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REPORT TO THE COMMITTEE ON RULES, OPEN GOVERNMENT AND INTERGOVERNMENTAL RELATIONS

CITY APPOINTMENTS TO THE CORPORATE BOARDS OF THE CENTRE CITY DEVELOPMENT CORPORATION AND THE SOUTHEAST ECONOMIC DEVELOPMENT CORPORATION.

INTRODUCTION

On March 25, 2009, the City Council Rules, Open Government, and Intergovernmental Relations Committee discussed the Mayor's and Audit Committee's recommendations for restructuring the oversight of the Centre City Development Corporation [CCDC] and the Southeast Economic Development Corporation [SEDC].

One recommendation is that the Mayor appoints one Board member, who will be a City employee or other City official. Another is that the City Council appoints another member, who will be a City Councilmember. This Office has been asked to evaluate legal issues related to expanding the membership of the Boards of Directors of the Corporations to include these additional appointees.

For the reasons set forth in more detail in this Report, we conclude that a City Councilmember may not be appointed to serve as a member of these corporate Boards. The Mayor could appoint a City employee to serve as a member of these corporate Boards. However, if a Charter-established City officer is contemplated as the appointee, we need further time to assess whether the offices might be incompatible with each other. In addition, there may be certain legal limitations to what information and actions the City may expect from such a City appointee.

DISCUSSION

I. City Councilmembers May Not Be Appointed Members of the Boards of Directors of SEDC and CCDC.

The question has been asked whether City Councilmembers may be appointed to serve as a member of the Boards of Directors of CCDC and SEDC. For the following reasons, this Office concludes they may not legally serve as members of those corporate Boards.

A. San Diego City Charter Section 12(k) Precludes City Councilmembers From Appointment to the Boards of Directors of SEDC and CCDC.

San Diego City Charter section 12(k) provides in pertinent part:

> Council members shall not be eligible during the term for which they were appointed or elected to hold any other office . . . with the City, except . . . as a member of any Board, Commission or Committee thereof, of which they are constituted such a member by general law or by this Charter.[1]

Phrased positively, the pertinent portion of this section means that during their terms of office, City Councilmembers may hold another City office, or be appointed to a City Board, Commission or Committee, only if the general laws of the State or the City Charter include them as members of such entities. This Office recently discussed Charter section 12(k) in conjunction with a suggested City Councilmember appointment to a committee created pursuant to San Diego Charter section 43. *See* City Att'y Rpt.RC-2009-3 (April 3, 2009). Section 12(k) prohibited that appointment because no state law or other City Charter provision included a City Councilmember as a member of the entity. Similarly, no state law or other City Charter provision includes Councilmembers as members of these corporate boards. Whether the prohibition in Charter section 12(k) applies to this situation depends on whether membership on these corporate boards constitutes a City "office," or the boards of directors are City "boards," within the meaning of Section 12(k).

Generally speaking, the board of a separate corporation contracting with a City or other public agency would not be considered a City agency, or its officials as City officials. *See* 89 Op. Cal. Att'y Gen. 285 (2006). However, SEDC and CCDC are unusual corporations given their very close association with the City and the Agency. *See* City Att'y MS-2009-3 (March 3, 2009).

The City authorized the formation of CCDC and SEDC in 1975 and 1980, respectively, and is the sole member of the corporations. The City, acting through the Council, confirms the Mayoral appointment of corporate directors;[2] and approves or can change the corporate bylaws. Corporate directors serve for fixed terms and may be removed by a two-thirds vote of the City Council. The City Council, as sole member, may voluntarily dissolve the corporation. Cal. Corp. Code §§ 5033 and 6610(a)(1). Upon dissolution, corporate assets go to the City. The primary purpose of both corporations is to contract with the Agency for services the Agency requires. The Mayor of the City, or his designee, acts as Executive Director of the Agency. Both CCDC and SEDC have indefinite operating agreements with the Agency, which give them responsibilities to manage different redevelopment projects in different areas of the City.

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[1] Consistent with this section, Charter section 12(j) requires Councilmembers to devote full time to the duties of their offices.

[2] *See* City Att'y Rpt. RC-2006-9 (Feb. 28, 2006) at 3-6.

Compliance with the operating agreements is monitored by City staff designated by the Mayor. The Agency or the corporations may terminate the agreements with ninety days notice.

Both corporations operate with public money. Their budgets are approved by the Agency. However, both have the discretion to enter into contracts without Agency approval, so long as the contracts are consistent with their budgets. The agreements provide that CCDC must act under the direction of the Agency. SEDC is referred to as an independent contractor in its agreement.[3]

The Agency has designated CCDC and its Board of Directors as the Design Review Board for CCDC's project area. *See* Agency Resolution No. 2130 (August 11, 1992). The City has also delegated City planning and zoning functions to CCDC by ordinance, including the authority to issue permits. CCDC's Board hears appeals related to certain development applications in lieu of the City's Planning Commission. San Diego Municipal Code § 156.0303.

