



County of San Diego

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CONFIDENTIAL
ATTORNEY-CLIENT
COMMUNICATION

Board of Supervisors
County of San Diego
County Administration Center
San Diego, California 92101

Re: Governance Provisions and Non-Interference in the San Diego County
Charter

Dear Honorable Board:

ISSUE PRESENTED

This Office has received a number of questions regarding the structure of San Diego County government. In particular, it has been requested to clarify the roles of the Supervisors and the interaction between them and the Chief Administrative Officer (CAO), including personnel under the CAO's supervision. In analyzing this question, the Office has looked closely at two related non-interference provisions in the San Diego County Charter (Charter), as well as the Charter as a whole.

SUMMARY

The County has a "council-administrator" form of government. Under this system—the most common governmental structure in the United States among larger municipalities and utilized by a substantial number of counties—the elected body sets policy, while the administrator carries out the policy. In our County's Charter, it is clear that the administrator (CAO) has sole authority to implement the policies adopted by the council (e.g. the Board of Supervisors). (Charter §§ 703; 703.3.) Of the fourteen counties that have charters (out of fifty-eight total), San Diego County has strong provisions setting forth the roles of the elected bodies and administrators, and the strongest in the area of non-interference.

There are two main provisions in the Charter that discuss “non-interference.” The principle of non-interference serves to strengthen the different roles of the Board and manager. The first provision, Section 501.9, indicates that no member of the Board shall give orders, instruct, or interfere with any officer or employee reporting to the CAO. The second, Section 705.3, prohibits influencing or coercing the Purchasing Agent of the County. Both provisions reinforce the governance model under which the CAO manages the day-to-day operations of the County, while the Board collectively sets policy.

The prohibition related to the Purchasing Agent was in the original Charter from 1933. However, in the early 1980’s, a series of scandals regarding serious dysfunction in County government occurred, perceived to be due in large part to coercion or interference with the operation of the County by the elected Supervisors. In response, in 1984 the voters of San Diego County approved a charter amendment to make the CAO the appointing authority for almost all department heads. In addition, Section 501.9 was added to the Charter prohibiting interference with the CAO and County operations. This amendment of the Charter included some of the strongest provisions reinforcing the council-administrator form of government among all the charter counties in the state.

In particular, those Charter amendments state that a member of the Board of Supervisors may not “give orders, instruct, or interfere, publicly or privately” with the CAO or the officers or employees under the CAO’s supervision. Further, the Charter indicates that such conduct shall constitute “misconduct in office” as well as an infraction (a criminal offense), which is enforceable by the District Attorney. For misconduct in office, an elected official, including a Supervisor, can be removed from office under general state law. (Charter § 1002; Gov’t Code § 3060 *et seq.*) Under the Government Code, removal could occur after the Grand Jury examines and returns a charge of such misconduct, which could then be further prosecuted by the District Attorney.

ANALYSIS

I. Nature of the County

An opinion of the Office of County Counsel set forth the nature of counties in California as follows:

“A county is defined in Government Code Section 23000 as the largest political subdivision of the State having corporate powers. The division of a state into counties originated in England many hundreds of years ago. This practice has continued because counties have fulfilled a practical need in the operation of local government and the administration of justice. Counties were first created by the legislatures of the various colonies and in turn by the legislatures of the states as they came into existence. They are political subdivision[s] of the state established for more efficient administration of

government and are invested by the legislatures with the powers necessary for the welfare, advantage and protection of the people within their boundaries.” (Memorandum of San Diego County Counsel Robert G. Berrey, POWERS AND DUTIES OF BOARDS OF SUPERVISORS AND COUNTY OFFICERS, (December 1974) (adapted from Memorandum of Los Angeles County Counsel John H. Larson): 1.)

II. The County Charter

The California Constitution authorizes counties to adopt charters for the purpose of local self-government. Since 1933, the San Diego County Charter has provided for the County’s “home rule” authority. (Approved by the California Legislature, Stats. 1933, res. ch. 10, p. 2814.)

