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## MEMORANDUM

TO: HONORABLE GAVIN NEWSOM, Mayor  
HONORABLE GLORIA YOUNG, Clerk of the Board

FROM: BURK E. DELVENTHAL  
AMY S. ACKERMAN  
Deputy City Attorneys

DATE: April 21, 2004

RE: Authority of the Board of Supervisors to Reject Mayoral Appointments to the Small Business Commission

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### Question presented:

Does the Board of Supervisors ("Board") have the authority to reject the Mayor's appointees to the Small Business Commission ("Commission") by a two-thirds vote?

### Short Answer:

A court would likely find that the voters intended that the Board have the authority to reject the Mayor's appointees to the Commission by a two-thirds vote. We base this conclusion on the statement in the ballot digest for the recent Charter amendment creating the Commission that the Board could reject the Mayor's appointees. In the absence of this statement, we would conclude that, consistent with the overall structure in the Charter as amended, the Mayoral appointments are not subject to rejection by the Board, where, as here, the Mayor shares appointments to a commission with other appointing authorities.

### Background:

On November 4, 2003, the voters approved Proposition D. Proposition D, codified in Charter section 4.134, created the San Francisco Small Business Commission.<sup>1</sup> Section 4.134(a) provides, in pertinent part:

The Commission shall consist of seven members, who shall serve at the pleasure of the appointing authority. The Mayor shall appoint four members of the Commission; the Board of Supervisors shall appoint the remaining three members.

We have reviewed a transcription of a portion of the May 7, 2003 meeting of the Rules Committee of the Board of Supervisors during which the proposal that eventually became Proposition D was considered. That transcription contains the following testimony of Bill

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<sup>1</sup> Unless otherwise specified, all further statutory references are to the San Francisco Charter.

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Barnes, aide to Supervisor Daly, who was a sponsor of Proposition D, regarding the process for appointment of Commission members:

The Mayor retains a majority of the appointments on the Commission. These appointments, unlike the Entertainment Commission, do not require Board confirmation. The Mayor would be able to make his or her four appointments and the Board would make its three appointments through the Rules Committee process. And those would happen independently.

On June 17, 2003, the Board of Supervisors voted to place Proposition D on the ballot.

The Ballot Digest for Proposition D prepared by the Ballot Simplification Committee provided, in pertinent part:

The Small Business Commission would have seven members. Four members would be appointed by the Mayor and three by the Board of Supervisors. *The Board could reject the Mayor's appointees by a two-thirds vote.* At least five of the seven Commissioners would own, operate or be officers of a small business located in San Francisco. Only the voters could change the number, qualifications or method of appointment of Commission members, or abolish the Commission.

(San Francisco Voter Information Pamphlet and Sample Ballot, November 4, 2003 Consolidated Municipal Election, p. 75, emphasis added.) The Board of Supervisor's argument in favor of Proposition D stated:

Four commissioners will be appointed by the Mayor; three by the Board of Supervisors. At least six members must be business owners, operators or officers and all the members will have to reflect the neighborhood interests and the diversity of San Francisco.

(*Id.* at p. 76.)

On November 4, 2003, the voters approved Proposition D. You now ask whether the Board of Supervisors may reject the Mayor's appointees to the Commission.

**Analysis**

The Charter prescribes several methods for the appointment of members to the City's boards and commissions. At the time the voters enacted the current Charter in November 1995, the Mayor appointed all members of most commissions.<sup>2</sup> In the 1932 Charter, the Mayor had the

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<sup>2</sup> There were some exceptions. (See §§ 4.121 [the Mayor appoints four members, the President of the Board of Supervisors appoints three members of Building Inspection Commission, as a result of a 1994 Charter amendment that the drafters of the 1996 Charter chose not to alter] 4.123 [the Mayor appoints six members and each member of the Board of Supervisors appoints one member of the Youth Commission, as a result of a Charter amendment occurring at the same election at which the 1996 Charter was approved]; 5.105 [the Fine Arts Museums Board of

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exclusive authority to appoint commissioners. (Former Charter §3.100.) The 1996 Charter, however, effected a change in the balance of power. It added section 3.100(17), which permits the Board to reject by a two-thirds vote most Mayoral appointees to boards and commissions. Section 3.100(17) states that the Mayor shall have the power to, “[u]nless otherwise specifically provided, make appointments to boards and commissions which shall be effective immediately and remain so, unless rejected by a two-thirds vote of the Board of Supervisors within 30 days following transmittal of Notice of Appointment.” Thus, the 1996 Charter gave the Board a role in selecting commissioners.

