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**MEMORANDUM OF LAW**

**DATE:** April 23, 2015

**TO:** Honorable Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** Delegation of Governmental Functions to Civic San Diego

**INTRODUCTION**

In 1975, the City of San Diego (City) formed Centre City Development Corporation (CCDC) and in 1980 it created the Southeastern Economic Development Corporation (SEDC). In addition to other purposes, both corporations were formed to provide “economic development” services. Over the years, CCDC and SEDC were delegated some land use approval functions that would otherwise have been performed by City staff. This Office is not aware of any written legal analyses of the related delegation or oversight issues until 2009.

In 2009, this Office raised concerns regarding oversight and liability issues related to the operations of CCDC and SEDC and recommended the City consider returning their functions to City Redevelopment staff. 2009 City Att’y MS 743 (2009-3; Mar. 3, 2009) (the 2009 Memo); *see also* City Att’y Report 2014-9 (Apr. 17, 2014). In 2010, after extensive review, the City Council amended the bylaws and operating agreements with CCDC and SEDC to bolster oversight and transparency.

In 2012, CCDC’s name was changed to Civic San Diego (CivicSD) and SEDC was merged into CivicSD. CivicSD is the same corporation as CCDC and SEDC, as they existed since 1975 and 1980, respectively.

This Office was asked to review CivicSD’s proposal to expand services beyond those provided by CCDC and SEDC. The proposal contemplates delegation of governmental functions and raises questions under state and local law of what functions the City can delegate, what authority is required to make such a delegation, what rights and powers must be retained by the City if such a delegation is made, and the risk to the City posed by CivicSD’s activities. These

questions apply equally to past delegations to CCDC and SEDC and for work currently being performed in the downtown area.<sup>1</sup>

If the City desires to delegate functions to CivicSD, the legal limitations and procedural requirements inherent in a delegation of governmental functions must be considered and addressed. The purpose of this Memorandum is to provide those limitations and procedural requirements.

## BACKGROUND

A brief summary of CivicSD's history and current role provides helpful context for the discussion here.

Formation and Purpose of CivicSD. CivicSD is a nonprofit public benefit corporation and successor to CCDC and SEDC. Restated Articles of Incorporation, CCDC (filed June 28, 2012) (CivicSD Articles); Amended and Restated Bylaws, CivicSD (CivicSD Bylaws). The City is CivicSD's sole member. *Id.* The City can amend CivicSD's articles or bylaws, appoint members to CivicSD's Board, dissolve or merge the corporation, or dispose of all or substantially all of its assets. CivicSD Bylaws, Art. 2. The Bylaws expressly state that the City is not liable for CivicSD's "debts, liabilities, or obligations." CivicSD Bylaws, § 2.6.

CivicSD's purpose is to carry out economic development, land use permitting, and project management services on behalf of the City. CivicSD Bylaws, § 1.2. Similarly, CCDC and SEDC were formed to work with the City's former Redevelopment Agency (Former RDA) to provide "redevelopment services," and for SEDC, to provide "economic development services." Articles of Incorporation, CCDC, Art. II; Articles of Incorporation, SEDC, Art. II. CCDC and SEDC performed services pursuant to operating agreements with the Former RDA. *See* Amended and Restated Operating Agreements, Redevelopment Agency Resolutions R-4498 and R-4499 (Apr. 10, 2010) (RDA Operating Agreements).

Under the RDA Operating Agreements, "economic development services" were limited by California's Community Redevelopment Law (California Health & Safety Code (H&S Code) sections 33000 to 33855). The Former RDA was created under the Community Redevelopment Law, limited to specific powers granted by the Law, and to operating within defined borders. 2009 City Att'y MS 743 (2009-3; Mar. 3, 2009); H&S Code § 33100; 2011 City Att'y Report 425 (2011-22; May 12, 2011) (citing *Kehoe v. City of Berkeley*, 67 Cal. App. 3d 666, 673 (1977)). For example, the Former RDA had "very limited authority . . . to directly use Agency funds for specific economic development programs," and could not direct funds to job creation and business retention efforts. Memorandum by Special Counsel Kane Ballmer & Berkman (June 4, 2010), attached to 2010 City Att'y Report 764 (2010-24; June 14, 2010).

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<sup>1</sup> Questions raised in the City Council's Public Safety and Livable Neighborhoods Committee meeting of March 18, 2015, relating to CivicSD's participation in the federal New Market Tax Credit program, and the structure of the community development entity (CDE) formed for that purpose, are beyond the scope of this Memorandum and will be addressed separately.

In 2009 and 2010, the City conducted performance audits of CCDC and SEDC resulting in recommended changes for greater oversight and accountability. *See* Council Docket, Mar. 22, 2010, Items 202 and 203; Independent Budget Analyst (IBA) Report No. 10-25 (Mar.10, 2010). The Former RDA amended the Operating Agreements, and the Council adopted changes to CCDC's and SEDC's articles and bylaws, putting the recommendations in place. *Id.* These changes were the product of a months-long deliberative and public process and included, among other items: requiring adoption of purchasing and fiscal policies with prior review and comment by the City's Chief Financial Officer (CFO); requiring regular performance audits and financial audits; requiring adherence to City budget policies and review and comment by the City's CFO of proposed budgets; requiring board member and officer training and clarifying the process for removal of board members by the City; and requiring monthly board review of financial statements. *See* Attachment A to IBA Report No. 10-25.

The RDA Operating Agreements set out the services to be performed to implement "the Project," and other services as requested by the Former RDA. For CCDC, the Project was implementation of the Centre City and Horton Plaza Redevelopment Plans; for SEDC, the Project was implementation of several redevelopment plans that became the Southeastern San Diego Merged Redevelopment Plan. Both RDA Operating Agreements included "detailed and cost-effective planning services" with "review and analysis of developers' proposals, staff services for the public and private entitlement process [and] the architectural design review process." RDA Operating Agreements, § 2.06(i). The parties to the RDA Operating Agreements were the Former RDA, CCDC, and SEDC, and all services were to be carried out under the direction of the Former RDA. *Id.* at § 2.06(d).

The Former RDA also had an agreement with the City to provide the RDA with staffing and management, administrative, and other services necessary to operate as a redevelopment agency under the Community Redevelopment Law. *See* Agreement, City Clerk Doc. No. 750581, San Diego Resolution R-212990 (Apr. 10, 1975), and First Amended Agreement, City Clerk Doc. No. RR-278441, San Diego Resolution R-278441 (Jul. 30, 1991) (the City/RDA Agreement). The Former RDA did not have employees; from its inception, it contracted with the City for staffing and services.

CivicSD's Current Role. In 2011 and 2012, a series of legislative actions and a California Supreme Court decision resulted in new laws dissolving redevelopment agencies across the state and forcing the City to rethink the purpose for and its relationship with CCDC and SEDC. *See* 2012 City Att'y Report 189 (2012-2, Jan. 19, 2012) (discussing the legislative actions and related court cases challenging those actions). This new legislation (the Dissolution Laws)<sup>2</sup> restricted work on prospective projects and created new work aimed at winding down tax increment funded redevelopment. Under the Dissolution Laws, the Former RDA dissolved as of February 1, 2012, and the City, acting as the Successor Agency, was vested with the Former RDA's authority, rights, duties and obligations under the Community Redevelopment Law, as amended. H&S Code Div. 24, Part 1.85. The Dissolution Laws generally invalidated agreements

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<sup>2</sup> The Dissolution Laws include, *inter alia*, Assembly Bill x1 26 (June 28, 2011), Assembly Bill 1484 (June 27, 2012) (codifying the modifications made by the California Supreme Court in its final opinion of December 29, 2011), and Assembly Bill 471 (Feb. 18, 2014).

between the Former RDA and the City, including the City/RDA Agreement for staffing and services. H&S Code § 34171(d)(2).