Included in this home rule authority is the ability to provide for the “powers and duties of governing bodies and all other county officers.” (Cal. Const. art. XI § 4, subd. (e).) A county charter will generally supersede inconsistent provisions in the State general law related to the organization of County government. (Cal. Const. art. XI § 4, subd. (g); *see also Dobb v. County of San Diego*, 8 Cal. 4th 1200, 1206 (1994); *Pearson v. County of Los Angeles*, 49 Cal. 2d 523, 533-35 (1957).)

III. Proposition A (1984 Charter Amendment)

A Charter amendment in 1984 was adopted by the voters in response to a series of scandals affecting the County. The nature of those scandals and the voters’ response was set forth in contemporaneous news reports as well as findings of the San Diego Grand Jury.

The position of CAO did not exist until it was created by Ordinance in 1947 to provide for administrative supervision over the affairs of the County. The position and duties were not added to the County Charter until 1969. (Approved by the California Legislature, Stats. 1969, res. ch. 14, p. 3515.)

But by 1984 the effectiveness of the CAO position under the then-current Charter was publically questioned. The San Diego Union reported:

“[CAO Clifford] Graves, also criticized for failing to lend a firm hand in running the day-to-day operations, appears hemmed in by the County Charter, which makes him little more than the supervisors’ chief adviser and the person who carries out board policies.”

(San Diego Tribune, February 27, 1984: 6.)

At the same time, the County was undertaking discussions regarding the roles of its elected officials and officers. For example, a minute order of the Board in February 1984 discussed "clarify[ing] the roles of the Board of Supervisors, the Chief Administrative Officer, and County managers....". ("Conference on County Goals Relating to Development of 84-85 Proposed Budget; Report Due 4/24," Board of Supervisors, February 21, 1984 (44).)

Then, in March 1984, the San Diego Tribune published a series of 13 articles titled "County in Chaos." These articles painted a dysfunctional picture of County government. Central to these stories was a perception that some Board members of that era were abusive to County staff and exerted too much individual authority over day-to-day administration. The Los Angeles Times later described the County in early 1980's as follows:

"In those days, [Rodger] Hedgecock was the dominant figure on the board, and he was joined in many political endeavors by [Jim] Bates. The pair had a reputation for publicly brow-beating the county staff, sometimes to the point of bringing seasoned professional bureaucrats to tears."

"County staff members complained privately that board members routinely summoned them to their private offices and ordered pet projects begun or studies undertaken." (Los Angeles Times, November 16, 1986.)

In response to a San Diego Tribune editorial suggesting several options for County reform, the San Diego County Employees' Association published the following response:

"We concur in your call for strengthening the office of the county's chief administrative officer. As it is, the staff of the Board of Supervisors -- political appointees all -- feels free to interfere in the departments of the chief administrative officer.

...

This association concurs that the county needs a strong chief administrative officer and would support that option suggested by you for an appointed county manager with broad and clearly defined executive powers similar to that of the San Diego city manager." (San Diego Tribune, March 23, 1984: B-11.)

The Grand Jury Issues a Report Recommending Clear Lines of Authority in County

The 1983-1984 San Diego County Grand Jury issued a report addressing the need for reorganization of the County. The Grand Jury made the following statements and findings:

“San Diego County is big business. Currently it needs help - a great deal of help. The County requires an administrative organization that is professional and diligent, with clearly defined lines of authority.”

“Previous leadership on the Board, stemming from a consuming search for power, apparently caused much of the early turmoil. The County's complex formal organizational structure, in and of itself, is the source of many formidable challenges.”

“Critically wounded by a heritage of arrogant and abrasive leadership in the early 80's, the County became an easy target for those who felt the urge to criticize -to find fault -to point the finger. This resulted in an atmosphere of distrust, a confusion of authority, a downswing in employee morale.”

“Probably the area of greatest concern involves the relationship between the Board of Supervisors and the Chief Administrative Officer.”

“If the Board would confine itself to policy, and insist that the CAO exercise firm leadership over the department heads, then everything quite possibly would fall into place.”

(“San Diego County Organization,” Interim Report #9, 1983/84 Grand Jury.)

