The Board may establish such rules and regulations as it may deem proper, within the terms of applicable Charter sections and ordinances, for the administration of the public agency's contract and benefits.
> *(Addition voted 03-05-2002; effective 04-24-2002.)*;

WHEREAS, pursuant to City Charter Article IX, Section 149, San Diego Municipal Code § 24.1801 provides as follows:

> **§24.1801 Administration by the Retirement Board**
> The Board may administer a Public Agency's retirement plan under the terms of an agreement between the Public Agency and the Board pursuant to this Division. The Board will invest in the Retirement Fund the assets of any Public Agency retirement plan administered under this Division. A Public Agency employee who participates in a Public Agency's Board-administered retirement

plan is a "Public Agency Participant," whose rights and responsibilities are governed by this Division and by the terms of the Public Agency's agreement with the Board and retirement plan. Public Agency Participants are not employees of the City of San Diego and are not Members of the System as defined in this Article. They are not entitled to vote on ordinances affecting the benefits of City employees under Charter section 143.1. Changes in benefits for Public Agency Participants must be approved according to the rules and procedures governing their respective Public Agency employers, but do not require approval by the City Council.
("Administration by the Retirement Board" added 1-7-2003 by O-19140 N.S.);

WHEREAS, pursuant to City Charter Article IX, Section 149, San Diego Municipal Code § 24.0912 provides as follows:

§24.0912 Board's Authority to Contract with Public Agencies
The Board may contract with any Public Agency to administer the Public Agency's retirement plan, pursuant to Division 18 of this Article, after the City Council makes a finding that the Public Agency is eligible to participate in the Retirement Fund and approves the agreement between the Public Agency and the Board. The Board may adopt the rules that it deems necessary or proper to administer these plans.
("Board's Authority to Contract with Public Agencies" added 1-7-2003 by O-19140 N.S.);

WHEREAS, pursuant to City Charter Article IX, Section 149, San Diego Municipal Code § 24.1806 provides as follows:

§24.1806 Accounting for Public Agency Contributions
The Board will account separately for all contributions it receives from a contracting Public Agency, and no assets of any Public Agency's retirement plan may be used to pay the benefits or costs of administering any other retirement plan administered by the Board. Each Public Agency's retirement plan assets will be commingled with the Retirement Fund's assets solely for investment purposes. The agreement between the Board and the Public Agency will provide for an equitable distribution of earnings among the System and all retirement plans administered by the Board, as determined by the Board in its sole discretion.
("Accounting for Public Agency Contributions" added 1-7-2003 by O-19140 N.S.);

History of Port Participation

WHEREAS, in 1963, the State of California established the Unified Port District of San Diego (the "Port") as a public corporation and the employees of the Port became members of SDCERS through an agreement between the City and the Port;

WHEREAS, on December 10, 2002, the San Diego City Council (the "Council") adopted a resolution finding that the Port was eligible to participate in SDCERS pursuant to City Charter Article IX, Section 149 and approving the Agreement to Administer Retirement Plan between the Port and the Board effective December 20, 2002 (the "Original Port Agreement");

WHEREAS, the Original Port Agreement was superseded by the First Amended Agreement to Administer Retirement Plan between the Port and the Board executed March 30, 2004;

WHEREAS, the First Amended Agreement to Administer Retirement Plan between the Port and the Board was superseded by the Second Amended Agreement to Administer Retirement Plan between the Port and the Board executed August 31, 2005 (the "Final Port Agreement");

History of Airport Authority Participation

WHEREAS, on January 1, 2003, the State of California established the San Diego County Regional Airport Authority (the "Airport Authority") as a separate local governmental entity of regional government, created from a group of employees formerly employed by the Port and from newly hired employees;

WHEREAS, on December 10, 2002, the Council adopted a resolution finding that the Airport Authority was eligible to participate in SDCERS and approving the Agreement to Administer Retirement Plan between the Airport Authority and the Board effective December 20, 2002 (the "Original Airport Authority Agreement");

WHEREAS, on March 29, 2004, the Council adopted a resolution approving the First Amended Agreement to Administer Retirement Plan between the Airport Authority and the Board (the "Final Airport Authority Agreement"), which superseded the Original Airport Authority Agreement;

Establishment of Group Trust

WHEREAS, the language of the City Charter, the San Diego Municipal Code, the Final Port Agreement, the Final Airport Authority Agreement and the related retirement plans was intended to result in the retirement plans of the City, Port and Airport Authority being treated as separate retirement plans with separate trusts, with the assets of those plans commingled only for investment purposes;

WHEREAS, in order to now accomplish the intent of the parties involved, the Board approved the establishment of a group trust for the common investment of the assets of SDCERS and the retirement plans of the Port and the Airport Authority at its meeting on August 26, 2006;

WHEREAS, to participate in the Group Trust, the Board of Commissioners of the Port must approve the participation of the Amended and Restated Unified Port District Retirement Plan and Trust in the Group Trust;

WHEREAS, to participate in the Group Trust, the Airport Authority Board must approve the participation of the Amended and Restated San Diego County Regional Airport Authority Retirement Plan and Trust in the Group Trust;

WHEREAS, the Board approved this Declaration of Trust at its meeting on March 16, 2007;

WHEREAS, simultaneously with the formal establishment of the Group Trust, SDCERS, the City, the Port and the Airport Authority are taking the steps necessary to accomplish the establishment of a separate retirement plan and trust for each of the City, the Port and the Airport Authority, which steps include actuarial studies to separate the assets and liabilities of each retirement plan and trust;

WHEREAS, the Board (or the "Trustee" when acting as trustee under this Declaration of Trust), established the Group Trust known as the SDCERS Group Trust pursuant to this Declaration of Trust, effective as of July 1, 2007;

WHEREAS, the initial allocation of assets pursuant to Section 5.3 of the Group Trust will be implemented as of July 1, 2007;

WHEREAS, the Group Trust is intended to qualify as a group trust under Sections 401(a) (including Section 401(a)(24)) and 501(a) of the Internal Revenue Code of 1986, as amended (the "Code"), and all provisions of this Declaration of Trust must be so construed; and

WHEREAS, SDCERS filed a determination letter request on July 12, 2005, and will revise that request upon the adoption of the Group Trust and completion of all other steps necessary to effectuate the intent of the parties for federal tax purposes.

NOW, THEREFORE, the Trustee declares that it will hold and administer in trust all money and property acceptable to it and received or purchased by it as Trustee under this Declaration of Trust, together with the income and proceeds thereof, upon the following terms, conditions and trusts:

ARTICLE I.
DEFINITIONS

Wherever used in this Declaration of Trust, unless the context clearly indicates otherwise, the following words have the following meanings:

Section 1.1. "*Airport Authority*" means the San Diego County Regional Airport Authority.

Section 1.2. "*Board*" means the Board of Administration of the San Diego City Employees Retirement System ("SDCERS"), which is responsible for the administration of the retirement plans of the City, the Port and the Airport Authority.

Section 1.3. "*Board Rule*" means a rule duly promulgated by the Board.

Section 1.4. "*City*" means the City of San Diego.

Section 1.5. "*Code*" means the Internal Revenue Code of 1986, as amended.

Section 1.6. "*Group Trust*" means the SDCERS Group Trust established by this Declaration of Trust.

Section 1.7. "*Interested Person(s)*" means the Plan Sponsors and any other person entitled to receive a regular periodic accounting of, or inspect the records of, a Participating Trust under federal, state or local law.

Section 1.8. "*Liquidating Account*" means an account established under Section 5.10 for the liquidation of assets.

Section 1.9. "*Net Assets*" means, as of each Valuation Date, the fair market value (as determined under Section 4.2) of all assets owned by the Group Trust, plus Unallocated Assets Receivable, minus Unallocated Liabilities, minus accrued administrative expenses of the Trustee relative to the Group Trust.

Section 1.10. "*Participating Trust*" means a Qualified Trust which, with the consent of the Trustee, has (1) taken formal action to participate in the Group Trust, (2) transferred assets to the Group Trust for investment, and (3) agreed to comply with Revenue Ruling 81-100 and Revenue Ruling 2004-67. Participating Trusts will initially include only those Qualified Trusts listed in Exhibit A hereto.

Section 1.11. "*Participation and Administration Agreement*" means the agreement which must be executed by the Plan Sponsor upon commencement of participation of a Participating Trust in the Group Trust. If applicable, the Participation and Administration Agreement will contain provisions regarding the administration of the Participating Trust by SDCERS.

Section 1.12. "*Plan Sponsor*" means the governmental employer that sponsors a Participating Trust.

Section 1.13. "*Port*" means the San Diego Unified Port District.

Section 1.14. "*Proportional Interest*" means the value of the undivided interest that each Participating Trust has in the Net Assets of the Group Trust as determined under Section 4.4.

Section 1.15. "*Qualified Trust*" means a qualified governmental pension plan under Code Sections 401(a) and 414(d), the assets of which may be invested in a group trust as provided in Code Section 401(a)(24), or an individual retirement account under Code Section 408(q), the assets of which may be invested in a group trust as provided in Revenue Ruling 81-100 (as revised by Revenue Ruling 2004-67).

Section 1.16. "*Trust Expenses*" means amounts paid by the Group Trust for administration of the Group Trust, including, but not limited to, investment management, accounting, custodian, legal counsel and litigation expenses.

Section 1.17. "*Trust Income*" means, as of each Valuation Date, all amounts received from dividends, interest, rents, royalties, net income or losses realized on the sale of Group Trust assets, and any other form of income that the Trustee determines should properly be included.

Section 1.18. "*Trustee*" means the Board of Administration of the San Diego City Employees' Retirement System when it is acting, or is to act, as Trustee under this Declaration of Trust.

Section 1.19. "*Unallocated Assets Receivable*" means settlement proceeds due but not yet received from assets sold by the Group Trust.

Section 1.20. "*Unallocated Liabilities*" means settlement proceeds the Group Trust owes but has not yet paid for assets the Group Trust has purchased.

Section 1.21. "*Valuation Date*" means each date established by the Trustee under Section 4.2.