The City considers members of both corporate Boards as City officials for conflict of interest purposes and requires them to file Statements of Economic Interest forms. Cal. Code Regs. tit. 2, § 18701. In addition, the City includes these corporate Board members as City officials for City laws governing the behavior of all City officials. *See* San Diego Municipal Code §§ 26.0413 [Ethics Commission Jurisdiction], 27.4002 [Lobbying Ordinance], and 27.3503 [Ethics Ordinance].

The very close relationships between the City and these corporate Boards, and the fact the City treats the members of these boards as City officials for other purposes lead us to conclude that the members of the Boards of Directors of CCDC and SEDC hold *City* office, and these corporate Boards are *City* Boards for purposes of Charter section 12(k). Accordingly, City Councilmembers are not eligible for appointment to these corporate boards while serving their elected or appointed terms as Councilmembers.[4]

B. The Offices of City Councilmember and Member of the Board of Directors of CCDC and SEDC are Incompatible Public Offices.

In addition to the prohibition under Charter section 12(k), there is a serious question whether a Councilmember[5] would risk forfeiture of his or her City Council seat if appointed as a

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[3] As explained in our recent memorandum, one may be both an independent contractor and agent. *See* City Att'y MS-2009-3 (March 3, 2009) at 7.

[4] Our conclusion that Section 12(k) bars City Councilmembers from serving on these corporate boards does not change if the Redevelopment Agency suggests its Board members be appointed to this position. Section 12(k) does not bar Councilmembers from membership on the Redevelopment Agency Board, because state law authorizes the dual holding of these offices. However, membership on the Redevelopment Agency Board rests entirely on City Council membership, and City Councilmembers are governed by Charter section 12(k).

[5] Or any other "public official" appointed by the Mayor or the City Council. *See* Section II *infra*.

Board member of CCDC or SEDC. The answer is controlled by California Government Code section 1099,[6] which reflects and codifies the common law doctrine prohibiting the simultaneous holding of incompatible public offices.[7] If two offices are "incompatible," the first office is deemed "forfeited" when the second office is assumed. Section 1099(b). For this doctrine to apply, *both* offices under consideration must be public offices.

1. The Requirements for a "Public Office" under Section 1099.

The Attorney General summarizes the requirements for a "public office" within the meaning of Section 1099 as follows:

> For the purpose of the doctrine of incompatible public offices, a public office is a position in government (1) which is created or authorized by the Constitution or some law; (2) the tenure of which

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[6] Future section references are to the California Government Code unless indicated otherwise.

[7] Section 1099 provides:

> (a) A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible. Offices are incompatible when any of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law: (1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body. (2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices. (3) Public policy considerations make it improper for one person to hold both offices.
> (b) When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second. This provision is enforceable pursuant to Section 803 of the Code of Civil Procedure. (c) This section does not apply to a position of employment, including a civil service position. (d) This section shall not apply to a governmental body that has only advisory powers. (e) For purposes of paragraph (1) of subdivision (a), a member of a multimember body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office. (f) This section codifies the common law rule prohibiting an individual from holding incompatible public offices.

> is continuing and permanent, not occasional or temporary; (3) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state.

80 Op. Cal. Att'y Gen. 74 (1997); 76 Op. Cal. Att'y Gen. 244 (1993).

Courts define the term in similar fashion:

> A public office requires the presence of two essential elements: (1) an office which is not transient, occasional or incidental but is in itself an entity in which incumbents succeed one another; and (2) the delegation to the office of some portion of the sovereign functions of government, legislative, executive or judicial.

Moore v. Panish, 32 Cal. 3d 535, 545 (1982), *also see Dibb v. County of San Diego*, 8 Cal. 4th 1200, 1211-1212 (1994); *People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 640 (1940).

Whether a particular office or official exercises some of the "sovereign powers" of government is not always easy to determine. Generally speaking, if an official or office is invested with specific duties related to the exercise of police powers, or the authority and power to dispose of property owned by a public agency, to incur financial obligations on behalf of the agency, or to act on behalf of the agency in business or political matters, then such functions are part of the sovereign functions of government. 76 Op. Cal. Att'y Gen. 244 (1993); *Schaefer v. Superior Court of the County of Santa Barbara*, 113 Cal. App. 2d 428, 432-433 (1952).

2. City Councilmembers Hold Public Office.

It is well settled that City Councilmembers hold public office for purposes of the incompatible offices doctrine. Section 1099(a) and (e); 85 Op. Cal. Att'y Gen. 199 (2002). In their roles as members of the City's Redevelopment Agency Board, Councilmembers also hold a second public office. However state law expressly authorizes City Councilmembers to hold this second public office, exempting these two offices from the incompatible offices doctrine. Section 1099(a); Cal. Health & Safety Code § 33200; *also see* 57 Op. Cal. Att'y Gen. 492 (1974).