The Successor Agency is a separate legal entity from the City. H&S Code § 34173(g).<sup>3</sup> The Former RDA's rights, duties, obligations (to the extent deemed "enforceable obligations" by the state's Department of Finance), and assets, belong to the Successor Agency. H&S Code §§ 34173(b) and 34175(b). The Dissolution Laws charge the Successor Agency with completing projects currently underway, disposing of the Former RDA's assets and properties, fulfilling enforceable obligations, and sending any remaining funds to the County of San Diego for redistribution. H&S Code § 34177. This work is overseen by an oversight board with members appointed by the local taxing entities that stand to benefit from the newly available tax dollars, and the Department of Finance. H&S Code § 34179.

The Dissolution Laws are designed to recapture tax increment funds and return them to local taxing entities; they ended the ability of the Former RDA, as a state entity, to continue to conduct redevelopment activities using tax increment funds. The Dissolution Laws do not, however, affect the ability of cities, counties or other government entities to carry out economic development activities not funded with tax increment dollars. *See* H&S Code § 34172(a)(1). To continue the economic development work of CCDC and SEDC, the City renamed CCDC to "Civic San Diego," modified its purpose, and merged SEDC and CivicSD by making CivicSD the sole member of SEDC. *See* Office of the Mayor Report No. 12-078 (June 21, 2012); CivicSD Articles; Restated Articles of Incorporation, SEDC, Art. VI; Amended and Restated Bylaws, SEDC, Art. II.

Under the revised governing documents, a specific purpose of CivicSD is to "engage in economic development, land use permitting and project management services which under California law, can be done by contract with or delegated by the [City], or the City solely in its capacity as the designated successor agency to the [Former RDA]." CivicSD Articles, Art. II; CivicSD Bylaws, § 1.2. CivicSD may enter into other agreements or conduct other activities "in furtherance of the purposes for which [CivicSD] was formed." *Id.* The governing documents also enable CivicSD to solicit donations and pursue other programs that encourage investment in low-income neighborhoods such as federal New Market Tax Credits, and invest and use funds and property. *Id.*, and *see* San Diego Resolution R-307659 (July 31, 2012) (amendment to allow solicitation of federal funding).

In June 2012, along with naming and repurposing CivicSD, the City entered into two agreements for CivicSD to provide services to the City: (1) the Successor Agency and Housing Successor Agency Services Agreement for services related to funds and properties held by those agencies (Successor Agency Agreement); and (2) the Administration of Certain Planned Districts, the Downtown Community Parking District and Economic Development Services Agreement covering the work previously performed by CCDC (Downtown Services Agreement). San Diego Resolutions R-307538 and R-307537 (respectively) (June 28, 2012); and

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<sup>3</sup> The Successor Agency "succeed[s] to the organizational status of the [Former RDA], but without any legal authority to participate in redevelopment activities, except to complete any work related to an approved enforceable obligation." H&S Code § 34173(g).

San Diego Resolution R-307849 (Nov. 28, 2012) (authorizing first amendment to Successor Agency Agreement).

Under the Downtown Services Agreement, CivicSD, like CCDC before it, reviews and processes applications for various development permits, including conditional use permits, neighborhood use permits, and temporary use permits as called for in the City's Planned District Ordinances (PDOs) for the Centre City, Gaslamp Quarter, and Marina Districts. The Council delegated this permitting authority to CivicSD through approval of the PDOs for these areas. San Diego Municipal Code (SDMC or Municipal Code) Ch. 15, Art. 6, 7, 11. CivicSD also administers the Downtown Community Parking District and implements the Comprehensive Downtown Parking Plan, and provides economic development services within the downtown and southeastern San Diego areas. CivicSD is to perform these services in compliance with the City's laws and "within the limitations of the City Charter and as directed by the City." Downtown Services Agreement, Scope of Services (Ex. A-1).

Like the Former RDA, the Successor Agency does not have employees. The Scope of Services for the Successor Agency Agreement provides for CivicSD to perform work required by the Dissolution Laws to wind-down the Former RDA and complete on-going projects identified in the Recognized Obligation Payment Schedule (ROPS), at the direction of the City. Successor Agency Agreement, § 1.1 and Scope of Services (Ex. A). The Scope provides a list of tasks that "shall" be performed, including processing payments due on enforceable obligations, monitoring bond requirements, disposing of property, collecting money due, documenting assets and obligations relating to housing functions and transferring them to the Housing Successor Agency, managing property, preparing an administrative budget and obligations schedules, and other tasks. For ongoing development projects, CivicSD is to "oversee development of properties until the contracted work has been completed or the contractual obligations of the [Former RDA] can be transferred to other parties," pursuant to the Dissolution Laws.

As approved in June 2012, section 1.1 of the Successor Agency Agreement limited services for the winding down and completion of projects to those located within the Centre City, Horton Plaza, and SEDC areas. The scope was expanded in November 2012 to include all projects listed on the ROPS, regardless of project area, that are held by the Successor Agency or by the City as housing successor to the Former RDA (Successor Housing Agency). City Att'y Report 2014-9 (Apr. 17, 2014).

Also as part of the Council's actions in June 2012, the City authorized CivicSD's annual administrative budget. The majority of funds in the approved budget were redevelopment funds (i.e., property tax revenues and other funds in the Successor Agency's possession) allocated for CivicSD's Successor Agency and Housing Successor Agency work. Under the Dissolution Laws, redevelopment funds can be used to pay for this work, subject to certain limitations. H&S Code §§ 34171(a) and (b), 34177(j). CivicSD also receives fees for its downtown permit processing functions, parking meter revenue for its management of the Downtown Parking District, and money from the City "for conducting economic development activities in the project areas formerly serviced by CCDC and SEDC." IBA Report No. 12-28 at 6-8 (June 22, 2012). "It is envisioned that Civic San Diego will use the seed money to identify new funding

sources” with the goal “to become a financially self-sustaining organization,” not “reliant on the City’s General Fund.” *Id.* at 8.

The City’s Workforce. The City has staff, both classified and unclassified, who perform planning, permitting, and economic development work, as well as public works construction and management, property transactions, and purchasing and contracting. The City conducts planning and economic development activities through the City’s Department of Planning, Neighborhoods, and Economic Development (PNED).<sup>4</sup> SDMC § 22.2402. The City’s Development Services Department (DSD) provides review, issues permits, inspects, and provides code enforcement for private and public development. SDMC § 22.2401. The City’s Public Works Department oversees development of public infrastructure and facilities. City of San Diego (Apr. 6, 2015), <http://www.sandiego.gov/publicworks/about/index.shtml>.

As a specific example of the work of City staff, PNED has completed the Euclid + Market Land Use and Mobility Plan that sets forth the goals, policies, and objectives for the Encanto transit village area, and the Euclid Avenue Gateway Master Plan, and is currently engaged in preparing and bringing to the Council an Encanto Neighborhoods Community Plan, including an Environmental Impact Report, Public Facilities Financing Plan, and a Euclid Transit Village Specific Plan. City of San Diego (Apr. 6, 2015), <http://www.sandiego.gov/planning/community/profiles/encanto/>.

### **QUESTIONS PRESENTED**

1. Can the City delegate authority to CivicSD to perform certain land use-related, governmental functions?
2. What steps must the City take to properly delegate proposed additional authority to CivicSD?
3. In delegating governmental functions, what rights and powers must be retained by the City for proper control over the delegation and San Diego Charter (Charter) compliance?
4. Does the delegation of authority create risks for the City?

### **SHORT ANSWERS**

1. Yes, the City can delegate authority to CivicSD to perform certain land use-related governmental functions within specific areas of the City, provided that the City’s delegation is limited and specific, accompanied by appropriate controls and safeguards to protect the public, and properly authorized by the Mayor and City Council. The City’s existing delegation of authority to CivicSD for administering land use permitting in the downtown area is subject to the bylaws, operating agreements, and ordinances by the City Council. The 2010 amendments made to the 35-year old CCDC and SEDC models to enhance controls, safeguards and oversight bolstered the City’s compliance with these requirements. Even before 2010, the

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<sup>4</sup> In this Memorandum, we reference the organization and duties of the departments as currently codified.

