Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: November 17, 2014

TO: Cybele Thompson, Real Estate Assets Director

FROM: City Attorney

SUBJECT: City Indemnification of Airports Advisory Committee Members

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INTRODUCTION

At a recent meeting, the City's Airports Advisory Committee (AAC) asked whether the City would be required to indemnify AAC members for actions taken on behalf of the AAC. The request was made in general, and not relating to any particular incident, action, or individual AAC member. Airports staff referred the question to this Office.

QUESTION PRESENTED

Would the City be required to indemnify the members of the AAC for actions taken within the scope of their duties?

SHORT ANSWER

The City likely would be required to indemnify AAC members as "employees" under the California Government Claims Act, which would include a general duty in most circumstances to provide a legal defense and to pay judgments and settlements for claims arising out of acts or omissions occurring within the scope of an AAC member's service to the City.

BACKGROUND

The AAC has advised the City on airport issues since approximately 1987. San Diego Ordinance O-20013 (Jan. 18, 2011). In 2011, the AAC was made a permanent advisory board to provide the City with "advice on general aviation issues related to City owned and operated airports." San Diego Municipal Code (SDMC or Municipal Code) § 26.2201. The AAC consists of twelve (12) members, appointed by the Mayor and confirmed by the City Council (Council). SDMC § 26.2202(a). The Municipal Code establishes qualifications for membership, member terms of office, and internal duties and functions of the AAC, among other things. The AAC serves "in an advisory capacity" to various City bodies, offices, and departments, and is a forum for receiving

public input and providing recommendations to the City for airport-related issues. SDMC § 26.2204.

This Office previously analyzed whether the City had a duty to indemnify members of citizen advisory groups in the attached memorandum to Chris Zirkle, Deputy Director, Park and Recreation Department, dated April 8, 2010. The memorandum concluded that in the absence of a City commitment to indemnify a particular citizen advisory group, the City may nonetheless be required to indemnify members as "employees" required to be indemnified by public entities under the California Government Claims Act (Act), codified at California Government Code sections 810-996.6. 2010 City Att'y MS 919, 921 (2010-2; Apr. 8, 2010). The memorandum further stated that whether a member of any particular citizen advisory group was an "employee" under the Act would require a fact-specific, case-by-case analysis of a particular advisory group and its members. *Id.* at 923.

ANALYSIS

I. A REVIEWING COURT LIKELY WOULD DETERMINE THAT AAC MEMBERS ARE "EMPLOYEES" ENTITLED TO DEFENSE AND INDEMNIFICATION UNDER THE CALIFORNIA GOVERNMENT CLAIMS ACT

Unlike the situation of several other City citizen advisory groups, no Municipal Code provision or Council Policy states a stand-alone duty of the City to indemnify the AAC.[1] Also, there is no written agreement with the AAC that would establish a City duty of indemnification.

Nonetheless, the Act requires the City to indemnify AAC members if those members are considered public "employees" as defined in the Act. The Act defines "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 previously concluded by this Office, members of citizen advisory groups are not "officers" under the Act. 2010 City Att'y MS 919, 921-22 (2010-2; Apr. 8, 2010). The question therefore becomes whether members of the AAC are "employees" or "servants," and not "independent contractors," under the Act.

San Diego Charter (Charter) section 117(a)(2) defines employees of the City to include all members of City boards and commissions. The AAC is a permanent advisory body created by the Council pursuant to Charter section 43(a), and its function, membership requirements, and terms of office all follow the criteria for advisory boards as stated in Charter section 43(a). *See*

[1] It is unlikely that members of the AAC would be indemnified as a function of Council Policy 300-01 and San Diego Resolution R-286906 (Feb. 12, 1996) as "authorized volunteers". Indemnification under this Council Policy and Resolution depends on satisfying several elements, including that volunteers serve pursuant to "the Citywide volunteer program." Council Policy 300-01. Membership on the AAC is not listed as a volunteer opportunity on the City's website, and according to staff, AAC members do not undertake the volunteer training or sign any type of volunteer participation agreement with the City as do other City volunteers.

Ordinance O-20013. The AAC therefore appears to be a board or commission[2] whose members would be considered to be City employees under the Charter. This holds true even though AAC members are not compensated by the City.[3] *See* 1993 City Att'y MOL 4, 5 (93-2; Jan. 5, 1993) (under Charter section 117(a)(2), uncompensated members of board created pursuant to Charter section 43 are City employees).

In addition, AAC members likely would also be considered "employees" or "servants" of the City under the Act independent of their status under the Charter. To distinguish independent contractors from "employees" and "servants" under the Act, a reviewing court would conduct "an individualized determination of whether a master-servant relationship exists" between the particular person and a public entity, in conjunction with a consideration of public policy implications. *Townsend v. State*, 191 Cal. App. 3d 1530, 1534-35 (1987); *see also* 81 Op. Cal. Att'y Gen. 310, 314-16 (1998). To do this, courts consider various factors, including the criteria outlined in the Restatement Second of Agency section 220:

> "(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business."

Briggs v. Lawrence, 230 Cal. App. 3d 605, 615-16 (1991); *Townsend*, 191 Cal. App. 3d at 1534; 81 Op. Cal. Att'y Gen. 310, 315 (1998).

The California Attorney General has previously stated in general that members of state boards, commissions, committees, and similar bodies established by statute are state "employees" entitled to defense and indemnity under the Act. 81 Op. Cal. Att'y Gen. 199, 200 (1998). Based on the above Restatement Second of Agency criteria and policy considerations, the California

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[2] While the AAC is nominally a "committee," in form and substance it appears to be a "board" under Charter section 43(a) in contrast to a temporary, limited-purpose, ad hoc "committee" under Charter section 43(b). In fact, Ordinance O-20013 specifically stated the intent of the Council to re-establish the AAC as a permanent advisory committee in conformance with Charter section 43(a), in contrast to the alternative of a temporary committee under Charter section 43(b). *See* Ordinance O-20013.

