

CITY OF OAKLAND

OFFICE OF THE CITY ATTORNEY

PUBLIC LEGAL OPINION

TO: Mayor Sheng Thao
Council President Nikki Fortunato Bas and Members of the Council
City Auditor Courtney Ruby
City Administrator Jestin D. Johnson

FROM: City Attorney Barbara J. Parker

DATE: August 14, 2023

RE: **What is the scope of the Oakland City Attorney's Authority under the City Charter?**

Dear Mayor Thao, City Auditor Ruby, Council President Fortunato Bas, Members of the Council and City Administrator Johnson:

Please see the attached public legal opinion which addresses the referenced question.

This is a public legal opinion because it addresses the relative powers of the City Attorney and the City Council and other City officers, and City departments, boards and commissions under the City Charter and state law. Like all public legal opinions, this opinion will be posted on the City Attorney's website at: <https://www.oaklandcityattorney.org>

Very truly yours,




BARBARA J. PARKER
City Attorney

Attachment: August 14, 2023 Legal Opinion from Karen Getman, Esq. of Olson Remcho

3295687v1

TO: Barbara J. Parker
Oakland City Attorney

FROM: Karen Getman 

DATE: August 14, 2023

RE: The Oakland City Attorney's Scope of Authority

You have asked for an overview and explanation of the Oakland City Attorney's scope of authority. We begin with a description of the core powers granted to the City Attorney by the Oakland City Charter, as informed by the Rules of Professional Conduct. We also describe powers granted to the City Attorney by state law.

I. The Context for Understanding the Charter Provisions

A. General Principles of Statutory Construction

"Generally, the same principles of construction applicable to statutes apply to the interpretation of municipal charters." *St. Croix v. Superior Court*, 228 Cal. App. 4th 434, 442 (2014) (citation omitted). The "sole objective is to ascertain and effectuate legislative intent." *Domar Elec., Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 172 (1994) (citations omitted). To so determine, courts employ a three-step sequential approach.

The inquiry begins with the language of the Charter. Where the plain language of the Charter is clear and unequivocal, it controls and there is no need to resort to other interpretive aids. *Sacks v. City of Oakland*, 190 Cal. App. 4th 1070, 1082 (2010) ("If we conclude that the statutory meaning is free of doubt, uncertainty, or ambiguity, the language of the statute controls, and our task is completed.") (citation omitted). In addition, "[w]here 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*, 9 Cal. 4th at 172 (citations omitted).

If the language is unclear, courts will attempt to determine the voters' intent as an aid to statutory construction. In attempting to ascertain that intent, "we must examine the legislative history and statutory context of the act under scrutiny." *Sacks*, 190 Cal. App. 4th at 1082. Where the provision requiring construction was enacted by the voters, "it is proper to consider the official statements made to the voters in connection with propositions of law they are requested to approve or reject." *Diamond Int'l Corp. v. Boas*, 92 Cal. App. 3d 1015, 1034 (1979) (citations omitted). To determine the legislative intent behind a ballot measure, courts

look at the ballot pamphlet materials. *See Westly v. Bd. of Admin.*, 105 Cal. App. 4th 1095, 1111-12 (2003); *see also Protect Our Benefits v. City and County of San Francisco*, 235 Cal. App. 4th 619, 633 (2015).

If the meaning of the statutory language is not evident based on the plain language and evidence of legislative intent, the courts will “apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable, practical, in accord with common sense and justice, and to avoid an absurd result.” *Sacks*, 190 Cal. App. 4th at 1082 (citation omitted).

B. Legislative History of Charter Section 401

The Charter provisions that most directly define the scope of the City Attorney’s authority were approved by the voters in a series of charter amendments that began in 1998 with the adoption of Measure X, the “Strong Mayor” measure, which amended the City Charter to restructure the balance of power in City Hall. Under the previous “Council-Manager” system, the Mayor served as the presiding officer of the Council, and the Council appointed a city manager to be the city’s executive officer. The legislative and executive branches thus were merged, which allegedly “obscure[d] responsibility and foster[ed] drift and inaction.”¹ The Council also appointed the City Attorney, and at its pleasure could remove the City Attorney or reduce their salary. Measure X sought to create more transparency and accountability by locating executive power and responsibility in the Mayor, and by creating an elected City Attorney to “provide[] an independent check on both the council and the mayor.”² The Council would retain authority to set the salary of the City Attorney, but could not reduce it during the City Attorney’s term of office. The measure passed in one of the highest turnout elections ever held in the City.³

As an interim step, for two years Measure X allowed the Mayor to appoint the City Attorney, subject to Council confirmation. The first election for City Attorney took place in March 2000, and the next election was scheduled for March 2004. However, Measure X contained a “sunset clause”: after six years – in November, 2004 – the voters would have the option of returning to the original council-manager system, including an appointed city

¹ See Measure CC, City Charter Amendment (Nov. 5, 2002) (Argument in Favor).

