

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: October 19, 2023

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Budgetary Roles of the Mayor and City Council and Recent Relevant Matters

The San Diego City Council (Council) has started its City Fiscal Year 2025 budget development process by submitting their respective budget priorities to the Office of the Independent Budget Analyst (IBA). On October 11, 2023, the IBA issued a report that compiles these priorities. This Office is providing previous guidance regarding the Council's role in the City's budget process to assist Councilmembers in their deliberations.¹

As stated in this Office's prior advice, the City's current budgetary process under the Strong Mayor form of governance (Strong Mayor) provides the Council the opportunity to modify the Mayor's proposed budget in whole or in part so long as the budget remains balanced. *See* San Diego Charter (Charter) § 69(f). If the Mayor vetoes any of the Council's modifications, the Council may override the Mayor's veto with a two-thirds vote. *See* Charter § 69(h).

Below are responses to questions this Office has received over the years concerning the Council's role in the budgetary process.

Earmarking Revenues for Specific Purposes

This Office has been asked whether revenue, such as Cannabis Business Tax revenue, can be designated for specific purposes. Although each designation must be individually analyzed for legality, these types of proposals may be problematic because placing restrictions on general tax revenues would violate: (1) the Charter's established budgetary process under Strong Mayor, in which the Mayor develops and proposes the City's budget each fiscal year; and (2) Proposition 218 by arguably converting a general tax into a special tax.² As stated above, Councilmembers

¹ *See* 2007 Op. City Att'y 347 (2007-1; Apr. 6, 2007); City Att'y MS 2019-19 (July 31, 2019).

² A special tax is a tax that is levied for a particular purpose. A general tax may be used for any governmental purpose. General taxes require a majority vote while special taxes require a two-thirds vote.

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may modify the Mayor's proposed budget and override any Mayoral vetoes to their modifications, and Council may use existing budgetary authority under the Charter to fund specific budget items without potentially violating either the Charter or state law.

San Diego Municipal Code Language that Predates Strong Mayor

The San Diego Municipal Code (Municipal Code) contains outdated budget-related language that predates our City's adoption of a Strong Mayor form of governance. The Charter supersedes conflicting Municipal Code language. For instance, Municipal Code section 35.0128(b) conflicts with the Charter (i.e., the budgetary process under Strong Mayor). This Office is working with the administration on amendments to this and other Municipal Code sections pertaining to transient occupancy tax. One of the proposed amendments would eliminate the language in section 35.0128(b) that conflicts with the Charter. Please ask this Office for legal review if you encounter conflicting budget language so that we may perform legal research.

Other Budgetary Actions

The Grand Jury recently issued a report recommending that the Council adopt an ordinance requiring the City to fund street pavement assessments every four years. An IBA report assessing the Grand Jury report correctly stated that such a recommendation could be problematic because it doesn't follow the City's budgetary process. The recommended ordinance would likely violate the Charter and is unnecessary because the budgetary process allows the Council to modify the Mayor's proposed budget and to override any Mayoral veto of their modifications. Depending on the source of the revenues used to fund any required street pavement assessments, the City also would need to evaluate its compliance with Proposition 218.

To conclude, the respective roles of the Mayor and Council in the City's budgetary process under Strong Mayor are presented in the Charter. Each issue that touches upon that process should be analyzed for compliance individually, and this Office is always available to assist. Please contact the undersigned with any legal questions relating to the City's budget process.

MARA W. ELLIOTT, CITY ATTORNEY

By



Bret A. Bartolotta
Deputy City Attorney

BAB:jdf

MS-2023-10

Enclosure

Doc. No.: 3440646

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Michael J. Aguirre
CITY ATTORNEY

OPINION NUMBER 2007-1

DATE: April 6, 2007

SUBJECT: Respective Roles of the Mayor and City Council in Budget Decisions
Affecting the City's Administration

REQUESTED BY: Mayor and City Council Members

PREPARED BY: City Attorney

INTRODUCTION

Since the current City Charter was adopted in 1931, the City of San Diego has operated under a City Manager form of government. On January 1, 2006, the City began a five-year trial period of a "Strong Mayor" form of governance. Under the new structure, all powers and duties of the appointed City Manager were transferred to the Mayor. The Mayor is now the City's chief executive officer, and chief budget and administrative officer. The City Council retained its legislative powers; however, most resolutions and ordinances passed by the Council are subject to a mayoral veto.

