

CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
MEMORANDUM

TO: President Rebecca Kaplan and Members of the City Council

FROM: Barbara J. Parker
City Attorney

DATE: July 13, 2020

RE: **Which Actions are Within the Province of the City Council Under the City Charter Versus the City Administrator or Other City Officers in the Administrative Service**

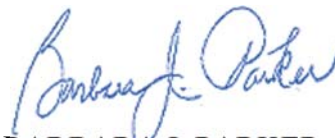
Dear President Kaplan and Members of the City Council:

Please see the attached public legal opinion which responds to questions regarding whether certain actions that may be undertaken in the name of the City constitute “administrative action” that is outside the purview of the Council’s authority.

The opinion addresses the relative powers of the City Council and the City Administrator and other City officers in the administrative service (i.e., Mayor, City Auditor, City Attorney and department heads designated as city officers by ordinance). 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 Administrator and other city officers in the administrative service.

Like all public opinions, this opinion will be posted on the City Attorney’s web site at www.oaklandcityattorney.org and can be found by clicking on the “Public Legal Opinions” link on the home page.

Very truly yours,



BARBARA J. PARKER
City Attorney


Attachment

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MEMORANDUM

VIA EMAIL

To: Barbara J. Parker, Oakland City Attorney

From: Karen Getman 

Date: July 13, 2020

Re: Which actions are within the province of the City Council under the City Charter versus the City Administrator or other officers in the Administrative Service (i.e., Mayor, City Attorney, City Auditor, and other department heads designated as officers by ordinance)?

QUESTION PRESENTED

Under the Oakland City Charter, the City Council is “the governing body of the City” and is “vested with all powers of legislation in municipal affairs,” but it “shall have no administrative powers.” Charter § 207. The City Administrator is “the chief administrative officer of the City.” *Id.* § 500. The Council and its members are prohibited from “attempt[ing] to coerce or influence the City Administrator or such other officers, in respect to any contract, purchase of any supplies *or any other administrative action . . .*” *Id.* § 218 (emphasis added).

You have asked whether certain actions that may be undertaken in the name of the City constitute “administrative action” that is outside the purview of the Council’s authority.

CONCLUSION

The City Council establishes City policy but that policy is implemented by the City Administrator and, with regard to litigation, by the City Attorney. This means that the Council must authorize such things as leases, contracts and franchises,¹ but the City Administrator executes the Council policy by negotiating the terms and bringing them to the Council for final approval when

¹ Not all contracts require approval from the Council. For example, the City Attorney has authority under the Charter to contract for outside counsel, experts and the like. Charter § 401(6). The Council by ordinance has delegated authority to the City Administrator to execute professional services contracts in an amount up to \$250,000. Mun. Code § 2.04.020. Such authority must be expressly delegated to another official by the charter, ordinance or resolution, however.

required.² The City Attorney represents the City in all litigation, and in that capacity negotiates settlement or dismissal, subject to Council approval.³

ANALYSIS

The Oakland City Charter is the constitution of the City of Oakland, adopted by the voters pursuant to article XI, section 3 of the California Constitution. Intending to take full advantage of the home rule provisions of the state Constitution, the Charter grants the City the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to restrictions and limitations provided for in the Charter. Charter § 106; *see* Cal. Const. art. XI, § 5(a).⁴

Municipal corporations such as the City are not bound to follow strict separation of powers principles,⁵ and thus the Charter determines how power is divided among City officials. “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.” *Domar Elec., Inc. v. City of L.A.*, 9 Cal. 4th 161, 172 (1994) (citations omitted). The Charter makes the City Council “the governing body of the City” and vests it “with all powers of legislation in municipal affairs adequate to provide a complete system of local government” Charter § 207. Under the Charter, legislation is required for adopting or amending administrative code provisions; establishing, altering or abolishing City agencies, departments and offices; providing for fines or penalties; levying taxes; regulating public utility rates; authorizing loans; buying, or conveying or leasing for longer than one year, city property; amending or repealing an ordinance. *Id.* § 219.

These legislative matters require action by the Council as a body. Charter § 210 (“The affirmative vote of five members of the Council shall be required to adopt any ordinance or resolution, except as otherwise provided by this Charter or by general law.”).⁶ The Council may choose to act by motion, resolution or ordinance, unless a specific form is required for the specific type of action. Charter § 210. However, no individual Councilmember has authority to legislate on behalf of the Council or to otherwise bind the Council.

² The City Attorney must approve all contracts as to form and legality prior to execution. Charter § 401(6).

³ The Council has delegated to the City Attorney the authority to settle claims up to the amount of \$25,000. Resolution No. 86476 C.M.S. The City Attorney also has independent authority under state law to bring certain types of actions in the name of the people. E.g., Cal. Bus. & Prof. Code § 17535; Cal. Penal Code § 11226. The Council also by ordinance may authorize the City Attorney to bring and/or settle actions.

