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August 8, 2006

SUBJECT: PARKING AUTHORITY GOVERNANCE  
REQUESTED BY: PARKING AUTHORITY COMMISSIONERS  
NATHANIEL P. FORD, SR.  
MTA Executive Director/CEO  
PREPARED BY: JOHN I. KENNEDY  
Deputy City Attorney

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### **Question Presented**

You have asked for an explanation of the laws applicable to the governance of the Parking Authority and options for establishing a closer relationship between the Parking Authority and the Municipal Transportation Agency (the "MTA"). Specifically, you have asked whether: (1) the MTA Executive Director may serve simultaneously as the Director of the Parking Authority and (2) Parking Authority staff may report to the Parking Authority Commission (the "Commission") through the MTA Executive Director.

### **Short Answer**

Under state and local law, the Director of the Parking Authority reports directly to the Parking Authority Commission, not through the MTA Executive Director, who is appointed and serves at the pleasure of the MTA Board of Directors. Both state and local law restrictions on holding incompatible offices and dual offices may prohibit the MTA Executive Director from serving simultaneously as the Director of the Parking Authority.

The first option is for the Parking Authority to enter into an operating agreement with the MTA. State law allows the Parking Authority to enter into an operating agreement with the MTA under which the MTA agrees to provide all Parking Authority related services. Such an agreement could detail the services that MTA staff would provide to the Parking Authority and authorize compensation to the MTA for the reasonable value of the services. The agreement could require the MTA Executive Director to report directly to the Parking Authority Commission and supervise MTA staff who provide services to the Parking Authority under the agreement. The Board of Supervisors must approve the agreement.

A second option is for the MTA to request appropriate legislation to authorize the MTA Executive Director to serve simultaneously as the Director of the Parking Authority. In order to eliminate the prohibition on incompatible offices under California Government Code section 1099, a change to state law is required. Restrictions imposed by local law on dual office holding may also apply. Since the penalty for violation of San Francisco Campaign and Government Code section 3.220 would be that the MTA Executive Director, upon assuming the office of the

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Parking Authority Director, would be deemed to have vacated his or her City office, we recommend that the MTA either (1) request an advisory opinion from the Ethics Commission to determine whether the ordinance applies, or (2) request a change in local law. In order to amend local law and waive the San Francisco Campaign and Government Code section 3.220 ban, approval by both the Ethics Commission, by a four-fifths vote, and the Board of Supervisors, by a super-majority or two-thirds vote, is required.

### Analysis

#### **I. THE PARKING AUTHORITY**

The Parking Law of 1949 (now codified at Streets and Highway Code section 32500, *et seq.*) authorizes a local government to establish a Parking Authority to acquire and provide for off-street parking. Cal. Sts. & Hy. sections 32650-32656. Chapter 17 of the San Francisco Administrative Code established the San Francisco Parking Authority.

Under state law, the Parking Authority is a legal entity separate from the City and County of San Francisco and from the MTA. Cal. Sts. & Hy. section 32650, *et seq.*; City Attorney Opinion No. 660 (1953). But, the MTA Board of Directors may serve *ex officio* as members of the Parking Authority. Cal. Sts. & Hy. section 32657(c); San Francisco Charter section 8A.112(b). As with the San Francisco Redevelopment Agency, a court would likely conclude that the Parking Authority is a state agency created for the local operation of a governmental function. *Kehoe v. City of Berkeley*, (1977) 67 Cal.App.3d 666.

