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SUBJECT: Interpretation of San Diego City Charter Regarding City Attorney's Authority to Initiate Litigation

PREPARED BY: City Attorney

INTRODUCTION

The City Attorney's authority is governed by San Diego City Charter section 40, requiring interpretation of the City's Constitution. *See Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1017 (city charter is equivalent of local constitution). The ramifications of this interpretation are not limited to one issue, one case or one City Attorney; rather, interpretation of Charter section 40 defines the structure of the City Attorney's Office and its duties and responsibilities. Questions regarding the scope of the City Attorney's authority have arisen in the context of the City Attorney's ability to initiate litigation without prior consent of the City Council. This Opinion addresses that issue and defines the scope of the City Attorney's authority in detail.

QUESTION PRESENTED

What is the scope of the authority of San Diego's elected City Attorney to initiate litigation?

SHORT ANSWER

As detailed below, the plain language of Charter section 40 authorizes the City Attorney, as "chief legal adviser," to "prosecute" "all" lawsuits brought in the name of the City. There is no requirement whatsoever that the City Attorney obtain permission to sue in any case. This interpretation is supported not only by the language of Section 40 read in its entirety, but also by the legislative history of the provision, the common law authority afforded to elected public attorneys, state statutes authorizing the City Attorney to sue and long-standing practice. The check of an independent legal advisor is required in the interests of the people. Indeed, it is a constitutional safeguard.

ANALYSIS

Since 1931, San Diego voters have chosen a form of government that provides for an elected City Attorney, who is an officer of and "chief legal adviser" to the City. This separation of powers and the broad authority afforded the City Attorney under San Diego's Charter contrast with the City Attorney's status in general law cities. Under the state law governing general law cities, the city attorney is appointed by the city council, is a "subordinate" city officer, and performs legal services only as directed by the council. By contrast, San Diego voters have granted different and broader authority to its elected City Attorney, as allowed under a Charter city government.

As the California Supreme Court has written:

> [W]e construe the charter in the same manner as we would a statute. Our sole objective is to ascertain and effectuate legislative intent. We look first to the language of the charter, giving effect to its plain meaning. Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history.

Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal.4th 161, 171-72.

It is instructive to consider the ways in which a court would construe San Diego's City Charter. In construing the Charter, a court must consider the obvious purposes and objects sought to be attained and construe the language to effectuate that purpose. *Gibson v. City of San Diego* (1945) 25 Cal.2d 930, 934-35. In particular, a court must give "great weight" to the interpretation offered by the City Attorney. *E.g.*, *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 ("the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction"; this is required "especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion"); *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1289; *MHC Operating Ltd. Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 219-220.

I. The Plain Language of Charter Section 40 Authorizes the City Attorney to Initiate City Litigation

Possibly the best way to understand the meaning and intent of Charter section 40 is to juxtapose its terms with the provisions governing city attorneys in general law cities. Charter section 40 not only differs dramatically from the general law provisions governing city attorneys, but provides sweeping authority to the elected City Attorney: Section 40 provides that "The City Attorney shall be ***chief legal adviser of***, and ***attorney for the City and all Departments and offices thereof*** in matters relating to their official powers and duties . . . ." (emphasis added); whereas, the general law city attorney is a "***subordinate***" official, who "shall perform . . . legal

services ***required from time to time by the legislative body***." *See* Section C., *infra*.; Cal. Govt. Code, §§ 36505, 41803.

Thus, in sharp contrast to general law cities, San Diego voters adopted an autonomous city attorney form of government, in which the City Attorney is independently elected, counter-balancing the other branches of City government —the Mayor and Council. Charter, Art. V, § 40. In the realm of legal affairs, the City Attorney is "the chief legal adviser of . . . the City . . ." with the "duty . . . to perform ***all services*** incident to the legal department." *Id.* (emphasis added). *See also* Charter, Art. XV, § 265(b)(2) ("Nothing in this section [establishing "strong mayor" government] shall be interpreted or applied to add or subtract from powers conferred upon the City Attorney in Charter sections 40 and 40.1"); *id.* §§ 270, 275 (enumerating power of City Council; no mention of initiating or controlling litigation or authority over legal affairs).

Detailing the duties of its "chief legal adviser," San Diego's Charter section 40 provides:

> It shall be the City Attorney's ***duty***, either personally or by such assistants as he or she may designate . . . ***to <u>prosecute</u> or defend, as the case may be, <u>all</u> suits or cases to which the City may be a party***; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law . . . . (Emphasis added).

