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OFFICE OF THE CITY ATTORNEY
ROCKARD J. DELGADILLO
CITY ATTORNEY

March 11, 2002

Mr. Greg Nelson, General Manager
Department of Neighborhood Empowerment
305 East First Street
Los Angeles, California 90012

Re: Exclusion of Elected City Officials From Serving on A Neighborhood Council's Governing Body

Dear Mr. Nelson:

As you know, my office is currently reviewing the bylaws submitted by neighborhood councils prior to their referral to the Board of Neighborhood Commissioners for action. Both in the course of this review and pursuant to a separate inquiry, questions have arisen as to whether neighborhood council bylaws may exclude elected City officials, and in some cases their staff, from serving as members of the governing body.

Because we have already encountered this question several times, we are providing our advice to you in writing so that your department will have in hand the necessary information to address similar questions in the future. This opinion letter addresses the following three questions:

1. May a neighborhood council adopt bylaws that exclude elected City officials from serving on its governing body?
2. May a neighborhood council prohibit City council staff, such as Council office chief deputies, or other City staff from serving as board members?
3. Should elected officials of the City be prohibited from serving on neighborhood council boards regardless of whether such service is permitted by the neighborhood council's bylaws?

Our conclusions are as follows.



Greg Nelson, General Manager
March 11, 2002
Page 2

Summary of Advice and Recommendation

In light of the Charter's purpose of creating a system to promote more *citizen* participation and to provide input to decision makers, it would not be unreasonable or unlawful to reserve all seats on the governing board solely for private community members.

While the Charter clearly envisioned a process that is inclusive, ("*Neighborhood councils shall include representatives of the many diverse interests in communities*"; [*n*]neighborhood council membership will be open to everyone who lives, works or owns property in the area [*stakeholders*]." Charter §§ 900, 906), in light of the primary purpose of empowering neighborhood communities that is enshrined in our Charter, we do not believe it advisable to allow neighborhood councils to place elected City officials on their boards.

Therefore, I recommend that the Plan and Ordinance be amended to expressly *prohibit* elected City officials from serving on neighborhood council boards by an amendment which could read as follows: "No person holding an elected City office shall be eligible to serve in any office or board of a Certified Neighborhood Council's governing body, including serving as a member of their board."

However, for the reasons explored further below, we do not believe that City employees may be excluded from serving on their neighborhood council boards.

Conclusions and Discussion

ISSUE 1:

May a neighborhood council adopt bylaws that exclude elected City officials from serving on its governing body?

ANSWER:

Yes. The Plan for a Citywide System of Neighborhood Councils ("Plan") and the City Charter do not set specific qualifications for board members of neighborhood councils, nor do they limit the ability of neighborhood councils to exclude elected City officials from serving on their governing boards. In light of the Charter's purpose of creating a system to promote more *citizen* participation in government and to provide input to decision makers, it is reasonable and lawful to reserve all seats on the governing board solely for private community members.

DISCUSSION:

In reaching our conclusion, three legal principles were examined: 1) legal or "practical" incompatibility of office; 2) the First Amendment's freedom of association; and 3) the equal protection clause of the Fourteenth Amendment. We analyze these issues by first considering the purpose of the Citywide System of Neighborhood Councils.

Purpose of Neighborhood Councils

The City Charter outlines the basic parameters of the Citywide System of Neighborhood Councils, which has been refined by the Plan and implemented through Regulations which were adopted by ordinance (Ordinance No. 174006). The system was clearly designed to provide for more community input and to "empower" neighborhoods at the grass roots level.

The goal of this empowerment is twofold: i) to engage in local decision making where legally permissible; and ii) to influence governmental decisions. Indeed, the Charter states that the purpose of setting up this system is to "promote more citizen participation in government and make neighborhoods more responsive to local needs. . ." Charter § 900.

Elsewhere, the Charter identifies several other objectives of the system of neighborhood councils, including to "make government more responsive to local needs," to "monitor the delivery of City services in their respective areas and have periodic meetings with responsible officials of City departments" and generally have an "advisory role on issues of concern to the neighborhood." See Charter §§ 900, 910. The Charter also dictates that an Early Warning System be set up with "procedures for receiving input from neighborhood councils prior to decisions by the City Council, City Council committees and boards and commissions." Charter § 907.

Incompatibility of Office: Legal or Practical

California courts have created an "incompatibility of office" doctrine. Under this doctrine, if a person holding a public office takes the oath of office for another office that is incompatible with the first, that person automatically loses the first office. In order for the doctrine to apply, both positions must be offices.