ARTICLE II.
ESTABLISHMENT OF THE GROUP TRUST

Section 2.1. **Creation of the Group Trust.**

a. The Board has established the Group Trust consisting of contributions made from time to time by the Participating Trusts and all earnings on investments of those contributions, in trust.

b. The Board has prepared this Declaration of Trust to govern the operation of the Group Trust.

c. The Board agrees to serve as trustee of the Group Trust on the terms and conditions set forth in this Declaration of Trust.

d. The Group Trust is named the SDCERS Group Trust. The principal business address of the Group Trust is 401 B Street, Suite 400, MS 840, San Diego, CA 92101.

e. The Group Trust is intended to be a valid trust under California law.

Section 2.2. **Purpose of the Group Trust.** The purpose of the Group Trust is to hold and jointly invest the assets of the Participating Trusts, and make appropriate payments pursuant to directions from the Participating Trusts.

Section 2.3. **Tax Status.** The Group Trust is intended to qualify as a group trust under Code Sections 401(a) and 501(a), Revenue Ruling 81-100 and Revenue Ruling 2004-67, and all provisions of this Declaration of Trust must be so construed.

Section 2.4. **Exclusive Benefit.** Notwithstanding anything to the contrary contained in this Declaration of Trust, or in any amendment hereto, no part of the Group Trust that equitably belongs to a Participating Trust, other than that portion required for reasonable fees, taxes and Trust Expenses (as determined pursuant to Section 7.2 herein) applicable to the Participating Trust, may be used or diverted for any purpose other than the exclusive benefit of the Participating Trust's participants or their beneficiaries who are entitled to benefits under the Participating Trust.

ARTICLE III.
INVESTMENT ADMINISTRATION

Section 3.1. **Responsibility and Authority of Trustee.** The Trustee's determination as to whether or not any investment is within the class or classes of property in which the Group Trust may be invested will be conclusive; provided, however, that all such decisions must be made in accordance with the then current investment policy adopted by the Board. The Trustee is solely and exclusively responsible for, and has exclusive authority and discretion for, the management and control of the Group Trust. Subject to the provisions of the preceding sentence, the Trustee may at its reasonable expense retain the services of such investment or other advisers and consultants as it may deem desirable to assist it in carrying out its responsibilities as Trustee under this Declaration of Trust.

Section 3.2. **Powers and Duties of Trustee.** The Trustee has, with respect to any property at any time held by it as part of the Group Trust, power in its discretion:

a. Authorized Investments. To invest and reinvest in any common and preferred stocks; bonds; notes; rights; warrants; debentures; securities; stock options and option contracts of any type; contracts for the immediate or future delivery of financial instruments; certificates of deposit; demand or time deposits (including demand deposits with the Trustee of funds awaiting investment or distribution); bills; certificates; acceptances; repurchase agreements; commercial paper; variable rate or amount notes; interests in trusts and collective and common trust funds; interests in or shares of mutual funds or other investment companies; and foreign unit trusts or other foreign pooled vehicles; provided, however, that the investment choices available to the Trustee are limited by applicable law and the then current investment policy adopted by the Board;

b. Retention of Property. To retain any property at any time received by it;

c. Authority to Sell Property. To sell or exchange any property at public or private sale for cash or on credit; to grant options for the purchase or exchange of any property; or otherwise to sell, exchange, convey, transfer or dispose of any property;

d. Participation in Reorganizations, Mergers, etc. To participate in any plan of reorganization, consolidation, merger, combination, liquidation or other similar plan relating to any property and to consent to, or to oppose, any such plan or any action thereunder, or any contract, lease, mortgage, purchase, sale or other action by any person or corporation;

e. Participation in Protective Reorganizations. To the extent permitted by applicable federal and state law, to deposit any property with any protective, reorganization or similar

committee; to delegate discretionary power thereto and to pay or agree to pay part of the reasonable expenses and compensation of any such committee and any assessments levied with respect to any such property so deposited;

f. Exercising Conversion Rights. To exercise all conversion, subscription or other rights, whether or not discretionary, and including rights to vote and grant proxies pertaining to any property held by it;

g. Payment Extensions. To extend the time of payment of any obligation to the Group Trust;

h. Stand-by Agreements. To enter into stand-by agreements for future investment, either with or without a stand-by fee;

i. Cash Balances. To hold part or all of any assets uninvested, without liability for interest; provided, however, that any such assets are held uninvested only so long as reasonably necessary to accomplish reinvestment or to the extent reasonably necessary to satisfy required payments from the Group Trust;

j. Borrowing. To borrow money from any source as may be necessary or advisable to protect the Group Trust in the event of a temporary net cash overdraft or similar event; provided, however, that any such borrowing may be undertaken only in accordance with applicable regulations and examination procedures;

k. Lending of Trust Securities. To lend any securities to brokers, dealers, banks, institutional investors, and to secure the same in any manner and, during the term of any such loan, to permit the securities so lent to be transferred in the name of, and voted by, the borrower or others;

l. Custody of Assets. To register or cause to be registered any investment held by it pursuant to this Declaration of Trust in the name of a nominee, with the addition of words indicating that such securities are held in a fiduciary capacity, or in the name of a nominee of any custodian bank acting pursuant to paragraph (q) of this Section 3.2, or of a depository or clearing corporation, or other system for the central handling of securities, either domestic or foreign; to hold any such investment in bearer form; and to maintain the indicia of ownership of assets outside the United States of America in conformity with regulations of the United States Department of Labor;

m. Collection of Monies Due. To collect and receive any and all money and other property due to the Group Trust and to give full discharge therefor;

n. Litigation. To settle, compromise or submit to arbitration any claims, debts or damages due or owing to or from the Group Trust; to commence or defend suit or legal proceedings whenever, in its judgment, any interests of the Group Trust require it; and to represent the Group Trust in all suits or legal proceedings in any court or before any other body or tribunal;

o. Management of Real Property. To retain, manage, operate, repair, develop, preserve, improve, mortgage or lease for any period, any real property held by the Trustee or by any entity organized by it pursuant to paragraph (p) of this Section 3.2 upon such terms and conditions as the Trustee deems proper, either alone or by joining with others, using other assets for any such purpose as it deems advisable; to modify, extend, renew, waive or otherwise adjust any or all of the provisions of any such mortgage or lease, including the waiver of rentals; and to make such provisions for the amortization of the investment in, or the depreciation of the value of, such property as it may deem advisable;

p. Organizing Corporations, Partnerships and Trusts. To organize corporations, partnerships or trusts for the purpose of acquiring and holding title to any property which the Trustee is authorized to acquire under paragraph (a) of this Section 3.2;

q. Employment of Agents. To employ suitable agents, including custodians, record keepers, auditors, depositories, and counsel, domestic or foreign, and to pay their reasonable expenses and compensation; and to transfer any assets of the Group Trust to any custodian or subcustodian employed by the Trustee;

r. Employment of Investment Advisers. To employ at its reasonable expense the investment advisers and consultants, domestic or foreign, that the Trustee, in its sole discretion, deems advisable; and

s. General Powers. Generally, to do all acts, whether or not expressly authorized, which the Trustee may deem necessary or desirable to carry out the purposes of the foregoing powers or for the protection of the Group Trust.

t. Investment Policy. To adopt an investment policy setting forth the permitted investments for the assets of the Group Trust.

Section 3.3. **Limitations of Responsibility.** The Trustee's authority, powers, duties, responsibilities and liabilities are subject to the following limitations and other limitations as set forth in federal, California and local law or this Declaration of Trust:

a. The Trustee has no duties with respect to the Group Trust other than those expressly set forth in this Declaration of Trust.

b. The Trustee is responsible only for money and property actually received by the Trustee, and then only to the extent described in this Declaration of Trust or, as applicable, the respective retirement plan and trust of a Participating Trust.

c. The Trustee has no liability for the acts or omissions of any Participating Trust.

ARTICLE IV.
INTERESTS OF PARTICIPATING TRUSTS

Section 4.1. **Trust Accounting.** The Group Trust will be invested and administered as a common investment fund. The Proportional Interest of each Participating Trust must be accounted for separately. The details of this accounting method, based on a unitization or

proportional method consistent with custodial bank record-keeping systems, will be established by Board Rule, subject to the prior consultations with and consent of the City, the Port and the Airport Authority, which consent will not be withheld or delayed unreasonably. Consistent with the adopted accounting method, the Trustee will maintain books and records that value the Proportional Interest of each Participating Trust at least monthly.

Section 4.2. Valuation of the Group Trust.

a. The Trustee will designate regular Valuation Dates, on which the Trustee will determine the value of the assets held in the Group Trust. The Trustee may establish these Valuation Dates by Board Rule. Valuation Dates must occur at least monthly. The Trustee may value the assets of the Group Trust on dates other than a Valuation Date, if the Trustee in its sole discretion determines additional valuations are necessary or appropriate.

b. Net Assets must be valued at their fair market values at the close of business on the Valuation Date. However, if fair market values are not readily ascertainable, the Trustee will value the Net Assets in accordance with one of the following methods consistently followed and uniformly applied, in accordance with GASB rules.

(i) Valuation by Independent Pricing Services

The Trustee may value certain securities and other investments based on valuations provided by an independent pricing service if the Trustee reasonably believes the valuations reflect fair market value. A pricing service may determine the value of certain securities and other investments without exclusive reliance on quoted prices and may take into account appropriate factors, such as institutional-size trading in similar groups of securities, yield, quality, coupon rate, maturity, type of issue, trading characteristics and other market data.

(ii) Valuation Where Independent Pricing Service Is Not Used

The Trustee will determine the value of assets for which a pricing service is not utilized as follows:

(A) The Trustee will value equity securities listed or regularly traded on a securities exchange or automated quotation system at the last quoted sales price on the Valuation Date. The Trustee will value a security that is listed or traded on more than one exchange at the quotation on the exchange determined by the Trustee to be the primary market for such security. The Trustee will value other equity securities and those listed securities that are not traded on a particular day at a price within the limits of the latest bid and asked prices deemed by the Trustee to best reflect fair market value.

(B) Debt securities are generally traded in the over-the-counter market. The Trustee will state investments in securities with original maturities of one year or more at fair market value as furnished by

dealers who make markets in such securities or by an independent pricing service, which considers yield or price of bonds of comparable quality, coupon maturity, and type, as well as prices quoted by dealers who make markets in such securities. The Trustee will value securities with original maturities of less than one year at their amortized cost in local currency which, when combined with accrued interest, approximates fair market value. The Trustee will value financial futures contracts at closing settlement prices.

