

CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
MEMORANDUM

TO: President Fortunato Bas and Members of the City Council

FROM: Barbara J. Parker
City Attorney

CC: Mayor Libby Schaaf
City Administrator Edward Reiskin

DATE: February 12, 2021

SUBJECT: Authority of City Administrator to Implement Budget Reductions Affecting Levels of Services

Dear President Fortunato Bas and Members of the Council:

Please see the attached public legal opinion on the subject matter.

The opinion addresses the relative powers of the City Council and the City Administrator regarding the budget adopted by the Council.

This is a public opinion because this issue requires interpretation of the City Charter, regarding the relative powers of the City Council and the City Administrator. Like all public opinions, this opinion will be posted on the City Attorney's web site at www.oaklandcityattorney.org and can be found by clicking on the "Public Legal Opinions" link on the home page.

Very truly yours,



BARBARA J. PARKER
City Attorney


Attachment

3025008v4

PUBLIC LEGAL OPINION

MEMORANDUM

TO: Barbara J. Parker, City Attorney

FROM: Karen Getman 

DATE: February 12, 2021¹

RE: Authority of City Administrator to Implement Budget Reductions Affecting Level of Services

QUESTIONS AND BRIEF ANSWERS

Question No. 1:

What legal authority under the Charter, Consolidated Fiscal Policy Ordinance No. 13487 C.M.S. (“Consolidated Fiscal Policy”) and Labor MOUs does the Council have to take actions to address fiscal solvency?

Brief Answer:

The Council has full authority under the Charter and Consolidated Fiscal Policy Ordinance No. 13487 C.M.S. (“Consolidated Fiscal Policy”) to establish budget policies and priorities that will be employed to address fiscal solvency. The Council has no authority to interfere with an approved labor MOU, but it can request that the labor union meet and confer on proposed changes. Each labor MOU must be looked at separately to determine what actions the City Administrator can take to address fiscal solvency without triggering meet and confer obligations and/or binding arbitration.

Question No. 2:

What legal authority under the Charter, Consolidated Fiscal Policy and Labor MOUs does the City Administrator have to take actions to address fiscal solvency? Does the Council have legal authority to amend actions by the Administrator?

¹ This revised memorandum reflects minor changes made after it was first posted.

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Brief Answer:

The City Administrator is authorized by the Charter, Consolidated Fiscal Policy and Labor MOUs to take any number of specific actions to address fiscal solvency, provided he keeps the Council apprised of those actions and follows any policy guidance provided by the Council. The specific actions that can be taken include, but are not limited to, spending freezes, layoffs, and reductions in levels of City services including fire station brown-outs. The Council does not have legal authority to interfere with actions taken by the City Administrator, but it does have legal authority to change the budget policies and priorities that the City Administrator must abide by in taking future actions. The Council also has authority to amend the Policy Budget to change the allocation of funds going forward, provided that the amended budget is balanced.

Question No. 3:

What tools does the Council have if the Administration does not implement directions authorized by Council, such as the June 2020 budget policy directive on OPD overtime?

Brief Answer:

The Council can require the City Administrator and the Mayor to apprise it of the actions they are taking to address fiscal solvency. The City Administrator and the Mayor must follow the fiscal policy directives of the Council but they have some leeway to assure the safety of Oakland residents. This means, for example, that the City Administrator and Mayor can employ OPD officers to work overtime to address an imminent threat to health or safety, but the Council can set budget policies to address the fiscal shortfall so created.

Question No. 4:

Under what circumstances is the City Administrator required to implement the budget passed by Council?

Brief Answer:

The City Administrator is required by the Charter to implement the policy budget passed by Council, bearing in mind his Charter-mandated duty to address issues of fiscal solvency. Note that the Policy Budget authorizes not-to-exceed amounts for the various line items; it does not require that the maximum amounts be expended. (See Brief Answer to Question No. 5.)

Question No. 5:

Under what circumstances is the City Administrator allowed to unilaterally and without notice or a vote change the budget adopted by Council?

Brief Answer:

The City Administrator has no legal authority to unilaterally and without notice or a vote change the budget adopted by Council. However, the budget is an authorization to spend, and not a mandate to spend all the funds budgeted regardless of immediate fiscal needs.

Question No. 6:

What are the findings required and who makes those findings to determine whether there are circumstances that would allow the City Administrator to unilaterally amend the budget without Council approval?

Brief Answer:

There are no circumstances under which the City Administrator may unilaterally amend the budget without Council approval. Adoption of the budget is a legislative act within the sole authority of the Council. The administrative actions that the City Administrator has authority to take to address fiscal solvency issues, such as spending freezes, layoffs, and reductions in levels of City services including fire station brown-outs, may impact the amounts expended for a particular budget line item, but these actions reduce expenditures for various line items/programs consistent with the City Administrator's authority to expend less than the maximum line item amount. (See Brief Answers to Question No. 5.)

FACTS

Charter section 801 and Ordinance No. 13487 C.M.S. amending and adopting the City of Oakland Consolidated Fiscal Policy require the Council to adopt a balanced budget "conforming to modern budget practices and procedures as well as specific information which may be prescribed by the Council." Charter § 801; see Consolidated Fiscal Policy p. 2. This is consistent with the California Constitution, which prohibits cities from incurring "any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose." Cal. Const. art. XVI, § 18(a); see Legal Opn. (May 20, 2010), Attachment A at p. ____.² The City Administrator has advised the Council that the adopted budget for fiscal year 2020-2021, while balanced when first adopted, is now estimated to require significant additional budget cuts to ameliorate a projected multi-million budget deficit attributable in large part to the COVID-19 pandemic.

² The May 20, 2010 opinion re: Adoption of City of Oakland Fiscal 2010-11 Budget Based on Passage of a Future Tax Increase is at pp. 19 through 29 of Attachment A to this opinion.

The City Administrator has taken a series of actions to achieve cost savings, including noticing layoffs of certain city employees, requesting cuts in departmental budgets, requiring certain non-union employees to take ten furlough days between January 1 and June 30, 2021, defer until July 1, 2021 a 1% cost of living increase scheduled to take effect on January 1, 2021, and other actions. Among other things, the City Administrator has indicated an intent to institute periodic reductions in staff at certain fire stations, colloquially referred to as “brown-outs,” to allow the personnel at those stations to help meet minimum staffing requirements in the stations that remain open without incurring overtime wage costs. The police department has exceeded its overtime budget in part due to overtime costs associated with public safety needs.

ANALYSIS

A. General Principles; Legislative vs. Administrative Action

This opinion builds upon and supplements a series of Legal Opinions issued by the City Attorney over the past 18 years. Those opinions address the respective roles of the City Council and the City Administrator in establishing and implementing the City budget. *See* Legal Opinion dated Feb. 6, 2003 re: City Manager’s Powers;³ Legal Opinion dated June 13, 2003 re: Addendum Clarifying February 6, 2003 Opinion Regarding City Manager’s Powers;⁴ Legal Opinion dated May 20, 2010 re: Adoption of City of Oakland Fiscal 2010-11 Budget Based on Passage of a Future Tax Increase;⁵ Legal Opinion dated July 13, 2020 re: Which Actions are Within the Province of the City Council Under the City Charter Versus the City Administrator or Other City Officers in the Administrative Service.⁶

The Oakland City Charter is the constitution of the City of Oakland, adopted by the voters pursuant to article XI, section 3 of the California Constitution. Intending to take full advantage of the home rule provisions of the state Constitution, the Charter grants the City the right and power to make and enforce all laws and regulations in respect to municipal affairs,

³ The Feb. 6, 2003 opinion re: City Manager’s Powers is at pp. 1 through 13 of Attachment A to this opinion.

⁴ The June 13, 2003 opinion re: Addendum Clarifying February 6, 2003 Opinion regarding City Manager’s Powers is at pp. 14 through 18 of Attachment A to this opinion.

⁵ The May 20, 2010 opinion re: Adoption of City of Oakland Fiscal 2010-11 Budget Based on Passage of a Future Tax Increase is at pp. 19 through 29 of Attachment A to this opinion.

⁶ The July 13, 2020 opinion re: which Actions are within the Province of the City Council under the City Charter versus the City Administrator or Other City Officers in the Administrative Service is at pp. 30 through 36 of Attachment A to this opinion.

Subsequent references to these opinions will be “Legal Opn. (date), Att. A at p. ____.”

subject only to restrictions and limitations provided for in the Charter. Charter § 106; see Cal. Const. art. XI, § 5(a).⁷ Therefore, the Charter is the supreme law of the City with respect to municipal affairs and supersedes any conflicting ordinance or resolution. Cal. Const. art. XI, § 5(a).⁸ Charter provisions can only be changed by the voters. Cal. Const. art. XI, § 3(a).

Municipal corporations such as the City are not bound to follow strict separation of powers principles,⁹ and thus the Charter determines how power is divided among City officials. The Charter makes the City Council “the governing body of the City” and vests it “with all powers of legislation in municipal affairs adequate to provide a complete system of local government” Charter § 207. These legislative matters require action by the Council as a body. *Id.* § 210 (“The affirmative vote of five members of the Council shall be required to adopt any ordinance or resolution, except as otherwise provided by this Charter or by general law.”).¹⁰

Moreover, the Council “shall have no administrative powers.” Charter § 207. Instead, the City Administrator is the “chief administrative officer of the City.” *Id.* § 500. The City Administrator serves under the direction of and “at the pleasure of the Mayor.” *Id.* § 501. The City Administrator has the power and the duty to “execute and enforce all laws and ordinances and policies of the Council and to administer the affairs of the City.”¹¹ *Id.* § 504(a). Among other things, the City Administrator has the power and the duty “to control and administer the financial affairs of the City,” to ensure that “all City contracts under his direction or that of the

⁷ Matters of state-wide concern remain subject to state legislative control. *T-Mobile West LLC v. City and County of San Francisco*, 6 Cal. 5th 1107, 1116 (2019).

⁸ “. . . City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.”

⁹ See McQuillin, *Municipal Corporations* § 10.06 (3rd ed.).

¹⁰ For example, the affirmative vote of at least six Council members is required for an ordinance to take effect immediately. Charter § 216.

¹¹ The Mayor is the “chief elective officer of the City, responsible for providing leadership and taking issues to the people and marshalling public interest in and support for municipal activity.” Charter § 305. The roles of the Mayor and the City Administrator overlap to the extent, for example, that both play a role in making recommendations to the Council, administering the City’s finances, preparing and presenting the annual budget, and representing the City in intergovernmental relations when directed by the Council. See *Brown v. Fair Political Practices Com.*, 84 Cal. App. 4th 137, 146-47 (2000). Under the Charter, the “crucial distinction” between the Mayor and the City Administrator in that regard is that the latter “operate[s] under the mayor’s direction.” *Id.* at 149 (emphasis in original).

Council are faithfully performed,” and “[t]o keep the Council at all times fully advised as to the financial condition and needs of the City.” *Id.* §§ 504 (e), (h) and (j). The City Administrator also establishes and maintains financial accounts and controls for the City. *Id.* §§ 805, 810.

