

Date of Hearing: May 6, 2015

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Brian Maienschein, Chair

AB 504 (Gonzalez) – As Amended March 26, 2015

**SUBJECT:** Local planning.

**SUMMARY:** Authorizes a city to delegate to or contract with a nonprofit public benefit corporation for certain administrative or ministerial planning functions, and requires a city to retain all nonadministrative or nonministerial planning functions. Specifically, **this bill:**

- 1) Allows a city to delegate to, or authorize pursuant to a contract with, a nonprofit public benefit corporation, as defined, the performance of administrative or ministerial planning functions and powers.
- 2) Requires a city to retain all nonadministrative or nonministerial planning functions.
- 3) Requires a nonprofit public benefit corporation performing administrative or ministerial planning functions and powers to comply with the city's charter, contracting rules, municipal code, ordinances, and any other applicable parts of a general plan, community plan, specific plan, or other plan, and all applicable local and state laws, including, but not limited to, the California Public Records Act, and the Ralph M. Brown Act.
- 4) Requires any planning action taken by a nonprofit public benefit corporation to be appealable to the legislative body of the city.
- 5) Requires, on or before July 1, 2016, and annually thereafter for as long as the planning functions and powers continue to be delegated or an authorizing contract is in effect pursuant to 1), above, a nonprofit public benefit corporation to report to the legislative body of the city on its planning functions it has undertaken in the previous calendar year that includes, but is not limited to, a detailed description of each planning function and an explanation of how it is consistent with the city's charter, municipal code, ordinances, and any applicable parts of a general plan, community plan, specific plan or other plan, and all applicable local and state laws.
- 6) Requires each report to be reviewed and approved by the legislative body of the city at a noticed public hearing.
- 7) Defines a nonprofit public benefit corporation as a corporation organized under the Nonprofit Public Benefit Corporation Law.
- 8) States that the Legislature hereby finds and declares that maintaining uniformity in the planning responsibilities of cities within this state, including charter cities, has a direct impact on the well-being of all residents of this state, and that the Legislature finds and declares that authorizing a city to delegate to, or authorize pursuant to a contract with, a nonprofit public benefit corporation the performance of administrative or ministerial planning functions and powers within the State of California is an issue of statewide concern and not a municipal affair. Declares that this act shall apply to every city in this state, including a charter city and charter city and county.

**EXISTING LAW:**

- 1) Allows a city to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.
- 2) Establishes the Nonprofit Corporation Law in the Corporations Code, and allows a nonprofit public benefit corporation to be formed under the law for any public or charitable purposes, as specified.

**FISCAL EFFECT:** None

**COMMENTS:**

- 1) **Bill Summary.** This bill allows cities to delegate to, or authorize pursuant to a contract with, a nonprofit public benefit corporation (nonprofit corporation), as defined, for the performance of administrative or ministerial planning functions and powers, and requires cities to retain all nonadministrative or nonministerial planning functions. Should a nonprofit corporation undertake administrative or ministerial planning functions, the bill requires the nonprofit to comply with the city's charter, contracting rules, municipal code, ordinances, and any other parts of a general plan, community plan, specific plan, or other plan, and all applicable local and state laws, including, but not limited to, the California Public Records Act and the Ralph M. Brown Act. The bill requires any planning action taken by a nonprofit corporation to be appealable to the legislative body of the city, and requires the nonprofit corporation to report annually to the city on the planning functions it has undertaken in the previous calendar year, and how those actions are consistent with the city's charter, municipal code, ordinances, and other specified plans and laws. This bill states that this subject of delegation of powers is an issue of statewide concern, and not a municipal affair, and thereby, the bill's provisions would apply to all cities in California, including charter cities.

This bill is an author-sponsored measure.

- 2) **Nonprofit Public Benefit Corporations and Background on Civic San Diego.** Existing law allows a nonprofit public benefit corporation to be formed under the Nonprofit Corporation Law contained in the Corporations Code, for any "public" or "charitable" purposes.

