



Good Neighbors

San Diego
Housing Commission

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REPORT

DATE ISSUED: October 1, 2004

ITEM 103

REPORT NO: HCR04-77
For Agenda of October 8, 2004

SUBJECT: Establishment of an Ad Hoc Retirement Benefit Committee of the San Diego Housing Commission Board

SUMMARY

Issue: Should the San Diego Housing Commission establish a three person (3) Ad Hoc Retirement Committee comprised of Board Members or others, at the Board's election, not within the employ of the Housing Commission to evaluate any proposed change to the retirement benefit offered by the Housing Commission?

Recommendation: That the Housing Commission Board establish an Ad Hoc Retirement Committee comprised of not more than three (3) Board members to evaluate a potential change to the retirement benefit offered by the Housing Commission, including a potential recommendation of the adoption of a defined benefit plan.

Alternative: Develop another method of studying the retirement issue that is compliant with applicable law.

Fiscal Impact: None with this action. Approval of this action establishing an Ad Hoc Retirement Committee will not result in any additional expenditure, but the implementation of recommendations of the Ad Hoc Committee may have a fiscal impact. This impact will be analyzed at the time of the recommendations, if any, of the Ad Hoc Committee.

Future Related Actions: Once the Ad Hoc Committee has evaluated potential changes to the retirement benefit offered by the Housing Commission to its employees, the Committee will present its recommendations for full Housing Commission and Housing Authority consideration and approval.



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BACKGROUND

The Brown Act allows a public entity to create an ad hoc committee to deal with issues of limited scope and duration. The committees cease to function once the purpose for their creation has been fulfilled.

The Housing Commission Board recommended and, thereafter, the Housing Authority of the City of San Diego approved, a three year Memorandum of Understanding (MOU) (Attachment 2) with SEIU Local 535 that represents many of the Commission's employees in May and June of 2004, respectively. One of the terms of the MOU provided, that, if the California Public Employees Retirement System (CalPers) was not offered to employees by the Commission, negotiations would be reopened to discuss the issue of compensation for Housing Commission employees. On August 27, 2004, Local 535 requested that the Housing Commission re-open negotiations on salary by October 15, 2004 (Attachment 3).

The Housing Commission currently offers its employees a Defined Contribution Retirement Program; the current contribution rate for every permanent Housing Commission employee is 14% of current salary.

DISCUSSION

To comply with the Memorandum of Understanding, there is a need to discuss, in a thorough and objective manner, the issue of retirement benefits for the employees of the Housing Commission. Since each of the employees of the San Diego Housing Commission has an interest in these issues, General Counsel recommends the formation of the Ad Hoc Retirement Committee because of potential conflict of interest concerns and to avoid even the appearance of impropriety. (See Attachment 1, Conflict of Interest Opinion). [Pursuant to the applicable provisions of Government Code Section 1090, 1091 and 1091.5 and other applicable law, all employees of the Commission and the Housing Authority have remote interests, as defined in Government Code Section 1091 (b)(13) and will abstain from taking any official action concerning this matter. This disclosure shall be incorporated into the official records of both agencies in accordance with applicable law.]

The Ad Hoc Retirement Committee would be created to discuss and formulate a recommendation to the entire Housing Commission Board. Further, it is recommended that the Housing Commission Board then make a recommendation to the Housing Authority of the City of San Diego concerning the retirement plan(s) to be adopted and/or amended.

Every employee of the San Diego Housing Commission has the ability and is welcome to present testimony before the Commission when it discusses these matters. Employees of the Commission do not divest themselves of their ability to discuss and to participate in the formulation of their respective compensation packages, including retirement benefits, by becoming public employees of the San Diego Housing Commission. However, it is

recommended that employees' participation in the formulation of any recommendations be limited to public input, both oral and written.

To provide the most objective review of the Housing Commission's retirement benefit, it is suggested that three Commissioners be appointed to participate on the Ad Hoc Retirement Committee and that the Ad Hoc Retirement Committee retain the services of independent experts (e.g., pension, legal, accountant, actuaries) as the Committee evaluates the Housing Commission's retirement benefit.

ALTERNATIVE

The Board may decide to adopt other methods to study the retirement issue that is compliant with applicable law.

Respectfully submitted,

**Signature on File
With Original Document**

Charles B. Christensen
Christensen Schwerdtfeger & Spath LLP
General Counsel

- Attachments: 1: Conflict of Interest Opinion
2. Memorandum of Understanding Excerpt Regarding CalPers System
3. August 27, 2004 Letter from SEIU Local 535

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Melissa A. Cheney

TO: Chair and Members of the San Diego Housing Commission

FROM: Charles B. Christensen, Esq.
Sean D. Schwerdtfeger, Esq.

