THE CITY OF SAN DIEGO

DATE: October 14, 2020

TO: Honorable City Council Members

FROM: Kyle Elser, Interim City Auditor
Office of the City Auditor

SUBJECT: Request to Obtain Independent Legal Counsel for the Office of the City Auditor

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On August 27, 2020, we issued a memo requesting that the City Council authorize us to obtain independent legal counsel. That request was based on a legal opinion from the City's outside counsel, Michael G. Colantuono, stating that the clear language of the City Charter provides the City Council with this authority.

On September 8, 2020, the City Attorney's Office issued a memo reiterating that Office's longstanding opinion that only the City Attorney can authorize the use of independent legal counsel.

Mr. Colantuono is unpersuaded by the City Attorney's Memo, and his September 24, 2020 response is attached. Mr. Colantuono finds that the City Attorney's Memo incorrectly assigns the authority to obtain independent legal counsel exclusively to the City Attorney, when the Charter clearly assigns that authority to the City Council as well.

We therefore respectfully ask that the City Council docket our request to use existing funds in our budget to obtain independent legal counsel as soon as possible. If the City Council approves our request, we plan to use independent legal counsel to obtain additional legal advice on issues that have arisen in the past year alone in which we, and by extension the City Council and the public, would have benefited from independent legal counsel. These issues are described in more detail in our August 27, 2020 memo that is linked above.

Thank you for your consideration of this important issue. Please contact me with any questions.

Respectfully submitted,

Kyle Elser
Interim City Auditor

CC: Honorable Audit Committee Members
Honorable City Attorney Mara Elliott
Andrea Tevlin, Independent Budget Analyst
Abby Jarl-Velz, Assistant Director, Human Resources Department
Timothy L. Davis, Burke, Williams and Sorensen, LLP
Michael G. Colantuono, Esq.
Ryan A. Reed, Esq.

ATTACHMENT:

1. Memorandum from Michael G. Colantuono, Esq. "Response to City Attorney's Memorandum re: City Council Authority to Engage Outside Counsel" dated September 24, 2020

Attachment 1

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MEMORANDUM

TO:	Kyle Elser, Interim City Auditor City of San Diego	FILE NO:	49017.0025
FROM:	Michael G. Colantuono, Esq. Ryan A. Reed, Esq.	DATE:	September 24, 2020
CC:	Andy Hanau, Interim Assistant City Auditor		
RE:	Response to City Attorney's Memorandum re City Council Authority to Engage Outside Counsel		

INTRODUCTION. As you asked, we have reviewed the City Attorney's September 8, 2020 memorandum (the "City Attorney Memo") which responds to our July 20, 2020 opinion regarding the City Council's authority under the third-to-last paragraph of Section 40 of the City Charter to authorize the use of counsel independent of the City Attorney.[1] The City Attorney Memo reads that third-to-last paragraph to authorize independent legal counsel only when the City Attorney determines it is necessary due to the City Attorney's conflict of interest or lack of resources or competence to address a matter. We maintain our respectful disagreement with that conclusion. It has the effect of reading the critical paragraph out of the Charter entirely — giving it no consequence that the law not would otherwise require. The City Attorney Memo's interpretation grants the City Attorney exclusive authority to determine when outside counsel is necessary. We understand the Charter to give that power to the City Council, as well.

DEFERENCE TO CITY ATTORNEY INTERPRETATION. The City Attorney Memo argues that Office's longstanding interpretation of contracting authority under the third-to-last

[1] Office of the City Attorney, Authority to Hire Outside Counsel (Sept. 8, 2020).

paragraph of Charter Section 40 is entitled to substantial deference. Courts generally do give some degree of deference to an agency's consistent, reasonable interpretation of its own legislation or the legislation under which it operates. However, we disagree the City Attorney's Office's view is entitled to substantial deference in this instance.

First, it is not clear that the City Attorney is an "agency" within the meaning of this rule, nor is it clear that any other officer of the City shares the City Attorney's view of the third-to-last paragraph of Section 40.

