

**CITY OF OAKLAND**  
**OFFICE OF THE CITY ATTORNEY**  
**LEGAL OPINION**

**TO: MAYOR LIBBY SCHAAF**

**FROM: BARBARA J. PARKER**  
**CITY ATTORNEY**

**DATE: OCTOBER 20, 2015**

**RE: DOES THE MAYOR HAVE THE AUTHORITY TO ISSUE EXECUTIVE ORDERS?**

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**I. INTRODUCTION**

Mayor Libby Schaaf has asked whether she has the authority to issue executive orders.

**II. QUESTION AND BRIEF ANSWER**

**Question:**

Does the Mayor have the authority to issue executive orders?

**Brief Answer:**

The Mayor has the authority to issue executive orders to the City Administrator, as long as (1) the executive order is within the executive or administrative authority the City Charter confers to the Mayor or the City Council delegates to the Mayor, (2) the executive order does not conflict with the City Administrator's or other City officials' charter-mandated duties, and (3) the executive order does not impinge on the legislative authority that the City Charter grants to the City Council.

### III. ANALYSIS

#### A. Mayors Have Authority To Issue Executive Orders If They Have Executive And Administrative Powers

##### 1. The scope and extent of executive orders

Whether a mayor has power to issue executive orders depends on the scope and extent of the mayor's executive and administrative powers under the applicable city charter.

Mayors in mayor-council forms of government like Oakland usually have a combination of executive powers and administrative powers. Executive power means the power to implement existing laws, such as charter provisions, ordinances or other legislation. This includes the power to adopt rules and regulations to enforce those laws. Administrative power means the power to manage or direct public departments and governmental functions.

As a general principle of municipal law, a mayor who is the chief executive officer of a municipal corporation in a mayor-council form of government has the inherent power to take executive actions as long as those actions do not impinge on the city council's legislative powers, i.e., the authority to make laws. Also, to the extent a city charter grants a mayor administrative powers, s/he has the inherent power to take administrative actions in the exercise of those powers. Thus, a mayor's power to take executive or administrative actions depends on the scope and extent of executive or administrative powers the charter grants to the mayor.

"The powers and duties of the mayor or chief executive rest almost entirely upon the proper construction of the charter and the ordinances or bylaws and municipal regulations passed in pursuance of such authority. . . . A mayor, in the performance of his or her administrative duties, must be accorded discretion and his or her exercise of such duties will be presumed to be valid unless the contrary is clearly shown." (*McQuillin: The Law of Municipal Corporations*, §12:73.)

Cities are free to establish any combination of powers for the mayor, city council, and city administrator/manager under their city charters. Cities are not constrained by the federal or state constitutional systems in determining the powers each branch of local government will have. (*McQuillin* at §10.06.) The strict separation of powers between the executive and the legislative branches embodied in the federal system of government is not constitutionally required for local governments. (13 *Cal Jur 3d* (Rev) Part §101, p. 224.) In cities, 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.*) Therefore, a city's charter determines the roles of the city council, mayor and city manager/administrator. For example, prior to the 1998 Oakland

City Charter amendment that created a “strong mayor” form of government, the Mayor was a member of the City Council, had no administrative or executive powers, and was prohibited from interfering in administrative affairs; the City Manager was the chief executive with responsibility to administer the City’s financial affairs and to enforce and implement the Council’s policies and laws. The 1998 amendment removed the Mayor from the Council and gave the Mayor new executive and administrative powers.<sup>1</sup>

But the mayor’s exercise of executive and administrative powers cannot impinge on the legislative powers the city charter reserves for the city council. “As a member of the executive branch of government, a mayor may not usurp the legislative function by enacting social policies not adopted by the legislative branch.” (*Id.*) However, adoption of administrative and executive rules and regulations such as executive orders, even though such rules have the force of law, does not necessarily constitute legislating if they concern an administrative matter or are simply implementing a legislative enactment:

“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. 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. However, 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.” (*McQuillin* at §10:6.)

Nor can a mayor’s exercise of executive and administrative powers conflict with the charter-mandated duties of other city officials.

