



CITY OF HUNTINGTON BEACH  
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of the  
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December 16, 2021

Mayor, Barbara Delgleize  
Mayor Pro Tem, Mike Posey  
Council Member, Dan Kalmick

SUPPLEMENTAL  
COMMUNICATION

Meeting Date: 12/21/2021

Re: Your Proposed "H Item" – a City Charter Violation

Agenda Item No.: 37(21-1008)

Ms. Delgleize, Mr. Posey, and Mr. Kalmick,

Allow this open letter to serve as a notice of your proposed violation of law as reflected in your "H Item" initiative you have prepared for this Tuesday's (Dec. 21<sup>st</sup>) City Council Meeting.

This is an open letter and it is *not* intended by me to be an attorney-client communication as this conflict may require judicial intervention for Declaratory Relief, Preliminary Injunction, and/or possibly Writ of Mandamus obtaining a Court Order in order to prevent this violation of law. As the City Attorney, and the one charged by the people of Huntington Beach to uphold and defend the law, I have a duty to the City (my client) to bring this important matter to light and press my opposition. The City Charter is our *highest (local) legal authority* and it embodies the voice of the people – it provides for my power and duties as the Elected City Attorney.

This may have gotten lost, but *this is the form of government the people of Huntington Beach have chosen*. By our Charter, the people elected to choose the City's legal counsel. By the same vote, the people of Huntington Beach have elected to not allow City Council its own choice of legal counsel. If you do not like it, locate to a city that has a form of government more to your liking, or, propose such a vote to the people of Huntington Beach for a change – but do not abuse *this* form of government. Your attempts to circumvent the Charter is not only offensive to your fiduciary duties to the City, it undermines the will of the people of Huntington Beach who adopted the Charter, who ratified the Elected City Attorney multiple times, and who elected us; in reality, it is a flagrant attack on our democracy.

To respond to some of your misrepresentations in your "H Item"... Under my leadership, we have ushered in an era of an exceedingly high quality of legal representation for the City, which includes overwhelming success in defending our police officers in lawsuits, achieving an over 90% win rate on cases, winning improbable lawsuits and trials, providing high quality legal advice,

Re: Your Proposed "H Item" – a City Charter Violation  
December 16, 2021

dramatically increasing levels of professionalism among our attorneys, increasing our hard and efficient work ethic, increasing responsiveness, and so much more. Through our legal work, we have saved/spared the taxpayers well over \$150,000,000 just since I took office in 2014. We have fought relentlessly for the City and the taxpayer; and have a win rate that any City Attorney, or frankly any attorney, would be envious of. Yet, you pretend now in your "H Item," for political purposes clearly, this is not good enough for you.

The lawsuit examples in the "H Item," which you cite for your poor opinion of our legal work, are inexplicable. *We have prevailed in every single legal battle* in the five-year long *Kennedy Commission v. City of Huntington Beach* case – and the only reason there is an attorney's fees award looming is because the court erroneously awarded fees to a party in the lawsuit who did not prevail. That is why we are appealing that fees award – you know this. All of Judge Stern's decisions have been overturned in this case – you know this too – yet you use his words against me? For the SB 54 *City of Huntington Beach v. State* lawsuit, we won that case in State Court too until a Court of Appeal misapplied the *City of Vista* 4-Part test analysis and arrived at a different conclusion. The California Supreme Court has not endorsed the *City of Vista* 4-Part for "Subdivision B" cases, or a case like SB 54. Indeed, the Court of Appeal got it wrong – and you all know this too. Having said this, we remain optimistic the California Supreme Court will intervene in cases like this and restore local control.

Posey and Delgleize *not only championed the legal fights on these lawsuits, Posey and Delgleize voted in favor of continuing the legal fights every step of the way.* And, you had always received briefs of applicable case law and full legal analysis from my attorneys, and you knew the odds/chances of prevailing – yet you repeatedly voted to pursue those legal challenges. Against many odds, my attorneys and I have won in court over and over again, in spite of the language of the "H Item."

Notably, none of the authors of this "H Item" have ever shared any complaints with me about the quality of legal representation the City was getting. I have been serving here now almost eight years, and, not one complaint from you. That fact alone speaks volumes regarding the merits behind your proposed "H Item."

Your "H Item" also contains misrepresentations, it is demoralizing to my staff, and it is disruptive to my working relationship with other City Departments. Regardless of the fact that your pretexts for your "H Item" are false, your attempt to retain outside legal counsel to report directly to you is *illegal*. To be abundantly clear, I have shared the following authorities and this analysis with you before. But, as in many other instances, apparently *you refuse to follow my sound legal advice.*

To be clear, according the Charter Section 309 and its subsections, the Elected City Attorney has the power and authority to, among other things, "represent and appear for the City *in any or all actions or proceedings* in which the City is concerned..." and "*prepare any and all proposed ordinances* and City Council resolutions and amendments thereto" and "perform such legal

Re: Your Proposed “H Item” – a City Charter Violation  
December 16, 2021

functions and duties incident to the execution of the foregoing powers as may be necessary” and ***“provide advice related to compliance with the City Charter to all elected and appointed officials of the City.”***

Most relevant at this juncture is the City Attorney has the power to *“provide advice related to compliance with the City Charter to all elected and appointed officials of the City.”* According to the Charter, only I am charged by the people of the City to interpret the meaning of the City Charter and provide advice related to compliance – not you, and not the City Manager. So, where there is a dispute or disagreement about what the Charter means, I alone am charged by the people of the community to interpret the Charter and provide counsel.

