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MEMORANDUM OF LAW

DATE: January 23, 2006

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: The Relationship Between the City Offices of the Mayor and the Auditor and Comptroller under the Mayor-Council Form of Government

QUESTION PRESENTED

What is the relationship between the Office of Auditor and Comptroller [Auditor] of the City of San Diego and the Office of the Mayor under the new Mayor-Council form of government?

SHORT ANSWER

Under the Mayor-Council form of government implemented January 1, 2006, the Mayor has the express authority to appoint and dismiss the Auditor. That places the office under the Mayor's supervision. However, the Mayor may not limit or impede the authority or duties given to, or required of, this public office by City Charter or ordinance, federal or state law.

BACKGROUND

On November 2, 2004, the voters of the City of San Diego passed Proposition F, which amended the San Diego City Charter to add Article XV to "test implementation of a new form of governance commonly known as a Strong Mayor form of government." Charter section 250. The five-year trial period of governance is operative January 1, 2006 and continues until December 1, 2010, unless the electorate extends this form of government. Charter § 255. Voters were urged "to elect a chief executive who is accountable for how the City is run, . . . who had the authority to make changes." San Diego Ballot Pamp. General Elec. Nov. 2, 2004, argument in favor of Prop. F.

Voters were told that "the Mayor would have the authority to give direction to all City officers and employees, except those in departments and offices recognized in the Charter as being independent . . . The Mayor would be responsible for preparing the annual budget for the

Council's consideration and adoption. . . .The Mayor would appoint the City Manager with Council confirmation. The City Manager would serve at the pleasure of the Mayor. The Mayor would appoint the City Auditor and Comptroller, Police Chief, and Fire Chief, subject to Council confirmation. All other managerial department heads formerly under the City Manager would be appointed by the Mayor and serve at the pleasure of the Mayor." San Diego Ballot Pamp. General Elec. Nov. 2, 2004, the City Attorney's Impartial Analysis of Prop. F.

Part of the system of "checks and balances" created by Proposition F was the new office of Independent Budget Analyst. San Diego Ballot Pamp. General Elec. Nov. 2, 2004, argument in favor of Prop. F. The City Council would appoint the Independent Budget Analyst: "to review and provide budget information to the Council independent from the Mayor." San Diego Ballot Pamp. General Elec. Nov. 2, 2004, the City Attorney's Impartial Analysis of Prop. F.

Charter section XV was effective January 1, 2006, and with its implementation and the election of a new Mayor, questions have arisen about the relationship between the Office of the Mayor and the Office of the Auditor in the new form of governance.

DISCUSSION

I. Charter Changes Impacting the Auditor.

Effective January 1, 2006, the Mayor assumed all executive authority, power, and responsibilities conferred by the Charter upon the City Manager in Article V [Executive and Administrative Service], Article VII [Finance], and Article IX [Retirement of Employees]. Charter § 260 (b). In addition, the Mayor became the Chief Executive Officer of the City of San Diego.[1] Charter § 265 (b) (1).

A. The Mayor's Financial Duties.

The Mayor now serves as Chief Administrative and Chief Budget Officer of the City, assuming the duties and responsibilities of the previous City Manager. As such, the Mayor assumed the duties outlined in Charter section 28:

> . . . to *supervise the administration of the affairs of the City* except as otherwise specifically provided in this Charter; to make such recommendation to the Council concerning the affairs of the City as may seem to him desirable; *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

[1] The Charter does not define "chief executive officer." But 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." The American Heritage Dictionary of the English Language: Fourth Edition (2000). (http://www.bartleby.com/61/90/C0289050.html)

> may be required by that body, including an annual report of all the Departments of the City . . . as Chief Budget Officer of the City, [the Mayor] shall be responsible for planning the activities of the City government and for adjusting such activities to the finances available. To this end he shall *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. He shall be charged with the *bringing together of estimates covering the 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. (Emphasis added).*

In addition, the Mayor is to cooperate fully with the Council and the Office of Independent Budget Analyst, including supplying requesting information concerning the budget process and fiscal condition of the city to the Council and the public. Charter § 265 (b)(14) (15).

