

**Office of the City Attorney
CITY OF RICHMOND**

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**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT PRIVILEGE/ATTORNEY WORK-PRODUCT**

MEMORANDUM

DATE: March 3, 2008

TO: Tom Butt, Councilmember

FROM: K. Scott Dickey, ^{KSD}Chief Deputy City Attorney
Carlos A. Privat, Assistant City Attorney

SUBJECT: Mayoral Appointment Powers – Design Review Board and Planning Commission

You have posed five questions to this Office regarding mayoral appointments and the possible assumption of Design Review Board functions by the Richmond Planning Commission. Those questions, presented via e-mail, are:

1. Can the City Council effectively block the mayor's Charter derived authority to appoint board and commission members by extending the terms indefinitely of termed out members appointed by a previous mayor and consistently refusing to ratify any proposed appointments by the current mayor?
2. Question: Assuming the Design Review Board – Planning Commission merger is adopted, can the City Council (a) specify that the membership consist of the specific individuals currently serving on the Design Review Board and Planning Commission, and (b) continue to block the mayor's Charter derived authority to appoint board and commission members by extending the terms of termed out members appointed by a previous mayor indefinitely and refusing to ratify any proposed appointments by the current mayor?
3. What constitutes a legal quorum for each of the two bodies?
4. What happens if the number of members is reduced below a legal quorum by attrition?

5. Does the Charter require 3 or 4 concurring votes for a mayoral appointment to a board or commission?

SHORT ANSWERS

1. The City Council has broad authority to reject a mayoral appointee; that a sitting board- or commission- member's term has expired does not affect the power to reject appointees, because the City Council has authorized sitting members to keep their positions until a replacement has been appointed.
2. The City Council may not require the appointment of sitting Design Review Board members to the Planning Commission as a condition of the "merger." The Mayor alone has the authority to appoint planning commissioners, subject to City Council confirmation.
3. As currently constituted, three members form a quorum of the Planning Commission, and four members form a quorum of the Design Review Board.
4. If the number of sitting members falls below the number required for a quorum, the body may not meet or conduct business.
5. Currently, mayoral nominations require four concurring votes for appointment. After the November 2008 election, the number of concurring votes required will drop to 3, by operation of Richmond Charter Article III-A, Sec. 2(c).

DISCUSSION AND ANALYSIS

1. City Council Input Into Mayoral Appointments.

Article III-A of the Richmond Charter addresses the Mayor's power to appoint members to boards and commissions, and the City Council's ability to affect those appointments:

The Mayor shall have the authority at any regularly scheduled meeting of the City Council to make appointments to or removals from all City boards, commissions and committees with the concurrence of at least four (4) other members of the City Council.¹

By its express terms, the Charter makes Council approval of appointees mandatory; no mayoral appointee may take a seat on a board or commission absent such confirmation. (*Id.*)

The Charter provides no guidance as to standards for confirmation, or the reasons under which a councilmember may refuse to confirm a mayoral nominee, and no state laws

¹ In November 2004, the City's voters adopted an amendment to reduce the number of concurring votes from four to three along with the reduction in the total number of Council members.

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speak to the issue. Generally, legislative decisions are afforded a great deal of deference; a reviewing court will overturn decisions only if the decision is arbitrary, capricious, without evidentiary support or procedurally unfair. (*Plastic Pipe & Fittings Assn. v. California Building Standards*, 124 Cal. App. 4th 1390, 1406 (2004).) The council's refusal to confirm appointees would need to rise to the level of a refusal to act as required by law – such as by refusing even to consider an appointee (*see* 3 McQuillin, *Municipal Corporations* (3rd ed. 2001), at § 12.87, pp.475-476 [refusal to confirm appointee must be made in good faith]) – before the law could provide a remedy. Under that circumstance, the Mayor or a citizen may seek to compel the Council to act by bringing a writ petition, but the ordinary rejection of nominees will not likely reach that threshold.

That the rejection of a mayoral appointee may result in the holdover of a board- or commission-member whose term has expired does not render that rejection improper. At its May 1, 2007 meeting, the Council voted 6-2 to reaffirm the City's longstanding unwritten policy allowing all board, commission, and committee members to remain in their seat even beyond their terms until a replacement is appointed. (See City of Richmond Resolution No. 48-07.)

2. The Effect of the Proposed Planning Commission-Design Review Board "Merger."

Later this year, the City Council will consider an ordinance that repeals the legislation creating the Design Review Board and reassigns that Board's powers and duties to the Planning Commission. If the Council adopts this ordinance, the Design Review Board will cease to exist, and all of its sitting members will lose their status as Board members.

The City Council may not require that the sitting Design Review Board members become Planning Commission members upon the adoption of the ordinance. As explained above, the Charter grants sole appointing authority to the Mayor. An ordinance that installed existing Board members to the Planning Commission would constitute an improper arrogation of mayoral authority, and would violate the Charter. The Mayor also cannot delegate this core executive power to the Council.

Upon adoption of the ordinance, therefore, the Mayor will have the power to make several new appointments to the Planning Commission. Currently, the Commission has four members. Of the four, one is serving under an expired term. The terms of the remaining three members expire on June 30, 2008. Under Richmond Municipal Code section 3.20.030, the one holdover member serves until a successor is appointed and confirmed or that member is formally removed. The three open positions are subject to appointment as set forth above.

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3. Quorum Requirements for the Planning Commission and the Design Review Board.

a. Planning Commission.

Richmond Municipal Code section 3.20.060 concerns the Planning Commission's quorum requirements: "A majority of the currently serving members of the Commission shall constitute a quorum for the conduct of business, provided however that a quorum shall never be fewer than three (3) members." Currently, the Planning Commission has four sitting members. Thus, three members must be present to constitute a quorum.

b. Design Review Board

Under Richmond Municipal Code section 15.04.930.70, the Design Review Board consists of seven members. Board Rule 2.7 provides that a quorum is a majority of the members, meaning that four sitting members must be present to constitute a quorum, and all four members must vote unanimously on any item for it to pass.

4. Effect of Loss of Sufficient Members to Constitute a Quorum.

The Brown Act (Cal. Gov. Code §§ 54950 *et seq.*) requires the attendance of a majority of the members of a body before that body can meet and conduct business. If the Planning Commission loses two members or the Design Review Board loses a single member through attrition, they will fall below their quorum requirement and will not be able to meet or conduct business.

5. Required Concurrences for Confirmation of Mayoral Appointees.

As explained above, the Charter currently requires that four council members concur in a mayoral appointment. (See Article III-A, Section 2(c).) This number will fall to three after the November 2008 election, when the total number of council members falls from nine to seven. (*Id.*, [reflecting change in concurrence requirements with the November 2008 election].)

Please let us know if you would like this memorandum distributed to the entire City Council.