This language could not be more plain or broad: The City Attorney has an express "duty" to "prosecute" "all" lawsuits "to which the City may be a party." The plain meaning of "prosecute," which governs,[1] is "[t]o ***commence*** and carry out a legal action . . . ." *Black's Law Dict.* (8th ed. 2004) (emphasis added). *See also Oxford English Dict. Online* (Oxford Univ. Press 2008) ("prosecute" is defined as: 2.a.: "To ***institute*** (an action, claim) in a court of law; to ***initiate*** or carry on (civil or criminal proceedings)"; 2.b.: "To institute legal proceedings against (a person, organization, etc.) . . ."; 2.c.: "To institute, conduct, or pursue legal proceedings against someone. . ."; 2.d.: "To institute legal proceedings against a person . . .") (emphasis added); *Webster's II New College Dict.* (1995) p. 888 ("prosecute" is "to initiate legal or criminal court action against" or "to initiate and conduct legal proceedings"); *The American Heritage College Dict.* (4th ed. 2002) ("prosecute" is "[t]o initiate civil or criminal court action against"); *accord Buck v. City of Eureka* (1895) 109 Cal. 504, 519 (when [the law] says 'all suits' . . . the language will bear no other construction than that which is patent on its face."). In short, the Charter authorizes the City Attorney to institute or initiate "all" lawsuits. There is no

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[1] *E.g.*, *Gillespie v. San Francisco Public Library Comm'n* (1998) 67 Cal.App.4th 1165, 1174 (plain meaning governs interpretation where possible; examining dictionary definition of term).

limitation on this authority, and there is no requirement whatsoever that the City Attorney obtain permission to sue.[2]

In addition to this plenary authority to institute "all" litigation, the City Attorney must also obey the Council's directive to initiate litigation ***as to a limited subset of lawsuits***. Charter section 40 further provides:

> [1] The City Attorney ***shall apply***, ***upon order of the Council***, in the name of the City, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the City or the abuse of corporate powers, or the execution or performance of any contract made in behalf of the City which may be in contravention of the law or ordinances governing it, or which was procured by fraud or corruption.
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> [2] The City Attorney ***shall apply***, ***upon order of the Council***, to a court of competent jurisdiction for a writ of mandamus to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance.

Thus, while the City Attorney has broad discretion and authority to institute any lawsuit in the name of the City, he or she must, when directed by the Council, follow that directive and institute litigation in these specific classes of cases. These provisions do not preclude the City Attorney from filing lawsuits of this type under his own general authority to institute "all" cases; they merely require that the City Attorney ***must*** do so regardless his own proclivity if the Council so directs in these specific kinds of actions. *Cf. Board of Supervisors v. Simpson*, 36 Cal. 2d 671, 673 (1951) (district attorney required to bring nuisance suit when statute required him to do so at the direction of the Board of Supervisors).[3]

These provisions do ***not*** provide that the City Attorney ***shall obtain Council approval***; rather, they provide that the City Attorney ***shall bring the action*** ("shall apply") when the

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[2] The mode prescribed for the exercise of power by a public officer is the measure of that power. *E.g., Kennedy v. Ross* (1946) 28 Cal.2d 569, 581. Because the City Attorney is given the mode to "prosecute" cases, he must have the power to do so. *Id.* at 581-82 (holding that San Francisco charter vesting authority in city official impliedly created all powers incident to performance of that function, even when not expressed). *See also Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 433 (implying broad authority for City Attorney in absence of prohibition).

[3] When the Council directs the initiation of litigation, it must comply with the Brown Act, Cal. Gov. Code, §§ 54950-54963.

Council so orders. ***These are not permission-to-sue provisions; they are requirement-to-sue provisions.***[4]

Finally, Charter section 40 provides that "[t]he City Attorney shall perform such ***other*** duties of a legal nature as the Council may by ordinance require or as are provided by the Constitution and general laws of the State." (Emphasis added). Hence, the City Council may add to the City Attorney's legal duties by ordinance, and the City Attorney must perform his duties under state law. In short, the notion that the City Attorney needs ***permission to sue is wholly absent*** from Charter section 40.

