Councilmember Expenditures/Reimbursements

A NOTE ON THE TITLE

I had intended to call this paper "A Heartbreaking Work of Staggering Genius," but was stunned to discover that someone had already taken that title.[1] After overcoming my disappointment, and upon further reflection, I determined that such an auspicious title was probably inaccurate. In point of fact, this is your standard, garden-variety League paper—a summary of the relevant law, some issues to watch out for, and some recommendations. Nothing too sexy or exciting. Of course, if you are reading this paper without the benefit of having heard the talk that accompanied it—well, that was a horse of a different color . . .

So why the dry title? I did consider yet another title option to try to jazz things up a bit. Recognizing that the issues of council expenditures and reimbursements are inextricably intertwined, I considered "Payback's a bitch." However, I thought this might encounter some editorial resistance. Further, anyone doing a keyword search on the topic of councilmember expenditures and reimbursements would not likely encounter this paper. Consequently, I opted for the somewhat pedestrian, but Boolean-friendly title which appears above.

THE ACTUAL PAPER

So you've just been elected to the City Council. There is a crisis in the State—hypothetically, let's say it is a budget crisis. You and some of your fellow councilmembers determine that a visit to the capitol is appropriate. You inquire of your compatriots "The City pays for all of this, right?" The response is a resounding "Of course. Absolutely. Mostly. Probably. So how about them Dodgers?"

The determination of what constitutes a permissible City Council expenditure is almost as confusing as how that expenditure gets paid. Assuming an expenditure is legally permissible, that expenditure can be paid in advance by the City, the councilmember can receive a check or cash as an advance to make the expenditure, the councilmember can use a city credit card, or the councilmember can be reimbursed for expenses. Regardless of how the expenditure gets paid, however, the threshold question to be asked is whether your city is a general law city or charter law city.

CHARTER v. GENERAL LAW CITIES

Although there may not be many areas in which the two types of cities differ anymore, allowable council expenditures is one of those areas. To refresh, general law cities derive authority from the California Constitution (police power) and statutes adopted by the California legislature. A Charter law city derives its authority from the California Constitution (authority to regulate over municipal affairs) and its charter.

[1] Dave Eggers, Heartbreaking Work of Staggering Genius (2000).

Additionally, where the charter is silent and/or state law in an area governs a matter of statewide concern (as opposed to a municipal affair) a charter city will be governed by state statutes.

What this means in the context of council expenditures is that general law cities are governed (read limited) by state statutes—and interpretations thereof (discussed more fully below) and charter law cities will be governed by the provisions of their charters, or ordinances adopted pursuant to authority in such charters. Thus, charter law cities have a great deal more flexibility in addressing the issue of council expenditures, and can be very detailed in regulations/provisions/policies pertaining to council expenditures. General law cities adopting such detailed regulations/provisions/policies have no assurance that a court or the legislature will agree that the regulations/provisions/policies are consistent with governing state law.

THE CHARTER CITY FREE FOR ALL

The Attorney General's office recently issued an opinion concerning Government Code section 36415.5,[2] in response to an inquiry from the Public Integrity Division of the Los Angeles County District Attorney's Office.[3] The DA's office wanted to know whether the funds of a general law city or a charter city may be used to reimburse city council members for their expenses in purchasing meals for others, such as legislators, constituents and representatives of private businesses, during a lunch or dinner meeting where legislation or other matters of importance to the city are discussed.

The AG concluded that the funds of a charter law city, but not those of a general law city, may be expended for such purposes.[4]

With regard to charter law cities, the AG opined that notwithstanding state law provisions,

> " . . . We believe that reimbursement of city officers and employees for expenses incurred in performing city duties is a municipal affair within the meaning of article XI, section 5. [Citation] Thus a city charter may provide for the reimbursement of expenses of members of a city council in a manner different from that provided in section 36514.5. . . .[T]he electorate of a charter city through the adoption of a charter or its amendment has the constitutional authority to determine which, if any, expenses incurred by city council members will be

[2] which prompted this paper

[3] 85 Ops.Cal.Atty.Gen. 210 (2002).

[4] Actually, the AG issued two opinions. In the first, the AG concluded that no city official in a general law city could be reimbursed for such expenses. In response to criticism that Govt. Code section 36514.5 only speaks to "city councilmen," the opinion was reissued, with its application expressly limited to city councilmen.

reimbursed. The charter and any implementing ordinances would govern the right to reimbursement in the circumstances presented."[5]

The Attorney General cites to *Porter v. City of Riverside* in support of this analysis. In *Porter*, the City of Riverside's Charter provided that the city council was to receive no compensation, but was entitled to reimbursement for council-authorized travel and expenses when on official duty. Additionally, "[E]ach member shall receive such amount as may be fixed by ordinance, which amount shall be deemed to be reimbursement for other out-of-pocket expenditures and costs imposed upon him in serving as a city councilman."