This office has already concluded that, while members of the governing body of neighborhood councils will be treated as City employees for liability purposes and are part of the governmental structure formed at the grass roots level, they are not "officers" of the

Greg Nelson, General Manager
March 11, 2002
Page 4

City. See City Attorney letters dated April 25, 2001, p. 1 and November 30, 2000, p. 6.¹ Therefore, no *legal* issue of incompatibility of office arises.

However, since a key purpose of the neighborhood council system is to advise the Mayor, the City Council and the other elected officials who are the ultimate decision makers, a "practical" incompatibility of office exists between the neighborhood council board and elected City officials. It would be incompatible to have elected officials first advising themselves and then making decisions relating to that advice. Essentially, by serving in this dual capacity, an elected official could conceivably make a recommendation at the local neighborhood council level on a matter that would ultimately be presented to him or her for decision. In addition, having an elected City official on a neighborhood council board could have a chilling effect on participation by the other board members as well as limit participation by the grassroots community. This is exactly the opposite effect that the Plan and Charter intended. Rather, it is consistent with the Charter's intent to limit the participation of elected City officials in order to maximize the opportunities for *community* stakeholders to participate on the board.

Freedom of Association

Upon limiting participation among a group, it is necessary to evaluate whether associational rights of either neighborhood council members or the elected officials are violated in the event a neighborhood council chooses to exclude elected City officials from its governing body.²

The freedom of association encompasses both the right to assemble and the right to expressive association. See 13 Cal. Jur 3d § 268. The right to assemble is protected by the First Amendment of the United States Constitution and by Article 1, § 3 of the California Constitution. However, cases protecting this right generally provide protections for the right of an individual to associate with a group or organization, not necessarily by guaranteeing access to leadership positions in those organizations. See, e.g., *Hurley v. Irish-American Gay, Lesbian and BiSexual Group of Boston* (1995) 515 U.S. 557, 115 S.Ct. 2338; *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 120 S.Ct 2446. Thus, in our view,

¹ As noted in that November 30, 2000 letter, "Members of neighborhood councils will not be 'officers' of the City. The City's officers are listed in Charter § 200, which does not include or describe members of neighborhood councils." *Id.* at p. 6.

² We analyze this issue because neighborhood councils, once certified, will be an arm of City government. Thus, any restrictions upon the constitutional rights of individuals would likely be attributed to the City.

establishing reasonable eligibility requirements for a governing body of a neighborhood council that does not otherwise violate the Plan or Charter, does not violate the right to associate.³

For the same reasons, we also conclude that the right of expressive association of other neighborhood council members would not be violated by excluding elected City officials from serving on their neighborhood council boards. Group members can still obtain the benefit of expressive association by elected City officials who choose to participate in a neighborhood council simply by joining and making their presence known in a variety of ways at the membership level even if they do not or cannot serve on its governing body.⁴

Equal Protection

Under the Equal Protection Clause, governmental classifications must satisfy either the "rational basis" or "strict scrutiny" test in order to be valid. *Heller v. Doe* (1993) 509 U.S. 312, 113 S.Ct. 2637; *Zelienga v. Nelson* (1971) 4 Cal.3d 716; *Weber v. City Council* (1973) 9 Cal.3d 950. When a fundamental right is involved, such as the right to seek public office (see, e.g., *Zelienga, supra*, at 720), or when classifications are made based upon race or gender ("suspect classes") "strict scrutiny" is the proper test. The government must identify a "compelling state interest" to justify treating certain people differently and must show that the action is narrowly tailored to accomplish the government's goal. We do not believe that service on a governing body of a neighborhood council would be treated by the courts as a "public office," and since elected City officials are not a "suspect class," it is our view that the strict scrutiny standard would not apply.

Where a fundamental right is not burdened, and where the classification does not involve suspect classes, the more lenient "rational basis" test applies. Under that test, the government must show the City has a rational basis to justify the exclusion. As noted earlier, the system of neighborhood councils was designed precisely to "promote more citizen participation" (Charter § 900, emphasis added), to be a vehicle to monitor the

³ In fact, the City of Los Angeles establishes its own eligibility requirements for service on City boards and commissions without implicating this right. See, e.g., Charter § 501 (d).

⁴ Indeed, an argument might be made that having the City *require* neighborhood councils to allow elected City officials to serve on their board might ultimately so chill their ability to advocate for their community needs or take controversial positions and thereby affect "in a significant way the group's ability to advocate public or private viewpoints" such that the group's freedom of expressive association might be violated. *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 120 S.Ct. 2446, 2452.