It is instructive to compare the San Diego Charter adopted in 1931 to the former Charter. In *Ward v. San Diego School Dist.* (1928) 203 Cal. 712, 714, the California Supreme Court discussed the prior charter, under which the City Attorney was an appointed City official. By stark contrast to Section 40's current description of the City Attorney as the "chief legal adviser" with plenary authority to "prosecute" "all" lawsuits, the former Charter, Art. 3, Ch. 5, § 2, provided "'that ***the Common Council shall have control of all litigation of the city*** . . . .'" *Ward,* 203 Cal. at 714 (emphasis added). That provision was dropped three years later when current Charter section 40 was adopted.

Because the City Charter assigns the power to "prosecute" "all" suits to the City Attorney, the legislature (the Council) may not interfere with that function. *See Rafael v. Boyle* (1916) 32 Cal.App.2d 623, 625-26 (interpreting San Francisco Charter providing that city attorney "must prosecute and defend for the city and county all actions at law or in equity"; "This express provision clearly indicates an intention that the city attorney should handle all legal work of the various departments of the city government . . . . The manifest intention of the framers of the charter in the adoption of this provision was to systematize the conduct of the city's legal business"). *See also Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 240-41 (legislature could not interfere with prosecutorial function); *Dadmun v. City of San Diego* (1908) 9 Cal.App. 549, 551 ("[T]he city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter . . . ."). *Accord Scott v. Common Council of San Bernardino* (1996) 44 Cal.App.4th 684, 689-70 (city council could not use budgetary process to prevent city attorney from carrying out charter-mandated prosecutorial duties). *See generally Citizens for Responsible Behavior v. Super. Ct.* (1991) 1 Cal.App.4th 1013, 1034 (Charter may be amended only by majority vote of electorate and ordinance cannot limit charter provisions).

In sum, the plain language of Charter section 40 largely eschews Council control over City litigation, and instead provides the City Attorney with authority to initiate "all" lawsuits. The Council's role is limited to the ability to direct the City Attorney to file lawsuits in a small class of cases. This interpretation is not only the straightforward reading of the language, but it is confirmed by all other authorities.

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[4] Even if they were permission-to-sue provisions, however, the mandamus provision extends only to actions compelling "the performance of duties of any ***officer*** or ***commission***." Charter, Art. V, § 40.

II. Other Sources Universally Confirm the City Attorney's Authority to Initiate City Litigation

A. The Legislative History of Charter Section 40 Recognizes the City Attorney's Broad Legal Power

The elected office of San Diego City Attorney was created by the voters in the general election held on April 7, 1931. The elected City Attorney provision adopted by the electorate was a triumph over the 1929 Charter Proposal, which would have provided for an appointed City Attorney.[5]

The rationale for the "Independent City Attorney" explained at the time was:

> The city attorney is to be elected by the people. This is a guarantee that the legal head of the government will be able to fearlessly protect interests of all San Diego and not merely be an attorney appointed to carry out wishes of counsel or manager.[6]

Charter section 40 has been amended seven times since its adoption over 75 years ago. Charter, Art. V, § 40. However, the voters' choice to have an independent, elected City Attorney has not changed.[7]

One of the interim amendments to Charter section 40 sheds further light on the legislative intent. To increase City Attorney autonomy from the Mayor, staggered elections were adopted. While this practice was later abandoned in favor of increasing voter turnout through combined elections, the ballot statement at the time is instructive:

> The city attorney as a popularly elected official is responsible first of all to the voters of the city. He should be protected from the possibility of the threat of economic pressure from an unfriendly city council . . . . A city attorney elected at a different period than the majority of the city council and protected from economic pressure by the city council is San Diego's best insurance against

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[5] The lengthy proceedings surrounding this adoption, and the political milieu at the time, is detailed in a 2005 Report by the City Attorney's Office. (Report on the Role of the City Attorney, April 26, 2005. See http://www.sandiego.gov/cityattorney.

[6] Ballot Brochure, "Plan for Progress," published by San Diego Straight Ahead. Expressions of intent of the framers of the Charter are relevant in construing its meaning. *E.g., Kennedy v. Ross* (1946) 28 Cal.2d 569, 577; *see also Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1018 (statements made to voters relevant in construing intent).

[7] The other two major California cities —San Francisco and Los Angeles— also have city charters authorizing an elected city attorney.

> the establishment of a politically dominant faction in our democratic municipal government.

Ballot Statement at p. 16.

