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**MEMORANDUM**

**To:** Barbara J. Parker  
Oakland City Attorney

**From:** Karen Getman

**Date:** June 14, 2018

**Re:** Authority of City Attorney to Appoint Legal Counsel for the Police Commission and the Community Police Review Agency

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**INTRODUCTION**

You have asked for a legal opinion on the questions below concerning the appointment of legal counsel for the Police Commission and the Community Police Review Agency. In formulating our opinion, we have reviewed the City Charter as amended by Measure LL, an initiative measure approved by the voters in 2016 which established the Police Commission and the Community Police Review Agency; the Title and Summary and Impartial Analysis of Measure LL; the City Attorney's Opinion dated March 19, 2018 regarding Appointing Authority Over Staff to the Oakland Police Commission; a proposed ordinance implementing Measure LL; the Police Commission's April 30, 2018 comments on the proposed ordinance; and relevant case law.

**QUESTIONS AND BRIEF ANSWERS**

**Question No. 1:**

**Does the City Attorney have the authority to select and assign the outside attorney who will serve as legal advisor to the Community Police Review Agency, subject to consultation with the chairperson of the Police Commission?**

**Answer:**

**Yes. The Charter amendments made by Measure LL regarding the Police Commission and the Community Police Review Agency (City Charter Article VI, § 604 et**

**seq.) clearly specify that the City Attorney, after consultation with the chair of the Police Commission, is authorized to select and appoint an outside attorney to serve a limited role as legal advisor to the Community Police Review Agency. The outside attorney will not serve as conflict counsel. Measure LL provides that the legal advisor to the Community Police Review Agency will provide legal services related to investigations and recommended discipline. Charter § 604(e)(1).**

**Question No. 2:**

**Does the City Attorney have the authority to unilaterally select and assign either a deputy city attorney or outside attorney to serve as counsel to the Police Commission and the Community Police Review Agency?**

**Answer:**

**Yes. Measure LL is silent as to the appointment of other counsel to the Police Commission and the Community Police Review Agency, and as such those appointments fall within the broad authority given the City Attorney under the Charter. Accordingly, the City Attorney has authority to assign a deputy city attorney or an outside attorney to advise the Police Commission and the Community Police Review Agency on matters that are not within the limited scope of the outside attorney who will serve as legal advisor to the Community Police Review Agency.**

**ANALYSIS**

In 2016, the voters passed Oakland Measure LL, which amended the Oakland City Charter to create a Police Commission charged with providing civilian oversight of the Police Department, and a Community Police Review Agency (“Agency”) charged with investigating allegations of police misconduct and recommending discipline where appropriate. Oakland City Charter § 604 et seq (hereinafter “Charter”). The measure also dissolved the Community Police Review Board that previously had been authorized by ordinance. *Id.* § 604(e)(2). Both the Police Commission and the Agency have “the functions and duties enumerated in” the Charter, “as well as those assigned . . . by Ordinance.” *Id.* § 604(a)(1) & (2).

As amended, the Charter now requires that the budget for the Commission must be sufficient to provide for the appointment of a “legal advisor” to the Agency. The relevant section reads:

The City shall allocate a sufficient budget for the Commission, including the Agency, to perform its functions and duties as set forth in this section, including budgeting at least one full-time-equivalent non-City Attorney legal advisor that is specifically charged with providing legal services to the Agency related to investigations and recommended discipline. The one full-time-equivalent non-City Attorney legal advisor shall be assigned by the City Attorney after consultation with the Chair of the Commission. The non-City Attorney legal advisor shall not in the regular course of his or her legal practice defend law enforcement officers and shall not participate in, nor serve as counsel to the City or any of its Council members or employees in defense of any lawsuit arising from any incident involving an Oakland police officer.

Charter § 604(e)(1).

The plain language of this Charter amendment is clear: only the City Attorney, in consultation with the Chair of the Police Commission, “assigns” – i.e., selects and appoints – an outside attorney to serve as legal advisor to the Agency. Where the plain language of the Charter is so clear and unequivocal, there is no need to resort to other interpretive aids. *Sacks v. City of Oakland*, 190 Cal. App. 4th 1070, 1082 (2010) (“If we conclude that the statutory meaning is free of doubt, uncertainty, or ambiguity, the language of the statute controls, and our task is completed.”) (quoting *Cummings v. Stanley*, 177 Cal. App. 4th 493, 507-08 (2009)).

This particular outside attorney, or “legal advisor,” has a narrowly delineated role under the Charter: he or she “is specifically charged with providing legal services to the Agency *related to investigations and recommended discipline*.” Charter § 604(e)(1) (emphasis added). Indeed, the narrow scope of the Agency legal advisor’s duties contrasts sharply with the broad role the Charter assigns to the independent Port Attorney, “whose duty it shall be to pass upon the form and legality of all contracts within the jurisdiction of the board, give legal advice to the Board on official matters, defend and (subject to direction from the Board) prosecute or compromise all actions at law or in equity and special proceedings for or against the City or any officers thereof in his official capacity, pertaining to matters within the jurisdiction of the Board.” *Id.* § 706(20). Moreover, unlike the Port Attorney, who can defend or prosecute lawsuits “for or against the City or any officers thereof” pertaining to the Port, the Agency’s legal advisor cannot serve as counsel to the City, the Council Members or any City employees in lawsuits arising from any incident involving an Oakland police officer. *Id.* § 604 (e)(1).

