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MEMORANDUM OF LAW

DATE: July 20, 2007

TO: Honorable Mayor and City Council Members

FROM: City Attorney

SUBJECT: Legality of Proposal to Require the City Attorney to Obtain City Council Approval Before Filing Cases

INTRODUCTION

On Monday, July 23, 2007, the City Council will consider the Fiscal Year 2008 Appropriation Ordinance (Item 205). The item includes a recommendation that the City Council adopt the FY 2008 Appropriation Ordinance, with certain changes considered at the Budget and Finance Committee's meeting on July 11, 2007. In particular:

- 3) Incorporate language of the July 10, 2007, Council President Peters' and Councilmember Hueso's memorandum regarding litigation expenses, deleting the title. (Councilmembers Atkins, Peters, and Madaffer voted yea. Councilmembers Frye and Faulconer voted nay.)

The language in the July 10, 2007 memorandum seeks to limit the City Attorney's authority to file cases by requiring pre-approval by the Council, except in limited situations. It also would require the City Attorney to dismiss actions not approved by the Council. (See, July 10, 2007 memorandum from Councilmembers Peters and Hueso).

The proposed language is flawed in several ways. First, the Council may not limit the City Attorney's authority, obligations, and duties as set forth in state law and Charter section 40. Second, the Appropriation Ordinance is intended as a vehicle to enact the budget and should not contain policy matters. Third, the proposed language infringes on the City Attorney's ability to protect the public interest. Therefore, if this proposal is adopted, it will have no legal force or effect.

The proposal attempts to usurp the people's right to have an independent City Attorney that will make decisions that are in the people's best interests and without interference by the legislative body. The people elected the City Attorney to prosecute cases, not the City Council. Further, the people have decided the duties of the City Attorney as reflected in the Charter. Any attempt to undermine the role of the City Attorney undermines the will of the people.

QUESTION PRESENTED

May the Council include in the Appropriation Ordinance a section to require that the City Attorney seek Council approval prior to filing any action and dismiss a legal action not approved by the Council?

SHORT ANSWER

No. 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. Under Charter section 40, the City Attorney is the chief legal advisor to the City. 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. Further, the Council has no authority to direct that the City Attorney dismiss any action.

ANALYSIS

I. The Proposal is Preempted by State Law.

The California False Claims Act (Cal. Gov't Code §§ 12650-12656) [CFCA] is designed to prevent fraud on the public treasury and ultimately to protect the public fisc. *State v. Altus Finance*, 36 Cal. 4th 1284, 1296-1297 (2005). It provides that any person who knowingly submits a false claim to the State of California, or to a political subdivision, may be liable in a court action for treble damages and civil penalties. *State ex rel. Harris v. PricewaterhouseCoopers, LLC*, 39 Cal. 4th 1220, 1223 (2006) (*PwC*); §§ 12651, 12652. For purposes of the CFCA, a political subdivision includes "any city, city and county, county, tax or assessment district, or other legally authorized local government entity with jurisdictional boundaries." *Id.* at 1227; § 12650(b)(3).

In *PwC*, the Supreme Court considered who may prosecute actions under the CFCA:

The CFCA specifies in detail who may bring and prosecute actions under that statute, depending on whether state or political subdivision funds are involved. If *state* funds are involved, the *Attorney General* may bring the action. (Gov. Code, § 12652, subd. (a)(1).) If *political subdivision* funds are involved, the action may be brought by the political subdivision's 'prosecuting authority' (*id.*, § 12652, subd. (b)(1)), i.e., 'the *county counsel, city attorney, or other local government official* charged with investigating, filing, and conducting

civil legal proceedings on behalf of, or in the name of, *[the] particular political subdivision*’ (*id.*, § 12650, subd. (b)(4), italics added). Where both state and political subdivision funds are involved, each of these officials may intervene, on *behalf of the public entity he or she represents*, in an action initiated by the other. (*Id.*, § 12652, subds. (a), (b).)

The City Council does not have a role in deciding whether to file a claim under the CFCA. The California Supreme Court has implied that local prosecuting authorities may “unilaterally” initiate actions under the California False Claim Act. *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1183 (2006). As a practical matter, it is also in a defrauded city’s best interest to have its prosecuting authority file the action as expeditiously as possible - doing so would allow the city to foreclose participation by a qui tam plaintiff, who would reduce the city’s potential recovery. In light of the Act’s purpose to protect the public fisc and the incentives the Act provides to public and private plaintiffs, a city should not be able to prevent its own “prosecuting authority” from initiating a similar lawsuit on its behalf, especially when that prosecuting attorney is elected by the public.

II. The City Council May Not Limit the City Attorney’s Authority, Obligations, and Duties as Set Forth in Charter Section 40.

A city council possesses no authority after a charter is adopted by the voters to thereafter pass any law which would limit, alter, or amend any of the provisions of the city charter. *Harder v. Denton*, 9 Cal. App. 2d 607 (1935). Under section 40 of the City Charter, the City Attorney is the “chief legal advisor of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers.” Further, section 40 provides that the City Attorney shall “perform all services incident to the legal department; . . . to prosecute or defend, as the case may be, all 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.” Accordingly, the plain language of Charter section 40 grants the City Attorney the authority to prosecute actions to protect the public interest. Moreover, “[T]he city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter.” *Scott v. Common Council of the City of San Bernardino*, 44 Cal. App. 4th 684, 695 (1996).

The Charter does not, in any respect, require that the City Attorney obtain City Council approval prior to filing a claim or defending the City in any action. However, the City Council may require that the City Attorney file certain actions in certain circumstances. First, the City Attorney is required “upon the order of the Council” to sue for injunction relief 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.” Second, the City Attorney is required “upon the order of the Council” to seek a court order “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 unfettered authority under

Charter section 40 to prosecute actions in the name of the City, the two provisions above are the only instances in which the Council has the authority to direct the City Attorney.