At the time of the lawsuit, each councilperson was receiving a payment of $350 per month pursuant to this provision and an implementing ordinance. A citizen brought suit, challenging the payment. The trial court considered evidence of the actual out-of-pocket expenditures of Riverside councilpersons, which ranged from $150 to $555. Consequently, the trial court found that the $350 was in excess of the actual and allowable out-of-pocket expenses and costs "incurred," and therefore the excess must be "compensation," in violation of the charter's prohibition on compensation.

The appellate court disagreed, and the rationale is very important for charter city fans out there. The court pointed out that

> "[a]n ordinance stands in the same relationship to a city charter as does a statute to the constitution of the state. . . The same presumptions that favor the constitutionality of state legislative enactments apply also to ordinances. . . .When the right to enact a law depends upon the existence of a fact, the passage of the act implies and the conclusive presumption is, that the Legislature performed its duty and ascertained the existence of the fact before enacting and approving the law—a decision which the courts have no right to question or review.
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> . . .
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> Whether we view the presumption in support of the validity of enactments as a conclusive presumption which the courts have no right to question or review . . . or follow the more limited rules to the effect that the enactment is presumed to be constitutional and must be deemed to have been enacted on the basis of any state of facts supporting it that "reasonably can be conceived" [cites omitted] or "reasonably could be assumed" [cites omitted], or are "possible" [cites omitted], it inevitably follows that the trial court's determination holding the expense allowance invalid was erroneous" [6]

[5] 85 Ops.Cal.Atty.Gen. at 214, citing 65 Ops.Cal.Atty.Gen. 517, and *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 834-39.
[6] *Porter* at 836-37.

In short, for purposes of analyzing what constitutes a lawful expenditure or reimbursement in a charter law city, the charter and ordinances promulgated pursuant thereto rule. As made clear by *Porter*, a council person in a charter law city can receive a "reimbursement" without actually expending any money! A court will not disturb the legislative determination of a charter law city concerning entitlement to reimbursements (regardless of whether expenses are in fact incurred), provided that the charter authorizes such legislation.

But it is important to ensure that such legislation is on the books before engaging in practices such as monthly expense allowances. *In Albright v. City of South San Francisco*, a citizen challenged the city's practice of paying the council and mayor flat monthly expense allowances, without requiring any documentation as to whether any expenses were actually incurred.[7] The court held that the practice of reimbursing unitemized expenses in the absence of a resolution or ordinance authorizing the reimbursements violated the California Constitution. "In the absence of a valid ordinance or resolution, a flat expense allowance to the extent that in any one month it exceeds amounts actually expended for a verifiable municipal purpose is the equivalent of a gift of public funds, in contravention of section 25, article XIII, of the California Constitution."[8]

"In the absence of a valid ordinance or resolution"? How much easier could they make this? Clearly, in the charter law city arena, the relevant issue is not whether an expense is for a municipal purpose—or even if the expense was incurred at all—the relevant determination to be made is what do you have on the books that authorizes "reimbursement" payments.

GENERAL LAW CITIES—A DIFFERENT LATITUDE

General law cities do not enjoy such latitude in the arena of expenditures and reimbursements. Depending upon your disposition, either citizens in general law cities have greater assurance that city funds are being appropriately utilized for public expenditures, or city councilpersons in general law cities have to be a lot more careful than their peers in charter law cities.

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[7] *Albright v. City of South San Francisco* (1975) 44 Cal.App.3d 866.

[8] *Id*. at 869-70. It is important to note that the City of South San Francisco is not a charter law city. However, notwithstanding that the *Albright* opinion seems to imply that South San Francisco should have adopted an ordinance authorizing flat monthly expense allowances, such an ordinance was not actually before the court. Had such an ordinance been before the court, it seems likely the ordinance would have been problematic in light of the "actual" and "necessary" elements of Govt. code section 36514.5. (see discussion below concerning general law cities). An ordinance limiting the flat monthly payment to a car allowance may have worked. (*See* Govt. Code § 1223 and *Citizen Advocates v. Board of Supervisors* (1983) 146 Cal.App.3d 171.

As stated above, charter law cities can adopt, and to a large extent interpret, their own provisions concerning expenditures and reimbursements. General law cities, and charter law cities that have not adopted any provisions, are limited by state statutes (and interpretations of same, as discussed below).

Government Code section 50023 provides in relevant part:

> "The legislative body of a local agency, directly or through a representative, may attend the Legislature and Congress, and any committees thereof, and present information to aid the passage of legislation which the legislative body deems beneficial to the local agency or to prevent the passage of legislation which the legislative body deems detrimental to the local agency. . . . The cost and expense incident thereto are proper charges against the local agency."

