

# CITY OF OAKLAND

## CITY ATTORNEY'S OFFICE

### LEGAL OPINION

TO: Ronald V. Dellums  
Mayor

FROM: John Russo  
City Attorney

CC: Oakland City Council  
City Administrator  
City Clerk

DATE: August 25, 2009

RE: **Who Has the Power to Make or Confirm Appointments to City Boards and Commissions**

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### INTRODUCTION

In May 2008, the Mayor's office requested a legal opinion regarding the proper appointment process for the Community Policing Advisory Board ("CPAB"). Upon our examination of CPAB appointments, it became clear that the appointment processes for several City boards and commissions do not comply with the City Charter. City Charter Section 601 grants the Mayor the exclusive authority to appoint members of City boards and commissions, and the City Council power to confirm the appointments.

In our opinion dated May 2, 2008 regarding the CPAB, we advised the City Council that this Office would review all of the City's boards and commissions to determine whether their appointment procedures and enabling legislation comply with section 601 of the City Charter. We have completed our review and determined that the appointment processes of several City boards and commissions are not in compliance with Charter Section 601.

### QUESTIONS

1. Does the City Charter allow the City Council to approve a resolution or ordinance that authorizes an appointment process for a City board or commission that deviates from the process outlined in Charter Section 601?

2. Does the City Charter allow the Oakland electorate to enact, by way of a ballot measure, an ordinance that authorizes an appointment process for a City board or commission that deviates from the process outlined in Charter Section 601?

3. Is a City “Committee” that has a long-term mandate, and that serves an “operational, advisory, appellate or rule-making” function, subject to Charter Section 601?

### **SUMMARY CONCLUSIONS**

1. No, the City Charter does not permit the City Council to approve a resolution or ordinance that authorizes someone other than the Mayor to appoint members of City boards or commissions. City Charter Section 601 grants the Mayor the exclusive authority to appoint all members of City boards and commissions and grants the City Council the authority to confirm the appointments.

2. No, the City Charter does not permit the Oakland electorate to enact, via a ballot measure, an ordinance that authorizes someone other than the Mayor to appoint members of City boards or commissions. City Charter Section 601 grants the Mayor the exclusive authority to appoint all members of City boards and commissions and grants the City Council the authority to confirm the appointments.

3. Yes, even though a body may be called a “committee” and not a “board” or “commission,” if it serves an operational, advisory, appellate or rule-making function for the City on a permanent or long-term basis, it is subject to the requirements of Charter Section 601.

Note: This opinion does not require reappointment of sitting board members or commissioners or invalidate their current appointments. This opinion also does not apply to a board or commission that is created by City Charter or federal or state law. A board or commission that is created by City Charter amendment could include in the Charter amendment an appointment procedure that deviates from Charter Section 601. (e.g. Port Board of Commissioners and Kids First! Oversight Board.) In addition, federal or state laws and regulations may determine the composition or appointment procedures for certain boards and commissions. (e.g. Oakland Housing Authority Board of Commissioners and Workforce Investment Board)

### **BACKGROUND**

The appointment processes for several City Boards and Commissions are not in compliance with the process required by Charter Section 601. These boards and commissions were created by ballot measures or City Council resolutions, and ordinances, and are listed in the table below. This is a list of the only boards and commissions that are out of compliance with Charter Section 601, and all but one serve only in an advisory capacity. The City’s major commissions with decision-making authority (such as Planning Commission and Board of Port Commissioners) are in compliance with Charter Section 601.

