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MEMORANDUM OF LAW

DATE: April 12, 2013

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Port District Appointments

INTRODUCTION

In response to a request from then Assemblyman Ben Hueso, the California state Legislative Counsel issued an opinion ("legislative counsel opinion") on February 28, 2013, a copy of which is attached. The legislative counsel opinion analyzes whether the Mayor of San Diego has authority to veto appointments made by the San Diego City Council to the San Diego Unified Port District Board of Commissioners ("Port District Board"). The legislative counsel opinion was not provided to the City Attorney until April 5, 2013.

We have been asked to reconsider our office's memorandum dated January 17, 2013, in light of the legislative counsel opinion. We have done so and re-analyzed the matter in light of issues raised by the legislative counsel opinion. Based upon that analysis and for the reasons discussed below, the January 17, 2013, memorandum is vacated and depublished. This memorandum of law reflects the legal opinion of the City Attorney's office.

SUMMARY OF FACTS

On January 7, 2013, the City Council upon a majority of five votes appointed Rafael Castellanos and Marshall Merrifield to fill two vacant positions on the Port District Board. The Resolution was vetoed by the Mayor on January 18, 2013. On February 11, 2013, the City Council voted 5-3 to override the Mayor's veto. The override failed as it did not get the 6 vote supermajority needed to override the veto.

The two positions on the Port District Board remain vacant today.

QUESTION PRESENTED

1. Does the Mayor of San Diego have authority to veto appointments made by the San Diego City Council to the Port District Board?

2. What is the legal effect of the Mayor exercising a veto he had no authority to exercise?

SHORT ANSWER

1. State law creating the Port District clearly grants appointment power to the City Council as a matter exclusively within the purview of the Council. The Mayor does not have veto power over such appointments.

2. It has long been settled law in California that an improperly exercised veto of a matter "will be wholly ineffectual and void for any and every purpose." *Lumens v. Nye,* 156 Cal. 498, 503-504 (1909). Accordingly, the appointment of Rafael Castellanos and Marshall Merrifield should be certified by the Clerk.

ANALYSIS

When the Strong Mayor-Strong Council form of governance took effect in 2006, the San Diego City Attorney's office reviewed whether changes were needed to the City's appointment process for outside Boards and Commissions due to the change in powers the San Diego Charter gives to the Mayor and Council. In 2006, a memorandum and accompanying chart ("2006 memorandum") was issued that listed appointments to the Port District Board as being among those made subject to Mayoral veto. The 2006 memorandum did not provide a legal analysis as to the basis for including Port District Board appointments within the list of those subject to a Mayoral veto. Nor, did the 2006 memorandum address the issue of state preemption.

Subsequent Council appointments to the Port District Board since 2006 have been made subject to veto, with no question raised about the process. As a practical matter, the question of veto power was a moot issue since override of a veto required only 5 votes, the same number needed for the original appointment. A veto, therefore, would not likely affect the outcome, but would be in the nature of a reconsideration by the City Council.

That changed on December 3, 2012, when the 9th City Council District took legal effect. Under the City Charter, at that point a supermajority of 6 votes was required to override a veto. Thus, a veto could affect the outcome of the City Council's decision. This heightened power of a veto prompted questions as to whether the Mayor has veto authority.

Although this office attempts to maintain consistency, we are open to reconsideration in light of new facts, contrary legal analyses and matters we should take into account. Here, the change from 5 to 6 votes needed to override a veto and the legislative counsel's opinion prompt reconsideration. Upon that reconsideration, as discussed below, it is clear that the Mayor has no veto authority either under the City Charter or otherwise preemptive state law.

I. THERE IS NO MAYORAL VETO UNDER THE CITY CHARTER FOR PORT DISTRICT APPOINTMENTS

A. Under the City Charter the Mayor has No Veto Power for "Matters that are Exclusively Within the Purview of Council"

City Charter section 280(a) provides that the Mayor has veto power over all resolutions and ordinances passed by the Council unless one of the enumerated exceptions applies. One of those exceptions is for "matters that are exclusively within the purview of Council, such as selection of the Independent Budget Analyst, the selection of a presiding officer, or the establishment of other rules or policies of governance exclusive to the Council and not affecting the administrative service of the City under the control of the Mayor." Charter section 280(a)(1).

'The phrase "such as" is not a phrase of strict limitation, but is a phrase of general similitude indicating that there are includable other matters of the same kind which are not specifically enumerated.' (Citation) The phrase is used in an illustrative, not an exhaustive sense. (Citations.) *Shaddox v. Bertani,* 110 Cal. App. 4th 1406, 1414 (2003).