For purposes of our analysis, the operative elements of this statute require that a cost or expense be "incident" to attendance at and presentation to the Legislature, Congress, or a committee.[9]

Government Code section 36514.5, "Expenses of councilmen" provides (in full):

> "City councilmen may be reimbursed for actual and necessary expenses incurred in the performance of official duties."

Without getting too pedantic, the elements of this grant of authority:

1. Are limited to "councilmen"[10]

2. for an "actual" expense;

3. that is also "necessary";

4. and was "incurred in the performance of official duties."

One would surmise that I could assume everyone understands what is meant by the first element and just move on to a discussion of what is meant by "actual." However, a pause to reemphasize the fact that the Government Code section is limited to

[9] On the bright side, while the AG and/or the court may question expenses "incident" to a Legislative trip, a court is unlikely to question the appropriateness of the trip itself to weigh in on any particular piece of legislation. *Powell v. San Francisco* (1944) 62 Cal.App.2d 291.

[10] Presumably this legislation also applies to councilwomen and councilpersons. The lack of gender-neutrality in legislation is beyond the scope of this paper.

"city councilmen" is probably appropriate for some people—and you know who you are.[11]

Returning to the recent AG opinion concerning reimbursement for meals paid for by councilmembers, the AG opined, without any real analysis, that payment for meals of non-councilmembers is not an "actual or necessary" expense under 36514.5. The AG did reference a prior AG opinion that provided an analysis of each of the elements of section 36514.5.[12]

In that prior opinion, the AG examined whether the travel expenses of an aide for a handicapped city councilmember was a reimburseable expense under section 36514.5. The AG set the stage:

> "An expenditure of municipal funds is permitted only where it appears that the welfare of the community and its inhabitants is involved and benefit results to the public."[13]
>
> "When an officer is required to travel in order to perform his duty, the payment of his actual necessary living expenses while away from home is a proper item of state expense and, unless expressly forbidden by the Constitution, it is a proper exercise of legislative authority to provide for the officer's reimbursement."[14]

With regard to "actual", the AG opined: "an actual expense refers to a specific sum of money which the councilmember has either paid or become legally liable to pay."[15] Thus, a flat monthly expense allowance or reimbursement payment that is not itemized would not constitute an "actual" expense.

With regard to the element of necessity, the AG opined that the dictionary definition of necessity ("something that cannot be done without") was not required. Rather "practical necessity" should be the standard.

> "It is physically possible to perform official duties at remote points without expenditures for hotel rooms and meals. One could carry meals from home and sleep in the car though this may not be convenient or very practical. The *Collins* case indicates that practical necessity is all that is required under the reimbursement statutes—a practical need based upon the prevailing business practices."[16]

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[11] *See* footnote 4.
[12] 65 Ops.Cal.Atty.Gen. 517.
[13] 65 Ops.Cal.Atty.Gen. at 519, citing *Albright v. City of South San Francisco* (1975) 44 Cal.App.3d 866, 869.
[14] 65 Ops.Cal.Atty.Gen at 519, citing *Collins v. Riley* (1944) 24 Cal.2d 912, 918.
[15] 65 Ops.Cal.Atty.Gen. at 521.
[16] 65 Ops.Cal.Atty.Gen. at 523.

If you are unsure as to what is meant by "based upon the prevailing business practices," there is a trap for the unwary here. According to the AG, the determination as to whether or not an expense is "necessary" is first made by the councilmember when he or she elects to incur the expense. However, the determination is subject to approval by the entire council. Section 36514.5 does not mandate reimbursement, it states that a council person "may be reimbursed." "Thus a city council may refuse to reimburse an expense of one of its members which was actually incurred and necessary to the performance of the member's official duties."[17]

So, before you go out of pocket, it is a good idea to make sure you are on good terms with at least a majority of the council.

As to the fourth element "incurred in the performance of official duties," the AG did not provide guidance on that, although as discussed more fully below, there are plenty of other folks who are willing to chime in on that element.

With regard to section 50023, the AG (in the Public Integrity Division opinion) again relied upon a prior opinion (66 Ops.Cal.Atty.Gen 186) to determine that meals of others is not an "incident" expense under 50023:

> "If meals are served at this meeting, then the county representatives' costs of their meals result from and are connected with that meeting and are therefore incident thereto and chargeable to the county under section 50023. However, the cost of meals of others attending the same meeting, though incident to the meeting and perhaps chargeable to their employers, are not chargeable to the county under section 50023."

