

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: April 8, 2010
TO: Chris Zirkle, Deputy Director, Park and Recreation Department
FROM: City Attorney
SUBJECT: Indemnification of Citizen Advisory Group Members

INTRODUCTION

You have asked whether members of certain citizen advisory groups are entitled to indemnification for their actions by the City of San Diego [City]. Such groups include the Mission Trails Regional Park Task Force Citizens Advisory Committee, the Torrey Pines City Park Advisory Committee, the Los Penasquitos Regional Park Task Force Citizens Advisory Committee, and Maintenance Assessment District [MAD] advisory boards. The park advisory committees advise various public bodies on matters of park development and park plan implementation. The MAD advisory boards are formed by property owners within City-managed MADs to represent the property owners and offer advice in meetings with the City's Park & Recreation Department staff. For purposes of this memorandum, all of these groups will be referred to as citizen advisory groups.

QUESTIONS PRESENTED

Does the City have a duty to indemnify members of citizen advisory groups?¹

SHORT ANSWER

Potentially. Absent a City policy to provide indemnification for members of citizen advisory groups, the courts will determine whether members of citizen advisory groups meet the definition of "employee" for purposes of the California Government Claims Act by way of a fact-specific, case-by-case analysis of the particular group, its member, and his or her acts. No universal determination will be applicable to every citizen advisory group, member, or act.

¹ This Office has previously addressed a similar question in a memorandum to Marcia C. McLatchy, Park & Recreation Director, dated October 16, 1996, which is attached hereto for reference.

ANALYSIS

I. The City Indemnifies Certain Groups.

In select instances, the City has chosen to indemnify certain groups because of the important and unique function these groups perform as a part of City government. The City has made clear its intent to provide indemnification for acts within the scope of their respective duties via adoption of Council Policies addressing the issue.

For instance, Community Planning Groups are recognized by the City Council to advise the Council, Planning Commission, City staff, and other governmental agencies on land use matters. The City has specifically elected to provide indemnification for members of the City's Community Planning Groups. *See* San Diego Ordinance O-17086 (April 25, 1988), Council Policy 600-24.

Another such group is City Authorized Volunteers. *See* Council Policy 300-01. The City has recognized the importance of the contributions of City volunteers, and thus, established guidelines for their utilization. Council Policy 300-01, UTILIZATION OF VOLUNTEERS, specifically addresses indemnification of Authorized Volunteers. It states:

It is the policy of the City Council that the City of San Diego will . . . [d]efend and indemnify Authorized Volunteers from liability for acts which occur during the performance of volunteer service when such service is rendered pursuant to the Citywide volunteer program and which is in compliance with City policies and procedures, and as more fully set forth by City Council Resolution R-286906, adopted February 12, 1996.

Council Policy 300-01 also defines Authorized Volunteers – those who the City Council has elected to indemnify – as volunteers who have “completed and signed a volunteer participation agreement which has been accepted by a City department.”²

The City has also elected to indemnify members of Recreation Councils. *See* Council Policy 700-42. The purpose of Recreation Councils is to promote the recreation programs in the community through planning, administering, publicizing, coordination, and interpretation. The actions of Recreation Councils in achieving their purpose are performed in accordance with Council Policy 700-42, as well as the policies of the San Diego Park and Recreation Department and the Park and Recreation Board. Membership in a Recreation Council is open to anyone meeting the requirements of its by-laws as approved by the Mayor or his designee. Per Council Policy 700-42, the City has agreed to provide

² Park and Recreation Department advisory committee positions are listed as volunteer opportunities on the City's website. If the City follows the framework established in Council Policy 300-01 and Resolution R-286906, these members would be entitled to indemnification under the confines of Council Policy 300-01. The referenced framework includes having the member complete and sign a volunteer participation agreement, which then must be accepted by the corresponding City department. MAD advisory board positions are not City volunteer positions.

indemnity and defense to members of the Recreation Councils for acts within the scope of their duties.

In the case of Community Planning Group members, Authorized Volunteers, and Recreation Council members, the City has made clear its intent to provide indemnification for acts within the scope of their respective duties. In the case of citizen advisory group members, there does not appear to be any current City intent to so indemnify. Nevertheless, even with the absence of intent to indemnify, the City may still be required to provide indemnification for certain citizen advisory group members.