The Grand Jury made the following recommendations:

“RECOMMENDATION 1: The Board of Supervisors is urged to request County Counsel to take the necessary steps for revision of the County Charter to make all department heads appointive excepting [certain elected officials].

RECOMMENDATION 2: All department heads, excepting [certain elected officials], should report directly to the CAO, who would have full authority to hire or fire such officials.

RECOMMENDATION 3: Appropriate instructions should be developed which would charge the Board of Supervisors with full responsibility for all policy decisions. The Board, in turn, would deal directly with the CAO, who would exercise complete authority over all of the department heads except [certain elected officials]. (Emphasis added.)

In the Board's response to this report, the Board stated it was “currently considering issues regarding the County government structure.” The Board concurred with the recommendation that the CAO should have more authority to hire and fire. The Board also

stated it was considering a County "non-interference policy" which would "regulate the manner" in which the Board members interacted with officers and employees under the CAO's authority. The Board proposed that "[s]uch a policy would help to delineate policy decisions from policy execution." ("Responses to 1983-84 Grand Jury Interim Report #9," Board of Supervisors, May 14, 1984.)

Proposition A is Placed on the Ballot

Three months later, the Board placed a County Charter amendment (Proposition A) on the November 1984 ballot. The 1984 County Counsel Impartial Analysis of Proposition A stated in part:

The existing Charter authorizes the Board of Supervisors (Board) to appoint officers and employees. This amendment will limit the Board's appointing power to the Chief Administrative Officer (CAO), County Counsel, Probation Officer and Director of Equal Opportunity Management. The CAO will appoint all other appointed County officers....

The existing Charter prohibits members of the Board from influencing the Purchasing Agent in performing his/her duties, except for purpose of inquiry. This amendment will prohibit any member of the Board or his/her staff from interfering with officers or employees appointed by or under the CAO, except through the CAO, but will permit seeking information from these officers or employees. Violation will be an infraction and constitute misconduct in office. (Emphasis added).

The Impartial Analysis also identified the impact of Proposition A on the Board's ability to remove the CAO:

The existing Charter places the CAO in the Executive Service and permits his/her removal, subject to a hearing right, by unanimous vote of the Board after fifteen days' written notice of intention to remove, or by four-fifths vote after thirty days' notice. This amendment places the CAO in the Unclassified Service and permits his/her removal by majority vote of the Board after fifteen days' written notice of intention to remove. (Emphasis added.)

Passage of Proposition A

In November 1984, Proposition A passed. Thus the non-interference clause was added as Section 501.9 of the County Charter. Section 501.9 states:

"Non-interference. No member of the Board nor any member of the Supervisor's staff shall give orders, instruct, or interfere, publicly or

privately, with any officer or employee appointed by or under the Chief Administrative Officer except through the Chief Administrative Officer.

This section does not limit a member of the Board or member of the Supervisors' staff from seeking information.

The Chief Administrative Officer shall establish a procedure for responding to requested information from members of the Board and the staff.

A violation of the provisions of this section shall constitute an infraction and violation by a member of the Board of Supervisors shall also constitute misconduct in office. The District Attorney shall enforce the provisions of this section."

To the extent that ambiguity exists regarding the Charter provisions discussed above, the contemporaneous events surrounding the Charter amendment would be probative in interpreting the meaning of the Charter. Cal Civ. Code § 3535 ("Contemporaneous exposition is in general the best"); *Cornell v. Harris*, 15 Cal. App. 2d 144, 149 (1936.)

Further Accountability for the CAO in Proposition A

While Proposition A added the non-interference clause, it also strengthened the Board's ability to remove the CAO, which was reduced from a unanimous or four-fifths vote (depending on the amount of notice), to a three vote majority. While the Board sets policy and the CAO administrates County business, ultimately the CAO is accountable to the Board. As stated in Section 703 of the Charter, "The Chief Administrative Officer is responsible to the Board for the proper administration of such affairs of the County." (Emphasis added.)

