

CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
MEMORANDUM

TO: Members of the Public

FROM: City Attorney Barbara J. Parker

DATE: June 7, 2021 Council Retreat – City Attorney’s PowerPoint Presentation

RE: **City Attorney PowerPoint Presentation At June 7, 2021 Council Retreat**

- **Who Does City Attorney Represent, Who Is The “Client”?**
- **What Role Does The City Attorney Play As An Initiator Of Policy And Programs?**
- **Where Are The Tensions And Frustrations On The Implementation Side And How Can They Be Resolved? Examples?**

The City Attorney presented the attached Power Point Presentation to the City Council at it June 7, 2021 retreat.

The retreat agenda includes the following item with the topics the City Attorney was asked to address highlighted in yellow:

12:30 p.m. **How We Get Things Done: Moving from Advocacy and Policymaking to Implementation**

City Council and Mayor:

- How does the Council work with the Mayor and her office?
- How can there be a more structured approach to create more consistent, clear, proactive communications and coordination?

City Council and City Administrator/City Staff:*

- How does the Council work with City staff on constituent issues and policy making, given limited interactions and the mandates of the City Charter?
- How do we get better on implementing our priorities, policies and budget allocations?

- Where are the tensions and frustrations on the implementation side and how can they to be resolved? Examples?

President Fortunato Bas and Members of the Council

June 7, 2021

RE: City Attorney PowerPoint Presentation at June 7, 2021 Council Retreat

- **Who does the City Attorney represent? Who is the “Client”?**
- **What role does the City attorney play as an initiator of policy and programs?**
- **Where do the tensions and frustrations exist and how can they be resolved?**

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City Council and City Attorney:

- **Who does the City Attorney represent? Who is the “client”?**
- **What role does the City Attorney play as an initiator of policy and programs?**
- **Where do the tensions and frustrations exist and how can they be resolved?**

The City Attorney made the attached PowerPoint presentation under the above agenda item during the Council’s retreat. A full copy of the June 7, 2021 Council retreat agenda is attached to the power point presentation.

This memorandum and the City Attorney’s PowerPoint presentation are posted on the City Attorney’s website - www.oaklandcityattorney.org - under the link “Public Legal Opinions and Public Records.”