The Charter defers to controlling law such as the Port District Act in determining the Mayor's role in the appointment process. Charter section 265(b)(12) (Mayor has power to appoint City representatives to boards "unless controlling law vests power of appointment with the City Council.")

Thus, if the Port District Act vests power to appoint commissioners "exclusively within the purview of Council", the Mayor would have no veto power under Charter section 280(a).

B. The Port District Act, Sections 16 and 17, Vest Power to Appoint Commissioners Exclusively Within the Purview of the Council

Section 17 of the Port District Act provides:

> "Any vacancy shall be filled by appointment by the city council of the city from which the vacancy has occurred....A commissioner may be removed from the board by a majority vote of the city council which appointed the commissioner."

Section 17 reiterates section 16 which vests appointment power in the "city council of the city from which the vacancy occurred."

Sections 16 and 17 vest power to appoint commissioners exclusively within the purview of the City Council. Section 16 provides that the "city council...shall appoint the commissioner...." Section 17 provides that vacancies "shall be filled by appointment by the city council...." And, section 17 provides that commissioners may be removed by the city council. Nowhere is an executive branch given any authority.

The California Supreme Court has stated that the veto power should be exercised only when clearly authorized by the constitution, and the language conferring it is not to be liberally construed. *Harbor v. Deukmejian*, 43 Cal.3d 1078, 1088 (1987) (quoting *Colorado Supreme Court* and see fn.9 at 1088).

As discussed below, sections 16 and 17 are consistent with a state policy of creating an effective port district where vacancies are promptly filled so that port district business can be conducted with representatives from each city. The conclusion that appointment power is exclusively within the purview of the City Council is consistent with that statutory scheme and the plain meaning of sections 16 and 17.

Accordingly, sections 16 and 17 of the Port District Act vest power to appoint commissioners exclusively within the purview of the City Council. Based thereon, the Mayor has no veto power under City Charter section 280(a).

II. A MAYORAL VETO WITH SUPERMAJORITY OVERRIDE WOULD BE PREEMPTED BY STATE LAW

Even if the City Charter authorized a Mayoral veto, it would be preempted by state law.

Before determining whether municipal legislation is preempted by state law, a court must first consider whether the local legislation actually conflicts with the state law. *Sherwin-Williams Co. v. City of Los Angeles,* 4 Cal. 4th 893, 897-898 (1993). A conflict exists if the local legislation duplicates or is coextensive therewith, is contradictory or inimical thereto, or enters an area either expressly or impliedly fully occupied by state law. *Id.* Charter cities such as San Diego may exercise authority over municipal affairs, free from constraints imposed by most general laws. The limitation is that they may not act in conflict with preemptive statutes governing matters of statewide concern. California Constitution, Article XI, section 5(a). Where a Charter city is preempted by state law, a court will review the state law to ensure it is narrowly tailored to limit incursion into legitimate municipal interests. *Cobb v. O'Connell*, 134 Cal. App. 4th 91, 96 (2005).

Accordingly, there are three analyses that must be made to determine whether a Mayoral veto would be preempted by state law:

1. Would a Mayoral veto conflict with state law?

2. If so, does the conflicting state law qualify as a matter of "statewide concern"?

3. If a conflicting state law qualifies as a matter of "statewide concern", is it narrowly tailored to limit incursion into legitimate municipal interests?

A. A Mayoral Veto Would Conflict with the State Law

As discussed above, Port District Act section 17, reiterating section 16, clearly vests power in the "city council of the city from which the vacancy occurred." It makes no reference to an independent or concurrent power of the executive branch of a city.

1. A Mayoral Veto Would Conflict with the Power Vested in the City Council under Sections 16 and 17

A Mayoral veto is not separate and apart from the power of the City Council to appoint commissioners to the Port District. In fact, it would interfere with, and disrupt that power.

As discussed by the California Supreme Court in *Harbor v. Deukmejian*, 43 Cal.3d 1078, 1085-1086 (1987), "'the executive, in every republican form of government, has only a qualified and destructive function'" through use of the veto. The court explained: "The word 'veto' means 'I forbid' in Latin. Then, as now, the effect of the veto was negative, frustrating an act without substituting anything in its place." (*Id.* at 1085)

The veto is a legislative function that operates as an exception to separation of powers. Case law, commentators, and historians have long recognized that in exercising the veto the Governor acts in a legislative capacity. (*Id.* at 1089).