The Charter changes provided a separation of powers between the executive branch and the legislative branch, including a system of checks and balances. This is especially true with respect to the City's budget and appropriations. This Opinion discusses the roles and duties of the Mayor and Council in adopting a budget, making appropriations, and making mid-year changes. It is intended to provide a general framework for future resolution of specific issues on a case-by-case basis. The analysis and discussion are primarily based on the City Charter and general principles of municipal law. We did not find any California case law directly on point. Accordingly, we have cited cases from other jurisdictions for guidance.

QUESTION PRESENTED

What are the respective roles of the Mayor and Council, especially in budget decisions affecting the City's administration?

SHORT ANSWER

The overarching rule is that the Mayor and the Council must act within the powers granted to them under the Charter. As that being the general rule, we make the following observations:

First, the Mayor holds all of the City's administrative power, and is solely responsible for the day-to-day operations of the City. The Mayor is the City's chief executive officer, chief budget officer and supervises the City's financial affairs. However, a Mayor has only those powers that are expressly or impliedly conferred upon him by the Charter or by the Council acting within the scope of the Charter. The Mayor proposes the City's annual budget. The Mayor has special veto power over any changes to that budget proposed by the Council, but the Council has sole power to approve a final budget. The Mayor must implement the budget as adopted by the Council in accordance with objectives set forth in that budget. Further, budgetary appropriations, which are the authorization to incur obligations and spend public funds for a specific purpose, do not represent an absolute obligation for the Mayor to spend the full amount of such appropriation. The Mayor must achieve the budgetary priorities as set forth in the budget. Correspondingly, the Mayor has the discretion in the exercise of his duties to seek economic savings in carrying out the budgetary plan. However, the Mayor may not, through the exercise of such discretion, thwart the legislative aims of the Council in setting budgetary priorities.

Second, all legislative power of the City is vested in the City Council. Using that power, the Council establishes the City's policies. It may *not* delegate any legislative power or responsibility it was elected to exercise that "raises or spends public monies," including but not limited to the City's annual budget ordinance and the salary ordinance, nor its power to set public policy by resolution or ordinance. Under the Charter, the Council is given the authority to ensure its policies, ordinances and resolutions are properly implemented by the Mayor and other public officials, and to permit public review of that implementation. Indeed the Council has the right and duty to request information from the Mayor and City officials to ensure that its policies and procedures are being implemented. However, the Council, through the exercise of its oversight responsibility, must do so in a manner that does not interfere with the Mayor's duty to conduct day-to-day administrative affairs of the City

HISTORICAL CONTEXT

Historically, most U.S. cities were created using the "Strong Mayor" or "Political" system of government. Under the true "Political" system, the elected mayor had broad patronage powers (the power to hire those who supported the mayor during an election, as well as friends and family) and the Council was limited to a part-time role passing laws as recommended by the Mayor.

Beginning in 1912, cities began adopting a “Council-Manager” form of government. This trend continued until the 1930s, slowed during the depression, and boomed during the 1960s and 1970s. George H. Frederickson, Gary A. Johnson, & Curtis H. Wood, *The Adapted City: Institutional Dynamics and Structural Change*, New York: Cities and Contemporary Society, M.E. Sharpe (2004). The true Council-Manager form of governance featured a professional manager chosen by the City Council. Administrative powers were unified under the City Manager while the Council maintained legislative and budgetary authority. One sphere of power was not to meddle in the affairs of the other. *Id.* at 38.

San Diego first experimented with a Strong Mayor form of government from 1915 to 1931. 1986 Op. City Att’y 17, 18-21. Charter changes created a Council-appointed City Manager form of government in 1931. *Id.* at 19-20. Over time, the City Manager’s authority strengthened, and the form of government survived an effort in 1973 to return the City to a Strong Mayor system. *Id.* at 21. Charter changes impacted the City Manager’s authority over the years, but none diminished the City Manager’s authority.¹ Under the Council-Manager form of government, the City Manager was *entitled* to assert full autonomy over administrative affairs and the implementation of the budget approved by the Council. This power was at times theoretical, given the risk to the City Manager’s livelihood if such assertion was against the wishes of the Council.