Very truly yours,



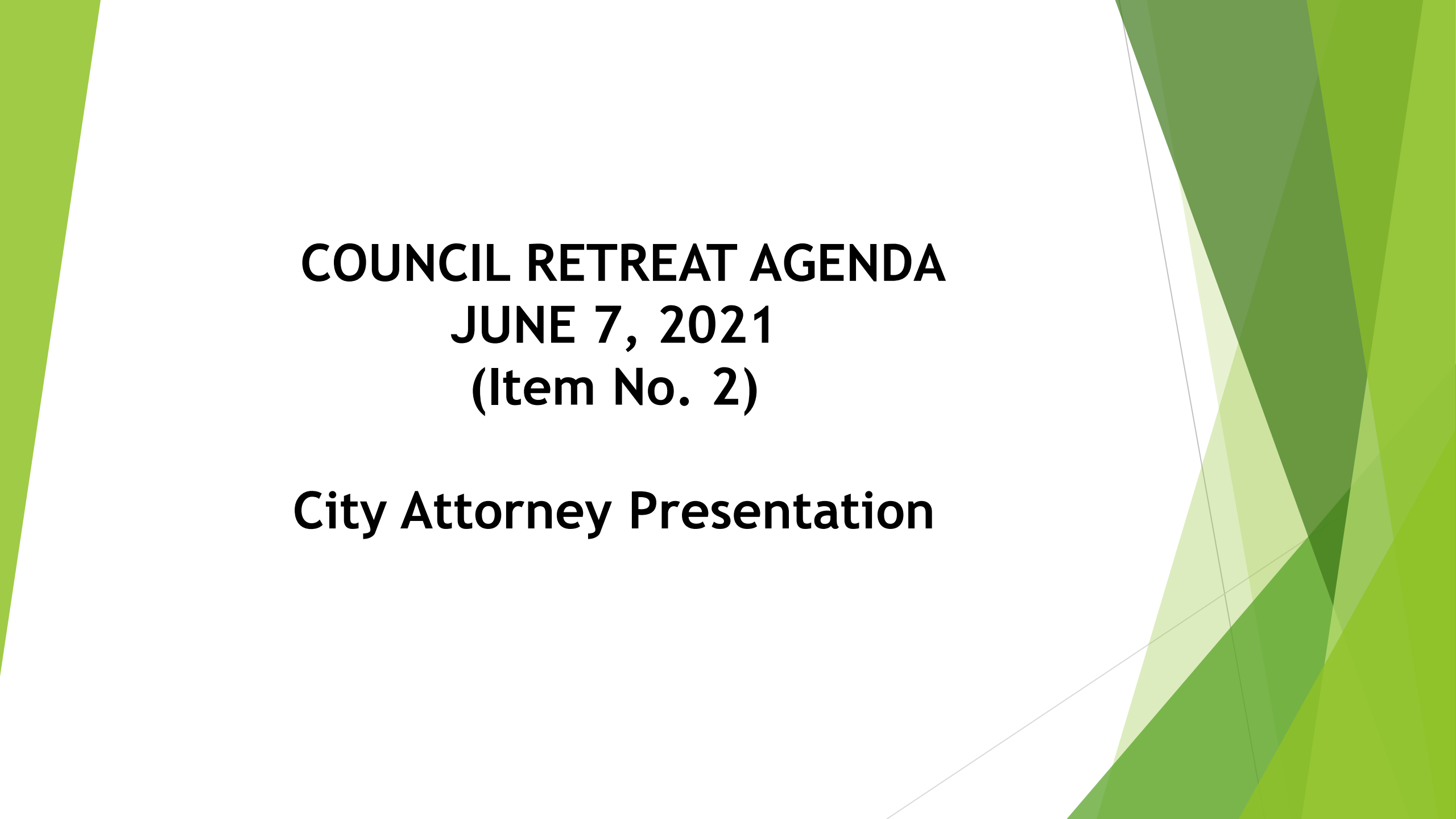
BARBARA J. PARKER
City Attorney

Attachments:

City Attorney’s Power Point Presentation - June 7, 2021 Council Retreat

Copy of June 7, 2021 Council Retreat Agenda

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**COUNCIL RETREAT AGENDA
JUNE 7, 2021
(Item No. 2)**

City Attorney Presentation

COUNCIL RETREAT AGENDA - June 7, 2021

▶ ITEM NO. 2

- ▶ **Subject: 2021 Council Retreat**
- ▶ **From: Council President Fortunato Bas**
- ▶ **Recommendation: A Discussion And Potential Action On Council Priorities, Including But Not Limited To Implementation And Evaluation, And Collaborative Approaches To Working Via Council Committees And Across City Branches of Government, For Fiscal Year 2021-23 Budgeting Process Following Facilitated Discussion On The Same**
- ▶ **NOTE: A copy of the Council Retreat Agenda is attached as Exhibit 1 to this Power Point presentation**

COUNCIL RETREAT - JUNE 7, 2021

SUBJECTS

- I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”?**
- II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED?**
- III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS?**

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”?

In the traditional individual party sense, the “client” is the individual who retains the attorney to provide representation on a matter.

When the “client” is an entity, such as an organization or corporation, the client is the entity itself not individuals.

The City Attorney’s “client” is determined by the Charter, court decisions and by the Rules of Professional Conduct that prescribe all California attorneys’ ethical obligations.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

- THE CITY OF OAKLAND - A MUNICIPAL CORPORATION

The City Attorney’s “Client” clearly is

The “City of Oakland” as an entity, which is a Municipal Corporation

California Rules of Professional Conduct Rule 1.13 **Organization as Client**
(a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

Under the plain terms of the Charter, the City Attorney is the City’s only attorney. The City Attorney is uniquely empowered to provide legal services to the entire municipal corporation and its officers and employees, acting in their official capacities, “pursuant to state law and the Charter.” Charter § 401(6).

Exceptions must be explicitly provided in the Charter. Exceptions: Port Department has its own attorney (Charter Article VII); November 2020 Charter amendments grant Police Commission the authority to hire or contract to retain its own attorney. (Charter § 604.)

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

City Attorney’s Client Is The City Itself; City Atty Doesn’t Represent Individual Councilmembers Or Other Officers Except In Their Official Capacities; City, Not Any Particular Officeholder Holds The Attorney-client Privilege

See Cal. State Bar Com. Prof. Responsibility, Formal Opn. No. 2001-156, 2001 CA Legal Ethics Ops. LEXIS 5, *7 (“[A]n attorney for a governmental entity usually has only one client, namely, the entity itself, which acts through constituent sub-entities and officials”); *Creighton v. City of Santa Monica*, 160 Cal. App. 3d 1101, 1021 (1984) (recognizing that the city council and its members constitute “the client” whom the city attorney represents in litigation); see also Cal. Gov’t Code § 41801 (“The city attorney shall advise the city officials in all legal matters pertaining to city business.”); Cal. Rules Prof. Conduct, Rule 1.13 (“Organization as Client”) (stating that “the client is the organization itself”).