**APPOINTMENT PROCESSES THAT ARE NOT IN COMPLIANCE WITH THE CITY CHARTER**

Name of Board or Commission	Enabling Legislation	Appointment Process
Business Tax Board of Review	O.M.C. section 5.04.440; Ordinance No. 91777 C.M.S., adopted June 26, 1975 (Section 5-1.54 Oakland Municipal Code).	Mayor nomination and Council appointment for two (2) public members. However, three (3) staff members are appointed by the City Administrator and City Auditor.
Budget Advisory Committee	Resolution No. 74826 C.M.S., adopted March 2, 1999; This Council action consolidated two similar committees: the Citizen's Budget Advisory Committee (created by Ordinance No. 11025 C.M.S., approved on July 26, 1988) and the Business Budget Advisory Committee (created by Ordinance No. 12119 C.M.S. approved on April 1, 1997).	Eight (8) members appointed by City Council. The Mayor appoints three (3) members from a list of recommendations made by the Chamber of Commerce. The Chairperson of the Finance and Management Committee appoints two (2) members. The Chairperson of the Economic Development Committee appoints one (1) member. All appointments subject to approval by the City Council.
Community Policing Advisory Board	Created by Resolution No. 72727 C.M.S., adopted June 11, 1996, as amended by Resolution No. 73185 C.M.S., adopted December 17, 1996, and amended by Resolution No. 73916 C.M.S., adopted November 4, 1997, changing status from task force to official board	Mayor makes three (3) appointments, City Council makes eight (8) appointments, Oakland Housing Authority makes one (1) appointment and Oakland School Board makes one (1) appointment.
Measure Z – Cannabis Regulatory Commission	Created by Measure Z, adopted by the voters on November 2, 2004, in the General Municipal Election. Appointment process established by Ordinance No. 12694 C.M.S., adopted July 19, 2005	The Mayor appoints one (1) community member, each City Councilmember appoints one (1) community member, and the committee shall also include a representative from the City Administrator and City Auditor.
Public Art Advisory Committee	Created by Ordinance No. 11086 C.M.S., adopted February 28, 1989 and Oakland Redevelopment Agency Resolution No. 89-8 C.M.S., adopted February 14, 1989	Nominated by Cultural Affairs Commission, appointed by City Council
Violence Prevention and Public Safety Oversight Committee – Measure Y	Created by Measure Y, adopted by the voters on November 2, 2004, in the General Municipal Election and amended by Ordinance No. 12690 C.M.S., adopted by July 19, 2005, to establish the terms and procedure of Violence Prevention and Public Safety Oversight Committee	The Mayor appoints three (3) community members, each City Councilmember appoints one (1) member.
Wildfire Prevention Assessment District Advisory Board	Created by Resolution No. 78305 C.M.S., adopted January 20, 2004.	Mayor appoints two (2) members who live in Assessment District; one must be a firefighter by profession. At-Large Councilmember appoints one (1) member who lives in Assessment District, Two (2) members who live in Assessment District appointed by each of the four (4) Wildfire Prevention Assessment District Council members.

## ANALYSIS

Section 601 of the City Charter requires that the Council create boards and commissions by ordinance. Section 601 grants the Mayor the exclusive authority to appoint members of boards or commissions and the City Council the authority to confirm the appointments by five affirmative votes. In this section, the division of powers between the legislative and executive functions is clear. The City Council has the authority to create boards and commissions and the Mayor has the power to appoint board and commission members. The Council has the power to block the Mayor's appointments by declining to confirm the Mayor's appointments. The Oakland electorate in enacting City Charter Section 601 decreed that the Mayor and Council must cooperate in the appointment of members of boards and commissions covered by Section 601.

Charter Section 601, entitled "Boards and Commissions" provides in relevant part:

"The Council may create by ordinance such operational, advisory, appellate or rule-making boards and commissions as may be required for the proper operation of any function or agency of the City and prescribe their function, duties, powers, jurisdiction and the number of board and commission members, their terms, compensation and reimbursement for expenses, if any, subject to the provisions of this Article. Members of boards and commissions shall be appointed by the Mayor subject to confirmation by the affirmative vote of five members of the Council . . . however, . . . if the Mayor does not submit for confirmation a candidate to fill the vacancy within 90 days of the date the vacancy first occurred, the Council may fill the vacancy. . . ." (Emphasis added.)