At the time the voters adopted the current Charter, the Charter sections for nearly all commissions containing members appointed by the Mayor specifically referred to section 3.100 when describing the appointment procedures for the commission.<sup>3</sup> Since 1996, the voters have amended the Charter several times to both add new Charter commissions and change the appointment process for existing commissions. All but one of the new commissions, and all of the commissions whose provisions were amended by the voters, provide that the authority to appoint members is shared by the Mayor and other entities. None of those provisions expressly provides that section 3.100(17) does not apply. (See §§ 4.105 [Mayor nominates three members, President of the Board nominates two members to the Planning Commission, all of whom are subject to Board approval]; 4.106 [Mayor nominates three members, President of the Board nominates two members to the Board of Appeals, all of whom are subject to Board approval]; 4.117 [Mayor nominates four members subject to Board approval and Board appoints three members of Entertainment Commission]; 4.134 [Mayor appoints four members and Board appoints three members to Small Business Commission]; 8A.102 [Mayor appoints seven members, Board of Supervisors confirms members of the directors of the Municipal Transportation Agency after a public hearing]; 13.103.5 [Mayor, Board of Education, Board of

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Trustees shall consist of 62 members to be elected by members of the Board]; 8.103 [ Law Library Board of Trustees, created by state law, consists of seven members of the San Francisco Bar and five *ex officio* members – the Mayor, Presiding Judge, and three judges of the Appellate Department of the Superior Court]; 12.100 [the Mayor appoints three members, subject to §3.100, members of the Retirement System elect three members and a member of the Board of Supervisors serve on the Retirement Board]; and 12.200 [the Mayor appoints two members, subject to §3,100, members of the Health Service System elect three members and a member of the Board of Supervisors and the City Attorney or a designated deputy serve as members of the Health Service Board]; 15.100 [Mayor, Assessor, Board of Supervisors, City Attorney and District Attorney each appoint one member to the Ethics Commission, as a result of a 1993 Charter amendment that the drafters of the 1996 Charter chose not to alter.]

<sup>3</sup> Three Charter sections describing commissions whose members are solely appointed by the Mayor in the original 1996 Charter do not refer to Section 3.100 when describing the appointment process: the Asian Art Commission, which is subject to the provisions of the Avery Brundage Trust which predated the 1996 Charter (see §5.104 [“The Asian Art Commission shall consist of twenty-seven trustees appointed by the Mayor.”]); the Port Commission, which is subject to the provisions of the state Burton Act (see §4.114 [“The Port Commission shall consist of five members who shall be appointed by the Mayor, subject to confirmation by a majority of the Board of Supervisors.”]); and the Ethics Commission, which was added as a Charter amendment in 1993 that the drafters of the 1996 charter chose not to alter (see § 15.100 [“The Mayor, the Board of Supervisors, the City Attorney, the District Attorney and the Assessor each shall appoint one member of the Commission.”]).

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Supervisors, City Attorney, District Attorney, Public Defender and Treasurer each appoint one member of the Elections Commission[.]) Only the Taxi Commission, added by the voters in November 1998, provides that the Mayor appoints all seven members. (Charter § 4.133.)

We now turn to whether Section 3.100(17), permitting the Board to reject the Mayor's appointments by a two-thirds vote, applies to the Mayor's appointments to the Small Business Commission. "[W]e construe a voter-approved amendment to the city charter as we would construe a voter-approved amendment to the state constitution. The voters' intent in approving the measure is our paramount concern. " (*Woo v. Superior Court* (2000) 83 Cal.App.4<sup>th</sup> 967, 975.)

In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. Thus, we turn first to the language of the statute, giving the words their ordinary meaning. The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. When the language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.

(*People v. Rizo* (2000) 22 Cal.4<sup>th</sup> 681, 685, citations omitted.)

Here, the language of Proposition D is ambiguous; it does not specify whether the Mayor's appointees are subject to the provisions of 3.100(17) or to another process. As noted above, the basic model under the 1996 Charter is that the Mayor's appointments to commissions are subject to rejection by the Board by a two-thirds vote. (§3.100(17).) None of the new or amended provisions of the Charter specifically refers to Charter section 3.100. But, with the exception of three commissions, the new or amended provisions specify either that appointments are made under the Commission's particular Charter section – as opposed to section 3.100 – or set a separate confirmation process for mayoral appointees. (See §§4.105 ["The Planning Commission shall consist of seven members nominated and appointed *pursuant to this section.*"]; 4.106 ["The Board of Appeals shall consist of five members nominated and appointed *pursuant to this section.*"]; 4.117 ["The San Francisco Entertainment Commission shall consist of seven members nominated and appointed *pursuant to this section.*"]; 8A.102 ["The [Municipal Transportation] Agency shall be governed by a board of seven directors appointed by the Mayor and confirmed after public hearing by the Board of Supervisors].)

Three commissions, Taxi, Small Business and Elections, to which the Mayor appoints at least one member, do not specify whether the Mayor's appointments are made under section 3.100, their particular sections or under a separate confirmation process. (See §§ 4.133, 4.134, 13.10.5.) The language in those three provisions is ambiguous. We examine the Mayor's appointment power of these three commissions to see how the Small Business Commission compares.

