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OPINION	:	No. 15-801
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of	:	September 1, 2016
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THE HONORABLE ROBERT M. HERZBERG, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

Under the weighted voting system used by the Board of Directors of the Metropolitan Water District of Southern California, the votes of some constituent public agencies are shared among two or more representative directors who are present when a vote is taken. If such a board member is legally disqualified and required to recuse himself or herself from participating in a given board vote, how does that recusal affect the counting and determination of the member agency's vote allocation?

CONCLUSION

If a member of the Board of Directors of the Metropolitan Water District of Southern California is legally disqualified and required to recuse himself or herself from participating in a given board vote, the board member is effectively absent from that vote.

So, if that board member is part of a multi-director delegation representing a constituent public agency, the votes allocated to the constituent agency are to be shared equally among the agency's other qualified representatives who are present when the vote is taken.

## ANALYSIS

The Metropolitan Water District of Southern California (Metropolitan) is a public agency incorporated in 1928 pursuant to the Metropolitan Water District Act (MWD Act or Act) to distribute waters from the Colorado River to the municipalities within the district.<sup>1</sup> Metropolitan comprises 26 constituent public agencies, including 14 cities, 11 municipal water districts, and one county water authority, all of which provide water to more than 19 million people in Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura counties.<sup>2</sup>

Metropolitan is governed by a 38-member board of directors.<sup>3</sup> Each constituent agency is represented by at least one member on the board; some agencies also have additional representatives, based on proportional property valuation.<sup>4</sup> We are informed that five of Metropolitan's constituent agencies are currently entitled to be represented by more than one director: The City of Los Angeles has five directors; the Municipal Water District of Orange County and the San Diego County Water Authority each have four; and the West Basin Municipal Water District and Central Basin Municipal Water District each have two.

A constituent agency may select one or more members of its governing board to serve on Metropolitan's board of directors.<sup>5</sup> Each member is entitled to one vote "for each

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<sup>1</sup> *Metropolitan Water Dist. of Southern California v. Whitsett* (1932) 215 Cal. 400, 406; see Stats. 1927, ch. 429, repealed and re-enacted by Stats. 1969, ch. 209; see now Water Code App. ch. 109.

<sup>2</sup> See <http://www.mwdh2o.com/WhoWeAre/Mission/Pages/default.aspx>.

<sup>3</sup> *Ibid.*

<sup>4</sup> Water Code App. ch. 109, § 52, subd. (a) (An agency is entitled to one additional representative "for each full 5 percent of the assessed valuation of property taxable for district purposes within the entire district that is within such member public agency"). Assessed valuations are certified annually. (See Water Code App. ch. 109, §§ 305, 306.)

<sup>5</sup> Water Code App. ch. 109, § 56. This is a statutory exception to the general prohibition against simultaneous occupancy of incompatible offices. (See Gov. Code, § 1099, subd. (a); cf. 95 Ops.Cal.Atty.Gen. 130, 134-135 (2012) [dual offices of director of San Diego County Water Authority and member of the governing board of a constituent member agency].) An agency with multiple representatives on the Metropolitan board may not

ten million dollars (\$10,000,000), or major fractional part thereof, of assessed valuation of property taxable for district purposes in the member public agency represented” by him or her.<sup>6</sup> As of December 2015, the total number of votes on the Board was 243,499.

When a constituent agency has only one representative on the board, all of the agency’s votes are controlled by that representative. For example, as of December 2015, the City of Anaheim had 3,953 votes controlled by a single representative director. Under section 52 of the MWD Act, however, when an agency is represented by more than one director, then “all such representatives present at a meeting of the board of directors when a vote is taken shall cast, or may abstain from casting, an equal share of the total vote to which such member public agency is entitled.”<sup>7</sup> For example, as of December 2015, the City of Los Angeles Water District had 48,956 votes and five representatives. When all five directors are present, they each control 9,791 1/5 votes; when four are present, they each control 12,239 votes; when three are present, 16,318 2/3 votes; and when two are present, 24,478 votes. When only one representative is present, he or she controls all of the City’s votes. The passage of any order, resolution, or ordinance coming before the Board generally requires the “affirmative votes of members representing more than 50 percent of the total number of votes of all the members.”<sup>8</sup>

Like most public officials, a Metropolitan board member may on occasion be disqualified from voting on a particular matter because he or she has a financial interest in the relevant decision.<sup>9</sup> Directors may also be disqualified from voting on contracts between Metropolitan and their constituent agencies.<sup>10</sup> Only those agency representatives who also serve on the governing board of the constituent agency are disqualified from voting on the

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appoint a majority of its governing board to serve in that capacity. (Water Code App. ch. 109, § 56.)

<sup>6</sup> Water Code App. ch. 109, § 55.