City's delegation required compliance with specific standards set forth in Council-approved agreements, ordinances, and policies.

2. To properly transfer proposed additional authority or functions to CivicSD, the Mayor and Council must approve a contract between the City and CivicSD that provides sufficient detail of the scope of the delegation, clear standards to be applied in carrying out the City's direction, and appropriate City oversight and controls. Before taking that step, the City must determine whether a proposed transfer raises a meet and confer issue under the Meyers-Milias-Brown Act (MMBA), the state collective bargaining law applicable to the City as a public agency employer. The City must also determine whether the proposal would transfer City services being performed by classified employees, requiring compliance with Charter section 117(c). If so, the City must first comply with these laws. For a proper delegation of City permitting functions, the Council must also adopt one or more ordinances establishing the standards and setting forth the authority of CivicSD to administer the land use policy.

3. For a proper delegation, the City must establish clear goals and standards for implementation of the delegated administrative functions, including notice, hearing, and decision processes that safeguard due process. The City's delegation of an administrative function must include provisions for City oversight and administration, and budget and fee approval. To the extent the delegation creates an agency relationship, the City must have the right to terminate the agreement, in the City's sole discretion. The existing agreements and ordinances governing CivicSD's administration of land use regulation downtown meet these requirements, but can be improved to strengthen oversight of and reporting by CivicSD.

4. The risks remain the same as with CCDC and SEDC. As discussed in the 2009 Memo, there are risks associated with inadequate oversight and with City liability.

## **DISCUSSION**

### **I. THE CITY'S ABILITY TO DELEGATE GOVERNMENTAL FUNCTIONS TO CIVICSD IS LIMITED TO ADMINISTRATIVE, NON-LEGISLATIVE FUNCTIONS**

CivicSD performs two distinct roles in implementing development: the first is planning and facilitating the development; and the other is as an administrative entity, carrying out regulatory activities on behalf of the City. In the first role, CivicSD uses its existing corporate powers to implement the City's economic development goals. In this role, it undertakes activities as a contractor assisting the City, such as overseeing the performance of developer agreements, processing plans and amendments for approval, creating economic development policies and strategies, pursuing financing sources for infrastructure improvements, handling the disposition or transfer of property, and managing the design and building of infrastructure projects. CivicSD may engage in these activities as an economic development partner of the City without performing governmental functions. CivicSD, however, also performs governmental functions in administering land use permitting and planning processes, including issuing land use permits. The power to perform these governmental functions resides with the City and cannot be exercised by CivicSD without a delegation of authority from the City.

Where CivicSD engages or proposes to engage in governmental functions on behalf of the City, we must consider: (1) whether the proposed function is a proper one for delegation; (2) what authority and permission is required to transfer the function; and (3) whether the City retains the proper control over CivicSD. *Cnty. of L.A. v. Nesvig*, 231 Cal. App. 2d 603, 616 (1965) (public body may delegate administrative functions if it retains ultimate control to safeguard the public interest). Certain governmental functions may not be delegated to CivicSD, while others may be delegated, but only with specific procedural requirements and controls. As discussed later, delegation of administrative authority to CivicSD also requires the concurrence of the Council and Mayor because the Council cannot infringe on the Mayor's Charter-mandated authority to oversee the City's administrative service.

**A. The City's Land Development Code Contains the City's Land Use and Permitting Regulations, Including the Existing Delegation to CivicSD**

**1. The City Has Land Use and Permitting Authority Pursuant to Its Constitutional Police Power**

The City's right to regulate land use matters comes from its inherent police power. *See Fonseca v. City of Gilroy*, 148 Cal. App. 4th 1174 (2007) and *Big Creek Lumber Co. v. Cnty. of Santa Cruz*, 38 Cal. 4th 1139 (2006). Police power is a key function of local government and a basic prerogative provided cities and counties in the state's constitution. Cal. Const. art. XI § 7; *Big Creek Lumber*, 38 Cal. 4th at 1151. Police power includes the right to adopt ordinances regarding land use matters and aesthetic concerns such as design review, so long as such ordinances are not unconstitutionally vague. *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 595 (1976); *Briggs v. City of Rolling Hills Estates*, 40 Cal. App. 4th 637, 643 (1995).

California's planning and zoning laws that apply to general law cities generally do not apply to charter cities, except for a patchwork of statutory provisions that the California Legislature has said must apply. Cal. Gov't Code §§ 65700(a), 65803. The City has adopted comprehensive land use laws and regulations. *See, e.g.*, SDMC Ch. 11 (Land Development Procedures), Ch. 12 (Land Development Reviews), Ch. 13 (Zones), Ch. 14 (General [Development] Regulations), Ch. 15 (Planned Districts) (collectively, the Land Development Code). The Land Development Code includes processes for approval of land uses and development, including permits, maps, and other approvals. SDMC § 111.0102.

The Land Development Code establishes different processes for different levels of decision-making ranging from Process One (lowest level of review) to Process Five (highest level). SDMC §§ 112.0501-112.0509. These procedures include necessary due process protections for decisions that affect property rights, including any appeals. The type of development proposed in the application determines the level of approval and the procedure that applies. SDMC § 112.0501.

City staff, the hearing officer, the Planning Commission, and the Council each has a role in the City's decision-making process. SDMC §§ 111.0105, 111.0201-111.0205. Process One is a non-appealable, staff-level decision used for ministerial permits. SDMC § 112.0502. Process Two is also a staff-level decision, but with a right of appeal to the Planning Commission. SDMC



§§ 112.0503, 112.0504. Process Three decisions are made by a hearing officer after staff-level review, with the right of appeal to the Planning Commission. SDMC §§ 112.0505, 112.0506. Process Four decisions are made by the Planning Commission after staff-level review, with the right of appeal to the Council. SDMC §§ 112.0507, 112.0508. Unless an exception to Planning Commission review is made by the Council, a Process Five decision is made by the Council after staff-level review and after a public hearing before, and opportunity to provide a recommendation by, the Planning Commission. SDMC § 112.0509.

These processes also apply within the City's Planned Districts, except as otherwise provided for in the PDOs. SDMC § 151.0103(b). Planned Districts are areas designated by the Council. Each Planned District has a comprehensive plan with specific land use controls intended to further stated goals. SDMC §§ 151.0101, 151.0102. For example, Centre City is a Planned District with land use regulations and design and development criteria that implement the Downtown Community Plan. SDMC § 156.0301. The Gaslamp Quarter is also a Planned District implementing the Downtown Community Plan, but with regulations specifically designed to protect the Gaslamp Quarter's historical resources. SDMC § 157.0101. The Marina PDO's regulations are intended to create discrete neighborhoods and strong waterfront and pedestrian connections, among other goals. SDMC § 1511.0101.

## 2. CivicSD's Current Permitting Authority Is Set Forth in the PDOs

For the Centre City, Gaslamp Quarter, and Marina Planned Districts, the Council has delegated certain decision-making authority to CivicSD. CivicSD conducts design review of development projects, such as the determination of compliance with design guidelines or the review of basic concept and schematic drawings. SDMC §§ 156.0304(e), 157.0202(a), 1511.0202(b). For projects in the Centre City Planned District, design review and approval may be conducted by the CivicSD President or Board, depending upon the size of the project. SDMC § 156.0304(e)(1)(B). CivicSD will not issue a development permit until design review is complete. SDMC § 156.0304(e)(1)(A).

