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MEMORANDUM

TO: Sunshine Ordinance Task Force

FROM: Helen K. Castillo, Deputy City Attorney *HKC*
Marc Price Wolf, Deputy City Attorney *MW*

DATE: November 17, 2021

RE: SOTF as a Policy Body requiring Compliance with the Mayor's October 8, 2021 Order requiring Vaccination for policy body members

We write to confirm our longstanding advice that the Sunshine Ordinance Task Force ("Task Force") is a policy body subject to the open meeting requirements of the Sunshine Ordinance ("Ordinance"), and our recent advice that the Mayor's October 8, 2021 order requiring vaccination for policy body members applies to members of the Task Force. At Task Force meetings in the past several months, the Task Force Chair has stated that the Task Force is not a policy body for several reasons, and recently questioned whether Task Force members are subject to the vaccination requirement. To ensure that the Task Force and the public understand the legal requirements that apply to the Task Force, we briefly respond to each of the Chair's points below.

A. The Task Force Is a Policy Body under the Ordinance.

1. Advisory bodies created by ordinance are "policy bodies" under the Ordinance.

All bodies created by ordinance, however they might be categorized – decision-making, purely advisory, primarily advisory, partially advisory, etc. – are policy bodies. There are no exceptions to this basic principle. The definition of "policy body" in Administrative Code Section 67.3(d)(3) includes "[a]ny board, commission, committee, or *other body* created by ordinance or resolution of the Board of Supervisors." (Emphasis added.) That the next definition of "policy body," in Section 67.3(d)(4), references "advisory" bodies, is of no moment. That provision, covering "[a]ny advisory board, commission, committee or body, created by the initiative of a policy body," addresses when a policy body creates a committee or subcommittee that advises it. The reference to "advisory" bodies in Section 67.3(d)(4) does not negate the definition in Section 67.3(d)(3), which covers bodies – of any type – created by ordinance. Indeed, the reference to "advisory" bodies in Section 67.4 reinforces the fundamental point that advisory bodies are subject to the Ordinance.

There are dozens of advisory bodies created by ordinance, most of them codified in Chapter 5 of the Administrative Code and some located in other parts of the Municipal Code. As the City Attorney's Office has consistently advised, these bodies all are subject to the Sunshine Ordinance and the Brown Act.

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2. The Task Force was created by a Board of Supervisors ordinance, thus is a "policy body" under the Ordinance.

Some members of the Task Force have also suggested that the Task Force is not a "policy body" under Section 67.3 because it was not established by the Board of Supervisors. That argument is factually incorrect. The Task Force was established in Ordinance No. 265-93, which the Board passed in 1993. The Board then amended Section 67.30 of the Ordinance, the section that establishes the Task Force and describes its responsibilities, several times by other Board ordinances before the voters further amended it in 1999 in Proposition G. (See Ordinance Nos. 118-94, 432-94, 287-96, 198-98, and 387-98 – enacted in 1994, 1996, and 1998.)

Consistent with our prior advice, Proposition G did not create the Task Force; the Board created the Task Force by ordinance. Proposition G did amend Section 67.30 to change the composition of the Task Force and to add some provisions regarding Task Force operations and responsibilities, and while one may debate the significance of the changes in the Task Force effected by Proposition G, that debate is not the relevant inquiry here. The relevant inquiry is: did the Board of Supervisors create the Task Force by ordinance? The answer to that inquiry is yes.

The term "create" has a common, well understood meaning, embodied in the dictionary definition: "to cause to come into existence; bring into being; make; originate; esp., to make or design (something regarding art, skill, invention, etc.);" (Webster's New World Dictionary, Third College Edition (1988) 325 [first definition of "create"]). Further, the term "created by" in Section 67.3(d)(3) of the Ordinance arguably has an even broader meaning, or at least a more layered one, than the dictionary definition. Section 54952(b) of the Brown Act has a parallel provision defining a "legislative body" as "[a] commission, committee, board, or other body of a local agency, whether permanent or temporary, decision-making or advisory, *created by* charter, ordinance, resolution, or formal action of a legislative body." (Emphasis added.) Courts have interpreted that provision to mean that "[a] commission, committee, board, or other body of a local agency is 'created by' charter, ordinance, resolution or other formal action of a legislative body if the legislative body "'played a role' in bringing ... 'into existence'" the commission, committee, board, or other body." (*Californians Aware v. Joint Labor/Management Benefits Committee* (2011) 200 Cal.App.4th 972, 978 (emphasis added; citing with approval *Epstein v. Hollywood Entertainment District II Bus. Improvement Dist.* (2001) 87 Cal.App.4th 862, 864, and *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 295, both cases interpreting the term "created by" in another part of the definition of "legislative body").