<sup>7</sup> Water Code App. ch. 109, § 52, subd. (a). Each member of a multi-member delegation may vote his or her share of the constituent agency’s votes independently of the others. As originally enacted, the MWD Act required a multi-member delegation to cast the agency’s vote “as a unit and as a majority thereof shall determine.” (Stats. 1927, ch. 429, § 6, p. 701, emphasis added.) The bloc voting requirement was removed from the Act in 1968. (See Stats. 1968, ch. 167, § 1, p. 391.)

<sup>8</sup> Water Code App. ch. 109, § 57. To establish a quorum, Metropolitan requires that directors capable of voting a majority of the total number of votes on Metropolitan’s board be present. Some matters may require a two-thirds majority. (MWD Admin. Code, § 2304, available at <http://www.mwdh2o.com>.)

<sup>9</sup> See Gov. Code, § 87100.

<sup>10</sup> Water Code App. ch. 109, § 56.

contract.<sup>11</sup>

We are asked how disqualifications affect voting when a disqualified director is one of a multi-member delegation. The answer to this question depends on the construction of subdivision (a) of section 52 of the MWD Act (section 52(a)). Section 52(a) directs that, for a constituent public agency with multiple representatives, “all such representatives present at a meeting of the board of directors when a vote is taken shall cast, or may abstain from casting, an equal share of the total vote to which such member public agency is entitled.”

Section 52(a) expressly contemplates that a member who is physically “present” at a meeting may have a choice about whether to cast his or her share of an agency’s votes or to abstain from casting those votes. In construing the provision, we seek to give effect to the intent of the statute. While we generally give primacy to the plain language of a statute, we may eschew an artificially literal reading if it would lead to absurd consequences, or to consequences that the Legislature did not intend.<sup>12</sup> Applying these principles, we read section 52(a) as allocating a constituent agency’s votes among those members of a multi-member delegation who are not only physically “present,” but also legally “present” in the sense that they are permitted to vote on the relevant matter.

We have previously concluded that legal disqualification is a basis for finding a lack of “presence” when a vote is taken. In 94 Ops.Cal.Atty.Gen. 100 (2011), we concluded that the compulsory abstention of a disqualified member of a deliberative body is distinguishable from voluntary abstention.<sup>13</sup> We reasoned that a disqualified member is, “legally speaking, not ‘present’ for the body’s deliberation on the disqualifying matter,”<sup>14</sup> and that the member’s “non-vote [is] required by law, and reflects no exercise of discretion whatsoever.”<sup>15</sup>

Similarly, we conclude here that a legally disqualified Metropolitan board member is effectively not “present” for purposes of the relevant voting. As a consequence, the member does not share in the agency’s votes in respect to the relevant matter, even if he or

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<sup>11</sup> See 95 Ops.Cal.Atty.Gen., *supra*, at p. 136 & fn. 32.

<sup>12</sup> See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387; *Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th 175, 186; see also 83 Ops.Cal.Atty.Gen. 124, 125 (2000) (“Interpretive constructions that defy common sense or lead to mischief or absurdity are to be avoided”).

<sup>13</sup> See 94 Ops.Cal.Atty.Gen. 100, 105-110 (2011).

<sup>14</sup> 94 Ops.Cal.Atty.Gen., *supra*, at p. 108.

<sup>15</sup> 94 Ops.Cal.Atty.Gen., *supra*, at p. 109.

she happens to be physically present when voting is conducted. The disqualified member's share accordingly devolves to the control of the remaining, legally-qualified representatives who are present.

Our conclusion is the same whether disqualification results from a personal financial interest or from holding dual offices in connection with a contract between Metropolitan and a constituent agency. In cases of personal financial interest, our conclusion finds additional support in the language of the Political Reform Act of 1974 (PRA) and its implementing regulations.<sup>16</sup> The PRA requires any financially interested “public official[] who manage[s] public investments”<sup>17</sup> to “[r]ecuse himself or herself from discussing and voting on the matter” and to “[l]eave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.”<sup>18</sup>

We readily conclude that the members of Metropolitan's board are “public officials who manage public investments” within the meaning of the PRA.<sup>19</sup> Metropolitan has the power to levy taxes;<sup>20</sup> the board has broad powers to sell construction and revenue bonds in order to carry out Metropolitan's purposes;<sup>21</sup> and the board must approve Metropolitan's annual Statement of Investment Policy.<sup>22</sup> Accordingly, unless a matter has been placed on the consent calendar,<sup>23</sup> a member who has a personal financial interest in a particular matter is required by the PRA to “leave the room” during discussion and vote on the relevant matter.<sup>24</sup> Under the plain language of section 52(a), then, such a member would not even be physically present during the vote from which he or she was disqualified, and therefore his or her votes would devolve to the delegation members who remained.

