MEMORANDUM OF LAW

DATE: February 29, 1996

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: San Diego Convention Center Corporation Assignment of Contractual Obligations Regarding Civic Theater

INTRODUCTION

During Council Comment at the City Council meeting of February 5, 1996, Councilmember Judy McCarty stated that she had heard that the San Diego Convention Center Corporation ("SDCCC") intended to assign management of the Convention and Performing Arts Center facilities at the Concourse (the "CPAC Facilities") to a third party without the consent of the City Council. This office was asked to investigate and report back to Council as to whether the SDCCC has the power to take such unilateral action.

QUESTION PRESENTED

May the SDCCC assign its contractual obligations for day-to-day management, operation and maintenance of the CPAC Facilities to a third party without the consent of the City?

SHORT ANSWER

Under California law and the terms of the contracts between the City of San Diego ("City") and the SDCCC, the day-to-day management, operation and maintenance of the CPAC Facilities may not be assigned to a third party without the consent of the City.

ANALYSIS

A. Background

The City Council formed the SDCCC in 1988 to manage the newly-constructed waterfront San Diego Convention Center ("Convention Center"). The terms under which the SDCCC would perform these services are currently memorialized in a First Amended Agreement between the City and the SDCCC, dated May 21, 1990, a copy of which is on file with the City Clerk as Document No. R-275740 (the "Agreement"). By Amendment dated November 15, 1993, (the "Third Amendment," on file with the City Clerk as Document No. RR-283012-2), the Agreement was amended to add to the SDCCC's responsibility the operation and management of the Civic Theater and other facilities in the Convention and Performing Arts Center in downtown San Diego (the "CPAC Facilities"). This amendment

adds an "Article VI" to the Agreement and provides, among other things, that the services already required of the SDCCC with respect to the Convention Center, under Sections 2.01 through 2.15 of the Agreement, are also required of the SDCCC with respect to the CPAC Facilities.

The term of the Agreement, with respect to the CPAC Facilities, is a rolling ten-year period which commences annually on July 1 of each year the Agreement is in effect. (Third Amendment, Section 6.14). Either party, however, may terminate the Agreement entirely (as to both the Convention Center and the CPAC Facilities) upon ninety (90) days written notice to the other party (Agreement, Section 1.01).

Recently it has come to the attention of the City Council that the SDCCC intends to assign to a third party its day-to-day operation and maintenance obligations with respect to the CPAC Facilities, and specifically the Civic Theater, apparently without first obtaining the City's consent to the assignment. In a letter dated February 7, 1996 (attached as Exhibit "A"), counsel for the SDCCC Board of Directors has opined that such an assignment would be proper without the City's consent.

B. Legal Analysis

California Civil Code section 1457 provides that: "The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise ...."

This is consistent with longstanding California law recognizing that a contract for personal services ordinarily may not be transferred or assigned by the obligor to another party without the consent of the party to whom the services are owed. See Haldor, Inc. v. Beebe, 72 Cal. App. 2d 357, 366 (1942) and Rokos v. Peck, 182 Cal. App. 3d 604, 617 (1986) (stating the general rule). Even if there is no explicit agreement that the contract shall be personal, and thus not freely assignable, the courts will effectuate a presumed intent to this effect if the circumstances indicate that performance by a substituted person would be different from that contracted for, Masterson v. Sine, 68 Cal. 2d 222, 230 (1968), or if there are equivalent expressions or language which exclude the idea of performance by another, LaRue v. Groezinger, 84 Cal. 281, 283-284 (1890).

The obligations imposed upon the SDCCC by the Agreement include, among other things, the covenants to:

7 "provide general management and other staff services necessary to support the marketing, operation, and maintenance" of the Convention Center and the CPAC Facilities (section 2.01(a)),

7 "provide overall executive direction" for the Convention Center and the CPAC Facilities, "report and recommend directly to City on, and carry out these matters," "employ necessary personnel," and "retain, when necessary, appropriate consultants and experts" (section 2.01(b)(i)-(iii)),

7 "supervise and administer the day-to-day operational activities needed to conduct" Convention Center and CPAC Facilities activities (section 2.01(g)),

7 "exclusively prepare, promulgate and administer policies that include but are not limited to the following: marketing, booking and rentals; operation and maintenance procedures and regulations; proposed exhibition space rental fees and catering commissions; description and selection of any consulting or other services to be provided" (section 2.01(i)), and

7 "purchase a Faithful Performance Bond insuring itself and City against loss in the amount of at least One Hundred Thousand Dollars ($100,000) per employee in a form approved by City" (section 2.10).

