

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: January 9, 2009
TO: Council President Ben Hueso and Councilmembers
FROM: City Attorney
SUBJECT: Indemnification Ordinance For Community Planning Groups

Introduction

At the December 9, 2008, City Council meeting, this Office requested a continuance to review more thoroughly the legal implications of the proposed amendments to the above-referenced ordinance [Ordinance]. This memorandum compares the corresponding sections and analyzes the risks associated with these amendments vis-à-vis the original ordinance.

Background

In April 1988, the City Council adopted "An Ordinance Providing for Legal Representation to and Indemnification of Community Planning Committees Against Claims for Damages." [Ordinance Number O-17086]. This ordinance was adopted in response to the City Council's desire to encourage citizens' participation in the planning process and at the same time assuage "concerns about personal exposure to litigation" which were jeopardizing "the vitality of the planning process" which relies on citizen participation.

In relevant part, ordinance number O-17086 provided for the following:

Section 1—required the City Attorney to defend and the City of San Diego [City] to indemnify the CPC or any community planning group created pursuant to Council Policy, or its duly elected or appointed members against any claim or action against such committee or member if:

- A. The person is a duly-elected or appointed member of a committee recognized and operating in accordance with Council Policy 600-9 or Council Policy 600-24; and the person attended a community planners' training course conducted by the Planning Department of The City of San Diego prior to

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participating in the activity which gave rise to the claim or action against the committee or member;

B. The alleged act or omission occurred or was authorized during a lawful meeting of the committee or subcommittee thereof;

C. The alleged act or omission was within the reasonable scope of duties of a committee as described in Council Policies 600-5, 600-6, 600-9 and 600-24 and was not in violation of any provision of the bylaws adopted by the committee and approved by the City Council;

D. The member or committee has made a request in writing to the City for defense and indemnification within five (5) working days of having been served such legal papers; and

E. The member or committee has performed his, her or its duties in good faith with such care, including reasonable inquiry, as an ordinarily prudent person or persons in a like position would use under similar circumstances.

(hereinafter referred to as "Circumstances 1.A through 1.E.").

Section 2—the City may decline to represent a member or a committee if the member or committee did not reasonably cooperate with the City Attorney in the defense or the member or committee acted or failed to act because of fraud, corruption, actual malice or bad faith.

Section 3—if the City Attorney determined that a member or committee is not entitled to or should not receive a defense and indemnification, the City Attorney shall promptly advise the City Council and the member or committee.

Section 4—the provisions of the ordinance apply only to members of committees established and recognized by the City Council pursuant to Council Policies 600-09 and 600-24.

Section 5—representation and indemnification would not be provided if the committee or its members initiated an administrative or judicial proceeding against the City or if damages to any person or organization are alleged to have resulted from the initiation of an administrative or judicial proceeding by a committee or its member.

Section 6—representation or indemnification would not be provided against any claim or judgment for punitive damages.

Recently, certain planning group members sought to expand the defense and indemnification provisions of O-17086. Two separate proposed amendments, versions A and B, attached hereto reflect that attempt to expand. On November 24, 2008, the City Council introduced version B. At the hearing to adopt the amendments (Version B), this Office raised legal concerns which are

C. Indemnity Expanded to Include New Members for 12 Months

Ordinance O-17086 only provides indemnity to a member of the CPG where the CPG is recognized and operating in accordance with Council Policies, and the member has attended City's Community Orientation Workshop [COW] (which includes the Brown Act and other public noticing and hearing matters).

Versions A and B provide for the same indemnity to **new** members of a community planning group who have not attended the COW training, but who plan to do so within 12 months of being appointed or elected. Both versions effectively indemnify all members in their first 12 months whether or not they have attended the required training. As a result, there is no urgency for a member to attend training for 12 months. If these members have not participated in the required training, they are more likely to commit an error, causing liability to the City.

D. Indemnification Provision to Include Non-Members Appointed to Subcommittees

Ordinance O-17086 does not provide indemnification to non-members appointed to subcommittees. However, both versions A and B would indemnify non-members who are appointed to planning group subcommittees.

Additionally, versions A and B do not require the same training of non-members as members. Rather, both versions simply state that the training requirements for non-members shall be set forth in a City administrative guideline (Council Policy 600-24 Administrative Guideline). Consequently, these non-members would enjoy indemnification of their actions without any training, unless and until that training is listed in an administrative guideline. It should be noted that no training is **currently** required in the existing administrative guideline nor does the City Council approve administrative guidelines. Therefore, under versions A and B, the City would indemnify untrained, non-members of a CPG subcommittee.

E. Duty to Defend for Any Act Subject to "Thorough Investigation"

Ordinance O-17086 provides the City, through the City Attorney, discretion to determine whether a member or a committee is entitled to receive defense or indemnification under the Ordinance.

