

LAW OFFICES
JEFFREY G. SCOTT
16935 WEST BERNARDO DRIVE, SUITE 170
SAN DIEGO, CA 92127

(858) 675-9896

JEFFREY G. SCOTT
BLAISE J. JACKSON
JAMES R. DODSON

FAX (858) 675-9897

April 28, 2011

Mr. Ray Lutz
Citizens' Oversight Projects
771 Jamacha Rd. #148
El Cajon, California 92019

Re: April 25, 2011 letter concerning Mr. Ernie Ewin

Dear Mr. Lutz:

Your letter of April 25, 2011 (copy attached), suggesting that service as a member of the La Mesa City Council and also as a volunteer on the Independent Citizens' Bond Oversight Committee (ICBOC) is a violation of the incompatibility doctrine has been referred to this office for response. For a variety of legal reasons, the two offices are not incompatible.

First and foremost, there is absolutely no clash of duties or loyalties, nor does one office have any authority to approve, disapprove, or otherwise control the decisions of the other office. It strains credulity to suggest that Mr. Ernie Ewin would somehow have to disregard the interests of his constituents in the City of La Mesa when he serves the interests of District taxpayers as a volunteer member on the ICBOC.

Moreover, the ICBOC is not a governmental agency and Mr. Ewin's position as a member of the ICBOC is not a "public office." The ICBOC is a group of interested community volunteers appointed by the Board of the Grossmont Healthcare District (District) solely in an "advisory capacity" to advocate and promote the interests of District taxpayers in relation to the expenditure of Proposition "G" funds. The ICBOC has no decision-making authority and does not exercise any "sovereign powers" of a governmental body, which is a prerequisite to qualify as a "public office" for purposes of the incompatibility doctrine.

As the California Attorney General recently noted:

"For the purpose of the doctrine of incompatible public offices, a public office is a position in government (1) which is created or authorized by the Constitution or some law; (2) the tenure of which is continuing and permanent, not occasional or temporary; (3) in which the incumbent performs a public function for the public benefit and

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exercises some of the sovereign powers of the state." (2010) 93 Ops. Cal. Atty. 104,105 (emphasis added).

The "sovereign powers" requirement means that the position must involve significant and independent policy-making discretion. Members of the ICBOC are independent but they have no policy-making discretion.

Your letter cites as a comparison, the case of *Chapman v. Rapsey* (1940) 16 Cal.2d 636. However, the *Rapsey* case involved the incompatibility of an individual serving simultaneously as a city judge and also the city attorney. Such a comparison is not even close to this situation.

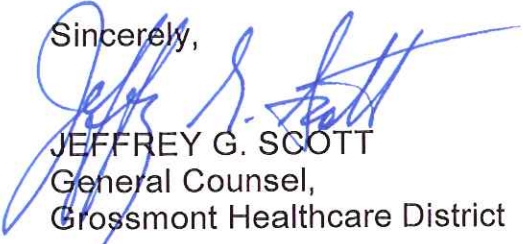
Even if the ICBOC were somehow determined to be a governmental agency (which it is not), concurrent service on the City Council and the ICBOC would still not rise to the level of incompatible offices. Government Code section 1099 specifically exempts offices that are advisory in nature from the incompatibility doctrine. The section was enacted in 2005 and codifies the common law rule. As provided in section 1099(d):

"(d) This section [1099] shall not apply to a governmental body that has only advisory powers" (emphasis added).

As noted above, the ICBOC is volunteer citizens group created to advocate and promote the interests of the taxpayers of the District. It can issue reports and make recommendations, but has no legislative authority or policy-making discretion. While the ICBOC is not a "legislative body" for purposes of the Brown Act, the committee has opted to follow the Act to encourage public participation and transparency of its meetings.

In conclusion, your letter and complaint simply do not raise substantial factual or legal issues that demonstrate a violation the doctrine of incompatible offices.