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<sup>16</sup> See Gov. Code, § 81000 et seq.; Cal. Code Regs., tit. 2, § 18000 et seq.

<sup>17</sup> See Gov. Code, § 87200.

<sup>18</sup> Gov. Code, § 87105, subd. (a)(2), (a)(3) (emphasis added); Cal. Code Regs., tit. 2, § 18707, subd. (a)(1)(C).

<sup>19</sup> See Cal. Code Regs., tit. 2, §§ 18700.3, subds. (b)-(e).

<sup>20</sup> See Water Code App. ch. 109, § 300 et seq.

<sup>21</sup> See Water Code App. ch. 109, § 200 et seq.

<sup>22</sup> See MWD Admin. Code, § 5114.

<sup>23</sup> See MWD Admin. Code, §§ 2120-2123 (re consent calendar).

<sup>24</sup> This same procedure is required by Metropolitan's own administrative code. (See MWD Admin. Code, § 7120.) Even if a matter is on the consent calendar, a disqualified member is still required to publicly disclose the financial interest and to recuse himself or herself from discussing or voting on the matter; it is only that the member need not leave the room. (Cf. Cal. Code Regs., tit. 2, § 18707, subd. (a)(3)(A).)

Before leaving the subject, we address the suggestion that a member's disqualification under the PRA should also disqualify the whole multi-member delegation, on the theory that a disqualified member could influence the other members of the delegation on how they should cast their votes. While we acknowledge the sentiment underlying this theory, we nonetheless disagree. The PRA prohibits a disqualified board member from “*in any way attempt[ing]* to use his official position to influence a governmental decision in which he knows or has to reason to know he has a financial interest.”<sup>25</sup> In the absence of any evidence to the contrary, we must assume that public officials observe this proscription.<sup>26</sup> Moreover, the PRA itself disqualifies only those officers who have a prohibited financial interest.<sup>27</sup> It is not for us to rewrite the statute so as to disqualify an otherwise eligible official based on another person's financial interest.<sup>28</sup> We specifically decline to do so here, where disqualification of the entire delegation would have the effect of disfranchising the whole constituent public agency without justification in the language of the statute.<sup>29</sup> We note that our conclusion finds support in repeated advice given by the Fair Political Practices Commission, the expert agency charged with enforcing the PRA,<sup>30</sup> to the effect that disqualification for a financial interest is personal, and does not disqualify others from acting.<sup>31</sup>

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<sup>25</sup> Gov. Code, § 87100; Cal. Code Regs., tit. 2, § 18700.

<sup>26</sup> See Evid. Code, § 664 (public officials are presumed to “regularly perform” their official duties); e.g. 99 Ops.Cal.Atty.Gen. 18, 27 (2016) (presuming that school district acts lawfully).

<sup>27</sup>See Gov. Code, § 87100.

<sup>28</sup> *Lucent Technologies, Inc. v. State Board of Equalization* (2015) 241 Cal.App.4th 19, 38 (courts are not permitted to add words to a statute to accomplish a purpose not apparent from the face of the statute); cf., e.g., 85 Ops.Cal.Atty.Gen. 203, 208 (2002) (declining to add another exemption); 71 Ops.Cal.Atty.Gen. 64, 68 (1988) (“[W]e are not free to add words to the statute to require declarations from anyone else in the guise of statutory construction”).

<sup>29</sup> See *Klein v. United States* (2010) 50 Cal.4th 68, 77 (where uncertainty exists, courts should consider consequences that will flow from a particular interpretation). Of course, a constituent agency having only a single representative could be disfranchised on a given board action if its sole representative were disqualified, but that consequence would flow directly from the express language of the statutes.

<sup>30</sup> See Gov. Code, § 83100 et seq.

<sup>31</sup> See, e.g., Munoz Letter, FPPC No. I-98-281 (Dec. 24, 1998) (“The disqualification requirement imposed by the Act is strictly limited to whichever individual official or officials have a financial interest in the decision”); McHugh Advice Letter, FPPC No. A-93-142 (May 5, 1993) [“Disqualification is personal as to the official and does not prohibit the agency from acting without the official's input and participation. This scheme

We conclude that, if a member of a multi-director delegation of a constituent agency of Metropolitan is legally disqualified and required to recuse himself or herself from participating in a particular vote, then the votes allocated to that constituent agency are to be shared equally among the agency's other qualified representatives who are present when the vote is taken.

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obviously envisions that the disqualified official may be supplanted in the decision-making process where delegation or transfer of the decision is appropriate”]; see also Klein Letter, FPPC No. I-10-184(a) (Jan. 11, 2011); Benjamin Advice Letter, FPPC No. A-86-148 (July 18, 1986); Feinstein Advice Letter, FPPC No. A-84-014 (Mar. 8, 1984).