The Parking Authority Commission is authorized to establish its own policies and procedures to exercise its powers. Cal. Sts. & Hy. section 32801(b). State law does not allow a government body, such as the Commission, to delegate discretionary authority granted to it by statute unless those statutes expressly authorize that delegation. *Bagely v. City of Manhattan Beach*, (1976) 18 Cal.3d 22, 25; *City and County of San Francisco v. Cooper*, (1975) 13 Cal.3d 898. Discretionary duties are those acts of a governmental body, such as the approval of a contract or setting policy for the agency. Under state law, the Parking Authority Commission has exclusive authority to select, appoint, or remove permanent or temporary Parking Authority officers and employees. Cal. Sts. & Hy. section 32801(c); S.F. Admin. Code section 17.6. The Parking Authority is authorized by state law to hire a Director but is not required to do so. Cal. Sts. & Hy. section 32801. The positions of Director and Assistant Director are not subject to the merit system selection rules. S.F. Admin. Code section 17.6. The employees in these positions serve at the pleasure of the Parking Authority Commission.

The City currently pays the salaries and benefits of Parking Authority employees and provides them offices and office supplies. But there is no formal agreement or other document that memorializes this arrangement.

The MTA Board of Directors governs the MTA and appoints the MTA Executive Director. Charter section 8A.102. Because the Parking Authority is a separate legal entity, the MTA Executive Director has no authority to appoint or direct employees or officers of the

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Parking Authority. Cal. Sts. & Hy. section 32801; Charter section 8A.102(c); S.F. Admin. Code section 17.6. Conversely, the Director of the Parking Authority has no authority over MTA staff. As a result, Parking Authority staff report only to the Director of the Parking Authority and his or her subordinate.

In order to answer the questions you have posed, we discuss whether state and local law restrictions apply.

## II. CALIFORNIA GOVERNMENT CODE SECTION 1099

You have asked whether the MTA Executive Director could either (1) serve simultaneously as the Director of the Parking Authority, or (2) supervise and direct Parking Authority staff.

California Government Code section 1099(a) provides that:

"A public officer, including but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible. Offices are incompatible when any of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law:

- (1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.
- (2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.
- (3) Public policy considerations make it improper for one person to hold both offices."

Under the statute, which codifies common law, the penalty for violation is that the public officer is deemed to have forfeited the first office upon assuming the second. California Government Code section 1099(b); *People ex rel. Chapman v. Rapsey*, (1940) 16 Cal.2d 636, 644; Opinion No. 01-104, 84 Ops.Cal.Atty.Gen. 94 (2001).

California Government Code section 1099 was enacted in 2005. As a result, there is no case law interpreting this statute. But the statute codifies a common law prohibition on public officials holding incompatible offices. Accordingly, we look to case law and other authorities that discuss the common law doctrine to determine the application of section 1099 to your question.

A threshold question here is whether both positions are offices within the meaning of the state law prohibition. Under state law, a "public office" is one in which the incumbent exercises a portion of the sovereign powers of the state or a local agency in the performance of a public function. *Dibbs v. County of San Diego*, (1994) 8 Cal.4<sup>th</sup> 1200, 1212-1214; *Coulter v. Pool*, (1921) 187 Cal. 181; *Spreckels v. Graham*, (1924) 194 Cal. 516; *City Council v. McKinley*, (1978) 80 Cal.App.3d 204, 210; Opinion No. 00-302, 83 Ops.Cal.Atty.Gen. 153 (2000). Under

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this test, the positions of MTA Executive Director and Director of the Parking Authority are both "public offices." Accordingly, the question becomes whether holding these simultaneously would be incompatible.

Government Code section 1099(a)(2) provides that offices are incompatible if the duties of the two offices could result in a significant clash of loyalties. *People ex rel. Chapman v. Rapsey*, (1940) 16 Cal.2d 636. Only one potential significant clash of duties is necessary to make offices incompatible. Opinion No. 01-1007, 85 Ops.Cal.Atty.Gen. 60 (2002). For example, the California Attorney General has concluded that one officer may not simultaneously hold the position of director of two different water districts since the performance of duties of either office could have an adverse effect on the other. Opinion No. 93-112, 76 Ops.Cal.Atty.Gen. 81 (1993). Further, the California Attorney General granted leave to sue in *quo warranto* when a chief probation officer served simultaneously as the chief officer of the bureau of corrections in the absence of express county charter authority. Opinion No. 93-901, 77 Ops.Cal.Atty.Gen. 7 (1994). Another California Attorney General opinion concluded that one officer may not simultaneously hold the position of director of a water district and school district trustee due to a significant clash of duties and loyalties that may arise. Opinion No. 04-904, 87 Ops.Cal.Atty.Gen. 153 (2004).