B. Mayor's Supervision of Officers Responsible for Financial Matters.

With the broad administrative and fiscal responsibilities came the Mayor's authority to appoint and dismiss the City officers responsible for City financial matters. He may appoint and dismiss the City Treasurer as could the previous City Manager. Charter §§ 260 (b), 29, and 45. The amendments to the Charter made no changes in the duties and responsibilities of the office of the Treasurer, which include maintaining custody of and disbursing City moneys, and recording all receipts and expenditures. Charter § 45. Similarly, the Charter transferred the authority to appoint the Auditor from the City Council to the Mayor, subject to Council confirmation, and provides that the Mayor may remove the Auditor subject to appeal to the City Council. Charter §§ 265 (b)(10) and (11). However, the Charter made no changes to the duties of the Auditor. The Auditor remains the "chief fiscal officer of the City" according to Charter section 39, with all of the previously-existing duties and powers.

In assuming the responsibility for the proper administration of all affairs of the City, Charter section 29 gives the Mayor the power to appoint and remove:

> . . .all officers and employees in the administrative service of the City under his control; but the [Mayor] may authorize the head of a Department or officer responsible to him to appoint and remove subordinates in such Department or office. Appointments made by, or under the authority of, the [Mayor], shall be on the basis of administrative ability and of the training and experience of such appointees in the work which they are to perform. All such appointments shall be without definite term unless for temporary service not to exceed sixty days. . . Charter § 29.

Under the new form of government, the Office of Auditor and Comptroller was expressly transferred to the new executive branch of City government and the officer holding the position

of Auditor now reports to the highest ranking officer within that branch, the Mayor. However, the Auditor's independent duties, and powers under the City Charter and San Diego Municipal Code have not changed. To help ensure the Auditor's independence, the Charter provides a "checks and balances" by allowing the Auditor to appeal his removal to the City Council. Charter § 265 (b) (11). Nonetheless, the Mayor's responsibilities with respect to the City's finances and budget require that he exercise supervisory authority over the Auditor, subject to other laws that require the Auditor's independence when performing his or her duties.

II. The Auditor's Authority and Responsibilities Remain Unchanged.

The Office of Auditor is created by the City Charter and the Charter provides the City Council with only limited authority to transfer to others those matters the office might handle that "do not relate directly to the finances of the City." Charter § 39. Accordingly, the Department may not be changed, abolished, combined or rearranged except by a charter change. Similarly, no other Department may be created that would duplicate the duties the charter places upon the Auditor that do relate directly to the finances of the City. *See,* Charter § 26; *Hubbard v. City of San Diego,* 55 Cal.App.3d 380, 387-388 (1976).

In addition, the Mayor would exceed his authority should he impede the performance of the mandatory duties and responsibilities placed upon the Auditor as a public officer by the City Charter, ordinance, or state or federal law. See, *Lockyer v. City and County of San Francisco,* 33 Cal.4th 1055, 1079-1080 (2004). A Mayor in the new form of government only has the authority that is expressly or impliedly conferred upon him or her by a charter. 3 McQuillin, Mun. Corp. (3rd Ed, 2001) § 12.43, p. 266; *see, Bartlett v. Bell*, 58 Cal. App. 357 (1922) [Mayor has no power to compel Auditor to act in matter to benefit a third party].

The duties required of and the power provided to the City Auditor by the City Charter remain intact through the governance change. Charter section 39 specifies the duties of the Auditor and provides, in relevant part, that:

> . . . The City Auditor and Comptroller shall be the chief fiscal officer of the City. He shall exercise supervision over all accounts, and accounts shall be kept showing the financial transactions of all Departments of the City upon forms prescribed by him and approved by the City Manager and the Council. He shall submit to the City Manager and to the Council at least monthly a summary statement of revenues and expenses for the preceding accounting period,[2] detailed as to appropriations and funds in such manner as to show the exact financial condition of the City and of each Department, Division and office thereof. No contract, agreement, or other obligation for the expenditure of public funds shall be entered into by any officer of the City and no such contract shall be valid unless the Auditor and Comptroller shall certify in writing that there has been

[2] Charter section 89 also requires the Auditor submit similar monthly statements to the Council.