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

THE CITY AS CLIENT SPEAKS TYPICALLY THROUGH THE CITY COUNCIL, WHICH IS THE GOVERNING BODY OF THE CITY VESTED WITH ITS CORPORATE POWERS, INCLUDING THE POWER TO LEGISLATE.

NOTABLY, COUNCIL HAS NO ADMINISTRATIVE POWERS (CHARTER § 207) AND CANNOT INTERFERE IN ADMINISTRATIVE AFFAIRS (Charter § 218.) For this reason, the City speaks through the Mayor, City Administrator and other officers regarding administrative affairs.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

The Charter Provides That In This Role, I.E., As The City Attorney For The Municipal Corporation, The City Attorney Has Certain Mandatory Responsibilities, Including But Not Limited To:

- The City Attorney is required to 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. Charter § 401(6).
- The City Attorney “shall” obtain Council authorization for any settlement or dismissal of litigation where the City or one of its constituent sub-entities is a party. Charter § 401(6).

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

The Charter Provides That In This Role, I.E., As The City Attorney For The Municipal Corporation, The City Attorney Has Certain Mandatory Responsibilities, Including But Not Limited To: (Cont.)

- The City Attorney “shall” commence legal proceedings when directed by the City Council. Id.
- The City Attorney may commence lawsuits on behalf of the City subject to Council ratification. Ratification can be accomplished either by specific Council authorization of a case, usually in closed session, or by Council passing legislation granting the City Attorney enforcement authority over a particular code section. Id.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

The Charter Provides That In This Role, I.E., As The City Attorney For The Municipal Corporation, The City Attorney Has Certain Mandatory Responsibilities, Including But Not Limited To: (Cont.)

- The City Attorney must pass on the form and legality of all contracts of the City before the same are executed. Charter § 401(6).
- The City Attorney has executive command of the office, including the responsibility for appointing, disciplining, and removing all employees who work under the City Attorney subject to the provisions of Article IX of the Charter. Charter § 401(6).

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

THE CITY ATTORNEY ADVISES MEMBERS OF COUNCIL, THE MAYOR, THE CITY ADMINISTRATOR, CITY AUDITOR, THE CITY CLERK AND THEIR SUBORDINATES ONLY IN THEIR OFFICIAL CAPACITIES AND NEVER INDIVIDUALLY

As noted above the attorney-client privilege is held by the organization itself; accordingly, City Attorney has a duty to share with the Council advice/communications with individual Councilmembers.

For example, when a Councilmember, the Mayor or the City Administrator requests a legal opinion regarding a proposed policy or law or program, the City Attorney maintains confidentiality of that request and provides the opinion to that individual; and the City Attorney does not disclose to other Councilmembers, the City Administrator or the Mayor that the request has been made.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

EXCEPTIONS:

HOWEVER, WHEN THE POLICY OR LAW OR PROGRAM IS COMING BEFORE THE COUNCIL, THE CITY ATTORNEY IS OBLIGATED TO PROVIDE THE OPINION/ADVICE TO THE FULL COUNCIL BEFORE THE COUNCIL ACTS SO THAT IT IS INFORMED OF THE LEGAL ISSUES/APPLICABLE LAW/RISKS.

THE CITY ATTORNEY ALSO HAS A DUTY TO BRING ISSUES/INFORMATION UP THE CHAIN OF COMMAND IF THE CITY ATTORNEY BECOMES AWARE OF A CONFLICT OF INTEREST OR ILLEGAL ACTION OR PLAN OF ACTION; OR IF THE CITY ATTORNEY DETERMINES THAT DISCLOSURE IS ADVISABLE BASED ON THE CITY ATTORNEY’S ETHICAL OBLIGATIONS.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

INDIVIDUAL COUNCILMEMBERS ARE NOT THE ULTIMATE “CLIENT”

Under the Rules of Professional Conduct, an individual council member or other city official (such as the city administrator) is not the ultimate “client;” as the municipal corporation, the City is the client.