(iii) For purposes of determining the value of the Group Trust's Net Assets, as of the close of business on each Valuation Date, the Trustee will convert into U.S. dollars all assets and liabilities initially expressed in foreign currencies at the mean of the bid and offer prices of those foreign currencies against U.S. dollars quoted by a recognized third-party bank or other financial services entity.

(iv) Subject to delivery of reasonable advance written notice to the Participating Trusts, the Trustee will have sole authority to determine the fair market value of a particular asset or liability where it reasonably determines that the above valuation procedures are inappropriate or do not reflect fair market value for a particular asset or liability.

Section 4.3. **Apportionment of Trust Income.** At each Valuation Date, the Trustee will credit Trust Income received by or accrued to the Group Trust since the previous Valuation Date proportionally to each Proportional Interest, as provided by Board Rule. This Board Rule will be subject to prior consultation with and consent of the Plan Sponsors, which consent will not be withheld or delayed unreasonably.

Section 4.4. **Valuation of Proportional Interests.** The Trustee will establish the initial value of each Proportional Interest in the Group Trust pursuant to Section 5.3. The Trustee will adjust the Proportional Interests at each Valuation Date by cash flow transactions including, but not limited to, the amounts of contributions received from the Participating Trusts (as provided in Section 5.4), benefits paid on behalf of the Participating Trusts (as provided in Section 5.5), allocations of Trust Expenses (as provided in Section 7.2), and amounts credited from Trust Income (as provided in Section 4.3). The value of each Proportional Interest will fluctuate with changing market conditions.

Section 4.5. **Records.** The Trustee will keep all records it deems necessary or appropriate, in its sole discretion, to record the assets and Trust Income of the Group Trust and to account for the Proportional Interest of each Participating Trust. Interested Persons have the right to examine and audit the records of the Trustee, at mutually agreeable times and locations, in accordance with Article VI. The Trustee will maintain these records in accordance with reasonable and appropriate record retention policies adopted by the Trustee.

ARTICLE V.
ADMISSIONS AND TERMINATION

Section 5.1. **Admission to Participation.** Participation in the Group Trust is limited to Qualified Trusts whose admission has been approved by the Trustee. The Qualified Trusts listed in Exhibit A will participate in the Group Trust from the inception of the Group Trust, are deemed to have been approved by the Trustee, and are not required to satisfy the application requirements of this section, but are required to comply with all other requirements of this section. Any other Qualified Trust that seeks to participate in the Group Trust must apply to the Trustee for admission by action of the governing body of its Plan Sponsor. If the Trustee approves the participation of the Qualified Trust through appropriate official action, the Qualified Trust will become a Participating Trust as of the Valuation Date immediately preceding completion of all of the following: (i) the Qualified Trust must execute a Participation and Administration Agreement, and (ii) the Qualified Trust must transfer all or any part of its assets to the Trustee for the Group Trust. The Trustee must approve or deny an application for admission within thirty days of receipt. A Qualified Trust may not cancel its application for participation after the Valuation Date on which it becomes a Participating Trust, but must instead follow the withdrawal provisions of Section 5.6. With respect to those Qualified Trusts that have met the requirements to participate in the Group Trust, the Trustee has sole discretion to decide whether to accept non-cash assets into the Group Trust. The Group Trust may accept a non-cash asset on the basis of the value of the asset as of the most recent Valuation Date, as provided in Section 4.2. The Trustee in its sole discretion will value non-cash assets at the close of business on the date of contribution. While assets of any Participating Trust are held in the Group Trust, this Declaration of Trust is part of that Participating Trust's retirement plan or plans.

Section 5.2. **Qualified Status of Participating Trusts.** Before a Qualified Trust is admitted to participate in the Group Trust under Section 5.1, the trustee or administrator of that Qualified Trust must satisfy the Trustee that the Qualified Trust is a qualified governmental pension plan under Code Sections 401(a) and 414(d) or an individual retirement account under Code Section 408(q) by providing to the Trustee a current Internal Revenue Service tax determination letter, legal opinion or other certification satisfactory and acceptable to the Trustee. However, the Participating Trusts listed on Exhibit A as of July 1, 2007, may participate in the Group Trust while an Internal Revenue Service tax determination letter request is pending. In this situation, the Airport Authority, the Port, and the City must agree to make any changes required by the Internal Revenue Service in order to receive a favorable tax determination letter as a condition to participating in the Group Trust.

Section 5.3. **Initial Allocation of Assets.** The Trustee will prepare an opening statement of assets based on an allocation and segregation of assets currently in trust as of June 30, 2005, pursuant to City Charter Article IX, Section 149 and San Diego Municipal Code §§ 24.0100 – 24.1809. This allocation and segregation will be done reasonably and in good faith, taking into account the recommendations of the Board's actuary, the history of the existing trust, the funding level of each contributing employer, and any other pertinent information. The initial allocation of assets will be implemented only upon the agreement of the City, the Port and the Airport Authority and will be submitted to the Internal Revenue Service as part of the filings necessary to obtain approval of the Group Trust. The Board's actuary will advise the Board, the City, the Port and the Airport Authority on the appropriate allocation of assets during the interim

period beginning July 1, 2005, and ending June 30, 2007. The Trustee will determine the allocation for this interim period based upon advice from its actuary, and after consultation with the Plan Sponsors. The Trustee will account for the Proportional Interests on this interim basis for as long as the Trustee determines advisable, but no longer than necessary to fully and properly implement the accounting in accordance with this Declaration of Trust based upon the best efforts of the Trustee and the custodial bank. Regardless of the date on which accounting in accordance with this Declaration of Trust takes effect, the Group Trust will be implemented and operational as of July 1, 2007.

Section 5.4. **Contributions.** The Trustee will accept transfers of assets only from current and potential Participating Trusts and the Plan Sponsors of those Participating Trusts and not from any other person except as permitted by law. However, the Trustee will also accept cash payments, rollovers, or plan to plan transfers for a purchase of service credit by a member of a Participating Trust in accordance with the terms of its plan document. The Trustee may accept assets in its sole discretion only as of the most recent Valuation Date. The Trustee shall determine in its sole discretion the value of any non-cash asset to be transferred on the basis of fair market value on the date of contribution and consistent with the terms of this Declaration of Trust. These transfers may be made by any form of transfer agreed to by the Trustee and the Participating Trust.

Section 5.5. **Termination by Participating Trust.** A Participating Trust may terminate its participation in the Group Trust at any time by resolution of the Plan Sponsor's governing body. The Participating Trust's Plan Sponsor must give the Trustee no less than one year advance written notice of the termination.

Section 5.6. **Termination by Trustee.** The Trustee may terminate the Group Trust at any time by resolution of the Board. The Trustee must give the Plan Sponsors of all Participating Trusts no less than one year advance written notice of the termination and must also provide notice to any other Interested Persons.

Section 5.7. **Distribution on Termination.** In the event of a termination pursuant to Section 5.5, the Trustee will distribute to the terminating Participating Trust its share of the Group Trust in cash, assets or otherwise as determined by the Trustee after consultation with the trustee or administrator of the affected Participating Trust. In the event of a termination pursuant to Section 5.6, the Trustee will distribute to each Participating Trust its share of the Group Trust in cash, assets or otherwise as determined by the Trustee after consultation with the trustee or administrator of the affected Participating Trust or, after consultation with the trustee or administrator of the affected Participating Trust, the Trustee may liquidate the assets for the benefit of the Participating Trusts in the same manner as if the Group Trust were a Liquidating Account (as defined below in Section 5.10). After the termination, the Board will no longer serve as the Trustee of the terminated Participating Trust.

Section 5.8. **Distribution on Disqualification.** If, at any time, the Trustee reasonably determines or becomes aware that any Participating Trust is no longer a Qualified Trust, and the Participating Trust fails to become a Qualified Trust after a reasonable cure period agreed to by the Trustee taking into account the circumstances, the Trustee will distribute to that Participating Trust its entire participation in the Group Trust (other than any interest it may have

in any Liquidating Account) in cash, assets or otherwise as the Trustee determines in its sole discretion, after consultation with the Plan Sponsor of the affected Participating Trust, as soon as practicable after the next Valuation Date following the expiration of the applicable cure period. After this distribution, the Board will no longer serve as the Trustee of the terminated Participating Trust.

Section 5.9. **Valuation of Assets upon Distribution.** In all cases, at no time prior to the satisfaction of all liabilities with respect to participants and their beneficiaries under any Participating Trust will that part of the corpus or income of the Group Trust which equitably belongs to that Participating Trust be used for, or diverted to, purposes other than for the exclusive benefit of such participants and their beneficiaries. All distributions from the Group Trust to the successor trustee or administrator of a Participating Trust (in the case of a termination) are deemed to be for the exclusive benefit of participants and their beneficiaries under the Participating Trust.

A special Valuation Date will be established for the distribution under Section 5.7. All assets will be valued pursuant to Article IV.

Section 5.10. **Liquidating Accounts.** Any asset held by the Group Trust may be transferred to a liquidating account (hereinafter referred to as a "Liquidating Account") when the Trustee reasonably determines that the investment should not continue to be part of the Group Trust. The Trustee may distribute that asset in-kind or liquidate it for the benefit of the Participating Trusts. In determining the basis upon which admissions to and withdrawals from the Group Trust are made pursuant to this Article V, the value of any asset that has been transferred to a Liquidating Account will be excluded. Any investment held in a Liquidating Account will be segregated and administered or realized upon solely for the benefit of those Participating Trusts which were participants in the Group Trust at the time of the transfer of such investment to a Liquidating Account. Each Participating Trust will hold an interest in the Liquidating Account (and any earnings or losses realized on that interest) in the same proportion as that Participating Trust's interest in the Group Trust at time of the creation of the Liquidating Account.

ARTICLE VI.
ACCOUNTING

Section 6.1. **Trustee's Accounts.** The Trustee will keep a record of all of its receipts and disbursements. These records will be open to inspection at all reasonable times during the Trustee's business hours by the authorized representative of any Interested Person.

Section 6.2. **Judicial Accounting.** Except as otherwise provided by law, only the Trustee and any Interested Person may require the judicial settlement of the Trustee's account, or bring any other action against the Trustee with respect to the Group Trust, or its action as Trustee. In any such action or proceeding, the only parties that need be joined are the Trustee and any Interested Person(s). Any final, non-appealable judgment or decree entered in that action will be conclusive.