A preeminent treatise on local government describes the resulting relationship among the branches of local government:

> The relation existing between a city attorney and the city council is not, in all respects, that of attorney and client; ***the city attorney is the law officer of the city, but is not the servant of the city council***. . . . In all matters that . . . concern the public . . . ***the city attorney is wholly independent of the city council, is a servant of the people,*** and as to such matters, ***vested with powers and burdened with duties over which the council has no jurisdiction***.

3 McQuillin, *The Law of Municipal Corporations* (3d ed. 2007) § 12.52.05; *see also* J. Martinez, 1 *Local Gov. Law* (2007) § 9.8 ("An extra measure of autonomy is granted in some states to the chief law officer of the local government unit . . . . Although certain of his actions may be subject to final disposition by the entity's executive or legislative branch, the legal officer is often said to be wholly independent of the other branches of local government.").

Thus, the breadth of the City Attorney's authority must be viewed through the lens of his status as an independent elected officer of the City. Where a local government official is popularly elected, in interpreting the authority of that official, the intent of the electorate to free that official from city council interference and to operate autonomously in his assigned sphere must be respected. *See Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1019-20 (electorate intended independently elected rent control board to be autonomous in legal affairs where it was provided power to enforce the law).

B. Elected Public Attorneys Have the Power to Initiate Litigation Under Common Law

The breadth of the City Attorney's authority is also readily evident by an examination of his California counterpart—the independently elected state Attorney General.

Regarding the Attorney General, who operates under constitutional and statutory directives largely indistinguishable from Charter section 40,[8] the courts repeatedly have held

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[8] *See* Cal. Const., Art. 5, § 13 ("the Attorney General shall be the chief law officer of the State") (emphasis added); Cal. Govt. Code, § 12512 ("The Attorney General shall . . . ***prosecute or defend all causes*** to which the State, or any State officer is a party in his or her official capacity") (emphasis added).

that, as chief law officer of the state, the Attorney General has broad common law powers, ***among which is the power to file any civil action he deems necessary***. *E.g.*, *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14; *Pierce v. Super. Ct.* (1934) 1 Cal.2d 759, 761-62 (absent legislative prohibition, Attorney General has common law power as chief law officer of state to "file any civil action or proceeding" he deems necessary in public interest); *People v. New Penn Mines* (1963) 212 Cal.App.2d 667, 671 ("As chief law officer of the state the Attorney General has broad common law powers. In the absence of legislative restriction he has the power to file any civil action which he deems necessary for the enforcement of the laws of the state and the protection of public rights and interests."); *People v. Birch Securities Co.* (1948) 86 Cal.App.2d 703, 707 (in absence of contrary statute, attorney general has the power to institute, conduct and maintain all civil actions involving interests of State).

In discussing the Attorney General's "paramount duty to represent the public interest," 11 Cal.3d at 15-16, the Supreme Court's statements in *D'Amico* are particularly pertinent:

> The Attorney General . . . is the chief law officer of the state . . . . As such he possesses not only extensive statutory powers but also ***broad powers derived from the common law relative to the protection of the public interest. "[H]e represents the interest of the people in a matter of public concern."*** Thus, 'in the absence of any legislative restriction, ***[he] has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the*** enforcement of the laws of the state, the preservation of order, and the ***protection of public rights and interest***."

Id. at 14 (citations omitted) (emphasis added).

Thus, it is well established that the Attorney General, as the state's elected chief legal officer, with the power to "prosecute" cases involving the state, has the independent power to initiate litigation. This is both a matter of inherent common law authority, and the statutory authority to "prosecute and defend." *See People ex rel. Lockyer v. United States Forest Service* (N.D. Cal., July 11, 2005, No. C04-02588 CRB) Not Reported in F.Supp.2d [2005 WL 1630020 *6] (Attorney General "retains broad common law authority to sue the federal government to protect the state's interests"; "In addition to his common-law powers, the Attorney General also has the duty to 'prosecute or defend all causes to which the State . . . is a party . . . .'") (citing Cal. Gov. Code, § 12512; other citations omitted).