There is no attorney-client confidentiality in communications with City officials in their individual capacities.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

INDIVIDUAL COUNCILMEMBERS ARE NOT THE ULTIMATE “CLIENT” (CONT.)

ADVICE MAY BE GIVEN TO AN INDIVIDUAL ONLY IN THEIR OFFICIAL CAPACITY AS AN OFFICER OF THE CITY.

Such advice is subject to disclosure to the City Council. For example, if a City Councilmember has a conflict of interest that could result in the invalidation of the Council’s decision under state conflict of interest laws, the City Attorney must advise the Council of the consequences of the conflict if the Councilmember fails to disclose the conflict and proceed with recusal.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

As noted above, the City Attorney is obligated under the Charter to provide advice to the City’s officers **in their official capacities**, including the Mayor, City Council, Councilmembers, and City departments, subject to certain exceptions. Charter § 401(6).

Accordingly, the Charter also directs that the City Attorney “shall render written legal opinions when the same are requested in writing by the Mayor or a member of the Council or the City Administrator or any other officer, board or commission of the City.” *Id.*

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

Although These Entities May Request Legal Advice, Because They Cannot Employ Independent Counsel Or Fire The City Attorney, They Cannot Control The Answer The City Attorney May Provide, I.E., They Cannot “Shop Around” For An Attorney Who Will Provide An Answer They Like.

Accordingly, The City Attorney Has Sole Discretion To Determine When To Retain Outside Legal Counsel And To Select Outside Counsel, Including Selecting Conflict Counsel. The City Attorney Exercises Their Independent Judgment As To Any Legal Conclusions.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

There Is No Conflict Of Interest For City Attorney In Providing Advice To Various Councilmembers, Mayor, City Administrator Who May Have Different Positions

Because City Attorney Represents The Municipal Corporation As A Singular Client That Acts Through Constituent Sub-entities And Officials, Ordinarily The City Attorney Does Not Have An Ethical Conflict When Two City Officials Disagree. Cal. Rules Of Prof'l Conduct, Rule 3-310(C).

This Is Because “No Conflict For The Governmental Attorney Is Created By A Disagreement Between A Government Entity And Its Constituents, Or Between Constituents Of The Entity[.]” Cal. State Bar Com. Prof. Responsibility, Formal Opn. No. 2001-156, 2001 Ca Legal Ethics Ops. Lexis 5, *7-8 (Internal Citations, Quotation Omitted).

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

CITY ATTORNEY HAS A CONFLICT OF INTEREST IN THE FOLLOWING CIRCUMSTANCES:

- (1) When a City officer or department or board possesses the authority to act independently of the municipal corporation - e.g., the Port Department, Police & Fire Retirement Board - and the City Attorney is asked to represent the officer/department/board in that independent capacity, a conflict could arise. Ordinarily, in that situation a distinct attorney-client relationship with the independent officer or department is created and the City Attorney may be conflicted from representing the interests of the municipal corporation in litigation between the two; or may establish an ethical wall or select conflict counsel.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

CITY ATTORNEY HAS A CONFLICT OF INTEREST IN THE FOLLOWING CIRCUMSTANCES: (CONT.)

- (2) When City Attorney has disqualifying conflicts of interest under state law.
- For example, the City Attorney may not advise on a contract in which the City Attorney has a personal financial interest. Cal. Gov't Code § 1090.
 - Similarly, the Political Reform Act may require City Attorney's recusal from making, participating in or attempting to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one of the City Attorney's economic interests, different from the effect on the public generally. Cal. Gov't Code §§ 87100, 87103. City Attorney selects conflict counsel.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

- THE PEOPLE OF THE CITY OF OAKLAND

The City Attorney has an obligation to uphold the Charter and other state and local laws and policies that protect the rights of the people of Oakland.

This is paramount for the elected City Attorney. For example, the Brown Act and Sunshine Ordinance implement state and City of Oakland policies to protect the people’s right to know what their government is doing on their behalf.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

- THE PEOPLE OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA ARE THE CITY ATTORNEY’S CLIENT WHEN THE CITY ATTORNEY INITIATES LAWSUITS ON BEHALF OF THE PEOPLE UNDER STATE LAW.

CITY ATTORNEY HAS INDEPENDENT AUTHORITY AND DISCRETION TO BRING LAWSUITS, PROSECUTE AND SETTLE LAWSUITS UNDER STATE STATUTES THAT GRANT THE CITY ATTORNEY THAT POWER.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (Cont.)

- THE PEOPLE OF THE STATE OF CALIFORNIA (Cont.)

