CITY OF OAKLAND

OFFICE OF THE CITY ATTORNEY

PUBLIC LEGAL OPINION

TO: PRESIDENT LARRY REID
AND MEMBERS OF THE CITY COUNCIL

FROM: BARBARA J. PARKER
CITY ATTORNEY

DATE: MARCH 7, 2018

RE: CITY ATTORNEY'S AUTHORITY TO BRING PUBLIC NUISANCE SUITS UNDER STATE LAW

I. INTRODUCTION

There has been some confusion regarding the circumstances in which the City Attorney must obtain Council ratification of lawsuits. This legal opinion addresses the City Attorney's independent authority to file and prosecute public nuisance lawsuits under state law.

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 Attorney related to filing lawsuits.

Like all public opinions, this opinion will be posted on the City Attorney's web site at www.oaklandcityattorney.org.

II. QUESTIONS AND BRIEF ANSWERS

Question No. 1:

What lawsuits does the City Charter require that the City Council ratify?

Brief Answer:

The City Charter requires that the City Attorney seek Council ratification of any lawsuit that the Office initiates on behalf of the City as a party.

Question No. 2:

Does the City Charter's ratification requirement apply to lawsuits the City Attorney files under state public nuisance law?

Brief Answer

No. The City Attorney has independent authority and discretion to file and prosecute public nuisance lawsuits under state law. State public nuisance law authorizes city attorneys to file public nuisance lawsuits on behalf of the People of the State of California. The Charter expressly limits the ratification requirement to causes of action brought on behalf of the City, e.g., when the City is the plaintiff in the lawsuit. Public nuisance suits are brought on behalf of a different party—the People of the State of California—and do not fall under the purview of the Charter requirement. Any contrary reading of the Charter would be inconsistent with its plain language, and would conflict with state nuisance law, which provides that city attorneys *may* bring such suits at their own discretion, but *must* bring suit if the local legislative body directs them to do so.

III. ANALYSIS

A. The Oakland City Charter Gives the City Attorney Authority to Bring Cases in the Name of the City of Oakland, With the Council's Ratification

The Oakland City Charter ("Charter"), section 401(6) ("Powers of the City Attorney"), specifies that:

> *[The City Attorney] may, whenever a cause of action exists in favor of the City, commence legal proceedings, subject to ratification by the City Council, when such action is within the knowledge of the City Attorney, or, he or she shall commence legal proceedings when directed by the City Council.*

By the plain language of this Charter provision, the City Attorney may choose to bring affirmative litigation on the City's behalf whenever a cause of action exists, and must bring such a suit when so directed by the Council. It is a well-settled principle of statutory construction that the word " 'shall' " is ordinarily construed as mandatory, while " 'may' " is generally construed as permissive, "particularly when both terms are used in the same statute." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.) For lawsuits that bring a cause of action on behalf of the City, i.e., when the cause of action "exists in favor of the City", the City of Oakland is the party that brings the lawsuit and is named in the pleadings.

Thus, when the City Attorney chooses to bring an action where the named plaintiff is the City of Oakland, she must seek "ratification" of that decision by the Council. Ratification can be accomplished either by specific Council authorization of a case, usually in closed session, or by passing legislation granting the City Attorney enforcement authority over that particular code section. But the Charter is also only a document of limitation—unless it proscribes an activity, or that activity conflicts with

state law or the federal constitution, such activity is permitted. (*Damar Elec., Inc. v. City of Los Angeles* (1994) 9 Cal. 4th 161, 170-71 ("The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; *and the enumeration of powers does not constitute an exclusion or limitation*")(emphasis added).) The Charter's description of the City Attorney's role, therefore, describes the limits on—and not the sum total of—her authority.

B. State Law Grants the City Attorney Independent Authority to Bring Public Nuisance Cases in The Name of the People of the State of California

Several provisions of state law deputize *all* California city attorneys to bring suit on behalf of the People of the State of California, essentially in the place of the attorney general or other state counsel. (See, e.g., Cal. Bus. & Prof. Code, § 17500 (authorizing false advertising suits); Cal. Penal Code § 11226 (authorizing Red Light Abatement actions).) One such statute is California's public nuisance law (Cal. Code Civ. Proc., § 731), which provides such authority. The public nuisance statute authorizes a civil action to be:

> *"brought in the name of the people of the State of California to abate a public nuisance… by the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists." (Id.)*

The full text of section 731 of the California Code of Civil Procedure is attached to this opinion.

When a city attorney files a state law public nuisance action under section 731, that action is not brought by the City of Oakland as a party. Rather, the city attorney brings the action in the name of the "People of the State of California"—a distinct legal entity from the City. (See, e.g., *People of California, ex rel. Herrera v. Check 'N Go of California, Inc.* (C.A.N.D. 2007) 2007 WL 2406888, *4-5) [when city attorneys bring suit as the People of the State of California under state statutory authority the real party in interest is the state, not the locality].)