A significant clash of loyalties could arise if the Parking Authority Commission set priorities for the operation and management of Parking Authority garages that conflicted with the MTA's objective of maximizing garage revenues. Under Charter section 8A.105(b), most of the Parking Authority's garage revenues are used to support the MTA. But, the Parking Authority Commission could establish a garage staffing policy that enhanced the ability to respond to consumer-related issues and resulted in less revenue for the MTA. To the extent that it is in the interest of the MTA Executive Director to maximize these garage revenues to support the Municipal Railway, there is a possibility that a significant clash of duties could result.

Strong arguments exist that these offices are not incompatible. State and local law authorize members of the MTA Board of Directors to serve also as members of the Parking Authority Commission. *See*, Cal. Streets and Highway Code section 32657(c); San Francisco Charter section 8A.112(b).

In addition, California Streets and Highway Code section 32812 provides:

"In order that there may be no unnecessary duplication of effort and expense, the [Parking] (A)uthority may provide for the furnishing of services by, and the use of facilities of, any department, office or agency of the city in lieu of, or in conjunction with, the direct provision by the authority of services and the use of facilities through employment or purchase or other means. The furnishing of such services and the use of such facilities of any such department, office or agency shall be upon such terms and conditions as may be approved by the authority and the legislative body of the city, and subject to reimbursement of the appropriate funds of the city for the reasonable value thereof."

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Under this statute, the Parking Authority may contract with a City agency to provide administrative services to perform ministerial duties that otherwise would be provided by employees of the Parking Authority.

Finally, Charter section 8A.113(b) provides that "(t)he Agency [the MTA] shall *manage* the Parking Authority so that it does not construct new or expanded parking facilities unless the Agency finds that the costs resulting from such construction and the operation of such facilities will not reduce the level of funding to the Municipal Railway from parking and garage revenues under Section 16.110 to an amount less than that provided in fiscal year 1999-2000." (emphasis added.)

In light of the explicit statutory authorization for members of the MTA Board of Directors to serve as members of the Parking Authority Commission, the statutory authority for the Parking Authority to obtain services from the City to perform its functions, and Charter section 8A.113(b), a court might hold that no significant clash of loyalties would be created by consolidating the functions of the Parking Authority Director with those of the MTA Executive Director

Given the gravity of the penalty in the event of incompatibility, we recommend that the MTA request a change in state law to authorize the MTA Executive Director to serve simultaneously as the Director of the Parking Authority in order to eliminate any possibility of holding incompatible offices under California Government Code section 1099. The Legislature may by statute abrogate both the common law and statutory prohibitions against holding incompatible offices. *American Canyon Fire Protection District v. County of Napa*, (1983) 141 Cal.App.3d 100, 104; *McClain v. County of Alameda*, (1962) 209 Cal.App.2d 73, 79; Opinion No. 80-801, 63 Ops.Cal.Atty.Gen. 748 (1980).

You have also asked whether Parking Authority staff could report to the Parking Authority Commission through the MTA Executive Director. We advise that such an arrangement would have the appearance that the MTA Executive Director is, in fact, holding the office of and acting as the Director of the Parking Authority. Such an arrangement could also violate state law for the same reasons discussed above.

As a result, it appears that state law restricting the holding of incompatible offices may prohibit the MTA Executive Director from either (1) serving as the Director of the Parking Authority, or (2) supervising and directing Parking Authority staff. Because it is an unclear area of law, the MTA may wish to request a change to state law to authorize the MTA Executive Director to serve simultaneously as the Director of the Parking Authority.