⁴ Matters of state-wide concern remain subject to state legislative control. *T-Mobile West LLC v. City and County of San Francisco*, 6 Cal. 5th 1107, 1116 (2019).

⁵ *See* McQuillin, *Municipal Corporations* § 10.06 (3rd ed.).

⁶ For example, the affirmative vote of at least six Council members is required for an ordinance to take effect immediately. Charter § 216.

Moreover, the Council “shall have no administrative powers.” Charter § 207. Instead, the City Administrator is the “chief administrative officer of the City.” *Id.* § 500. The City Administrator serves under the direction of and “at the pleasure of the Mayor.” *Id.* § 501. The City Administrator “execute[s] and enforce[s] all laws and ordinances and policies of the Council and [] administer[s] the affairs of the City.”⁷ *Id.* § 504(a). He makes recommendations to the Council and “investigate[s] affairs of the City under his supervision,” including the performance of franchises and contracts. *Id.* § 504(c) & (d). He “control[s] and administer[s] the financial affairs of the City,” including preparing the annual budget, although the Council adopts the City budget by resolution. *Id.* §§ 504(e) & (f), 801. The City Administrator prepares plans, specifications, and contracts for work ordered by the Council, supervises purchases of materials and supplies, makes recommendations to the Council in connection with the awarding of public contracts, and ensures that “all City contracts under his direction or that of the Council are faithfully performed.” *Id.* §§ 504(g) & (h), 807. The City Administrator represents the City in intergovernmental relations and “negotiate[s] contracts for joint governmental actions, subject to Council approval.” *Id.* § 504(i). He establishes and maintains financial accounts and controls for the City. *Id.* §§ 805, 810.

In addition to those distinctions listed above, the Charter provides that the Council legislates when it sets by ordinance the conditions and procedures for purchases and contracts, including bid requirements. Charter § 808(a). However, the actual contracting and purchasing of supplies are administrative actions performed by the City Administrator or his designees, as to which the Council is forbidden from attempting to coerce or influence the City Administrator. *Id.* §§ 218, 807.

Thus the Charter clearly separates the legislative and administrative powers and defines what those respective powers are in some areas. To maintain that separation, the Charter forbids the Council and each Council member from interfering with the administrative service for which the City Administrator, Mayor and other appointed or elected officers are responsible. Charter § 218. In addition to not interfering with the City Administrator’s contracting and purchasing authority, this includes not giving orders to any employee under the jurisdiction of the City Administrator and not taking any part in the appointment or removal of city employees and officers. *Id.* Council members who violate section 218, titled “Non-Interference in Administrative Affairs,” are subject to misdemeanor prosecution and forfeiture of office. *Id.*

⁷ The Mayor is the “chief elective officer of the City, responsible for providing leadership and taking issues to the people and marshalling public interest in and support for municipal activity.” Charter § 305. The roles of the Mayor and the City Administrator overlap to the extent, for example, that both play a role in making recommendations to the Council, administering the City’s finances, preparing and presenting the annual budget, and representing the City in intergovernmental relations when directed by the Council. See *Brown v. Fair Political Practices Com.*, 84 Cal. App. 4th 137, 146-47 (2000). Under the Charter, the “crucial distinction” between the Mayor and the City Administrator in that regard is that the latter “operate[s] under the mayor’s direction.” *Id.* at 149 (emphasis in original).

While the Charter is clear that the administrative and legislative functions must remain separate, and draws that line of separation explicitly in some areas, it does not answer where the line is drawn in every circumstance. As a leading treatise notes,

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. . . . [S]o 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, *Municipal Corporations* § 10.06 (3rd ed.).

Further insight comes from case law construing the powers of initiative and referendum, which are coextensive with the legislative power. “The electorate has the power to initiate legislative acts, but not administrative ones[.]” *Sacks v. City of Oakland*, 190 Cal. App. 4th 1070, 1090 (2010) (quoting *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 399 (2001)). In that context, the courts have held that “[l]egislative acts are those that declare a public purpose whereas administrative, sometimes called adjudicative or quasi-adjudicative, acts implement the steps necessary to carry out that legislative purpose.” *Id.* at 1090 (quoting *Citizens for Planning Responsibly v. County of San Luis Obispo*, 176 Cal. App. 4th 357, 367 (2009)). Thus “[a]n enactment that interferes with the City’s ability to carry out its day-to-day business is not a proper subject of voter power.” *Id.* (quoting *Dunkl*, 86 Cal. App. 4th at 400). Administrative acts are those that “carry out [the City’s] day-to-day business.” *See id.* (interpreting initiative ordinance to articulate the purposes to which bond measure funds were directed, but retaining the City’s administrative discretion to implement the legislation).

With these principles in mind, we address four specific scenarios below.