A contract must be construed as a whole, and detached words or clauses standing alone are not controlling on the question of its interpretation. Cedars-Sinai Medical Center v. State Board of Equalization, 162 Cal. App. 3d 1182, 1188 (1984). In this Agreement the clause allowing the SDCCC to retain consultants and experts is separate and distinct from--and does not modify--the clause requiring them to supervise and administer the day-to-day operations of the CPAC Facilities. The exclusivity of performance by the SDCCC is further expressly required under section 2.01(i). If all of these clauses in the Agreement are read together, the contract must be interpreted to limit those duties and functions which the SDCCC may delegate to third parties. Consultants and experts might be retained, certainly, but the administration of day-to-day operations is plainly and exclusively left in the hands of the SDCCC.

Exhibit "A," representing the SDCCC's apparent position, cites only certain provisions of the Agreement. The SDCCC then infers from those provisions that it can, as part of its "overall executive direction," hire outside personnel, classifying them as "consultants and experts", to perform the day-to-day functions of operation and management. Exhibit "A," however, ignores that part of section 2.01(b) which states that the words "overall executive direction" do not limit the "generality" of the SDCCC's obligation to "provide general management and other staff services," and further would read out of the Agreement entirely section 2.01(g), which calls upon the SDCCC to perform the day-to-day operational services.

Exhibit "A" also cites, but misinterprets, section 2.01(i), which requires the SDCCC "exclusively" to prepare, promulgate and administer policies regarding operations and maintenance. The SDCCC construes this directive as a grant of "exclusive authority", but in fact it is an exclusive obligation. The SDCCC, and only the SDCCC, shall administer policies regarding operations and maintenance, in the same fashion as it is obligated to administer the day-to-day operations and maintenance

under section 2.01(g).

The circumstances under which the Agreement was created are also relevant to determining that the day-to-day obligations under the contract cannot be freely assigned by the SDCCC. Cedars-Sinai, 162 Cal. App. 3d at 1187; Masterson v. Sine, 68 Cal. 2d at 230. The SDCCC is a creature of the City, formed and retained to serve the interests of the City and its inhabitants (Agreement, Recital B). Prior to assigning the management and day-to-day operations of the CPAC Facilities to the SDCCC, the City itself was responsible for the CPAC Facilities' management and operations. When in 1993 the City decided to turn the operations of the CPAC Facilities over to the SDCCC, it gave to the SDCCC the right to determine the policies and procedures under which the CPAC would be operated. It was the City's stated intent, however, "that operation of the San Diego Concourse be consolidated with the San Diego Convention Center," and it was "anticipated that the transfer of responsibility for operation and management of the San Diego Concourse to the SDCCC will not impact service level to the citizens of San Diego . . . ." (Manager's Report No. 93-307, November 10, 1993).

Turning over the operations and management of the CPAC Facilities to a third party would frustrate the intent to "consolidate" these operations with those of the Convention Center. Moreover, it removes a critical level of direct accountability by the SDCCC to provide services that will not adversely impact the citizens of San Diego. Indeed, to ensure that accountability, the City requires, among other things, procurement of a Faithful Performance Bond for each of the SDCCC's employees (Agreement, section 2.10). The quality of the service by these employees is thus paramount among the concerns of the City with respect to the operation and management of the CPAC Facilities. The City's ability to assure itself of that quality is undermined if the SDCCC can, without the consent of the City, devolve those responsibilities to a third party (whose obligations would not be so insured) to perform the broad spectrum of day-to-day management and operational functions of the CPAC Facilities.

CONCLUSION

Both the terms of the Agreement, and the underlying circumstances of its creation, evidence the intent of the parties that the SDCCC, and not a third party, would perform the day-to-day operations and management of the CPAC Facilities. The City looks to the SDCCC for quality day-to-day management that will advance the interests of the City's inhabitants. The allowance that the SDCCC may retain consultants and experts "when necessary" is "not a limitation on the generality" of either the SDCCC's personal obligation to provide "general management and other staff services" in section 2.01(a) or its obligation to "supervise and administer the day-to-day operational activities" of the CPAC Facilities under section 2.01(g).

Put simply, the SDCCC is empowered to retain whatever consultants and experts it deems advisable to aid its own performance under the Agreement. The SDCCC has further been given the exclusive authority and obligation to promulgate the policies and procedures by which it will manage and operate the CPAC Facilities. For those decisions they need not seek the City Council's approval, nor may the City Council directly control the performance of duties by the SDCCC or the implementation of its policies and procedures. The Agreement does not allow, however, expressly or by implication--nor does the City expect--that the ability to retain "consultants and experts" or promulgate policies and procedures translates into an unfettered ability to assign away its obligations for the actual day-to-day operation and maintenance of the CPAC Facilities.

Under California law, therefore, without the City's consent such an assignment cannot be effective. In the event such an assignment were attempted, and the City Council did not concur in the assignment, the City's remedies would include, as set forth previously in this memorandum, the termination of this Agreement by written notice to the SDCCC, effective ninety (90) days from the SDCCC's receipt of such notice, or other actions to enforce the terms of the contract and prohibit the assignment.

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By
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Attachment-Exhibit A
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