Second, the City Attorney Memo cites *Don't Cell our Parks v. City of San Diego*, which evaluates the level of deference appropriate to the City's Park Director's interpretation of Charter Section 55.[2] *Don't Cell our Parks* found the City was entitled to "some deference" to determine whether a proposed project would disrupt or interfere with use of a park. The Court granted deference only to the City's interpretation of this factual question, because "the Park Director had a comparative interpretive advantage over the courts in evaluating how the Project will impact the Park because this issue is 'entwined with issues of fact, policy, and discretion.'"[3]

We do not see that the City Attorney has "comparative interpretive advantage over the courts" in construing the Charter. Courts exist to interpret laws using the tools lawyers do. Further, an agency receives less deference when interpreting a statute than when exercising delegated authority because it is not the law-giver.[4] Charter provisions have the force of statutes.[5] And, as the City Attorney Memo observes,[6] the law-givers here are the voters who approved the Charter in 1931, not any current City official.

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[2] *Don't Cell our Parks v. City of San Diego* (2018) 21 Cal.App.5th 338.
[3] *Id.* at p. 356.
[4] *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 6 ["Because an interpretation is an agency's **legal opinion**, however "expert," rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference," original emphasis].
[5] Cal. Cont., art. XI, § 5, subd. (a).
[6] City Attorney Memo, *supra*, at p. 9.

Third, this rule of statutory interpretation only applies when the meaning of the Charter is not clear from its language. For all the reasons described in our earlier memorandum,[7] the third-to-last paragraph of Section 40 authorizes the Council to hire outside counsel by its plain terms.

Fourth, the position of the City Attorney's Office on this issue has not been consistent over time and the City Attorney Memo takes a position which seems to be a modern innovation. That memo cites a 1943 City Attorney opinion reading the third-to-last paragraph of section 40 as we do — to empower the City Council, not the City Attorney, to determine when outside counsel is needed. That opinion states:

> "I do not here question the right of the Council to engage the services of special counsel. This has been done for many years. The City has, even since the adoption of the new charter and before, employed special water counsel, but this special water counsel has always been considered to be working with and through the City Attorney's Office."

Written 12 years after votes approved the language in issue, it seems a better indicator of voter intent than opinions of City Attorneys generations later reading their own authority broadly at the expense of the City Council. The City Attorney's current position has been documented only to 1977.

Fifth and finally, any such deference would not allow the City Attorney's Office to construe its own authority in a way that binds a court. It is an aphorism dating to the earliest roots of our law that no one may be "a judge in his own cause."[8]

THE COUNCIL, NOT THE CITY ATTORNEY, DECIDES WHEN OUTSIDE COUNSEL IS NECESSARY. The City Attorney Memo argues that the City Attorney has authority under Charter Section 40 to determine when it is necessary to engage outside legal counsel. The

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[7] Colantuono, Highsmith & Whatley, PC, City Council Authority to Engage Outside Counsel (July 29, 2020).

[8] E.g., *Estate of Carter* (2003) 111 Cal.App.4th 1139, 1142.

City Attorney Memo reasons that this is necessary because the Charter designates the City Attorney as the City's chief legal officer. The memo thus has the effect of allowing general language establishing the role of the City Attorney to defeat more specific language creating an exception to that role. However, the law governing the interpretation of writings requires us to read Section 40, in its entirety, to give meaning to each provision of Charter Section 40, and to allow an exception to a general rule to operate as such.

Courts harmonize apparently conflicting Charter provisions by "giving effect to all parts of all [charter provisions] if possible."[9] The City Attorney Memo reads the third-to-last paragraph of Section 40 so as to have no independent meaning. The City Attorney already has an independent legal and ethical obligation to engage outside counsel when it has a conflict of interest, or is not competent to handle a specialized matter — such as the water-law expertise early City Attorneys lacked. To read the third-to-last paragraph of Section 40 as a restatement of this obligation gives it no meaning. Voters must be understood to have intended it to mean something.

Further, the City Attorney Memo reads a role for the City Attorney into the third-to-last paragraph of Charter Section 40 when it includes no language to that effect. In various places, Charter section 40 ascribes obligations solely to the City Attorney or jointly to the City Attorney and the Council. Thus, Charter Section 40 provides actions taken by:

1. The City Attorney, e.g. "[t]he City Attorney shall …";
2. The City Attorney and City Council jointly, e.g. "[t]he City Attorney shall apply, upon order of the Council …"; and
3. The Council, e.g. "[t]he Council shall …".

[9] E.g., *Medical Bd. of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1013.