## **2. What areas can an executive order address?**

An executive order is an order or regulation that an executive officer issues to a department under the officer’s authority for the purpose of interpreting, implementing, or

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<sup>1</sup> City charters also can impose limitations on an executive officer’s authority. For example, while the Oakland Charter gives the City Attorney broad authority to defend and bring actions, the Charter also requires that the City Attorney secure Council authorization to file and to settle certain types of affirmative litigation. (Charter §401(6).)

giving administrative effect to a law.<sup>2</sup> Couching action in the form of a written order to a department or the executive branch as a whole is simply one way that a city's executive officer can choose to exercise his/her executive duties. (Other ways that an executive officer potentially could exercise his/her executive power include giving directions directly to subordinate staff, either informally or formally, or leading negotiations on the behalf of the city with outside parties. However, as we discuss below, the Oakland City Charter does not grant the Mayor power to direct department/agency heads or subordinate City staff; accordingly the Mayor's executive orders must direct only the City Administrator.)

The case law and internet archives are full of examples of mayors of American cities issuing executive orders:

- New York City. See *Under 21 v. City of New York* (1985) 65 N.Y.2d 344 (executive order banning discrimination on the basis of sexual orientation by city contractors, overturned because it impinges on legislative authority). See also [http://www.nyc.gov/html/records/html/executive\\_orders/executive\\_orders.shtml](http://www.nyc.gov/html/records/html/executive_orders/executive_orders.shtml) ("The Mayor of the City of New York, as the City's Chief Executive Officer, has the authority to issue orders to executive branch agencies, offices, divisions, and bureaus. Generally, these orders concern the implementation of laws and/or mayoral policies.")
- Chicago. See <http://chicityclerk.com/council/exec.php> ("Executive orders are official directives or commands from the Mayor to agencies in the executive branch. These orders generally concern the implementation or enforcement of rules, policies and procedures which have the force of law.")
- Los Angeles. Referred to as "mayoral executive directive", see e.g. [http://www.lamayor.org/executive\\_directive\\_5\\_emergency\\_drought\\_response\\_creating\\_a\\_water\\_wise\\_city](http://www.lamayor.org/executive_directive_5_emergency_drought_response_creating_a_water_wise_city), executive order re emergency drought response.
- Houston. See <http://www.houstontx.gov/policies/exec-orders>.
- Boston. See *White v. Massachusetts Council of Const. Employers, Inc.* (1983) 460 U.S. 204, 103 S. Ct. 1042, 75 L. Ed. 2d 1 (executive order requiring local employment on public works projects, upheld against commerce cause claim).
- Philadelphia. See [www.phila.gov/executiveorders](http://www.phila.gov/executiveorders).

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<sup>2</sup> Definition in Black's Law Dictionary: "**Executive order**. An order or regulation issued by the President or some administrative authority under his direction for the purpose of interpreting, implementing, or giving administrative effect to a provision of the Constitution or of some law or treaty."

- Seattle. See *Leskovar v. Nickels* (2007) 140 Wash. App. 770 (executive order recognizing same sex marriages of city employees, upheld against state preemption claim).
- Memphis. See *Aaron v. City of Memphis* (1971) 63 Tenn. App. 215 (executive order reducing pay of city employees remaining in the pension system, overturned because it violated charter provision prohibiting reductions in pension benefits).
- San Francisco. See *Mullins v. Henderson* (1946) 75 Cal. App. 2d 117 (mayoral “proclamations” regulating operations of municipal railway upheld as proper exercise of the mayor’s wartime emergency powers under charter).
- New Orleans. See [www.nola.gov/mayor/executive-orders](http://www.nola.gov/mayor/executive-orders).
- Pittsburgh. See <http://pittsburghpa.gov/mayor/executive-orders>.
- New Haven. See *State v. Boles* (1967) 5 Conn. Cir. Ct. 22, 240 A.2d 920 (executive order imposing curfew in response to civil unrest, upheld under authority granted to mayors under state law to suppress riots).

We have not examined the charters of all of the foregoing municipalities. But we are aware that the mayors of San Francisco, Los Angeles and New York have broad executive powers under their respective charters, including the authority to hire and fire department/agency heads.