State public nuisance law also addresses the interaction between city attorneys acting on behalf of the People of the State of California and their local legislative bodies. Section 731 gives discretion to each enumerated official—including city attorneys—to bring actions on behalf of the People at his or her discretion. ("A civil action *may* be brought … by the city attorney.") That same section also allows local legislative bodies like Oakland's City Council to *direct* that the City Attorney take action: [The] city attorney of any … city in which the nuisance exists shall bring an action whenever … directed by the legislative authority of the town or city." (Cal. Code Civ. Proc. § 731.)

Thus, state public nuisance law deputizes the City Attorney to bring suit on behalf of the People of the State of California—not Oakland—at her own discretion, and *requires* her to do so when such actions are requested by the City Council.

C. The Charter Does Not Require City Council Ratification of State Law Public Nuisance Suits Because the City is Not a Party to Those Suits

In order to determine whether the Charter ratification requirement applies to public nuisance suits brought on behalf of the People of the State of California pursuant to section 731, we first review the question in light of the plain language of that Charter provision. (*San Diego City Firefighters, Local 145, AFL-CIO v. Board of Admin. of San Diego City Employees' Retirement System* (2012) 206 Cal.App.4th 594, 629–30 [interpretation of City charter first relies on plain meaning of the language used].) Here, the plain language of the charter is instructive and clear.

The Charter's ratification provision applies when a "cause of action exists in favor of the City." But as discussed above, state public nuisance actions are brought on behalf of the People of the State of California, and *not* on the City's behalf. And though these actions can—and almost always do—provide a benefit to the City, the party bringing the suit is not the City, but the People. In 2011, the Alameda County Superior Court examined this very issue, and ruled that:

> *The named plaintiff in this action is The People of the State of California ex rel John A. Russo, City Attorney for the City of Oakland. The City Attorney is acting on behalf of the People under his discretionary right to do [so] pursuant to Code of Civil Procedure section 731. Because The City of Oakland is not a party to this action, Section 401(6) of the Charter of the City of Oakland does not apply. (The People of the State v. Nortenos (2011) 2011 WL 5931174.)*

Nor is a ratification requirement consistent with the text of the state statute. As discussed above, the state grants the City Attorney discretion to bring nuisance cases but requires such cases be brought if directed by Council. A reading of the Charter that required such direction before filing *any* public nuisance case would both circumscribe the discretion given by the statute and nullify the requirement to act with legislative direction. "An interpretation that renders statutory language a nullity is obviously to be avoided." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1039.)

Further, requiring Council preauthorization of ratification to bring such suits would contravene the purpose of the state statute. In statutes like section 731, the state has chosen to deputize various local public attorneys to assist it in prosecuting issues of statewide importance. While the City Attorney can—and typically does—notify Council

in closed session before filing high-profile public nuisance cases, such notification is advisory and does not require Council ratification. The state legislature carefully considered whether and how to delegate such duties, and decided *not* to allow a local legislature to veto certain actions on behalf of the People of the State of California. Accordingly, section 731 allows the Council to require the City Attorney to file suit, but not to prevent the filing of nuisance actions.

The Oakland City Charter, which expresses the only limits on the City Attorney's authority, see supra, neither prohibits the filing of actions on behalf of the People of the State of California when authorized by state law, nor requires Council approval for actions brought on behalf of parties other than the City of Oakland. Nor does the City Attorney's representation of the People of the State of California conflict with her ethical duties as counsel for the City of Oakland. Attorneys are permitted to represent multiple clients without written or oral consent so long as no action or potential conflicts are present in that particular matter. (Cal. Rule of Prof. Conduct 3-310.) The cases brought by the City Attorney on behalf of the People of the State of California under a public nuisance theory have , and will continue to benefit the People and of the City of Oakland; because no conflict exists, there is no ethical bar to dual representation of the People's interests alongside or in addition to the City's interests.

IV. CONCLUSION

Section 401(6) of the City Charter requires that the City Attorney obtain Council ratification of actions that she brings on behalf of the City of Oakland. However, actions that the City Attorney brings on behalf of the People of the State of California, pursuant to powers granted to her by state law, are not subject to the ratification requirement because they are brought on behalf of a different party. Thus, the City Attorney is not required to obtain Council ratification of her decision to bring an action under state public nuisance law (Cal. Code Civ. Proc. §731).

Very truly yours,

Barbara J. Parker

BARBARA J. PARKER
City Attorney

Attorney Assigned:
Erin Bernstein

cc: Mayor Libby Schaaf
Sabrina Landreth, City Administrator
LaTonda Simmons, City Clerk

California Code of Civil Procedure Section 731

731. An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as defined in Section 3479 of the Civil Code, and by the judgment in that action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as defined in Section 3480 of the Civil Code, by the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists. Each of those officers shall have concurrent right to bring an action for a public nuisance existing within a town or city. The district attorney, county counsel, or city attorney of any county or city in which the nuisance exists shall bring an action whenever directed by the board of supervisors of the county, or whenever directed by the legislative authority of the town or city.