CivicSD also approves the issuance of certain development permits in accordance with established regulations, standards, plans, and policies. SDMC §§ 156.0304, 157.0202, 157.0203, 1511.0202, 1511.0203. This includes processing applications for development permits and other matters following the five decision processes set forth in the Municipal Code. SDMC §§ 156.0304(a), 157.0103, 1511.0201(a). In the Centre City and Gaslamp Quarter Districts, the CivicSD President considers applications in accordance with Processes One and Two, and the CivicSD Hearing Officer considers applications in accordance with Process Three.

CivicSD does not make decisions under Processes Four or Five; those return to the usual City process and are heard by the Planning Commission and Council, respectively. SDMC §§ 156.0304(c), 157.0202. In lieu of the Planning Commission, CivicSD's Board hears appeals of administrative decisions made under Processes Two and Three in the Centre City and Gaslamp Districts. SDMC §§ 156.0304(c)(2), (3), 157.0202(b), 157.0202(c). CivicSD can revoke certain permits if there is a violation of applicable terms, conditions, requirements, or provisions. SDMC §§ 157.0204, 1511.0202(h).

**B. Administrative Functions, Including Adjudicatory Decisions, May Be Delegated with Proper Authorization and Direction**

The Charter generally vests the Council with the legislative authority to make laws, ordinances and policies, and the Mayor with the administrative power to implement those laws, ordinances, and policies. *See* Charter §§ 11 (vesting all legislative powers in the Council, except as otherwise stated) and 265(b)(2) (Mayor has power and duty to execute and enforce all laws, ordinances, and policies). Legislative acts declare a public purpose and involve adoption of general laws, standards, or policies. *Horn v. Cnty. of Ventura*, 24 Cal. 3d 605, 612 (1979). A legislative body may declare a policy, fix a standard, and then delegate to some other body the tasks of writing regulations, applying the policy to individual cases, and otherwise carrying the legislation into effect. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 167 (1976); *Kugler v. Yocum*, 69 Cal. 2d 371, 375-77 (1968).

California law distinguishes between the delegation of these legislative and administrative powers, because the duty to “resolve the truly fundamental issues” is the job of the elected legislative body and cannot be delegated. *People ex rel. Lockyer v. Sun Pac. Farming Co.*, 77 Cal. App. 4th 619, 632-33 (2000).<sup>5</sup> “[T]he legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others” or by failing to provide adequate direction for policy implementation. *Id.* at 632-33; *see also State Bd. of Educ. v. Honig*, 13 Cal. App. 4th 720, 750 (1993). Thus, legislative authority to make fundamental policy decisions cannot be delegated. *CEED v. Cal. Coastal Zone Conservation Comm’n*, 43 Cal. App. 3d 306, 325 (1974); *City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.*, 72 Cal. App. 4th 366, 376 (1999).

A governmental entity is also subject to limits on what duties and functions it can delegate based on its fundamental purpose and the separation of powers principle. Courts recognize the “delegation doctrine,” also called the “nondelegation doctrine,” which limits the transfer of core functions from one branch of government, such as the legislative branch, to another branch or to a third party, such as an administrative agency or a private entity. *Carmel Valley Fire Prot. Dist. v. Cal.*, 25 Cal. 4th 287, 297 (2001); *People v. Figueroa*, 68 Cal. App. 4th 1409, 1414-15 (1999). The purpose of the doctrine is to prevent one branch “from exercising the complete power constitutionally vested in another.” *Younger v. Super. Ct.*, 21 Cal. 3d 102, 117 (1978) (emphasis in original). It does not prevent one branch from properly taking action that incidentally duplicates a function delegated to another branch. *Id.*

The same principle applies to the City through the Charter’s delegation of powers, including its assignment of legislative powers to the Council, under Charter section 11. Charter section 11.1 further states that the Council is prohibited from delegating “legislative power or responsibility which [the Councilmembers] were elected to exercise in the adoption of any ordinance or resolution . . . setting public policy.” Charter §11.1.

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<sup>5</sup> “Delegation” means “[t]he act of entrusting another with authority or empowering another to act as an agent or representative.” Black’s Law Dictionary (9th ed. 2009). A “delegate” is “[o]ne who represents or acts for another person or a group.” *Id.* A delegation of duties occurs when, for example, “a party to a contract arranges to have a third party perform the party’s contractual duties.” *Id.*

Once the Council has established the law, it may properly delegate authority to private or governmental entities to administer or apply the law. *Sun Pac. Farming*, 77 Cal. App. 4th at 632 (citing *Wilkinson v. Madera Cmty. Hosp.*, 144 Cal. App. 3d 436, 442 (1983)). “But, while legislative or discretionary powers or trusts devolved by charter or law on a council . . . , or a specified board or officer, cannot be delegated to others, it is equally well established that ministerial or administrative functions may be delegated to subordinates or agents.” *Sacto. Chamber of Commerce v. Stephens*, 212 Cal. 607, 610 (1931).

In the land use context, administrative acts involve application of the general laws to specific development projects. *City of Chula Vista v. Super. Ct.*, 133 Cal. App. 3d 472, 489 (1982). Administrative acts may be discretionary (and are sometimes called adjudicative or quasi-adjudicative) or ministerial. *Horn*, 24 Cal. 3d at 613. Ministerial actions involve nondiscretionary decisions based only on fixed and objective standards; they do not require a subjective judgment. *Calvert v. Cnty. of Yuba*, 145 Cal. App. 4th 613, 622 (2006). For example, the issuance of a typical, small-scale building permit is a ministerial action. *Id.* Adjudicatory decisions require the decision-maker to ascertain the necessary facts to justify the granting of a permit under the established land use legislation. *Horn*, 24 Cal. 3d at 614; *Mitchell v. Morris*, 94 Cal. App. 2d 446, 450 (1949). For example, the issuance of a discretionary land use permit or a variance is an adjudicatory act. *Land Waste Mgmt. v. Contra Costa Cnty. Bd. of Supervisors*, 222 Cal. App. 3d 950, 957 (1990). Accordingly, these administrative functions, carrying out the procedures, rules, standards, and policies enacted by the legislative body, whether ministerial or adjudicative, can be delegated.

### **C. Delegation Must Be Accompanied by Proper Standards, Controls, and Procedural Due Process Safeguards**

A proper delegation of the City’s administrative authority must include appropriate controls and safeguards to ensure that the City retains the necessary, ultimate control and protects the public interest. In the context of permitting and land use decisions, this also means ensuring that proper procedures are followed to protect due process rights.

When a legislative body, like the Council, makes a fundamental policy decision, it may delegate the authority to administer or apply the policy or law to some other body, consistent with its charter authority, as long as it puts sufficient standards in place to adequately safeguard the public interest. *Sun Pac. Farming*, 77 Cal. App. 4th at 632-33; *Burbank*, 72 Cal. App. 4th at 376-77. The legislative body “may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature.” *Kugler*, 69 Cal. 2d at 376 (citations omitted); *Coastside Fishing Club v. Cal. Res. Agency*, 158 Cal. App. 4th 1183, 1205 (2008). To do so, the delegation of administrative or regulatory powers must include “sufficiently definite directions” for exercising the delegated powers. *Burbank*, 72 Cal. App. 4th at 376-77. And the legislative body must retain ultimate control over its legislative policy and safeguard the public interest. *Int. Longshoremen’s & Warehousemen’s Union v. L.A. Export Terminal, Inc.*, 69 Cal. App. 4th 287, 297-98 (1999); *Nesvig*, 231 Cal. App. 2d at 616-17.

In an early case, the California Supreme Court invalidated a contract between a city and a private corporation to build an opera house on public land because the agency did not retain

sufficient control over operation of the opera house for the delegation to be valid. *Egan v. City & Cnty. of S.F.*, 165 Cal. 576, 583-84 (1913). Control over management was vested in perpetuity in a board of trustees which included public officials and private individuals, most of whom were not selected by the agency and whose actions the agency could not direct. *Id.* at 580. The court concluded that “the beneficial attributes of ownership, over and above the naked legal title, [had been] taken from the city and county, and ... placed in the hands of private persons.” *Id.* at 581.