1. Negotiating real property agreements such as ground leases and development agreements, sale or purchase agreements: The Charter provides that the Council has the authority to lease or sell real property “in accordance with such uniform procedures as it shall adopt by ordinance[.]” Charter § 1001. Thus the Council must authorize and approve the lease or sale, and procedures governing the lease or sale, as a legislative matter. However, the Charter grants the Council no role in implementing the real property transaction. Thus, as with other legislative acts, the policy is set by the Council, but implementation of that policy through the actual negotiation process resides with the City Administrator.

2. Negotiating other types of contracts, including franchise agreements and information technology agreements: This question is squarely addressed by the Charter, which assigns

the role of setting contract parameters to the Council, but requires the City Administrator to implement that policy, including negotiating the actual contract.

Under the Charter, “[t]he Council shall establish by ordinance the conditions and procedures for any purchase or contract, including advertising and bidding requirements” *Id.* § 808(a). Similarly, the Council has “authority to grant or issue franchises, licenses and permits . . . and to provide by ordinance the procedures for the granting or issuing thereof, the taxes, charges, fees or other compensation to be paid therefor and the penalties for the violation thereof.” *Id.* § 1000. “The issuance of a franchise involves the setting, not the implementation, of public policy; it rests on a determination in the first instance as to which private entity is best suited to provide services for the public. Thus, ‘[t]he rule is firmly established that the granting of a franchise by a city or county is a legislative act.’” *Lindelli v. Town of San Anselmo*, 111 Cal. App. 4th 1099, 1113 (2003). “It has long been established that ‘the award of a contract . . . [is] legislative in character.’” *Joint Council of Interns & Residents v. Board of Supervisors*, 210 Cal. App. 3d 1202, 1211 (1989) (citations omitted).

However, the implementation of that legislative decision, including negotiating the specific terms of the contract or franchise, rests with the City Administrator. He (or his designee) “shall purchase or contract for equipment, materials, supplies and public works required by the City in the manner prescribed by ordinance” Charter § 807; *see also Dunkl*, 86 Cal. App. 4th at 390 (determination of contract compliance is an administrative act); *id.* at 402 (invalidating initiative measure that intruded upon contract compliance decisions vested in city administration).

3. Negotiating labor agreements: Labor agreements are a form of contract, and the general rules stated above regarding contracts apply here with particular force, including but not limited to the City Administrator, or other officers in the administrative service, being responsible for actual negotiation of the agreements and conducting the meet and confer process. The Charter assigns to the City Administrator the task of administering the City’s entire workforce, except the employees of the Mayor and other appointed or elected officers of the City.

The City Administrator 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. He may delegate to directors or other department heads responsible to him/her the authority to appoint, discipline and remove subordinate employees, subject to the provisions of Article IX of this Charter.

Charter § 503.

Section 900 of the Charter sets forth the personnel policy of the City, which is to establish “a comprehensive personnel system based on merit” Consistent with this policy, section 902 confirms that all “offices and employments in the City government” are part of the competitive civil service except those exempt positions specifically enumerated in the Charter. The

provisions of Article IX are enforced by the Civil Service Board, which is “responsible for the general supervision of the personnel system, without impairment of the responsibility and duty of the City Administrator, department heads and other supervisory personnel to exercise the administrative discretion vested in them by this Charter, or by ordinance.” Charter § 901. We construe this to mean, for example, that the Civil Service Board has no authority to override the administrative authority of the City Administrator over the departments and agencies created by the City Council. See Charter § 600.

Thus in the area of labor relations, as elsewhere, the Council’s authority is legislative in character, and extends to setting policy, but not to implementing that policy. This is consistent with the state law provisions governing local agency/employee relations, which assign to “[t]he *governing body* of a public agency, or such boards, commissions, *administrative officers* or other representatives as may be properly designated by law or by such governing body” the obligation to “meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.” Cal. Gov’t Code § 3505 (emphasis added). State law clearly contemplates that the Council’s role in the meet and confer process is that of the legislative body operating as a whole, setting policies on wages, hours, and terms and conditions. Otherwise, the negotiations are conducted by “administrative officers . . . designated by law,” which here is the City Administrator or his designee.

4. Negotiating settlement of litigation. This involves analysis of the roles of the Council and the City Attorney when the City is a party to litigation. Under the Charter, the City Attorney is the sole attorney for the City, which acts through the Council. Charter §§ 207, 401(6). The Charter mandates that she act as counsel on behalf of the City or any of its officers, boards, commissions, or other agencies in litigation involving any of them in their official capacity. *Id.* § 401(6). She must receive Council authorization to settle or dismiss any litigation brought for or against the City. *Id.*; but see exceptions in n.3 *supra*. By implication, and because negotiation is an administrative function, this means the City Attorney conducts settlement negotiations, subject to the direction and approval of the Council. The Council has no authority under the Charter to direct someone other than the City Attorney (or those acting under her direction or control) to represent the City in litigation or in settlement discussions. See *Dadmun v. City of San Diego*, 9 Cal. App. 549, 551 (1908) (voiding city council’s appointment of a special prosecutor to act in lieu of the city attorney; “the city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter and designate another to perform such duties.”).