The City of San Diego formed Centre City Development Corporation (CCDC) in 1975 and the Southeastern Economic Development Corporation (SEDC) in 1980, to provide economic development services. The City, over time, delegated some land use approval functions to both CCDC and SEDC, and in 2012, CCDC was renamed to Civic San Diego, and SEDC was merged into Civic San Diego.

Civic San Diego is a nonprofit public benefit corporation, formed under the California nonprofit public benefit corporation law, and is organized and operated exclusively for charitable purposes. Civic San Diego has one single member that has voting rights – the City of San Diego. Civic San Diego is not a city department, and Civic San Diego employees are not City employees. In recent years, Civic San Diego has been carrying out much of the winding down of the City of San Diego's former redevelopment agency (RDA), under a consultant agreement with the Successor Agency and Housing Successor Agency, and has

recently expressed an interest in expanding its scope beyond its current role into the neighborhoods of Encanto and City Heights.

On April 10, 2015, a petition was filed in the Superior Court of California, County of San Diego by the San Diego County Building & Construction Trades Council, AFL-CIO, and Murtaza Baxamusa, Ph.D., a Director on the Civic San Diego Board of Directors, against Civic San Diego and the City of San Diego for declaratory relief concerning: (1) The scope and oversight of Civic San Diego; (2) Conflicts of interest inherent and internal to Civic San Diego; (3) The entitlement to a community benefits plan; and, (4) The entitlement to a formal appeals process for decisions made by Civic San Diego.

- 3) **Author's Statement.** According to the author, "Prior to the dissolution of statewide redevelopment, California allowed cities and counties the authority to establish redevelopment agencies (RDAs) in order to eliminate blight through development, reconstruction and rehabilitation of residential, commercial, industrial and retail districts. These activities were funded by local property taxes and subject to city or county approval.

"After the dissolution of redevelopment, the organizations that the City of San Diego used to administer its RDA program merged to form a nonprofit organization that is now known as Civic San Diego—which has land use authority in various San Diego neighborhoods to perform planning, zoning and permitting functions. Despite the dissolution of redevelopment, Civic San Diego has continued to permit development but without the benefit of local property tax financing.

"In an effort to replace this lost funding, Civic San Diego successfully applied for roughly \$58 million in federal new market tax credits, which are required to be used in low-income communities. However, unlike redevelopment funds, allocating these tax credits does not require approval by the city council, nor does AB 504 seek to require city council approval of the purpose.

"Moreover, Civic San Diego has pursued plans to expand their permitting and planning authority to include the City of San Diego neighborhoods of City Heights and Encanto. Using new market tax credits and bank loans, Civic San Diego has begun putting together a \$100 million investment fund to finance development projects that it could potentially have the ability to permit and approve without oversight by the city council, which voters elected to make decisions regarding the planning, zoning and permitting of development in their neighborhoods.

"California's decision to end redevelopment eliminated requirements regarding community reinvestment work done by groups like Civic San Diego. As it stands now, if residents do not agree with what Civic San Diego has planned for their community, they can only go to the board of directors of this nonprofit organization—which is not accountable to the city council that was elected to be stewards of the city's development.

"Civic San Diego's potential authority to dramatically engineer the future of neighborhoods with little supervision or accountability presents a serious conflict of interest. Furthermore, the City of San Diego's arrangement with Civic San Diego is comparatively new, unique in the State of California, and has not been sufficiently examined. Local leaders and good government advocates have even openly questioned the legality of the arrangement.

"AB 504 will address this conflict of interest and clarify state law for future local government arrangements by requiring any zoning, planning and permitting activity by a private individual or nonprofit organization made on behalf of a local government to earn final approval by the local government's governing board before implementation."

- 4) **Delegation of Land Use Powers and Legislative Counsel Opinion.** The California Constitution allows a city to "make and enforce within its limits, all local, police, sanitary, and other ordinances and regulations not in conflict with general laws, known as the police power of cities." It is from this fundamental power that local governments derive their authority to regulate land through planning, zoning, and building ordinances, thereby protecting public health, safety and welfare.