The legislative history of Charter section 40 confirms the independence of the City Attorney from the City Council. As discussed in an April 26, 2005 report by the City Attorney:

The duty of the City Attorney is to give legal advice to every department and official of city government on municipal matters. He must also act as the representative of various departments before the courts. He should occupy an independent position so that his opinions would not be influenced by any appointive power. For this reason he should be elected by the people. If elected, the city attorney is in the position of complete independence (sic) and may exercise such check upon the actions of the legislative and executive branches of the local government as the law and his conscience dictate.

“Report on the Role of the City Attorney as Independent Representative of the People and City of San Diego,”

<http://www.sandiego.gov/cityattorney/pdf/role050426.pdf> at p. 6.

In drafting the reform charter of 1931, the board of freeholders decided to create an elected City Attorney in order to insulate that position from the influences of “appointed” power. In so doing, the express intent of the charter changes was to repose in the City’s chief legal representative the power and obligation to prosecute legal claims on behalf of the citizens. As the Court of Appeal in *Scott v. Common Council* stated: “[T]he legislative body cannot act in excess of its authority by first eliminating mandatory government functions, such as the investigative function of the city attorney in this case.” *Id.* at 697. Accordingly, the intent of Charter section 40 is to give the City Attorney independence from the City Council before prosecuting or initiating cases on behalf of the City.

III. The Purpose of the Appropriation Ordinance is to Enact the Budget, Not to Give Policy Direction.

The purpose of the Appropriation Ordinance is to provide spending authority for City operation for Fiscal Year 2008 and to enact the City Budget. This is what differentiates the Appropriation Ordinance from other City legislation. Under Charter section 71, “the Council shall prepare an appropriation ordinance using [the Budget] as a basis.” Under the Strong Mayor form of government, the Budget is proposed by the Mayor [Charter Section 265(b)(15)] and ultimately approved by the Council after a formal negotiation process with the Mayor [Charter Section 290(b)(2)(C)]. At the conclusion of that process, the Appropriation Ordinance becomes the “controlling document for preparation of the Annual Appropriation Ordinance for the ensuing fiscal year.”

The Appropriation Ordinance is an improper vehicle for enunciating policy. The Mayor expressly has no veto power over the Appropriation Ordinance making any policy matters attached to the Appropriation Ordinance particularly suspect. In fact, at the same time the Council will consider adoption of the proposed Appropriation Ordinance, the Council will also consider adoption of a Statement of Budgetary Principles. It is notable that such document includes a principle that the Appropriation Ordinance shall not be used to establish policy directions. Accordingly, the Charter does not permit the Council to add policies in the Appropriation Ordinance and thereby deprive the Mayor of his right to veto such policies.

Moreover, the Appropriation Ordinance is intended to last only one fiscal year. If the Council desires to adopt policies, it should do so by other means. Otherwise, the policy would expire unless readopted each year. Further, the Appropriation Ordinance has strict timelines for adoption. In particular, it has to be adopted during July of each year. By placing last minute, extraneous policies in the Appropriation Ordinance, the Council is under pressure to make hasty decisions. Similarly, a Councilmember may feel undue pressure to accept policy changes so that the Appropriation Ordinance is adopted and to ensure programs are timely funded. The matter of limiting the City Attorney's authority should be more fully discussed, debated, and analyzed. It should not be raised only days before the Council must adopt the Appropriation Ordinance.

IV. The City Council May Not Infringe on the City Attorney's Duty to Protect the Public Interest.

The proposed language limits the ability of the City Attorney to protect the public interest. While the proposal attempts to provide an exception for cases in which the City Attorney faces a statute of limitation deadline, there are other situations where the public interest requires that the City Attorney move expeditiously without Council approval. The proposal ignores cases where the health and safety of citizens or other vital interests of the City are at risk and demand immediate redress. The City Attorney must have the authority to act promptly and use all appropriate resources in matters affecting the public health and safety.

The proposed language also requires the City Attorney to dismiss "without prejudice" any action not approved by the City Council. The City Attorney is obligated to dismiss such action whether or not there is a vital public interest at stake, including serious health and safety risks. Under the proposal, the Council would usurp the unique legal determinations that are vested in the elected City Attorney. Under the proposal, there would be no options to conduct the litigation with City staff, or seek alternative means of pursuing the action. This provision of the proposed language clearly violates Charter section 40 and is void.

The independence of the City Attorney also ensures that politically sensitive cases may be pursued without first obtaining the approval of the Council. Such cases could be avoided though Council inaction and the requirement to minimize expenditures pending approval would limit potential legal strategies and compromise the outcome if the case is approved. If this proposal had been in place last year, the City Attorney would not have had the authority to file the case against Sunroad for violating Federal Aviation Administrative regulations by

constructing a building that was a public safety hazard. Delays in prosecuting this case would have significantly impaired the litigation strategy of the City.

CONCLUSION

The proposal to require that the City Attorney obtain Council approval is flawed in several ways. First, the proposal is preempted by state law. The California Supreme Court has implied that local prosecuting authorities may “unilaterally” initiate actions under the California False Claim Act. Second, it is clear that the Council may not limit the City Attorney’s authority, obligations, and duties as set forth in Charter section 40. 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. Third, the Appropriation Ordinance is intended as a vehicle to enact the budget and should not contain policy matters. Finally, the proposed language infringes on the City Attorney’s ability to protect the public interest. For all the above reasons, if this proposal is adopted, it will have no legal force or effect.

MICHAEL J. AGUIRRE, City Attorney



By

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