Applying these principles to the Port District legislation, clearly a Mayoral veto would conflict with state law that vests appointment power in the City Council. By its very nature, a veto is part of the legislative process in which the executive is empowered to thwart the will of the legislative body. That is specifically what it is designed to do.

2. A Supermajority Vote of 6 Required to Override a Mayoral Veto Would Conflict with the Port District Act Providing for a Majority Vote

Section 17 of the Port District Act provides that vacancies are to be filled by the City Council and that commissioners may be removed by majority vote of the City Council that appointed the commissioners. Clearly, the Port District Act envisions a consistent policy that encourages timely filling of vacancies.

A Mayoral veto would deny the City Council majority power to appoint commissioners of their choice. Instead, upon Mayoral veto, a supermajority vote of the City Council would be required to override the veto. Commissioners would not serve by authority of the City Council as required by the Port District Act, but authority of the Mayor and City Council. In fact, Mayoral power would be of greater impact due to the ability to trigger a supermajority vote. The veto and resulting interference could preclude timely filling of vacancies.

Until December, 2012, there was little interference with the City Council's authority to act by majority vote to appoint commissioners because the City Council majority had the power to override a Mayoral veto with 5 votes. When the override vote was increased to 6, the council

majority's ability to appoint commissioners was thwarted in direct conflict with Port District Act sections 16 and 17.

B. Port District Act Sections 16 and 17 Qualify as a Matter of "Statewide Concern"

As discussed in the legislative counsel opinion, the California Supreme Court has stated that the courts are entrusted with the task of determining what constitutes a matter of statewide concern. *County of Riverside v. Superior Court*, 30 Cal.4th 278, 286, 287 (2003). However, in exercising the judicial function of deciding whether a matter is of statewide concern, the courts will give weight to the purpose of the Legislature in enacting general laws that disclose an intention to preempt the field to the exclusion of local regulation. *Bishop v. City of San Jose*, 1 Cal.3d 56, 63 (1969).

The inquiry regarding statewide concern focuses on "the identification of a convincing basis for legislative action originating in extra-municipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations." In other words, the court "must be satisfied that there are good reasons, grounded on statewide interests, to label a given matter a "statewide concern." "Municipal affair" and "statewide concern" represent legal conclusions rather than factual descriptions, and their ambiguity masks the difficult duty of a court to allocate governmental powers in the most sensible and appropriate fashion as between local and state legislative bodies. *California Fed. Savings & Loan Assn. v. City of Los Angeles,* 54 Cal. 3d 1 (1991). "Statewide concern" is nothing more than a conceptual formula to help judicial mediation of disputes between home rule cities and the state legislature which focuses on extra-municipal concerns as the starting point for analysis. *Id.*

As discussed in the legislative council opinion, the court in *City of Coronado v. San Diego Unified Port District,* 227 Cal.App.2d 455, 477-478 (1964) construed the Port District Act as establishing a scheme of public improvement that transcends the boundaries of individual municipalities, and thereby falls within the regulatory powers of the state. This conclusion is supported by the Declaration of policy set forth in the Port District Act, section 2: "Because of the several separate cities and unincorporated populated areas in the area hereinafter described, only a specially created district can operate effectively in developing the harbors and port facilities."[emphasis added]

In enacting the Port District Act, the Legislature expressed the intent to create a district that "can operate effectively" and noted that this purpose could not be achieved through the separate cities. Indeed, section 79 of the Act states that the state law is intended to preempt conflicting laws of the cities.

Creating a unified Port District in San Diego that operates effectively is a matter of statewide concern. The appointment process set forth in sections 16 and 17 provide a simple process for appointment of commissioners based upon a majority vote of the appointing City Council. This simplified appointment process would allow for prompt filling of vacancies that would tend to reduce political maneuvering and interferences. The state's interest is to do everything possible to ensure that the appointment process is functional.

One only has to look at the City of San Diego to illustrate what the state was trying to avoid. By complicating the process in allowing a Mayoral veto to interfere with the City Council's appointment power, the process became dysfunctional and has been at a standstill for some 3 months. As a result, the Port District and the City of San Diego have been denied commissioners. This is exactly the type of political situation the Port District Act was designed to avoid.

Based upon the foregoing and the arguments set forth in the legislative counsel opinion, clearly the appointment process is a matter of statewide concern.

C. State Law is Narrowly Tailored to Limit Incursion Into Legitimate Municipal Interests

The appointment process provided for in sections 16 and 17 of the Port District Act are narrowly tailored to respect the City's legitimate municipal interests. The Act does not impose inappropriate or cumbersome qualifications. The appointment process is narrowly tailored to provide for the effective appointment of commissioners through a process that is designed to avoid stalemate and dysfunction, but allows the City Council to exercise its sound judgment.