The City Attorney Memo reads these meaningful language choices out of Section 40. While the third-to-last paragraph of Charter Section 40 does not expressly state the necessity determination is to be made by the Council, a reviewing court may apply the "predicate act" canon, which provides that express authority to do a thing implies authority to do all acts necessary to accomplish the thing expressly authorized.[10] It is true that limited time has not permitted us to cite a California case for that rule of construction, but the logic of the rule is persuasive — language creating authority is read to authorize every other step needed to make use of that authority; otherwise the authority granted is meaningless. Of course, language is never read to be meaningless. As a determination that outside counsel services are "necessary" is required for the City Council to retain outside counsel, we conclude the Charter must be interpreted to empower the City Council to make that judgment because it is not expressly conferred on anyone else.

Finally, the City Attorney Memorandum relies on various statements made when voters approved Charter Section 40, all to the effect that the voters chose an elected — not appointed — City Attorney. Agreed. But the issue at present is the division of responsibility between that elected City Attorney and the equally elected City Council. It does not destroy the elected office of City Attorney to allow use of other counsel on appropriate occasions. The City has done so in water law and other areas ever since the 1931 Charter was adopted — and before that adoption, too.

SUBSTANTIVE LIMITATIONS ON THE COUNCIL'S POWER TO AUTHORIZE OUTSIDE COUNSEL. The City Attorney Memo reads the word "necessary" as used in the relevant paragraph of Section 40 to mean "strictly necessary," citing the Merriam-Webster Dictionary and Black's Law Dictionary. The Black's Law Dictionary definition, however, begins:

> "The word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical

[10] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (2012) at pp. 192–194; Colantuono, Highsmith & Whatley, PC, *supra*, at p. 4.

> necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conductive to the end sought."[11]

Reading "necessary" as "strictly necessary" has the effect of reading the third-to-last paragraph out of the Charter by giving it only the effect that other principles of law require — that the City Attorney must abstain when his or her office has a disqualifying conflict of interest or lacks specialized knowledge necessary for a task. As voters adopted that language to have some effect in addition to background principles of law, a less demanding meaning of "necessary" is appropriate. The Council can reasonably identify fact patterns under which outside counsel is necessary, it need not act on each and every decision to use outside counsel. For example, the Council could authorize the Auditor to use outside counsel to the extent of budgeted funds when the City Auditor determines a second opinion is necessary because the City Attorney's Office is the subject of a report or has provided the subject department with legal advice on the audit topic, when the City Attorney's Office determines that the Auditor cannot be given access to certain records, or when the City Attorney's Office concludes the Auditor cannot fully inform either the Audit Committee or the City Council about a report as required by auditing standards. However, this does not mean the Council can allow City Departments to use independent counsel whenever a Department determines it is in the City's best interest. "Necessary" must be read as a substantive, but not disabling, restriction and the City Council must make the finding.

The City Attorney Memo argues that our interpretation would lead to unreasonable results. "The Council would have the authority to abrogate the express duties of the City Attorney to serve as the City's 'chief legal advisor'…" .[12] Not so. Hiring a water lawyer, for example, does not destroy the office of City Attorney. The City has routinely hired outside counsel for a variety of reasons over the years and the large and well-staffed City Attorney's office survives. In any event, the third-to-last paragraph of

[11] Black's Law Dictionary (11th ed. 2019).
[12] City Attorney Memo, p. 9.

Charter Section 40 provides that outside counsel are "additional" to the City Attorney's Office, not in lieu of it.

The City Attorney Memo helpfully notes the language in issue requires outside counsel to be "competent technical legal attorneys." "Technical attorneys" is an unusual phrase, but the City Attorney Memo helpfully cites drafting history suggesting water lawyers were considered such in 1931. Charter section 53 emphasizes the point, stating "the Council shall have power to employ special counsel for the purpose of advising and representing the City in all matters, proceedings and things relating to or concerning the development, impounding and distribution of water." This provision also makes no mention of the City Attorney and does not require a determination that such counsel are necessary or budgeted, requiring only that they be employed for the stated purposes. It is another exception to the general role of the City Attorney.

We conclude the term "technical" requires some degree of specialization in the outside counsel the Council authorizes Departments to hire under the third-to-last paragraph of Section 40. Thus, when the Council exercises its power to hire outside counsel under this provision, it should ensure that it is hiring those with some degree of specialization.

The cases cited by the City Attorney Memo are consistent with our analysis that the third-to-last paragraph of Charter Section 40 creates an exception to the general rule, with only the limitations it states. These cases stand for the proposition that charter provisions are enforceable and that detailed charter language describing an office cannot be ignored when inconvenient. However, none provides a basis to read the third-to-last paragraph of Charter Section 40 out of the Charter or to insert into that paragraph a role for the City Attorney in deciding when outside counsel is "necessary."

