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## **Memorandum**

**To:** South Bay Cities Council of Governments  
**From:** Michael Jenkins  
**Date:** March 16, 2021  
**Re:** Delegation of Authority

### **BACKGROUND**

This memorandum responds to the Steering Committee's request that I provide an opinion pertaining to the allocation of authority between the South Bay Cities Council of Governments' Board of Directors ("Governing Board") and the Steering Committee, a standing committee of the Governing Board.

The principal legal issue that has been raised is whether the Steering Committee routinely exercises authority beyond that allowed by the governing documents of the Council. In particular, the questions presented are whether (i) committees created by of the Governing Board are solely advisory, (ii) the authority given to the Steering Committee in the Bylaws exceeds what is permitted by the Fourth Amended and Restated Joint Powers Agreement, and (iii) the Steering Committee approves contracts without contract approval authority.

### **ANALYSIS**

The South Bay Cities Council of Governments ("Council") was formed pursuant to a Joint Powers Agreement, as amended and restated by the Fourth Amended and Restated Joint Powers Agreement ("Agreement") that governs the operation of the Council. Additionally, the Council is limited in the exercise of its powers by applicable law and the Council's Bylaws. (Agreement, Section 4(c).) The Agreement provides for the creation of a Governing Board and General Assembly and stipulates the duties of the Governing Board. Section 7(d) describes the Governing Board's authority to establish Committees as follows:

Committees. As needed, the Governing Board may create permanent or ad hoc advisory committees to give advice to the Governing Board on such matters as may be referred to

such committees by the Governing Board. All committees shall have a stated purpose before they are formed. Standing committees shall remain in existence until they are dissolved by the Governing Board. Ad hoc committees shall be dissolved upon completion of their designated functions. Committees, unless otherwise provided by law, this Fourth Amended and Restated Agreement, the Bylaws or by direction of the Governing Board, may be composed of representatives to the Governing Board and nonrepresentatives to the Governing Board.

Section 7(e) of the Agreement establishes the vote requirements for actions by the Board as follows:

Actions. Actions taken by the Governing Board shall be by not less than fifty percent (50%) plus one (1) of the voting representatives of the Governing Board who are present provided that a quorum has been established, unless by a provision of applicable law, this Fourth Amended and Restated Agreement, the Bylaws or by direction of the Governing Board, a higher number of votes is required to carry a particular motion.

While Section 7(d) does provide that committees are created to “give advice,” Section 8 of the Agreement expressly provides that the Governing Board may delegate its authority as follows:

Duties of the Governing Board. The Governing Board shall be deemed, for all purposes, the policy making body of the Council. All of the powers of the Council, except as may be expressly delegated to others pursuant to the provisions of applicable law, this Fourth Amended and Restated Agreement, the Bylaws or by direction of the Governing Board, shall be exercised by and through the Governing Board.

(Emphasis added.) As written, Section 8 allows the Governing Board to delegate authority in four separate ways: (i) pursuant to the provisions of applicable law; (ii) pursuant to the provisions of the Agreement itself; (iii) through the Bylaws; or (iv) by direction of the Governing Board. Hence, the Agreement accords the Governing Board broad flexibility to delegate its powers and functions to a subordinate officer or body both formally and informally as it deems appropriate. It is well established that a public agency legislative body may delegate certain functions to a subordinate body. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal 3d 22.)

The authority of the Governing Board to delegate authority is also found in Section III.A.1 of the Bylaws, which reads “[a]ll of the powers of the Council provided in Section 4 of the Agreement except as may be expressly delegated to others pursuant to the provisions of the Agreement these Bylaws or the direction of the Governing Board shall be exercised by and through the Governing Board.” (emphasis added.) Exercising its discretion to delegate authority as provided by Section 8 of the Agreement, and as supported by case law, the Governing Board has delegated authority to the Steering Committee (i) through the Bylaws, (ii) by express delegation, and (iii) through custom and practice.