We need only look to the clear and unambiguous language of Section 601 to determine its meaning. "Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use. [*Citations omitted.*] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." *Lungren v. Deukmejian* 45 Cal. 3d 727, 735 (1988). A Council ordinance or resolution "can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the State Constitution." *Hubbard v. City of San Diego*, 55 Cal.App.3d 380, 392 (1976). Amendment of the City Charter by ordinance, resolution or agreement is prohibited.

The City Charter is the City's constitution; it is the supreme law of the City subject only to conflicting provisions in the federal and state Constitutions and preemptive state law. Ordinances must be consistent with the City Charter; otherwise they are void. *Domar Electric, Inc. v. City of Los Angeles* 9 Cal.4<sup>th</sup> 161, 170 (1994). A charter city may not act in conflict with its charter. (*Id.* at p. 171.) Any act that is violative of or not in compliance with the charter is void. (*Ibid.*) See also, *Skaggs v. City of Los Angeles*, 43 Cal.2d 497, 501 (1954); *De Aryan v. Butler*, 119 Cal.App.2d 674, 683 (1953); *Howard Jarvis Taxpayer's Assn. v. City of Roseville*, 106 Cal.App.4<sup>th</sup> 1178, 1186 (2003).

The supremacy of the City Charter is established by the state constitution. California Constitution Article XI sections 3(a) and 5(a) provide: “The provisions of a charter are the law of the State and have the force and effect of legislative enactments.” “City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.” City Charter provisions are controlling in the absence of preemptory state law. *United Public Employees v. City and County of San Francisco*, 190 Cal.App.3d 419, 422 (1987).

The appointment process for the Violence Prevention and Public Safety Oversight Committee (Measure Y) was established by an ordinance enacted by ballot measure, not by City Council ordinance.. Section 601 provides that “[t]he Council may create by ordinance” boards and commissions, and it does not explicitly provide for the creation of a board by ballot measure. However, the power to legislate is shared by the Legislature and the electorate through the initiative process. Cal. Const., art. IV, § 1, *Professional Engineers in California Government v. Kempton*, 40 Cal.4th 1016 (2007). An initiative approved by the voters has the same legal significance as a legislative act taken by the legislative body. *Marblehead v. City of San Clemente*, 226 Cal. App. 3d 1504, 1508 (1991).

Just as any City Council action is subject to the requirements of the City Charter, any ballot measure provision that violates or fails to comply with the City Charter is void. Courts have consistently held that ballot initiatives approved by the voters “...are subject to the same constitutional limitations and rules of construction as are other statutes.’ The same is true when a local initiative is at issue.” *Leshar Communications, Inc. v. City of Walnut Creek* 52 Cal.3d 531, 540 (1990). Just as a Council ordinance must be consistent with the City Charter, an appointment provision in a ballot measure that conflicts with Charter Section 601 is void.<sup>1</sup>

Three of the boards listed above are called “committees,” instead of “boards” or “commissions”: the Budget Advisory Committee, the Public Art Advisory Committee, and the Violence Prevention and Public Safety Oversight Committee (Measure Y). The designation of these entities as “committees” does not exempt them from the requirements of Section 601. These “committees” serve the same functions as boards or commissions. They fall within the scope of Section 601 in that they are “operational, advisory, appellate or rule-making” and are involved in the “proper operation of any function or agency of the City.”

These three “committees” are not short-term, *ad hoc*, or temporary committees. The Budget Advisory Committee has been in existence for ten years, the Public Art Advisory Committee has existed for twenty years, and the Measure Y Committee is a permanent board. Section 601 applies to those bodies with a long-term mandate, as evidenced by its provisions applying to vacancies, holdovers, and terms of office, which are characteristics of boards and commissions that are intended to exist for a long or indefinite period. Since the Budget Advisory Committee, the Public Art Advisory Committee, and the Measure Y Committee serve the same functions as boards or commissions, and were designed to exist in the long term, the

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<sup>1</sup> This does not apply to ballot measures that explicitly amend the Charter.

appointments to each of these “committees” are subject to the requirements of Charter Section 601.