Section 6.3. Audits and Reports of Group Trust. At least once during each twelve-month period, the Trustee will retain an independent certified public accountant to audit the Group Trust. This accountant will be responsible only to the Trustee. Based upon this audit, after the close of each fiscal year of the Group Trust, and also after the termination of the Group Trust, the Trustee will render a written report, without charge, to each Interested Person. The Trustee will furnish a copy of the report, upon request, to any other person for a reasonable charge. The report will include those financial statements and disclosures required by law, as well as any statements and disclosures the Trustee deems appropriate after consultation with the independent certified public accountant.

ARTICLE VII.
TAXES AND EXPENSES

Section 7.1. Taxes. The Trustee may deduct from and charge against the Group Trust any taxes or other charges imposed upon the Group Trust or the income of the Group Trust, or which the Trustee is required to pay with respect to the interest of any Participating Trust by any present or future laws of any jurisdiction or taxing authority. However, the Group Trust is established as a governmental entity and the Trustee will generally assert that no taxes may be assessed.

Section 7.2. Allocation and Apportionment of Trust Expenses. The Trustee may pay reasonable Trust Expenses from the Group Trust, if these amounts would have been chargeable to the Participating Trusts if incurred in their separate administration. For each year, the Trustee will determine and allocate to each Participating Trust the reasonable and quantifiable Trust Expenses from the previous fiscal year that the Trustee recorded as directly attributable to that Participating Trust. All remaining Trust Expenses will be allocated to the Participating Trusts in the following ways:

a. Investment manager fees, custodian fees and other investment-related fees (including, but not limited to, broker fees, transaction manager fees, and securities lending fees) will be allocated based on the same proportions as the allocation of Net Assets to each Participating Trust (i.e., Proportional Interests) as of the last Valuation Date; and

b. All other remaining expenses will be allocated based on the same proportion as the number of total participants (i.e., active members, individuals receiving benefits, and vested deferred individuals) of a Participating Trust on the first day of the plan year is to the number of total participants of all Participating Trusts on the first day of the plan year.

ARTICLE VIII.
MISCELLANEOUS

Section 8.1. Amendment. The Trustee may amend this Declaration of Trust at any time and in any respect by a resolution of the Board, after consultation with the Plan Sponsors. Notice of any amendment that may affect a Participating Trust must be sent to each Interested Person prior to adoption of the amendment; provided, however, that this Declaration of Trust is adopted subject to the condition that it will be amended, without prior notice to any such persons, to the extent required or deemed necessary by the Trustee in order to qualify as a group trust

under Code Section 401(a) and to be exempt from taxation under Code Section 501(a). If a Participating Trust determines that the amendment is not acceptable, that Participating Trust may withdraw from the Group Trust pursuant to Section 5.5.

Section 8.2. **Duty of Trustee.** For all purposes under this Declaration of Trust, the Trustee must discharge its duties under this Declaration of Trust with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. The Trustee will not be liable for any loss sustained by the Group Trust by reason of the purchase, retention, sale or exchange of any investment in good faith and in accordance with the provisions of this Declaration of Trust, the laws of the City of San Diego and the State of California, and any applicable federal law.

Section 8.3. **Non-Transferability.** No Participating Trust may assign or transfer all or any portion of its interest in the Group Trust, except transfers in accordance with Article V of this Declaration of Trust.

Section 8.4. **Reliance of Communications.** The Trustee is fully protected in acting upon any instrument, certificate or paper it reasonably believes is genuine and signed or presented by a proper person or persons, and the Trustee has no duty to make any investigation or inquiry as to a statement contained in any such writing, but may accept the writing as conclusive evidence of the truth and accuracy of the statements in the writing.

Section 8.5. **Governing Law.** Except as otherwise provided, this Declaration of Trust is governed by, and must be construed according to, the laws of the City of San Diego and of the State of California. In the event of any conflict between the provisions of this Declaration of Trust and the laws of the City of San Diego or of the State of California, the latter law and regulations will prevail. The Group Trust is organized in the United States and will be maintained at all times as a domestic trust in the United States.

Section 8.6. **Availability of Copies of Declaration of Trust.** The Trustee will keep a copy of this Declaration of Trust on file at its principal office and it will be available for inspection during regular business hours. A copy of this Declaration of Trust will be sent, upon request, to each Interested Person, and will be furnished to any other person, upon request, for a reasonable charge.

Section 8.7. **Titles and Headings.** The titles and headings in this Declaration of Trust are for convenience and reference only and will not limit or affect in any manner any provisions contained herein.

The SDCERS Board of Administration has caused this Declaration of Trust to be signed by an appropriate and duly authorized officer on March 16, 2007.

SETTLOR AND TRUSTEE

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM BOARD OF ADMINISTRATION

By: _____

President of the Board of Administration for the San Diego City Employees' Retirement System

EXHIBIT A

PARTICIPATING TRUSTS

San Diego City Employees' Retirement System

San Diego Unified Port District Retirement Plan and Trust

San Diego County Regional Airport Authority Retirement Plan and Trust

TAB 12

CITY OF SAN DIEGO
ETHICS COMMISSION

Office of the Executive Director

MEMORANDUM

DATE: November 16, 2015

TO: Honorable Council President Sherri Lightner, Chair of the Charter Review Committee

FROM: Stacey Fulhorst, Executive Director

SUBJECT: Recommended Update to the City Charter
Docketed for Committee Consideration on December 3, 2015

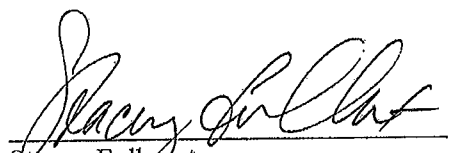
As you know, at the Charter Review Committee meeting on May 14, 2015, the Committee expressed support for the Ethics Commission's proposal to amend the City Charter to solidify the existence of the Commission, and asked the Commission to return with proposed language to effect this change. As we previously explained, the Charter currently recognizes certain powers of the Commission, but notes that the Commission is established by ordinance adopted by the City Council. Solidifying the Commission's existence in the Charter will ensure that the Commission cannot be eliminated by Council action, without a public vote.

With respect to draft language, the Commission staff has conferred with the City Attorney's office and proposes the following amendments to Charter section 41(d):

> (d) Ethics Commission. ~~For so long as an Ethics Commission remains established by ordinance of the Council, the~~ There shall be an Ethics Commission to administer and enforce the City's governmental ethics laws, which consist of laws regulating the disclosure of economic interests, lobbying efforts, and campaign activities; the acceptance of gifts; financial conflicts of interest; the receipt and expenditure of campaign funds; and other matters proposed by the Commission and adopted by the City Council. In furtherance of these duties, the Commission shall provide training, education, and advice; investigate and enforce violations; refer violations to other enforcement agencies when appropriate; review and audit disclosure statements; monitor the effectiveness of the City's governmental ethics laws; and propose reforms to these laws as necessary to preserve public confidence in City government. The Executive Director of the Commission shall be appointed by the Commission, subject to confirmation by the Council, and shall thereafter serve at the direction and pleasure of the Commission. The Commission may, in accordance with complaint and investigation procedures

approved by ordinance of the Council, subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records, or other items material to the performance of the Commission's duties or exercise of its powers. The Ethics Commission shall be authorized to retain its own legal counsel, independent of the City Attorney, for legal support and guidance in carrying out its responsibilities and duties.

If you have any questions concerning the proposed amendments, please contact me at your convenience.



Stacey Fulhorst
Executive Director

cc: Sharon Spivak, Deputy City Attorney

CITY OF SAN DIEGO
ETHICS COMMISSION

Office of the Executive Director

MEMORANDUM

DATE: January 13, 2015

TO: Honorable Council President Sherri Lightner, Chair of the Charter Review Committee

FROM: Stacey Fulhorst, Executive Director

SUBJECT: Recommended Update to the City Charter

In response to your memo dated December 18, 2014, we respectfully request that the Charter Review Committee consider and recommend language solidifying the existence of the Ethics Commission. The City Charter currently recognizes certain powers of the Commission, but also notes that the Commission is established through an ordinance adopted by the City Council. Although the Commission has historically enjoyed the support of the City's elected officials, this may not always be the case, particularly in light of the potential for enforcement activities involving such officials. Until the Commission's existence is established under the Charter, the Ethics Commission could be eliminated by Council action, without a public vote.

When voters overwhelmingly approved amendments to the City Charter in 2002 and 2004 to provide the Commission with subpoena power and independent legal counsel, they conveyed their support for the Commission's continued administration and enforcement of the City's governmental ethics laws. The requested City Charter amendment would serve to bolster that goal, and would prevent the potential for political repercussions by ensuring that only the voters could eliminate the Commission.

It is also relevant to note that the Ethics Commissions in Los Angeles, Oakland, and San Francisco are all established by the voters in their respective city charters.

Stacey Fulhorst
Executive Director

cc: Scott Chadwick, Chief Operating Officer
Prescilla Dugard, Deputy City Attorney

TAB 13

Proposed language for Charter section 41(c).

There shall be a City Planning Commission, organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws. The duties of the Commission shall also include advising upon public facilities and such other improvements as the Council may by ordinance determine.

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

SHANNON M. THOMAS
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
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TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: February 6, 2012

TO: Kelly Broughton, Director, Development Services Department

FROM: City Attorney

SUBJECT: CIP Conformance Review by the Planning Commission

INTRODUCTION

The City of San Diego, a charter city, has a Planning Commission established pursuant to the San Diego Charter. California Planning and Zoning Law requires that certain functions be performed by the planning agencies of general law cities, although no duties are specifically set forth for planning commissions. A question has arisen as to whether the City's Planning Commission must review the City's Capital Improvement Program (CIP) for conformance with the general plan pursuant to state law.

QUESTION PRESENTED

Is the City, as a charter city, required by state law to have its Planning Commission review the CIP for conformance with the general plan?

SHORT ANSWER

No. State law does not require the City's Planning Commission to review the CIP for conformance report with the general plan.

