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April 23, 2010

Mr. Gregory Schmidt
Secretary of the Senate
State Capitol, Room 400
Sacramento, CA 95814

HIGH-SPEED RAIL AUTHORITY: DUAL OFFICE HOLDING - #1008976

Dear Mr. Schmidt:

You have asked whether an individual who is the Mayor of the City of Anaheim or a member of the Los Angeles County Metropolitan Transportation Authority may simultaneously serve as a member of the High-Speed Rail Authority.

By way of background, the High-Speed Rail Authority (hereafter HSRA) is established pursuant to the California High-Speed Rail Act (Div. 19.5 (commencing with Sec. 185000), P.U.C.) to develop and implement high-speed intercity passenger train service. HSRA is governed by nine members, appointed by the Governor, the Senate Committee on Rules, and the Speaker of the Assembly (Sec. 185020, P.U.C.). When making appointments to the board, the appointing authorities are required to consider "geographical diversity to ensure that all regions of the state are adequately represented" but are not otherwise limited with respect to the qualifications of their appointees (Ibid.).

The City of Anaheim is a charter city governed by a city council of five members, including the mayor, all of whom are elected at large for no more than two consecutive four-year terms (Sec. 500, Anaheim City Charter). The Los Angeles County Metropolitan Transportation Authority (hereafter Metro) is established pursuant to the County Transportation Commissions Act (Div. 12 (commencing with Sec. 130000), P.U.C.) with various transportation planning and transit operations responsibilities in the County of Los Angeles, including operation of the county's largest public transit system. Metro is governed by a board of 14 members, including the five members of the Los Angeles County Board of Supervisors, the Mayor of the City of Los Angeles, two public members and one member of the Los Angeles City Council appointed by the mayor, four elected city council members or mayors from other cities in Los Angeles County appointed from specified sectors of the county by the Los Angeles County City Selection Committee, and a nonvoting member appointed by the Governor (Sec. 130051, P.U.C.).

Nothing in the California Constitution or statutes or in the charter of the City of Anaheim expressly precludes an individual from simultaneously serving as a member of HSRA and as the Mayor of the City of Anaheim or as a member of the board of Metro. However, in 2005, the Legislature codified the longstanding common law prohibition against simultaneously holding incompatible public offices (see *People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d. 636, 641-642; hereafter *Rapsey*) by enacting Section 1099 of the Government Code (hereafter Section 1099), as follows:

> "1099. (a) 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.
>
> "(b) When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second. This provision is enforceable pursuant to Section 803 of the Code of Civil Procedure.
>
> "(c) This section does not apply to a position of employment, including a civil service position.
>
> "(d) This section shall not apply to a governmental body that has only advisory powers.
>
> "(e) For purposes of paragraph (1) of subdivision (a), a member of a multimember body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office.
>
> "(f) This section codifies the common law rule prohibiting an individual from holding incompatible public offices." (Emphasis added.)

The general prohibitions against holding incompatible offices concern the clash of duties and loyalties of two "public offices" simultaneously held by a single individual.[1] A public office is a position created by law that delegates to the person holding the position the authority to perform a duty or function constituting the exercise of an aspect of governmental sovereignty (*Kirk v. Flournoy* (1974) 36 Cal.App.3d 553, 557).

Under the common law doctrine of incompatibility of public offices, offices are generally considered incompatible where their duties and functions are inherently inconsistent and repugnant so that, because of the antagonism that would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. The basis of the rule of incompatibility of offices does not lie in the physical impossibility to discharge the duties of both, but rather in a conflict of interests or a conflict in the duties of the offices, as where one is subordinate to the other or subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other (see *Rapsey*, supra, at p. 641; *People v. Bagshaw* (1942) 55 Cal.App.2d 155; *People v. Thompson* (1942) 55 Cal.App.2d 147; *People v. Garrett* (1925) 72 Cal.App. 452, 456).

Generally speaking, incompatibility of office is found by examining the character of the offices and their relation to each other. The existence of an actual conflict is not necessary if, by the nature of the offices and their duties, the potential for a conflict exists, as noted in *Rapsey*, supra, as follows:

> "Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them." (Id., at pp. 641-642; emphasis added.)

There is some precedent for applying the common law doctrine of incompatibility to the situation where dealings and transactions will or may occur between two offices. The Supreme Court of New Jersey had such an issue before it in the case of *McDonough v. Roach* (N.J. 1961) 171 A.2d 307. In that case, a person was both a member of the county board of

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[1] You did not ask, and this opinion will not address, whether a specific individual has any particular issues regarding incompatible activities or private interests with respect to any public office.

freeholders (governing board of the county) and mayor of a municipality located in the county. The dual office holding was held to involve incompatibility under the common law doctrine on the basis of the contractual relations and other dealings that would or could occur between the city and county. Under the scheme of the statutory law applicable to the governmental entities, transactions and dealings between the two were contemplated in regard to numerous subjects. The court stated the following at pages 309 and 310:

> "In all of these matters the terms upon which the project is to be pursued are left to the agreement of the public bodies. In the negotiations the county board is bound to consider the interests of all of its citizens while the local governing body has a like obligation to the citizenry of the municipality alone. No man, much less a public fiduciary, can sit on both sides of a bargaining table. He cannot in one capacity pass with undivided loyalty upon proposals he advances in his other role. . . . The offices are accordingly incompatible.
>
> * * *
>
> "It is of no moment that the statutes listed above do not mandatorily require the political divisions of government to act. A power to act imports a duty to act when the public interests suggest to the unfettered official judgment that something should be done. If anything, the existence of discretion as to whether, when, and upon what basis to act, calls for a greater margin of freedom from the distracting demands of another office. The significant fact is that the Legislature entrusted these matters to the judgment of the several public bodies and thereby charged their officers with the obligation to exercise their authority in the best interests of their respective constituents. Hence, ... the offices are incompatible 'in the rights, duties, or obligations connected with or flowing out of them.'"