The concomitant of this broad authority to initiate litigation is nearly unlimited discretion free from judicial restraint. *See People v. Honig* (1996) 48 Cal.App.4th 289, 355 (superior court may not interfere with Attorney General's decision to prosecute case absent manifest abuse of discretion and burden is on defendant to establish abuse of discretion, rather than on Attorney

General to justify decision; Attorney General's decision to institute lawsuit must be upheld unless no reasonable person could reach same conclusion).[9]

The broad authority of the elected state Attorney General, operating under nearly indistinguishable statutory authorization to initiate litigation free from legislative control, indicates that the City Attorney, operating under the same mandate in Charter section 40, enjoys the same discretion. Indeed, if anything, the Attorney General's power under the California Constitution is ***more limited than the City Attorney's under Charter section 40***: "***Subject to the powers and duties of the Governor***, the Attorney General shall be the chief law officer of the State." Cal. Const., art. V, § 13 (emphasis added); *compare* Charter section 40 (stating, without qualification, that City Attorney is "the chief legal adviser of . . . the City . . ."); Charter, Art. XV, § 265(b)(2) ("Nothing in this section [establishing "strong mayor" government] shall be interpreted or applied to add or subtract from power conferred upon the City Attorney in Charter sections 40 and 40.1"). Thus, whereas the Constitution and Government Code limit the Attorney General's powers somewhat (though his prosecutorial powers are still broad), the Charter provides almost no limit to the City Attorney's legal powers.[10]

In sum, as can be seen by analogy to the elected California Attorney General, who operates under an indistinguishable, if not more restrictive statutory scheme, the power of the chief legal adviser —here the City Attorney— to initiate litigation in the public interest of his elected constituency derives both from his inherent common law authority as the head of the law

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[9] The law of other states, too, recognizes this common law power. *E.g.*, *Perdue v. Baker* (Ga. 2003) 586 S.E.2d 606, 619-20 (state attorney general enjoys broad general authority, based upon the independent constitutional role of the attorney general as chief legal officer of the state, to independently initiate litigation and to represent the state in all civil actions); *People ex rel. Salazar v. Davidson* (Colo. 2003) 79 P.3d 1221, 1230 (state attorney general has broad common law powers, including power to initiate lawsuits, except to the extent specifically repealed or limited by statute); *Lyons v. Ryan* (Ill. 2002) 780 N.E.2d 1098, 1105 (state attorney general has "exclusive constitutional power and prerogative to conduct the state's legal affairs," including by initiating lawsuits in his or her discretion); *State Consol. Pub. Co. v. Hill* (Az. 1931) 39 Ariz. 21, 24 (city attorney "***stands to his city what the Attorney General stands to the state***"; "As . . . legal adviser, one of his principal duties, it is obvious, was . . . ***to institute proceedings*** for . . . recovery [of public funds] when unlawfully . . . paid out . . . .") (emphasis added) (emphasis added).

[10] Note that the California Constitution expressly subordinates the Attorney General to the Governor, while the Charter does not similarly limit the City Attorney. *See People ex. Rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 158-59. Indeed, *Deukmejian* expressly notes that a public attorney's authority must be determined by the "peculiarities of the prevailing law" in the pertinent jurisdiction and that its rule does not apply where the laws "permit their attorneys general to sue . . . without restriction." *Id.* at 158 (explaining that California law circumscribes the power of the Attorney General but, the law in other states is different, and in those states, the Attorneys General are not subject to the Governors) (citing Massachusetts, Connecticut, Illinois, and Kentucky law).

department, and from the constitutional (Charter) provision authorizing him to "prosecute" "all" litigation.

C. The City Attorney Has the Power to Initiate Litigation by State Statute

State law is relevant to this debate in another respect: multiple state statutes confirm the City Attorney's authority to initiate litigation. These statutes provide for enforcement by the City Attorney, ***without reference to, much less requirement of, prior legislative approval.*** *See, e.g.*, Cal. Bus. & Prof. Code, § 17204 ("Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General . . . or any city attorney of a city having a population in excess of 750,000 . . ."); Cal. Govt. Code, § 12650(b)(4) (False Claims Act) ("'Prosecuting authority' refers to . . . city attorney . . . charged with investigating, filing, and conducting civil legal proceedings . . ."); Cal. Health & Safety Code, § 25249.7(c) ("Actions pursuant to this section may be brought . . . by any city attorney of a city having a population in excess of 750,000 . . .").[11]

As discussed at length in *People v. Bhakta* (2006) 135 Cal.App.4th 631, such statutes, including the state Unfair Competition law and the Red Light Abatement Law, specifically permit the City Attorney to bring actions in the name of the people. *Id.* at 656-55, 659. *See also* Cal. Govt. Code, § 91005.5 (providing for civil action to be "brought" under Political Reform Act by "the elected city attorney").