It should be noted that it is well-established that the CAO can only take instruction from the Board acting as a collective body, and not from the direction of one individual member. *See, e.g.*, Gov't Code § 25005; County Counsel Opinion No. 1975-153M (January 1975); *County of San Diego v. Siefert*, 97 Cal. 594 (1893); *see also* Board Policy A-72 (generally limiting CAO efforts without collective Board direction to 8 hours for individual Board offices).

Specific Mechanisms of Enforcement

As a formal matter, the non-interference clauses in the Charter are enforceable by the District Attorney. *See* Charter § 501.9 ("The District Attorney shall enforce the provisions of this section."); *see also* Charter § 1002 (stating that a violation of the Charter is enforceable as provided by the "general law," which is enforced by the District

Attorney). Complaints could be filed directly with the District Attorney. Under the relevant government code provisions for removal from office, conduct would have to be “willful or corrupt.” See Gov’t Code §§ 3060-3075. Case law has confirmed that removal requires “serious misconduct,” not mere negligence, *Steiner v. Superior Court*, 50 Cal. App. 4th 1771 (1996), and an accused official is entitled to a jury trial. Gov’t Code § 3070. A private party may also be able to bring a civil lawsuit to enforce compliance with the provisions of the Charter. See, e.g., *Giles v. Horn*, 100 Cal. App. 4th 206 (2002); *Terry v. Bender*, 143 Cal. App. 2d 198 (1956).

Beyond formal enforcement, other efforts to obtain compliance with the Charter include: informal private counseling between a member and another member; an open session discussion of particular matters, as appropriate; or a censure by the Board of particular conduct, among other remedies.

County Policies Reflect the Non-Interference Provisions in the Charter

The Board has implemented Board Policy A-98 (Board Policy on Non-Interference in Administrative Affairs), and Board Policy A-72 (Board of Supervisors’ Agenda and Related Processes; see § D “CAO Referrals and Requests for Information”), and the CAO implemented Administrative Manual Policy 0020-13 (Responses to Referrals from Individual Supervisors and their Staff). Each of these policies reflect and effectuate the Charter’s policy of non-interference.

The Charter’s Non-Interference Clauses are Modeled After the San Diego City Charter

The County Counsel Impartial Analysis for Proposition A correctly stated that Section 501.9 is based on an already existing Charter prohibition on Supervisor contacts with the Purchasing Agent (Charter § 705.3). But as will be discussed herein, both the Purchasing Agent clause and the non-interference clause in Proposition A appear to be modeled after the San Diego City Charter’s prohibition on City Council interference with the City Manager. This is explained further in Section IV, below.

IV. Charter Section 705.3 (Interference with Purchasing Agent)

As discussed above, the non-interference clause added to the Charter in 1984 was reported to have been influenced by the already existing prohibition in Section 705.3 regarding interference with the Purchasing Agent. The Purchasing Agent prohibition was included in the original Charter in 1933. However, this section was modeled after a similar City of San Diego Charter (City Charter) prohibition related to contacts with the City Manager.

Development of the 1933 Charter

Prior to the 1933 Charter, the Board of Supervisors had little control over the County's annual budget or the number of total County employees. These were set by the State legislature and were based on recommendations from the San Diego County Grand Jury. (San Diego Union, October 17, 1932: 3.) Individual Supervisors did exercise considerable control over road districts that were contiguous with their supervisory districts. (San Diego Union, March 21, 1931: 2.)

By 1931, discussions were underway for a charter to reorganize the structure of County government. The San Diego County Grand Jury published a report recommending a centralized form of County government, with the Board becoming the "general overseers" of the County. (San Diego Union, March 21, 1931: 2.) The Report also recommended that the County designate a "county superintendent of operations—a business head" to "see that the business affairs of the county are conducted with the fullest possible co-ordination and co-operation between all county departments."¹ (San Diego Union, March 21, 1931: 2.) In 1932, The Board of Supervisors called for an election to seat a fifteen-member Board of Freeholders² to prepare a proposed charter. (Ordinance No. 364, 1932.)