The Charter forbids the Council and each Council member from interfering with the administrative service for which the City Administrator, Mayor and other appointed or elected officers are responsible. Charter § 218. This includes not giving orders to any employee under the jurisdiction of the City Administrator and not taking any part in the appointment or removal of city employees and officers. *Id.* Council members who violate section 218, titled “Non-Interference in Administrative Affairs,” are subject to misdemeanor prosecution and forfeiture of office. *Id.*

With regard to the budget, the Charter specifies the roles of the Council and the City Administrator:

Each department, office and agency of the City shall provide in the form and at the time directed by the Mayor and City Administrator all information required by them to develop a budget conforming to modern budget practices and procedures as well as specific information which may be prescribed by the Council. Under the direction of the Mayor and Council, the City Administrator shall prepare budget recommendations for the next succeeding fiscal year which the Mayor shall present to the Council, in a form and manner and at a time as the Council may prescribe by resolution. Following public budget hearings, the Council shall adopt by resolution a budget of proposed expenditures and appropriations necessary therefor for the ensuing year, failing which the appropriations for current operations of the last fiscal year shall be deemed effective until the new budget and appropriation measures are adopted.

Charter § 801.

In addition, the Charter authorizes the City Administrator “[t]o control and administer the financial affairs of the City” and “[t]o keep the Council at all times fully advised as to the financial condition and needs of the City.” Charter § 504(e) and (j).

The adopted budget and budget resolutions thus reflect policy decisions and budget priorities established by the Council. See Legal Opn. (Feb. 6, 2003), Att. A at p. [7] (“In short, the allocation and prioritization of resources expressed in the budget itself are a powerful statement of City policy.”). As noted in a prior Legal Opinion provided to the Council regarding its budgetary authority, “a city’s annual budget necessarily includes certain assumptions

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regarding revenues and expenditures. The courts have recognized that the adoption of a city's budget is a legislative function and generally give deference to the judgment of its city council." Legal Opn. (May 20, 2010), Att. A at p. [7], citing *Scott v. Common Council of the City of San Bernardino*, 44 Cal. App. 4th 684, 690 (1996) and *County of Butte v. Superior Court*, 176 Cal. App. 3d 693 (1985). Cf. *Steinberg v. Chiang*, 223 Cal. App. 4th 338 (2014) (the state budget bill includes an estimate of revenues made as of the date of passage that is within the Legislature's fundamental constitutional authority to make, and provided that estimate exceeds appropriations and transfers, the Controller has no authority to determine whether the budget bill is in fact balanced).

The City Administrator's role is to "control and administer the financial affairs of the City" faithfully with those policies, taking into consideration "the financial condition and needs of the City." Charter § 503(e) and (j). Line items in the budget generally *authorize* expenditures up to the amount stated; they do not require that the entirety be expended if doing so is not prudent given the City's fiscal condition at the time. Legal Opn. (May 20, 2010), Att. A at p. [6]. Provided the City Administrator's actions are consistent with Council policy priorities as expressed through budget resolutions and the Consolidated Fiscal Policy, the City Administrator is vested with the discretion to determine how best to administer the City's finances, while keeping the Council apprised.

This is consistent with case law construing the powers of initiative and referendum, which are coextensive with the legislative power. In that context, the courts often have to decide whether something is a legislative act or an administrative function. "'The electorate has the power to initiate legislative acts, but not administrative ones[.]'" *Sacks v. City of Oakland*, 190 Cal. App. 4th 1070, 1090 (2010) (quoting *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 399 (2001)).

Sacks v. City of Oakland is illustrative here. A resident challenged the City's implementation of Measure Y, an initiative measure that imposed a special parcel tax and parking lot surcharge for ten years to be used exclusively for specified purposes, including to "hire and maintain" at least 63 police officers assigned to community policing activities. 190 Cal. App. 4th at 1076. The police department's existing policy was to assign new officers to patrol, and veteran officers to community policing, so the City used Measure Y funds to recruit and train new officers assigned initially to patrol to backfill positions of veteran officers who would be reassigned to community policing. *Id.* at 1077-78. The City was sued for failure to comply with the conditions specified in the measure for expenditure of funds because the funds collected by the parcel tax were not being used to hire and train community officers, but rather to hire new recruits for patrol. The court of appeal found the measure was silent as to the timing and procedures to be followed in implementation, and that the City's interpretation of the measure as allowing it to move veteran officers to those positions and use the funding to backfill through new hires was "a reasonable, commonsense result that comports with the legislative intent." *Id.* at 1086. More importantly for these purposes, the court of appeal noted

that had the measure not been silent on implementation, it would have been invalid as beyond the power of the voters to enact.

“The electorate has the power to initiate legislative acts, but not administrative ones[.] . . .” [Citation.] “An enactment that interferes with the City’s ability to carry out its day-to-day business is not a proper subject of voters power.” [Citation.] “Legislative acts are those that declare a public purpose whereas administrative, sometimes called adjudicative or quasi-adjudicative, acts implement the steps necessary to carry out that legislative purpose.” [Citation.] “When implementing a plan adopted by a superior power, a city acts in an administrative capacity.” [Citation.] Here, while the ordinance properly articulated the particular purposes to which the use of Measure Y funds were directed, the City correctly retained the authority and administrative discretion to implement the legislation.

Id. at 1090, citations omitted.

Labor agreements are a form of contract, and in the area of labor relations, as elsewhere, the Council’s authority is legislative in character, and extends to setting policy, but not to implementing that policy. This is consistent with the state law provisions governing local agency/employee relations, which assign to “[t]he *governing body* of a public agency, or such boards, commissions, *administrative officers* or other representatives as may be properly designated by law or by such governing body” the obligation to “meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.” Cal. Gov’t Code § 3505 (emphasis added). State law clearly contemplates that the Council’s role in the meet and confer process is that of the legislative body operating as a whole, setting policies on wages, hours, and terms and conditions. Otherwise, the negotiations are conducted and the agreement administered by the “administrative officer[] . . . designated by law,” which here is the City Administrator.

B. Application to the Proposed Actions of the City Administrator and Council

In an opinion issued in 2003, the City Attorney was asked whether the City Manager (as the City Administrator was then titled) could, without prior authorization from the Council, “(1) decline to spend appropriated funds; (2) layoff employees when the Council has budgeted funds for their salary/benefits; (3) reduce levels of service at fire stations; and/or (4) close certain branch libraries.” On the basis of the Charter provisions discussed above, the City Attorney concluded:

In the absence of conflicting municipal policy/legislation, the City Manager has the authority to eliminate or reduce a budget deficit by refraining from spending appropriated funds, terminating employees, reducing levels of service at fire stations and/or closing certain branch libraries.

Legal Opn. (Feb. 6, 2003), Att. A at p. [2].

The City Attorney subsequently advised the Council that it could, by Resolution, change its budget policies to require Council approval in specific areas. The proposed Resolution language read:

“RESOLVED: that the policy budget for FY 2003-05 expresses the Council’s policy regarding the levels of service and the programs that the City will provide during FY 2003-05 and the relative funding for such programs/services, departments and agencies; and be it

FURTHER RESOLVED: that the City Manager must obtain approval from the City Council before he/she (1) substantially or materially alters the relative agency [fn.] allocations of funding set out in the Policy Budget, (2) substantially or materially changes the levels of service expressly prioritized and funded by the Policy Budget, including but not limited to layoffs and/or freezes that would substantially or materially (a) change levels of service or (b) affect programs, or (3) eliminates or suspends entirely programs funded by the Policy Budget; and be it

FURTHER RESOLVED: that, notwithstanding the foregoing, the City Manager may exercise his/her discretion so as to reduce across-the-board funding levels and/or implement freezes if the funding reductions/freezes do not materially or substantially change the programs or levels of service established by the Policy Budget; provided that he/she advises the City Council of such action(s) as soon as reasonably possible; and be it

FURTHER RESOLVED: that, subject to the foregoing limitations, the City Manager/Mayor may transfer funding within an Agency, but may not transfer funds between Agencies.”

Legal Opn. (June 13, 2003), Att. A at p. 16.

Along these same lines, the City Attorney concluded in 2010 that “[w]ith respect to most budget items (e.g., salaries, utilities, leases), the budgeted expenditure amount is an authorization to spend up to that dollar amount if the liability should become real.” *Id.* at p. 6. That the Council has budgeted an expenditure amount does not by itself require the City Administrator to spend the entire sum, if fiscal conditions suggest doing so would not be prudent. However, in determining whether to withhold funding, the City Administrator is constrained by the Council’s budget policies, such as maintaining the relative level of funding among agencies and departments established by the policy budget.

The general principles expressed in these Legal Opinions still hold. However, there are additional specific legislative pronouncements that influence particular actions that may or may not be taken by the City Administrator.

First, the Council’s Consolidated Fiscal Policy, amended most recently in May 2018, provides binding policy guidance to the City Administrator on steps he can take to achieve budget cuts. It specifies that:

Substantial or material alterations to the adopted budget including shifting the allocation of funds between departments and substantial or material changes to funded service levels, shall be made by resolution of the City Council.

The Finance Department will include departmental expenditure projections for the General Purpose Fund in the Second Quarter Revenue & Expenditure Report. In the event that a department is projected to overspend in the General Purpose Fund by more than one percent (1%), the City Administrator shall bring an informational report to the City Council within 60 days following acceptance of the Revenue & Expenditure report by the City Council. The report shall list the actions the Administration is taking to bring the expenditures into alignment with the budget.

...

The City Administrator shall have the authority to transfer funds between personnel accounts, and between non-personnel accounts within a department. The City Administrator shall have the authority to transfer funds allocated to personnel accounts to non-personnel accounts within a department provided that cumulative transfers within one fiscal year do not exceed 5% of the original personnel account allocation of that department. The City Administrator shall have the authority to transfer funds from

non-personnel accounts to personnel accounts within a department. The City Administrator shall have the authority to transfer funds allocated to personnel accounts to non-personnel accounts if the transfer is required to meet the conditions of or maximize the funding derived from a grant that has been approved by the City Council. . . .

Consolidated Fiscal Policy at p. 5.

In addition, the Consolidated Fiscal Policy requires that the Council must authorize use of funds from the General Purpose Fund Emergency Reserve or the Vital Services Stabilization Fund, and once authorized, the City Administrator may allocate the funds. *Id.* at p. 7.

The Council can change the Consolidated Fiscal Policy at any time by ordinance. Unless and until it does so, however, the document is binding law that must be enforced and implemented by the City Administrator.

Another specific legislative priority that must be followed is contained in the most recently adopted MOU between the City and the firefighters' local. That MOU includes a provision allowing the City Administrator to employ brown-outs in certain circumstances.

4.2.8. Temporary Suspension of Minimum Staffing

For any year during which this Section 4.2 Staffing Agreement is in effect, if a Severe Financial Event occurs that adversely impacts the General Purpose Fund so as to prevent the City from budgeting for an maintaining the minimum staffing requirements under this Section 4.2, the City Administrator may temporarily suspend the requirements of this Section 4.2 temporarily reducing the minimum number of fire apparatus regularly and routinely staffed and deployed daily (e.g. apparatus closures and/or rotating apparatus closures).