In sum, the concept that the City Attorney cannot initiate litigation without prior Council approval is flatly inconsistent with numerous state laws, which contain no such restriction.

D. Construing Section 40 to Require the City Attorney to Obtain Permission to Sue from the Legislative Branch Would Violate Separation of Powers Principles

The doctrine of separation of powers provides that the powers of government are legislative, executive, and judicial, and that "persons charged with the exercise of one power may not exercise either of the others" except as expressly permitted. Cal. Const., Art. III, § 3; *see also Case v. Lazben Fin. Co.* (2002) 99 Cal.App.4th 172, 182. The purposes of separation of powers —which are pivotal here— are "to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government, as well as to avoid overreaching by one governmental branch against the other." *See, e.g.*, *Case*, 99 Cal.App.4th at 183 (internal quotations and citations omitted). Accordingly, none of the three branches may co-opt the core functions of any other branch. *See, e.g.*, *People v. Bunn* (2002) 27 Cal.4th 1, 14 (each branch is vested with "core or essential functions that may not be usurped by another branch"). The doctrine "prohibits the legislative branch from arrogating to itself core functions

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[11] Prosecuting authorities ordinarily have the sole discretion to determine what charges to bring. *E.g., Manduley v. Super. Ct.* (2002) 27 Cal.4th 537, 552.

of the executive or judicial branches." *See, e.g.*, *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal. 4th 287, 298. The doctrine of separation of powers "fully applies to legislative action of local legislative bodies." *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, n.7. Applying a different interpretation of Section 40 would do precisely what the doctrine prohibits: it would transfer core functions of the executive branch to the legislative branch.

The structure of the current Charter, dating back to 1931, incorporates fundamental principles of separation of powers. Under the Charter, the City Council is the legislative body, and it is vested with "[a]ll legislative powers of the City." Charter, Art. III, § 11. The Charter Article describing the Council is entitled "Legislative Power." *Id.* Although the Charter does not define "legislative power," it is well settled that "[t]he core functions of the legislative branch include passing laws, levying taxes, and making appropriations." *See* Cal. Const., Art IV, §§ 1, 8(b); *Carmel Valley Fire Protection Dist.*, 25 Cal.4th at 299. "Essentials of the legislative function include the determination and formulation of legislative policy." *Id.* (quoting *State Bd. of Educ. v. Honig* (1993) 13 Cal.App.4th 720, 750). The powers expressly conferred on the San Diego City Council are consistent with these descriptions of the legislative power. Charter, Art. III, § 11 *et seq.*; *id.* Art. XV § 270.

By contrast, the City Attorney's authority is separately described in Article V, entitled "***Executive and Administrative Service***." The City Attorney is vested with powers that include, among other things, to prosecute all suits to which the City may be a party and to prosecute criminal actions. Charter, Art. V, § 40. Determining when and whether to prosecute and on what grounds is a core executive function that cannot be usurped by another branch. *See, e.g.*, Cal. Const., Art. V, § 13 (law enforcement and the prosecution of crimes is part of executive branch of government); *Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1282 (judicial intrusion into a prosecutor's actions should be minimal because prosecuting involves "executive discretion of such high order"); *People v. Honig* (1996) 48 Cal.App.4th 289, 355 ("separation of powers doctrine ... precludes courts from interfering with the executive decisions of prosecutorial authorities"); 71 Ops. Cal. Atty. Gen. 255, 260 (1988) ("prosecution and legal advice . . . are both executive powers"). Thus, there can be no question that the Charter separates the executive powers of the City Attorney and the legislative powers of the Council.

Reading Section 40 otherwise would allow the legislative body —the Council— to usurp a core executive function, the decision of when and whether to institute legal action. To interpret it to mean the City Attorney must obtain the approval of the legislative body before initiating a lawsuit gives the legislative body the authority to entirely prevent the City Attorney from carrying out core executive functions, thereby allowing the legislative branch to usurp the executive function of enforcing the laws. The Council would have the authority to determine whether a particular law could be enforced. If the Council denied the City Attorney permission to prosecute, the Council would entirely prevent the executive from enforcing the law.

