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Subpoena Power of Cities

This paper will address various issues associated with a city's ability to issue and enforce subpoenas. As will be discussed below in detail, a city has the power to issue subpoenas which would require the attendance of witnesses or the production of documents in any action or proceeding before that body. The neglect or refusal of any individual to obey such a subpoena may be judicially enforced by the superior court of jurisdiction. While not necessarily a common procedure used by most cities, the subpoena may be an effective way to obtain information from a reluctant witness or an uncooperative applicant or city vendor.

I. Sources of the Subpoena Power

A city's legislative body has the power, under general law, to issue subpoenas requiring attendance of witnesses or production of documents in proceedings pending before it. See, *Government Code* sections 37104-37109. Additionally, a charter city has the independent authority to issue subpoenas pursuant to the powers contained within the California Constitution irrespective of the powers conferred by the Government Code. See generally, *Cal. Const. Art. XI* sections 3(a) and 4(e). California Government Code sections 37104 through 37109 provide a brief and relatively undetailed framework from which cities may exercise their subpoena power. Section 37104 authorizes a "legislative body" of a city to issue subpoenas to compel witnesses to appear or produce documents "in any action or proceeding " before that body .1/ Section 37105 states that the subpoena shall be signed by the mayor and issued by the city clerk. Section 37105 further states that the subpoenas are to be served in a manner consistent with the procedures set forth in "civil actions." See generally, *Civil Procedure Code* section 1987.

Charter cities which have the subpoena power included within their charter have independent authority to issue subpoenas. See, *Brown v. City of Berkeley* , 57 Cal. App. 3d 223, 236 (1976). This independent authority provides a charter city with greater latitude in defining the nature of its subpoena power. For example, while general law cities may not delegate the authority to issue subpoenas to boards or commissions within a city, charter cities may make such a delegation so long as it is not inconsistent with the provisions of its charter. *Id.*

II. Limitations of the Subpoena Power

Government Code sections 37104 through 37109 do not clearly delineate limitations on a city's subpoena power. Nor is there significant case law on this issue with respect to either

general law or charter cities. However, a city may be guided by general principles associated with the issuance of subpoenas in other contexts. Set forth below is a guide to the more common limitations on the ability to issue and enforce a subpoena.

The primary limitation on the ability to issue and enforce a subpoena is a requirement that the testimony or the documentation sought be relevant to an issue before the body issuing the subpoena. See generally, *In re McLain*, 99 Cal. App. 2d 274 (1950). In other words, the subpoena, on its face, must demonstrate the "materiality and pertinency" of the material sought to the action or proceeding before the legislative body. *Id* at 276. Other limitations include that the materials or testimony sought be sufficiently defined (see, *Flora Crane Service, Inc. v. Superior Court*, 234 Cal. App. 2d 767 (1965)), that the request is not unduly "burdensome and oppressive" (*Southern Pacific Co. v. Superior Court*, 15 Cal.2d 206 (194)) and, that the material sought does not invade any statutory or common-law privilege which prevents disclosure.

No case law or statutory authority was found addressing the issue of the jurisdictional scope of a city's subpoena power. However, absent residency or other significant contacts, it would likely be difficult to enforce any subpoena on an individual or corporation outside of the jurisdiction. Such significant contacts would likely include matters such as doing business within the city, witnessing or participating in an unlawful activity within the city, or applying to the city for a permit, franchise or license. In any circumstance, a city should take steps to enable it to sufficiently justify its need for the information in relation to the costs associated with complying with the subpoena. In other words, the greater the costs to the witness, the more important it becomes for the city to enumerate the necessity for the proposed information.

An additional argument concerning the jurisdictional scope of a city's subpoena power could be made based on *Civil Procedure Code* section 1989 that a city may not compel any witness outside of the county in which the jurisdiction in which the city resides. Section 1989 applies to civil subpoenas and restricts the ability of the court to subpoena individuals outside the county in which the Court is located. While it is arguable that this section is applicable, it may nonetheless represent the practical limitation of a city's ability to enforce its subpoena. Because it is the superior court which enforces the subpoena and, as set forth below, the superior court's ability to enforce the subpoena is limited those, however temporarily, located within the county jurisdiction, it may be difficult to enforce a subpoena against a person located outside the county's jurisdiction.

Finally, there appears to be no inherent limitation on the type of "proceeding or action" for which the subpoena is being issued. Based on the language of Section 37104, a city may use its subpoena power to require testimony or documents in either a legislative or quasi-judicial context. With respect to subpoenas issued for legislative proceedings, it becomes imperative that the city justify the burden on an individual taxpayer or business to provide information especially where that information may be available for a number of different sources without the need for a subpoena.

III. Procedural Requirements For Issuing Subpoena

Government Code section 37105 and Civil Procedure Code section 1987 provide the basic procedures required for the issuance and service of a subpoena.

In the first instance, a subpoena must be signed by the mayor and issued by the city clerk. While not specified in the statutory framework, it appears that the proper form to be used for the subpoena is the same as required is the same as set forth in Civil Procedure Code Section 1985. See *Exhibit A* attached to this paper.

The service of the subpoena is governed by Civil Procedure Code Section 1987. Government Code, section 37105. In short, the service of a subpoena is made by delivering a copy of the subpoena to the witness personally and offering to pay any fees which the witness is entitled to for travel to and from the place designated for appearance or, if only production of records is requested, the estimated cost of producing those records Civil Procedure Code section 1987. The service of the subpoena must be made so as to allow the witness a "reasonable time" for preparation and travel. *Id.*

IV. Enforcement of Subpoena

Generally, a city has no independent authority to enforce the failure to comply with a subpoena, but is instead required to report a violation of the subpoena to the superior court within its jurisdiction. The superior court determines both the validity of the subpoena and whether it has been violated.

Government Code sections 37105 through 37109 define the City's remedy for a failure to comply with a subpoena. Upon the failure of a person to obey a subpoena, the mayor of a city notifies the superior court. *Government Code*, section 37105. The superior court then issues an attachment directed to the sheriff, of the county where the witness was required to appear or produce documents commanding the appearance of the person to the court. *Government Code*, section 37107. On the return of the attachment and production of the witness, the judge has jurisdiction to issue a contempt order *Government Code*, section 37108. At that time, the witness has the opportunity to purge himself of the contempt. *Government Code*, section 37109. The punishment for disobedience of a subpoena issued under Section 37104 is the same as if the contempt had been committed in a civil trial in superior court. *Government Code*, section 37109.

^{1/} Section 37104 states:

The legislative body may issue subpoenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding before it.

Government Code § 37104.