Effective January 1, 2006, voters amended the Charter to test the “Strong Mayor” form of governance for a five-year trial period. The new Article XV of the Charter suspends the operation of certain Charter provisions. It transfers to the Mayor all fiscal and administrative authority previously held by the City Manager, provides the Mayor with appointment and supervisory powers over fiscal officers of the City, and with a veto over certain Council actions including a special veto in the budget and salary ordinance process. The new form of government also includes certain checks and balances with respect to fiscal matters, including authorizing the Council to appoint an Independent Budget Analyst, requiring Council acceptance of any budget before it may be implemented, and an oversight role for the City Council.

GENERAL PRINCIPLES

This Opinion focuses primarily on the issue presently facing the Mayor and City Council with respect to the budget and the annual appropriation ordinance. During the last year, questions have been raised regarding the authority and decision-making powers of the Mayor and the Council relative to the City’s budget. The Charter contemplates a system of checks and balances; however, interpretation of these provisions has not been easy. The following is a general discussion of this balance of power.

¹ For example, see Charter §§ 32.1, 94, 94.1, 94.2, 94.4

In general, a mayor has only that authority which is expressly or impliedly conferred upon him by charter or by the council acting within the scope of the charter. 3 McQuillin, Mun. Corp. (3d ed. 2005), § 12.43, p. 249. This principle is illustrated in a case entitled *Detroit Fire Fighters Association v. the City of Detroit*, 449 Mich. 629, 537 N.W.2d 436 (1995). Detroit is a charter city with separate executive and legislative branches. *Id.* at 639-640. In that case, the Mayor submitted a budget proposal to the Detroit City Council. The Council amended the budget to include \$750,000 for a new fire department squad, whose purpose was to provide reserve manpower and to engage in certain specialized functions, such as rescue, extrication, and transport. The city council passed the amended budget, but the mayor vetoed \$500,000 of the \$750,000 appropriated. The council overrode the veto, reinstating the original \$750,000 appropriation. When the mayor did not spend the funds that were appropriated, the fire fighters association sued.

The Court noted that appropriations generally cannot be diverted to any other purpose except as provided by statute or charter. *Id.* at 639, citing 15 McQuillin, Mun. Corp. § 39.69, at p. 233 (3d ed. rev.) In analyzing the facts, the court found that the Detroit City Charter contemplated a separation of powers between the executive branch (the Mayor) and the legislative branch (the City Council). In that regard, the Court stated:

. . . Just as the city council cannot make unilateral changes in the budget, the mayor cannot single-handedly alter the city council's appropriations. To allow the mayor such power would provide a means for circumventing the legislative branch and essentially render meaningless the powers and duties granted to the city council by charter.

Additionally, although the executive branch is granted some discretion in the expenditure of appropriated funds, it possesses no inherent constitutional power to refuse to spend in the face of clear legislative intent and statutory directive. [citations omitted] Here, the city council clearly earmarked \$750,000 of the appropriation to be used to fund an additional fire squad. Thus, the mayor may not use discretion as a guise for frustrating this intention. *Id.* at 640-641.

The concurring opinions provide further guidance. One justice notes that: "the mayor is not required to spend the entire amount appropriated if he can effect the purpose with less money." *Id.* at 649. Another concurring opinion sums up the issues as follows:

I do not believe that anyone can seriously dispute that an appropriation is not a mandate to the executive branch to spend the full appropriation. Additionally, the executive branch certainly has inherent discretion, if not a duty to seek economic savings.

However, this executive discretion may not extend so far as to usurp legislative authority. Adopting a budget is a legislative function. In contrast, proposing and implementing a budget are executive functions. Everyone here recognizes that the budget is no more than a financial plan, which may be adjusted throughout the fiscal year in order to adapt to changing financial conditions. . .

. . . . The question becomes, how do we strike a balance between the executive branch's discretionary power to operate within the financial plan and the legislative branch's intent and power to adopt the budget and to set fiscal policy. . .

. . . "Appropriation" means an authorization granted by a legislative body to incur obligations and to expend public funds *for a stated purpose* . . .

. . . I think our solution lies with the "stated purpose" objective of an appropriation. If the executive branch has substantially accomplished the stated purpose, then it has legally operated within executive discretionary authority when it economically saved money by not spending the full amount. In other words, the mayor secured a "better deal," or the project did not cost as much as expected. However, if the effect of the "not spending" frustrated or thwarted the stated purpose, then the executive branch has not executed or implemented a legislative authorization. Instead, it has unilaterally adopted its own budget by deviating from if not ignoring, the council's budget. This it cannot do. *Id.*, at 658-660.