Obviously, because City governance is necessarily political, the question about the powers and authority of the City Attorney have been questioned by other political voices for decades – now yours. You cite one small section of the Charter that states the City Council “may” hire legal counsel, *yet you take it entirely out of context.* On this very question, the California Court of Appeal analyzed the City Charter and provided this response:

***“the City Council has the power to hire other attorneys, but this power is limited by the city attorney’s powers over City legal affairs and the City’s legal department under City Charter section 309...”*** and ***“The City Council may hire other attorneys to help the city attorney discharge her official duties, but may not relieve her of such duties. Any such attorneys hired by the City Council are under the city attorney’s supervision and have no authority to give opinions or act independently of the city attorney.”***

(Emphasis added, both cites at pg. 5 of the 1981 decision by the Court of Appeal, 4<sup>th</sup>. Div. 1; 24536). I have again attached a copy of that Court of Appeal opinion for your reference.

My predecessor City Attorneys have interpreted the Charter as well and have stated that the Elected City Attorney is the City’s “Chief Legal Officer” and “the City Attorney’s powers are plenary. The City Council cannot usurp the powers or duties of the City Attorney.” The courts of this State have expressly recognized the rule that a public agency may not contract and pay for services which the law requires a designated public official to perform. (McQuillin, Municipal Corporations section 12.52; *Jaynes v. Stockton* 14 Cal. Rptr. 49; *Merriam v. Barnum* 116 Cal. 619; *Montgomery v. Superior Court* 47 Cal.App.3d. 876)” and “any [Charter] grant of power to the Council... may not be interpreted as abrogating the authority and responsibility vested in a public official for the language of the grant does not dictate such a conclusion.” (*Merced County v. Cook*, 120 Cal. 275, 52 at p. 721; *Denham v. Webster* (1903) 139. 452, 454, 73 at p. 1390)” and “the elected and duly constituted city attorney shall continue to provide all legal services and advice to the City, that in civil matters the Council... should decide the disposition of causes and appeals brought by the city, that the other attorneys of the city are the alter ego of the City Attorney and under her supervision and control...” I have attached a copy of that City Attorney opinion for your reference.

Re: Your Proposed "H Item" – a City Charter Violation  
December 16, 2021

I have repeatedly advised you and others that no one in the City has any authority to independently retain outside legal services for the City except me. Not only is this reflected in my Charter authority under Section 309, it is also clearly mandated in more detail in Administrative Regulation 201, which governs the conduct of the City. City AR 201 states:

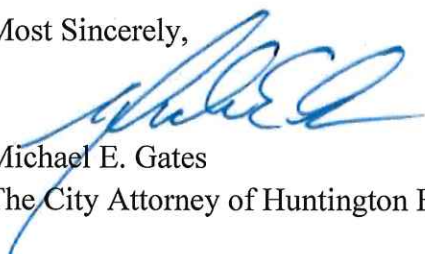
**Rule:** It is the responsibility of each Department Head to obtain authorization from the City Attorney's Office *prior* to any discussion/contact with outside legal counsel regarding any matter. No Department may independently contract for legal services by entering into a professional services agreement or any other type of agreement without the specific written authorization from the City Attorney." (emphasis in AR 201)

In essence, even thinking about using outside legal counsel requires *my written authorization*. As such, *any unauthorized retention of outside legal services is impossible, it is void*.

With all of this in mind, as the City Attorney, I will not sit idly by and permit the City Council to proceed down the path of violating the law and abusing the City. To that end, I will consider all legal options available and will take whatever steps are necessary to defend the form of government the people have chosen (by defending the City Charter) from the political opportunism clearly on display by your "H Item." I have explained my clear Charter authority to all of you before, even *ad nauseam*, yet you continue this fruitless pursuit in spite of my counsel.

While we may have our personal differences, we also have a job to do as charged to us by the Charter. I am requesting once and for all that you cease this absurd endeavor. Your pursuits by this "H Item" will only lead to violations of law, an undermining of the public trust, increased dysfunction among the Departments in City Hall, and ultimately, perhaps a Court Order mandating you to comply with the strictures of the City Charter. For these reasons, I am requesting that you abide by the City Charter, follow the law, and withdraw the "H Item."

Most Sincerely,



Michael E. Gates  
The City Attorney of Huntington Beach

Cc: All City Electeds and All City Staff, and  
Entire Huntington Beach Community