## CONCLUSION

The City Charter authorizes the Council to create boards and commissions by ordinance. The Charter grants the Mayor the exclusive power to appoint members of boards and commissions and it gives the Council the exclusive power to confirm the Mayor’s appointments. Council has the power to veto or reject the Mayor’s appointments by failing to confirm them with five affirmative votes. Because the City Charter is the supreme law of the City, it can be amended only by a vote of the electorate approving an amendment to the Charter, not by the enactment of a mere ordinance. No enactment by the City Council, whether by resolution, motion or ordinance can override the Charter’s dictates; nor does any elected official, City officer or employee have the authority to ignore the City Charter’s requirements. Likewise, a ballot measure (that is not a Charter amendment) is void if it conflicts with the City Charter. A charter city may not act in conflict with its charter and any act that violates the Charter is invalid. Therefore to the extent provisions of those resolutions, ordinances and ballot measures listed above conflict with Charter Section 601, they are void.

Next Steps: The Office of the City Attorney has reviewed all of the City’s boards and commissions to determine whether their appointment procedures and enabling legislation comply with the City Charter and to assure uniformity and consistency regarding the various entities. Attached please find a listing of every city board and commission and its enabling legislation, for your reference. This Office will submit to the Council a report and appropriate legislation correcting the appointment process, either (1) to submit a Charter amendment to the voters to write some or all of the existing appointment processes into the Charter, or (2) to submit legislation to the Council to confirm that some or all of the appointment processes must be made consistent with Charter Section 601. We also will present options to the Council to address two additional recurring issues: (1) term limits and (2) holding over after the end of one’s term.

Whether the above legislative changes occur or not, on a going forward basis, the Mayor must continue to seek Council confirmation of his appointments to the seven boards listed above. And because the Charter grants the Mayor exclusive power to make appointments to these seven boards/commissions, all appointments must come from the Mayor. Of course Councilmembers have the option to make recommendations to the Mayor and request his endorsement of their proposals. This opinion does not require reappointment of sitting board members or commissioners or invalidate their current appointments.

### Legislative Changes:

- The **Budget Advisory Committee**, the **Community Policing Advisory Board** and the **Wildfire Prevention Assessment District Advisory Board** were created by Council Resolution. These boards will need to be created by ordinance, and the appointment processes will need to be: (1) corrected to be consistent with Charter Section 601, or (2) written into the Charter to maintain the existing appointment processes, by way of a Charter amendment presented to the voters.

- The enabling ordinances of the **Business Tax Board of Review** (Ordinance No. 91777 C.M.S.), and the **Public Art Advisory Committee** (Ordinance No. 11086 C.M.S.) will either (1) be corrected to make the appointment process consistent with Charter Section 601, or (2) written into the Charter to maintain the existing appointment processes by way of a Charter amendment.
- The ordinance establishing the appointment process of the **Cannabis Regulatory Commission** (Measure Z) (Ordinance No. 12694 C.M.S.) will either (1) be corrected to make the appointment process consistent with Charter Section 601, or (2) written into the Charter to maintain the existing appointment processes by way of a Charter amendment.
- The appointment process for the **Violence Prevention and Public Safety Oversight Committee** (Measure Y) was established by the voters by ballot measure ordinance, not by Charter amendment. The language of this ordinance can be changed only by the voters. However, any appointment procedures that conflict with the City Charter are void and unenforceable. These appointments must be made in accordance with the requirements of Charter Section 601.

To comply with Section 601, the Mayor will need to make appointments to the seven boards and commissions cited above even if their enabling ordinances or resolutions provide for appointment by an appointing authority other than the Mayor. An orderly transition would be facilitated by consultation by the Mayor and the Councilmember or other entity or individual who is designated in the ordinance or resolution as the “appointing authority.” All Mayoral appointments to City boards and commissions must be confirmed by the City Council regardless of whether an ordinance, resolution or measure provides for an appointment by the Mayor without City Council confirmation.

Very truly yours,

JOHN A. RUSSO  
City Attorney

Attorney Assigned:  
Alix A. Rosenthal

ATTACHMENT:  
Table of Boards and Commissions