² *Id.*

³ See Measure H, City Charter Amendment (Nov. 15, 2011) (Rebuttal to Argument in Favor).

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attorney.⁴ In March 2002, the Council placed on the ballot Measure E, a charter amendment that would allow the City Attorney elected in March 2004 to serve a full four year term even if Measure X did sunset. The measure also added qualifications for the City Attorney, and provided that the Council could declare and fill a vacancy in that office under certain conditions. The argument in favor (there was no argument against) concluded that “[m]ost importantly,” Measure E “ensures that the choice of City Attorney remains in the hands of citizens by securing the four-year term of the candidate elected by the voters.”⁵

Measure E also added additional Charter provisions specifying the powers of the City Attorney. The impartial analysis noted that the then-existing Charter provision on the City Attorney “does not refer to the attorney-client privilege or authorize the city attorney to initiate legal proceedings for the City without city council direction.”⁶ Measure E “would require the city attorney, as counsel, to maintain the attorney-client privilege pursuant to state law. It would authorize the city attorney to commence legal proceedings for the City, subject to city council ratification.”⁷ The language added by Measure E includes section 401(6) of the Charter, which defines the core powers of the City Attorney. The only changes made to that section after passage of Measure E have been to change the “City Manager” references to “City Administrator” and to make the language gender neutral and gender inclusive.⁸

In March 2004, the question of whether to retain the Strong Mayor system and elected City Attorney was presented to the voters as Measure P. The measure passed by a wide margin, permanently embedding in the Charter the elected City Attorney and the City Attorney’s current duties.

The voters were aware that Measure P would preserve the City Attorney’s independence. The ballot argument favoring Measure P stated that, by virtue of being elected,

⁴ In November 2002, the Council placed Measure CC on the ballot, which would have made the Measure X changes permanent two years earlier than originally planned. Measure CC did not pass.

⁵ Measure E, City Charter Amendment (Mar. 5, 2002) (Argument in Favor).

⁶ *Id.*, City Attorney’s Impartial Analysis.

⁷ *Id.*

⁸ The latter was required by passage of Measure R, a City Charter amendment that appeared on the November 8, 2022 general election ballot.

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Oakland's City Attorney was "accountable only to you the voters."⁹ Measure P also restricted the Council's discretion regarding the City Attorney's compensation, requiring that the salary fall within a range of salaries in peer cities.¹⁰

The City Attorney's independence was affirmed in 2011, when another ballot measure sought to return the office to an appointed position. Measure H, on the November 2011 ballot, would have given the City Council the sole discretion to appoint and remove the City Attorney. Opponents pointed out that this would make the City Attorney "beholden to a few elected insiders, not Oakland residents."¹¹ The measure lost by a wide margin, with over 73% voting against it.¹²

The significance of making the City Attorney an elected official is manifest: unlike private or appointed counsel, an elected City Attorney cannot be fired by the client the City, acting through its City Council, as discussed below. Nor can the Council employ other attorneys to represent it. See Oakland City Charter § 401(6) [hereinafter "Charter"]. Thus, the City, unlike other clients, must use the City Attorney regardless of the legal advice the City Attorney provides, absent a disqualifying conflict of interest.

⁹ Measure P, City Charter Amendment (Mar. 2, 2004) (Rebuttal to Argument Against).

¹⁰ See *id.* (Ballot Title and Summary). At the November 8, 2022 general election the voters approved passage of Measure X, which among other things amended the Charter provisions regarding the City Attorney's compensation. Charter section 401(1) now provides that the City Attorney's salary is set annually by the Public Ethics Commission "to provide for competitive compensation and equitable alignment and, taking into account the top of the range for the highest paid professional employee in the Office of the City Attorney and salaries for other department heads, and shall be comparable to the salaries of City Attorneys and other comparable positions, such as County Counsel or Port Attorney, in California cities, counties and agencies selected by the Commission. The City Attorney's salary may not be reduced during the City Attorney's term of office except as part of a general reduction of salaries of all officers and employees in the same amount or proportion."