3. Members of the Boards of Directors of SEDC and CCDC Hold Public Office.

Whether members of boards of directors of corporations like SEDC and CCDC hold public office as defined under Section 1099 has not been addressed by the Attorney General. That Office decides whether there is sufficient legal cause to permit a challenge to such dual officeholders. Section 1099(b); Cal. Civ. Proc. Code § 803. We use the Attorney General's analysis of dual office situations in attempting to answer this question.

We consider the same facts discussed in the Charter section 12(k) analysis above to decide whether the members of CCDC and SEDC hold public office pursuant to Section 1099. In addition, we consider the fact that both corporate boards are legislative bodies under the Ralph M. Brown Act. Section 59452(c)(1)(A). They also meet the definition of a local agency for purposes of the California Public Records Act. Section 6252(a).

The corporations were created under state law, by express direction of City Council resolutions. Their purpose is to perform public functions for the City and the City's Redevelopment Agency. State law requires such corporations to have boards of directors whose members serve for fixed terms, and they serve such fixed terms. Cal. Corp. Code §§ 5210, 5220. The corporations may incur financial obligations on the behalf of the Agency and to act on its behalf. In addition, CCDC has been delegated police powers of the City and Agency. Considering all these factors, we conclude that CCDC and SEDC Board members would likely meet section 1099's requirements for holding a "public office."

4. City Council Offices Are "Incompatible" with Offices as SEDC or CCDC Board Members.

Section 1099(a) defines public offices as incompatible:

> Offices are incompatible when *any* of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law: (1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body. (2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices. (3) Public policy considerations make it improper for one person to hold both offices.

(Emphasis added.)

The statute clarifies that:

> For purposes of paragraph (1) of subdivision (a), a member of a multimember body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office. Section 1099(e).

The City Council may remove members of the Board of Directors of both corporations. Accordingly, pursuant to Section 1099(a)(1) and (e), the offices are incompatible with each

other. City Councilmembers might forfeit their Council Office upon acceptance of appointment as a member of either CCDC's or SEDC's Board of Directors.

5. Non-voting City Council Membership on the Boards.

It has been suggested that a Councilmember be appointed as a non-voting member of each Board. It is unclear whether a corporate Board membership, with all the privileges and responsibilities of such membership, except the right to vote, constitutes a "public office" under Section 1099. The Attorney General has opined that a "standby officer" is not a public office under this section because there is no exercise of sovereign powers while in that standby position. 87 Ops. Cal. Att'y Gen. 54 (2004). We cannot predict whether the Attorney General would reach the same conclusion with assumption of a corporate board membership. Accordingly, Council offices could still be at risk of forfeiture.

We presume the suggestion for non-voting membership is made to entitle *one* Councilmember to attend and participate in meetings, to provide recommendations and to debate issues, but not to vote on matters. Both corporation's bylaws already grant *all* City Councilmembers and the Mayor, or their authorized representatives, with those same privileges:[8]

> The Mayor and members of the City Council of the City of San Diego shall be entitled to make recommendations to the Board of Directors or any committee thereof with respect to any matter at any meeting thereof. The Mayor and each member of the City Council or their authorized representatives shall have the right to attend any meeting of the Board of Directors or any committee thereof with the right to debate, but he/she shall not be entitled to vote on any matter considered by the Board of Directors or any committee thereof. CCDC Amended and Restated Bylaws Art. III § 10.[9]

Accordingly, Councilmembers currently have the opportunity to provide input to these corporate boards and to exercise some oversight, without the risk of losing their elected office.

II. Issues Related to a Mayoral Appointee.

The Mayor currently appoints all corporate Board members for both corporations, subject to City Council confirmation. *See* City Atty Report RC-2009-9 (Feb. 26, 2006) at 3-6. These

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[8] The Ralph M. Brown Act might require public notice if a quorum of Councilmembers, or their staffs, chose to attend and participate in any one particular board meeting. *See* section 54952.2(b).

[9] SEDC's Amended and Restated Bylaws are identical except they refer to the City Manager instead of the Mayor, and do not permit attendance at Board closed sessions based solely on these City positions. Art. III § 12.

board members are all citizens, volunteering their services. The recommendation is to expand the corporate boards to include an additional voting member appointed by the Mayor.[10] We assume the Mayor contemplates a Charter City officer, or other City employee reporting to the Mayor, for that position. Charter Section 12(k) does not prohibit such an appointment. [11] However, further analysis under Section 1099 must await the identity of the appointee, for the reasons set forth below. In addition, there could be communication and other conflicts that could affect such an appointee.