A "Severe Financial Event" shall be defined as when the General Purpose Fund revenues in the Adopted Budget are less than the current year's revenues and when layoffs or furloughs are noticed to all of the City's labor unions due to adverse financial conditions.

This exception shall apply only if the City Administrator submits a report to the City Council explaining the Severe Financial Event, the steps that were taken by the City to avoid the need to temporarily suspend the minimum staffing provisions, and the

steps that will be taken by the City in the future to restore the minimum staffing provisions. Such actions must be taken for each fiscal year in which the City fails to meet the requirements of this Section. Additionally, upon the conclusion of a Severe Financial Event or if the definition of Severe Financial Event is no longer met, the temporary suspension of minimum staffing shall terminate.

If staffing must be reduced due to a Severe Financial Event, the City shall meet with IAFF, Local 55 within thirty days, and every thirty days thereafter, after submitting a report to the City Council to discuss returning staffing to the levels set forth in Section 4.2.

Memorandum of Understanding between City of Oakland and International Association of Firefighters, Local 55 (Nov. 1, 2020 through Dec. 31, 2023) at pp. 28-29.

This MOU is binding legislative policy that must be enforced by the City Administrator. However, it also is a binding contract between the City and the labor union. It cannot be unilaterally changed or ignored. If the Council wants to change this provision to eliminate the City Administrator's authority to employ brown-outs it will have to engage in the meet and confer process and, if no agreement is reached, the labor union has the right to insist on binding interest arbitration. Charter §910.

CONCLUSION

The Charter vests the Council with authority to establish policies for the City, including budgetary policies, through legislative action. The Council does so by enacting the biennial budget, budget resolutions, and related legislation, such as the City of Oakland Consolidated Fiscal Policy Ordinance No. 13487 C.M.S. and resolutions approving Memoranda of Understanding ("MOUs") with the City's labor unions. Those legislative pronouncements cannot be changed unilaterally by the City Administrator.

The Charter vests the City Administrator with authority to implement budget policy, including using his discretion as to where to cut expenditures during times of fiscal restraint, in the absence of policy directive to the contrary or budget amendments that re-balance the budget.¹² The Council cannot change the Charter without a vote of the people. The Council

¹² Part B(4) of the Council's Consolidated Fiscal Policy requires that amendments to the adopted budget maintain a balanced budget: "From time to time the City Council may present changes in policy and consider additional appropriations that were not anticipated in the most recently adopted budget. Amendments by the City Council shall maintain a balanced budget." City of

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thus cannot interfere with the City Administrator's discretionary decisions on how to achieve the fiscal goals of the City. The City Administrator must keep the Council apprised of actions he is taking and of the fiscal condition of the City, and the Council can require the City Administrator to report on those matters. The Council can change the City's fiscal goals and priorities by legislation, such as enactment of a revised balanced budget or binding budget-related resolutions that set forth the Council's policies and policy priorities; and if the Council does so the City Administrator must enforce those revised priorities.

The MOUs between the City and its labor unions are approved by the Council and constitute legislative policy, as well as binding contracts. The City Administrator's Charter authority, combined with language in the current Local 55 MOU approved by the Council, allows the City Administrator to implement brown-outs at fire stations to avoid overtime pay. Those provisions of the MOU can be changed by the Council only through the meet and confer process and ultimately interest arbitration pursuant to City Charter section 910 if the City and the fire union do not reach agreement. The Council could adopt a budget resolution establishing other priorities for budget cuts that the City Administrator must follow. In the absence of such legislative action, the Council cannot interfere with the City Administrator's decision to implement brown outs as necessary to administer the financial affairs of the City. However, the City Administrator also must ensure the security of Oakland residents and deploy resources accordingly when public safety demands.

KG:NL

Attachment

(00430851-3)

Attachment A

CITY OF OAKLAND
Office of the City Attorney

Legal Opinion

TO: President De La Fuente and
Members of the Oakland City Council

FROM: John A. Russo
City Attorney

DATE: February 6, 2003

RE: City Manager's Powers

I. QUESTIONS

At the City Council's January 14, 2003 meeting, Councilmember Nadel asked whether the City Manager has the power without City Council authorization to:

- (1) decline to spend appropriated funds;
- (2) layoff employees when the Council has budgeted funds for their salary/benefits;
- (3) reduce levels of service at fire stations; and/or
- (4) close certain branch libraries.

II. CONCLUSION

The City Council is the City's governing body. The City Council establishes City policy by passing legislation, adopting the City's policy budget, and passing other resolutions and motions. The City Council, however, has no administrative powers and is expressly prohibited from interfering in the administrative affairs/service of the City.

The City Manager is the City's chief administrative officer. He has the power and duty to execute and enforce all laws, ordinances and policies of the Council and administer the affairs of the City. Notwithstanding this wide discretion, the City Manager must exercise his administrative powers in accord with City policies, legislation and applicable law. In performing his duties, the City Manager is obligated to keep the Council at all times fully advised as to the financial condition and needs of the City.

In the absence of conflicting municipal policy/legislation, the City Manager has the authority to eliminate or reduce a budget deficit by refraining from spending appropriated funds, terminating employees, reducing levels of service at fire stations and/or closing certain branch libraries. These actions are within the scope of the City Manager's administrative powers, which include the judgments and quasi-legislative policy determinations incidental to executing City policies, administering the budget, and managing the City's financial affairs.

We emphasize that if the City Council has not set a clear, specific policy with respect to a particular issue or matter, it can always establish a policy with which the City Manager must comply in administering the City's financial and other affairs.

Based on the Charter's separation of the legislative and administrative powers and the Council's budgetary policies, we conclude:

1. The City Manager and the other City officers responsible for the administrative service, have the sole authority to appoint or remove employees under their jurisdiction. The City Council cannot direct the City Manager to appoint or remove a particular employee. However, because the City Council holds the "purse strings" and fixes compensation ranges of City employees and officers, it has the sole power to fund positions, fund programs, cut funding or eliminate funding. (In some instances applicable laws require that the City allocate certain funding to specific programs.)

2. The City Manager can decline to spend appropriated dollars in order to address a budget deficit, but his decision must be in accord with the City Council's policies. He cannot eliminate the budget deficit in a manner that changes or conflicts with the Council's budget priorities/policies unless he obtains City Council authorization. The City Council's budget resolutions authorize the City Manager to expend new appropriations for programs and departments. A decision to eliminate the budget deficit by imposing across-the-board cuts, would maintain the relative priority and funding levels that the Council established. The City Manager cannot balance the budget by transferring funds from one Agency to another Agency.

3. The City Manager can adjust levels of service in the Fire Department in the absence of conflicting policy. However, the City Council could enact legislation or a policy that would require maintenance of full-service fire stations. On January 14, 2003, the City Council approved the City Manager's proposed spending adjustments for the Fire Department.

4. To balance the budget, the City Manager can reduce, eliminate or alter certain programs. The City Manager's plan is based on his judgments and quasi-legislative policy determinations as to which services should be eliminated or cut; these judgments and quasi-legislative policy determinations are intertwined in administrative decision-

making. The City Council can establish a clear policy that will determine where and to what extent spending adjustments will be made.

Consequently, as a general rule, the City Manager can close branch libraries as part of a plan to eliminate a budget deficit. (He cannot transfer library funding to another Agency; nor can the closure violate City Council policy or applicable laws.) The FY 2001-03 budget resolutions merely authorize the City Manager to expend new appropriations in accordance with the Policy Budget. The FY 2001-03 Policy Budget sets two specific policies: a 7.5% General fund Reserve policy and a net zero increase in staffing policy. Regarding library services, the Policy Budget 2-001-03 states that the City currently operates 15 branches and announces a "plan" to expand Main Library hours. Neither the budget resolutions, nor the Policy Budget clearly establish a policy requiring maintenance of the precise current levels of services, or directing the City Manager to return to the City Council for authorization if due to fiscal constraints, he decides to close library branches. City Council may, should it so choose, provide such policy direction.

III. BACKGROUND FACTS

At its January 14, 2003 meeting, the City Council, after making findings required by the Sunshine Ordinance and Brown Act, discussed urgency item #S-8, entitled: "Immediate action(s) necessary to address budget deficits/crisis resulting from Governor's January 10, 2003 announcement of proposed revenue reductions to local jurisdictions." The City Manager detailed his proposals to address the fiscal impacts of the Governor's proposed budget reductions and distributed a four-page written report. The City Manager's report stated in part:

"The "Police and Fire elements of the plan will be enacted immediately. All other elements will be on hold pending the Legislature's approval of the Governor's state budget proposal by February 1, 2003. . . . The overall value of the proposed spending reductions and revenue enhancements is \$20.0 million." (A copy of the City Manager's report is attached.)

Vice Mayor Nadel asked this Office whether the City Manager could make the cuts he proposed to the Fire and Police Departments and the Library without City Council authorization. We briefly outline the proposed spending adjustments for the Police and Fire Departments and the Library below.

Police Department Spending Adjustments

The City Manager's proposed General Fund spending adjustments for the Police Department include reducing overtime by \$5.0 million, laying-off 5 police officer trainees, funding 18 police officers in the academy through the end of this fiscal year

with grant funds instead of general fund dollars, and "miscellaneous reductions". The proposed reductions total \$6,387,000.

Fire Department Spending Adjustments

The Fire Department General Fund spending adjustments include periodic reductions in levels of service at various fire stations to permit deployment of personnel who currently staff those stations to serve at other fire stations during their regular work schedules; the purpose of this periodic redeployment plan is to reduce or eliminate the overtime the department currently pays to provide minimum staffing at the other stations. Proposed reductions total \$2,200,000.

Library Spending Adjustments

The City Manager's proposal also includes a reduction in the level of library services, including closure of seven small branch libraries: Temescal, Lakeview, Martin Luther King, Melrose, Elmhurst, Brookfield, and West. Patrons of the closed libraries would be served by the remaining branch libraries and the main library.

After discussion, the Council passed a motion approving the City Manager's proposed spending adjustments for the Police and Fire Departments that were scheduled to take effect on Friday, January 17, 2003. The Council by consensus agreed to schedule a budget workshop to discuss the other spending reductions the City Manager proposed and to address the City's budget deficit in light of the Governor's budget proposal. The workshop is scheduled for February 7, 2003.

IV. DISCUSSION

A. Mayor-Council Form of Government

The Oakland City Charter ("City Charter") is the constitution of the City of Oakland ("City"). It was adopted in the municipal election of November 5, 1968 and became effective on January 28, 1969.

The City Charter grants the City the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in the Charter. The Charter provides that the City shall take advantage of the provisions of Section 6 of Article XI of the Constitution of the State of California giving cities Home Rule as to municipal affairs. (City Charter § 106.)