The *Detroit Fire Fighters Association* case, though not binding precedent, provides insight that is well-reasoned and instructive. These principles can be equally and appropriately applied to the City Charter and the roles of the Mayor and the City Council.

DISCUSSION

I. The Mayor's Executive, Budgetary, and Administrative Powers

In any form of municipal government, a mayor "has no authority, except what is expressly or impliedly conferred upon him or her by the charter or applicable law, or by the council or governing legislative body acting within the scope of the law." 3 McQuillin Mun. Corp. § 12.43 (3rd ed. 2005). San Diego's Charter gives the Mayor broad administrative authority in planning the activities of the City government and for adjusting such activities to the finances available.

A. Administrative Authority and Day-to-Day Operations are Vested in the Mayor

Article XV of the Charter transfers to the elected Mayor all administrative powers, duties and responsibilities previously held by the City Manager, thus making the Mayor the City's Chief Administrative Officer. Charter §§ 28, 260(b). Black's Law Dictionary, Seventh Edition, defines administration in part as: "1. The management or performance of the executive duties of a government, institution, or business. 2. In public law, the practical management and direction of the executive department and its agencies." The Mayor also has the title of Chief Executive Officer. Charter § 265(b)(1). The title commonly means "The highest-ranking executive in a company or organization, responsible for carrying out the policies of the board of directors on a day-to-day basis."²

The Mayor's Charter-imposed duties are consistent with these definitions. The Mayor supervises the City's administrative affairs. Charter § 28; *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380, 385-386 (1976). Heads of departments reporting to the Mayor are "responsible to him for the efficient administration of their respective Departments." Charter § 28. The Mayor has a corresponding duty to ensure departments under his control function efficiently. Consistent with this duty, the Mayor may "transfer employees temporarily from one Department to perform similar duties in another Department." The Mayor also may "direct any Department or Division to perform work for any other Department or Division" "in order to expedite the work of any department or to adequately administer an increase in the duties which may devolve on any Department or to cope with periodic or seasonal changes." Charter § 28.³

The Mayor has authority to "promulgate and issue administrative regulations that give controlling direction to the administrative service of the City," and to regulate the "general conduct of the administrative Departments." Charter §§ 265(b)(2), 28. However, the Mayor may not issue regulations that conflict with the valid City policies or ordinances enacted by the Council. This would intrude upon the Council's exclusive authority under the Charter to enact legislation.

B. The Mayor is Responsible for Planning and Preparing the Budget

The Mayor is also Chief Budget Officer, which means he is "responsible for planning the activities of the City government and for adjusting such activities to the finances available." Charter § 28. To do so, the Mayor must "prepare annually a complete financial plan for the ensuing year and shall be responsible for the administration of such a plan when adopted by the Council." *Ibid.* The Mayor also is responsible for "bringing together . . . estimates covering the

² See The American Heritage Dictionary of the English Language: Fourth Edition (2000) (<http://www.bartleby.com/61/90/C0289050.html>).

³ The authority to move personnel or order departments to work for each other does not apply to certain departments, including the Police and Fire Departments. Charter § 28.

financial needs of the City, with the checking of these estimates against the information relative to past expenditures and income, with the preparation of the budget document and supporting schedules and with the presentation of the budget to the Council.” *Ibid.* The Mayor now has authority to appoint, with Council approval, City officers responsible for financial matters, including the City Treasurer and Auditor-Comptroller. Charter §§ 29, 45, 260(b), 265 (b)(10), (11). *See* City Att’y MOL 2006-2 (Jan. 23, 2006).

The Mayor’s intimate knowledge of the City’s fiscal and administrative condition provides his “ability to propose plans for the council’s approval . . . and . . . for which the mayor is uniquely qualified since he is the official in charge of carrying out the plans.” *See Brown v. Fair Political Practices Com.*, 84 Cal. App. 4th 137, 148 (2000). Thus, the Mayor has the right and duty to propose legislation or make recommendations to the Council concerning the City’s affairs. Charter § 265(b)(3). In addition, the Charter requires the Mayor to propose the budget and salary ordinance, and gives him a special veto over their terms before they become controlling documents for the appropriation ordinance. Charter §§ 28, 69, 265(b)(15), 290(a). The Council finalizes the budget and salary ordinance, and enacts the annual appropriation ordinance. Charter §§ 71, 290. The Mayor then administers the plan and is responsible “for adjusting the activities of the City to the finances available.” Charter § 28.