BACKGROUND

Council Policy 000-02, titled Budget Policy, requires the City's CIP budget to be submitted by the Planning Commission to the City Council, pursuant to California Government Code sections 65103(c) and 65401, with "assurance of General Plan conformance." *See* Policy 000-02 at pg. 5. This language was added to Council Policy 000-02 in 2009 when the Budget Policy underwent a significant revision. *See* City of San Diego Memorandum to Members of the Budget & Finance Committee, Re: Proposed City of San Diego Budget Policy (Sept. 15, 2009). Prior to that, the only reference to a role by the Planning Commission in the review of the CIP budget was in Council Policy 800-06, titled Capital Improvements Programming, approved in

1991. Regarding this role, Council Policy 800-06 stated only "[t]he Capital Improvements Program shall be submitted through the Planning Commission to the City Council for adoption." Council Policy 800-06, Implementation 3 (repealed and superceded by Council Policy 000-02 pursuant to San Diego Resolution R-305348 (Mar. 5, 2010)).

The duties of the Planning Commission are generally set forth in the Charter as follows:

> The City Planning Commission shall be organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws. The duties of the Commission shall also include advising upon public buildings, bridges, retaining walls, approaches, park and harbor structures, the improvement of Pueblo lands and such other improvements as the Council may by ordinance determine.[1]

San Diego Charter § 41(c).

ANALYSIS

The California Planning and Zoning Law, Division 1, Chapter 3, Article 1, contains various requirements regarding the establishment of planning agencies, and the duties of the planning agencies. *See* Cal. Gov't Code §§ 65100- 65107. However, with some exceptions not relevant here, charter cities are not subject to the provisions of Chapter 3, except to the extent the charter city adopts them by charter or by ordinance.

I. GENERAL LAW CITIES MUST EITHER ASSIGN TO A PLANNING AGENCY THE DUTY TO CONDUCT AN ANNUAL REVIEW OF THE CAPITAL IMPROVEMENTS PROGRAM OR THE LEGISLATIVE BODY MUST CONDUCT THE REVIEW ITSELF, BUT THERE IS NO REQUIREMENT THAT THE REVIEW BE CONDUCTED BY PLANNING COMMISSIONS

Government Code section 65103, enacted in 1984, requires that planning agencies "[a]nnually review the capital improvement program of the city or county and the local public works projects of other local agencies for their consistency with the general plan, pursuant to Article 7 (commencing with Section 65400)." Cal. Gov't Code § 65103(c). California Government Code section 65401, enacted in 1965 and amended in 1970, requires that government agencies whose functions include "recommending, preparing plans for, or constructing, major public works, shall submit to the official agency, as designated by the respective county board of supervisors or city council, a list of the proposed public works recommended for planning, initiation or construction during the ensuing fiscal year." Cal. Gov't Code § 65401. The agency designated to receive the list "shall list and classify all such recommendations and shall prepare a coordinated program of proposed public works for the ensuing fiscal year." *Id.* Finally, "[s]uch coordinated program shall be submitted to the county or city planning agency for review and report to said official agency as to conformity with the adopted general plan or part thereof." *Id.* Contrary to the language in Council Policy 000-02,

[1]Although not relevant to this discussion, the Planning Commission is also the decision making body for Process Four land use matters, and the appeals of Process Two and Three land use matters. San Diego Municipal Code Chapter 11, Article 2, Division 5.

neither California Government Code section 65103 nor section 6540 state a duty for planning commissions. Instead, they refer to the duties of the planning agencies.

Regarding the creation of planning agencies, the California Government Code states:

> There is in each city and county a *planning agency* with the powers necessary to carry out the purposes of this title. The legislative body of each city and county shall by ordinance assign the functions of the *planning agency* to a planning department, one or more planning commissions, administrative bodies or hearing officers, the legislative body itself, or any combination thereof, as it deems appropriate and necessary. In the absence of an assignment, the legislative body shall carry out all the functions of the planning agency.

Cal. Gov't Code § 65100 (emphasis added).

Regarding the creation of planning commissions, the California Government Code states that the legislative body "*may* create one or more *planning commissions* each of which shall report directly to the legislative body." Cal. Gov't Code § 65101(a) (emphasis added). Therefore, state law does not require that a general law city create a planning commission, nor does it dictate any duties for the *planning commissions*; however, duties are set forth for the *planning agencies*. *See* Cal. Gov't Code § 65103. In addition, California Government Code section 65700 states that, with some exceptions, the provisions of Chapter 3 do not apply to charter cities, except to the extent they are adopted by charter or ordinance of the city.[2]

II. AS A CHARTER CITY, THE CITY IS EXEMPT FROM THESE PROVISIONS OF THE PLANNING AND ZONING LAW, UNLESS OTHERWISE ADOPTED BY CHARTER OR ORDINANCE, AND NEITHER THE CHARTER NOR ANY ORDINANCES ADOPT THESE PROVISIONS

As stated above, California Government Code section 65700 states that, with some exceptions, the provisions of Chapter 3 do not apply to charter cities, except to the extent they are adopted by charter or ordinance of the city. San Diego has not adopted the provisions of Chapter 3 by charter or ordinance.

Section 42 of the 1931 Charter (Freeholder's Charter) stated in part that "[t]he City Planning Commission shall be organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws." [3] When a body of law relating to a specific subject is adopted by reference, the adoption is deemed to include all later amendments to that body of law. 58 Cal. Jur. 3d *Statutes* § 53 (2011).[4] Therefore, when the Freeholder's Charter adopted by reference the "laws of the State" and provided the Planning

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[2] Some exceptions are that charter cities must adopt general plans containing the mandatory elements set forth in Article 5, and the provisions relating to low and moderate income housing within the Coastal Zone set forth in California Government Code sections 65590 and 65590.1 also apply to charter cities.

[3] Although this provision was transferred to section 41 in 1969, the language was unchanged. *See* 1968 Op. City Att'y 1, 3 (Jan. 3, 1968).

[4] When specifically identified statutes are adopted by reference, however, later amendments to that statute are not considered incorporated by reference. *Id.*

Commission with "such powers and duties as are prescribed by such laws," that adoption by reference included all later amendments to the state laws establishing the powers and duties of planning commissions.

Because Charter section 41 adopted a body of law relating to a specific subject, the most recent amendments to the Planning and Zoning Law govern. The current relevant Planning and Zoning Law exempts charter cities from its provisions, except to the extent the charter city has adopted them by charter or ordinance. The City of San Diego does not have a charter section or ordinance that requires its planning agency to conduct an annual review of the CIP for general plan consistency.[5]

The City Council may still wish to ensure that any proposed CIP projects are consistent with the general plan.[6] The standard for a project's consistency with the general plan is not difficult to meet. A project is inconsistent with a general plan only if it conflicts with a plan policy that is fundamental, mandatory, and clear. *Families Unafraid To Uphold Rural El Dorado County v. Board of Supervisors*, 62 Cal. App. 4th 1332, 1341-42 (1998); *see also Corona-Norco Unified School Dist. v. City of Corona*, 17 Cal. App. 4th 985, 994 (1993) ("'[A] . . . project is consistent with a general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.'")(citation omitted). Furthermore, courts afford an agency's consistency determination a "strong presumption of regularity." *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal. App. 4th 704, 717 (1993).

The Council Policy should be revised so that it no longer states that state law sections "require" that the CIP be submitted to the Planning Commission for assurance of conformance with the General Plan. Absent the passage of a charter amendment or an ordinance, the reference to a state law requirement should be deleted entirely.[7]

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[5] The City's various planning functions are performed by the Development Services Department Planning Division staff, the Planning Commission, and the City Council. There is no one entity designated as the City's "planning agency," nor, as a charter city, is the City required to designate a planning agency, for the reasons set forth herein.

[6] Some other charter cities require their planning commissions to conduct an annual review of the CIP budget, *See* Gilroy Charter § 906(b); Modesto Charter § 1107; Modesto Municipal Code § 10-1.102(e). However, upon obtaining charter city status, the City of Carlsbad repealed their requirement that the planning commission conduct an annual CIP conformance review. *See* Carlsbad Ordinance CS-071 (Dec. 22, 2009)

[7] Any department may bring forward an amendment to a Council Policy. Council Policy 000-01, Procedure 1, states "[t]he City Council or any standing committee or member thereof, the City Manager, non-managerial department heads, and City Boards and Commissions may originate draft policy proposals for formal consideration by the Council."

CONCLUSION

The City Planning Commission is not required by state law to conduct an annual review of the CIP budget for conformance with the City's General Plan. As a charter city, the City is not subject to this requirement, absent a requirement in the charter or the passage of an ordinance. Until such time as the City passes such a charter amendment or ordinance, the Council Policy should be revised to delete the reference to a requirement by state law.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Shannon M. Thomas
Shannon M. Thomas
Deputy City Attorney

SMT: als
ML-2012-2

TAB 14

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

GORY J. HALSEY
EPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

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MEMORANDUM OF LAW

DATE: November 3, 2015

TO: The Charter Review Committee

FROM: City Attorney

SUBJECT: The Legality of Appointment Language in San Diego Charter Section 42

INTRODUCTION

In November 1973, San Diego voters approved Proposition K to amend Charter section 42 to read: "The appointing authority in selecting appointees to commissions, boards, committees or panels shall take into consideration sex, race and geographical area so the membership of such commissions, boards, committees or panels shall reflect the entire community." San Diego Charter § 42.

New legal developments call into question the legality of the appointment language in Charter section 42. On February 5, 2014, our Office published a Report to the City Council identifying sections in the Charter that need legal review. We opined that the language in Charter section 42 that requires appointing authorities to take into consideration "sex and race" in selecting appointees to City commissions, boards, committees or panels "may be prohibited by state and federal discrimination laws." City Att'y Report 2014-3 (Feb. 5, 2014). We suggested that the Charter Review Committee consider the option of amending Charter section 42 "to delete the requirement to consider sex and race in making appointments and provide more appropriate language regarding appointments." *Id.* Upon further review, the Charter Review Committee requested a definitive conclusion on whether the directive in Charter section 42 to take into consideration the sex, race and geographical area of appointees to City commissions, boards, committees or panels violates the law.

QUESTIONS PRESENTED

1. Does Article 1, section 31 of the California Constitution (Section 31) apply to the appointment of members to City commissions, boards, committees or panels?

2. Is the directive in Charter section 42 to take "sex and race" into consideration in selecting appointees to City commissions, boards, committees or panels lawful?

3. Is the directive in Charter section 42 to take "geographical area" into consideration in selecting appointees to City commissions, boards, committees or panels lawful?