II. Members of Citizen Advisory Groups Would Not be Considered Officers for Purposes of Indemnification Under the California Government Claims Act.

A public entity has a duty to indemnify a public "employee" against any action arising out of any act or omission within the scope of his or her employment. The duty for a public entity to indemnify public employees is controlled by the provisions of the California Government Claims Act (Cal. Gov't Code §§ 810-996.6).³

The Government Claims Act defines the term "employee" as "an officer . . . employee, or servant, whether or not compensated, but does not include an independent contractor." Cal. Gov't Code § 810.2.

As to whether members of advisory groups would be considered "officers," we turn to case law:

It is apparent now there are two requirements for a public office; first, a tenure of office which is not transient, occasional, or incidental but is of such nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency and, second, the delegation to the officer of some portion of the sovereign functions of government either legislative, executive, or judicial.

City Council v. McKinley, 80 Cal. App. 3d 204, 210 (1978) (citing *Spreckels v. Graham*, 194 Cal. 516, 530).

Regarding the first requirement, there is no standard among the citizen advisory groups regarding tenure, incumbency, or term of membership. In fact, some of the groups have very specific guidelines regarding these matters set out via City Council resolution, while others have no guidelines at all. Therefore, the examination of tenure would require a case-by-case analysis.

While the citizen advisory groups may differ structurally regarding the creation of the body as well as the makeup, incumbency, tenure, and term of membership on the board, the common theme that

³ The Supreme Court of California determined "that 'Government Claims Act' is a more appropriate short title than the traditional 'Tort Claims Act'" because the statutory scheme of Government Code section 810 et seq. includes claims sounding in contract and in tort. *City of Stockton v. Superior Court of Sacramento County*, 42 Cal. 4th 730, 741-742 (2007).

unites them is that their duties entail simply advising various public bodies in the City of San Diego within the scope of a particular subject matter. The citizen advisory groups have not been specifically delegated a sovereign function of government and do not have the attributes of a body that has, such as the ability to make governing decisions that would intrude upon the lives, liberty, or property of private citizens. "They involve merely the interchange of information, the assembling of data, and the formulation of proposals Such tasks do not require the exercise of a part of the sovereign power of the state." *Parker v. Riley*, 18 Cal. 2d 83, 87 (1941) (stating that the members of the statutorily-created California Commission on Interstate Cooperation do not meet the high standard of having been vested a portion of the sovereign powers). Therefore, the citizen advisory groups would not be considered "officers" for purposes of determining whether the City has a duty to indemnify them under the California Government Claims Act.

The question then becomes whether the members of the citizen advisory groups would be considered "employees" or "servants."

III. Whether a Citizen Advisory Group Member is Considered an Employee for Purposes of the Government Claims Act Must be Determined on a Case-by-Case Basis.

As mentioned in section II of this memorandum, a public entity has a duty to indemnify a public employee against any action arising out of any act or omission within the scope of his or her employment.

Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

Cal. Gov't Code § 825(a).

The California Attorney General has addressed the issue of whether the State is required to provide indemnification for appointees to State advisory boards and committees. 81 Op. Cal. Att'y. Gen. 310 (1988). The Attorney General stated that the crucial factor in distinguishing an employee or servant from an independent contractor for purposes of the California Government Claims Act is "the right to control the manner and means by which the work is to be performed." *Id.* at 321 (quoting *Societa per Azioni de Navigazione Italia v. City of Los Angeles*, 31 Cal. 3d 446, 457 (1982)). The more control retained as to how the work will be performed, the more likely a court will find that an employer-employee relationship has been formed. "When the right to exercise complete control is retained, an employer-employee relationship is established." *Societa per Azioni de Navigazione Italia v. City of Los Angeles*, 31 Cal. 3d 446, 457 (1982).