Sincerely,



JEFFREY G. SCOTT
General Counsel,
Grossmont Healthcare District

cc: Ernie Ewin, Chairman, ICBOC
ICBOC, Members
District, Board of Directors
Barry Jantz, CEO
City Clerk, City of La Mesa

Citizens' Oversight Projects (COPs)

771 Jamacha Rd. #148
El Cajon, CA 92019
CitizensOversight.org
619-447-3246

April 25, 2011



Grossmont Healthcare District
c/o Barry Jantz, CEO
9001 Wakarusa Street
La Mesa, CA 91942-3300

REF: C00037

AND

City of La Mesa
c/o La Mesa City Clerk
8130 Allison Avenue
La Mesa, CA 91942-5502

Citizens' Oversight Projects (COPS) has been working to fulfill the obligation of oversight required by the citizenry in our democracy. One of the most important concerns is that our elected and appointed officials operate without conflicts of interest. Such conflicts not only occur when the official can benefit financially from decisions of that official, but also if officials have positions that have overlapping jurisdictions. If a single official simultaneously holds two offices which overlap in jurisdiction, the official's loyalty may be divided between the two offices. Holding the two offices may be incompatible and the first assumed office may have been forfeited by operation of law.

According to "Conflicts of Interest" a publication of the State Attorney General (2004 – see <http://www.copswiki.org/Common/M1100>, p188 & 119):

The *Rapsey* court, 16 Cal.2d, *supra*, at pp. 641-642, discussed the conflict between offices in the following passage:

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.

Then later it explains enforcement:

Where a public official is found to have accepted two public offices, the common law provides for an automatic vacating of the first office.

Recently, I read a compliant letter by a citizen regarding James Stieringer, who held two seats concurrently in overlapping districts, that of Treasurer of the City of La Mesa and also as Director of the

Grossmont Healthcare District (GHD). In 2006, he resigned from the office of Treasurer and kept his position as Director on the GHD Board, I believe as a direct result of this complaint. This illustrates that the two offices indeed are in conflict.

COPS has noted that Mr. Ernest Ewin serves as both a member of the La Mesa City Council and as the chair of the Independent Citizens Bond Oversight Committee (ICBOC) of the GHD. ICBOC was formed as part of Proposition G, and is required to be composed of "Independent Citizens," a fact that is even implied by the name of the committee. The Committee operates in compliance with the Brown Act, which governs the operations of official public bodies, illustrating that it is not an employee function.

COPS hereby asserts that Ernest Ewin is in violation of the Doctrine of Incompatible offices per Conflict of Interest law. Furthermore, COPS asserts that Mr. Ewin is not an "independent citizen" but is instead a representative of a stakeholder in a jurisdiction that also contains the hospital which is being constructed with Prop. G Bond funds.

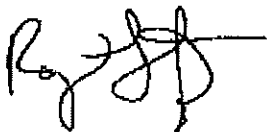
According to the reference above, an official who occupies two seats that are in conflict will automatically vacate the earliest seat and keep the most recent seat. Operation of that law would mean that Mr. Ewin would automatically forfeit his City Council seat and maintain his seat on the ICBOC committee.

According to the information on the ICBOC website (<http://icboc.gafcon.net>), Proposition G is a \$247 million general obligation bond placed on the ballot by the GHD Board of Directors and passed by more than 77% of the voters on June 6, 2006. In order to ensure that bond funds are spent in an efficient manner as outlined in Proposition G, the GHD Board of Directors desired that an effective and functional oversight committee be formed. The Independent Citizens' Oversight Committee (ICOC) shall represent the community and be responsible to the GHD Board of Directors. The ICOC is intended to provide accountability for expenditures made from Proposition G bond revenues. In addition, the ICOC shall function in an independent and open manner to ensure that the intent of the voters as set forth in the measure is effectively implemented. The role of the ICOC is to represent, advocate and promote the interests of the District residents.

Since Mr. Ewin represents a single city within the larger area of the GHD, he will be unable to represent all the members of the district, and therefore clearly suffers from this conflict of interest.

→ Please take action to address this conflict of interest and respond to this letter with evidence of that action. Response in electronic form is preferred.

Sincerely,

A handwritten signature in black ink, appearing to read "Ray Lutz", with a long horizontal line extending to the right.

Raymond Lutz
National Coordinator, Citizens' Oversight Projects