¹¹ See Measure H, City Charter Amendment (Nov. 15, 2011) (Argument Against).

¹² Although the fact of the measure's defeat is not itself clear evidence of voter intent, see *Santa Clara Cty. Local Transp. Auth. v. Guardino*, 11 Cal. 4th 220, 237-38 (1995), in this case, the arguments made against it are consistent with the voter intent that motivated the passage of Measure X in 1998 and Measure P in 2004.

II. The Charter Provisions Addressing the City Attorney

The determination of the City Attorney's scope of authority begins, as it must, with the language of the Charter. The Charter represents the supreme law of the City, subject to conflicting provisions in the United States and California Constitutions, and to preemptive state law. *Harman v. City & County of San Francisco*, 7 Cal. 3d 150, 161 (1972) (citations omitted). "Any act that is violative of or not in compliance with the charter is void." *Domar*, 9 Cal. 4th at 171. The Charter may be amended, revised, or repealed only with approval of the voters. Cal. Const. art. XI, §§ 3, 5. 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*, 9 Cal. 4th at 170 (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.

Although the Charter contains various references to the City Attorney's responsibilities, section 401(6) sets forth the core of the City Attorney's powers:

Section 401(6). Powers of the City Attorney. The City Attorney shall serve as counsel to the Mayor, City Council, and each and every department of the City, except departments specifically enumerated by this Charter as an independent department of the City, in their official capacities pursuant to state law and the Charter, and as counsel, shall assert and maintain the attorney-client privilege pursuant to state law. The City Attorney shall advise all officers, boards, commissions, and other agencies of the City on legal matters referred to the City Attorney and 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. The City Attorney shall draft such ordinances, resolutions, contracts and other legal documents as directed by the Council or requested by the Mayor or City Administrator or any official board or commission of the City. The City Attorney shall act as Counsel in behalf of the City or any of its officers, boards, commissions, or other agencies in litigation involving any of them in their official capacity. The City Attorney may, whenever a cause of action exists in favor of the City, commence legal proceedings, subject to

ratification by the City Council, when such action is within the knowledge of the City Attorney, or, the City Attorney shall commence legal proceedings when directed by the City Council. The City Attorney shall pass on the form and legality of all contracts of the City before the same are executed. The City Attorney shall not settle or dismiss any litigation brought for the City nor settle any litigation brought against the City which may be under the City Attorney's control unless upon the City Attorney's written recommendation the City Attorney is authorized to do so by the Council. The City Attorney shall administer the office of City Attorney, and shall have the power to appoint, discipline and remove all officers and employees of the City Attorney's office subject to the provisions of Article IX of the Charter. The Council may empower the City Attorney, at the City Attorney's request and without regard to the provisions of Article IX, to employ special legal counsel, and he or she shall have the power to appoint appraisers, engineers and other technical and expert services necessary for the handling of any pending or proposed litigation, proceeding or other legal matter. Upon the City Attorneys recommendation and the approval of the Council, when the City Attorney has a conflict of interest in litigation involving another office of the City in the City Attorney's official capacity, such other officer may retain special legal counsel at City expense.

Charter § 401(6).

A. Powers Granted to the City Attorney Under the Charter

Under the plain terms of the Charter, the City Attorney is the City's only attorney.¹³ The City Attorney is uniquely empowered to provide legal services to the municipal corporation and its officers and employees, acting in their official capacities, "pursuant to state law and the Charter." Charter § 401(6). As such, the City Attorney's ultimate client is the City itself; the City Attorney does not represent individual councilmembers or other officers in anything other than their official capacities, and it is the City, not any particular officeholder, that is the holder of the attorney-client privilege. See Formal Op. No. 2001-156, 2001 CA Legal Ethics Ops. LEXIS 5 at *7 (Cal. State Bar Comm. On Prof'l Resp. and Conduct) ("[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 1011, 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 of Prof'l Conduct, Rule 1.13(a) ("Organization as Client") (stating that "the client is the