The City's Charter first provided for a city manager form of government when the Charter was amended in 1931. *Stohl v. Hostman*, 64 Cal.App. 2d 316, 319 (1944). Prior to the passage of Measure "X", the "Strong Mayor" City Charter amendment, the City Manager was the City's chief executive officer and the City Council appointed and

removed the City Manager. The Mayor was a member of the City Council, subject to the non-interference clause, which, except for the purposes of inquiry, prohibits the City Council and its members from interfering in the administrative service/affairs of the City under the purview of the City Manager and other City officers.

In 1998, Measure "X", "the Strong Mayor" ballot measure amended the Charter to provide for a Mayor-Council form of government. Now the City Manager is the "chief administrative officer of the City". (City Charter § 500.) The City Manager is appointed for an indefinite term and serves under the direction of and "at the pleasure of the Mayor." (City Charter § 501.) The City Council now consists of eight Councilmembers. The Mayor is not a member of the Council, but has a vote on the Council if the Councilmembers are evenly divided. (Oakland City Charter §200.)

Measure "X" established the Mayor as the head of the executive branch of the City, with untrammled power to control the City Manager's administrative functions. See *Brown v. Fair Political Practices Commission*, 84 Cal.App.4th 137, 147 (2000). To summarize, the Mayor is the City's chief executive and elective officer; the City Manager is the City's chief administrative officer.

B. City Charter Separates Legislative and Administrative Branches of City Government

Municipal corporations, such as the City of Oakland, are not bound to follow the separation of powers principles in the federal or state constitution. *McQuillin Mun Corp* § 10.06, p. 313 (3rd Edition). Executive officials sometimes exercise legislative powers and purely executive officials may have the power to set policy by delegation when the legislature is silent. *Id.* The strict separation of powers is not constitutionally required for local governments. 13 Cal Jur 3d (Rev) Part §101, p. 224. Therefore, the City Charter determines the roles of the City Council, Mayor and City Manager.

Oakland's City Charter clearly expresses the voters' intent to separate the municipal corporation's legislative (residing in the City Council) and administrative (residing in the City Manager who serves at the Mayor's pleasure) powers. The City Charter declares that the City Council shall have no administrative powers and prohibits the City Council and its members from interfering with the "administrative affairs/service" of the City for which the City Manager, Mayor, and other appointed or elected officers are responsible. (City Charter §§ 207, 218.)

One of the strongest expressed limitations on the City Council's powers is the non-interference clause. (City Charter section 218.) The non-interference clause and the Charter's declaration in section 207 that the Council shall have no administrative powers underscore that, while the policy-making/legislative powers of the City government rest with the Council, the administrative/executive, day-to-day control of the financial affairs of the City -- as well as the duty to execute and enforce all laws,

ordinances and policies of the City and administer the City's affairs-- rest with the City Manager, who receives direction from the Mayor.¹

To further highlight the serious nature of this separation of powers: A violation of the non-interference clause is a misdemeanor; a conviction for such violation results in immediate forfeiture of office.

The City Manager has the sole authority to appoint, remove, and/or discipline employees and officers under his jurisdiction. (City Charter § 218 and 503.) All employees of the City are under the jurisdiction of the City Manager except the employees of the Mayor and other appointed or elected officers of the City, such as the City Attorney, and City Council. The City Council and its members are prohibited from giving orders to any subordinate of the City under the jurisdiction of the City Manager, Mayor, or other officers responsible for administrative affairs. Section 218 provides:

Section 218. Non-Interference in Administrative Affairs.

Except for the purpose of inquiry, the Council and its members shall deal with the administrative service for which the City Manager, Mayor and other appointed or elected officers are responsible, solely through the City Manager, Mayor or such other officers. Except for powers particularly reserved to the Mayor pursuant to Section 305 of this Charter, neither the Council nor any member shall give orders to any subordinate of the City under the jurisdiction of the City or such other officers, either publicly or privately, nor shall they attempt to coerce or influence the City Manager or such other officers, in respect to any contract, purchase of any supplies or any other administrative action; nor in any manner direct or request the appointment of any person to or his removal from office by the City Manager, or any of his subordinates or such other officers, not in any manner take part in the appointment or removal of officers or employees in the administrative service of the City. Violation of the provisions of this section by a member of the Council shall be a misdemeanor, conviction of which shall immediately forfeit the office of the convicted member. (Amended by: Stats. November 1988 and Stats. November 2000.)

Webster's Dictionary, Tenth Edition, defines "inquiry" as "examination into facts or principles: research". It also defines "inquiry" as "a request for information" and as "systematic investigation, often of a matter of public interest". City Charter section 218 allows the City Council to request information from employees of the City Manager, Mayor or other City officers such as the City Clerk and City Attorney.

¹ Section 218 also recognizes that the Mayor and other City Officers such as the City Auditor and City Attorney are responsible for the administration of their offices.

C. City Council's Powers

Section 207 of the Oakland City Charter prescribes the City Council's powers. The City Council is the governing body of the City; it exercises the corporate powers of the City and subject to expressed limitations in the Charter, the Council is vested with "all powers of legislation in municipal affairs." Except as otherwise provided in the City Charter, the Council has the power to fix the compensation of all City employees, officers and officials. (City Charter § 207.)

With respect to the questions addressed by this opinion: the other, and possibly the most important, Charter power of the Council is its budgetary authority. City Charter section 801 provides in part: "Following public budget hearings, the Council shall adopt by resolution a budget of proposed expenditures and appropriations necessary therefore for the ensuing year, failing which the appropriations for current operations of the last fiscal year shall be deemed effective until the new budget and appropriation measures are adopted."

Here, the Council has established policies and priorities with respect to budgetary matters in the City of Oakland FY 2001-03 Adopted Policy Budget ("Policy Budget – 2001-03") that the Council adopted and amended by resolution. Appropriation levels for programs and activities and the authorized staffing for departments and agencies reflect the City Council's budget policies and priorities. The budget resolutions and the Policy Budget authorize the City Manager to expend "new appropriations for departments and activity programs as incorporated in Exhibit A [Policy Budget –2001-03]" and authorize funding for a number of positions (FTEs) in each Agency. (Resolution Nos. 76507, 77206, 01-37, 02-47, C.M.S.)

In short, the allocation and prioritization of resources expressed in the budget itself are a powerful statement of City policy.

The budget resolutions also authorize the City Manager to transfer funds **within an Agency**; City Council approval is required to transfer funds **from one Agency to another** or to appropriate additional money. Nothing in the resolution mandates that the City Manager expend the appropriated funds; indeed City Manager arguably would not fulfill his duty to "control and administer the financial affairs of the City" and to properly and efficiently administer affairs of the City under his jurisdiction, if he spent all of the appropriated funds despite his knowledge of a budgetary deficit. "Appropriation" is defined as an authorization by the Council that permits the City to incur obligations. (Policy Budget – 2001-03, p. B-11.) An authorization is a maximum not-to-be-exceeded amount; it is neither a mandate nor a minimum expenditure..

The budget resolution the Council passed, adopting the biennial budget for Fiscal Years 2001-2003, provides:

"RESOLVED: That the City Manager is authorized to expend in accordance with the laws of the State of California and the City of Oakland on behalf of the City Council new appropriations for departments and activity programs as incorporated in Exhibit A [FY 2002-03 Adopted Policy Budget"], attached hereto; and be it

FURTHER RESOLVED: the City Manager may transfer operating appropriations between departments and activity programs during the fiscal year provided that such funds remain within the Agency in which the funds were approved by City Council, except that the amount maintained in the Emergency Contingency Account and the Public support contingency Account may be transferred at the direction of the City Council only." (Resolution No. 76507 C.M.S.)²

The Policy Budget- 2001-03 establishes a 7.5% General Purpose Fund reserve policy and a zero-net increase in staff policy. (Policy Budget- 2001-03, p. A-4.) With respect to library services, the Policy Budget-2001-03 provides:

"Plans for FY-2001-03 include expanded service hours at the Main Library by 23%. The Main Library will open at 10 a.m. Monday-Saturday and will remain open four nights per week." (Policy Budget – 2001-03, p. J-48.)

"Services Provided: The Branch Division operates 15 branches and a bookmobile . . ." (Policy Budget –2001-03, p. J-50.)

The budget amendment process for the Policy Budget –2001-03 is clearly set forth as follows:

"The budget is a flexible document which provides a comprehensive framework of resource allocations for implementation of the City's goals, priorities and program activities. . . . Amendments to the budget may be made throughout the two-year period. Appropriation of new money or transfers between funds and Agencies requires formal action through council resolution. Transfers between departments within an agency, divisions, accounts or projects may be made at the administrative level." (Policy Budget-2001-03, p. B-6.)

² The resolution adopting the budget for the Redevelopment Agency contains similar language and authorizes the Agency Administrator to transfer operating appropriations between projects and activities during the budget year. (Resolution No. 01-37 C.M.S.) The City Council and Agency amended the budget resolutions to reflect changes in the second year of the Fiscal Years 2001-2003 budgets. (Resolution Nos. 77206 C.M.S. and 02-47 C.M.S., respectively.)

D. Powers of the City Manager

As the City's chief administrative officer, the City Manager has the power and the duty to "control and administer the financial affairs of the City" and "to keep the Council at all times fully advised as to the financial condition and needs of the City". (City Charter § 504.) The City Charter further provides:

"City Manager shall be responsible to the Council for the proper and efficient administration of all affairs of the City under his jurisdiction and shall, subject to the provisions of Article IX of this Charter and except as otherwise provided in this Charter, have the power to appoint, assign, reassign, discipline and remove all directors or heads of departments and all employees under his jurisdiction."
(City Charter § 503.)

The City Charter does not define administrative services or duties. Webster's Dictionary, Tenth Edition, defines "administrative" as "of or relating to administration or an administration: executive". "Administration" is defined as "performance of executive duties: management. 2: the act or process of administering. 3: the execution of public affairs as distinguished from policy-making."

Black's Law Dictionary defines "administration" as follows:

"Management or conduct of an office or employment; the performance of the executive duties of an institution, business, or the like. In public law, the administration of government means the practical management and direction of the executive department, or of the public machinery or functions, or of the operations of the various organ or agencies. Direction oversight of any office, service, or employment."

According to a leading national treatise on municipal corporations, McQuillin's The Law of Municipal Corporations:

"Municipal corporations ordinarily are vested with legislative and executive powers, the latter being sometimes referred to as administrative or ministerial powers or duties. Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them, or appoint the agents charged with the duty of such enforcement. If it can be shown that the particular act could not have been done without a law or ordinance, such act is considered as legislative.

The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence. In other words, if the legislative function is principally law creation, the executive function is chiefly law enforcement.

However, the complexities of modern life often impel legislatures to confer on executive and administrative department this authority to make rules and regulations in order to enforce and achieve the policy intended. Thus, the making of such rules and regulations by executive and administrative departments sometimes become not a matter of mere law enforcement but of secondary law creation. But, so long as the determination of the legislative principle remains within the control of the legislative body, the determination of the secondary structure that insures and assists the establishment of the principle is not legislation. The idea is that the creative element delegated is exclusively limited to arrangements and procedures consistent with the substantive principle." *McQuillin Mun Corp* § 10.06, pp. 311-312 (3rd Edition).