Influence of the San Diego City Charter

The County's non-interference provisions appear to be heavily influenced by the 1931 Charter of the City of San Diego (City Charter). The City Charter established a council-manager form of government. That existed in the City up until 2006, when the City adopted a "strong mayor" form of government. (Charter of the City of San Diego, § 22, as approved April 7, 1931.) Section 22 (a) of the City Charter contained a "non-interference" clause prohibiting members of the City Council from "directly or indirectly by suggestion or the otherwise influence or coerce the City Manager" in matters of purchasing supplies, or appointments to office or employment."³ The 1933 County Charter

¹ A County CAO would not be appointed for another sixteen years, in 1947.

² Under former Article 11, Section 7 ½ of the California Constitution (repealed 1970), a "board of freeholders" consisted of fifteen members of the public elected for the purpose of preparing a proposed charter to be voted on at the next election.

³ The full text of the 1931 City Charter Section 22:

"INTERFERENCE BY INDIVIDUAL MEMBERS OF COUNCIL WITH ADMINISTRATIVE SERVICE PROHIBITED.

(a) No member of the Council shall directly or indirectly by suggestion or otherwise attempt to influence or coerce the City Manager or other officer appointed or confirmed by the Council in the making of any appointment to, or removal from, any city office or employment, or the purchase of any supplies, or discuss directly or indirectly with any candidate for City Manager the matter of appointments to City Offices or employment, or attempt to exact any promises from such candidate relative to any such appointments.

(b) Except for the purpose of inquiry, the Council and its members shall deal with that part of the administrative service for which the City Manager is responsible solely through the City Manager and not through his subordinates.

(c) A violation of the provisions of this section by any member of the Council shall constitute a misdemeanor for which the offending member may be removed from office by the Council or for which the offending member may

restriction on Supervisor contacts with the Purchasing Agent mirrors much of the language in the City Charter.⁴

Section 22 (b) of the City Charter required members of the City Council to only deal directly with administrative personnel through the City Manager and not through subordinates.⁵

A contemporaneous news report referred to the unprecedented “teeth” of this City Charter provision:

“Elective officials found themselves confronted by these ‘teeth,’ which were inserted in the new charter to prevent the political domination of the business functions of government, when strong intimation was given that any ‘suggestions’ to the new manager would have to be couched in the most delicate manner.

Section 22 of the charter is explicit regarding what an elective official cannot do if he wishes to continue in office. It is the strongest section known to have been written into any city manager charter form.” (San Diego Union, May 27, 1932: 11.) (Emphasis added.)

Despite the recommendation from the 1931 Grand Jury for a “county superintendent of operations,” the 1933 County Charter did not create a position equivalent to a city manager. As discussed above, a similar non-interference provision would later be added to the County Charter in 1984’s Proposition A.

Creation of the Purchasing Agent Office and Charter Restrictions on Interference

While a CAO was not added to the County until 1947, the concept of a “purchasing agent” was more common in local government in the early part of the last century. Because of the perceived potential for improper influence, especially in the area of contracting, the San Diego City Charter provisions regarding non-interference were added to the County Charter to insulate the Purchasing Agent against such influence. An understanding of this history, and the problems that were to be protected against in the purchasing area, is useful in interpreting the County’s Charter today.

be tried by any court of competent jurisdiction and if found guilty the sentence imposed shall include removal from office.”

⁴ The Office been unable to find any document predating the 1931 City Charter that uses similar phrasing. However, the City’s non-interference with the City Manager provision may be found in smaller cities, predominantly in Utah and Oregon.

⁵ These provisions still exist in the City Charter, but the office of City Manager was replaced with the Mayor due to the 2006 change to a strong mayor form of government. (City Charter § 270.)