The Mayor has a duty to operate the City within a balanced budget, and must control spending so as to avoid a budget deficit. *Detroit Fire Fighters Association*, 449 Mich. at 655. Consistent with the Mayor’s duty to oversee the efficient administration of City Departments, the Charter provides him with specific and implied authority to reduce costs. For example, the Mayor executes the contracts for departments under his control and may contract for certain other City needs below set dollar amounts. Charter §§ 28, 94, 94.1, 94.2, 94.4. The Mayor can alter City contracts, so long as this does not increase the amount of the contract. Charter § 98.⁴

With respect to mid-year budget adjustments, the Charter contemplates that all funds appropriated for a particular purpose may not be spent, while other appropriations may be insufficient to meet actual needs. The Council has authority to transfer unencumbered, appropriated funds to meet those other needs. However, the Mayor must first recommend such fund transfers in writing. Charter § 73. The Mayor is given the power to allocate internal budget amounts for departments under his control. Charter § 81. The Council also may authorize the Mayor to transfer funds between allocated items within the same department. Charter § 73.

The Mayor’s responsibility to be fiscally efficient is tempered by the requirement that the Mayor is also required to implement, not contravene, valid and established policies or ordinances of the Council. It is clear that the Mayor is not required to spend the full amount appropriated if the Mayor can find a way to accomplish the purpose of the appropriation without spending the

⁴ The Mayor must seek Council approval when contract costs are to exceed those previously authorized by Council. *Ibid.*

entire amount. However, the Mayor may not completely disregard the Council's policies and programs by not spending appropriated monies.

C. Mayor Has a Duty to Provide Information to the City Council

Although the Mayor no longer serves on the Council (Charter §§ 260(b), 270),⁵ the Mayor is required to provide information to the Council. For example, the Mayor must "keep the Council advised of the financial condition and future needs of the City." Charter § 28. The Mayor must "prepare and submit to the Council . . . such reports as may be required by that body." *Ibid.* Similarly, he must "comply promptly with all lawful requests for information by the Council." Charter § 32.1. Another section requires the Mayor to "cooperate fully with the Council and Independent Budget Analyst" including supplying requested information concerning the budget process and fiscal condition of the City. Charter § 265(b)(14). Even absent a request, the Mayor still has a duty to "inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council." Charter § 32.1. These provisions benefit the Council and the public generally, and are part of the checks and balances contemplated by the Charter.

II. The Council's Legislative Power

The Charter vests all legislative power in the City Council, subject to the terms of the Charter and the Constitution of the State of California. Charter § 11. The Council has the legislative power and responsibility for which it was elected to adopt ordinances and resolutions which raises or spends public monies, including the City's annual budget ordinance and the annual salary setting ordinance, and any ordinance or resolution setting public policy. Charter § 11.1.

A. The Council's Role in the Budget

Under the Strong Mayor form of governance, the Mayor proposes both the salary ordinance and the budget and submits them to the Council. There is a process for public hearings, Council modifications to the budget, mayoral veto, and final passage. Charter §§ 11.1, 71, 265(b)(15) and 290. The budget becomes the controlling document for preparation of the Annual Appropriation Ordinance. Charter § 290(b). After adoption of the appropriation ordinance, the City Council may transfer previously appropriated but unused funds to meet unanticipated needs in different departments, upon the written recommendation of the Mayor,

⁵ The Mayor has limited legislative authority to approve and veto most Council ordinances and resolutions. Charter §§ 265(b)(5), 280 and 290; *See Pulskamp v. Martinez*, 2 Cal. App. 4th 854, 862 (1992); *McDonald v. Dodge*, 97 Cal. 112, 114 (1893) [limited legislative authority does not make Mayor part of legislative body]. The Mayor may attend open sessions and chair closed sessions of the Council, but may not vote at either. Charter § 265(b)(4) and (b)(6).

Charter § 73. Accordingly, the Charter contemplates a joint approval process of amendments to the appropriation ordinance.

The Council has the power to set the policy of spending public money and to allocate the money needed to meet the City's needs. In making its appropriations, the Council should clearly set forth the stated purpose of the appropriations. This will allow the Mayor to implement the Council's goals and objectives in administering the day-to-day operations of the City. In setting budgetary policy, however, the Council must be mindful that it may not interfere with the Mayor's powers under the Charter. That is, the Council may not intrude upon the Mayor's administrative authority to implement the Council's policies in the most efficient manner.