This is exactly what separation of powers forbids: "[i]n our tripartite system of government, legislative function is limited to declaring the law and providing the ways and means of its accomplishment. ***The Legislature cannot exercise direct supervisorial control over***

the execution of the laws." *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 63; *cf. Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684, 696-97 (holding that Council could not eliminate city investigators through budget cuts because doing so exceeded the Council's legislative power by preventing the City Attorney from carrying out his core functions); *see also Buck v. City of Eureka* (1895) 109 Cal. 504, 511 (it was not within the power of the Council to modify the duties assigned by law to the city attorney). One should not construe Section 40 to give the Council, a legislative body, direct control over the execution of the laws.[12]

There also is no question that the City Attorney, as a public entity lawyer, has the authority in appropriate cases to sue the constituent branches of the client entity, *e.g.*, departments, agencies or officials of the City, as part of his duty to uphold the law; public lawyers often sue subdivisions of their entity client. *See, e.g., City of Long Beach v. Mansell* (1970) 3 Cal. 3d 462, 477 (city sued city manager and clerk); *City and County of San Francisco v. Boyd* (1943) 22 Cal. 2d 685, 687 (city attorney for city sued city controller); *People v. City and County of San Francisco* (1979) 92 Cal.App.3d 913, 915 (district attorney sued client).[13]

E. Longstanding Practice Confirms the Power of the Elected City Attorney to Initiate Litigation

It is noteworthy that the interpretation espoused here is not the unique view of the current City Attorney; all recent occupants of the office have jealously guarded the independence of their authority for the benefit of the public, including the ability to initiate litigation in the public interest. Such interpretations are to be afforded "great weight." *Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at 7-8 ("evidence that the agency 'has consistently maintained the interpretation in question, especially if it is long-standing'" warrants substantial deference in interpretation of law).

The prior pronouncements of broad City Attorney authority include:

- James Ingram's "Report on the City Attorney's Office," prepared for the Charter Review Committee's Subcommittee on Duties of Elected Officials at 3: "[O]ne of the differences

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[12] Nor is there any basis to conclude that it should be the Mayor's decision to initiate litigation. The revisions to the Charter to adopt the "Strong Mayor" form of government expressly disclaim intent to intrude on the City Attorney's authority under Charter section 40, *see* Charter, Art. XV, § 265(b)(2) ("Nothing in this section [establishing "strong mayor" government] shall be interpreted or applied to add or subtract from powers conferred upon the City Attorney in Charter sections 40 and 40.1"), and the description of the Mayor's duties in the Charter does not remotely encompass decision-making regarding initiation of litigation. Charter, Art. XV, § 265.

[13] *See generally City Attorney Ethical Issues* (2001) 188 PLI/Crim 387, 400 ("***In addition to a public lawyer's role as an adviser or advocate for his or her entity, the public lawyer appears to have an additional duty, directly to the public, to act as a check on governmental action and to accurately advise the public.***") (emphasis added).

in the way that San Diego handles the City Attorney's office, as compared to Los Angeles, is that ***L.A. specified that the City Council would control litigation while San Diego gave the officer a free hand***." (Emphasis added).

- City Attorney John W. Witt's Memorandum of Law, dated November 10, 1977 at 2: The ordinance is invalid because it does not harmonize with Section 40 of the Charter which places in the City Attorney the duty and responsibility of advising the City Council on all matters before it. ***One of the important checks and balances, established by the original draftsmen of our Charter, was establishment of an elected City Attorney, an independent officer, not subject to direct control by the City Council, except in the traditional budgetary sense***. The proposed ordinance would weaken that check and balance seriously by downgrading the independence of the legal advice which may be given the Council at times of critical importance to the City." (Emphasis added).

- Ted Bromfield, Chief Deputy City Attorney to John Witt, Memorandum dated August 3, 1982 at 2: The "exclusive authority to prosecute is specifically provided in Section 40 of the . . .Charter. . . . [U]nder the charter. . .the city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter . . . ."

- John W. Witt, City Attorney, Memorandum dated October 6, 1983 at 1-2, declining Council request to abstain from enforcement of the law: "I must advise you that I am respectfully declining your request to delay any further enforcement actions . . . . Section 40 of the Charter provides . . . that it is my duty. . . to: . . . 'prosecute or defend, as the case may be, all suits or cases to which the City may be a party . . . .' It is clear that what the Committee requests is in effect that I not abide by my Charter-mandated duty to enforce the law. . . . My office is presently proceeding with enforcement actions as required of us. . . . I am sure that you understand my position and agree that the legislative branch should not influence prosecutorial authority."

- John W. Witt, City Attorney, Opinion No. 86-7, November 26, 1986 at 7: "The framers of our Charter intended a clear distinction between the necessarily political legislative arm of City government and the administrative arm."