Thus, administration is the performance of executive duties, management and the execution of public affairs as distinguished from policy-making. City Charter section 500 provides that the Mayor shall appoint a City Manager who shall be the chief administrative officer of the City. The City Charter mandates that the City Manager shall be a person of demonstrated administrative ability with experience in a responsible, important executive capacity and shall be chosen by the Mayor solely on the basis of his or her executive and administrative qualifications. The administrative service for the City Manager is defined in section 504 of the Oakland City Charter as duties. They include:

- (a) To execute and enforce all laws and ordinances and policies of the Council and to administer the affairs of the City.
- (b) To attend all meetings of the Council, and its committees, unless excused, and such meetings of boards and commissions as he chooses or which he is directed to attend by the Council, and to participate in discussions at such meetings.
- (c) To recommend to the Council such measures and ordinances as he may deem necessary or expedient and to make such other recommendations to the Council concerning the affairs of the City as he finds desirable.
- (d) To investigate affairs of the City under his supervision, or any franchise or contract for the proper performance of any obligation running to the City within his jurisdiction.
- (e) To control and administer the financial affairs of the City. He may appoint a Director of Finance to act under his direction.
- (f) To prepare an annual budget under the direction of the Mayor and Council for the Mayor's submission to the Council.

- (g) To prepare or cause to be prepared the plans, specifications, and contracts for work which the Council may order.
- (h) To supervise the purchasing of materials and supplies and to make recommendations to the Council in connection with the awarding of public contracts and to see that all City contracts under his direction or that of the Council are faithfully performed.
- (i) To prepare and submit to the Council such reports as it may require.
- (j) To keep the Council at all times fully advised as to the financial condition and needs of the City.

E. Legislative versus Administrative Action

The specific questions raised here must be answered based on the interpretation of the provisions of the City Charter, which is the duty of the City Attorney in matters of first impression.

Cases that examine the limits of the powers of chief executive/administrative officers such as the Governor and City Managers of other cities, while not dispositive, provide guidance and are consistent with our analysis of the distinction between administrative affairs/services and policy-making.

The California Constitution declares that the state government's powers are legislative, executive and judicial. (Const. Art. 3 § 3.) The Constitution then establishes the separation of powers doctrine, providing that one branch may not exercise the powers of the other branches, except as permitted by the Constitution. *Id.*

It is well settled that the primary purpose of the separation of powers doctrine in the California Constitution, is to prevent combining in a single person or group the basic fundamental powers of government. *In re Attorney Discipline System*, 19 Cal. 4th 582, 596 (1998), citing *Davis v. Municipal Court*, 46 Cal.3d 64, 76 (1988). However, the separation of powers doctrine has not been interpreted as requiring the rigid classification of all the incidental activities of government. *Id.*

Both executive and judicial branches of state government "routinely exercise quasi-legislative authority in establishing general policies and promulgating general rules for the governing of affairs within their respective spheres. The exercise of quasi-legislative authority, even when the policy decision that is made by the executive or judicial entity or official is one that could have been made by the legislature, has never been considered to violate the separation of powers doctrine." *In re Attorney Discipline System, supra* 19 Cal.4th 582, 596.

See also, *Carmel Valley Fire Protection Dist. v. State*, 25 Cal.4th 287, 289 (2001):

“The purpose of the doctrine is to prevent one branch of government from exercising the complete power constitutionally vested in another; it is not intended to prohibit one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch. The distinction is between the power to make the law and the discretion of the executive/administrative branch as to its execution.” *Id.* at 299.

It is not possible to define in advance and without contextual facts, a precise and permanent distinction between the powers of legislative and executive branches. The branches of government are mutually dependent and the acts of one branch may significantly affect the other. *Superior Court v. County of Mendocino*, 13 Cal.4th 45, 52 (1996).

What is clear is that the legislative body makes public policy, enacts laws and has the “power of the purse”. The executive branch cannot disregard legislatively prescribed directives, priorities and limitations pertaining to the use of public funds. *In re Attorney Discipline System*, *supra* 19 Cal.4th 582, 595. The Council cannot invade the administrative service. See *e.g.*, *Hubbard v. City of San Diego*, 55 Cal.App.3d 380, 388 (1976) where the Court of Appeal held that the San Diego City Council could not create a department of city government that duplicated or infringed upon the specific powers and duties assigned by charter to the City Manager, the city’s chief administrative officer, and remove it from the supervision and control of the manager.

Like the State Legislature, the Council has the entire law-making authority of the City.³ What this means is that the City Manager must execute and enforce the laws passed by the Council and administer the City’s financial and other affairs in accordance with the Council’s public policies.

In this case, the City Manager must keep the Council apprised of the financial status of the City and plans to address the budget deficit. Plans to address the deficit must be consistent with clearly established legislative policies. Here, Council has expressed policy in budget resolutions and the Policy Budget and City Manager cannot make cuts in programs in violation of the policy. At any time, the Council could establish a specific policy requiring, for example, that the City Manager obtain Council authorization if budget cuts exceed a certain percentage of the budget, or if the

³ The Council’s law-making authority is subject to constitutional limitations (must involve municipal affairs); Mayor participates in legislative process through tie-breaking authority and his ability to require reconsideration of ordinances that receive five votes on final passage; the people have the power of initiative and referendum.

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proposed cuts eliminate or substantially alter the services and priorities stated in the budget.

When and if the City Council is silent or if its policy direction is unclear, the City Manager has broad authority to manage the City's affairs in a manner consistent with his sound judgment **so long as he keeps the Council advised of the financial status and plans**. The Council then has both legislative and budgetary power which must be respected.

Very truly yours,

JOHN A. RUSSO
City Attorney

Assigned Attorney:
Barbara J. Parker

cc: Mayor Brown
City Manager Bobb

CITY OF OAKLAND

Office of the City Attorney

Addendum Clarifying February 6, 2003 Legal Opinion

TO: President De La Fuente and
Members of the Oakland City Council

FROM: John A. Russo
City Attorney

DATE: June 13, 2003

RE: Addendum Clarifying February 6, 2003 Opinion Regarding City Manager's Powers

I. QUESTIONS

The City Attorney's Office previously provided a legal opinion to the City Council regarding whether, for the purpose of eliminating or reducing a budget deficit, the City Manager has the power without City Council authorization to:

- (1) decline to spend appropriated funds;
- (2) layoff employees when the Council has budgeted funds for their salary/benefits;
- (3) reduce levels of service at fire stations; and/or
- (4) close certain branch libraries.

This addendum clarifies the February 6, 2003 opinion and provides language that will explicitly require that the City Manager obtain City Council authorization prior to taking actions, in order to eliminate or reduce a budget deficit, that would change the priorities, relative funding, programs and/or levels of service established by the City Council's Policy Budget. (A copy of the February 6, 2003 opinion is attached.)

II. BACKGROUND

In this Office's February 6, 2003 opinion, we advised that the City Manager must exercise his administrative powers in accordance with the City Council's policies, legislation and applicable law. The City Charter clearly and unequivocally requires that the City Manager administer the City's administrative affairs under his purview in accord with City Council policy.

City Charter section 207 establishes the Council as the City's governing body. All powers of legislation reside in the Council. The Council adopts the City's budget and sets the compensation for employees, officers and officials. (The City Charter provides exceptions to the Council's compensation-setting authority for certain elected officials and employees.) The City Council, however, has no administrative powers and is expressly prohibited from interfering in the administrative affairs/service of the City. Notwithstanding the prohibition on administrative interference by the Council, the City Charter commands that the City Manager keep the Council *at all times fully advised* as to the City's financial condition and needs. (City Charter § 504.)

We also advised that in the absence of conflicting municipal policy/legislation, the City Manager has the authority to eliminate or reduce a budget deficit by refraining from spending appropriated funds, terminating employees, reducing levels of service at fire stations and/or closing certain branch libraries. These actions are within the scope of the City Manager's administrative powers, which include the judgments and quasi-legislative policy determinations incidental to executing City policies, administering the budget, and managing the City's financial affairs.

Finally, we emphasized that if the City Council had not previously set a clear, specific policy with respect to a particular issue or matter, it could at any time establish a policy with which the City Manager must comply in administering the City's financial and other affairs.

III. CONCLUSION

First, we note that the February 6, 2003 legal opinion was presented in the context of a budget deficit that the City Manager was attempting to eliminate or reduce in accordance with his power and duty "to control and administer the financial affairs of the City". (City Charter § 504(e).) It is only in order to properly and efficiently administer the City's financial affairs that the City Manager would have the authority to propose or implement budget cuts/reductions.

The City Council's FY 2001-03 budget resolutions specifically authorize the City Manager to transfer funds within an Agency, but prohibit transfer of funding from one Agency to another. The City Manager must obtain approval from the Council before he/she, in order to eliminate or reduce a budget deficit, (1) substantially or materially alters the relative agency¹ allocations of funding set out in the Policy Budget, (2) changes the levels of service expressly prioritized and funded by the Policy Budget, or (3) suspends or eliminates entirely programs funded by the Policy Budget.

The Policy Budget expresses the Council's policies and priorities by funding particular programs and levels of service. By adopting the Policy Budget and passing the budget resolution the Council established as a matter of policy the programs, services and the relative allocations of funding for each department/agency and program.

¹ For the purposes of this opinion, departments that do not fall within an agency are considered to be separate agencies.

The following language will specifically require that the City Manager obtain Council approval if he wishes to change the levels of service or programs funded by the Policy Budget or the relative funding of programs/services, departments and agencies:

“RESOLVED: that the policy budget for FY 2003-05 expresses the Council’s policy regarding the levels of service and the programs that the City will provide during FY 2003-05 and the relative funding for such programs/services, departments and agencies; and be it

FURTHER RESOLVED: that the City Manager must obtain approval from the City Council before he/she (1) substantially or materially alters the relative agency¹ allocations of funding set out in the Policy Budget, (2) substantially or materially changes the levels of service expressly prioritized and funded by the Policy Budget, including but not limited to layoffs and/or freezes that would substantially or materially (a) change levels of service or (b) affect programs, or (3) eliminates or suspends entirely programs funded by the Policy Budget; and be it

FURTHER RESOLVED:²

FURTHER RESOLVED: that, notwithstanding the foregoing, the City Manager may exercise his/her discretion so as to reduce across-the-board funding levels and/or implement freezes if the funding reductions/freezes do not materially or substantially change the programs or levels of service established by the Policy Budget; provided that he/she advises the City Council of such action(s) as soon as reasonably possible; and be it

FURTHER RESOLVED: that, subject to the foregoing limitations, the City Manager/Mayor may transfer funding within an Agency, but may not transfer funds between Agencies.”

The City Attorney’s Office is available to craft language for the budget resolution that will assure that the Council’s policy direction is crystal clear and that the City Manager will be

² Should Council decide to identify specific priorities or top priorities, this Office will draft appropriate language for an additional “Further Resolved” that could be added to the Policy Budget resolution.

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obliged to obtain City Council approval prior to implementing any budget reductions or other actions that would conflict with the Council's policies.