¹³ There are only a few circumstances in which a City department, office, board or commission is authorized to employ separate counsel. Where that is the case, the Charter language is clear and explicit. For example, section 706 of the Charter expressly states that the Board of Port Commissioners "shall have the complete and exclusive power, and it shall be its duty for and on behalf of the City [. . .] to appoint a Port Attorney, whose duty it shall be to pass upon the form and legality of all contracts with the jurisdiction of the Board, give legal advice to the Board on official matters, defend and (subject to direction from the Board) prosecute or compromise all actions at law or in equity and special proceedings for or against the City or any officers thereof in his official capacity, pertaining to matters within the jurisdiction of the Board. The Board shall fix and provide for his compensation." Charter § 706(20). Sections 604(b)(12), 604(e)(1) and (6), and 604(i) provide that the Oakland Police Commission and the Community Police Review Agency may hire or contract for a Commission Attorney and up to two Agency Attorneys to advise and represent the Commission and Agency under specified circumstances. Compare *id.*, § 220(h) ("The City Attorney shall serve as legal counsel to the [Independent Redistricting] Commission in the manner provided for in Section 401(6) of Article IV of the City Charter.").

organization itself"). The City as client speaks through the City Council, which is the governing body of the City vested with its corporate powers, including the power to legislate.¹⁴

The Charter provides that in this role, the City Attorney has certain mandatory responsibilities:

- 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.¹⁵ *Id.*
- The City Attorney "shall" commence legal proceedings when directed by the City Council.¹⁶ *Id.*
- The City Attorney must pass on the form and legality of all contracts of the City before the same are executed. *Id.*
- The City Attorney has executive command of the office, including the responsibility for appointing, disciplining, and removing all officers and

¹⁴ Note, however, that the City Council lacks administrative powers. Those powers are reserved to the City Administrator, Mayor, City Attorney and other City officers. Charter § 218 ("Non-Interference in Administrative Affairs"); *id.*, § 207 (providing that the Council "shall have no administrative powers"); *id.*, §§ 500 et seq. ("The City Manager").

¹⁵ The Council has delegated to the City Attorney the authority to settle claims up to the amount of \$25,000. Oakland City Council Resolution No. 86476 C.M.S. (Nov. 29, 2016). There is a longstanding history of the Office prosecuting and/or settling cases on behalf of the City under City ordinances granting the City Attorney such authority, such as the Neighborhood Law Corps program funded by the City to bring such cases and granting the City Attorney discretion to settle them.

¹⁶ The City Attorney has independent authority under state law to bring certain actions on behalf of the People of the State of California. See Oakland City Attorney, Public Legal Opinion on City Attorney's Authority to Bring Public Nuisance Suits Under State Law (Mar. 7, 2018) (available at www.oaklandcityattorney.org). Further, the City Attorney "may, whenever a cause of action exists in favor of the City, commence legal proceedings, subject to ratification by the City Council, when such action is within the knowledge of the City Attorney[.]" Charter § 401(6).

employees who work under the City Attorney, subject to the provisions of Article IX of the Charter.¹⁷ *Id.*, § 401(6).

- The City Attorney appoints one member of the Public Ethics Commission. *Id.*, § 603(d)(1).
- The City Attorney must attend all meetings of the Police and Fire Retirement Board. *Id.*, § 2601(a).

The Charter also creates obligations for the City Attorney pursuant to request or directive by another city official or city entity.

- 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.” Charter § 401(6).
- The City Attorney is responsible for “draft[ing] such ordinances, resolutions, contracts and other legal documents as directed by the Council or requested by the Mayor or City Administrator or any official board or commission of the City.” *Id.*
- With respect to affirmative litigation, the City Attorney “shall” commence legal proceedings when directed by the City Council.¹⁸ *Id.*

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, and City departments, boards and commissions, subject to certain exceptions. Charter § 401(6).

¹⁷ The City Attorney has authority under the Charter to contract for outside counsel, experts and the like necessary for the handling of any pending or proposed litigation, proceeding or other legal matter. Charter § 401(6).

¹⁸ The Council has authorized the City Attorney by ordinance to bring certain actions on the City’s behalf, including but not limited to actions arising under the Tenant Protection Ordinance, Oakland Munic. Code § 8.22.670, and the City Minimum Wage, Sick Leave and Other Employment Standards Ordinance, *id.*, § 5.92.050(G)(3). The City Attorney’s independent authority under state law to bring certain actions on behalf of the people is discussed *infra* at Section III, and Oakland City Attorney, Public Legal Opinion on City Attorney’s Authority to Bring Public Nuisance Suits Under State Law (Mar. 7, 2018) (available at www.oaklandcityattorney.org).