SHORT ANSWERS

1. Section 31 likely does not apply to the appointment of members to City commissions, boards, committees or panels. Section 31 prohibits the City from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin – but only in the operation of public employment, public education, or public contracting. Members of the City commissions, boards, committees and panels contemplated in Charter section 42 hold a public office, not public employment, and therefore likely fall outside the reach of Section 31.

2. No. The requirement to take sex and race into consideration in selecting appointees to City commissions, boards, committees or panels violates the California equal protection clause. This Office advises that the language in Charter section 42 should be amended to eliminate sex and race as attributes for appointing authorities to consider.

3. Yes. Appointing authorities may lawfully take into consideration geographical areas when selecting appointees to City commissions, boards, committees or panels. Additionally, appointing authorities may consider the racial and gender demographics of geographical areas, provided that all individuals from the same geographical area are treated equally regardless of his or her race or gender

ANALYSIS

I. ARTICLE 1, SECTION 31 OF THE CALIFORNIA CONSTITUTION PROHIBITS THE CITY FROM DISCRIMINATING AGAINST OR GRANTING PREFERENTIAL TREATMENT TO INDIVIDUALS ON THE BASIS OF RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN.

Effective August 28, 1997, Proposition 209 banned government affirmative action programs that give preferential treatment based on race, sex, color, ethnicity or national origin. Proposition 209 amended the California Constitution to read, "The State 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." Cal. Const. art. I, § 31(a). Proposition 209 (hereafter referred to as "Section 31") was intended to end government sponsored discrimination and, specifically, all governmental affirmative action programs and preferential hiring, contracting and university admissions practices. *Id.*; *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 562 (2000).

Although the prohibitions in Section 31 are absolute, they are limited in the scope to "the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a). Therefore, the prohibitions in Section 31 will apply to appointments to City commissions, boards, committees and panels only if a court finds such appointments constitute

public employment, public education, or public contracting. These appointments do not concern public education or public contracting, and likely do not amount to "public employment" as the term is used in Section 31.

A. Members of City Commissions, Boards, Committees and Panels Appointed Pursuant to San Diego Charter Section 42 are Public Officers, Not Public Employees.

Courts have distinguished public officers from public employees. The leading opinion on this distinction is *Coulter v. Pool*, 187 Cal. 181 (1921). In *Coulter*, the Court defined a public office as follows:

> A public office is ordinarily and generally defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public.

Id. at 186-187.

More recently, in *Dibb v. County of San Diego*, 8 Cal. 4th 1200 (1994), the California Supreme Court adopted this definition to determine whether members of San Diego County's Citizens' Law Enforcement Review Board (CLERB) were public officers rather than public employees. Applying the *Coulter* analysis, the Court held that members of CLERB are public officers rather than public employees because they are "appointed under the law for a fixed term of office and are delegated a public duty to investigate specified citizen complaints against county sheriff and probation department employees, and to make recommendations to the board of supervisors." *Dibb*, 8 Cal. 4th at 1213.

The City commissions, boards, committees and panels referenced in Charter section 42 are not expressly defined, but the legislative history suggests that this section only applies to those citizen oriented bodies created by local law to advise local officials. *See* City Ballot Pamphlet, General Election (Nov. 6, 1973), argument for Proposition K at 30 ("Only by providing a method for airing the widest views and divergent opinions in our community, can these citizen oriented commissions, boards, committees and panels effectively perform their advisory functions, which have been so important to City officials over the years.") Similar to San Diego County's CLERB, members appointed to the positions contemplated in Charter section 42 generally embody the traditional characteristics of a public officer; they are appointed under local law for a fixed term of office and delegated with a public duty "to exercise a part of the governmental functions of the political unit for which [they are] acting." *Dibbs*, 8 Cal.4th at 1212.

This conclusion is germane only to appointments to City commissions, boards, committees and panels that qualify as a "public office." Our Office has not reviewed the characteristics of every City commission, board, committee or panel. Therefore, an individualized inquiry should be done to ensure that members of any particular City commission, board, committee or panel qualify as "public officers" as defined in *Coulter* and *Dibbs*.

B. Appointments to a Public Office Fall Outside the Scope of the Prohibitions in Article 1, Section 31 of the California Constitution.

In construing constitutional provisions, "courts look first to the language of the constitutional text, giving the words their ordinary meaning." *Powers v. City of Richmond*, 10 Cal. 4th 85, 91 (1995). Where a text is "clear and unambiguous" courts "need look no further." *Bowens v. Superior Court*, 1 Cal. 4th 36, 48 (1991). Section 31 limits its reach to the "operation of public employment" and there is no support to inflate this term to include public office.

Because the California Supreme Court had established a distinction between public office and public employment prior to voter approval of Proposition 209, the absence of any mention of public office in Proposition 209 is significant. Voters are deemed to have been aware of existing laws and judicial constructions of laws when they enact an initiative measure such as Proposition 209. *Wilson v. John Crane, Inc.*, 81 Cal. App. 4th 847, 855 (2000); *Hill v. National Collegiate Athletic* Assn. 7 Cal.4th 1, 23 (1994) ("When an initiative contains terms that have been judicially construed, the presumption is almost irresistible that those terms have been used in the precise and technical sense in which they have been used by the courts."). Thus, a court would likely presume that the voters intended Section 31 to be consistent with existing law, and did not intend the language "operation of public employment" to include the selection of public officers.

Likewise, interpreting Section 31 to apply to public officers would conflict with other California constitutional provisions that require the consideration of racial, ethnic, and gender diversity in the appointment of public officers. For instance, the California Constitution directs the Governor to "strive insofar as practicable to provide a balanced representation of the geographic, gender, racial, and ethnic diversity of the State" in appointing members to the Citizens Compensation Commission. Cal. Const. art. III, § 8(c).[1] The California Constitution also provides that the Governor's selection of the Regents of the University of California "shall be able persons broadly reflective of the economic, cultural, and social diversity of the State, including ethnic minorities and women." Cal. Const. art. IX, § 9(d). The only way to harmonize these constitutional provisions with Section 31 is to limit Section 31 to the operation of public employment, and not extend its reach to the appointment of public officers. *Greene v. Marin County Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277, 290 (2010) ("Rudimentary principles of construction dictate that when constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted.")[2]

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[1] Although not binding as precedent here, a trial court in Sacramento recently held that Section 31 does not apply to the appointment of public officers to the Citizens Compensation Commission. *See Connerly v. State*, 229 Cal. App. 4th 457 (2014).

[2] Although a court need not look to voter intent to interpret Section 31, its historical context reaffirms the notion that it was intended to cover only conventional public employment. The Legislative Analyst – the only ballot material that provides any insight into the type of "public employment" covered under Section 31 – specifies that the measure "would eliminate affirmative action programs used to increase hiring and promotion opportunities for state and local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions." Ballot Pamp. analysis for Proposition 209 by the Legislative Analyst, p. 31, prepared for the voters, Gen. Elec. (Nov. 5, 1996) (emphasis added). The appointment of a members to City commissions, boards, committees and panels, does not neatly fall within these categories of hiring, promotion, training, or recruitment for public employment.

C. San Diego Charter Section 117 Likely Does Not Change The Status Of Members On City Commissions, Boards, Committees or Panels From Public Officers to Public Employees.

As a charter city, the City is empowered under article XI, section 5 of the California Constitution to regulate, control, and govern its internal affairs, including its role as an employer. *Johnson v. Bradley*, 4 Cal. 4th 389, 395–96 (1992). A court will look to the City's Charter for guidance on the parameters and employment rights of City employees. *Estrada v. City of Los Angeles*, 218 Cal. App. 4th 143, 152 (2013); *Williams v. Department of Water & Power*, 130 Cal. App. 3d 677, 680 (1982).

There is an argument that Charter section 117 creates a public employment relationship between the City and members on City commissions, boards, committees and panels because it provides that "members of all boards and commissions" are part of the "unclassified service" of City employment. San Diego Charter §117(a)(2). Further, our Office has previously advised that members of certain boards and commissions are entitled to limited benefits such as indemnification and workers' compensation similar to public employees. *See* 2010 City Att'y MS 919 (2010-2; Apr. 8, 2010); City Att'y MS 2014-23 (Nov. 17, 2014) (The city would likely be required to indemnify the City's Airport Advisory Committee members as "employees" under the California Government Claims Act).

Although Charter section 117 may confer some members of boards and commissions with certain limited protections traditionally provided to public employees, it does not change the crucial terms or conditions that distinguish these members as public officers. Specifically, Charter section 117 does not change the fixed tenure of these positions, the incumbent terms of its members, or the delegated public duty to advise the Mayor, Council, or Civil Service Commission. *See Spreckels v. Graham*, 194 Cal. 516 (1924). Since these terms and conditions remain intact, Charter section 117 cannot transform an otherwise clear public office into an "operation of public employment" within the scope of Section 31.

As public officers, the appointment of members to City commissions, boards, committees, and panels, as prescribed in Charter section 42, likely fall beyond the scope of Section 31.

II. THE EQUAL PROTECTION CLAUSE REQUIRES LIKE PARTIES TO BE TREATED EQUALLY UNDER THE LAW.

The equal protection clause of the California constitution requires that governmental decision makers treat parties equally under the law if those parties are alike in all relevant respects. Cal. Const. art. I, § 7; *Las Lomas Land Co., LLC v. City of L.A.*, 177 Cal. App. 4th 837, 857 (2009).[3] In considering whether legislation violates the equal protection clause, courts apply different levels of scrutiny depending on the classifications used to treat two or more similar parties differently.

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[3] The Fourteenth Amendment to the United States Constitution similarly provides that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. However, since the directive in Charter section 42 to consider race and gender in the appointment of a public office violates the California equal protection clause, this Memorandum will not conduct a separate federal equal protection clause analysis.

Legislative classifications are presumptively valid and may not be rejected by the courts unless they are palpably unreasonable. *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 33 (2001). But legislative acts that treat similarly situated parties differently on the basis of "suspect classifications" or "fundamental rights" are not presumptively valid and must pass strict judicial scrutiny – which means such acts will only survive an equal protection challenge "if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available." *Id*; *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 298 (2007).

A. The City Must Survive Strict Judicial Scrutiny to Consider Gender and Race in the Appointment Process of Charter Section 42.