Thus, however one frames the "created by" issue here – whether the Board ordinance, in the words of the dictionary, "caused [the Task Force] to come into existence," or whether, in the words of the *Californians Aware* opinion, it "played a role in bringing [the Task Force] into existence" – the result is the same: within the meaning of Section 67.3(d)(3), the Board created the Task Force by ordinance.

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3. Even if the Task Force was created by Proposition G, it would still be considered a "policy body" under the Ordinance.

Though it is clear that the Board created the Task Force, the Task Force would be a policy body even if it had been established by Proposition G. Courts will not interpret an ordinance literally if to do so would produce an absurd result. The California Supreme Court has "often said that courts will not give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended." (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276; *Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1064–1065; *People v. Ledesma* (1997) 16 Cal.4th 90, 95; *Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1072; *People v. Pieters* (1991) 52 Cal.3d 894, 898.) *In re J.W.* (2002) 29 Cal.4th 200, 210.) The principle applies to voter-approved measures as well as measures adopted through the normal legislative route. (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 409-410.) Even a law whose meaning is "plain" will not be given a literal construction that is absurd in light of legislative purpose. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

No court would construe the Sunshine Ordinance, which implements principles of open government grandly embraced in Section 67.1 by both "the Board of Supervisors" and "the People of the City and County of San Francisco," as exempting the Task Force from those very principles. The idea that the Task Force might operate in secret, or that it might cut whatever Sunshine corners it wanted to cut, is unimaginable. We would not attribute such an intent to either the Board, the drafters of Proposition G, or the voters who adopted Proposition G, absent the clearest evidence in the legislative record. And there is no evidence of such an intent. Moreover, there is no reason a body created by a voter-approved ordinance – whether the Task Force or another body – should be treated any differently, from an open government standpoint, than bodies created by a Board ordinance.

Section 67.3(d)(3)'s reference to an "ordinance or resolution of the Board of Supervisors" merely indicates the most common method of enacting an ordinance. The only plausible interpretation of Section 67.3(d)(3) is to understand the reference to the "Board of Supervisors" as including the voters when, by adopting an ordinance, they are acting, like the Board of Supervisors, in a legislative capacity. (*Santos v. Brown*, supra, 238 Cal.App.4th at 409 (citation omitted) ["The electorate acts as a legislative entity when it acts through its initiative power."].) We are aware of no indicia in the legislative record that the Board or the voters intended Section 67.3(d)(3) to exclude from its reach multimember bodies created by ordinances adopted by the voters – much less to exempt the Task Force itself.

4. The Ethics Commission has not concluded that the Task Force is not a policy body.

Some members of the Task Force have also asserted that the Ethics Commission has concluded the Task Force is not a policy body, but that is incorrect. In a formal written opinion on November 17, 2017, the Ethics Commission analyzed whether a member of the Task Force was subject to "behested payment" reporting requirements under Campaign and Governmental Conduct Code Section 3.610. That Code section required members of boards and commissions to file reports when they requested charitable contributions from "any party, participant or agent

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of a party or participant involved in a proceeding regarding administrative enforcement, a license, a permit, or other entitlement for use before the Commissioner's board or commission." The Ethics Commission accurately noted that the Ordinance "does not vest the Task Force with authority over any proceedings regarding a 'license, a permit, or other entitlement for use.'" Accordingly, members of the Task Force were not subject to the "behested payment" filing requirement under the Campaign and Governmental Conduct Code.

Nothing in the Ethics Commission's opinion discusses or implies that the Task Force is not a policy body. The Commission's opinion evaluated the application of a separate section of local law that is entirely separate from the Ordinance. The opinion is irrelevant to this question.

B. Members of the Task Force are subject to the vaccination requirement in the Mayor's emergency order.

Finally, members of the Task Force are subject to the Mayor's October 8 order requiring members of City policy bodies to be fully vaccinated by January 1, 2022 in order to attend in-person meetings. The Mayor's order applies to members of any "City Policy Body," which the order defines to include any "City board, commission, committee, task force, or other legislative or policy body established by the Charter, City ordinance, or California statute and that is subject to the open meeting requirements of the Ralph M. Brown Act (Cal. Govt. Code §§ 54950 et seq.)." As discussed above, the Task Force is a body established by City ordinance that is subject to the open meeting requirements of the Brown Act—which means the Task Force is a "City Policy Body" under the order. Task Force members are subject to the requirements of the order. As noted in the order, failure to comply is official misconduct.