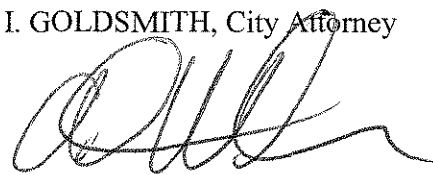
The Attorney General opinion concludes that the determination of whether a member of a State advisory board is an employee or servant, and thus entitled to indemnification by the State, must be determined on a case-by-case basis. *Id.* at 325. Based on the individualized criteria and the parallels between State advisory boards and the City's citizen advisory boards, the Attorney General's conclusion that indemnification of State advisory board members must be determined on a case-by-case basis also applies to the City's citizen advisory groups. There may be factors that weigh in favor of finding members of citizen advisory groups to be "employees" under the California Government Claims Act, while other factors could weigh against such a finding. Further, even if a particular member of a citizens advisory group is determined to meet the criteria of one whom the City would ordinarily be required to indemnify for their actions, such member would only be entitled to indemnification if the action in question arose out of "an act or omission occurring within the scope" of his or her duties as a servant of the City. Cal. Gov't Code § 825(a). No final and universal determination can be made without a detailed, fact-specific, case-by-case inquiry into the particular citizen advisory group, the member, and the action.

CONCLUSION

The duty of a public entity to indemnify public employees is controlled by the provisions of the California Government Claims Act. Members of citizen advisory groups would not be considered "officers" under the California Government Claims Act. However, the determination of whether members of citizen advisory groups meet the definition of "employee" or "servant" for purposes of the California Government Claims Act requires a fact-specific, case-by-case analysis of the particular group and its members. There is no clear statement of intent to indemnify members of citizen advisory groups under the City policies currently in place. This Office stands ready to analyze whether the City would be obligated to defend and indemnify any particular citizen advisory group upon receipt of a specific request, to determine whether unintended consequences, such as the duty to defend and indemnify, have arisen.

JAN I. GOLDSMITH, City Attorney

By



Adam R. Wander
Deputy City Attorney

ARW:mm:js
Attachment.
MS-2010-2

cc: Greg Bych, Director, Risk Management Department
Stacey LoMedico, Director, Park and Recreation Department

Office of
The City Attorney
City of San Diego

MEMORANDUM

236-6220

DATE: October 16, 1996
TO: Marcia C. McLatchy, Park & Recreation Director
FROM: City Attorney

SUBJECT: Defense and Indemnification for Certain Boards and Committees

INTRODUCTION

By memorandum dated September 30, 1996, you requested advice as to the defense and indemnification rights of certain persons and groups. These were the Park and Recreation Board, Advisory Committees of that Board, and Recreation Councils.

FACTS

The Park and Recreation Board is a Charter authorized Board whose membership is appointed by the Mayor and confirmed by the City Council. Charter § 43 (b); Municipal Code § 26.30. Advisory Committees to that Board are established by the Municipal Code and are appointed by the Chair of the Board upon the advice of the Board. Municipal Code § 26.30 (d). Members of the Committees need not be appointed members of the Board. *Id.*

Recreation Councils are recognized by Council Policy 700-42, a copy of which is enclosed. That Policy expressly extends a defense and indemnification to members of such Councils under certain circumstances, in recognition of their volunteer service.

ANALYSIS

Municipalities are required to defend and indemnify their employees under certain circumstances. Cal. Govt. Code § 995 et seq. Members of Charter authorized Boards and Commissions are considered employees of the City for that purpose. Charter § 117 (a) (2). Thus the Board itself, and its members, are entitled to a defense and indemnification for acts generally occurring within the course and scope of their duties. Members of advisory committees to the Board who are not members of the Board are not necessarily "employees" of the City for

Marcia C. McLatchy
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purposes of the defense and indemnification provisions. We recognize that the Municipal Code authorizes the appointment of non-Board members to such committees, but we are hesitant to conclude such appointees are employees under the Charter.

That conclusion, however, does not mean that such appointees are not entitled to a defense and indemnification under appropriate circumstances. We recognize that the Municipal Code has authorized the Board to make appointments in the manner provided, and thus non-Board members have an expectation of a defense and indemnification. We must look at each individual case and judge it on its own facts.

With regard to Recreation Councils, while those bodies are not official bodies of the City, and their members are not employees of the City, The City Council has specifically extended a defense and indemnification to them under the appropriate circumstances. We will also look at each of those fact situations in determining whether a defense and indemnification is authorized.

JOHN W. WITT, City Attorney

By



Leslie J. Girard
Assistant City Attorney

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enclosure
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