In contrast, in a later decision, the California Supreme Court upheld a city’s delegation of authority even though the city retained significantly less control. *Irwin v. City of Manhattan Beach*, 65 Cal. 2d 13, 23-25 (1966). In *Irwin*, the city delegated authority to private parties to build and operate an overpass. The court upheld the delegation finding the city had maintained control over the construction, maintenance, and use of the overpass because it had the power to approve or reject construction documents and to revoke the operating permit under various circumstances.

The California Supreme Court’s *Irwin* decision cited two decisions from the California Courts of Appeal, each upholding the delegation of authority by a city to a private entity. The court in *Haggerty v. City of Oakland*, 161 Cal. App. 2d 407, 415-17 (1958), found the lease of a port facility to a private company to be a lawful delegation because the lease included public agency control over price modifications and sublease approval. In *Nesvig*, the court upheld a contract between the County of Los Angeles and a private nonprofit corporation as a lawful delegation of governmental authority under a contract that gave the corporation the right to operate and manage the Music Center, a City-owned facility, for 40 years. The court determined the county retained sufficient control over operations because it had authority to set admission and concession prices and control the operator’s annual budget, among other controls. 231 Cal. App. 2d at 617.

California courts have also upheld the delegation of building and land use permitting authority accompanied by appropriate standards. *CEEED*, 43 Cal. App. 3d at 326 (citing, *inter alia*, *City & Cnty. of S.F. v. Super. Ct.*, 53 Cal. 2d 236, 250 (1959) (standards contained in municipal code applied to review by planning commission and permit appeals board and were sufficient); *Mitcheltree v. City of L.A.*, 17 Cal. App. 3d 791, 797 (1971) (general welfare standard was sufficient for issuance of conditional use permit in absence of master plan).

In *CEEED*, the court analyzed the delegation of legislative power to a commission as part of the Coastal Zone Conservation Act of 1972, and determined that “[s]tandards for the issuance of building and land use permits couched in general health, safety or welfare terms . . . have been uniformly upheld against the charge that they confer unbridled discretion on the administrative body or are unconstitutionally vague.” *CEEED*, 43 Cal. App. 3d at 326. In that case, the legislation dictated that the regional commission make certain findings prior to approval of a permit, including that the development would not have any substantial adverse environmental or ecological effect and was consistent with certain objectives related to the “preservation, restoration and enhancement of the coastal zone environment.” *Id.* at 327. The court determined that the legislation “sets out the goals to be achieved and the standards for permit issuance with . . . clarity,” even though “application of the standard calls for the exercise of judgment and discretion.” *Id.* at 326-27. The court stated that “[t]he fact that the Commission is required to weigh complex factors . . . does not . . . mean that unbridled discretion has been conferred on it. A

statute empowering an administrative agency to exercise a judgment of a high order in implementing legislative policy does not confer unrestricted powers.” *Id.* at 327.

In contrast, in *Burbank*, the court denied the airport authority’s claim that delegation of authority to conduct permit reviews was implied through a joint powers agreement. Such a delegation cannot be implied because it requires expressly stated standards and safeguards; without those, the resulting unfettered discretion would be an impermissible abdication of the city’s police power. 72 Cal. App. 4th at 376-77; *see also Birkenfeld*, 17 Cal. 3d at 169 (standards provided were inadequate because they did not protect the public from unfairness or favoritism).

In addition to standards, land use decisions that are adjudicatory in nature generally require due process protections, specifically prior notice and hearing. *Horn*, 24 Cal. 3d at 612 (approval of tentative map for proposed subdivision required public notice and opportunity to be heard). For due process, the administrative body “is required to determine the existence or nonexistence of the necessary facts before” making a decision. *Mitchell*, 94 Cal. App. 2d at 450; *Simi Valley Rec. & Park Dist. v. Local Agency Formation Comm’n of Ventura Cnty.*, 51 Cal. App. 3d 648, 685 (1975).

The Downtown PDOs provide the administrative and due process safeguards for the work CivicSD currently performs administering the City’s land use regulations in the Downtown Districts. Each PDO requires compliance with detailed processes and standards contained in the PDO and other referenced documents for planning and permitting approvals. For example, the Centre City PDO requires CivicSD comply with the PDO and other parts of the Land Development Code, the Downtown Community Plan, the CivicSD Land Development Manual, and any policies or guidelines adopted by the City to implement the Downtown Community Plan. SDMC § 156.0304(a); *see also* SDMC §§ 157.0103-0104 (Gaslamp Quarter), 1511.0201 and 1511.0103 (Marina).

Further, the PDOs and Downtown Services Agreement place ultimate control over CivicSD’s performance of the delegated administrative functions with the City. The City can terminate the Downtown Services Agreement for failure to perform after a 30 day opportunity to cure, and can terminate without cause after 180 days notice. Downtown Services Agreement §§ 2.5, 2.6. CivicSD must make decisions consistent with the standards and policies enacted by the City, and the City has continuing authority to establish and amend the standards and policies for design and development of projects set forth in the Downtown PDOs and related documents. The City has, in fact, revised the PDOs and community plan documents a number of times. *See* SDMC Ch. 15, Art. 6, 7, and 11 (references to legislative history). The City has the right to access CivicSD’s books and records and to audit its performance. Downtown Services Agreement § 4.2.

## **II. TO COMPLY WITH THE CHARTER, DELEGATION OF ADMINISTRATIVE FUNCTIONS REQUIRES MAYOR AND COUNCIL ACTION**

### **A. Delegation of Administrative Functions Must Properly Account for the Mayor's Charter Authority**

1. The Mayor "Executes and Enforces" the City's Laws and Oversees the City's Administrative Service and the Council Sets the Powers and Duties of the City's Departments by Ordinance

Any action taken by the City to delegate authority must comply with the Charter as the City's supreme law. *See* Cal. Const. art. XI, §§ 3(a) and 5(a); *Harman v. City & Cnty. of S.F.*, 7 Cal. 3d 150, 161 (1972). Under the strong mayor provisions of the Charter, the Mayor is the City's chief executive officer and the duties that formerly belonged to the City Manager are now those of the Mayor. Charter §§ 260, 265(b)(1). The Mayor has the duty to "execute and enforce" the City's laws and policies, and the right to "give controlling direction" to the City's administrative service. Charter § 265(b)(2). As the head of the City's administrative service, the Mayor is responsible for carrying out City and state laws and administrative powers. Charter § 28. Administrative department directors are "immediately responsible to [the Mayor] for the efficient administration of their respective Departments" and the Mayor is specifically empowered to "set aside any action taken by a Director or Department subordinate responsible to him, and may supersede him in authority." Charter § 28.

Any delegation must properly account for this Charter authority. The Mayor is ultimately responsible for the performance of the administrative services, and has the right and obligation to oversee their performance. The Council cannot remove these powers and responsibilities from the Mayor, or change the distribution of power or authority provided by the Charter. *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380 (1976).

While the Mayor is responsible for execution and enforcement of the City's laws and policies and the work of most of the City's departments, the Council determines the organization of the City's departments and their respective powers and duties to the extent not set forth in the Charter. Charter §§ 26, 28. The Charter gives the Council authority to "change, abolish, combine, and rearrange the departments, divisions and boards of the City Government provided for in said administrative code." Charter § 26. An action to decrease the powers of a department requires an ordinance adopted by a two-thirds vote of the Council. *Id.*

In *Hubbard*, the Council sought to create a Department of Legislative Analyst to provide fiscal analysis services to the Council. 55 Cal. App. 3d at 385. The court held that the Council could not create a new department and vest it with duties that, under the Charter, would otherwise be under the City Manager because the Council's power to rearrange departments was limited by the Charter. *Id.* at 387-88. To the extent the ordinances would "invade or duplicate" managerial duties, they tended to "undermine the harmony of the council/manager system of municipal government." *Id.* at 392. The Council could not "change or limit the effect of a charter" by ordinance. *Id.*

Under these principles, proper delegation of responsibilities carried out by the City's administrative service under the Mayor requires action by both the Council, as the legislative body setting the standard for proper administration of the City's laws, and the Mayor, as the City official holding the administrative power. The delegation must properly account for the Mayor's responsibilities under the Charter, and the Mayor must authorize the delegation.

