

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 untrammelled 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