### **III. SAN FRANCISCO CAMPAIGN AND GOVERNMENT CODE SECTION 3.220**

Restrictions imposed by local law on dual office holding may also apply. San Francisco Campaign and Gov't Code section 3.220 provides that "(a)ny person holding an office under the City and County with an annual salary in excess of \$2,500, whether by election or by appointment, who shall, during his or her term of office, hold or retain any other with such a

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salary under the government of the United States, the State of California, or the City and County shall be deemed to have thereby vacated the office held by him or her under the City and County."

Since the Parking Authority is created by state law and a separate legal entity, a court would likely conclude that terms in section 3.220 "under the government of ... the State of California" include state agencies created for local purposes such as the Parking Authority. The position of Director of the Parking Authority is a salaried position. If the MTA Executive Director serves as the Director of the Parking Authority but waives any additional compensation, a court could conclude that the ban in section 3.220 does not apply because, on its face, the ordinance applies to persons receiving compensation in excess of \$2,500 from each office.

But there is no case law or advisory opinions to support this conclusion. It is possible that a court could conclude that the intent of the ordinance was to prevent divided loyalties similar to the state statute discussed above or to prevent the concentration of power in one individual. In addition, section 3.220 appears to tie the salary to the office rather than to the incumbent. Given these considerations, there is a risk that a court would hold that waiver of the salary of one of the offices would not cure the violation of section 3.220.

Since the penalty for violation of this ordinance would be that the MTA Executive Director, upon assuming the office of Parking Authority Director, would be deemed to have vacated his or her City office, we recommend that the MTA either (1) request an advisory opinion from the Ethics Commission to determine whether the restriction imposed by local law applies, or (2) request a change in local law to authorize the MTA Executive Director to serve simultaneously as the Director of the Parking Authority. In order to amend local law and waive the ban imposed by section 3.220, approval by both the Ethics Commission, by a four-fifths vote, and the Board of Supervisors, by a super-majority or two-thirds vote, is required.

#### **IV. STREETS AND HIGHWAY CODE SECTION 23812 – OPERATING AGREEMENT**

In order to avoid any potential problem discussed above, we recommend that the Parking Authority enter into an inter-agency operating agreement with the MTA. Such an agreement would eliminate any problems posed by local and state law restrictions on holding dual offices and incompatible offices.

The Parking Authority is authorized by state law to hire a Director but is not required to do so. Cal. Sts. & Hy. section 32801. As discussed previously, section 32812 empowers the Parking Authority Commission to enter into an agreement with the MTA to provide all the services and duties currently provided by Parking Authority staff.

The agreement could describe in detail the services that MTA staff would provide and authorize reimbursement for the reasonable value of any services provided. The MTA Executive Director could then direct MTA staff in performing those services and report directly to the Parking Authority Commission under such an agreement.

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Such an agreement is subject to approval by the San Francisco Board of Supervisors. Cal. Sts. & Hy. sections 32812, 32508.

The Parking Authority Commission cannot delegate its authority to the MTA Executive Director but the Commission could establish in the agreement the policies and procedures that would control how the MTA provided its services. As stated previously, the Parking Law of 1949 establishes the powers of the Parking Authority Commission, and the law does not provide for delegation of the Commission's authority to any other person or entity to perform discretionary acts. The Commission's primary responsibilities are to set policies and rates for the parking facilities under its control, review the operating budgets and revenue receipts for those facilities, and approve contracts and leases. These powers cannot be delegated, either to the Director of the Parking Authority, or to another City agency providing administrative services to the Parking Authority. The MTA's Executive Director, therefore, could not approve contracts or perform other discretionary acts on behalf of the Parking Authority. To further facilitate the integration of the Parking Authority's operations into the MTA, however, the Commission could by resolution adopt the MTA's and the City's contracting policies. But all contracts and policy decisions would still have to be approved by the Commission.

**Conclusion**

We hope this information has been of assistance. If you would like to explore any of the options we have discussed, please do not hesitate to contact us. Thank you for your consideration.

Very truly yours,

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