The court held that the common law doctrine was not limited to cases in which one office is subordinate to the other, but "embraces as well all situations in which under the established scheme of government 'the duties of the offices clash in their demands with the result that the incumbent must choose between them. . . . An officer cannot serve two masters with conflicting statutory roles'" (Id., at pp. 308-309).

Each of the positions in question here, other than the nonvoting member of Metro, exercises an aspect of governmental sovereignty and thus constitutes a public office for the purpose of this analysis.[2] Existing law does not expressly authorize the same individual to simultaneously serve as a member of the HSRA and as Mayor of the City of Anaheim or as a

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[2] The member of the board of Metro appointed by the Governor has no voting rights. Our analysis, therefore, is limited to those members of Metro with voting rights.

member of the board of Metro,[3] and therefore we must address whether the general prohibitions under Section 1099 and common law against the simultaneous holding of two offices by one individual apply to those offices.

The high-speed rail project being undertaken by HSRA includes, as the first phase of the project, the corridor between San Francisco Transbay Terminal, Los Angeles Union Station, and Anaheim (para. (2), subd. (b), Sec. 2704.04, S.& H.C.). The project is designated to receive funding from both the Safe, Reliable, High-Speed Passenger Train Bond Act for the 21st Century (Ch. 20 (commencing with Sec. 2704), Div. 3, S.& H.C.) and from the federal American Reinvestment and Recovery Act (P.L. 111-5). The HSRA has various powers and responsibilities with respect to the project, including acquisition of rights-of-way through purchase or eminent domain and entering into cooperative agreements or joint development agreements with local governments or private entities (Sec. 185036, P.U.C.).

The City of Anaheim is designated as the southern terminal of the first phase of the high-speed rail project. The Mayor of the City of Anaheim is one of the elected members of the Anaheim City Council, the body with general governing authority over the City of Anaheim under its city charter. Transactions and dealings between the HSRA and the City of Anaheim will likely be required to bring the high-speed rail project into the city, and those activities will be subject to approval by both the board of the HSRA and the Anaheim City Council. As an example, the HSRA might prefer the City of Anaheim to partially or fully fund the station to be used by high-speed trains in Anaheim, while the City of Anaheim might view the high-speed rail project as a potential source of funding for the station. Thus, there is reasonable potential for a conflict between the local views of the City of Anaheim on the high-speed rail project and the views of a body such as HSRA with a statewide perspective. Unlike the mayor or a city council member of a city substantially removed from the route of the high-speed rail system as currently contemplated, we think the potential for conflict between the HSRA and the City Council of Anaheim is sufficient, pursuant to paragraph (2) of subdivision (a) of Section 1099, to create the possibility of a significant clash of duties or loyalties for the Mayor of the City of Anaheim simultaneously serving as a member of the HSRA. Therefore, we think a court could reasonably determine that the two offices are incompatible under that section and the common law doctrine of incompatibility of public offices, and that the same individual may not hold both offices simultaneously. The absence of actual conflict does not avoid the prohibition (see *Rapsey*, supra, at pp. 641-642).

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[3] The two offices would be deemed not incompatible if, for example, a statute either compelled or expressly authorized an individual to simultaneously serve on the HSRA board and as mayor (subd. (a), Sec. 1099, Gov. C.). For example, the statute prescribing the membership of the board of Metro specifies that certain individuals already holding an elective office shall also serve on the board (Sec. 130051, P.U.C.). Likewise, a voting member of the California Transportation Commission may serve on the HSRA board (subd. (c), Sec. 14502, Gov. C.).

With respect to a member of the board of Metro, the potential for conflict is similar. Metro has countywide jurisdiction over a number of transportation matters in Los Angeles County and, among other things, is one of the member agencies of the Southern California Regional Rail Authority, the joint exercise of powers agency that operates the Metrolink commuter rail network (Sec. 14072, Gov. C.; Sec. 130255, P.U.C.). Not only do Metro transit operations and Metrolink trains operate into Los Angeles Union Station, which is to be served by the high-speed rail trains, but the railroad rights-of-way owned, controlled, or used by Metrolink or its member agencies such as Metro likely will be contemplated by HSRA as the routings for high-speed rail alignments into and through Los Angeles County. Transactions and dealings between the HSRA and Metro will likely be required to bring the high-speed rail project into Los Angeles County, and those activities will be subject to approval by both members of the HSRA and the board of Metro. As an example, the HSRA might prefer Metro to fund certain costs associated with the high-speed rail project along Metro-owned rights-of-way, while Metro might view the high-speed rail project as a potential source of funding for costs Metro would otherwise incur for its own rail or transit operations. This creates the possibility of a significant clash of duties or loyalties for a board member of Metro simultaneously serving as a member of the HSRA. Therefore, we think a court could reasonably determine that the two offices are incompatible under Section 1099 and the common law doctrine of incompatibility of public offices. As with the case of the City of Anaheim, the absence of actual conflict does not avoid the prohibition.

Accordingly, it is our opinion that an individual who is the Mayor of the City of Anaheim or a voting member of the Los Angeles County Metropolitan Transportation Authority may not simultaneously serve as a member of the High-Speed Rail Authority under the common law doctrine of incompatibility of public offices that is now codified in Section 1099 of the Government Code.

Very truly yours,

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By
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LEL:pjb