Indeed, the *Hubbard* case, involving an early effort to establish an Independent Budget Analyst in San Diego, states that the Council's action was invalid only "to the extent it may have a contemplated a permanent arrangement outside charter

provisions."[13] A one-off consulting arrangement approved by the Council would not have offended the Charter under that case. Similarly, *Rafael v. Boyle* held San Francisco's Civil Service Commission could not unilaterally hire independent counsel "except where special provision is made for additional counsel."[14] The third to last paragraph of Section 40 is such a "special provision."

APPROVAL OF LEGAL SERVICES AGREEMENTS AS TO FORM.

The City Attorney's Office has an obligation under Section 40 to "prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, **and to endorse on each approval of the form or correctness thereof.**" The City Attorney's Office has previously opined that it cannot approve contracts for legal services entered into by the Council under the third-to-last paragraph of Charter Section 40 based on its reading of that paragraph. The duty to approve contracts as to form cannot amount to an unchecked veto of the City Attorney over contracting decisions. The Charter confers a veto on the Mayor and provides for its override. If voters intended a veto for the City Attorney, much less one that cannot be overridden, they would have said so.[15]

The City Council has at least two options to proceed with contracts absent approval as to form by the City Attorney's Office. First, this language can be read as part of its entire paragraph, which governs the City Attorney's authority and duty to perform services incident to the City's legal department. As the third-to-last paragraph of Charter Section 40 creates an exception to these general rules, it should also be read to not require the City Attorney's approval of contracts made by and with outside counsel. This seems appropriate, as other law will forbid the City Attorney to approve the form of contracts as to which his or her office has a disqualifying conflict of interest, but the work of the

[13] *Hubbard v. City of San Diego* (1976) 55 Cal.App.3d 380, 385.
[14] *Rafael v. Boyle* (1916) 31 Cal.App. 623, 625.
[15] This legal rule is known as "*expressio unius est exclusion alterius*" or "to say one thing is to exclude another." (E.g., *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391, fn. 13.)

City must continue, nonetheless. Accordingly, we conclude, such contracts may be approved as to form by outside counsel.

The City Council can also proceed without the City Attorney's approval as to its form. The absence of the City Attorney's signature is, arguably, a default of the City Attorney's obligation under the Charter — not a defect in the Agreement. This does not affect the City Council's authority to sign the Agreement. Otherwise, the City Attorney's approval as to form would operate as a veto not subject to override. The City Attorney Memo cites *San Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Employees Ret. Sys.* for the proposition that "[a]n attempt to hire outside counsel without the City Attorney's consent violates the Charter and is void."[16] However, that case involved a resolution deemed void because the City's Charter required the action to be approved by ordinance. The relevant language in Charter section 40 simply describes an obligation of the City Attorney — not an action necessary to form a contract. In any event, we agree with the City Attorney's Memo that the Charter is binding; we disagree as to the authority it grants the City Council and the City Attorney, respectively. Given the value of legal advice regarding contracts, however, we do not recommend foregoing legal review and approval.

RISK OF CONFLICTING ADVICE. The City Attorney Memo concludes by explaining the meaningful risk of conflicting legal advice when more than one lawyer is consulted. This is a real risk. The City Council would be wise to consider it when exercising its authority to authorize outside counsel when necessary and within budget. However, it does not preclude the Council from exercising authority granted to it under the Charter.

CONCLUSION

The Council has authority under the third-to-last paragraph of Charter Section 40 to employ "competent technical legal attorneys" additional to the City Attorney's Office. This paragraph creates an exception to the general rule that the City Attorney is the City's

[16] *San Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Employees Ret. Sys.* (2012) 206 Cal.App.4th 860.

chief legal officer. It is restricted by substantive limitations described in the paragraph, including that the City Council determine the outside counsel is "necessary in connection" with City Departments. This exception also applies to the City Attorney's role in approving contracts as to form, so special counsel may do that as well. This is the best interpretation of the authority granted by Charter Section 40, giving each provision meaning without reading language into the Section not approved by the voters or giving the third-to-last paragraph of section 40 no meaning at all.

Thank you for the opportunity to assist. If there is more we can do to be helpful, please contact either of us.