

MEMORANDUM OF LAW

DATE: January 4, 2002

TO: Frank Belock, Director, Engineering and Capital Projects Department

FROM: City Attorney

SUBJECT: Delegation of City Engineer's Duties

QUESTIONS PRESENTED

- (1) As City Engineer, may you designate others to act in your place as City Engineer, that is, create "Deputy City Engineers?"
- (2) If the answer to question one is "yes," what limitations are placed on your authority to create Deputy City Engineers?
- (3) What effect, if any, does the creation of Deputy City Engineers have on the City's ability to assert the design immunity defense in lawsuits?

SHORT ANSWER

- (1) Yes, you have the authority to designate registered professional engineers employed by the City as "Deputy City Engineers," with the power to act in your place.
- (2) You may designate others to act in your stead as City Engineer, that is you may appoint Deputy City Engineers, with the following constraints and limitations:
 - (a) Only those persons who themselves are professional engineers registered in the State of California may be deputized.
 - (b) Those deputies themselves may not lawfully create other deputies.
 - (c) Unless you circumscribe a deputy's duties, once designated as Deputy City Engineers, each deputy can act in your stead for all City Engineer duties. For example, signing as Deputy City Engineer, they may approve plans and specifications for City improvements.

(d) Once you leave the post of City Engineer, the deputies that you have appointed will lose their status as deputies. They or others will have to be reappointed deputies by your successor.

(e) Although the law does not require the appointment of deputies to be in writing, the better practice is to make the designation in writing to avoid confusion and mistake.

- (3) The City may continue to assert the design immunity defense in reliance on plans and specifications approved by duly qualified and appointed Deputy City Engineers.

BACKGROUND

By written memorandum dated February 16, 1994, and signed by then City Manager Jack McGrory, you were authorized and designated City Engineer effective February 18, 1994.

Under current, longstanding practice, you as the City Engineer periodically sign a memo filed with the City Clerk showing whom you have authorized (“deputized”) to sign as City Engineer. Persons listed in this memo are authorized to approve plans and specifications as “City Engineer” for the City’s public improvements. This memo is out of date and it needs updating. Before you do so, you want to know to whom you can delegate this authority, whether the delegation needs to be in writing, and what effect your deputizing others has on the City's design immunities.

From a practical standpoint you want to avoid having to see and approve each and every document personally. Yet you do not want to “over delegate” your City Engineer’s authority to persons who are unqualified and whose signature cannot provide the City with immunities.

ANALYSIS

I. History of Office of City Engineer in this City

For purposes of this memorandum it will be instructive to understand how the City has historically treated the office of City Engineer, the City Engineer's duties and qualifications, and delegation of those duties.

A. 1931 City Charter

A whole section of the original 1931 City Charter was devoted to establishing the office of City Engineer. San Diego Charter 36. Among other things, San Diego Charter section 36 required the Manager to appoint a City Engineer, specified the qualifications for City Engineer, and set forth the City Engineer's duties. This charter section specifically stated that the City Engineer was to have such "subordinate officers and employees" as authorized by ordinance. Although implied in this Charter section, whether these subordinates or employees could act for, or in the stead of, the City Engineer is not clearly stated. The question of delegation of the City Engineer's authority apparently was to be determined by general legal principles.

B. 1963 Changes to City Charter

In 1963, as part of the Charter Review Committee's overhaul of the City Charter, they proposed removing section 36, among several other sections, from the City Charter entirely. Proposition R, Ballot of September 17, 1963. Proposition R was adopted. The ballot argument in favor of adoption of Proposition R illuminates the purpose of the proposition:

Proposition R removes language from the charter establishing several City departments . . . The purpose is to create administrative flexibility and economy and remove from the charter unnecessary sections.

By removing section 36 from the Charter, it was clearly intended that the City Engineer come under the administrative arm of the City. The City Engineer's powers and duties, and delegation of those powers and duties, were to be set by the City's administration.

C. 1971 Reorganization of City

Following the 1963 revisions to the City Charter, the City underwent a reorganization. In a published memorandum to the City Manager, in July 1971, the City Attorney addressed the effect of the reorganization on City Engineer functions. 1971 City Att'y MOL 166.