Other chief executives of governmental entities routinely issue executive orders, including the President of the United States (see, e.g., Executive Order 13658, President’s executive order establishing a minimum wage for federal contractors<sup>3</sup>) and the Governor of California (see, e.g., *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989 (Governor’s executive order imposing furloughs on state employees).)

#### **B. The Oakland City Charter Grants The Mayor Broad Executive And Administrative Authority.**

The Oakland Charter reserves exclusively to the Mayor and the City Administrator executive and administrative authority over employees under the City Administrator’s jurisdiction. The City Council has only legislative authority and no

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<sup>3</sup> The presidential power to issue executive orders must stem either from a clause in the Constitution granting power to the President or from a delegation of power by Congress to the President. (*Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 US 579, 585.) See *3 Modern Constitutional Law* at §38:2.

administrative powers. (Charter §§207 and 218.) The Mayor's powers stem from two sources: (1) the functions, powers, and duties that City Charter section 305 specifically assigns to the Mayor; and (2) the Mayor's power to give direction to the City Administrator in the performance of the City Administrator's duties as enumerated in Article V of the City Charter.

### 1. Mayor's enumerated powers.

The powers assigned specifically to the Mayor are enumerated chiefly in section 305 of the Charter.<sup>4</sup> These include the power to prepare and submit budgets, make recommendations to Council on legislation, appoint and remove the City Administrator, and promote economic development. The Mayor is the chief elective officer of the City.

### 2. Mayor's power to direct the City Administrator.

The Charter provides that the City Administrator is the chief administrative officer of the City and grants the City Administrator the authority "to administer the affairs of the City." (Charter §504(a).) The administrative duties of the City Administrator are enumerated chiefly in Section 504 of the Charter.<sup>5</sup> The City Administrator also has executive authority: Charter Section 504(a) gives the City Administrator the power and duty "to execute and enforce all laws and ordinances and policies of the Council."

However, the City Administrator's authority is subject to the Mayor's ultimate executive and administrative authority. Section 304(e) of the Charter grants the Mayor broad authority to "give direction"<sup>6</sup> to the City Administrator. Such direction would pertain to the City Administrator's exercise of his/her executive and administrative duties. Although the Charter does not explicitly identify the Mayor as the "chief executive officer" of the City, given the Mayor's broad power to direct the actions of the

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<sup>4</sup> See also powers of Mayor enumerated in Sections 202 (power to nominate Public Ethics Commissioners); 401(6) (power to request legal opinions or drafts of contracts and legislation by City Attorney); 403 (power to request City Auditor audits); 601 (power to appoint members of boards and commissions, subject to Council confirmation); 702 (power to nominate Port commissioners); and 801 (power to direct preparation and submit City budgets).

<sup>5</sup> See also powers of City Administrator enumerated in Sections 401(6) (power to request legal opinions or drafts of contracts and legislation by City Attorney); 402 (power to appoint or discharge City Clerk); 503 (authority to appoint, assign, reassign, discipline and remove agency directors and employees); 600 (power to administer City departments); 805 (power to establish and maintain financial and accounting systems); 806 (power to approve disbursements of City funds); 807 (power to purchase or contract for goods and services); 810 (power to invest City funds); and 1201 (power to determine incompatible employment).

<sup>6</sup> Definition in Black's Law Dictionary: "**Direction.** The act of governing; management; superintendence."

City Administrator, the Mayor must have ultimate executive authority herself. Therefore, under the Charter, the Mayor has power to take executive and administrative action on behalf of the City by directing the City Administrator to take such actions.

In *Brown v. Fair Political Practices Commission*, 84 Cal.App.4<sup>th</sup> 137 (2000), the California Court of Appeal considered the scope of the Oakland Mayor's executive and administrative powers under the Charter as amended by Measure X, the 1998 voter initiative that created a strong mayor form of government for Oakland. The Court gave specific attention to the "give direction" clause that Measure X added to the Charter, concluding:

"The principal effect of the charter revisions was to establish the mayor as head of the executive branch of city government, with unprecedented authority to control the city manager's administrative functions." (*Id.* at 147.)