> made an appropriation to cover the expenditure and that there remains a sufficient balance to meet the demand thereof.[3] He shall *perform the duties imposed upon City Auditors and Comptrollers by the laws of the State of California, and such other duties as may be imposed upon him by ordinances of the Council,* but nothing shall prevent the Council from transferring to other officers matters in charge of the City Auditor and Comptroller which do not relate directly to the finances of the City. He shall prepare and submit to the City Manager such information as shall be required by the City Manager for the preparation of an annual budget. He shall appoint his subordinates subject to the Civil Service provisions of this Charter. *(Emphasis added).*

Other Charter-mandated duties include the joint determination with the City Attorney of the proper form, arrangement, and itemization of the annual appropriation ordinance; and determination of the "percentage change in price index" (Charter § 71); the keeping of accounts for each item of appropriation; and the transfer of unexpended funds from these accounts to the general fund upon completion of the project or at the end of one year. Charter § 72. If the Council fails to include adequate funds in the appropriation ordinance to cover the Mayor's estimate of the City's debt, or the amount actually required to cover the debt, the Charter requires the Auditor to set up an account for the full amount the Mayor estimates or the amount required to cover the debt, and to transfer tax revenue into that account. Charter § 74. The Auditor has the responsibility to examine all payrolls, bills and other claims against the city (except claims for damages) and has the discretionary authority to investigate such claims (Charter § 82); he is responsible for issuing the checks to pay claims against the City that have been approved by the heads of the Department or offices incurring the debt (Charter § 83); he receives reports from all City officials who collect and deposit money for fees, permits, licenses, inspections, services, taxes, and other municipal charges (Charter §§ 86 and 88); and he determines the appropriate form of accounts to be used by all officers and Departments of the city that receive or disburse City moneys (Charter § 87).

The Auditor must include in his records the cost or value of all City assets; present a balance sheet containing that information to the Mayor-Manager; and publish that information in his annual report. Charter § 112; SDMC § 22.0708. He must audit the accounts of any officer who dies, resigns or is removed from office, and report the results to the Mayor-Manager and Council. If the person is found indebted to the City, the Auditor must notify the Mayor and Council. Charter § 111. And the Auditor has authority to refuse to issue a warrant for a retirement allowance, if, in the Auditor's opinion, the allowance has been granted in contravention of Charter Article IX or ordinances passed under its authority. Charter § 144.

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[3] Charter section 80 also requires the Auditor first certify there are adequate unencumbered funds in the Treasury to cover any contract, agreement, or obligation involving the expenditure of funds before the Council makes such contracts or orders.

The Auditor has additional responsibilities and powers codified in section 7, Article 2 of the San Diego Municipal Code. For example, the Auditor:

> . . . shall, at any time, have power to examine, check and audit the accounts and records of any commission, board, department, division, office, or employee of the City; to require an accounting for all cash revenues of the City; to make and certify to an actual count of cash and securities, and to prescribe, govern and control the movements, or transfer of all cash revenues, or securities, to the custody of the City Treasurer." SDMC §22.0701.

The Mayor and the Auditor must jointly prepare and submit an annual report to the City Council and the Financial Reporting Oversight Board on the status of the City's internal financial controls, with the necessary joint certifications. SDMC § 22.0708. The Auditor also has separate duties associated with the City's Comprehensive Annual Financial Report (CAFR). SDMC §§ 22.0709, 22.0710. Accordingly, the Auditor has many responsibilities and duties outlined in the Charter, City ordinances, and state laws in addition to the reporting obligations to the Mayor and City Council.

CONCLUSION

Under the new Mayor-Council form of governance, the Auditor reports to the Mayor as Chief Executive Officer of the City of San Diego. Under the Charter, the Auditor is required to support the Mayor in his obligation to provide a budget to the City Council and to provide such other information related to the City's finances and the administration of the City. However, the Auditor does retain some independence in that the Mayor may not limit or impede the authority or duties given to or required of this public officer by Charter, ordinance, federal or state law. Finally, the Auditor's right to appeal his removal to the City Council provides a check and balance on any improper interference with the Auditor's duties and responsibilities.

Respectfully submitted,

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