In California, a classification based on gender or race is considered "suspect" for purposes of an equal protection analysis. *See Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17–20 (1971) ("classifications based upon sex should be treated as suspect")[4]; C & C *Const., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284, 298 (2004) (discussing race); *State Pers. Bd.*, 92 Cal. App. 4th at 34 ("the core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions"). Likewise, the opportunity to participate in public office, such as a City commission, board, committee or panel, is a "fundamental right." *Bay Area Women's Coal. v. City & Cnty. of S.F.*, 78 Cal. App. 3d 961, 969 (1978).

Consideration of suspect classifications in the appointment of public officers triggers strict judicial scrutiny. The recent decision in *Connerly v. State*, 229 Cal. App. 4th 457 (2014), illustrates that, as a matter of law, legislative directives similar to Charter section 42 violate the equal protection clause without justification strong enough to survive strict scrutiny. In *Connerly*, the American Civil Rights Foundation challenged the constitutionality of California Government Code section 8252, which requires the California Citizens Redistricting Commission to be comprised of members that "reflect [California's] diversity, including, but not limited to, *racial, ethnic, geographic, and gender diversity*." *Id.* at 461 (emphasis added). The trial court dismissed the lawsuit as to the alleged violation of Proposition 209 (Cal. Const., art. I, § 31), but the court of appeal permitted the lawsuit to proceed on its merits past a demurrer stage on the legal theory that the selection process for the Citizens Redistricting Commission violated the federal equal protection clause. *Connerly*, 229 Cal. App. 4th at 460, 466. The court held that *Connerly* could show a *prima facie* case of federal equal protection violations because such a selection process "must be subjected to strict judicial scrutiny in its implementation ... [and] must be narrowly tailored to meet the goal of diversity without straying into invidious discrimination." *Id.* at 466.[5]

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[4] The federal equal protection clause applies a slightly less strict "intermediate scrutiny" for classifications based on gender, but this does not affect our analysis under the California equal protection clause. *State Pers. Bd.*, 92 Cal. App. 4th at 32; *Molar v. Gates*, 98 Cal. App. 3d 1, 16-17 (1979) ("in light of the repeated affirmations by our [California] Supreme Court that gender-based classifications are suspect and on that basis alone are subject to strict scrutiny, even if the [US] Supreme Court should adopt an intermediate level of analysis, we are satisfied that sex-based classifications will continue to be subjected to the highest level of review.")

[5] Although the California constitutional guarantee is independent of the federal guarantee, "California courts consider decisions of the United States Supreme Court and other federal courts as persuasive authority because the equal protection provision of the California Constitution is substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution." *Walgreen Co. v. City & Cnty. of S.F.*, 185 Cal. App. 4th 424, 434 (2010).

Connerly is currently ongoing in the Superior Court of Sacramento County where the court will decide whether the challenged selection provisions can survive strict scrutiny.

The selection language in Charter section 42 is similar to the challenged selection language in *Connerly*. Both require appointing authorities to consider gender and race in the appointment process. As such, a court will likely find, as in *Connerly*, that the Charter section 42 selection process violates the California equal protection clause unless the City can provide the justification needed to survive strict judicial scrutiny.

B. The City Has Not Shown a Compelling Reason to Consider Gender and Sex in the Selection Process of Charter Section 42.

Even though Charter section 42 was enacted via voter initiative, it is still subject to the same constitutional limitations that apply to statutes adopted by the Legislature. *In re Marriage Cases*, 43 Cal. 4th 757, 851 (2008) ("our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution.") (superseded on other grounds by Constitutional Amendment); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981) ("It is irrelevant that the voters rather than a legislative body enacted [the challenged law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.") To survive an equal protection challenge, the City must articulate a compelling interest to consider suspect classifications in the appointment of members to City commissions, boards, committees or panels. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). This compelling interest must have existed at the time Charter section 42 was enacted and must be supported, with some degree of specificity, by convincing evidence that the need for such remedial action was necessary. *State Pers. Bd.*, 92 Cal. App. 4th at 37. The language of Charter section 42 and its associated legislative history falls short of this standard.

The ballot language in support of Proposition K provides the only available justification for the consideration of gender and race in the selection process. It reads:

> The proposal includes another requirement aimed at diminishing discrimination and establishing a broader representative base in the appointment of persons to city commissions, boards, committees and panels. The appointing authority would be required to take into account such factors as race, sex and residence of appointees to the end that membership on much city organized citizen groups reflects as broad and varied segment of the entire community as is possible.
>
> Only by providing a method for airing the widest views and divergent opinions in our community, can these citizen oriented commissions, boards, committees and panels effectively perform their advisory functions, which have been so important to City officials over the years.

City Ballot Pamphlet, General Election (Nov. 6, 1973), argument for Proposition K at 30.

Clearly, the goal of Proposition K was to "diminish discrimination" and "establish[] a broader representative base in the appointment of persons to city commissions, boards, committees and panels." *Id.* But this generalized assertion of past discrimination is not sufficient

to show a compelling interest needed to survive strict judicial scrutiny. *State Pers. Bd.*, 92 Cal. App. 4th at 38 (Merely "conceding past discrimination" or recognizing "societal discrimination" is not enough to satisfy this criterion.). "Only the most exact connection between justification and classification will suffice." *Woods v. Horton*, 167 Cal. App. 4th 658, 675 (2008).

The ballot language also shows that the voters considered Proposition K the "only" method to end discrimination and achieve a broader representative base. But this assertion, alone, will not provide a compelling interest. The City must prove that it considered nonracial and nongender-based alternative measures and determined that the least restrictive method to achieve the stated goal of the legislation was Proposition K. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 732 (2007). No such legislative record exists. The City cannot cite to any report, study, or testimony to clearly identify any compelling interest to support Proposition K. Thus, a court will likely find the directive in Charter section 42 to consider sex and race in selecting appointees violates the equal protection clause of the California constitution.[6]

C. The City Has a Rational Basis to Consider "Geographical Area" in the Appointment of Members to City Commissions, Boards, Committees or Panels.

The directive to consider "geographical area" in selecting appointees on City commissions, boards, committees and panels does not implicate any suspect classifications. An individual's area of residence is not a "suspect" class. *Ostrager v. State Bd. of Control*, 99 Cal. App. 3d 1, 7 (1979) (status as a "resident" or "nonresident" is not a suspect classification); *Spurlock v. Fox*, 716 F.3d 383, 395 (6th Cir. 2013) ("the requirement that legislative classifications be color-blind does not demand demographic ignorance during the policymaking process"). To survive a federal or state equal protection clause challenge, the City need only show that distinguishing appointees on the basis of geographical area rationally achieves a legitimate purpose. *Warden v. State Bar*, 21 Cal. 4th 628, 642 (1999); *Spurlock*, 716 F.3d at 402. The language in the ballot materials for Proposition K likely satisfies this standard.

The purpose of Charter section 42 was to have members of City commissions, boards, committees and panels fairly represent "all segments of the community." Proposition K. Requiring appointing authorities to consider the geographical area of appointees is a rational

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[6] This requirement also risks violating California anti-discrimination laws. Both Title VII of the Civil Rights Act of 1964 (Title VII) and The California Fair Employment and Housing Act (FEHA) prohibit employers from discriminating against employees or applicants for employment on the basis of certain protected characteristics, including sex and race. 42 U.S.C.A. §§ 2000e – 2000e-17; Cal. Gov. Code. § 12900 - 12907. Appointees to City commissions, boards, committees or panels must be "employees" to receive protection under FEHA and Title VII. It is unclear whether these appointees would be covered under Title VII because this law generally does not cover individuals who render unpaid, volunteer services. *See Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 439-40 (5th Cir. 2013). However, FEHA may cover these appointees. California courts have expressly permitted city charters to create statutory employment relationships for purposes of FEHA liability. *Estrada v. City of L.A.*, 218 Cal. App. 4th 143, 152 (2013). Charter section 117 establishes that "members of all boards and commissions" are within the City's "Unclassified Service." This may be enough to trigger FEHA liability, however, this analysis is beyond the scope of this Memorandum because any consideration of gender or race in the appointment process of Charter section 42 violates the state equal protection clause.

means to achieve this purpose, sufficient to survive an equal protection clause challenge. Moreover, an appointing authority may even consider the demographic makeup of particular geographic areas, provided that all individuals from the same geographical area are treated equally regardless of his or her race or gender. *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207, 217-18 (2009) (School district's use of a student's residential neighborhood demographics, which included consideration of household income, education level of adults, and the racial composition of the neighborhood as a whole, to assign students to schools and academic programs did not violate California Constitution because students in a given residential area were treated equally regardless of the student's individual race or other personal characteristics.)[7]

CONCLUSION

Appointees to the City commissions, boards, committees and panels contemplated in Charter section 42 are public officers likely outside the scope of the prohibitions in Article 1, section 31 of the California Constitution. However, the requirement in Charter section 42 to take race and gender into consideration in selecting appointees violates the equal protection clause of the state constitution because there is no evidence in the legislative record to show a compelling interest to treat similarly situated parties differently based on race and gender; further, there is no evidence to support an argument that the goals of Proposition K are accomplished by the least restrictive means. Appointing authorities may lawfully take into consideration geographical area, and the demographics of such areas, when selecting appointees, provided that all individuals from the same geographical area are treated equally regardless of his or her race or gender. To best comply with these legal requirements and decrease the possibility of costly litigation, it is the opinion of this Office that the language in Charter section 42 should be amended to eliminate "sex and race" as attributes for appointing authorities to consider in selecting appointees to City commissions, boards, committees or panels.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Gregory J. Halsey
Gregory J. Halsey
Deputy City Attorney

GJH:sc
ML-2015-17
Doc. No.: 965833

[7] Although this case primarily focuses on whether the challenged school program violated Proposition 209, its analysis of whether the program gave preferential treatment based on race is analogous to the analysis a court would rely on to evaluate an equal protection clause violation.

TAB 15

SDCERS
San Diego City Employees' Retirement System

→ SH

Elaine W. Reagan, Esq.
Deputy CEO
Compliance and Legal Operations
(619) 525-3614
Email: ereagan@sdcers.org

RECEIVED
MAR 03 2015
OFFICE OF COUNCILMEMBER
SHERRI LIGHTNER

February 27, 2015

VIA U.S. MAIL

Hon. Council President Sherri S. Lightner
City of San Diego
202 C Street, 10th Floor
San Diego, CA 92101

Dear Ms. Lightner:

At the February 15, 2015 meeting of the City Charter Review Committee, SDCERS requested that the Committee delay taking action on the City Attorney's recommendation to remove Article X (Transfer of Police and Fire Department Employees into the Retirement System) to allow SDCERS an opportunity to determine whether removal of that section would impact retirees and beneficiaries currently receiving a benefit.