In reviewing the question whether the Mayor has ultimate responsibility over the City's executive functions (and thus was within the exception under conflict of interest laws for an official's decision when there is no alternative source of decision making), the Court declared:

"As we have already noted, the fact that the charter assigns many of the same functions to both the city manager and the mayor makes this a difficult case, and the FPPC's conclusion an understandable one. Nevertheless, the crucial distinction between the roles of these two officers is that the charter intends the city manager to operate *under the mayor's direction*. The central feature of Measure X, overwhelmingly approved by Oakland voters, was to make the city manager answerable to the mayor, who in turn is answerable to the voters." (*Id.* at 149.)

Citing to the *Brown* decision in a 2003 legal opinion, this Office concluded that "'Measure X' established the Mayor as the head of the executive branch of the City, with untrammelled power to control the City Manager's administrative functions" and that "the Mayor is the City's chief executive and elective officer." (See City Attorney's February 6, 2003 Legal Opinion to the Oakland City Council re *City Manager's Powers*, at 5<sup>7</sup>.)

For example, the Charter provides that the City Administrator appoints department and agency heads and all other employees under the City Administrator's jurisdiction. The Mayor has authority to direct the City Administrator, and that authority includes the authority to direct the City Administrator to appoint or remove a department/agency director.

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<sup>7</sup> The legal opinion is posted on the City Attorney's website – [oaklandcityattorney.org](http://oaklandcityattorney.org) – under "Opinions and Reports."

However, the Mayor's exercise of executive and administrative powers may not be exercised in a manner that conflicts with the City Administrator's or other City officials' charter mandated duties. For example, the City Charter mandates that the City Administrator execute and enforce all laws and ordinances and policies of the Council and administer the affairs of the City. (City Charter §504(a).) Therefore, the Mayor may not direct the City Administrator to refrain from enforcing a Council ordinance, law or policy.

**C. The Mayor's Broad Executive And Administrative Authority Does Not Extend To The Legislative Power, Which Is Reserved To The City Council**

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The Charter provides that the City Council is the governing body of the City vested with all powers of legislation, i.e., the authority to create "new law," by adopting motions, resolutions or ordinances. (Charter §207.) Thus, the Mayor's exercise of administrative and executive authority may not impinge on the exclusive authority of the Council to make laws.

The clearest test for determining whether an act is legislative or administrative is whether the act requires Council approval under the Charter. "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." (*McQuillin* at §10:6.) For instance, the Charter requires a Council ordinance to provide for a fine or other penalty (Charter §219(2)); therefore, the Mayor could not take action imposing a fine or other penalty, unless the Council by ordinance has delegated the authority to her to impose the fine or penalty.<sup>8</sup>

**D. In Addition To The City Administrator's And Mayor's Charter Powers, Council May Delegate Authority To The City Administrator And the Mayor.**

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As a legislating body, the City Council may, and routinely does, delegate authority to the City Administrator to implement the laws it creates. (*Borum v. Graham* (1935) 4 Cal.App.2d 331, 335-36. See generally *McQuillin* at §10.44<sup>9</sup>.) Such

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<sup>8</sup> While the Council is sometimes described as the chief policymaking body for the City, establishing "policy" does not necessarily equate only with legislative authority. An executive officer may have the authority to establish "policy" for a city. (*Auriemma v. Rice* (1992) 957 F.2d 397, 399.)

<sup>9</sup> "The rule, forbidding the delegation of legislative authority, does not preclude the appointment of officers, agents or employees for the performance of administrative and executive duties in making effective the legislative will, as, for example, in carrying out the police power. It does not deprive a municipality of power to appoint agents to make contracts, and an



delegation may include delegating the authority to negotiate and enter into agreements, take enforcement action, hold administrative hearings, and adopt implementing rules and regulations. Delegation language is typically included in the Council resolution or ordinance. In some cases, the Council delegation provision may simply be restating or affirming the existing authority of the Administrator under the Charter to enforce and administer City laws (e.g., standard language providing that the Administrator “is authorized to take whatever action is necessary with respect to this Resolution and its basic purposes”); in other cases, the Council may be delegating powers it would ordinarily retain without the delegation (e.g., ordinances that authorize the Administrator to enter into certain contracts or real estate transactions under a specified amount without specific Council approval).