*1. Delegation of Authority through the Bylaws*

Article VII, B.2. of the Bylaws extends specific authority to the Steering Committee as follows:

The Steering Committee shall have the authority and duty to:

- a. Formulate the agendas for the meetings of the Governing Board;
- b. Oversee the day-to-day business of the Council, monitor the progress of ongoing contracts and provide direction to the staff of the Council;
- c. Approve payment of bills for receipt of goods and services within the approved annual budget;
- d. Make recommendations to the Governing Board regarding the work program, budget, positions to be taken on issues, contracts and all other matters within the jurisdiction of the Council;
- e. Evaluate Council staff;
- f. Monitor the function of all Council committees; and
- g. Receive regular reports from outside agencies.

*2. Delegation of Authority by Express Delegation*

At Council's meeting on June 22, 2017, the Governing Board approved as Consent Calendar Item VII.D., a memorandum extending additional authority to the Steering Committee as follows:

Since January, 2005, the Steering Committee has been delegated the authority by the Board of Directors to take action on any time critical issues that require it in those months that the Board of Directors does not meet. The policy includes the requirement that the Board be informed at their next meeting of the actions that were taken by the Steering Committee.

With this memo, SBCCOG staff is proposing that the authority of the Steering Committee be expanded to include the following approvals:

- Contract extensions when the scope, terms and funding remain the same
- Minor adjustments to contract scopes of work or cost under \$10,000
- Small administrative contracts under \$10,000 for projects such as website design

- Administrative items such as changes to committees, their composition, office procedures, etc.

These items would be approved by the Steering Committee with the same requirement that the Board be informed at their next meeting. Governing Board members can ask for review and possible reconsideration of the item at that time.

Additionally, more information on each of these actions is available to Board members on request.

As noted above, since 2005 the Governing Board extended specific authorization to the Steering Committee annually in order to take actions on its behalf during the months of December when the Board does not meet and in February or March when the General Assembly is scheduled to convene. By way of example, the Steering Committee on December 11, 2020, approved a website design contract in the amount of approximately \$72,000. The approval of the contract was reported to the Governing Board, along with other actions taken on December 11, 2020, as an exercise of delegated authority in accordance with the historic policy allowing the Steering Committee to act on behalf of the Governing Board in the month of December.

### *3. Delegation of Authority by Custom and Practice*

The Governing Board has further delegated authority to the Steering Committee through practice. For example, the Steering Committee has customarily taken actions in between Governing Board meetings, which actions are reported to the Board at its next meeting. The Board is aware of and has acquiesced in this arrangement, which would satisfy the delegation “as directed by the Governing Board” under Section 8 of the Agreement.

When considering the role of custom and practice in the context of an agreement, the law of contracts provides that “[w]here the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.” (Restatement (Second) of Contracts §201(a)(1981).) The comment on this section asserts that “the mutual understanding of the parties prevails even where the contractual term has been defined differently by statute or administrative regulation.” Further supporting this legal principle, “[a]n agreement or term thereof need not be stated in words if the parties manifest assent to it by other conduct, and such assent is often manifested by conduct in accordance with usage.” (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal. App. 4th 832, 853.) Usage in this case is defined as “a habitual or customary practice.” (*Id.*) The Governing Board’s habitual and customary practice further substantiates that the Governing Board has delegated certain functions to the Steering Committee.



## OPINION

In light of the above analysis, the question initially posed whether the Steering Committee is solely advisory or is approving contracts without the authority to do so, is answered in the negative. The Governing Board, through both express delegation and through custom and practice has specifically provided the Steering Committee with the authority to act on its behalf.

And in response to the concern that the Bylaws exceed what is permitted by the Agreement, I conclude that the allocation of authority as between the Governing Board and the Steering Committee does not violate the terms of the Agreement. However, I recommend that the Governing Board amend Section VII.B.2 of its Bylaws to more clearly, comprehensively and transparently delineate the powers delegated to the Steering Committee.