B. The Council May Not Delegate Its Legislative Authority

Charter section 11.1 states that the Council members were elected to exercise their legislative authority and responsibility with respect to the raising and spending of taxpayer money. Accordingly, such responsibility cannot be delegated.⁶ Charter section 11.1 provides, in pertinent part:

The same prohibition against delegation of the legislative power which is imposed on the State Legislature by Article XI, Section 11a of the Constitution of the State of California shall apply to the City Council of The City of San Diego, so that *its members shall not delegate legislative power or responsibility* which they were elected to exercise in the adoption of any ordinance or resolution which raises or spends public monies, including but not limited to the City's *annual budget ordinance* or any part thereof, and the annual ordinance setting compensation for City employees, or any ordinance or resolution setting public policy. . . . (Emphasis added.)

Similarly, California Constitution, article XI, section 11a provides:

The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions.

⁶ Section 11.1 was added to the Charter by the voters in 1980 as an alternative to a proposition (Proposition B) that would have replaced the Council as the decision-making body for the salaries of police officers, in favor of final and binding arbitration in the event of an impasse in labor negotiations. *See* 1980 Op. City Att'y 65; San Diego Ballot Pam. Primary Elect. June 3, 1980.

An unconstitutional delegation of legislative power occurs when the legislative body confers upon any person or body the “unrestricted authority to make fundamental policy decisions.” *People v. Wright*, 30 Cal. 3d 705, 712 (1982), citing *Clean Air Constituency v. California State Air Resources Board*, 11 Cal. 3d 801, 816 (1974); *Kugler v. Yokum*, 69 Cal. 2d 371, 376 (1968). “This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.” *Kugler* at 376-377.

Although a legislative body may not delegate its legislative authority, it may properly confer upon administrative or executive officers the authority to implement their legislative enactments. The authority may include the use of some discretion, as long as rules, standards, or guides set the limits under which the authority may be exercised. *See generally* 2A McQuillin Mun. Corp. §§ 10.40.10, 10.43, 10.44 (3rd ed.).

While the Council may not delegate its legislative authority on fiscal matters, it does adopt a budget, salary and appropriations ordinances that set the parameters of City spending for City needs based on the Mayor’s recommendations. There is no need for the Council to grant authority to the Mayor to implement the spending guidelines in the appropriation ordinance, as this authority is already granted under the Charter. Moreover, there are rules and guidelines already set forth in the Charter that recognize the Mayor’s discretionary authority, including the authority to adjust the City’s activities to the finances available, to transfer employees temporarily to cope with periodic or seasonal changes, and to make recommendations to the Council regarding mid-year transfers of appropriations.

C. The Council’s Oversight Function

The Council may not interfere with the Mayor’s administrative authority under the Charter any more than the Mayor may usurp the Council’s legislative powers. However, Article XV provides the Council with oversight authority more clearly than in the past, to enable the Council to ensure its policies, ordinances and resolutions are properly implemented by the Mayor and other public officials, and to permit public review of that implementation. In addition, Article XV authorized the Council to establish an Office of Independent Budget Analyst and to determine the powers of that office by ordinance. The Council has taken advantage of this provision by creating the office and providing that the Independent Budget Analyst “assists the Council in the conduct of budgetary inquiries and in the making of budgetary decisions.” SDMC § 22.2301. Accordingly, the Independent Budget Analyst regularly evaluates and comments upon the financial matters affecting the City.

One of the checks and balances is the Charter requirement that the Mayor has a duty to cooperate fully with the Council and the Office of Independent Budget Analyst, including supplying requested information concerning the budget process and fiscal condition of the City. Charter § 265(b)(14). Moreover, the Charter places an *affirmative duty* on the Mayor and other

City officials to volunteer any information the Council may require for its proper decision-making. The affirmative duty to provide information about “all material facts or significant developments relating to all matters under the jurisdiction of the Council” is placed on the Mayor and other City officials by Charter section 32.1.

The Charter also provides the Council with the right to request information from the Mayor. Article XV expressly provides the Council with power to summon officials before the Council or its committees, and clarifies those situations when individual Council members may bypass the Mayor and communicate directly with members of the administrative service. Charter § 270(h) and 270(i). These sections provide broad authority for the Council and its committees, and in certain circumstances individual Council members, to ensure the Mayor implements and enforces the Council’s policies and ordinances to meet the needs of the City.

