

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

MEMORANDUM

DATE: March 13, 2012
TO: Chief Mainar, San Diego Fire-Rescue Department
FROM: Noah J. Brazier,
SUBJECT: Section 201 status

The City of San Diego (City) is in the process of preparing a “request for proposal” for a provider of emergency medical services (EMS). The San Diego Fire Department (SDFD) desires to know if the City is grandfathered into the California Health and Safety Code section 1797.201 (Section 201¹) exception, which would exempt the City from needing County of San Diego (County) approval to administer its EMS program. The SDFD also desires to know if the City is exempt from the competitive bid process that is required under California Health and Safety Code section 1797.224 (Section 224).

QUESTIONS PRESENTED

1. Is the City grandfathered into the Section 201 exception?
2. Is a competitive bid process required under Section 224 when the City seeks a new EMS provider?

SHORT ANSWERS

1. No. The City became ineligible for the Section 201 exception when it entered into an agreement with the County regarding the provision of EMS services in the City.
2. Yes. The City is required to conduct a state approved competitive bid process under Section 224.

ANALYSIS

I. SECTION 201 APPLICABILITY TO THE SDFD

Section 201 is a part of the larger EMS Act, codified in 1980. The Act was intended to unify the administration of pre-hospital EMS services statewide.² It does this by creating a two-tiered

¹ All section references are to the California Health and Safety Code unless otherwise specified.

² See *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 914-15 (1997).

system consisting of a state EMS authority and county designated local EMS agencies. Through local EMS agencies, counties have control over the administration of the EMS of cities and fire districts within the local EMS agency's jurisdiction.³ Section 201 provides an exception allowing a city to retain control over the provision of EMS independent of a local EMS agency, so long as the scope of services in the City's existing program does not change and there is no written agreement with the County. The language of Section 201, however, is somewhat ambiguous because the scope of this exception is unclear. This problem led to a California Supreme Court's ruling interpreting Section 201 in 1997. Both the statute and case law explain how Section 201 applies to the City.

A. The Statute

Section 201 reads as follows:

[u]pon the request of a city or fire district that contracted for or provided, as of June 1, 1980, prehospital emergency medical services, a county shall enter into a written agreement with the city or fire district regarding the provision of prehospital emergency medical services for that city or fire district. Until such time that an agreement is reached, prehospital emergency medical services shall be continued at not less than the existing level, and the administration of prehospital EMS by cities and fire districts presently providing such services shall be retained by those cities and fire districts, except the level of prehospital EMS may be reduced where the city council, or the governing body of the fire district, pursuant to a public hearing, determines that the reduction is necessary.

Notwithstanding any provision of this section the provisions of Chapter 5 (commencing with section 1798) shall apply.

Cal. Health & Safety Code §1797.201.

Therefore, a city providing EMS prior to June 1, 1980 is free to retain the administration of its EMS program unless either the EMS services are provided at a different level or the city has entered into a written agreement with a county. *Id.* However, the statute is unclear as to whether a city must enter into an agreement with the county at all. This section also fails to specify how a change to a higher level of service would affect a city whose EMS program was grandfathered in to the Section 201 exemption.

B. Case Law: The *San Bernardino* Case

The questions raised by Section 201's wording were answered by the California Supreme Court in *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909 (1997). The City of San Bernardino administered its own EMS program in conjunction with a private EMS contractor prior to June 1, 1980. *Id.* at 919. In 1991, the City of San Bernardino began charging its EMS patients and gave priority in dispatching to its own EMS units over the units provided

³ Cal. Health & Safety Code §1797.200.

by the private contractor. *Id.* The County of San Bernardino issued several protocols seeking to reverse the city's policies, accusing the City of San Bernardino of seeking to raise funds at the expense of patient safety. *Id.* at 919-20. Because the City of San Bernardino refused to obey the protocols and had not entered into an agreement with the County of San Bernardino regarding this change to the city's EMS services, the County of San Bernardino sought an injunctive order in court. *Id.* at 920.

The City of San Bernardino argued that its EMS program was grandfathered into the EMS Act by Section 201 and therefore no further EMS agreement was required. *See Id.* at 922-25. The county contended that Section 201 was a "transitional" provision, and that cities only had a limited time before counties gained administrative power over their EMS programs by default. *Id.* at 922. While the court agreed with the county that this may have been the intent of Section 201, the court held that Section 201 did not create a specific deadline within which a city had to come to an agreement with the county. *Id.* The court said "that under section 1797.201 a county may not contravene the authority of eligible cities and fire districts to continue the administration of their prehospital EMS without the latter's consent, either through acquiescence or through formal agreement." *Id.* at 924. The City of San Bernardino's independence from county control, however, was not absolute.

The court held that a city that retains EMS administrative rights pursuant to Section 201 holds those rights "subject to significant constraints." *Id.* at 925. Cities retaining EMS administrative rights are still subject to "medical direction and management" by the county. *Id.* (citing the last sentence of Cal. Health & Safety Code § 1798(a)). This subjected the City of San Bernardino to the county's protocols, as they were issued under a California Health and Safety Code section that applied to the city regardless of the Section 201 exception. *Id.* at 928-29.

In addition, the court prevented the City of San Bernardino from "expand[ing] into new types of service it did not provide as of June 1, 1980." *Id.* at 929.⁴ This prohibition included the City of San Bernardino's attempt to create an exclusive EMS operating area for itself. The court stated that while Section 201 does allow cities "to continue to control EMS operations over which they have historically exercised control. . . . [n]othing in this reference to section 1797.201 suggests that cities . . . are to be allowed to expand their services, or to create their own exclusive operating areas." *Id.* at 932. Therefore, a city grandfathered under Section 201 can only either maintain its pre-1980 level of service, or enter into an agreement with its county in order to expand those services. The City of San Bernardino was unable to expand and charge for its EMS program absent an agreement with the County of San Bernardino because by creating an exclusive operating area for city EMS units it unlawfully increased its level of service under Section 201.