The City Attorney explained that under Charter section 28, the City Manager was the chief administrative officer of the City. All administrative powers conferred by the state upon a municipal official were to be exercised by the City Manager or persons designated by him or her. The City Attorney further found that the responsibility for engineering operations was in that grant of administrative authority. The Attorney also found that the Manager had the power to appoint one or more persons to perform City Engineer duties prescribed either under state law or local ordinance. Additionally, the City Engineer did not have to be an employee of, or from, a particular City department. *Id.*

In designating you City Engineer in 1994, the City Manager at that time relied on San Diego Municipal Code sections 22.0201 and 22.0202, which are portions of an ordinance adopted by the City Council as part of the City's "Administrative Code" in 1933, long before the 1963 charter change. Under the City Attorney's memorandum of July 1971, cited above, the City Manager did not need to rely on authority granted to him by the City Council in the Municipal Code to appoint you City Engineer. Since 1963, the City Manager has had, and continues to have, full authority under Charter section 28 to appoint one or more individuals to fulfill the statutory and local legal functions of City Engineer.

The question now presented is whether you as City Engineer have authority to further delegate the City Engineer's powers and duties and, if so, to whom and with what effect on the City's design immunity defense in lawsuits.

II. Delegation of City Engineer Powers and Duties

By state law, local governments are required to designate at least one person in responsible charge of professional engineering work for each branch of professional engineering practiced in that local government. Cal. Bus. & Prof. Code 6730.2. The person "in responsible charge" of civil engineering¹ in this City is the City Engineer, which office you currently hold.

The City may lawfully employ non-registered engineers to perform administrative or business activities related to the design or construction of public improvements. *See, for example*, 63 Op. Cal. Att'y Gen. 24 (1980); Cal. Stats. 1987, ch. 804 4. However, it is unlawful for anyone but a registered professional engineer to stamp or seal any plans, specifications, plats, reports or other documents with the seal or stamp of a professional engineer or in any manner use the title "professional engineer." Cal. Bus. & Prof. Code 6732.

In contrast with other City officers², none of the City's laws or policies address the City Engineer's ability to appoint deputies to act in his or her place. Also, we found no California court decision that articulates the principles of delegation of a City Engineer's duties. Therefore, we turn to general principles of delegation of a public officer's powers and duties for guidance.

A well-recognized treatise on municipal law, McQuillin on Municipal Corporations, contains a good discussion of delegation of a public officer's duties. Examining case law from several states, McQuillin sets down several rules for delegation of a municipal officer's powers and duties: (1) an individual authorized by an officer to exercise the powers and duties that the officer possesses for and in place of the officer is generally said to be a "deputy"; (2) a deputy acts in the principal's name and the principal is responsible for the deputy's misconduct; (3) a deputy's term of office is limited by that of the principal, but it may be incumbent on the deputy to continue to perform the duties of the principal until the principal's successor is replaced; (4) a deputy's duty to perform the duties of the principal does not require the absence or disability of the principal; (5) since the deputy generally possesses all the powers of the principal, a deputy is not equivalent to a mere assistant and is considered a public officer; (6) although a deputy generally possesses all the powers of the principal, critically, a deputy cannot make another deputy, that is, cannot deputize another to act for the principal; and, (7) under the general rule, ministerial acts which are required by statute to be performed by a particular officer are valid if

performed by the deputy of such officer. 3 McQuillin, Mun. Corp. 12.33 (3rd ed. 2001).

Applying the state and local law constraints described in Section I of this memorandum and the principles enunciated by McQuillin to the question you presented, we find that, as a properly designated City Engineer:

- (a) You may designate others to act in your stead as City Engineer, that is, you may appoint Deputy City Engineers.
- (b) Only those persons who themselves are registered professional engineers may be deputized.
- (c) Those deputies themselves may not lawfully deputize others.
- (d) Unless you circumscribe a deputy's duties³, once designated as Deputy City Engineers, each deputy can act in your stead for all City Engineer duties. For example, if they are registered civil engineers, signing as Deputy City Engineer, they may approve plans and specifications for City improvements.
- (e) Once you leave the post of City Engineer, the deputies that you have appointed will lose their status as deputies. They or others will have to be reappointed as deputies by your successor.
- (f) Although the law does not require the appointment of deputies to be in writing, the better practice is to make the appointment in writing to avoid confusion and mistake.

