



**Measure A: Outside Legal Counsel for
City of San Diego Independent Auditor and Audit Committee**

February 2024

SDCTA Position:

SUPPORT

Rationale for Position:

There are real conflicts of interest that can occur between the city auditor and the city attorney that cannot be resolved, as the two distinct professions have distinct standards of procedure. Because the Association wants the city auditor to be assured of his or her independence, a charter change that creates the option for independent counsel is appropriate when the auditor and city attorney have differences in opinion that cannot be resolved.

Title: Measure A

Type: Council sponsored voter initiative to amend the city charter

Vote: Primary Presidential Election in March 2024

Status: On the ballot

Issue: Independent Counsel for City Auditor and Audit Committee

Description: To adjust the city charter to permit independent legal counsel for the city auditor without the approval of the city attorney

Fiscal Impact: If passed, likely \$0-\$300K per year

Background

In November 2023, the city council requested the placement on the March 2024 Presidential Primary ballot. A January 2020 proposal from the then city auditor, Kyle Else, to amend the charter to permit the city auditor to hire outside counsel when the Audit Committee deems it is in the public interest.

Of note, though not of salience for the purposes of this position paper, the significant time delay between the origination of the proposal and the placement on the ballot was due to required meet-and-confer procedures with the Municipal Employees Association and the Deputy City Attorneys Association.

The current city auditor Andy Hanau has advocated strongly for this change because he cites numerous conflicts of interest between the auditors and the city attorney's office, especially when his office is auditing the work of the city attorney. The conflicts between the two offices became known publicly when there were differences in viewpoints on the 101 Ash Street debacle in the city of San Diego.



The current city attorney Mara Elliott has objected to this proposal, arguing that as city attorney, she has sole responsibility for all legal advice to the city and that there are procedures and practices in place already for conflicts of interest.

Governance Impact

Fundamentally, this proposal invites questions on the appropriate checks-and-balances within the city of San Diego when different officers—elected or appointed—have significant disagreements. In this particular case when there is a potential conflict between the city auditor—who has a responsibility to conduct independent audits—including of the city attorney’s office, and the city attorney – who has a responsibility to provide legal advice to all city officers and departments, including the city auditor – we must ask what practices and procedures ought to be in place to protect taxpayer interests first and then whether those practices and procedures ought to be specified in the city charter.

It is clearly in the interest of taxpayers for the city auditor to be absolutely independent and to have in place practices and procedures that assure that independence. Noted in the Association of Local Government Auditors, ‘Model Legislation Guidelines for Local Government Auditors’ (Sixth Edition, 2021), “it is essential to protect auditors’ impartiality and objectivity, so decision-makers and the public can rely on their work. Managers of functions that may be audited should not have authority over the work of auditors. To be independent in fact and appearance, auditors must be free from conflicts of interest and free from interference in how the work is conducted and reported. Auditors must have systems in place to identify and safeguard against, or if necessary, to report threats to independence.” They note that Government Accounting Standards, known as the, “Yellow Book,” highlight seven threats to independence: self-interest, self-review, bias, familiarity, undue influence, management participation, and structure.” The Association of Local Government Auditors suggest explicitly in their model legislation, which address the seven areas of risk, that outside counsel should be permitted should the auditor identify a conflict of interest or threat of independence.

Interestingly though, if the city of San Diego were to approve this charter amendment, it would also be the only large city in California to have such an explicit authority for the auditor to have outside counsel and to follow the model legislation guidelines discussed above. Below is a brief table that highlights how each city attains both legal advice and auditing and whether charters specify how to handle conflicts of interest between officers. The table also notes any funding requirements for the auditing function.



City	General Counsel	Auditor	Outside Counsel and Conflicts of Interest	Funding Requirements for Auditor
Los Angeles	Elected City Attorney	Elected Controller/ Auditor	Not specified in charter - City Attorney provides counsel	No minimum
San Francisco	Elected City Attorney	Appointed “City Services Auditor” in executive branch under Controller	Not specified in charter - outside counsel hiring process specified in City Attorney description	Charter requires a minimum amount of funding
San Jose	City Attorney appointed by City Council	Appointed City Auditor	Not specified in charter - City Attorney provides counsel	No minimum

That said, the voters of San Diego have approved outside counsel for the Ethics Commission and the Commission on Police Practices. The Association supported in 2004 Proposition E, which created independent counsel for the Ethics Commission.

As a contrast to what charter cities seem to do, auditors at the Federal and state levels do have independent counsel, and across the state of California, county auditors also have independent counsel.

The city attorney notes that there are accepted practices and procedures to handle conflicts of interest. While no other large city charter except the City and County of San Francisco specifies a specific manner by which to handle city attorney conflicts, it seems highly likely that conflicts of interest may occur in places like Los Angeles and San Jose, whose charters do not define a process.

The crux of the matter, however, is what happens when the auditor and city attorney disagree on whether there is a conflict.

Given the Association supported the establishment of independent counsel for the Ethics Commission, as well as the establishment of the independent city auditor, it seems natural to support this proposal to create independent counsel for the auditor to assure that he/ she could perform auditing duties with absolute independence.

Fiscal Impact

If passed, the City Auditor estimates an annual cost of up to \$180,000.¹ While that seems reasonable, SDCTA believes it could be anywhere from nothing in years when no outside counsel is hired to potentially \$300K depending on the difficulty of finding counsel that is not already conflicted or hired by the city in other areas.

Proponents and Arguments

Supporters argue that an Independent Counsel is necessary to ensure the City Auditor's autonomy and impartiality in conducting audits. They contend that having an external legal advisor would enhance transparency, objectivity, and the overall effectiveness of the auditing process. The City Auditor, backed by some council members and external advocates, asserts that an Independent Counsel is essential for addressing legal complexities and potential conflicts of interest that may arise during audits.

- City Auditor Andy Hanau
- Council President Sean Elo-River
- Councilmembers
 - Joe La Cava
 - Kent Lee
 - Monica Montgomery Steppe
 - Vivian Moreno
- Association of Local Government Auditors
- Institute of Internal Auditors

Opponents and Arguments

Opponents, including some city officials, express concerns about the cost and need for an Independent Counsel. They argue that existing legal resources within the city, such as the City Attorney's office, are sufficient to support the City Auditor. Some critics raise questions about the necessity of external legal counsel and suggest that it may duplicate existing services, leading to unnecessary expenses. Additionally, there may be concerns about potential delays and complications in the audit process if an external lawyer is involved.

- City Attorney Mara Elliott
- Councilmembers

1

<https://www.sandiegouniontribune.com/news/watchdog/story/2023-11-03/san-diego-city-auditor-independent-lawyer>



- Jennifer Campbell
- Raul Campillo
- Marni von Wilpert
- Stephen Whitburn