⁴ Expansion of *type* of service is different than expansion of *levels* of service. Section 201 allows for the raising and lowering of the *level* of service, but excludes expansion into new types of service not offered as of June 1, 1980. *San Bernardino*, 15 Cal. 4th at 934; *Valley Medical Transport v. Apple Valley Fire Protection District et. al.*, 17 Cal 4th 747, 757 (1998).

C. Applying Section 201 and the *San Bernardino* Case to the City

The City has, to date, entered into at least two agreements with the County regarding the provision of EMS within the City. The first such agreement became effective on August 13, 1991. Both parties entered into the agreement “for the purpose of clarifying roles and responsibilities” for the administration of the City’s EMS program. EMT-Paramedic Services Agreement, signature page (1991). A similar agreement was also signed by the City and the County in 1997. *See* EMT-Paramedic Services Agreement (1997). The City has twice entered into a written agreement with the County regarding the provision of EMS services in the City, therefore any grandfathering of the EMS program under Section 201 has been nullified. Section 201 makes it clear that the exception only applies until a written agreement is reached. Further, the *San Bernardino* case supports this conclusion.

In *San Bernardino*, the California Supreme Court held that a city lost its Section 201 status by “acquiescence or through formal agreement.” *San Bernardino*, Cal. 4th at 924. Since the City entered into a formal written agreement with the County, *San Bernardino* makes it clear that the City no longer would have the rights of a Section 201 city.

Additionally, the *San Bernardino* court ruled that any expansion into “new *types* of service . . . not provide[d] as of June 1, 1980” would not be permitted by a Section 201 city. *Id.* at 929 (italics added). The City has expanded service since June 1, 1980, most notably through the creation of an exclusive operating area with San Diego Medical Service Enterprise.⁵ Even without the agreements between the City and County, this expansion of services would eliminate the City’s Section 201 exempt status.

It should be noted that Section 201 subjects exempt agencies to “significant constraints.” *Id.* at 925. Because of the County agreements, the SDFD may expand into new areas of service not offered in 1980. The agreement also grants the City powers that mirror the administrative powers a city exempt under Section 201 would have.⁶ Therefore, despite losing its Section 201 exempt status, the City may be able to negotiate more control over its EMS program through its agreement with the County at the local EMS agency.

⁵ The ability to create an exclusive operating area arose with the agreement between the City and the County. EMT-Paramedic Services Agreement, section B “Responsibilities of the City” (1997). The right to operate within this exclusive area was granted by the City to San Diego Medical Service Enterprise in 1997. EMS RFP (1997) section I.C.

⁶ For example, the City has the right “[t]o provide EMT-Paramedic services within the borders of its local jurisdiction” and the City may “develop and operate EMT Paramedic services” in its jurisdiction including the right to “subcontract all or a portion of these services.” EMT-Paramedic Services Agreement, section B “Responsibilities of the City” (1997).

II. SECTION 224 AND COMPETITIVE BIDDING

The EMS Act also grandfathers certain existing EMS programs into an exception from the usual competitive bid process involved in creating an EMS exclusive operating area. The exception is found in Cal. Health and Safety Code section 1797.224 (Section 224). Because the City has changed EMS providers since the grandfathering deadline, it does not meet the Section 224 competitive bid exemption.

A. The Statute

According to the EMS Act, a local EMS agency can create an “exclusive operating area . . . if a competitive process is utilized to select the provider.” Cal. Health & Safety Code § 1797.224. A competitive process is not required if “the local EMS agency develops or implements a local plan that continues the use of existing providers operating within a local EMS area in the manner and scope in which the services have been provided without interruption since January 1, 1981.” *Id.* All other exclusive operating areas need to be submitted by the local EMS agency to the California Emergency Medical Services Authority (state EMS authority) for competitive process approval. *Id.*

B. Does the competitive bid process apply to the City?

Section 224, the competitive bid process, applies to the City. The City is not continuing the operation of its pre-1981 EMS program. Instead, the City is creating a new exclusive operating area for a possible new provider. The City has granted exclusive operating areas to contractors in the past as well, after the Section 224 grandfathering date. According to the EMS Act, the City must obtain the approval of the County and State EMS authorities when it is ready to open competitive bidding for EMS services to ensure the competitive bid process meets local and state EMS requirements.

While the 1997 agreement does not mention competitive bidding, one of the obligations of the City is to “comply with all applicable state statues, regulations, local standards, policies, procedures, and protocols.” EMT-Paramedic Services Agreement, Art. III.B.19 (1997). This would, necessarily, include the competitive bid requirements of Section 224. And, while Section 224 makes no mention of city responsibilities, it is unlikely a local EMS agency would approve the creation of an exclusive operating area if a city did not competitively bid the program. Under the Agreement with the County, the City is responsible for “provid[ing] EMT-Paramedic services within the boundaries of its local jurisdiction,” but it “may subcontract all or a portion of [those] services.” EMT-Paramedic Services Agreement, Art. III.B.1 & 3 (1997). Nothing in the agreement says that the City is exempt from section 1797.224 of the California Health and Safety Code competitive bid requirements.

CONCLUSION

The City no longer is grandfathered into the Section 201 exemption because it entered into agreements with the local EMS agency and added new types of service to its repertoire. Similarly, the City does not qualify for an exemption under Section 224. Therefore, the City must follow the competitive bidding requirements for its exclusive operating area.

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