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**Taxi Commission**

As noted above, statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. (*People v. Rizo, supra*, 22 Cal.4<sup>th</sup> 681, 685, citations omitted.) Section 4.133, establishing the Taxi Commission, provides that the Mayor makes all appointments. Although it does not specifically refer to section 3.100(17), nothing in the ballot pamphlet indicates an intent to deviate from the standard appointment model established in section 3.100(17.) (See San Francisco Voter Information Pamphlet and Sample Ballot, November 3, 1998 Consolidated Municipal Election, p. 79 [“The Taxi Commission members would be appointed by the Mayor . . .”].) Accordingly, we previously concluded that the Mayor’s appointments to the Taxi Commission were subject to Board rejection by a two-thirds vote.

**Elections Commissions**

As described above, the Elections Commission has seven members each appointed by elected officials. (See §§13.103.5 [Mayor, Board of Education, Board of Supervisors, City Attorney, District Attorney, Public Defender and Treasurer each appoints one member of the Elections Commission].) As noted above, statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. In addition, we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet. (*People v. Rizo, supra*, 22 Cal.4<sup>th</sup> 681, 685, citations omitted.)

The Proponents Argument in Favor of Proposition E, which established the Elections Commission, stated:

[p]roposition E will create an appointed Elections Commission. The Commissioners will be selected by the Board of Supervisors, the City Attorney, the Public Defender, the District Attorney, the Treasurer, Board of Education, and the Mayor. *Each elected official or body only gets one appointment to the Elections Commission thereby establishing a set of checks and balances that does not allow any official any undue influence on the Commission.*

(San Francisco Voter Information Pamphlet and Sample Ballot, November 6, 2001 Consolidated Municipal Election, p. 60, emphasis added.) Thus, the structure of section 13.103.5 and the Proponent’s Argument, submitted by the Board of Supervisors, demonstrate an intent to create an alternative to the section 3.100 appointment structure. This new structure would ensure that neither the Mayor nor any other single elected official or elective body can control the Commission. The process provides for multiple appointing authorities to reduce real or perceived political influence over the board or commission. Given the special appointment rule and the multiple appointing authorities, it appears that the voters did not intend to allow one appointing authority (the Board) the power to reject appointees of another appointing authority (the Mayor). Accordingly, we conclude that section 3.100(17) does not apply to the Mayor’s appointment to the Elections Commission.

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**Small Business Commission**

Here, too, we consider evidence of the voters' intent to interpret the statutory language . (*People v. Rizo, supra*, 22 Cal.4<sup>th</sup> 681, 685, citations omitted.) In the absence of the Ballot Simplification Digest, we would conclude that the shared appointment process serves as an alternative to the section 3.100 appointment process, consistent with the other new commissions where the Mayor and Board share appointments.<sup>4</sup> As noted above, however, the Ballot Simplification Committee expressly stated that the Mayor's appointees would be subject to Board disapproval. The voters adopted Proposition D based on this analysis. As a result, we have concluded that a court would likely find that the voters intended that the Mayor's appointees be subject to Board disapproval.

It has been suggested that the testimony of Supervisor Daly's aide before the Board committee hearing Proposition D provides evidence of legislative intent that the Mayor's appointments of members to the Commission would not be subject to the Board of Supervisors' power of disapproval under Charter section 3.100. This interpretation is unlikely to persuade a court. First, Barnes' testimony is, arguably, ambiguous. He states that unlike the Entertainment Commission, which requires the Board to confirm the Mayor's appointments before the appointees may serve, the Mayor's appointees to the Small Business Commission do not require Board *confirmation*. He does not explicitly address whether the Mayor's appointments would be subject to rejection, although the implication from his testimony, in particular his comment that the Mayor and Board's appointments would "happen independently," is that they would not.

Second, and more significant, Barnes' testimony was not presented to the voters. In *Robert L. v. Superior Court* (2003) 30 Cal.4<sup>th</sup> 894, 904, the California Supreme Court rejected an interpretation of a voter-approved initiative based on Legislative Committee analysis that was not presented to the voters. The Court stated:

. . . the motive or purpose of the drafters of a statute is not relevant to its construction, absent reason to conclude that the body which adopted the statute was aware of that purpose and believed the language of the proposal would accomplish it. The opinion of drafters or legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent.

(*Ibid.*)

Here, the analysis of Supervisor Daly or his aide was not presented to the voters. Instead, the analysis offered by the Ballot Simplification Committee – that the Mayor's appointees were subject to Board rejection -- was provided to the voters. Thus, a court would likely find that the voters intended the interpretation clearly stated in the Digest. Accordingly, we conclude that the Mayor's appointees are subject to Board rejection by a two-thirds vote.

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<sup>4</sup> Indeed, we so advised former Mayor Brown's Office, before we became aware of the Ballot Digest.

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We hope you have found this information helpful. If we can provide any further assistance, please do not hesitate to call on us.

B.E.D.  
A.S.A.