SDCERS has now completed its research and has determined that removal of Article X should have no impact on those retirees and beneficiaries. SDCERS has no objection to the City Attorney's recommendation pertaining to Article X.

SDCERS has docketed an item for the March 13, 2015 SDCERS Board meeting to determine if the SDCERS Board has any additional input on the Charter revisions and would ask that the Charter Review Committee delay any final decisions on revisions to Article IX of the City Charter to allow the Board additional time to provide input.

Thank you for allowing SDCERS to be a part of this process. If you have any questions, please let us know.

Sincerely,

Elaine W. Reagan
Deputy CEO, Compliance and Legal Operations

EWR/jsm

TAB 16

Charter § 215 Publicity of Records and § 216 Copies of Records

Issue: These sections were adopted with the original Charter. Since then, the California Public Records Act was enacted and requires that the City allow the public to inspect and copy documents unless an exception applies. Sections 215 and 216 are no longer necessary and may conflict with state law.

Options: Consider repeal as the sections are no longer required.

Level: 3

Charter § 219 Pueblo Lands

Issue: Currently, the language in section 219 is unclear and reads too broadly. Recommend revising the last sentence ("No lease shall be valid for a period of time exceeding 15 years.") to state the section only applies to leases of those Pueblo Lands covered by the section. Also, the section should be revised to limit applicability of the section to only those Pueblo Lands north of the San Diego River actually City-owned when the predecessor of Section 219 was adopted in 1909, and which have remained in continuous City ownership since that time. *See,* 1999 Op. City Att'y 40 (99-2; Jul. 15, 1999).

Options: Clarify language to read consistent with City Attorney memos.

Level: 3

Charter § 225 Mandatory Disclosure of Business Interests

Issue: Charter section 225 requires that the person applying or bargaining for any right, title or interest in the City's real or personal property, or any right, title or interest arising out of a contract, or lease, or any franchise, right or privilege may be granted pursuant to section 103 or 103.1, must make a full and complete disclosure of the name and identity of any and all persons directly or indirectly involved in the application or proposed transaction and the precise nature of all interests of all persons therein. The term "person" means any natural person, joint venture, joint stock company, partnership, association, firm, club, company, corporation, business trust, organization or entity. The City has had difficulty complying with this provision given the large number of contracts and leases the City enters into each year. Also, the requirement to disclose "any and all persons directly or indirectly involved" is extremely broad.

Options: Review section 225 to clarify intent and scope of the terms to help ensure compliance with the provision. Consider amending to include only persons with a direct and substantial interest in the application.

Level: 3

TAB 17

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Options: Clarify language to read consistent with City Attorney memos.

Level: 3

Charter § 225 Mandatory Disclosure of Business Interests

Issue: Charter section 225 requires that the person applying or bargaining for any right, title or interest in the City's real or personal property, or any right, title or interest arising out of a contract, or lease, or any franchise, right or privilege may be granted pursuant to section 103 or 103.1, must make a full and complete disclosure of the name and identity of any and all persons directly or indirectly involved in the application or proposed transaction and the precise nature of all interests of all persons therein. The term "person" means any natural person, joint venture, joint stock company, partnership, association, firm, club, company, corporation, business trust, organization or entity. The City has had difficulty complying with this provision given the large number of contracts and leases the City enters into each year. Also, the requirement to disclose "any and all persons directly or indirectly involved" is extremely broad.

Options: Review section 225 to clarify intent and scope of the terms to help ensure compliance with the provision. Consider amending to include only persons with a direct and substantial interest in the application.

Level: 3

TAB 18

SECTION 58: FIRE DEPARTMENT

The Fire Department shall consist of a Chief of the Fire Department and such other officers, members and employees as the Council may from time to time prescribe by ordinance.

The Chief of the Fire Department shall be appointed by the City Manager and the appointment shall be confirmed by a majority of the Council, provided, however, that the Chief of the Fire Department may be removed by the City Manager at any time in the manner provided for in Section 30 of Article V of this Charter. The Chief of the Fire Department shall have all power and authority necessary for the operation and control of the Fire Department and the protection of the lives and property of the people of the City from fire.

The Chief of the Fire Department, with the approval of the City Manager, shall direct and supervise the personnel. Members of the Fire Department shall be subject to all the Civil Service provisions of this Charter contained in Article VIII. This section shall not become effective until July 1, 1974.

(Amendment voted 11-06-1956; effective 01-10-1957.)
(Amendment voted 09-17-1963; effective 02-11-1964.)
(Amendment voted 11-06-1973; effective 12-07-1973.)
(Section 58 is modified by contrary language in section 265(b) effective 01-01-2006.)

City of San Diego
COUNCIL PRESIDENT PRO TEM MARTI EMERALD
DISTRICT NINE
M E M O R A N D U M

DATE: **February 2, 2015** **Reference: M-15-02-01**

TO: **Council President Sherri S. Lightner, Chair**
Committee on Charter Review

FROM: **Council President Pro Tem Marti Emerald**

SUBJECT: **Charter Review Committee Priorities**

This is in response to your memo dated December 18, 2014 regarding priorities for the Special Issues Committee on Charter Review. With the understanding that additional ideas may arise as we go through the process, I respectfully submit the following topics of concern for potential charter updates and modifications:

1. The Committee should take all necessary steps to solicit the maximum possible public input into the process.

2. To the greatest extent possible, make the charter language easy for the average citizen to understand and digest. Use plain language and minimize the amount of text.

3. Create an introductory passage outlining the purposes and goals of the San Diego City Charter.

4. To the extent possible, place the most significant proposed charter amendments on the General Election Ballot for 2016, as opposed to the Primary Election ballot. The purpose would be to allow for the greatest amount of participation by voters, who turn out in greater numbers for the general election. If necessary, place items that are merely housekeeping in nature on the primary ballot.

5. Reform the referendum process to reduce the potential for results to be influenced by a small number of people spending large amounts of money. Take steps to ensure that campaigns for and against referendum measures are conducted transparently and without willful deception.

6. Incorporate the language of Council Policy 500-09 Minimum Staffing for Fire Engines and Fire Trucks.

7. Examine whether the city needs to reform Charter Sections 26 and 26.1 in order to allow voters to consider having all users pay for refuse collection and thereby provide more General Fund revenue for public safety, infrastructure and other critical needs.

8. Remove the responsibility of setting Mayoral and Council salaries from the City Council. Look to the recommendations of the city's Salary Setting Commission.

ME/tt
cc: Honorable Members of the City Council

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

CURRENT

SUBJECT: MINIMUM STAFFING FOR FIRE ENGINES AND FIRE TRUCKS
POLICY NO.: 500-09
EFFECTIVE DATE: November 29, 2010

BACKGROUND:

As of June 30, 2010, the City of San Diego has forty-seven (47) fire engines and twelve (12) fire trucks. Presently, it is the City Policy to staff fire engines and trucks with four personnel, which is consistent with national professional standards within the firefighting industry. Despite budget-cutting moves by the Fire-Rescue Department, the City has not swayed from the national standard of four personnel staffing on each engine and truck.

PURPOSE

The purpose of this Council Policy is to clearly state the City Council's desire and intent to maintain minimum staffing of fire engines and fire trucks, consistent with the national industry standard.

POLICY

The City Council is deeply committed to improving public safety throughout the City of San Diego. The Fire-Rescue Department provides resources for the emergency response to fires and needed emergency medical services in an environment of continued development of dwelling units and associated population increases.

The City Council is committed to providing the appropriate resources for the fastest response time and cessation of emergency incidents by the Fire-Rescue Department.

It is the intention of the City Council that fire engines and fire trucks positioned in fire stations be staffed and operational, consistent with national fire industry standards.

This policy of the City Council requires that all in-service fire engines and fire trucks be minimally staffed with four-person crews.

This policy is not intended to create a legal duty where one does not exist.

HISTORY:

Adopted by Resolution R-306319 - 11/29/2010

TAB 19

SECTION 64: SUPPORT OF EDUCATIONAL AND CULTURAL INSTITUTIONS

The Council shall annually make appropriations for the support of all institutions of an educational, scientific, historical and cultural character, and which have a tendency to promote the welfare of the City and its inhabitants, which are now or which may hereafter be controlled by The City of San Diego and partially or wholly operated and maintained by said City for the benefit of its inhabitants.

TAB 20

financial expenditure obligations (versus, for example, standard City leases where City is lessor and there is no public expenditure).

(3) Consider further clarification to provide that the limitation only applies to those contracts, agreements, or obligations with financial obligations that will arise/become due in more than five years.

Level: 3

Charter § 110 Claims Against the City

Issue: Charter section 110 provides a 100-day time limit in which to file claims for damages for injuries to person or property due to City or City officer negligence, and claims for money the City may be obligated to pay a person by contract or operation of law. By contrast, Government Code section 911.2(a) of the Claims Act provides that claims "shall be presented . . . not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented . . . not later than one year after the accrual of the cause of action." The City's 100-day limit raises a possible state preemption issue. *See, Helbach v. City of Long Beach*, 50 Cal. App. 2d 242, 246-247 (1942) (charter provision specifying longer time limit than provided in Claims Act was preempted).

Options: Amend section 110 to provide that claims shall be submitted in accordance with state law.

Level: 3

Charter § 113 Official Advertising

Issue: Charter section 113 deals with official advertising for bids. The section should be reviewed to see if print advertising should be replaced with internet advertising on the City's website. See section 114 below regarding using the "City Bulletin" for official advertising and possible changes to internet communications.

Options: Amend section 113 to update advertising for bids. Also consider issues related to sections 35 (Purchasing Agent) and 94 (Contracts) discussed above.

Level: 3

Charter § 114 Bureau of Information and Publicity

Issue: This section provides that the Council *may* establish a Bureau of Information and Publicity to be given a number of duties – many of them similar to a public information officer and overlapping with functions currently carried out by the City Clerk. This section also allows for the "City Bulletin" as a means of providing information relating to the affairs of the City and official advertising. Because the establishment of the Bureau and its duties is permissive, it is not a direct legal issue. Nonetheless, the section should be reviewed in light of open data and other open government policies.