Since the Mayor has plenary authority to “direct” the Administrator, any authority delegated to the Administrator by Council is ultimately held by the Mayor, since the Administrator operates under the Mayor’s control and direction.

**E. The Mayor May Issue Executive Orders In Exercising Her Executive And Administrative Authority Under The Charter, Or Council-Delegated Authority.**

The executive authority that the City Charter grants to the Mayor under the Charter by implication allows her to issue executive orders as a means to take executive action, as long as the executive order is not legislative and is within the Mayor’s administrative and executive authority. Also, as noted above, since the Mayor only has power to direct the City Administrator, any executive order must be addressed to the City Administrator, not to department heads or other City officials. And any such order may not conflict with the City Administrator’s charter-mandated duties, such as the duty to enforce all laws and ordinances and policies of the Council and administer the affairs of the City.

The fact that the Charter does not expressly authorize executive orders does not prohibit the issuance of such orders. The Charter simply enumerates powers; it does not purport to provide a comprehensive or exclusive list of the means by which those powers may be exercised. Taking action in the form of issuance of a written executive directive to the City Administrator is simply one way that the chief executive can choose to exercise her executive powers.<sup>10</sup>

A case-by-case review of proposed executive orders is necessary to determine whether a particular executive order is within the Mayor’s executive and administrative

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ordinance may delegate to administrative officers the power to determine when its provisions are being disobeyed.”

<sup>10</sup> The President and the Governor clearly have the power to issue executive orders in the exercise of their respective executive functions, even though neither the US Constitution nor the California Constitution make explicit reference to executive orders.

authority or impinges on the Council's legislative authority. The review should consider, among other things, the following:

- (1) Does the proposed executive order concern a matter encompassed by the Mayor's enumerated powers under the Charter? For instance, does the order fall within the Mayor's power to "encourage programs for the physical, economic, social and cultural development of the City" or "actively promote economic development"?
- (2) Does the proposed executive order direct the City Administrator on a matter encompassed by the City Administrator's enumerated powers under the Charter? For instance, does the order direct the Administrator on a matter related to the control and administration of the financial affairs of the City?
- (3) If the executive order provides direction to the City Administrator regarding a matter that is not encompassed by her enumerated powers, has Council delegated authority to the City Administrator to take the action contemplated by the executive order? (If the City Administrator has delegated authority, the Mayor can issue an executive order directing the Administrator to exercise her delegated authority in a certain way.)
- (4) Does the proposed executive order create a new law, or is it simply implementing an existing law such as a Council ordinance or a provision of the Municipal Code? If the order implements an existing law, it would be akin to an administrative regulation implementing a statute, which generally is considered to be within the authority of administrative officers to adopt "secondary laws". By contrast, an executive order that creates a "primary law" that is within the legislative authority of the Council would not be permissible. See, e.g., *Under 21 v. City of New York* (1985) 65 N.Y.2d 344 (executive order banning discrimination on the basis of sexual orientation by city contractors impinges on legislative authority of the city council because it sets new policy, even though the mayor has authority to set the terms of city contracts).

#### **IV. CONCLUSION**

We conclude that the Mayor has the authority to issue executive orders to the City Administrator, as long as (1) the executive order is within the executive or administrative authority the Charter grants to the Mayor (either under the Mayor's enumerated powers or the Mayor's authority to direct the City Administrator), or the executive order is within the executive or administrative authority the Council has delegated to the Mayor (directly or through delegation to the City Administrator); (2) the executive order does not conflict with the City Administrator's or other City officials' charter-mandated duties; and (3) the executive order does not impinge on the Council's legislative authority under the Charter.

MAYOR LIBBY SCHAAF


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Given the case-by-case analysis that is required to determine whether the Mayor has authority to issue a particular executive order, we strongly recommend that the Mayor consult with the City Attorney prior to issuing any executive orders. We look forward to assisting you in determining whether any proposed executive order meets these criteria.

Very truly yours,

  
BARBARA J. PARKER  
City Attorney

cc: Sabrina Landreth, City Administrator

Attorney Assigned:  
Daniel Rossi

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