III. AN IMPROPERLY EXERCISED VETO OF A MATTER "WILL BE WHOLLY INEFFECTUAL AND VOID FOR ANY AND EVERY PURPOSE"

California law is clear that a Mayor is forbidden to exercise a veto power except as expressly provided for in the City Charter. No act, mistake or keying a matter as subject to a veto can be a substitute for constitutional authority. *St. John's Well Child and Family Center v. Schwarzenegger*, 50 Cal.4th 960, 986 (2010). *See also, Pulskamp v. Martinez,* 2 Cal.App.4th 854, 862 (1992).

It has long been held by the California Supreme Court that the attempted exercise of a veto power beyond the scope of the constitution is "wholly ineffectual and void for any and every purpose." *Lukens v. Nye*, 156 Cal.498, 502 (1909).

Since the Mayor had no veto power under the City Charter or state law, his attempted exercise of a veto power is "wholly ineffectual and void for any and every purpose." Based thereon, the City Council appointments should be certified by the City Clerk and the appointees should be seated as Port District Commissioners.

CONCLUSION

State law creating the Port District clearly grants appointment power to the City Council as a matter exclusively within the purview of the Council. The Mayor does not have veto power over such appointments.

It has long been settled law in California that an improperly exercised veto of a matter "will be wholly ineffectual and void for any and every purpose." *Lumens v. Nye,* 156 Cal. 498, 503-504 (1909). Accordingly, the appointment of Rafael Castellanos and Marshall Merrifield should be certified by the Clerk.

JAN I. GOLDSMITH, City Attorney

/s/ Jan I. Goldsmith

By

Jan I. Goldsmith
City Attorney

JIG:cbs
Attachment: Legislative Counsel Opinion dated February 28, 2013
ML-2013-5

cc: Andrea Tevlin, Independent Budget Analyst

LEGISLATIVE COUNSEL
… F. Boyer Vine

CHIEF DEPUTY
[illegible]

PRINCIPAL DEPUTIES
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February 28, 2013

Honorable Ben Hueso
Room 5155, State Capitol

SAN DIEGO UNIFIED PORT DISTRICT: PORT COMMISSIONER APPOINTMENT - #1306175

Dear Mr. Hueso:

QUESTION

We have been informed that the City Charter of the City of San Diego provides that the mayor is authorized to veto appointments made by the city council. You have asked whether the mayor is authorized to veto an appointment made by the city council to the Board of Commissioners of the San Diego Unified Port District.

OPINION

Even if the City Charter of the City of San Diego provides that the mayor is authorized to veto appointments made by the city council, the mayor would not be authorized to veto an appointment made by the city council to the Board of Commissioners of the San Diego Unified Port District.

ANALYSIS

The San Diego Unified Port District (hereafter District) was created under the Harbors and Navigation Code, Appendix 1, also known as the San Diego Unified Port District Act (hereafter Act). Section 4 of the Act[1] authorizes the establishment of the District for, among other things, the development, operation, maintenance, control, regulation, and management of the harbor of San Diego upon the tidelands and lands lying

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[1] All further section references are to the Act, unless otherwise indicated.

ATTACHMENT

navigable waters of San Diego Bay, and for the promotion of commerce, navigation, fisheries, and recreation thereon. The territory and jurisdiction of the District are prescribed in section 5 and include specified areas within the Cities of San Diego, Chula Vista, Coronado, National City, and Imperial Beach, and certain unincorporated territory in the County of San Diego that is contiguous to those cities.

Section 16 provides for the governance of the District as follows:

> "The district shall be governed by a board of commissioners who shall be known as 'port commissioners.' *Each city council, respectively, of the cities which are included in the district pursuant to the provisions of this act shall appoint the commissioner or commissioners to which it is entitled,* pursuant to this section, to represent that particular city on the board. Three of the commissioners shall be residents of the City of San Diego, one shall be a resident of the City of National City, one shall be a resident of the City of Chula Vista, one shall be a resident of the City of Coronado, and one shall be a resident of the City of Imperial Beach. The commissioners shall be residents of the respective cities they represent at the time of their appointments, and during the term of their office. All of the powers and duties conferred upon the district shall be exercised through the board of commissioners." (Emphasis added.)

Thus, the District is to be governed by a board of commissioners (hereafter port commissioners), and each city council of the cities included in the District is to appoint the commissioner or commissioners to represent that city.