EXAMPLES OF STATE LAWS THAT DEPUTIZE ALL CALIFORNIA CITY ATTORNEYS TO BRING SUITS ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA, IN THE PLACE OF THE ATTORNEY GENERAL OR OTHER STATE COUNSEL:

- FALSE ADVERTISING SUITS (Cal. Bus. & Prof. Code, § 17500)
- RED LIGHT ABATEMENT ACTIONS (Cal. Penal Code § 11226)
- CALIFORNIA PUBLIC NUISANCE LAW (Cal. Code Civ. Proc., § 731).

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT; WHO IS THE CLIENT (CONT.)

- THE PEOPLE OF THE STATE OF CALIFORNIA (cont.)

THESE LAWSUITS ARE IN THE NAME OF THE “PEOPLE OF THE STATE OF CALIFORNIA”—A DISTINCT LEGAL ENTITY FROM THE CITY. (SEE, E.G., *PEOPLE OF CALIFORNIA, EX REL. HERRERA v. CHECK ‘N GO OF CALIFORNIA, INC.* (C.A.N.D. 2007) 2007 WL 2406888, *4-5) [WHEN CITY ATTORNEYS BRING SUIT AS THE PEOPLE OF THE STATE OF CALIFORNIA UNDER STATE STATUTORY AUTHORITY THE REAL PARTY IN INTEREST IS THE STATE, NOT THE LOCALITY].)

THUS, THE COUNCIL DOES NOT NEED TO RATIFY OR AUTHORIZE FILING SUCH LAWSUITS ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA, NOR DOES COUNCIL HAVE AUTHORITY TO AUTHORIZE SETTLEMENT OF SUCH ACTIONS.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (CONT.)

IN SUM:

-THE CLIENT CLEARLY IS THE CITY AND NEVER CITY OFFICERS IN THEIR PERSONAL CAPACITY BUT ONLY IN THEIR OFFICIAL CAPACITY (except when City Attorney represents the People of the State of California)

-THE SOURCE OF CITY ATTORNEY’S AUTHORITY ULTIMATELY IS THE VOTERS, WHO DECIDE ON THE CHARTER AND WHO ELECT THE CITY ATTORNEY, COUPLED WITH THE ETHICAL RULES THAT BIND ALL LAWYERS

-NOTE: The voters have repeatedly rejected efforts to make the City Attorney an appointed official again, instead choosing to maintain the independence of the Office. - (The elected city attorney was initially set to sunset under Measure X (1998 Strong Mayor Charter Amendment) and in 2011 Council placed a measure on the ballot that would have provided for the Council to appoint and remove the appointed City Attorney.)

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (CONT.)

-Limits on the City Council’s Ability to Control the City Attorney

When the Charter expressly grants authority to the City Attorney without Council oversight, the Council may not contravene that express grant of authority, nor take actions that would materially impair the City Attorney’s ability to carry out their Charter obligations.

Importantly, “[t]he charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation.” *Domar Elec., Inc. v. City of L.A.*, 9 Cal. 4th 161, 170 (1994) (emphasis added, citations omitted). Thus, the Charter’s silence on a matter should not be construed as necessarily prohibiting action by the City Attorney. Conversely, the duties and powers expressly enumerated in the Charter bind the City Attorney.

COUNCIL RETREAT - JUNE 7, 2021

I. WHO DOES THE CITY ATTORNEY REPRESENT? WHO IS THE “CLIENT”? (CONT.)

-Limits on the City Council’s Ability to Control the City Attorney (Cont.)

Because the Charter is only a document of limitation—unless it proscribes an activity, or that activity conflicts with state law or the federal constitution - such activity is permitted. Id. at 170-71 The Charter’s description of the City Attorney’s role, therefore, describes the limits on—and not the sum total of—the City Attorney’s authority.

COUNCIL RETREAT - JUNE 7, 2021

II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED

- Misunderstanding of the City Attorney's role, duties and powers -

AS EXPLAINED PREVIOUSLY, THE CHARTER IS AN INSTRUMENT OF LIMITATION, I.E., IT PLACES LIMITS ON THE POWERS OF THE CITY ATTORNEY, IT DOES NOT PRESCRIBE THE FULL SCOPE OF THE CITY ATTORNEY'S POWERS AND DUTIES. In litigation, the City Attorney must comply with ethical duties and duty of competency; and City Attorney has power to make strategic and tactical decisions regarding litigation, such as when to conduct discovery, take depositions, make motions and set or defer trial dates and deciding who to depose.