RECOMMENDATION

Based on the above, we recommend the creation of an Appropriations Adjustment Committee, to be composed of appropriate representatives of the Council, Independent Budget Analyst, Mayor's Office and City Attorney's Office. The purpose of the Committee would be to consider the process by which the Mayor administers the budget during the fiscal year, and to make recommendations to the City Council for legislative changes to the municipal code that will enable the Mayor to implement the policy of the Council with maximum flexibility to achieve efficiency and cost savings.

CONCLUSION

The Mayor has only that authority that the Charter provides or the Council grants by ordinance or resolution. However, the Mayor has inherent discretion, if not a duty to seek economic savings. This discretion may not extend so far as to usurp legislative authority. Adopting a budget is a legislative function of the Council. In contrast, proposing and implementing a budget are functions granted to the Mayor. Both parties have important roles after adoption of the budget and the appropriation ordinance. Mid-year adjustments are anticipated by the Charter, and both parties must participate. The Mayor must make recommendations to the Council, which must approve and authorize the transfer of appropriations. The parties may not act unilaterally to frustrate the duties and responsibilities of the other.

As this review illustrates, there is no bright line to draw in the absence of specific facts that determine exactly where the Mayor’s and the Council’s authority begins and ends in all City fiscal matters. Each has specific duties and powers. Yet, for the City to function effectively, both must act in the interdependent manner established by the Charter. Whether one party improperly contravenes the authority of the other necessarily must be determined on a case-by-case basis. Although the Mayor and Council have experienced some challenges under the new system of governance, the answers to most questions are found in the Charter. For the most part, the

Mayor and
City Council Members

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April 6, 2007

Charter provisions contemplate a system that should work - a system of checks and balances, cooperation, oversight and independence. Nonetheless, improvements could be made to the Charter, including clarifying the process for mid-year adjustments to the appropriation ordinance under the strong mayor. These issues will likely be addressed by the Charter Commission and the Council in the next several months. In the meantime, we will assist the Mayor and Council on specific issues as they arise.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

MJA:jb
LO-2007-1

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

**MEMORANDUM
MS 59**

(619) 236-6620

DATE: July 31, 2019
TO: Councilmembers Chris Ward and Monica Montgomery
FROM: City Attorney
SUBJECT: Expenditure of Measure N Tax Revenues

INTRODUCTION

On November 8, 2016, California voters approved Proposition 64 legalizing adult use, cultivation, and retail sale of recreational cannabis in California. City of San Diego (City) voters also approved a ballot measure labeled “Measure N,” establishing a Cannabis Business Tax in the San Diego Municipal Code (Municipal Code or SDMC).¹ Measure N tax revenue is projected at \$11.9 million in the Fiscal Year 2020 Budget.

You have expressed your desire to explore the establishment of a Cannabis Equity Program,² which would be intended to provide support and mentoring services for communities that may have suffered disproportionate levels of law enforcement of cannabis-related crimes.³ You have asked the Office of the City Attorney for guidance regarding whether Measure N revenues could be used to fund such a program in light of restrictions on general tax revenues.⁴

¹ Measure N is codified in Municipal Code sections 34.0101 - 34.0132.

² Other jurisdictions have established similar programs, such as the City of Sacramento’s Cannabis Opportunity Reinvestment and Equity Program.

³ One of your stated goals of the Cannabis Equity Program would be to provide loan assistance for entrepreneurial access to the cannabis industry. As of the date of this memorandum, the City has issued the maximum number of permits (40) for Marijuana Production Facilities (MPF), but there may be other forms of access to the industry. In addition, the City Council (Council) has the option of amending the Municipal Code to increase the maximum number of MPF permits.

⁴ The establishment of a Cannabis Equity Program in the City may raise other legal issues not addressed in this memorandum. This Office would need to perform additional research and analysis should the Council elect to move forward with such a program.

QUESTIONS PRESENTED

1. What are the existing restrictions on the Council's direction of Measure N tax revenues?
2. May the Council establish specific goals for the use of Measure N tax revenues?

SHORT ANSWERS

1. Measure N is a general tax, the proceeds of which must be placed into the City's General Fund to be allocated in accordance with the City's annual budgeting and appropriation process (Budget Process). As discussed in Part I below, Measure N received approval by more than two-thirds of local voters, but this circumstance does not convert it to a special tax.