A. Incompatibility of Offices.

It is settled that an elected Mayor holds a public office, as does a City Manager in cities with a city manager form of government. 73 Op. Cal. Att'y Gen. 357 (1990), and 63 Op. Cal. Att'y Gen. 623 (1980) [Mayor]; 81 Op .Cal. Att'y Gen. 304 (1998), and 80 Op. Cal. Att'y Gen. 74 (1997) [City Manager]. Other City Charter offices would also likely qualify as public offices under section 1099. On the other hand, administrative officers, whose positions and duties are not established by ordinance or other law, who are appointed by the City Manager, and have responsibilities only as directed by the City Manager, are not considered public officers. 80 Op. Cal. Att'y Gen. 74 (1997). [12]

If the Mayoral appointee is a City *employee*, Section 1099 would not be applicable. However, if the appointee holds "public office," this Office must review that officer's duties and loyalties to see if he or she "(1) . . . may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body;" whether "there is a possibility of a significant clash of duties or loyalties between the offices;" or whether "[p]ublic policy considerations make it improper for one person to hold both offices." Section 1099(a). Accordingly, this Office defers its assessment on the applicability Section 1099 until we know the individual the Mayor is considering for this appointment.

B. Closed Session Communications.

A voting member of the Board attends and participates in Board closed sessions as permitted by the Ralph M. Brown Act (Sections 54950 through 54963). The expectation may be that the new Mayoral appointee reports what occurs in those closed sessions to the Mayor, City Council, or other City official.

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[10] If the corporate Boards are increased by only one member, the Board memberships would be an even number increasing the risk of tie votes.

[11] The Board of Directors of the San Diego Data Processing Corporation currently includes City employees as non-voting, ex-officio members.

[12] This same analysis would apply should the City Council wished to appoint a Charter City Officer or City employee who reports to them.

However, the Ralph M. Brown Act prohibits the disclosure of information from those closed sessions to others, in the absence of authorization from that legislative body. Section 54963.[13] In a similar situation in 2003, the Attorney General opined that a county supervisor, appointed as the county's representative to a regional board, could not disclose information learned in the regional board's closed session to his appointing agency or to its lawyer. 86 Ops. Cal. Att'y Gen. 210 (2003).[14]

Accordingly, if the City desires the disclosure of information its appointee learns in closed session meetings of these corporate Boards, the City may wish to consider requiring some form of advance authorization to permit that disclosure. [15]

C. Divided Loyalties.

The Mayor and Councilmembers should be aware that directors of non profit corporations like SEDC and CCDC have fiduciary duties of care and loyalty to the corporation imposed on them by Section 5231(a) of the California Corporations Code. It provides:

> A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be *in the best interests of the corporation* and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(Emphasis added.)

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[13] Section 54963 provides in part:

> a) A person may not disclose confidential information that has been acquired by being present in a closed session . . . to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information. (b) For purposes of this section, "confidential information" means a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under this chapter.

[14] This opinion was based on provisions of the Bagley-Keene Open Meeting Act (sections 11120-11132), which are essentially identical to similar provisions in the Ralph M. Brown Act.

[15] In a litigation situation, communications with corporate counsel in closed session could be privileged and there is a question whether authorization to share those communications could constitute a waiver of the privilege.

In most circumstances, the interest of the City or the Agency would parallel that of the corporations. But these interests could also diverge, for example, in a litigation situation.

CONCLUSION

City Councilmembers may not serve as members of the Boards of Directors of CCDC and SEDC because the City Charter prohibits them from holding both offices. Moreover, it appears the two public offices are incompatible under California Government Code section 1099. Any Councilmember accepting such an appointment would risk forfeiture of his or her Council Office pursuant to Section 1099. However, existing corporate bylaws permit City Councilmembers access to and participation in Board meetings.

The City Charter and Section 1099 do not prohibit the Mayor from appointing a City employee to these corporate Boards, with a corresponding corporate bylaw change to expand Board membership. However, if the Mayor contemplates a Charter City official as the appointee, this office will need time to assess the potential impact of Section 1099 on the appointee.

If the intent is to impose additional City control over the actions of these separate corporate boards, it is important to realize there are barriers imposed by certain state laws. The Ralph M. Brown Act prohibits sharing of information received in closed sessions with others. In addition, the Corporations Code imposes a duty to act in the best interest of the corporation on those who serve as members of these corporate boards. Theoretically at least, the corporate interests and City's interest could diverge.

Finally, this Office reiterates its recent caution that City efforts to increase its or the Agency's control over these corporate entities could expose the Agency and the City to greater risk of liability. *See* City Att'y MS-2009-3 (March 3, 2009).

Respectfully submitted,

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RC-2009-6
cc. Mayor and City Councilmembers