COUNCIL RETREAT - JUNE 7, 2021

II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED (CONT.)

- Misunderstanding of the City Attorney's role, duties and powers (Cont.)

Because the City Attorney often brings these decisions/issues to the Council's attention in high profile or major cases and takes into account the Council's thinking, the Council may believe it has authority to give direction on such litigation strategies, creating confusion or concern when the City Attorney acts within the City Attorney's authority. Settlement negotiations are an administrative affair and thus not within the purview of the Council which has no administrative powers (City Charter section 207.) While Council can set the parameters of what it will agree to settle for, it cannot direct nor participate in the negotiations unless invited by the City Attorney.

COUNCIL RETREAT - JUNE 7, 2021

II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED (CONT.)

- Misunderstanding of the City Attorney's role, duties and powers (Cont.)

These tensions/frustrations perhaps can be ameliorated by the City Attorney being clearer on when the Office has authority and is seeking input from the Council versus decisions that are within the Council's authority such as approving settlement.

COUNCIL RETREAT - JUNE 7, 2021

II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED (CONT.)

- Misunderstanding of who the “client” is
- Misunderstanding regarding when City Attorney has a conflict of interest
- Concern regarding the fact that under the Charter the City Attorney is the sole attorney for the Council. The Council can't retain a different attorney; the Council is not entitled to a “second” opinion. And the Council can't fire the City Attorney because the City Attorney is elected by the people of Oakland.

COUNCIL RETREAT - JUNE 7, 2021

II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED (CONT.)

- Disagreement with the City Attorney's advice/opinion is interpreted as unsound or incredible advice or evidence of the City Attorney "playing favorites," i.e., slanting advice to support the position of a particular branch of government or a particular Councilmember or members. - This questions the ethics, integrity of the City Attorney.
- Concern that City Attorney as an elected official may run for other office in competition with Councilmembers and/or Mayor.

COUNCIL RETREAT - JUNE 7, 2021

II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED (CONT.)

- Timing of providing opinions/advice. The Council sometimes expects to receive advice in “real time” such as on the floor at an open or closed session of the Council, or in a time frame that is not realistic or reasonable given the complexity of the matter and/or the number of matters, including urgent or time sensitive matters, that the City Attorney’s Office is juggling.

COUNCIL RETREAT - JUNE 7, 2021

II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED (CONT.)

- Perception that City Attorney “always” settles lawsuits.

-The reality of civil litigation in public and private sector cases throughout the country is that most civil cases settle.

-We bring cases to closed session typically to assess the Council’s appetite for trial and inform the Council of the risks, probability of success and to request settlement authority.

-The City Attorney takes cases to trial and also disposes of cases through motions to dismiss, summary judgment and summary adjudication when feasible.

COUNCIL RETREAT - JUNE 7, 2021

II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED (CONT.)

- Perception that City Attorney “always” settles lawsuits. (Cont.)

-To dispel this perception we have begun to bring “good news” cases to closed session and we have begun to provide, more consistently, confidential letters, to Council reporting successful motions and trials.

- Perception that City Attorney’s advice routinely is that Council can’t do what it desires versus working with Council on how to accomplish its goals.

-The Office strives to work with Councilmembers to help them accomplish their goals.
-However, sometimes there isn’t an option to accomplish the goal in question.

COUNCIL RETREAT - JUNE 7, 2021

II. WHERE DO THE TENSIONS AND FRUSTRATIONS EXIST AND HOW CAN THEY BE RESOLVED (CONT.)

- Perception that City Attorney's advice routinely is that Council can't do what it desires versus working with Council on how to accomplish its goals. (cont.)

- Example: There was great political pressure for the City Administrator to allow the Police Commission to hire an Inspector General and for the City Attorney to allow the Commission to hire its own attorney before the 2020 charter amendment that granted the Commission this authority. Our Office provided public legal opinions and explained that a Charter amendment was the only vehicle to accomplish these goals.

COUNCIL RETREAT - JUNE 7, 2021

III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS?

Importantly, as discussed previously, “[t]he charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation.”

Domar Elec., Inc. v. City of L.A., 9 Cal. 4th 161, 170 (1994) (emphasis added, citations omitted). Thus, the Charter’s silence on a matter should not to be construed as necessarily prohibiting action by the City Attorney. Conversely, the duties and powers expressly enumerated in the Charter bind the City Attorney.