Very truly yours,

JOHN A. RUSSO
City Attorney

Attachment: February 6, 2003 legal opinion
Attorney Assigned: Barbara J. Parker

cc: Mayor Brown
City Manager Bobb

President De La Fuente and Members of the Oakland City Council
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bcc: Russo, Morodomi

CITY OF OAKLAND
Office of the City Attorney

Legal Opinion

TO: President Jane Brunner and Members of the City Council

CC: Mayor Ronald V. Dellums
City Administrator Dan Lindheim
City Auditor Courtney Ruby

FROM: City Attorney John Russo

DATE: May 20, 2010

SUBJECT: Adoption of City of Oakland Fiscal 2010-11 Budget Based on Passage of a Future Tax Increase

The City Council is creating a new City Budget for fiscal year 2010-11. As a part of its budget deliberations, the City Council is discussing putting onto the November 2010 ballot for voter approval one or more new tax measures. If approved, the measure or measures will provide new revenue to the City of Oakland.

The City Council has been discussing the adoption of the City's Fiscal Year 2010-2011 Budget based on the projected revenues from one or more tax measures.

The City Charter section 801 requires that the City have a budget "conforming to modern budget practices . . ." and that it adopt by Resolution a budget of proposed expenditure and appropriations for the ensuing year. City Councilmember Ignacio de la Fuente has asked this office whether the City Council can pass a budget that is balanced in part by relying on the outcome of a future election.

Attached is the formal legal opinion of outside counsel, the law firm Richards, Watson, Gershon. The City Attorney's Office adopts this opinion as its own.

In sum, the opinion concludes that it would be legal for the City Council to adopt a Fiscal Year 2010-11 Budget which includes projected revenue from the proposed tax. However, such action involves significant risks and should be

undertaken simultaneously with a proposed contingency budget that will specifically address the revenue shortfall if the tax measure fails. Furthermore, California state constitutional considerations demand that the City carefully monitor its expenses until the result of the November ballot is known.

Very truly yours,



JOHN A. RUSSO
City Attorney

Attorney Assigned:
Mark T. Morodomi



May 17, 2010

RICHARD RICHARDS
(1916-1988)

GLENN R. WATSON
(RETIRED)

HARRY L. GERSHON
(1922-2007)

STEVEN L. DORSEY
WILLIAM L. STRAUSS
MITCHELL E. ABBOTT
GREGORY W. STEPANIGICH
ROCHELLE BROWNE
QUINN M. BARROW
CAROL W. LYNCH
GREGORY M. KUNERT
THOMAS M. JIMBO
ROBERT C. CECCON
STEVEN H. KAUFMANN
KEVIN G. ENNIS
ROBIN D. HARRIS
MICHAEL ESTRADA
LAURENCE S. WIENER
STEVEN R. ORR
B. TILDEN KIM
SASKIA T. ASAMURA
KAYSER O. SUME
PETER M. THORSON
JAMES L. MARKMAN
CRAIG A. STEELE
T. PETER PIERCE
TERENCE R. BOGA
LISA BOND
JANET E. COLESON
ROXANNE M. DIAZ
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ROY A. CLARKE
WILLIAM P. CURLEY III
MICHAEL F. YOSHIBA
REGINA N. DANNER
PAULA GUTIERREZ BAEZA
BRUCE W. GALLOWAY
DIANA K. CHUANG
PATRICK K. BOBKO
NORMAN A. DUPONT
DAVID M. SNOW
LOLLY A. ENRIQUEZ
KIRSTEN R. BOWMAN
BILLY D. DUNSMORE
AMY GREYSON
DEBORAH R. HAKMAN
D. CRAIG FOX
SUSAN E. RUSNAK
G. INDER KHALSA
GINETTA L. GIOVINCO
TRISHA ORTIZ
CANDICE K. LEE
DAVID G. ALDERSON
MELISSA M. CROSTHWATE
MARICELA E. MARROQUIN
GENA M. STINNETT
JENNIFER PETRUSIS
STEVEN L. FLOWER
CHRISTOPHER J. DIAZ
DEBBIE Y. CHO
GEOFFREY WARD
ERIN L. POWERS
TOUSSAINT S. BAILEY
WHITNEY G. McDONALD
SERITA R. YOUNG
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KATRINA C. GONZALES

John Russo
Oakland City Attorney
City Hall, 6th Floor
1 Frank Ogawa Plaza
Oakland, California 94612

Re: Adoption of City of Oakland Fiscal Year 2010-11 Budget Based on
Passage of a Future Tax Increase

Dear John:

We are providing this letter in response to your request for advice on whether the City Council may adopt the City's Fiscal Year 2010-2011 Budget based on the projected revenues from one or more tax measures (the "tax measure") to be submitted to the City's voters at the upcoming November election. This letter summarizes our findings regarding the following questions:

- (1) Is it illegal for the City Council to adopt a Fiscal Year 2010-11 Budget which assumes that the tax measure will be approved by the voters and that the City will be able to collect the revenue from the proposed tax on a timely basis?
- (2) If the City Council indeed decides to include such revenue in the City's Fiscal Year 2010-11 budget, and if the tax measure fails in November, must the City Council take prompt action to amend the Budget?

* * *

I. *It would not be illegal for the City Council to adopt a Fiscal Year 2010-11 Budget which includes projected revenue from the proposed tax. However, such action involves significant risks and should be done with a proposed contingency plan that will specifically address the Budget shortfall if the tax measure fails. Furthermore, State Constitution considerations demand that the City carefully monitor its expenses until the result of the November ballot is known.*

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- A. *Pursuant to the City’s Charter Section 801 and City Council Resolution No. 77922, the City is required to adopt a balanced budget annually and follow the guidelines established by the Government Finance Officers Association (“GFOA”) in its budget practices.*

There is no state law in California requiring a city to adopt a balanced budget each year. Nonetheless, the City is bound by the requirements set forth in Section 801 of its Charter, and Resolution No. 77922, adopted by the City Council on July 15, 2003. Section 801 of the Charter states:

“Each department, office and agency of the City shall provide in the form and at the time directed by the Mayor and City Administrator all information required by them to develop a budget conforming to modern budget practices and procedures as well as specific information which may be prescribed by the Council. Under the direction of the Mayor and Council, the City Administrator shall prepare budget recommendations for the next succeeding fiscal year which the Mayor shall present to the Council, in a form and manner and at a time as the Council may prescribe by resolution. Following public budget hearings, the Council shall adopt by resolution a budget of proposed expenditures and appropriations necessary therefor for the ensuing year, failing which the appropriations for current operations of the last fiscal year shall be deemed effective until the new budget and appropriation measures are adopted.” (Underline added.)

Resolution No. 77922, Section 1, further provides that “[t]he City shall adopt balanced budgets, i.e., containing appropriated revenues equal to appropriated expenditures.”

The Charter does not elaborate on the meaning of “modern budget practices and procedures” in Section 801. However, California municipalities generally follow the budget guidelines established by GFOA. The City of Oakland has recognized this. For example, Resolution No. 77922 expressly recites that the City’s balanced budget policy is based on the recommendations made by GFOA. GFOA’s

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recommendations and guidelines for municipal budget practices are available on its website. GFOA's "Best Practices in Public Budgeting ("GFOA Best Practices") can be found at: <http://www.gfoa.org/services/nacslb/>. We conclude that the City Charter's reference to modern budget practices and procedures should be interpreted consistently with GFOA's budget recommendations and guidelines.

Section 801 further provides that "the Council shall adopt by resolution a budget of proposed expenditures and appropriations necessary therefore for the ensuing year...." Although this language does not use the term "balanced budget" or state explicitly like Section 1 of Resolution 77922 that the Budget must contain appropriated revenues equal to appropriated expenditures, Section 801 nonetheless requires the Council to appropriate sufficient revenues to pay for the budgeted expenditures or in other words adopt a balanced budget. Reading Section 801, the GFOA budget guidelines, and Council Resolution No. 77922 together leave no doubt that the City Council is required to adopt a balanced budget.

B. When developing its annual budget, the City should strive to include revenue projections that are as accurate as possible to the actual outcome. GFOA Best Practices recognize that assumptions may be made regarding revenue projections. However, key assumptions must be highlighted, discussed and considered carefully. Regarding whether to include the projected revenue from the proposed tax, the City should act cautiously in light of its balanced budget policy.

GFOA Best Practices, Practice 9.2 states, in part: "Revenue projections should generally strive for accuracy by coming as close as possible to the actual outcome." However, assumptions regarding projected revenues (as well as expenses) are a necessary part of budgeting that is recognized by GFOA. At this time, the City cannot predict whether the revenue from the proposed tax will be realized, and if so, exactly when and how much of such revenue will be collected. No one can know, with certainty, whether a ballot measure will pass until the votes have been counted after the election.

According to GFOA guidelines, key assumptions incorporated into a budget (such as the inclusion of the projected revenue from the proposed tax) should be highlighted, discussed and considered carefully. GFOA Best Practices, Practice 9.2a notes, in part: "An analysis of major revenue sources should identify factors that

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have influenced historical collections, forecasting assumptions, and any problems or concerns. Any trends should also be identified, along with an analysis of whether or not the trend is likely to continue. The analysis can be summarized in a separate document or used as an input into an overall revenue projection. Significant changes to major revenue sources - projected and actual - should be highlighted in the budget document. (Underline added.) The following statement can be found under Practice 10.1c: “Financial data presented in the budget documents should include comparisons of prior period actual results, current period budget and/or estimated actual results, and budget period projected figures. Key assumptions for revenues and expenditures should be highlighted.” (Underline added.)

GFOA also recommends that a municipal government identify each major revenue source that may be unpredictable. The government should address the impact of this potential volatility and prepare contingency plans, in case that actual outcomes will differ from the assumptions included in the budget. GFOA notes in Practice 4.4a:

“For each major unpredictable revenue source, a government should identify those aspects of the revenue source that make the revenue unpredictable. Most importantly, a government should identify the expected or normal degree of volatility of the revenue source.... A government should decide, in advance, on a set of tentative actions to be taken if one or more of these sources generates revenues substantially higher or lower than projected. The plans should be publicly discussed and used in budget decision making....

Many of the most important revenue sources relied on by state and local governments are unpredictable to some degree. Examples may include intergovernmental revenues, inheritance taxes, taxes on mineral production, interest income, sales and use tax, lottery revenues, and revenues subject to future judicial rulings. These revenues are often used to fund ongoing programs. A financial plan for governments should take into account the unpredictable nature of key revenues. This ensures that a government

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understands the potential impact on its ability to cover service costs and develops contingency plans in advance to address unpredictable revenue fluctuations. Specific allocation and contingency plans do not have to be developed for all unpredictable revenues, but become increasingly necessary as the size or unpredictability of the revenue source increases. This practice may address or refer to a separate policy on the use of stabilization funds.” (Underline added.)