The first County Purchasing Agent was hired in early 1931—two years before the County Charter was adopted. The Board voted to put the Purchasing Agent under the direction of County Supervisor Leroy H. Aul.⁶ (San Diego Union, March 3, 1931: 8.) Later that year, the Board considered a new ordinance to prohibit interference by Supervisors in the dealings of the Purchasing Agent. The ordinance borrowed language from the new City Charter’s “non-interference” clause and stated that no Supervisor “shall directly or indirectly, by suggestion or otherwise, attempt to include the purchasing agent in the performance of his duties.” (San Diego Union, October 27, 1931: 6.) The San Diego Union reported that the proposed ordinance received “bitter opposition” from members of the Board who voiced strong opposition to the non-interference clause.⁷ The paper reported:

“[Supervisor] Hornbeck thought the section ‘too strong;’ he suggested various modifications which he believed essential to permit members of the board at least to say ‘how do you do’ when they meet the purchasing agent. Supervisor Hastings said something about ‘a little king’ and Supervisor Hurley broke in with ‘I’d suggest we buy a little throne for the purchasing agent....’” (San Diego Union, October 27, 1931: 6.)

A provision prohibiting interference with the Purchasing Agent was later included in the 1933 County Charter. (Stats. 1933, res. ch. 10, p. 2824.) The current provision is substantially unchanged from the original 1933 Charter. The clause is now found in County Charter Section 705.3 which states:

“A Supervisor or an officer shall not attempt, directly or indirectly, to influence or coerce the Purchasing Agent in the performance of duty. Except for the purpose of inquiry, a Supervisor shall not deal directly with the Purchasing Agent for the purpose of buying supplies. The Board shall conduct official business with the Purchasing Agent only as a Board convened in regular session.” (Emphasis added.)

The enforcement provision for this Charter provision is found in Section 1002, which states:

“Unless otherwise specified in this Charter, a violation of a provision of this Charter constitutes misconduct in office and may be grounds for removal from office as provided by general law.”

⁶ At the time, individual Supervisors had direct supervision over certain County departments. (San Diego Union, March 3, 1931: 8.)

⁷ Later that week Supervisor Aul and members of his staff testified in front of the Grand Jury regarding allegations of improper purchases for Supervisor Aul’s road district. (San Diego Union, October 31, 1931: 2.)

Although additional provisions in the Charter relate to the Purchasing Agent, the current Charter section 705 summarizes the broad authority of the Purchasing Agent:

“The Director of Purchasing and Contracting acts as the Purchasing Agent. Except in cases of emergency, the Purchasing Agent shall make all purchases for the County and may make them only upon receipt of a requisition signed by an official authorized by the Board. Emergency purchases may be made by others authorized by the Board, but they shall be subsequently either approved by the Purchasing Agent or ratified by a four-fifths vote of the Board. Purchases of property for the County are invalid unless made as specified in this Section.”

Charter Section 1000.1 Adopted in 2001 to Further Reduce Political Influence on the Purchasing Agent

An additional Charter provision added in 2001 further addressed the relationship between the Board and the Purchasing Agent. The 2001 Charter amendment added Section 1000.1 which requires contractors to disclose contributions to Supervisors prior to Board approval of service contracts. The following subsection was added to Section 1000.1 that reflects the continued delegation to the Purchasing Agent of approval of service contracts:

“Section 1000.1 (h) Delegation. In accordance with applicable law, and the provisions of this Charter, the Board of Supervisors may continue to delegate to the County’s Purchasing Agent or to other appropriate County officers the authority to approve service contracts in order to permit the Purchasing Agent and other appropriate County officers to continue to approve service contracts outside the political arena.” (Emphasis added.)

For this reason, the Charter Section 1000.1 disclosure process is rarely invoked since the Board does not commonly approve service contracts directly. Instead, the Board will as a matter of course authorize the Purchasing Agent to approve certain service contracts on behalf of the County in accordance with the Administrative Code. Upon successful negotiations and determination of a fair and reasonable price, the Purchasing Agent may approve the service contract. (See The Board Letter Manual-County of San Diego, September 24, 2018: 86.)

Recommended Practices Based on the Charter’s Purchasing and Contracting Non-Interference Clauses

The San Diego County Charter is notable in that, beyond the strong non-interference clause prohibiting interference with the CAO’s operations, it has a specific non-interference clause for the Purchasing Agent (Section 705.3), along with an additional prohibition against political influence in contracting generally (Section 1000.1). Because of these clauses, it is recommended to avoid contact or influence with the processes of the

Our Office is available to advise on any particular matters that may arise in this regard in the future.

Very truly yours,

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APPROVED:

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