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.* 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, with the one exception explained in Section II(B) below. The City Attorney exercises independent judgment as to any legal conclusions.

As noted above, moreover, the duties expressly enumerated in the Charter do not necessarily constitute a limitation on the City Attorney’s authority as sole counsel for the City. Thus in addition to the mandatory obligations, the City Attorney has the right and in some cases the duty to exercise her judgment to provide advice, including but not limited to legal opinions, even when there is no express request to do so from the Mayor, the Council or other city officers, boards or commissions.

B. When the City Attorney Has a Conflict

The Charter recognizes one instance in which the City Attorney may be excused from performing the Charter-enumerated duties:

Upon the City Attorney’s [sic] recommendation and the approval of the Council, when the City Attorney has a conflict of interest in litigation involving another office of the City in the City Attorney’s official capacity, such other officer may retain special legal counsel at City expense.

Charter § 401(6).

The Rules of Professional Conduct of the State Bar of California define circumstances where the City Attorney would be deemed to have a conflict. These rules are as applicable to public lawyers as to other members of the State Bar. Formal Op. No. 2001-156, 2001 CA Legal Ethics Ops. LEXIS 5 at *5 (citations omitted); *see also* 71 Cal. Op. Atty. Gen. 255 (1988), 1988 Cal. AG LEXIS 29 at *12-13 (citations omitted).

Ordinarily, a central tenet of lawyers’ professional responsibility is the avoidance of conflicts of interest, such as representing clients with potentially conflicting interests. Cal. Rules of Prof’l Conduct, Rule 1.7. However, because the City Attorney represents the

municipal corporation as a singular client that acts through constituent sub-entities and officials, in many circumstances the City Attorney will not have an ethical conflict even when two city officials disagree. 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[.]” Formal Op. No. 2001-156, 2001 CA Legal Ethics Ops. LEXIS 5 at *7-8 (internal citations, quotation omitted).

However, if a city officer or department possesses the authority to act independently of the municipal corporation – e.g., the Port Department – and the City Attorney is asked to represent the officer or department in that independent capacity, a conflict could arise. Formal Op. No. 2001-156, 2001 CA Legal Ethics Ops. LEXIS 5 at *5 (citations omitted). 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. *See id.* at *12 (quoting *Civil Service Commission v. Superior Court*, 163 Cal. App. 3d 70, 78 (1984)). This is an “unusual situation” potentially requiring the City attorney to “choose between conflicting duties” (*id.* at *7-8 [internal citations, quotation omitted]), or requiring the use of a screening device such as an ethical wall.¹⁹ *Id.* at *13 n.12 (collecting authorities). Here, however, the Charter proactively prevents such conflicts by stating that the City Attorney does *not* serve as counsel to “departments specifically enumerated by the Charter as an independent department of the city[.]” Charter § 401(6).

In addition, certain state laws define disqualifying conflicts of interest. For example, under Government Code section 1090, the City Attorney may not advise on a contract in which the City Attorney has a personal financial interest. Similarly, the Political Reform Act may require the City Attorney to recuse 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.

¹⁹ This situation has arisen with regard to the Police and Fire Retirement Board, which under the California Constitution, article XVI, section 17, has a duty of loyalty to the retirement plan participants and beneficiaries that takes precedence over any other duty, such as considerations of cost to the City. This can create a conflict requiring the City Attorney to appoint conflict counsel for the Board. *See, e.g., City of Oakland v. Oakland Police & Fire Retirement System*, 224 Cal. App. 4th 210, 226 (2014); *id.* at 243 (city’s budget concerns “must give way to the legitimate pension concerns of the impacted PFRS retirees”).