The above comment applies particularly to the analysis regarding whether the City should include the projected revenue from the proposed tax measure. In light of the City’s balanced budget policy, if the City includes the projected revenue from the tax in its Fiscal Year 2010-11 Budget, then the City likely will budget a similar amount of expenditures that it otherwise could not include. In other words, if the tax measure fails in November (or, even if it passes, the actual revenue amount turns out to be less than expected or comes in slower than expected), then the City’s budgeted expenditures will likely exceed the actual revenues. At that point, the City either will have to immediately cut-back on its expenditures or, worse, may face default on some of its obligations, unless the City has a sufficiently large reserve fund to cover the difference. (This also will trigger implications relating to the State constitutional debt limit, which is discussed below).

Therefore, the City will need to consider the potential impact of multiple possibilities – including the passage and the failure of the proposed tax measure – in its budget deliberations. If the City Council decides to include the potential revenue in the Fiscal Year 2010-11 Budget, then contingency plans should be adopted in the event that the voters reject the measure in November or, even if the measure passes, that the timing or the amount of the revenue turn out differently than expected.

A key question is how specific must the proposed contingency plan be with respect to addressing the Budget shortfall that will result if the tax measure fails. In particular due to the balanced budget requirement of the City Charter and Council Resolution No. 77922, the contingency plan should describe the specific actions that the City will take to balance the budget. Simply directing staff to reduce expenditures by the amount of the shortfall would not seem sufficient as the GFOA Best Practices provides that *specific* contingency plans be prepared when the size or unpredictability

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of the revenue source increases. We recommend that a contingency plan be adopted as part of the Budget that addresses specific programs that will be eliminated or curtailed and the levels of staffing cuts that will be necessary by department.

- C. *The adoption of an annual city budget based on certain revenue assumptions (which later turn out to be different from the actual outcomes) does not, in and of itself, violate the law, including California’s constitutional debt limitation (set forth in Cal. Const. Art XVI, Sec. 18). However, if the City decides to include the revenue from the proposed tax measure, it runs a significant risk of triggering such a violation later if the measure fails in November (or if the actual revenue turns out to be less than expected or comes in slower than expected).*

As mentioned, in California, there is no general law requiring a city to annually adopt a budget. The City has self-imposed the requirement – to annually adopt a balanced budget – under City Charter Section 801 and Resolution No. 77922. However, the State Constitution, under Article XVI, Section 18, contains a restriction – on the balancing of a city’s liabilities and revenues during each fiscal year – which effectively requires a city to adopt a balanced budget. This restriction is commonly referred to as the State constitutional debt limit. California Constitution Article XVI, Section 18(a) states, in relevant part:

“No...city...shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose.”

The inclusion of certain revenue or expense assumptions (which later turn out to be different from the actual outcomes) does not, in and of itself, violate the State constitutional debt limit at the time of budget adoption. This is because, generally, the City has not incurred “debt” within the meaning of the State constitutional debt limit by the mere act of adopting the budget. With respect to most budget items (e.g., salaries, utilities, leases), the budgeted expenditure amount is an authorization to spend up to that dollar amount if the liability should become real. An analogy may be made with the so-called “Offner-Dean” exception in public financing (named after

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two California Supreme Court cases: *City of Los Angeles v. Offner*, 19 Cal. 2d 483 (1942) and *Dean v. Kuchel*, 35 Cal. 2d 444 (1950)). California courts have recognized that a city may enter into a long-term, multi-year lease without violating the State constitutional debt limit, if the lease provides, among other things, that (i) the obligation to pay rent each year is contingent on the beneficial use of the leased premises during the year, and (ii) the rent is abated if the use and occupancy is not available. By the mere act of signing such a lease, the City has not yet “incurred debt” (i.e., the immediate and present obligation to pay), in violation of the State constitutional debt limit. Similarly, most budget items, such as the City’s obligation to pay utilities bills, are generally contingent upon the actual usage. Just because the City has budgeted up to a certain dollar amount to pay utilities, the City has not legally obligated itself to pay the utilities companies that exact budgeted amount. Absent some contractual or other legal obligations to which the City is otherwise subject, debt has not been “incurred” by the mere act of including a certain estimated expenditure in its budget.

Furthermore, as recognized by the GFOA, a city’s annual budget necessarily includes certain assumptions regarding revenues and expenditures. The courts have recognized that the adoption of a city’s budget is a legislative function and generally give deference to the judgment of its city council. *Scott v. Common Council of the City of San Bernardino*, 44 Cal. App. 4th 684, 690 (1996); *County of Butte v. Superior Court*, 176 Cal.App.3d 693 (1985). So long as the City follows the GFOA guidelines in developing its budget in accordance with the City Charter, a court will likely find that the City has not violated any law by the mere act of adopting a budget that includes the revenue from the proposed tax measure.

Nonetheless, if the City indeed decides to include the revenue from the proposed tax measure, the City needs to carefully monitor its expenses until the result of the November ballot is known. Discretionary expenditures should be delayed where feasible until after the tax measure is adopted. Even though the City has not “incurred debt” within the meaning of the State constitutional debt limit by merely adopting the budget, the City may subsequently take actions that will actually incur liabilities pursuant to the budget authorization. Without closely monitoring expenses, the City could find itself in this position: By the time it becomes clear that the revenue from the proposed tax measure will not be realized, the City has incurred liabilities that exceed revenues for the fiscal year. At that time, the City will not only

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be in danger of defaulting on its obligations, it would be in violation of the State constitutional debt limit.

To summarize, so long as it follows the GFOA guidelines (including adopting a contingency plan that specifically addresses how the budget will be balanced if the tax measure fails), the City may include the projected revenue from the proposed tax measure in the Fiscal Year 2010-11 Budget. However, if it does so, the City would be undertaking a significant risk of violating the State constitutional debt limit if the measure fails in November (or if the actual revenue turns out to be less than expected or comes in slower than expected).

II. If the City Council decides to include the projected revenue from the proposed tax in the City's annual budget, and if the measure eventually fails at the November election, the City Council should take prompt action to amend the Budget, particularly to avoid incurring expenses which would exceed the City's revenues for Fiscal Year 2010-11 in violation of the State Constitution.

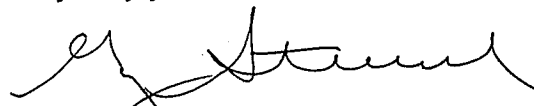
For all of the reasons stated above, if the City Council decides to include revenues from the proposed tax measure in the Fiscal Year 2010-11 Budget, the City Council should take action to amend the Budget as soon as it becomes clear that (a) the measure has failed at the November election, or (b) even if the measure passes, the projected revenue will come in less than expected or slower than expected. GFOA states in GFOA Best Practice, Practice No. 12.1: "A government should watch for significant deviations from expectations and make adjustments [to the budget] so that the plan is consistent with revised expectations." Moreover, the adjustments should be done as promptly as possible to avoid the incurrence of liabilities that would exceed the City's revenues for the fiscal year in violation of the State constitutional debt limit.

* * *

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Hopefully, the above discussion is helpful. If you have any questions or would like further assistance on this matter, please do not hesitate to contact me.

Very truly yours,



Gregory W. Stepanicich

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CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
MEMORANDUM

TO: President Rebecca Kaplan and Members of the City Council

FROM: Barbara J. Parker
City Attorney

DATE: July 13, 2020

RE: **Which Actions are Within the Province of the City Council Under the City Charter Versus the City Administrator or Other City Officers in the Administrative Service**

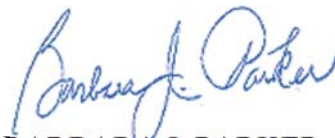
Dear President Kaplan and Members of the City Council:

Please see the attached public legal opinion which responds to questions regarding whether certain actions that may be undertaken in the name of the City constitute “administrative action” that is outside the purview of the Council’s authority.

The opinion addresses the relative powers of the City Council and the City Administrator and other City officers in the administrative service (i.e., Mayor, City Auditor, City Attorney and department heads designated as city officers by ordinance). This is a public opinion because this issue requires interpretation of the City Charter, regarding the relative powers of the City Council and the City Administrator and other city officers in the administrative service.

Like all public opinions, this opinion will be posted on the City Attorney’s web site at www.oaklandcityattorney.org and can be found by clicking on the “Public Legal Opinions” link on the home page.

Very truly yours,



BARBARA J. PARKER
City Attorney


Attachment

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MEMORANDUM

VIA EMAIL

To: Barbara J. Parker, Oakland City Attorney

From: Karen Getman 

Date: July 13, 2020

Re: Which actions are within the province of the City Council under the City Charter versus the City Administrator or other officers in the Administrative Service (i.e., Mayor, City Attorney, City Auditor, and other department heads designated as officers by ordinance)?

QUESTION PRESENTED

Under the Oakland City Charter, the City Council is “the governing body of the City” and is “vested with all powers of legislation in municipal affairs,” but it “shall have no administrative powers.” Charter § 207. The City Administrator is “the chief administrative officer of the City.” *Id.* § 500. The Council and its members are prohibited from “attempt[ing] to coerce or influence the City Administrator or such other officers, in respect to any contract, purchase of any supplies *or any other administrative action . . .*” *Id.* § 218 (emphasis added).

You have asked whether certain actions that may be undertaken in the name of the City constitute “administrative action” that is outside the purview of the Council’s authority.

CONCLUSION

The City Council establishes City policy but that policy is implemented by the City Administrator and, with regard to litigation, by the City Attorney. This means that the Council must authorize such things as leases, contracts and franchises,¹ but the City Administrator executes the Council policy by negotiating the terms and bringing them to the Council for final approval when

¹ Not all contracts require approval from the Council. For example, the City Attorney has authority under the Charter to contract for outside counsel, experts and the like. Charter § 401(6). The Council by ordinance has delegated authority to the City Administrator to execute professional services contracts in an amount up to \$250,000. Mun. Code § 2.04.020. Such authority must be expressly delegated to another official by the charter, ordinance or resolution, however.

required.² The City Attorney represents the City in all litigation, and in that capacity negotiates settlement or dismissal, subject to Council approval.³

ANALYSIS

The Oakland City Charter is the constitution of the City of Oakland, adopted by the voters pursuant to article XI, section 3 of the California Constitution. Intending to take full advantage of the home rule provisions of the state Constitution, the Charter grants the City the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to restrictions and limitations provided for in the Charter. Charter § 106; *see* Cal. Const. art. XI, § 5(a).⁴

Municipal corporations such as the City are not bound to follow strict separation of powers principles,⁵ and thus the Charter determines how power is divided among City officials. “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 Elec., Inc. v. City of L.A.*, 9 Cal. 4th 161, 172 (1994) (citations omitted). The Charter makes the City Council “the governing body of the City” and vests it “with all powers of legislation in municipal affairs adequate to provide a complete system of local government” Charter § 207. Under the Charter, legislation is required for adopting or amending administrative code provisions; establishing, altering or abolishing City agencies, departments and offices; providing for fines or penalties; levying taxes; regulating public utility rates; authorizing loans; buying, or conveying or leasing for longer than one year, city property; amending or repealing an ordinance. *Id.* § 219.