2. The Existing Delegation Provides for Mayoral Oversight and Was Approved by the Mayor and Council; Any Future Delegation Must Do the Same

CivicSD currently performs planning and permitting functions in the downtown area pursuant to the Downtown Services Agreement, which was executed by the Mayor after being authorized by resolution adopted by the City Council and approved (and not vetoed) by the Mayor. The City first delegated these functions to CCDC through the CCDC Operating Agreement and the Downtown PDOs. The City transferred the delegation from CCDC to CivicSD, consistent with the name change and restructuring, in its approval of the Downtown Services Agreement. The City later amended the Downtown PDOs to reflect the name change. The Mayor's office participated in the negotiation and drafting of the documents and bringing them forward to the Council for consideration.

The Downtown Services Agreement provides for Mayoral supervision and oversight in several respects. The Mayor (or the Mayor's designee) is named as the administrator of the contract. Downtown Services Agreement § 1.2. As the contract administrator, the Mayor is the designated point of communication "on all matters related to the administration of this Agreement," and the performance of services. *Id.* The Agreement specifically states that CivicSD "shall provide the services under the direction of the Contract Administrator." *Id.* The Mayor can terminate the contract for convenience on 180 days prior written notice, or for cause within 30 days after notice and failure to cure a default. *Id.* §§ 2.5, 2.6.

The Mayor has the right to access and review CivicSD's books and records and those of its contractors, to access CivicSD's offices, and to review and audit CivicSD's performance. *Id.* § 4.2. CivicSD and its contractors are required to maintain complete and accurate accounting records, and must provide those records to the Mayor upon request. *Id.*

The Mayor and Council participate in the formation and approval of CivicSD's budget. The Downtown Services Agreement calls for a Consultant Services Budget based on a list of City Projects, and the anticipated services for each project. *Id.* § 3.1. The list of City Projects is drafted jointly by the City (Mayor or designee) and CivicSD. *Id.* The proposed Budget is submitted to the City's Chief Financial Officer (CFO) for review and comment. Civic Bylaws § 6.1. The CFO reports to the Mayor. Once approved by CivicSD's Board, the Budget is submitted to the Council for approval, subject to Mayoral veto. *Id.*

In addition to the Mayor's express rights for oversight of the Downtown Services Agreement, the Mayor plays a key role in the appointment of eight of the nine directors to CivicSD's Board. CivicSD Bylaws § 3.2.2. The Council appoints one director as its representative, and this appointment is not subject to Mayoral veto. The Mayor appoints one

director as the Mayoral representative, and this appointment is not subject to Council vote. The remaining seven directors are appointed by the City through a process that includes appointment by the Mayor and confirmation by the Council. *Id.*; *see, e.g.*, San Diego Resolution R-309147 (Jul. 22, 2014); *compare* Charter § 41(c) (seven members of Planning Commission are appointed by Mayor subject to Council confirmation). The Mayor can recommend suspension or removal of a director for breach of the Bylaws and the Council can approve the recommendation on a majority vote. CivicSD Bylaws § 3.4.1(c). Otherwise, removal of a director by the Council requires a two-thirds vote.

The Mayor also appoints CivicSD's highest ranking officer, its President, subject to Council confirmation by a two-thirds vote. *Id.* § 8.3.1(b). The President is responsible for CivicSD's operations, hiring and firing of all personnel except the Chief Financial Officer, and accounting for all funds. *Id.* § 8.3.1(a). Suspension or termination of the President requires the Mayor's concurrence, and is appealable to the Council. *Id.* § 8.3.1(d).

Under the Downtown PDOs, the substitution of a CivicSD hearing officer for a City hearing officer to make decisions under Process 3, or an appeal to the CivicSD Board instead of the City's Planning Commission under Process 2, does not affect the Mayor's existing authority. In either case, the decision-maker exercises independent judgment based upon the facts presented to render a quasi-judicial decision. *See, e.g.*, SDMC §§ 156.0304(c)(2)-(3). Any Mayoral influence would take place as oversight or direction of staff preparing the recommendation to the decision-maker, understanding that in both instances, clear standards apply and must be followed by either staff as well as the decision-maker. It appears that under the Downtown Services Agreement and Downtown PDOs, in conjunction with CivicSD's Bylaws, the Mayor has the ability to provide any necessary oversight and direction, and these documents preserve the right and responsibility of the Mayor to oversee the delegated administrative functions.

### 3. Delegation to a Third Party Should Avoid Duplication of Effort or Expense

Additionally, California courts have considered whether a government body may properly contract for services with a third party when those services may be provided by public employees. *Service Employees Int'l Union, Local 715, AFL-CIO v. Bd. of Trustees of the West Valley/Mission Comm'y Coll. Dist.*, 47 Cal. App. 4th 1661 (1996) (contract for operation and management of campus bookstore upheld); *Jaynes v. Stockton*, 193 Cal. App. 2d 47, 54-55 (1961); 60 Ops. Cal. Atty. Gen. 206 (1977) (disallowing use of outside attorney for school board, in lieu of county counsel); *City & Cnty. of S.F. v. Boyd*, 17 Cal. 2d 606 (1941) (board of supervisors could determine whether to retain engineer to advise board).

The concern raised in these cases is duplication of public expenditure: if the public is paying the salary of a public employee to do the work, and the public employee can do the work, then there is no need or authority to pay a private entity for the services. *Jaynes*, 193 Cal. App. 2d at 54-55; 60 Ops. Cal. Atty. Gen. 206 (1977). Where professional services are sought, there is also a danger of conflicting opinions. *Jaynes*, 193 Cal. App. 2d at 55 (noting the potential for conflict between different school districts in the same county and practical difficulties for the



designated advisor). These cases often look to state laws allowing contracts for special expert services and discuss whether the services sought come within those laws.

For the City, the issue of duplication of public expenditure is addressed by Charter section 117(c), discussed more fully below. Section 117(c) permits the transfer of duties performed by certain classified employees that can be performed more economically and efficiently by an independent contractor, as determined by the Mayor, along with other measures to protect the cost and quality of providing services to the public. The Mayor is responsible for administering and monitoring the agreement with the contractor. Any potential for conflict in carrying out the delegated duties should be addressed in the standards set by the Council and in the oversight provided by the agreement with the contractor.<sup>6</sup>

#### 4. Lawful Delegation Requires Effective Mayoral Oversight

As stated above, a proper delegation of planning and permitting authority to CivicSD by the City, requires a contract approved by both the Council and the Mayor, with sufficient provisions to ensure City oversight of the services performed; CivicSD would be acting as the agent of the City, performing governmental functions under the Mayor's purview. As also stated above, under the Downtown Services Agreement and CivicSD's Articles and Bylaws, the City has ultimate control over CivicSD's performance of the delegated functions. However, to ensure the Mayor also has adequate oversight consistent with the Mayor's duties under the Charter, we recommend review and amendment of the existing contract and working relationship to ensure the Mayor and staff have access to the information necessary for effective oversight, including ensuring the consistency of the contracted services with other City functions. Requiring that CivicSD confer with City staff prior to the issuance of a permit involving a police-regulated business, for example, would enable City staff and ultimately the Mayor to ensure the business is treated consistently and issues known to City staff are also considered by CivicSD. Delegated permit issuing authority must be balanced with controls and effective oversight by the Mayor or Mayoral department that would otherwise be responsible for that function.