The California Supreme Court has stated:

Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. Apart from this limitation, the "police power [of a county or city] under this provision...is as broad as the police power exercisable by the Legislature itself. *Candid Enters., Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 885 (1985).

A city must act within all applicable statutory provisions so there will be no conflict with general laws. A city's actions must also meet constitutional principles of due process; they must be reasonable and nondiscriminatory, and not arbitrary or capricious.

A city also has the authority to enter into contracts that enable it to carry out its necessary functions. A city's authority to enter into such contracts is not absolute, and it is well settled that "a local government may not contract away its right to exercise its police power in the future, and land use regulations involve the exercise of police power." *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4<sup>th</sup> 1716, 1724.

According to a Legislative Counsel opinion dated April 17, 2015, at the request of the author of this bill to examine "whether a city may contract away its land use authority to a nonprofit public benefit corporation and whether the Legislature may authorize a city to contract away its land use authority to a nonprofit public benefit corporation," Legislative Counsel drew the following conclusion (for brevity, the citations are removed):

We have determined that a city may not, and the Legislature may not authorize a city to, contract away to a nonprofit entity its police powers, which includes land use authority. However, it is well established that a "governmental entity does not contract away its police power unless the contract amounts to the 'surrender' or 'abnegation' of a proper governmental function." Whether a contract amounts to a surrender or abnegation of a local government's police power will depend upon the facts of the contract. With respect to contracts with private parties, "the fact that a third party, whether private or governmental, performs some role in applications and implementation of the established legislative scheme does not render the legislation invalid as an unlawful delegation." "The general rule is that while a public body may not delegate its power of control over public affairs to a private group, it may delegate the performance of administrative functions to such groups if it retains ultimate control over administration so that it may safeguard the public interest." Ultimately, "[p]owers which require the exercise of

judgment and discretion...must necessarily remain with the public agency and cannot be delegated." Thus, the issue in each case of delegation is whether ultimate control over matters involving the exercise of judgment and discretion has been retained by the public entity. If the performance of the function being delegated does not constitute the exercise of police powers because the city retains ultimate control of matters involving exercise of judgment and discretion, then a city may, and the Legislature may authorize a city to, delegate such a function.

For the foregoing reasons, it is our opinion that a city may not contract away its land use authority to a nonprofit corporation, and the Legislature may not authorize a city to contract away its land use authority to a nonprofit corporation. However, it is also our opinion that a city may, and the Legislature may authorize a city to, by contract, delegate to a nonprofit corporation the performance of certain functions so long as that delegation does not constitute a surrender or abnegation of the city's police power.

- 5) **Policy Considerations.** The Committee may wish to consider the following:
  - a) **Terminology.** The terms used in the bill – "administrative" and "ministerial" planning functions and powers could be open to interpretation at the local level. Given the case law on this issue of delegation of legislative land use functions, the Committee may wish to consider whether these terms are consistent with court actions and plainly understood.
  - b) **Necessary?** Given the lawsuit filed on April 10, 2015, the Committee may wish to consider whether legislation is necessary, or whether this issue is best left to the Courts to decide.
- 6) **Arguments in Support.** Supporters argue that clarifying Civic San Diego's legal standing will remove uncertainty and help reduce the possibility of expensive and disruptive lawsuits, and that the current arrangement does not provide the public transparency and accountability necessary to incorporate public opinion and community needs.
- 7) **Arguments in Opposition.** Opponents argue that the bill could slow development to a crawl, putting at risk millions in development and thousands of good paying jobs.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Center on Policy Initiatives  
City Heights Community Development Corporation  
International Brotherhood of Electrical Workers, Local Union 569  
Plumbers & Steamfitters Local Union #230  
San Diego County Building and Construction Trades Council  
State Building and Construction Trades Council  
UNITE HERE Local 30  
United Taxi Workers of San Diego  
United Union of Roofers, Waterproofers & Allied Workers Local 45

**Opposition**

Associated Builders and Contractors – San Diego Chapter

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