2. The Council may annually designate Measure N tax revenues for specific goals during the City's annual Budget Process. The Council may not make multi-year commitments of Measure N tax revenues toward specific goals absent a new public vote approving a special tax.

ANALYSIS

I. MEASURE N TAX REVENUES MUST BE PLACED IN THE CITY'S GENERAL FUND AND ALLOCATED DURING THE ANNUAL BUDGET PROCESS

In California, local voters must approve a city's levy of taxes, subject to different vote thresholds depending on whether the tax is identified in the relevant ballot materials as a general tax or a special tax. A general tax is placed in the taxing entity's general fund to be used for "general governmental purposes." *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 57 (1982). A special tax is levied for a specific purpose and is "earmarked or dedicated in some manner to a specific project or projects." *Bay Area Cellular Telephone Co. v. City of Union City*, 162 Cal. App. 4th 686, 696 (2008). Under the California Constitution, a general tax requires approval by a majority of local voters, while a special tax requires approval by a two-thirds supermajority of local voters. Cal. Const. art. XIII A, § 4 and art. XIII C, § 2 (b) and (d). Likewise, under the San Diego Charter (Charter), the Council's levy of "a special tax, as authorized by Article XIII A of the California Constitution," requires approval by a two-thirds supermajority of local voters. San Diego Charter § 76.⁵

⁵ This Office recognizes that pending lawsuits in San Francisco, Oakland, and Fresno have raised the legal issue of whether the vote threshold may be a simple majority, rather than a two-thirds supermajority, where a special tax is proposed by citizens' initiative. However, the vote threshold issue in those lawsuits is not relevant here as Measure N is a general tax, not a special tax, and the Council, not citizens, initiated Measure N.

The citizens of San Diego approved Measure N as a general tax. The ballot language of Measure N states that the receipts of the tax will be used for “general revenue purposes” and that the measure required approval of a simple majority (over 50%) of the voters. Measure N, Gen. Elec. (Nov. 8, 2016). The Municipal Code also provides that Measure N revenues must be placed into the City’s General Fund and used for general governmental purposes. SDMC § 34.0101(b). These monies are then “allocated during the general budgeting process in light of changing priorities and conditions.” *Neecke v. City of Mill Valley*, 39 Cal. App. 4th 946, 956 (1995). The Council retains the authority to direct expenditures of General Fund dollars, including Measure N tax revenues, during the Budget Process each fiscal year as delineated in the Charter.⁶ See San Diego Charter §§ 69(f) and (h).

Even though over two-thirds of local voters approved Measure N in 2016, the relevant ballot materials identified the tax as a general tax, and the tax cannot be converted to a special tax after the fact without an additional public vote and full compliance with statutory requirements. For Measure N tax revenues to be designated for a specific purpose (i.e., converting it from a general tax to a special tax), a two-thirds supermajority of City voters would need to approve a new ballot measure that expressly identifies the tax as a special tax and includes various accountability measures required by statute. See Cal. Gov’t Code § 50075.1.

II. THE COUNCIL MAY DESIGNATE THAT MEASURE N TAX REVENUES BE USED FOR SPECIFIC PROGRAMS PROVIDED IT DOES SO ON AN ANNUAL BASIS

The Council may establish goals and community programs aimed at achieving racial and health equity in marijuana policy, such as the Cannabis Equity Program, and direct funding to those programs on an annual basis during the Budget Process. The Council’s determination “as to where to spend general sales taxes is not equivalent to saying that the tax was ‘levied’ for that particular purpose.” *White v. State*, 88 Cal. App. 4th 298, 309 (2001). Therefore, the Council may structure, establish, or fund specific programs with Measure N tax revenues, without converting it into a special tax, if the funding is committed in one-year increments within the framework of the City’s Budget Process.

CONCLUSION

San Diego voters approved Measure N as a general tax to increase revenues for the City’s General Fund. All Measure N tax revenues must be annually allocated pursuant to the City’s Budget Process. The Council may establish specific goals and programs for use of Measure N

⁶ The annual budget priority memo issued by each Council District provides Councilmembers the opportunity to request money be allocated to fund specific programs and goals during the upcoming fiscal year.

Councilmembers Chris Ward and Monica Montgomery

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tax revenues if these programs are funded on an annual basis. To earmark Measure N tax revenues on a multi-year basis for a specific purpose, Cityvoters would need to approve a special tax by a two-thirds vote.

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DLP:jdf

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cc: Honorable Mayor and City Councilmembers
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