Further, because CivicSD acts as the City's agent when carrying out permitting functions, the City must have the authority to end the agency relationship at any time in the City's sole discretion. The ability to immediately end the delegation of authority is consistent with the City's

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<sup>6</sup> The departments of the City's administrative services under the Mayor include DSD, PNED, Engineering, General Services, Purchasing, and Real Estate Assets. *See* SDMC Ch. 2, Art. 2, Administrative Code, and for commonly used names *see* City of San Diego (Mar. 30, 2015), <http://www.sandiego.gov/orgchart/pdf/mayoral.pdf>. These departments perform the services that have been or potentially would be delegated to CivicSD. DSD provides review, permit issuance, inspection, and administrative code enforcement services for private and public development. SDMC § 22.2401(a) and (c). The Development Services Director performs the duties and functions of that position as assigned by and under the direction of the Mayor, "with policy direction of the City Council and policy guidance and recommendations of the Planning Commission." SDMC § 22.2401(b). PNED's responsibilities include long-range community planning, economic development programs, and environmental policy and analysis. SDMC § 22.2402(a). Other Mayoral departments generally operate the public works and provide the public services needed in any community, such as libraries, parks, police and fire stations, water and wastewater infrastructure, and streets. *See* Charter § 26.1.

right, as sole member, to dissolve CivicSD. Moreover, because the permit issuing function is under the Mayor's purview and the Mayor is responsible for its performance, the contract should permit the Mayor to exercise discretion to end the delegation and take back performance of the permitting function should the Mayor see fit to do so.

**B. The Delegation Cannot Infringe on Charter-Mandated Duties of the Planning Commission**

As explained earlier, for the Centre City and Gaslamp Quarter Planned Districts, CivicSD's Board stands in the place of the Planning Commission for appeals of staff-level decisions under Process Two and hearing officer decisions under Process Three. SDMC §§ 156.0304(c)(2), (3), 157.0202(b), 157.0202(c). Any such delegation must be consistent with Charter section 41(c) pertaining to the Planning Commission.

The Charter provides for the City Planning Commission, "organized as provided by the laws of the State," with powers and duties prescribed by state law, in addition to the specific duties listed. Charter § 41(c). The Charter's general reference to the "laws of the State" is a reference to the laws on the subject generally, including later changes to those laws, as opposed to a specific reference by title or section number, which would incorporate only the law as it existed at that time. 2B Singer, *Sutherland Statutory Construction* § 51.7 (7th ed. 2013). *See also Pearce v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 603 F. 2d 763, 767 (9th Cir. 1979); *Somermeier v. Dist. Dir. of Customs for the Port of L.A. Long Beach*, 448 F. 2d 1243 (9th Cir. 1971) (citing *Palermo v. Stockton Theatres, Inc.*, 32 Cal. 2d 53, 58-59 (1948)).

State laws pertaining to the power and duties of planning commissions have changed significantly since section 41(c) was added to the Charter. At the time of the voters' approval of the Charter provision in 1931, the State Planning Act of 1929 was in effect. That law was repealed in 1947 (Cal. Stats. 1947, ch. 807). Provisions regarding the organization and functions of planning agencies and commissions are now found in the Planning and Zoning Law (Cal. Gov't Code §§ 65000-66103), under Chapter 3, Local Planning (Cal. Gov't Code §§ 65100-65763).

However, the state's Planning and Zoning Law does not require that a city create a planning commission. Cal. Gov't Code §§ 65101, 65103. Instead, Chapter 3 gives general law cities the option of creating one or more planning commissions. *Id.* Once created, with very few exceptions, it is up to the city to determine the duties of its planning commission(s).<sup>7</sup> *Id.*; and *see* 2012 City Att'y MOL 88 (2012-2, Feb. 6, 2012). Accordingly, because Charter section 41(c) adopts the laws of the state pertaining to the organization of planning commissions, pursuant to those laws, the City may organize and determine the powers and duties of the Planning Commission to best meet the needs of the City.

In addition to the general reference to state law, Charter section 41(c) establishes general advisory duties for the Planning Commission, all of which are subject to more specific

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<sup>7</sup> For example, California Government Code section 65353 provides that if a City has a planning commission that is authorized by local ordinance or resolution to review or recommend action on a proposed general plan or proposed amendments to a general plan, the planning commission must hold at least one public hearing for that purpose.

determination by the Council: “[t]he duties of the Commission shall also include advising upon public buildings, bridges, retaining walls, approaches, park and harbor structures, the improvement of Pueblo lands and such other improvements as the Council may by ordinance determine.” The Council has, throughout the Land Development Code, determined the manner in which the Planning Commission provides advice to the City, and its role in the decision-making processes for applications for permits, maps, and other matters. *See, e.g.*, General Rules for Land Development Code (SDMC §§ 111.0101-111.0107), Decision Process (SDMC §§ 112.0501-112.0520), and Permits and Procedures for Planned Districts (SDMC §§ 151.0201-151.0204). These duties are assigned by the Council via ordinance and, consistent with Charter section 41(c), can be amended via ordinance to best meet the City’s needs.

**C. The Delegation Must Comply with Collective Bargaining Laws and Charter Section 117(c)**

This Office has previously advised the Mayor and Council on compliance with Charter section 117(c) for the contracting out of civil service work, and compliance with the MMBA for the transfer of work of represented employees. In the April 17, 2014, City Attorney Report, “Proposed Employment of Civic San Diego to Provide Certain Services Related to Former Redevelopment Agency Properties Proposed to be Transferred to the City of San Diego,” this Office advised on rules related to contracting out City services and collective bargaining. City Att’y Report 2014-9 (Apr. 17, 2014). *See also* 2009 Op. City Att’y 710 (2009-2; Oct. 8, 2009) (Outsourcing City Services); 2012 City Att’y Report 208 (2012-4; Feb. 1, 2012) (Managed Competition and Service Levels); 1997 City Att’y MOL 296 (97-18; June 27, 1997); City Att’y Report 2006-6 (Feb. 2, 2006) (discussion of Charter amendment related to managed competition).

As explained in these prior opinions and memoranda, if the City transfers work of represented employees to CivicSD, the City must comply with state collective bargaining laws, and if the City employs CivicSD as an alternative to Civil Service employees, the City must comply with Charter section 117(c). Compliance with these laws must take place prior to any transfer of City work or functions.

For example, compliance with Charter section 117(c) requires specific action by the Mayor prior to Council approval of an agreement: the City “may employ any independent contractor when the [Strong Mayor] determines, subject to City Council approval, City services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service while maintaining service quality and protecting the public interest.” Charter §117(c) *and see* 2009 Op. City Att’y 710 (2009-2; Oct. 8, 2009) (outlining the steps required to comply with Charter section 117(c)). Because the City has a specific Charter-mandated process to employ an independent contractor as an alternative to classified employees, the City must follow the procedure. *See Giles v. Horn*, 100 Cal. App. 4th 206, 222-23 (2002) (concluding the County of San Diego violated its charter by entering into contracts with independent contractors to perform case management functions under the state welfare-to-work program without first determining that the functions could be done more economically and efficiently by the contractors than by civil service personnel).

Compliance with section 117(c) is not required if the work of classified employees is not being transferred (for example, work transferred to CCDC and SEDC (now operating as CivicSD) occurred prior to adoption of section 117(c)). Under Charter section 28, the Mayor has the power to hire experts or consultants to provide advice or perform services when necessary in connection with the Mayor's oversight of the City's administrative service. It is only the transfer to an outside contractor of the work of classified employees' performing City services that triggers compliance with section 117(c).