[3] While one hallmark of an employer-employee relationship is payment of compensation, "[t]he term 'employee' may mean different things in different contexts" and under section 810.2 of the Act, employee and servants are covered "whether or not [they are] compensated . . . ." 81 Op. Cal. Att'y Gen. 310, 313 (1998).

Attorney General has also previously concluded that appointees to state advisory boards and commissions in general would likely be "employees" or "servants" under the Act. 81 Op. Cal. Att'y Gen. 310, 315-16 (1998).

There are many similarities between the AAC and the appointed state advisory boards considered by the California Attorney General. AAC members provide a public service to the City by providing specialized information and recommendations regarding airport matters. ("A 'public servant' is 'an individual . . . rendering a public service.'" *Id.* at 313. "An advisory body may be created to assist state agency officials in the performance of official duties. . . ." *Id.* at 316)). Also, the AAC is City-created, and the Municipal Code ensures significant City control over the group's composition, functioning, and scope of activities. ("The right to control the means by which the work is accomplished is clearly the most significant test of the employ[ee] relationship . . . . " *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal. 3d 943, 950 (1970). Control over the manner and means by which the work is to be performed is the "crucial factor." 81 Op. Cal. Att'y Gen. 310, 314 (1998)).[4] Furthermore, the AAC meets in City-owned space, and utilizes City equipment, supplies, and City staff assistance in conducting its meetings. (Instrumentalities, tools, and place of work supplied by employer is indicia of employee-type relationship. *Id.* at 315). Due to its official role in service to the City and the fact that its activities are undertaken under City auspices (including being a manifestation of a permanent City advisory board under Charter section 43(a)), the AAC may be considered part of the general "enterprise" and "business" of the City's general public governance and operation and ownership of the City airports. *See* 81 Op. Cal. Att'y Gen. 310, 315-16 (1998).

Policy considerations also would likely favor City coverage of AAC members under the Act. Such coverage would "further the policy of encouraging private individuals to participate in government activities without fear of being named in a civil suit regarding their designated duties." 81 Op. Cal. Att'y Gen. 310, 316 (1998). Absent indemnification and defense by the City, AAC activities could be tempered by the 'chilling effect' caused by the prospect of personal lawsuits against ACC members. *See Johnson v. State,* 69 Cal. 2d 782, 792 (1968) ("[t]o the extent that the ardor of public employees might be affected by the threat of personal liability, these fears will be allayed by . . . indemnification").

Based on the above analysis it is likely that a reviewing court would conclude that AAC members are "employees" or "servants" entitled to City legal defense and indemnification under the Act.

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[4] The fact that the AAC is permitted to establish its own bylaws does not defeat the primacy of City control, since under Municipal Code section 26.2202(d) all AAC bylaws must be "consistent with the law for the governing of its meetings and activities." *See Briggs*, 230 Cal. App. 3d at 616-18 (absolute control is not required to establish an employer-employee relationship for purposes of the Act; indirect and fundamental control suffices, and factors other than control should also be considered).

II. WHILE THE CITY LIKELY WOULD BE REQUIRED TO INDEMNIFY AND DEFEND AAC MEMBERS IN GENERAL, DEFENSE AND INDEMNIFICATION OF ANY PARTICULAR CLAIM OR ACTION WOULD BE DETERMINED ON A CASE-BY-CASE BASIS

AAC members would be indemnified by the City as provided and limited by the Act. This would include a City duty to defend AAC members against civil actions brought against them in their individual or official capacities, or both, and to pay judgments and settlements for claims against the members. Cal. Gov't Code §§ 825(a), 995. In both instances, the City would only be required to indemnify members for matters arising out of acts or omissions occurring within the scope of their service to the City. *Id.* Furthermore, City indemnification would be subject to other conditions and limitations in the Act, including member duties to cooperate and assist with the defense, and exclusion of punitive and exemplary damages and certain claims.

Because the extent of coverage depends on many variables, a fact-specific analysis would be required to determine whether the City would be required to defend and indemnify any particular claim or action against an AAC member.

CONCLUSION

Because of the relationship between the AAC and the City, the City likely would be required to defend and indemnify AAC members as "employees" under the Act. This would include a general City duty in most circumstances to provide a legal defense and to pay judgments and settlements for claims arising out of acts or omissions occurring within the scope of an AAC member's service to the City. However, the extent of any particular City indemnification must be determined on a case-by-case basis. This Office is available to provide further advice based on specific facts, if necessary.

JAN I. GOLDSMITH, CITY ATTORNEY

By */s/ Jeremy M. Fonseca*
Jeremy M. Fonseca
Deputy City Attorney

JMF:meb
Attachment
MS-2014-23
Doc. No.: 865881_2

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.

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[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

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[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

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[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).

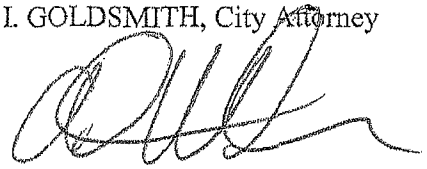
The California Attorney General has addressed the issue of whether the State is required to provide indemnification for appointees to State advisory boards and committees. 81 Op. Cal. Att'y. Gen. 310 (1988). The Attorney General stated that the crucial factor in distinguishing an employee or servant 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

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

LJG:ljg
enclosure
MS-96-1
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