Greg Nelson, General Manager

March 11, 2002

Page 6

delivery of City services, and provide an opportunity to have input before decisions are made by the City Council, its committees and boards and commissions. The Plan expands on the Charter's vision by identifying several goals and objectives of the Neighborhood Council System which include: "to promote *public participation* in City governance and decision making processes so that government is more responsive *to local needs* and requests and so that more opportunities are created to build partnerships with government to address local needs and requests"; "to facilitate the delivery of City services and City government responses to Certified Neighborhood Councils to both identify and prioritize their needs and to effectively communicate those needs"; and "to create an environment in which all people can organize and propose their own Certified Neighborhood Councils so that they develop from *the grassroots of the community.*" Plan, Article I. (Emphasis added.)

There is a significant public policy interest in ensuring the grassroots *community* nature of neighborhood councils and that neighborhood councils maintain their independence from City government. See Plan, Article II, Section 4. ("*Certified Neighborhood Councils shall be as independent, self-governing and self-directed as possible.*") Accordingly, based on these identifiable goals, objectives and purposes of the neighborhood council system, it is reasonable and lawful for neighborhood councils to exclude elected City officials from serving on a governing body of a neighborhood council.

ISSUE 2:

May a neighborhood council prohibit City council staff, such as Council office chief deputies, or other City staff from serving as board members?

ANSWER:

No.

DISCUSSION:

The Charter defines a stakeholder as everyone who "lives, works, or owns property in the area." Charter § 906 (2). Indeed, to be certified, neighborhood councils must submit bylaws that assure that "the members of the neighborhood council will reflect the diverse interests within their area" and guarantee that "all meetings will be open and public, and permit, to the extent feasible, every stakeholder to participate in the conduct of business, deliberation and decision-making." Charter § 906 (a) (3), (6).

The Plan reiterates this goal and provides in Article II that one of the desired characteristics

Greg Nelson, General Manager
March 11, 2002
Page 7

of neighborhood councils is that they shall be "diverse, inclusive and open to all Community Stakeholders."

While we conclude that elected City officials can be excluded from serving on a neighborhood council board, by virtue of their being the ultimate decision makers, the same result is not warranted in the case of City employees. There is no "practical" incompatibility problem since City staff are not decision makers and the "chilling effect" is less likely to occur, again, precisely because they are not the ultimate decision makers. Moreover, City workers can be part of the "grassroots community" as much as any non-City worker. Thus, in our view, excluding City employees merely by virtue of their employment status, notwithstanding their Charter-given status as stakeholders would most likely raise equal protection problems.

ISSUE 3:

Should elected officials of the City be prohibited from serving on neighborhood council boards regardless of whether such service is permitted by the neighborhood council's bylaws?

ANSWER:

Yes. While there is currently no legal prohibition preventing elected City officials from serving on neighborhood council boards, we believe that it is inadvisable for elected City officials to serve in that capacity.

DISCUSSION:

Recognizing that this is a policy issue ultimately to be decided by the City Council, it is our recommendation that the Plan and Ordinance be amended to clarify that elected City officials should not be allowed to serve on the neighborhood council boards for the reasons set forth in this correspondence. Prohibiting this service would require a simple amendment of the Plan and Ordinance, which could be amended to read as follows:⁵

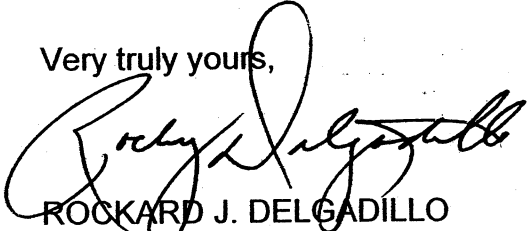
⁵ The Plan would be amended at Article III, Section 2 (c) (ii) (2) (b) and the corresponding Ordinance (Ordinance No. 174006) at Section 2 B 3 (c) (2) with the same language: "No person holding an elected City office shall be eligible to serve in any office of a Certified Neighborhood Council's governing body, including serving as a member of their board."

Greg Nelson, General Manager
March 11, 2002
Page 8

"In order to encourage diversity and innovation in leadership on the governing body, no person may serve more than eight consecutive years in any office of a Certified Neighborhood Council's Governing Body. No person holding an elected City office shall be eligible to serve in any office or board of a Certified Neighborhood Council's governing body, including serving as a member of their board."

We hope this letter addresses some of the concerns that have been raised by groups forming neighborhood councils and provides your department with the necessary information in order to address future questions raised in this regard. Please let me know if my office can be of further assistance to you in connection with this matter.

Very truly yours,



ROCKARD J. DELGADILLO
City Attorney

RJD/GRP:pj

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cc: Office of the Mayor
Office of the City Controller
Each member of the City Council
Each member of the Board of Neighborhood Commissioners