Version A **requires** the City to defend member, form member, or planning group in **any** civil action brought against a member or group acting within the scope the member's or group's official duties as described in Council Policies 600-5, 600-6, 600-7 and 600-24. This duty applies unless the City Attorney's "thorough investigation" reveals the following:

- the act or omission was not undertaken within the scope of the official duties of recognized CPG or members;
- the act or omission was due to actual fraud, corruption, direct economic interest, or actual malice;
- the defense would create a conflict of interest between the City and the member or CPG;

more fully set forth in this memorandum. The matter was continued to provide the new City Attorney with an opportunity to review the proposed amendments.

Analysis

A. Requirement that City Attorney Perform Defense

Section 1 of Ordinance O-17086, as well as proposed amendments, versions A and B, all require that this Office assume the defense of the Community Planner's Committee [CPC], the Community Planning Group [CPG], or members thereof, that is or are subject to a lawsuit. None of the versions provides for the use of outside counsel for the CPG or its member.

Under California Rule of Professional Conduct, section 3-310 (C), a lawyer is prohibited from accepting or continuing representation of more than one client in a matter in which the interests of the clients actually conflict without the informed written consent of each client. Informed written consent does not alleviate a lawyer from the lawyer's duty of loyalty. *See e.g. Flatt v. Superior Court*, 9 Cal. 4th 275, 885 P.2d 950 (1994)(discussing lawyer's duty of loyalty in concurrent representation of adverse interests).

Thus, requiring this Office to defend each and every community planning group member, without a provision allowing for outside counsel, or some other means, puts this Office in a position of a potential conflict of interest. For instance, where more than one CPG member is named as a defendant in a lawsuit, the evidence may demonstrate that one has more liability than the other. By defending both, this Office may acquire information that would exonerate one member, but not the other. As a result, the Office would have to recuse itself from representation of both members, defeating the entire purpose of the Ordinance.

This issue can be resolved by changing the language to read "the City shall provide for the defense" of those requiring it.

B. Indemnification Provision to Include Former Members

Ordinance O-17068 does not contain an express provision whereby former members are indemnified for certain acts.

Versions A and B would require the City to indemnify CPG members against any claim or action against the CPG, or member, where the alleged act or omission actually occurred within the scope of activities of a planning group. Both versions limit the indemnity of these former members to circumstances in which current members would be indemnified. For example, a CPG member who retired from membership, but voted on a project that became the subject of a lawsuit where the CPG was named, could require defense. The revised versions of the Ordinance would extend indemnity to the now-retired CPG member, as long as that former member was acting within the scope of his or her duties as a CPG member and the CPG was recognized and acting in accordance with all applicable Council policies and other City requirements.

- or request or defense is determined to be a request for the defense of a criminal action or proceeding including a criminal proceeding for the removal of a member or members.

Under this version, the City Attorney would have to conduct a "thorough investigation" into allegations, which may include actual fraud, corruption, direct economic interest, malice, actual malice, or bad faith. It does not provide for the length of time in which that investigation would take place, but once a complaint is filed and defense is requested, that investigation would be necessarily limited to the time in which an answer was due, which is **30 days or less**. It is doubtful that a "thorough investigation" could be conducted in all cases within that timeframe.

Version B provides that the City shall defend and indemnify CPG members against each and every complaint filed, regardless of the allegations, with only a reservation of rights to recoup that cost. Given this expansive level of indemnity, a plaintiff suing a CPG member for corruption or actual malice would place a higher value on the case knowing the City will defend and indemnify the member than if the City were not required to defend and indemnify the member. As a result, under the same facts, a plaintiff is more likely to demand more money from the City than from the member personally. This sort of indemnification is more than the law requires. In fact, it is a greater level of indemnity than the City provides its own employees, volunteers, or even recreation council members. Council Policies 300-01 and 700-42. In both version A and B, the City's ability to determine whether a planning group or its member is entitled to defense and indemnity is more limited than under Ordinance Number O-17086.

Conclusion

Ordinance Number O-17086 provides the CPC, a CPG, or a member with the right to a defense and to be indemnified by the City for certain limited acts in certain limited circumstances. In the event the City Council were to adopt version A or B, the City would certainly increase its risks and liabilities by requiring the defense and indemnification of former planning group members, of members who have not received the requisite training early on in their tenure as a planning group member, of certain non-members of planning groups who serve on subcommittees, and of members who commit intentional acts of malice. The policy decision to extend the right to a defense and indemnification in the planning group context remains squarely within the City Council's purview. However, as your legal advisor, the City Attorney strongly discourages the expansion of the City's duties and obligations to defend or indemnify a person where it is not otherwise required by law to defend or indemnify that person.

• **ASK RECOMMENDATIONS**

JAN I. GOLDSMITH, City Attorney

By



Andrea Contreras Dixon
Deputy City Attorney

ACD:pev

Attachments

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Effective:[See Text Amendments]

West's Annotated California Codes Currentness

Government Code (Refs & Annos)

Title 1. General

Division 3.6. Claims and Actions Against Public Entities and Public Employees (Refs & Annos)

Part 7. Defense of Public Employees (Refs & Annos)

→ § 995.2. Grounds for refusal to provide defense; request of defense; refusal because of conflict of interest

(a) A public entity may refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines any of the following:

(1) The act or omission was not within the scope of his or her employment.

