

**Switzer, Donna**

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**From:** Estanislau, Robin  
**Sent:** Tuesday, December 21, 2021 10:30 AM  
**To:** Derek Cole  
**Cc:** Switzer, Donna; Moore, Tania; Esparza, Patty  
**Subject:** Re: Correspondence re City Council Agenda Item 2021-1008

Received ... thank you.

Sent from my iPad

On Dec 21, 2021, at 9:57 AM, Derek Cole <dcole@colehuber.com> wrote:

Dear Ms. Estanislau:

On behalf of City Attorney Michael Gates, our office submits the attached letter concerning Item 2021-1008 on tonight's City Council agenda. We ask that this letter be made part of the record for that item.

Please confirm this letter will be added to the record as requested. Please also let us know if you have any questions or if there is anything else we need to do to have this item made part of the record.

Thank you,

Derek P. Cole, Partner  
<image001.jpg>  
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Roseville, CA 95661  
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<Letter to City Council\_1221-21.pdf>

**SUPPLEMENTAL  
COMMUNICATION**

Meeting Date: 12/21/21

Agenda Item No.: 37(21-1008)

Derek P. Cole  
dcole@colehuber.com

REPLY TO:  
 ROSEVILLE     ONTARIO

December 21, 2021

**VIA ELECTRONIC DELIVERY**  
**CITY.COUNCIL@SURFCITY-HB.ORG**

Mayor Barbara Delgleize and  
Members of the City Council  
City of Huntington Beach  
2000 Main Street  
Huntington Beach, CA 92648

Re: Regular Meeting of the Huntington Beach City Council  
December 21, 2021 Agenda, Item 21-1008  
Comments of City Attorney Michael Gates

Dear Mayor Delgleize and Members of the City Council:

This Office represents Michael Gates, the elected Huntington Beach City Attorney, regarding Item 21-1008 on the City Council's December 21, 2021 meeting agenda. For reasons we explain within, we write to advise the Council that this proposed item would be unlawful if approved, and we demand that the Council refrain from taking the proposed action.

Agenda Item 21-1008 is a proposal by Mayor Delgleize, Mayor Pro Tem Posey, and Councilmember Kalmick. It calls for City staff to "engage in a process to facilitate City Council selection of an outside legal firm that would directly report to and support the City Council." If the item is approved, the Council would direct the City Manager to take the actions necessary to retain a law firm to provide legal advice and representation outside the City Attorney's supervision. Under both the City Charter and California law, the retention of any outside law firm for these purposes is beyond the Council's authority, and would be unlawful.

Before outlining the reasons why the Council must refrain from taking the proposed action, we note we are well positioned to opine on Item 21-1008. Our law firm specializes in representation of municipal clients. Like other private law firms, we serve as contract city attorney to a number of cities and as special or litigation counsel to several cities. Because of our representation of municipal clients, we are very familiar with the unique nature of the attorney-client relationship in municipal settings. In particular, we understand that any contract not made in conformance with a city charter or applicable law is void. (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171.) Like all municipal law firms, we are scrupulous about respecting a city's contracting requirements and procedures because we know that our failure to abide by these could render our agreements unenforceable. (*Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 109.)

Consistent with these limitations on municipal contracting, it is our opinion that no law firm could lawfully enter into any agreement with the City Council under the terms and conditions Item 21-1008 proposes. To be sure, there is no dispute the City Attorney may retain outside legal counsel for a variety of purposes, as the City Attorney has historically done. Cities of all sizes regularly retain attorneys to perform specialized services in areas such as litigation, land use, environmental law, public contracting, and employment law. Even in cities with large in-house city-attorney offices, the complexities and demands of these and other unique areas of law often require the retention of specialists that can only be found in private law firms.

But while state law affirms the practice of retaining outside legal counsel when circumstances dictate (Gov. Code, § 37103), courts have made clear that such counsel may never be retained to replace or duplicate the work performed by in-house city attorneys. (*Rafael v. Boyle* (1916) 31 Cal.App. 623, 626; *Denman v. Webster* (1903) 139 Cal. 452, 456.) California law makes plain that when a city charter creates and enumerates the powers of city offices, a city council may not contract with private parties to perform those officers' duties. (*Hubbard v. City of San Diego* (1976) 55 Cal.App.3d 380, 388.)

Here, the powers of your City Attorney are clearly enumerated in Section 309 of your Charter. This section vests the exclusive power in the City Attorney to do the following:

- “(a) Represent and advise the City Council and all City officers in all matters of law pertaining to their offices.
- (b) Prosecute on behalf of the people any or all criminal cases arising from violation of the provisions of this Charter or of City ordinances and such state misdemeanors as the City has the power to prosecute, unless otherwise provided by the City Council.
- (c) Represent and appear for the City in any or all actions or proceedings in which the City is concerned or is a party, and represent and appear for any City officer or employee, or former City officer or employee, in any or all civil actions or proceedings in which such officer or employee is concerned or is a party for any act arising out of their employment or by reason of their official capacity.
- (d) Attend all regular meetings of the City Council, unless excused, and give their advice or opinion orally or in writing whenever requested to do so by the City Council or by any of the boards or officers of the City.
- (e) Approve in writing the form of all contracts made by and all bonds and insurance given to the City.

(f) Prepare *any and all* proposed ordinances and City Council resolutions and amendments thereto.” (Emphasis added.)