COUNCIL RETREAT - JUNE 7, 2021

III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS? (CONT.)

Because the Charter is only a document of limitation—unless it proscribes an activity, or that activity conflicts with state law or the federal constitution - such activity is permitted. Id. at 170-71 The Charter’s description of the City Attorney’s role, therefore, describes the limits on—and not the sum total of—the City Attorney’s authority.

Accordingly, the City Attorney has the option, like members of the public, individual councilmembers, city administrator and mayor to propose policies, programs, laws.

COUNCIL RETREAT - JUNE 7, 2021

III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS? (CONT.)

The City Attorney has proposed policies, programs and laws both when the City Attorney was appointed by the Council and since the City Attorney became an elected office in 2000.

The City Attorney's unique position in the government informs our Office of policies, programs and laws and amendments thereto that will enable our office to pursue/implement the City Council's priorities and policies and facilitate the Council's achievement of its policy goals as well as assist the Council in pursuing/implementing its priorities, policies and laws. This is valuable and benefits the City.

COUNCIL RETREAT - JUNE 7, 2021

III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS? (CONT.)

Proposing Programs - There is a long history of the City Attorney proposing programs. Examples:

-Appointed City Attorney Jayne Williams proposed and the Council established a receivership program and City Attorney Williams proposed laws to allow the City Attorney to protect the rights of Oaklanders and empower the City Attorney to bring actions to protect their rights and further Council policies and priorities.

COUNCIL RETREAT - JUNE 7, 2021

III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS? (CONT.)

Proposing Programs - There is a long history of the City Attorney proposing programs. Examples: (Cont.)

-The first elected **City Attorney John Russo** likewise proposed two major programs and the Council approved the programs and funded them: the **Community Prosecutor Program** which funded several attorneys to serve as community prosecutors under the oversight of the Alameda County District Attorney to prosecute misdemeanors on behalf of the City of Oakland; and the **Neighborhood Law Corps (“NLC”)** which prosecutes lawsuits to protect and advance the rights of Oaklanders bringing cases that the people of Oakland, Councilmembers, and/or the City Administrator (through City departments) bring to the NLC’s attention.

COUNCIL RETREAT - JUNE 7, 2021

III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS? (CONT.)

Proposing Programs - There is a long history of the City Attorney proposing programs. Examples: (Cont.)

-For example, the NLC has pursued lawsuits against a number of motels that were magnets for sex trafficking and exploitation of minors and women, shutting them down or securing court injunctions to change their business practices; pursued lawsuits against liquor and convenience stores for failure to enforce laws prohibiting drug trafficking and other crimes on their property and sales of alcohol and cigarettes to minors; pursued lawsuits to protect renters rights, including securing receiverships to manage properties and the Empyrean Towers case that resulted in rehabilitation of the property and sale to an affordable housing developer to be reserved for affordable housing for at least 50 years.

COUNCIL RETREAT - JUNE 7, 2021

III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS? (CONT.)

Proposing Policies and Laws and Working with Councilmembers and City Administrator and Mayor on Crafting the Same - The City Attorney has a long history of initiating and/or collaborating with Councilmembers, Mayor and/or City Administrator on proposing policies, programs and laws. A few Examples:

-Tenant Protection Ordinance and Amendments. Tenant protection and tenants' rights are top priorities of the Council. The City Attorney and a Councilmember proposed and crafted the ordinance to clarify and strengthen tenants' rights and to empower the City Attorney to bring actions to protect tenants' rights. The City Attorney proposed amendments to strengthen and clarify the Tenant Protection Ordinance.

COUNCIL RETREAT - JUNE 7, 2021

III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS? (CONT.)

A few Examples of policies, laws proposed or co-sponsored by City Attorney:
(cont.)

- The Equal Ordinance prohibits discrimination against tenants who receive Section 8 subsidies.
- The Gender inclusive/Gender neutral language policy which was proposed to the City Attorney by members of my Office and supported unanimously by the Council/the Mayor, is consistent with and furthers the City's policy positions.
- The Lease v. Sale Policy City Attorney and the Interim City Administrator (Henry Gardner) proposed this policy which provides that City-owned land shall be leased versus sold unless the Council finds sale is in the City's best interest.

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III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS? (CONT.)

A few Examples of policies, laws proposed or co-sponsored by City Attorney:
(cont.)

-The High Stakes Negotiation Policy was jointly sponsored by the City Attorney and then Councilmember Schaaf. These are a few examples of the policies/laws we have co-sponsored or initiated and/or crafted.