C. 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 performance of Charter duties.

Dadmun v. City of San Diego, 9 Cal. App. 549, 551 (1908) is illustrative. Under the San Diego charter, the prosecution for violation of municipal ordinances devolved wholly upon the city attorney. The city council’s ordinance providing for the office of special prosecutor for such violations, at a fixed salary, and referring the appointment thereof to the city council, was thus found by the court to be “unauthorized and void.” *Id.* The court explained that the “the city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter.” *Id.*; *cf. Los Angeles City Ethics Comm. v. Superior Court*, 8 Cal. App. 4th 1287, 1301-02 (1992) (retention of special counsel permissible where “expressly authorized by the charter”); *see also* 79 Ops. Cal. Atty. Gen. 46 (1996), 1996 Cal. AG LEXIS 8 (concluding that a city whose charter directs the city attorney to undertake a specific function may transfer that function to the county district attorney without a vote of the people “if the transfer is authorized by the charter”).

Likewise, a decision by the Council that would materially impair the City Attorney’s ability to carry out the City Attorney’s Charter obligations would be impermissible. This principle was applied in *Scott v. Common Council*, 44 Cal. App. 4th 684, 686 (1996). In *Scott*, a city council made a budgetary decision to eliminate funding for the City Attorney’s investigative staff. *Id.* The court determined that this decision improperly rendered the City Attorney unable to perform functions required under the city charter. *Id.* at 695; *see also Carmel Valley Fire Prot. Dist. v. Cal.*, 25 Cal. 4th 287, 302 (2001) (observing that *Scott v. Common Council* prohibits the deprivation of “resources necessary to carry out” charter functions). *Scott*, however, presented an extreme situation. Thus, while the Council exercises budgetary oversight of city departments, including the office of the City Attorney, the City Attorney does not need Council authorization to retain outside counsel when the City Attorney deems it appropriate. Charter § 801; *see* Oakland City Attorney, Public Legal Opinion on City Attorney Powers, Protocols and Procedures for Retention of Outside Counsel (Apr. 9, 2013) (available at www.oaklandcityattorney.org).

D. The City Counsel’s Role in Directing Litigation

1. City Council Ratification of Affirmative Legal Actions

Charter section 401(6) makes certain discretionary acts by the City Attorney subject to subsequent approval by the Council. That section states that the City Attorney “may,

whenever a cause of action exists in favor of the City, commence legal proceedings, subject to ratification by the City Council, when such action is within the knowledge of the City Attorney.” Charter § 401(6). This provision arguably is ambiguous with respect to the timing of Council involvement and the consequences of such involvement. The term “may” is permissive, suggesting that the City Attorney possesses the discretion to decide whether to pursue legal proceedings and is not compelled to do so. This contrasts with actions the Charter requires the City Attorney to take: the City Attorney “shall act as Counsel” for the City or any of its officers in litigation and “shall commence legal proceedings when directed by the City Council.” *Id.*; see also *Woodbury v. Brown-Dempsey*, 108 Cal. App. 4th 421, 433 (2003) (“Ordinarily, the word ‘may’ connotes a discretionary or permissive act; the word ‘shall’ connotes a mandatory or directory duty. This distinction is particularly acute when both words are used in the same statute.”).

“Ratification” also could be said to contain a permissive temporal element: “to confirm by expressing approval or formal sanction,”²⁰ or “to give official sanction to,”²¹ suggesting that such ratification could occur *after* the City Attorney has commenced an action. Consistent with the established rules of statutory construction, we must give significance to each word in the Charter in ascertaining the meaning and intent of a particular provision. Here, the ratification language is preceded by permissive language providing that the City Attorney *may* commence legal proceedings, subject to ratification, and the ratification of the City Attorney’s discretionary decision to commence legal action contrasts with the mandatory duty to commence legal proceedings when directed by the Council. We therefore conclude that the Charter grants the City Attorney discretion to commence legal proceedings and then seek ratification.²² This provision clarifies the City Attorney’s authority to protect the City’s interest by commencing legal proceedings when, for example, the lawsuit would be barred by the applicable statute of limitations if the City Attorney had to secure Council authorization before initiating a lawsuit. It is clear that if the Council declines to ratify a lawsuit, the City Attorney may not proceed further and must dismiss the action.

²⁰ *Ratification*, Webster’s Desk Dictionary (1990).

²¹ *Ratification*, Webster’s New World Dictionary, Third Edition (1996).

²² This is consistent with the impartial analysis of Measure E, discussed earlier in this memorandum, which added this language to the Charter. The impartial analysis noted that the then-existing Charter provision “does not . . . authorize the city attorney to initiate legal proceedings for the City without city council direction,” while the language added by Measure E “would authorize the city attorney to commence legal proceedings for the City, subject to city council ratification.”