**D. If CivicSD Is Acting on Behalf of the City, It Must Comply with the City's Policies and Procedures**

In addition to following the standards and procedures created by the City specific to the delegation, when acting on behalf of the City, CivicSD must also comply with the policies and procedures that would apply if the City were carrying out the function. 81 Op. Cal. Att'y Gen. 281 (1998) (nonprofit corporation to which administrative functions were delegated must comply with the same laws and regulations as the public entity that delegated its authority); *see also Wesley Inv. Co. v. Cnty. of Alameda*, 151 Cal. App. 3d 672, 679 (1984) (related to administration of existing zoning policy under specific ordinance).

In the context of a community redevelopment agency using a nonprofit corporation to administer its housing activities, the California Attorney General advised that the nonprofit corporation is required to comply with the same laws and regulations as the redevelopment agency, including open meeting laws, acquisition and relocation requirements, and public bidding and prevailing wage statutes. 81 Op. Cal. Att'y Gen. 281 (1998) at 6. The redevelopment agency could not avoid the statutory requirements intended to benefit individuals within the redevelopment project area by delegating administrative responsibilities to the nonprofit. *Id.* at 8. Rather, "[w]hen a redevelopment agency is using a nonprofit corporation to carry out its governmental responsibilities, the corporation must comply with acquisition and relocation requirements and public bidding and prevailing wage statutes." *Id.*

Similarly, when acting on behalf of the City, CivicSD must follow statutory requirements that would otherwise apply to the City. CivicSD's board-adopted policies currently require compliance with open meeting laws, financial disclosure and ethics laws, and public contracting laws that also apply to the City. *See CivicSD Corporation Policies* (Apr. 6, 2015), <http://www.civicsd.com/about-us/corporation-policies.html>. Also, the Downtown Services Agreement includes provisions for compliance with the City's Equal Opportunity Contracting Program, Non-Discrimination in Contracting Ordinance, Equal Benefits Ordinance, Drug-Free Workplace policy, and Ethics Ordinance. Downtown Services Agreement, Art. 4. The Agreement also requires compliance with all applicable laws and compliance with directives issued by the City. *Id.* at § 8.7.

**III. CONTRACT TERMS FOR DELEGATION OF ADMINISTRATIVE FUNCTIONS**

As discussed above, the existing ordinances, plans, and agreements include standards and procedures that address the legal requirement for delegation of administrative functions by the City to CivicSD, and retain ultimate control in the hands of the City. Also as discussed, any delegation must properly account for the rights, powers, and duties of the City's legislative body

and chief executive as set forth in the Charter, and certain powers and duties cannot be delegated. Ultimately, the City is responsible for carrying out these governmental functions, and the City must ensure that it has the oversight it needs to know that these functions are properly handled.

Based on the prior analysis, any delegation, existing or contemplated, of City permitting functions should include:

- Goals set by the Council, as in the Downtown PDOs, clearly defining the City's objectives;
- Clear standards set by the Council, as in the Downtown PDOs, for permit application, processing, and issuance;
- Notice, hearing, and decision processes, like those provided in the Land Development Code and referenced in the Downtown PDOs, to provide fairness and safeguard due process;
- Oversight by the City through the Mayor and responsible departments of the administration of delegated functions, including appropriate reviews, reports, and access;
- Budget approval for services to be provided and approval of the cost to the City;
- Fee structure approval; and
- Termination rights by the City in its sole discretion.

Currently, these matters are addressed in the agreements, PDOs, and other documents that control CivicSD's performance of services for the City. The Mayor and Council have the right and the responsibility to act to improve the standards and procedures when appropriate. The City should periodically review and ensure that any agreement with CivicSD includes provisions that give the City sufficient reporting, review, and oversight to enable the City to address issues as they arise.

#### **IV. LIABILITY ISSUES CREATED BY THE CITY'S RELATIONSHIP WITH CIVICSD**

In 2009, this Office responded to a request to review the legal risks of the relationship between the City and CCDC and SEDC, and between the Former RDA and CCDC and SEDC. 2009 City Att'y MS 743 (2009-3; Mar. 3, 2009) (the 2009 Memo). As CivicSD is the successor to CCDC and SEDC, this analysis remains relevant to the City's continuing relationship with CivicSD. This Office advised:

The current relationship between the Agency and CCDC and SEDC does not provide adequate protection of Agency assets. Should there be evidence of wrongdoing by CCDC or SEDC, Agency funds would be used to finance both the Agency's and the corporations' legal bills. This office leaves to the policymakers consideration of policy reasons for maintaining the two corporate entities. However, the best way to protect the Agency's assets is to eliminate the corporate entities, transfer their redevelopment

functions to the Redevelopment Agency, and institute internal controls.

The unique relationship between the City and CivicSD continues to create uncertainty as to whether the City will be subject to claims and potential liability for CivicSD's acts. As discussed in the 2009 Memo, CCDC and SEDC, and now CivicSD, are independent corporations and separate legal entities from the City. Generally, the City, as the sole member of CivicSD, is not liable for the debts, liabilities, or obligations of the corporation. *ECC Constr., Inc. v. Ganson*, 82 Cal. App. 4th 572, 576 (2000) (citing Cal. Corp. Code § 7140(i)).

However, in the continuing relationship between the City and CivicSD, it is important to recognize and preserve the separate corporate identities, and thereby continue to limit the City's liability for CivicSD's activities. For the same reason, any delegation of responsibility from the City to CivicSD should be clearly defined and appropriately limited.

In the 2009 Memo, this Office cautioned that the Former RDA could face potential liability if CCDC or SEDC were deemed its agent. CivicSD is presently the contractual agent of the City for purposes of performing certain land use regulatory functions downtown. See 1988 City Att'y Report 1333 (88-44; Aug. 25, 1988) (explaining that CCDC and SEDC acted as the agents of the Former RDA related to land use regulations). Thus, for some services CivicSD acts as an independent contractor, and for others, as an agent.

To the extent that CivicSD acts as the City's agent, the City, as principal, is liable for CivicSD's acts if those acts were actually or ostensibly authorized by the City. Cal. Civ. Code §§ 2330, 2333. The City would not be bound by conduct not within CivicSD's actual, apparent or ostensible authority. Cal. Civ. Code § 2334. For these reasons, it is essential that the agreements between the City and CivicSD clearly identify the work to be performed by CivicSD, the specific authority delegated to CivicSD, and the degree of control and supervision by the City.

As described earlier, the City must retain ultimate control over the delegated government functions, and adequate supervision to ensure consistent delivery of services and protection of the public. For these services, it is appropriate for the City to clearly establish an agency relationship with appropriate standards for performance and risk management. The City should ensure that CivicSD agrees to defend and indemnify the City for any wrongdoing by CivicSD or its employees. Further, the City should ensure that CivicSD carries sufficient insurance.

### **CONCLUSION AND RECOMMENDATION**

The Council may delegate administrative authority to enforce the City's land use policy to CivicSD in accordance with the City's established standards and safeguards, and ultimate control. In addition, to account for Charter-mandated duties, both the Mayor and Council must authorize the delegation of administrative functions, and the delegation should include provisions for Mayoral oversight and the ability to end the delegation, if appropriate. If the City delegates regulatory authority to CivicSD, CivicSD will be acting as the City's agent in that respect.

If the City intends to delegate additional administrative functions to CivicSD that would transfer work from represented employees to CivicSD, then the City must first comply with its

obligations under the MMBA, the state's collective bargaining law applicable to public agency employers. If the City intends to employ CivicSD to provide City services as an alternative to the services being provided by classified employees in the City's Civil Service system, the City must first comply with Charter section 117(c).

Based on our analysis, we recommend that the City revisit the existing agreements to clarify CivicSD's activities, build in transparency and financial oversight, provide for delegation of permitting authority by separate agency agreement, and include appropriate termination provisions. We stand ready to assist the Mayor and Council to work through these issues and draft any necessary legal documents.

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