- Sharon A. Marshall, Deputy City Attorney to City Attorney John Witt, Memorandum dated January 20, 1993 at 3-4: "The City Attorney, as an independently elected official, has broad discretionary power . . . ." (opining that City Attorney has power to initiate litigation on his own, but may "choose to confer" with Council).

- John W. Witt, City Attorney, "Report to the Civil Service Commission re Legal Representation by the City Attorney," dated February 23, 1995 at 2: "[T]he City Attorney of San Diego, an independently elected official, is charged with providing legal advice to the City Council and its Committees . . . . The drafters of the 1931 City Charter ensured that the City Attorney ultimately reported, not to the Mayor and Council . . ., but to the voters. By making the office an elected one, its independence was ensured."

- Michael J. Aguirre, City Attorney, Memorandum dated July 20, 2007 at 2: "The Council may not limit the City Attorney's statutory and Charter authority to file cases. State law provides that a City Attorney may file a civil action for a violation of the California False Claims Act. Any action by the City Council to limit that authority would be contrary to state law . . . . The Charter imposes no limitations on the authority of the City Attorney to file actions on behalf of the City, including any requirement to obtain Council approval prior to filing any action."

As these historical interpretations uniformly make clear, the independence of the City Attorney is a constitutional structure which transcends the particular occupant of the office. If a court or council were to attempt to alter this arrangement, the uncertainty that would follow from the disruption of long-settled roles and expectations is incalculable.[14]

III. General Law Limitations on Public Attorneys Do Not Apply

Finally, as noted at the outset, it is critical to bear in mind the stark contrast between charter law and general law cities; a comparison of the role of the city attorney in a general law city highlights the breadth of the elected City Attorney's authority under our Charter.

In *People v. Chacon* (2007) 40 Cal.4th 558, 571 n.13, the Supreme Court explained the fundamental difference between general and charter law cities, and the limited authority of the city attorney in a ***general law*** city:

> In California, cities are classified as 'general law cities,' organized under the general law of the state, or 'chartered cities,' organized under a charter. The government of a general law city is vested in the city council, city clerk and treasurer, police and fire chiefs, 'and [a]ny *subordinate officers* or employees provided by law.' A city council may appoint a city attorney and '*such other subordinate officers* or employees as it deems necessary.' The city attorney and other appointive officers and employees serve at the pleasure of the city council.

(Emphasis in original; citations omitted). As the Supreme Court noted in *Chacon*, the City of Bell Gardens at issue in that case "is a general law city, in which the city attorney is a subordinate officer of the city council, appointed by and serving at its pleasure." *Id.* at 571. *See also* Cal. Govt. Code, § 36505 (in general law city, the "city council shall appoint the chief of

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[14] For example, if the Council must direct the initiation of litigation, questions arise as to the fate of decisions to file cross-complaints, to appeal, to dismiss litigation, to submit amicus curiae briefs and to prosecute civil or criminal actions under state law. The City Council, many of whose members are not lawyers, and who are charged by law with the legislative —not the executive function— should not be empowered to micro-manage litigation, directing or overruling the City's designated "chief legal adviser" under the Charter.

police. It may appoint a city attorney . . . and such other subordinate officers or employees as it deems necessary."). Because, in a general law city, the city attorney is appointed and, by statute, subordinate, serving at the pleasure of, and acting at the direction of the council —none of which was adopted in San Diego's charter— general law is instructive only to show the alternative restricted form of authority that was ***rejected*** by the voters of this City.

The rules governing general law cities place the authority of the City Attorney under San Diego's Charter in sharp contrast. Here, as detailed above, the duties of the City Attorney are delimited by the Charter, not by the general law statutes, and the Charter expressly authorizes the City Attorney to prosecute "all" lawsuits, without any reference to the Council in the authorizing provision.

CONCLUSION

As detailed above, the plain language of Charter section 40 authorizes the elected City Attorney, as "chief legal adviser," to "prosecute" "all" lawsuits brought in the name of the City and gives the City Attorney broad authority to initiate litigation. The legislative history of Section 40, common law authority, state statutes authorizing the City Attorney to sue and long-standing practice support this role. Indeed, the City Attorney's independence is a constitutional safeguard. Those who would impose requirements upon the City Attorney that fall outside of the clear language of Section 40 would rewrite San Diego's City Charter and cast aside the will of the electorate.

Respectfully submitted,

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