You have informed us that the City Charter of the City of San Diego (hereafter city charter) provides that the mayor is authorized to veto city council appointments,[2] and have asked whether that veto power would apply to the appointment by the city council of a port commissioner under the Act.

Under the rules of preemption, local legislation is preempted if it conflicts with state law. (*California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1310.) Conflicts exist if the local legislation, either expressly or impliedly, duplicates, contradicts, or enters an area fully occupied by the general law of the state. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897; *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) While charter cities have the power to make and enforce all laws and regulations with respect to municipal affairs, even a charter city's local legislation is invalid if it attempts to impose additional requirements in a field that is preempted by the general law. (Cal. Const., art. XI, § 5; *American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239, 1251-1252; *Agnew v. City of Los Angeles* (1958) 51 Cal.2d 1, 5.)

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[2] City charter, art. XV, § 280.

The California Supreme Court has stated that the courts are entrusted with the task of determining what constitutes a municipal affair, and the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern. (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 286.) However, in exercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts will give great weight to the purpose of the Legislature in enacting general laws that disclose an intention to preempt the field to the exclusion of local regulation. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63 (hereafter *Bishop*).)

Applying these principles, we must determine whether a conflict exists between section 16 and the mayoral veto provision of the city charter and, if a conflict exists, whether the matter is a municipal affair or of statewide concern. In that regard, it is possible that a court could find that the veto provision is not in conflict with section 16. In support of this view, it can be argued that the veto power exercised by the mayor is distinguishable from the appointment power exercised by the city council, and that the Legislature, in granting appointment authority to the city council, did not intend to supersede local provisions regarding whether a particular appointment takes effect. It can also be argued that, because section 16 does not expressly prohibit a charter city from adhering to charter provisions governing appointments, the Legislature intended to allow the application of those city charter provisions.

However, in our opinion, the power to veto an appointment is, in its very nature, a restriction on the power to appoint. Consequently, it is our view that a court would be more likely to find that these powers cannot reasonably be separated. Additionally, section 79 provides that the Act applies to any municipal corporation governed under a freeholders' charter. That provision is indicative of legislative intent to supersede provisions of a city charter that conflict with the Act and to require a strict adherence to the Act. In that regard, municipal governance provisions that require the appointment of a port commissioner to be approved by another municipal officer could make it more difficult for a city council to fill a port commissioner vacancy and thereby affect the ability of the board of commissioners to function effectively. For these reasons, we conclude that a conflict exists between the veto provision of the city charter and section 16.

Because it is our conclusion that a conflict exists, it is necessary to determine whether section 16 addresses a statewide concern or municipal affair. In *City of Coronado v. San Diego Unified Port District* (1964) 227 Cal.App.2d 455 (hereafter *Coronado*), the City of Coronado argued that the voting scheme in section 11 did not reflect the "interests of Coronado citizens as residents of their municipality." (*Id.* at p. 477.) The court disagreed, citing *Wilson v. City of San Bernardino* (1960) 186 Cal.App.2d 603, 611, and stated the following:

> "It would therefore clearly appear that when a general law of the state, adopted by the state Legislature, provides for a scheme of public improvement, the scope of which intrudes upon or transcends the boundary of one or several municipalities, together with unincorporated territory, such contemplated

improvement ceases to be a municipal affair and comes within the proper domain and regulation of the general laws of the state." (*Coronado, supra,* 227 Cal.App.2d at p. 477.)

Thus, the court in *Coronado* construed the Act as establishing a scheme of public improvement that transcends the boundaries of individual municipalities, and thereby falls within the regulatory powers of the state. We think this view of the Act applies equally to the appointment provisions of section 16. Furthermore, section 79 specifically provides that the provisions of the Act are "a matter of statewide concern and are to prevail over any inconsistent provision in any such charter," evincing a clear intention on the part of the Legislature to supersede inconsistent local laws. As discussed above, this statement would be given great weight by the courts when deciding whether a matter is a municipal affair or of statewide concern. (*Bishop, supra,* 1 Cal.3d at p. 63.)

Therefore, we conclude that a court would find that the provisions of the Act, including section 16 regarding the appointment power of the respective city councils, are matters of statewide concern and thus preempt conflicting provisions of a city charter. As indicated above, it is also our view that the veto provision of the City Charter of the City of San Diego is a conflicting provision.

Accordingly, it is our opinion that, even if the City Charter of the City of San Diego provides that the mayor is authorized to veto appointments made by the city council, the mayor would not be authorized to veto an appointment made by the city council to the Board of Commissioners of the San Diego Unified Port District.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

By
Jason K. Lee
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JKL:sjk