-Councilmembers also have requested that the City Attorney develop or co-sponsor legislation to address issues; and the City Attorney has asked Councilmembers and the Mayor to sponsor or co-sponsor legislation and policies.

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III. WHAT ROLE DOES THE CITY ATTORNEY PLAY AS AN INITIATOR OF POLICY AND PROGRAMS? (CONT.)

A few Examples of policies, laws proposed or co-sponsored by City Attorney:
(cont.)

-All of the policies/laws the City Attorney has initiated and/or co-sponsored advance the City's progressive policies/laws/programs, have been co-sponsored by Councilmembers, Mayor and/or City Administrator and help to further or achieve the goals of the City Council's priorities, policies/laws and in some cases implement policies, establish laws or amend laws to address problems.

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DISCUSSION

**City of Oakland
City Council
Retreat Agenda**

Day Two

Monday, June 7, 2021

9:30am - 4:30pm

Meeting Objectives:

- To continue to build strong and effective working relationships among members of the City Council, the Mayor, the City Administrator and the City Attorney in service of the people of Oakland
- To build toward alignment on the Council and Mayor’s budget priorities for the FY 2021-2023 budget cycle
- To create a set of agreements/protocols/communication tools which support working in ways that promote collaboration, and minimize tensions, disagreements and misunderstandings across branches of City Government as well as other jurisdictions
- To explore approaches to ensuring measurable progress while we hold each other mutually accountable for success

9:30am	Welcome & Agenda Review
	Public Comment
9:40am	<p><u>Aligning City Council and Mayoral Budget Priorities:</u></p> <p><u>Desired Outcome:</u> To build toward alignment on the Council and Mayor’s budget priorities for the FY 2021-2023 budget cycle</p> <p>Review of the budget process going forward:</p> <ul style="list-style-type: none"> ● Key dates and action items; CP Bas will provide an overview of the Council’s priorities and the work of the Council President’s Budget Team <p>Discuss potential amendments to the Mayor’s proposed budget:</p> <ul style="list-style-type: none"> ● How can we improve the Mayor’s proposed budget to be more reflective of the Council priorities? ● What would you offer as alternative proposals? If possible, offer specific proposals by line item and amount?
11:30am	<i>Mid-morning break</i>
11:40am	<p><u>How We Get Things Done: Moving from Advocacy and Policymaking to Implementation</u></p> <p><u>Desired Outcome:</u> Create a set of agreements/protocols/communication tools which support working in ways that promote collaboration, and minimize tensions, disagreements and misunderstandings</p>

	<p>Key Question: What will it take to work collaboratively across all branches of Municipal government?</p> <p>Facilitator will share summary from interviews on views regarding the working relationships across branches: Mayor & Council; Council and City Administrator/City Staff; Council and City Attorney</p>
noon	<i>Lunch break</i>
12:30pm	<p><u>How We Get Things Done: Moving from Advocacy and Policymaking to Implementation</u></p> <p><i>Continued</i></p> <p>City Council and Mayor:</p> <ul style="list-style-type: none"> • How does the Council work with the Mayor and her office? • How can there be a more structured approach to create more consistent, clear, proactive communications and coordination? <p>City Council and City Administrator/City Staff:*</p> <ul style="list-style-type: none"> • How does the Council work with City staff on constituent issues and policy making, given limited interactions and the mandates of the City Charter? • How do we get better on implementing our priorities, policies and budget allocations? • Where are the tensions and frustrations on the implementation side and how can they to be resolved? Examples? <p>City Council and City Attorney:</p> <ul style="list-style-type: none"> • Who does the City Attorney represent? Who is the “client”? • What role does the City Attorney play as an initiator of policy and programs? • Where do the tensions and frustrations exist and how can they be resolved?
2:00pm	<i>Mid-afternoon break</i>
2:10pm	<p><u>Working Collaboratively Across Other Jurisdictions:</u></p> <ul style="list-style-type: none"> • How can we improve our working relationships across other jurisdictions including Alameda County, OUSD, and other external boards/commissions?
3:10pm	<p><u>Creating Mutual Accountability as We Track Our Progress</u></p> <ul style="list-style-type: none"> • Identifying metrics for tracking progress on budget priorities • Implementing a Citywide Performance Management System
4:00pm	Public Comment/Open Forum
4:30pm	Adjourn

*See attached *DRAFT: Communication Protocols Between Council Offices & the Administration*