These legislative matters require action by the Council as a body. Charter § 210 (“The affirmative vote of five members of the Council shall be required to adopt any ordinance or resolution, except as otherwise provided by this Charter or by general law.”).⁶ The Council may choose to act by motion, resolution or ordinance, unless a specific form is required for the specific type of action. Charter § 210. However, no individual Councilmember has authority to legislate on behalf of the Council or to otherwise bind the Council.

² The City Attorney must approve all contracts as to form and legality prior to execution. Charter § 401(6).

³ The Council has delegated to the City Attorney the authority to settle claims up to the amount of \$25,000. Resolution No. 86476 C.M.S. The City Attorney also has independent authority under state law to bring certain types of actions in the name of the people. E.g., Cal. Bus. & Prof. Code § 17535; Cal. Penal Code § 11226. The Council also by ordinance may authorize the City Attorney to bring and/or settle actions.

⁴ Matters of state-wide concern remain subject to state legislative control. *T-Mobile West LLC v. City and County of San Francisco*, 6 Cal. 5th 1107, 1116 (2019).

⁵ *See* McQuillin, *Municipal Corporations* § 10.06 (3rd ed.).

⁶ For example, the affirmative vote of at least six Council members is required for an ordinance to take effect immediately. Charter § 216.

Moreover, the Council “shall have no administrative powers.” Charter § 207. Instead, the City Administrator is the “chief administrative officer of the City.” *Id.* § 500. The City Administrator serves under the direction of and “at the pleasure of the Mayor.” *Id.* § 501. The City Administrator “execute[s] and enforce[s] all laws and ordinances and policies of the Council and [] administer[s] the affairs of the City.”⁷ *Id.* § 504(a). He makes recommendations to the Council and “investigate[s] affairs of the City under his supervision,” including the performance of franchises and contracts. *Id.* § 504(c) & (d). He “control[s] and administer[s] the financial affairs of the City,” including preparing the annual budget, although the Council adopts the City budget by resolution. *Id.* §§ 504(e) & (f), 801. The City Administrator prepares plans, specifications, and contracts for work ordered by the Council, supervises purchases of materials and supplies, makes recommendations to the Council in connection with the awarding of public contracts, and ensures that “all City contracts under his direction or that of the Council are faithfully performed.” *Id.* §§ 504(g) & (h), 807. The City Administrator represents the City in intergovernmental relations and “negotiate[s] contracts for joint governmental actions, subject to Council approval.” *Id.* § 504(i). He establishes and maintains financial accounts and controls for the City. *Id.* §§ 805, 810.

In addition to those distinctions listed above, the Charter provides that the Council legislates when it sets by ordinance the conditions and procedures for purchases and contracts, including bid requirements. Charter § 808(a). However, the actual contracting and purchasing of supplies are administrative actions performed by the City Administrator or his designees, as to which the Council is forbidden from attempting to coerce or influence the City Administrator. *Id.* §§ 218, 807.

Thus the Charter clearly separates the legislative and administrative powers and defines what those respective powers are in some areas. To maintain that separation, the Charter forbids the Council and each Council member from interfering with the administrative service for which the City Administrator, Mayor and other appointed or elected officers are responsible. Charter § 218. In addition to not interfering with the City Administrator’s contracting and purchasing authority, this includes not giving orders to any employee under the jurisdiction of the City Administrator and not taking any part in the appointment or removal of city employees and officers. *Id.* Council members who violate section 218, titled “Non-Interference in Administrative Affairs,” are subject to misdemeanor prosecution and forfeiture of office. *Id.*

⁷ The Mayor is the “chief elective officer of the City, responsible for providing leadership and taking issues to the people and marshalling public interest in and support for municipal activity.” Charter § 305. The roles of the Mayor and the City Administrator overlap to the extent, for example, that both play a role in making recommendations to the Council, administering the City’s finances, preparing and presenting the annual budget, and representing the City in intergovernmental relations when directed by the Council. See *Brown v. Fair Political Practices Com.*, 84 Cal. App. 4th 137, 146-47 (2000). Under the Charter, the “crucial distinction” between the Mayor and the City Administrator in that regard is that the latter “operate[s] under the mayor’s direction.” *Id.* at 149 (emphasis in original).

While the Charter is clear that the administrative and legislative functions must remain separate, and draws that line of separation explicitly in some areas, it does not answer where the line is drawn in every circumstance. As a leading treatise notes,

The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence. In other words, if the legislative function is principally law creation, the executive function is chiefly law enforcement. However, the complexities of modern life often impel legislatures to confer on executive and administrative departments the authority to make rules and regulations in order to enforce and achieve the policy intended. . . . [S]o long as the determination of the legislative principle remains within the control of the legislative body, the determination of the secondary structure that insures and assists the establishment of the principle is not legislation.

McQuillin, *Municipal Corporations* § 10.06 (3rd ed.).

Further insight comes from case law construing the powers of initiative and referendum, which are coextensive with the legislative power. “The electorate has the power to initiate legislative acts, but not administrative ones[.]” *Sacks v. City of Oakland*, 190 Cal. App. 4th 1070, 1090 (2010) (quoting *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 399 (2001)). In that context, the courts have held that “[l]egislative acts are those that declare a public purpose whereas administrative, sometimes called adjudicative or quasi-adjudicative, acts implement the steps necessary to carry out that legislative purpose.” *Id.* at 1090 (quoting *Citizens for Planning Responsibly v. County of San Luis Obispo*, 176 Cal. App. 4th 357, 367 (2009)). Thus “[a]n enactment that interferes with the City’s ability to carry out its day-to-day business is not a proper subject of voter power.” *Id.* (quoting *Dunkl*, 86 Cal. App. 4th at 400). Administrative acts are those that “carry out [the City’s] day-to-day business.” *See id.* (interpreting initiative ordinance to articulate the purposes to which bond measure funds were directed, but retaining the City’s administrative discretion to implement the legislation).

With these principles in mind, we address four specific scenarios below.

1. Negotiating real property agreements such as ground leases and development agreements, sale or purchase agreements: The Charter provides that the Council has the authority to lease or sell real property “in accordance with such uniform procedures as it shall adopt by ordinance[.]” Charter § 1001. Thus the Council must authorize and approve the lease or sale, and procedures governing the lease or sale, as a legislative matter. However, the Charter grants the Council no role in implementing the real property transaction. Thus, as with other legislative acts, the policy is set by the Council, but implementation of that policy through the actual negotiation process resides with the City Administrator.

2. Negotiating other types of contracts, including franchise agreements and information technology agreements: This question is squarely addressed by the Charter, which assigns

the role of setting contract parameters to the Council, but requires the City Administrator to implement that policy, including negotiating the actual contract.

Under the Charter, “[t]he Council shall establish by ordinance the conditions and procedures for any purchase or contract, including advertising and bidding requirements” *Id.* § 808(a). Similarly, the Council has “authority to grant or issue franchises, licenses and permits . . . and to provide by ordinance the procedures for the granting or issuing thereof, the taxes, charges, fees or other compensation to be paid therefor and the penalties for the violation thereof.” *Id.* § 1000. “The issuance of a franchise involves the setting, not the implementation, of public policy; it rests on a determination in the first instance as to which private entity is best suited to provide services for the public. Thus, ‘[t]he rule is firmly established that the granting of a franchise by a city or county is a legislative act.’” *Lindelli v. Town of San Anselmo*, 111 Cal. App. 4th 1099, 1113 (2003). “It has long been established that ‘the award of a contract . . . [is] legislative in character.’” *Joint Council of Interns & Residents v. Board of Supervisors*, 210 Cal. App. 3d 1202, 1211 (1989) (citations omitted).

However, the implementation of that legislative decision, including negotiating the specific terms of the contract or franchise, rests with the City Administrator. He (or his designee) “shall purchase or contract for equipment, materials, supplies and public works required by the City in the manner prescribed by ordinance” Charter § 807; *see also Dunkl*, 86 Cal. App. 4th at 390 (determination of contract compliance is an administrative act); *id.* at 402 (invalidating initiative measure that intruded upon contract compliance decisions vested in city administration).

3. Negotiating labor agreements: Labor agreements are a form of contract, and the general rules stated above regarding contracts apply here with particular force, including but not limited to the City Administrator, or other officers in the administrative service, being responsible for actual negotiation of the agreements and conducting the meet and confer process. The Charter assigns to the City Administrator the task of administering the City’s entire workforce, except the employees of the Mayor and other appointed or elected officers of the City.

The City Administrator shall be responsible to the Council for the proper and efficient administration of all affairs of the City under his jurisdiction, and shall, subject to the provisions of Article IX of this Charter and except as otherwise provided in this Charter, have the power to appoint, assign, reassign, discipline and remove all directors or heads of departments and all employees under his jurisdiction. He may delegate to directors or other department heads responsible to him/her the authority to appoint, discipline and remove subordinate employees, subject to the provisions of Article IX of this Charter.

Charter § 503.

Section 900 of the Charter sets forth the personnel policy of the City, which is to establish “a comprehensive personnel system based on merit” Consistent with this policy, section 902 confirms that all “offices and employments in the City government” are part of the competitive civil service except those exempt positions specifically enumerated in the Charter. The

provisions of Article IX are enforced by the Civil Service Board, which is “responsible for the general supervision of the personnel system, without impairment of the responsibility and duty of the City Administrator, department heads and other supervisory personnel to exercise the administrative discretion vested in them by this Charter, or by ordinance.” Charter § 901. We construe this to mean, for example, that the Civil Service Board has no authority to override the administrative authority of the City Administrator over the departments and agencies created by the City Council. See Charter § 600.

Thus in the area of labor relations, as elsewhere, the Council’s authority is legislative in character, and extends to setting policy, but not to implementing that policy. This is consistent with the state law provisions governing local agency/employee relations, which assign to “[t]he *governing body* of a public agency, or such boards, commissions, *administrative officers* or other representatives as may be properly designated by law or by such governing body” the obligation to “meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.” Cal. Gov’t Code § 3505 (emphasis added). State law clearly contemplates that the Council’s role in the meet and confer process is that of the legislative body operating as a whole, setting policies on wages, hours, and terms and conditions. Otherwise, the negotiations are conducted by “administrative officers . . . designated by law,” which here is the City Administrator or his designee.

4. Negotiating settlement of litigation. This involves analysis of the roles of the Council and the City Attorney when the City is a party to litigation. Under the Charter, the City Attorney is the sole attorney for the City, which acts through the Council. Charter §§ 207, 401(6). The Charter mandates that she act as counsel on behalf of the City or any of its officers, boards, commissions, or other agencies in litigation involving any of them in their official capacity. *Id.* § 401(6). She must receive Council authorization to settle or dismiss any litigation brought for or against the City. *Id.*; *but see* exceptions in n.3 *supra*. By implication, and because negotiation is an administrative function, this means the City Attorney conducts settlement negotiations, subject to the direction and approval of the Council. The Council has no authority under the Charter to direct someone other than the City Attorney (or those acting under her direction or control) to represent the City in litigation or in settlement discussions. See *Dadmun v. City of San Diego*, 9 Cal. App. 549, 551 (1908) (voiding city council’s appointment of a special prosecutor to act in lieu of the city attorney; “the city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter and designate another to perform such duties.”).

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