However, the Police Commission and the Agency are likely to require general legal advice and representation on matters common to City boards and commissions, such as interpretations of their enabling statutes, questions about public records and open meetings laws, drafting of contracts and

policies, litigation defense, and the like. The Police Commission has suggested that it be given authority to employ a second non-city attorney, independent of the City Attorney's office, to serve as a legal advisor to the Commission. In our opinion, however, if the Commission and Agency require general legal services, the City Attorney will have sole discretion to assign an attorney to provide those services and to determine whether the attorney will be one employed by her office, or one who contracts with her office. Either way, that legal advisor will be under the direction and control of the City Attorney, and not the Police Commission.

Our conclusion is based on the longstanding principles of statutory construction that apply to the interpretation of city charters. In sum, “[w]e look first to the language of the charter, giving effect to its plain meaning. 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.” *Kreeft v. City of Oakland* 68 Cal. App. 4th 46, 54 (1998), quoting *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171-72 (1994) (citation omitted). Moreover, the Charter must be read as a whole, and each of its provisions “must be construed together so as to give effect to each.” *Waters v. Civil Service Board of City of Oakland*, 133 Cal. App. 2d 733, 737 (1955). In this regard, a specific provision controls over a general one “and the general and special provisions operate together, neither working the repeal of the other.” *Diamond Int'l Corp. v. Boas*, 92 Cal. App. 3d 1015, 1031 (1979) (citations omitted); see *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 173 Cal. App. 4th 13, 19, 22 (2009). Where the Charter explicitly grants authority to an officer or department, and does not expressly grant the same authority to another, the courts assume the voters intended to make that distinction. See, e.g., *Diamond Int'l Corp.*, 92 Cal. App. 3d 1015 (registrar is subject to the budgetary oversight of the chief administrative officer (“CAO”) under the city charter, notwithstanding language granting the registrar exclusive authority over elections, where nothing in the language or design of the charter evidences an intent to exempt the registrar from the CAO's broad authority).

1. Measure LL is silent as to the appointment of an attorney to perform legal work for the Police Commission and the Agency. In that situation, the assumption is that the electorate intended to maintain the existing structure of City government. “We assume the electorate, when enacting [the measure], was aware of preexisting related laws and intended to maintain a consistent body of rules that harmonizes and gives effect to both.” *Sacks*, 190 Cal. App. 4th at 1085 (citations omitted).

2. Under current law, the City Attorney has sole authority to advise the Commission and the Agency. Article IV, section 401(6) of the Charter provides that the elected City Attorney “shall serve as counsel to the Mayor, City Council, and each and every department of the City, except departments specifically enumerated by this Charter as an independent department of the City” and “shall advise all officers, boards, commissions, and other agencies of the City on legal matters referred to him or her.” *Id.* This includes the Police Commission and the Agency, which is designated in the Charter as a department of the City. Charter § 604(e)(8). The City Attorney’s broad authority includes issuing written opinions; drafting ordinances, resolutions, and other legal documents; representing the City and its boards, commissions, and departments in litigation; reviewing for form and legality all City contracts; hiring and supervising all employees of the City Attorney’s office; and employing special legal counsel and other experts. *Id.*

3. The City Attorney’s broad authority over the provision of legal services to the City and its governmental agencies is circumscribed only when a conflict of interest exists, or as explicitly specified in the Charter for independent City departments. Charter, § 401(6). Neither situation is present here. The creation of the Police Commission and the Agency poses no inherent conflict for the City Attorney. Moreover, neither the Police Commission nor the Agency is designated as independent in the Charter. *Compare* Charter § 706 (granting the Board of Port Commissioners “complete and exclusive power . . . for and on behalf of the City” over all Port-related matters), *with id.* § 604.

4. An ordinance implementing Measure LL cannot impede the broad authority of the City Attorney under the Charter. While Measure LL authorizes the Council to “enact legislation or regulations that will further the goals and purposes of this section 604” (Charter § 604(h)), the Measure does not amend or alter the provisions of the Charter that proscribe the City Attorney’s scope of authority, and it cannot give the City Council authority to do so under the guise of implementing the measure. *See Scott v. Common Council*, 44 Cal. App. 4th 684, 695 (1996) (“[T]he city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter[. . .].”) (citation, quotation omitted); *Citizens for Responsible Behavior v. Super. Ct.*, 1 Cal. App. 4th 1013, 1034 (1991) (“While a city charter may be amended by a majority vote of the electorate (Cal. Const., Art. XI, § 3), an ordinance cannot alter or limit the provisions of a city charter.”) (citation omitted); *City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 104 (1988) (“The initiative ordinance as drafted sought to change this discretionary power of the board granted by the charter. Such attempt to *amend* the charter by the proposed initiative measure is patently invalid.”).

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We conclude, therefore, that:

1. The City Attorney must appoint an outside attorney to provide legal assistance to the Agency related to investigations and recommended discipline, subject to consultation with the chairperson of the Police Commission, and

2. The City Attorney has sole discretion to determine how best to provide all other legal services required or requested by the Police Commission and the Agency.

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