(2) He or she acted or failed to act because of actual fraud, corruption, or actual malice.

(3) The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee. For the purposes of this section, "specific conflict of interest" means a conflict of interest or an adverse or pecuniary interest, as specified by statute or by a rule or regulation of the public entity.

(b) If an employee or former employee requests in writing that the public entity, through its designated legal counsel, provide for a defense, the public entity shall, within 20 days, inform the employee or former employee whether it will or will not provide a defense, and the reason for the refusal to provide a defense.

(c) If an actual and specific conflict of interest becomes apparent subsequent to the 20-day period following the employee's written request for defense, nothing herein shall prevent the public entity from refusing to provide further defense to the employee. The public entity shall inform the employee of the reason for the refusal to provide further defense.

CREDIT(S)

(Added by Stats.1963, c. 1683, p. 3300, § 16. Amended by Stats.1982, c. 1046, p. 3806, § 1.)

HISTORICAL AND STATUTORY NOTES

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CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

SUBJECT: UTILIZATION OF VOLUNTEERS
POLICY NO.: 300-01
EFFECTIVE DATE: February 12, 1996

BACKGROUND:

The City has a significant resource available in the San Diego community: individuals who are ready, willing and able to serve as volunteers. In a time of diminishing financial resources and increasing demands for services, it is important that volunteer opportunities continue to be identified and this resource increasingly utilized.

The City has been using volunteers for a wide variety of job assignments for many years. Volunteer programs throughout the City are considered model programs in volunteerism in the public sector. Volunteers are essential to City operations, and they help provide a level of customer service that could not be achieved by City staff alone.

DEFINITIONS:

VOLUNTEERS are individuals who perform services without pay.

VOLUNTARY SERVICE is service performed by any authorized volunteer who receives no remuneration other than for work assignment-related expenses.

AUTHORIZED VOLUNTEER is a volunteer who has completed and signed a volunteer participation agreement which has been accepted by a City department.

PURPOSE:

The purpose of this policy is to formally recognize the importance of the contributions of City volunteers, and to establish general guidelines for the utilization of volunteers.

POLICY:

It is the policy of the City Council that the City of San Diego will:

1. Optimize the use of volunteers where it is economically feasible, by supporting the development of volunteer opportunities throughout the City.
2. Create a Citywide volunteer program which will establish policies and procedures to assist departments in the effective management of volunteer programs.
3. Proactively recruit, select and place volunteers; provide reasonable supervision and training of volunteers; and officially recognize volunteer service.
4. Extend worker's compensation coverage to authorized volunteers, as set forth in City Council Resolution R-254933, adopted 8/31/81 (copy attached).

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5. Defend 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.

HISTORY:

“Salary Setting Policy”

Adopted by Resolution R-193401 04/11/1968
Amended by Resolution R-207205 01/16/1973
Amended by Resolution R-207686 04/05/1973
Amended by Resolution R-215540 03/17/1976
Repealed by Resolution R-261024 06/25/1984

“Utilization of Volunteers”

Adopted by Resolution R-286906 02/12/1996

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

SUBJECT: RECREATION COUNCILS
POLICY NO.: 700-42
EFFECTIVE DATE: February 7, 2005

BACKGROUND:

Public recreation is a function of government closely related to the citizenry. In order to achieve participation of the people in the planning of Park and Recreation activities, the Park and Recreation Department has assumed responsibility for the organization of recreation councils.

PURPOSE:

The purpose of recreation councils shall be to promote the recreation programs in the community through planning, administering, publicizing, coordination, and interpretation. The actions of recreation councils in achieving their purpose shall be in accordance with the policies of the San Diego Park and Recreation Department and the Park and Recreation Board.

MEMBERSHIP:

Membership in a recreation council shall be open to anyone meeting the requirements of its by-laws as approved by the City Manager or his designee. Recreation councils will not discriminate or permit discrimination against any person or class of persons on the basis of race, color, national origin, religion, sex or age, or physical disability.

POLICY:

1. City will work cooperatively with recreation councils in the fiscal administration, planning, promoting, and development of community recreation programs.
2. City will issue "Special Use Permits" to recreation councils for periods of up to three (3) years.
3. City, in consideration of the volunteer services rendered by recreation councils; does hereby agree to provide legal defense to and indemnify such members from liability for acts of such members performed while engaged in assisting the Park and Recreation Department community recreation programs when such acts are done under the direction, control or supervision of Park and Recreation personnel.
The City shall further provide a legal defense to, and indemnify such members from liability for acts of such members performed in connection with recreation councils acting as a body within the policy guidelines of the City of San Diego.
The City shall not, however, defend or indemnify any member of recreation councils for any act or acts with regard to damages or liability resulting from same, alleged to have occurred as a result of any criminal act of any such members.

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CROSS REFERENCE:

City Charter Sec. 43
Municipal Code Sec. 26.30
Municipal Code Sec. 26.31

HISTORY:

Adopted by Resolution R-254869 08/24/1981
Amended by Resolution R-266849 10/27/1986
Amended by Resolution R-300111 02/07/2005