III. Effect of Delegating City Engineer's Duties on City Design Immunities

A. Design Immunities Generally

A public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures. *Cornette v. Department of Transportation*, 26 Cal. 4th 63, 66 (2001). California Government Code section 830.6 creates an affirmative defense known as "design immunity" to liability for a dangerous condition of public property. If the public entity demonstrates it is entitled to design immunity, recovery may be denied regardless of the evidence presented relating to a defective design. *Compton v. City of Santee*, 12 Cal. App. 4th 591, 596 (1993). A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and, (3) substantial evidence supporting the reasonableness of the plan or design. *Cornette*, 26 Cal. 4th at 66. The following three sections of this memorandum focus on the second and third elements of the design immunity defense and the impact of the delegation of the City Engineer's duties on those elements.

B. Discretionary Approval of Design Prior to Construction

Discretionary approval prior to construction “simply means approval in advance of construction by the legislative body or *officer exercising discretionary authority*.” *Grenier v. City of Irwindale*, 57 Cal. App. 4th 931 (1997). [Emphasis added.]. A public entity does not as a matter of law lose its ability to assert the design immunity defense when plans are not signed by an engineer. Cal. Gov’t Code 830.6; *see also*, *Thomson v. City of Glendale*, 61 Cal. App. 3d 378, 384 (1976). If a public employee with properly delegated discretionary authority can testify that he or she approved the plans in advance, the public entity’s burden with respect to that element is met. *Id.* at 384-85. Even though the immunities statute does not require the “employee exercising discretionary authority” to be a licensed engineer, California Business and Professions Code section 6735 states clearly that only registered civil engineers may approve plans and specifications.

C. Substantial Evidence Supporting the Reasonableness of the Plan or Design

The law does not require that a project be perfectly designed, only that it be given a design that is reasonable under the circumstances. *Grenier*, 57 Cal. App. 4th at 941. As long as reasonable minds can differ concerning whether a design should have been approved, the governmental entity is entitled to immunity. *Id.* A civil engineer’s opinion that a particular design is reasonable or the approval of the plan by competent professionals can, in and of itself, constitute substantial evidence of reasonableness. *Id.* Hence, a stamp or signature showing that a City employee who is a registered civil engineer and who has been properly designated as Deputy City Engineer has approved particular plans would constitute substantial evidence of reasonableness of the design shown in those plans.

D. Effect of Delegation of City Engineer’s Duties on the City’s Design Immunities Defense

Under the principles set forth above, the City Engineer may delegate his or her responsibilities, including approval of plans and specifications, to other registered civil engineers employed by the City. Approval of design plans by a duly appointed and qualified Deputy City Engineer would provide substantial evidence of reasonableness of design and would entitle the City to assert the design immunity defense to a claim of dangerous condition. Even though the law does not require the delegation to be in writing to establish that the authority was in fact given, it will be easier to establish the delegation in a court of law if the delegation is put in writing. Also, even though the immunities statute does not state that only civil engineers must approve plans to entitle a city to assert the design immunities defense, under California Business and Professions Code sections 6731 and 6732, only registered civil engineers are entitled to approve plans. Therefore, we recommend that only registered civil engineers be designated deputies for purposes of approving plans and specifications.

Although it is not required that the principles of delegation of a City Engineer’s authority be made part of a City law or regulation, for yours and any future City Engineer’s assistance you may want to propose codifying these principles in an Administrative Regulation to be adopted by the City Manager. Please let us know if you would like us to assist you in that effort.

CONCLUSION

This memorandum explores the history of the City Engineer’s powers and duties in this City,

with special focus on the delegation of the City Engineers' duties, especially the duty of approving plans and specifications. The memorandum concludes that although civil, electrical, and mechanical engineers registered with the state may be designated City Engineer, only registered civil engineers may approve plans and specifications for City improvements. You are a registered Civil Engineer and have been duly appointed as this City's Engineer since 1994.

This memorandum further concludes that the City Engineer may in turn delegate the City Engineer's duties, including approval of plans and specifications, to other registered civil engineers. Although not required by law, we recommend that the delegation be in writing. The City may continue to assert the design immunity defense in reliance on approval of plans and specifications by duly qualified and appointed Deputy City Engineers.

This memorandum also concludes that persons appointed as Deputy City Engineers do not themselves have the power to appoint other deputies. Only the City Engineer has that power.

Finally, this memorandum also outlines other constraints and limitations on the City Engineer's delegation of duties to others.

CASEY GWINN, City Attorney

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By

Cristie C. McGuire
Deputy City Attorney

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