2. The City Council’s Authority Over the City Attorney’s Affirmative Litigation Strategy

Whether the City Council may dictate a particular legal strategy after it has either directed that an action be taken or ratified the City Attorney’s decision to bring an action presents a closer question. Section 401(6) carefully proscribes the ways in which the City Council has supervisory authority over the City Attorney, particularly with respect to affirmative litigation. The Council may or may not choose to ratify actions proposed by the City Attorney; may direct that legal proceedings be initiated; and subject to certain exceptions discussed earlier in this Memorandum, must authorize settlement of actions against the City and dismissal of actions advanced by the City. Charter § 401(6). But nowhere does the Charter provide that once the initiation of a proceeding is approved, the City Council maintains oversight over the legal strategy.

Thus under the Charter, the power to make legal strategy decisions for cases ratified or directed by the Council resides with the City Attorney. *See Henderson v. Mann Theatres Corp.*, 65 Cal. App. 3d 397, 403 (1976) (“A recognized rule of statutory construction is that the expression of certain things in a statute necessarily involves exclusion of other things not expressed – *expressio unius est exclusio alterius*.”) (citation omitted, italics in original). This is consistent with the State Bar of California’s Rules of Professional Conduct governing attorneys. *See Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 403-04 (1985) (“attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action” but cannot “impair the client’s substantial rights or the cause of action itself[,]” or “stipulate to a matter which would eliminate an essential defense”) (citations omitted).

On the other hand, the municipal corporation is the City Attorney’s ultimate client in such litigation, and the Charter arguably recognizes that the City Council in its official capacity represents the City’s interests. *See Creighton*, 160 Cal. App. 3d at 1021 (recognizing that the city council and its members constitute “the client” whom the city attorney represents in litigation). This carries with it a host of obligations under the California Rules of Professional Conduct, which are fully applicable to the City Attorney.

The Rules of Professional Conduct are explicit on the attorney’s duties once a representation is commenced. Rule 1.2, captioned “Scope of Representation and Allocation of Authority,” states that:

a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by rule 1.4, shall

reasonably consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

Cal. Rules of Prof'l Conduct, Rule 1.2(a).

The comment to the rule notes that it "confers upon the client the ultimate authority to determine the purposes to be served by legal representation" but that "[a] lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions" provided that the lawyer does not "impair the client's substantive rights or the client's claim itself." Cal. Rules of Prof'l Conduct, Rule 1.2 cmt. [1].

As a practical matter, this means for example that the Council can direct the City Attorney to seek a continuance of a trial date to allow time for settlement discussions while avoiding additional fees for outside litigation counsel; but the City Attorney can direct that certain litigation tasks nonetheless go forward during that time to adequately prepare for trial (if settlement fails) and to meet litigation deadlines.

Rule 1.4, referenced in Rule 1.2, is captioned "Communication with Clients" and requires that the lawyer "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation" and "keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents."²³ *Id.*, Rule 1.4(a)(2), (3). In sum, the City Attorney has authority to make strategic and tactical decisions, including but not limited to stipulating to or asking the court to continue a hearing or

²³ The terms "reasonable" and "reasonably" are defined in the Rules to mean "the conduct of a reasonably prudent and competent lawyer." Cal. Rules of Prof'l Conduct, Rule 1.0.1(h).

trial date, determining the timing, order of discovery and filing of motions, and negotiating settlement subject to Council approval.

III. The City Attorney's Authority Under State Law

At times, California law provides the City Attorney independent discretion to initiate or take particular legal actions in the name of the People of the State of California. State law may alternately require that the City Attorney take particular defensive actions. In those situations, the Oakland Charter does not provide the City Council with oversight or approval authority.