Charter Section 309 is unambiguous in assigning the responsibility for all essential municipal legal services to your City Attorney.<sup>1</sup> Critically, the section uses mandatory language—“The City Attorney *shall*”—in describing the duties to “represent and advise” the Council in “all” matters; prosecute “any and all” code-enforcement cases; “represent and appear” in all “actions or proceedings;” attend “all” regular Council meetings; approve the form of “all” contracts; and prepare “any and all” ordinances and resolutions. Also of note, Section 309 takes care to grant the City Attorney all necessary implied powers for carrying out these responsibilities. Subsection (h) of the section specifies the City Attorney must “[p]erform such legal functions and duties incident to the execution of the foregoing powers as may be necessary.” In short, the Charter vests authority over *all* legal services—express and implied—in your City Attorney.

Because of its comprehensive language, Section 309’s command is clear: the City Attorney must be responsible for *all* legal services provided to the City. Legal services can, of course, be performed by subordinates in the City Attorney’s office or, when appropriate, by outside counsel. But to carry out his or her duties under the City Charter, the City Attorney must be responsible for supervising subordinates or outside counsel in whatever tasks they are assigned. Necessarily, the City Attorney cannot execute his or her ultimate responsibility over “all” City legal matters if he or she cannot supervise or direct other attorneys working on City matters.

We understand that the Councilmembers proposing Item 21-1008 believe Charter Section 304(b) provides authority to retain legal counsel independent of City Attorney supervision. But this is a clear misinterpretation of the subsection, which merely authorizes retention of outside legal counsel. In this regard, the subsection states:

“... The City Council shall have control of all legal business and proceedings and all property of the legal department, and may employ other attorneys to take charge of or may contract for any prosecution, litigation or other legal matter or business.”

The language the Councilmembers rely on, the second clause of this sentence, simply authorizes the City Council to retain outside attorneys for “prosecution,” “litigation,” or “other” specialized legal matters. This language recognizes that, as the ultimate organizational decision-maker for the City, the City Council may retain attorneys in private practice when necessary or convenient for City purposes. But this language cannot be read to supplant or usurp the City Attorney’s role in supervising or controlling any counsel the Council retains.

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<sup>1</sup> Your Charter is consistent with general state law in this regard. As Government Code section 41801 provides, “[t]he city attorney shall advise the city officials in *all* legal matters pertaining to city business.” (Emphasis added.)

Municipal charters are subject to the same rules that California courts have developed for interpreting statutes. (*Oneto v. City of Fresno* (1982) 136 Cal.App.3d 460, 465; *Castaneda v. Holcomb* (1981) 114 Cal.App.3d 939, 942.) Charters are to be interpreted according to their plain meaning. (*Squire v. City and County of San Francisco* (1970) 12 Cal.App.3d 974, 980.) They must be read as a whole, such that all charter provisions are given effect, and none is nullified or rendered meaningless. (*Don't Cell Our Parks v. City of San Diego* (2018) 21 Cal.App.5th 338, 349.)

Under these rules of interpretation, Charter Sections 304 and 309 must be read together such that they are harmonized. Because Section 309 states that the City Attorney shall “represent and advise the City Council and all City officers in all matters,” and is responsible for all matters related to litigation, contracts, ordinances, resolutions, and the like, Section 309 must be read in conjunction with the Council’s authority under Section 304. Although Section 304 affirms the Council’s right to retain counsel, this right must be interpreted to only authorize the hiring of attorneys, who upon retention become subject to the City Attorney’s direction. Section 304 cannot be read to allow the Council to retain legal counsel who act independently of the City Attorney. Such an interpretation would nullify the plain language of Section 309, which vests in the City Attorney the power to supervise all City legal matters.

Put more simply, Section 304 does not allow the City Council to hire its own attorney to act entirely outside City Attorney supervision. The Council cannot create its own “shadow” city attorney simply because it disagrees with his advice or the acts he has taken. In interpreting municipal charters, courts ultimately look to the voters’ intent. (*International Federation of Professional & Technical Engineers, AFL-CIO v. City of San Francisco* (1999) 76 Cal.App.4th 213, 224.) Surely City voters did not intend for their city’s legal services to be provided by dual layers of legal counsel, each serving the same City Council, but each acting separately—and no doubt in conflict—with each other. It is inconceivable City voters intended to sow the seeds of such organizational disunity in approving their City Charter.

The Charter has, moreover, already received relevant—and dispositive—court interpretation. In a 1981 decision, the Fourth District Court of Appeals, in an unpublished opinion, considered the appeal of a former deputy city attorney whose employment had been terminated. (*O’Connor v. Hutton* (4th Dist. Ct. App. 1981) 4 Civ. No. 24536.) The then City Attorney had terminated the appellant’s employment for insubordination after the deputy had met privately with a city council member and refused to disclose his communication. In upholding the appellant’s dismissal, the court explained:

“In exercising client control over the City’s legal business, the city council has power to hire other attorneys, but this power is limited by the city attorney’s power over City legal affairs and the City’s legal department under City Charter section 309 and City personnel rule 4-4. ... Deputy city attorneys hired by the City work under the city attorney’s supervision and have no independent authority to represent and advise the City; they may act only through the city attorney.” (Op. at p. 5, emphasis added.)

This appellate decision confirms that the City Council has no authority to divest or abridge the City Attorney's authority over City legal services. Under Charter Section 309, the City Attorney must always take charge of the City "legal department." This requires that all attorneys who provide legal services to the City—whether as subordinate attorneys in the City Attorney Office or outside counsel—do so under his or her supervision.

In sum, for the reasons described above, we demand that the City Council refrain from approving or otherwise acting on Item 21-1008. The retention of an outside law firm not subject to City Attorney direction would manifestly violate Charter Section 309. We trust that the Council will recognize the error in proceeding as proposed when it considers the proposed item. However, should the Council proceed as proposed, City Attorney Gates advises he will be required to seek immediate judicial relief to protect the integrity of his Office. We hope the Council will act reasonably and responsibly so that litigation is unnecessary.

Sincerely,



Derek P. Cole  
COLE HUBER LLP