Obviously, reasonable minds can dispute the "necessity" of buying meals for legislators to obtain an audience with them. Perhaps the easy solution is to have someone else at the table (City Manager, etc.) pick up the tab. But that solution does not get to the real issue—which is whether the payment of meals really is a "necessary" expense (a question that does not have to be asked in charter law cities). And that gets to the issue of who is the ultimate arbiter on the issue of expenses.

WHO'S WATCHING?

There are at least seven different groups of people who may weigh in on any expenditure issue. The first are the persons incurring the expense—the city councilpersons. The second group, as described above, are those councilpersons who did not incur the expense, but nevertheless have to approve payment for the expense, through approval of the warrant register, or other means, depending upon how your city's finances function.

[17] 65 Ops.Cal.Atty.Gen. at 523.

The third reviewing body is the Legislature, which adopts statutes, such as Govt. code sections 36514.5 and 50023. It is within their purview to amend those statutes or adopt new statutes, as the spirit (or other influential forces) moves them.

The fourth body is the AG's office, who is happy to opine on almost any issue, when asked. While you may not always agree with the AG's opinions, and the AG's opinions are not binding upon a court (but can be persuasive), it is important to note that the AG's opinions are certainly influential on the fifth body—the District Attorney.

Your local District Attorney not only can seek opinions from the AG, as evidenced by the Los Angeles DA seeking an opinion on the meal reimbursement issue, but is very likely to rely upon those opinions in deciding whether or not to prosecute an "illegal" expenditure of public funds. At the time of the writing of this paper, the Los Angeles County District Attorney has obtained indictments and is prosecuting several councilmembers for alleged improper expenditures (for meals and other things). And again, whether or not you agree with the AG or the DA, you may have serious problems with the sixth group of people looking over your shoulder as the waiter delivers the lunch tab, the press.

Nothing gets ink like a good political scandal. The recent indictments by the DA in L.A. County have gotten a lot of press already—and once the trial starts the coverage will intensify. In Ventura County, the press had a field day with one official's submittal for reimbursement for breath mints (a meal expense).

And finally, the ultimate arbiter of the appropriateness of a public expenditure would be a court—assuming you have survived long enough to get that far. And even if you are ultimately vindicated by a court, it is important to calculate the "cost" (in terms of political capital, reputation, stress, etc.) of such vindication when considering whether or not to expense an item.

ADVANCES, CHARGES, PAYBACK AND THE "FLOAT"

Which brings us to the part of the paper where I am supposed to make some helpful suggestions (practice tips) and raise some scholarly, though potentially irrelevant in daily practice, issues.

<u>The First scholarly issue:</u> Throughout this paper I have used the terms reimbursement, advance, and expenditure interchangeably—largely because the cases and AG opinions do so. This may be because regardless of the method of payment for an expense, the council, AG, DA, the Legislature, the press and the courts may not draw any distinction.

To be more concrete, if you, as a council person, intend to travel to and stay in Sacramento to visit the Legislature, and you know of this visit far enough in advance, you could have the city pay for your travel and hotel before you even go. No reimbursement would be necessary. But if the expense was questioned, the analysis of the

appropriateness of such an "expenditure" would likely follow the same path as if you had paid the expense and requested reimbursement.

What about the circumstance where you are issued a city credit card, which you use to pay for the travel? Same analysis?

The Second scholarly issue: But city credit cards raise an interesting issue. What if on the trip, you have a massage (it's a stressful trip) and charge it on the city card. Assume for the moment that you are not going to try to pass this off as an actual and necessary public expense. The day you get back to the City you write a check to the City for the full amount of the massage. Any problem? What if you pay it back 2 weeks later, but before the City has paid the credit card bill? What if you pay it back six months later, well after the City has paid the credit card bill?

This is one of the issues in the cases the Los Angeles DA is prosecuting right now. According to press accounts, defendants claim their city had a practice of allowing personal charges on the city's credit card, and all such charges were paid back. The DA asserts that all such charges were not paid back, those that were paid back were paid back several months after they were incurred, and this "practice" was not in writing anywhere.

Assuming that the practice were in writing, would such a "float" on the city's credit card be an impermissible loan under California Constitution Article XVI section 6. I was unable to locate an opinion on this issue—but let me just suggest that you do not want to be the test case on this issue. No matter how a court comes rules, you will not look good.

CONCLUSION

Other than that, the clear message that comes out of the cases and opinions in this area is that the greatest protection you as a councilperson, and your city for that matter, can achieve in this area comes in the form of clear written ordinances, resolutions, and/or policies that spell out as specifically as possible what expenses are reimburseable in your city, and what the process for reimbursement, or check requests, or use of city credit cards, etc. is. Of course such policies, procedures, etc. must be consistent with the scope of your authority, be you general law or charter law city. But the more explicit the language, the greater the likelihood you can avoid criticism (and incarceration).

Oh, and if you are a general law city—adopt a charter.