A. Authority To Bring Lawsuits in the Name of the People of California

Various provisions of state law separately authorize the City Attorney to bring causes of action not on behalf of the City, but rather on behalf of the People of California. For example, California's False Advertising Law provides that city attorneys may bring "[a]ctions for injunction" "in the name of the people of the State of California upon their own complaint[.]" Cal. Bus. & Prof. Code § 17535. Likewise, the City Attorney is empowered to bring certain suits under California's civil rights laws. See Cal. Civ. Code §§ 51.7, 52(d) (the Ralph Civil Rights Act of 1976, providing that when an individual equal protection action has already commenced, city attorneys may intervene in the name of the people upon certification that the case is "of general public importance"); *id.*, § 52.1 (the Tom Bane Civil Rights Act, providing that city attorneys may bring civil actions for equitable relief "in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment" of constitutional or statutory rights). Similarly, California's red light abatement law provides that a city attorney may "maintain an action in equity to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee, or agent of the building or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting it." Cal. Penal Code § 11226; see also *People v. Bhakta*, 135 Cal. App. 4th 631, 638 (2006) (recognizing that city attorneys have the authority to bring suit in the name of the People of the State of California to abate a red light nuisance); Cal. Pub. Res. Code § 72430 (the California Clean Coast Act, providing that "[i]f a district attorney or city attorney brings an action under this section, the action shall be in the name of the people of the State of California."). The City Attorney also is authorized to bring a civil action "in the name of the people of the State of California to abate a public nuisance . . ." Cal. Civ. Proc. Code § 731; see generally *Oakland City Attorney, Public Legal Opinion on City Attorney's Authority to Bring Public Nuisance Suits Under State Law* (Mar. 7, 2018) (available at www.oaklandcityattorney.org).

In such circumstances, the City Attorney does not act as counsel for the City, but rather brings such actions on behalf of the broader public. The Charter's requirement that the City Attorney seek approval by the City Council or take action at the direction of the City Council is limited to such instances when "a cause of action *exists in favor of the City*"; stated otherwise, when the City Attorney brings an action on behalf of the City. Charter § 401(6) (emphasis added). Such restrictions do not apply when the City Attorney brings an action on behalf of the broader public, because charter cities' authority is limited to "municipal affairs." Cal. Const. art. XI, § 5(a). Insofar as state laws granting the City Attorney the authority to bring such actions relate to matters of statewide concern, the Oakland Charter cannot supersede them. *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981) ("[G]eneral laws on subjects of statewide concern supersede any conflicting enactments of chartered cities."). Because the City Attorney is authorized by state law to bring an action on behalf of the state, the Charter does not limit the City Attorney's exercise of this authority.

B. Standing to Initiate State Law Actions Generally

Other California statutes provide that a City Attorney "may" bring actions, but do not specify that such actions must necessarily be brought in the name of the People of California. *See, e.g.*, Cal. Health & Safety Code § 25191.2 ("Actions pursuant to Sections 25189.5, 25189.6, 25189.7, 25190, and 25191 [the Hazardous Waste Control Act] may be brought by any city attorney."); Cal. Lab. Code § 1706.2 (Child Performer Service Permits) ("The Attorney General, any district attorney, or any city attorney may institute an action for a violation of this chapter, including an action to restrain and enjoin a violation."); Cal. Civ. Code § 52 (providing that "[w]henver there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights," any city attorney "may bring a civil action in the appropriate court by filing with it a complaint."). Arguably, the implication of this omission is that the City Attorney is not advancing such actions on behalf of the people of the state, but rather in the role of legal representative of the City, and the statutes provide standing for these actions. Accordingly, the Charter's proscription for City Council oversight does not conflict with state law and so applies with full force.

C. Affirmative Duties Conferred by State Law

Occasionally, state law also imposes duties on the City Attorney independent from those obligations in the Charter. For example, provisions of the California Torts Claim Act, California Government Code section 810 et seq., state that subject to certain exceptions, "upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on

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account of an act or omission in the scope of his employment as an employee of the public entity.” Cal. Gov’t Code § 995. This provision has been interpreted as “mak[ing] it mandatory upon the city attorney to represent a policeman upon request in a civil action arising out of the scope of his employment” unless certain exceptions apply, such as a conflict of interest. *Sinclair v. Arnebergh*, 224 Cal. App. 2d 595, 598 (1964). However, in that situation the City Attorney is representing the individual employee in their official capacity, for actions taken within the scope of their employment. Thus the representation remains under the control of the City, not the individual, and the City Attorney is authorized by statute to withdraw from the representation if an actual conflict develops between the City and the individual. See *DeGrassi v. City of Glendora*, 207 F.3d 636, 642 (9th Cir. 2000) (confirming the City, and not the individual councilmember, has the sole right to control the defense and to settle the claim). The City Attorney has consistently retained conflict counsel to represent an officer who is named as a defendant in their official capacity when the City has taken or is pursuing disciplinary action against the officer regarding the subject matter of the lawsuit.