DATE: September 23, 2004

SUBJECT: Conflict of Interest Opinion

PREAMBLE

On September 16, 2004, the Washington D.C. based law firm of Vinson & Elkins L.L.P. issued an investigative report entitled "The City of San Diego, California's Disclosures of Obligations to Fund the San Diego City Employee's Retirement System and Related Disclosure Practices 1996-2004 with Recommended Procedures and Changes to the Municipal Code." The purpose of the report is to address whether from 1996 to 2004 the City of San Diego made adequate disclosures of its obligations to fund the retirement system. Among the issues considered by the investigators in the report were various alleged potential conflicts of interest.

The issuance of the Vinson & Elkins' report follows the filing of two law suits alleging, inter alia, alleged conflicts of interest associated with the City of San Diego's defined benefit plan. (See *David W. Woo v. Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP, et al.* [SDSC Case No. GIC830558] and *San Diego City Employees' Retirement System v. Hanson, Bridgett, Marcus, Vlahos & Rudy, et al.* [SDSC Case No. GIC831983].) Both cases are still pending in the San Diego Superior Court, and each alleges that the attorneys for the San Diego City Employees Retirement System failed to recognize and advise the board on conflict of interest issues involving the Political Reform Act (Government Code §87100 et seq.) and Government Code §1090.

The increased level of scrutiny given to potential conflicts of interest associated with the development and management of public retirement plans is real, and the potential for these types of conflicts of interest in the Housing Commission's proposed alternatives of its retirement plans deserves special attention. For this reason, General Counsel prepares this memorandum to examine the potential conflicts of interest and recommend a course of action designed to avoid both real conflicts of interest and the appearance of impropriety.

ISSUES

Issue One:

Should the Housing Commission request approval from the Housing Authority to implement revised or alternative retirement plans for employees in lieu of re-opening salary negotiations for fiscal year 2005?

Issue Two:

Should the Housing Authority authorize the Housing Commission to implement the direction from the Housing Authority concerning retirement plan(s) for its employees?

CONCISE CONCLUSION

Issue One:

The Housing Commission may request the Housing Authority to make the determination as to whether the Housing Commission can offer revised and/or alternative retirement plan(s) to its employees; however, it cannot seek the authority to make the decision itself.

In pursuing the administrative process necessary to secure a determination from the Housing Authority regarding the creation of potentially new retirement plan(s), General Counsel recommends that the Housing Commission establish an ad hoc committee to review the report prepared by Housing Commission staff and make a recommendation to the Board of Housing Commissioners concerning the advisability of the Housing Commission adopting a new plan or plans. The ad hoc committee should not contain any employees of the Housing Commission, but it may contain less than a quorum of the Housing Commissioners.

The decision of the Board of Housing Commissioners would be advisory only to the Housing Authority, so that the Housing Authority would make the final determination as to whether to authorize the Housing Commission to adopt new retirement plan(s) including potentially a defined benefit plan.

Issue Two:

If the Housing Authority authorizes the Housing Commission to adopt revised retirement plan(s), it may also establish parameters for the implementation of the plans(s) and/or new revised retirement plan(s), and it may authorize the Housing Commission to take those administrative actions necessary to fulfill the parameters established for the implementation of the retirement plan. The scope of the administrative actions available to the Housing Commission, however, is confined by the breadth of the direction given by the Housing Authority. Consequently, the Housing Authority should be requested to make determinations on each of the material points of the proposed retirement plan, so that the implementation of the direction given by the Housing Authority does not violate the governing conflict of interest laws.

LAW & ANALYSIS

The Political Reform Act of 1974 (occasionally “PRA”) is by its terms applicable to all governmental decisions made by public officials, whether contractual or noncontractual in nature. State and local laws, however, may impose additional requirements, provided that such additional requirements do not prevent a public official from complying with the PRA. Government Code §1090 is a state law imposing such additional requirements.

The Political Reform Act takes precedence over the provisions of Government Code §1090 et seq. (Government Code 81013.) However, as a practical matter, where a potential conflict-of-interest is involved, most courts begin with reference to section 1090 et seq., rather than section 87100 et seq. because under the PRA all that is required to avoid the proscriptions of Government Code §87100 is nonparticipation or abstention by the interested official with respect to the official action. Government Code §1090, by contrast, imputes the conflict of a single member of the public agency’s governing board or its employees so that abstention by the interested party is insufficient to either dispel the conflict or ratify the action of the board. (See, *Thompson v. Call* (1985) 38 Cal.3d 633, 649; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 570-571; *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 196; *Fraser-Yamor Agency, Inc. v. Del Norte County* (1977) 68 Cal.App.3d 201.)

A. Government Code §1090 et seq.

The proscriptions of Government Code §1090 et seq. are organized in a hierarchal order, where the financial interests of the individual at issue must be classified as either a prohibited, remote, or non-interest. The criteria for determining the nature of the subject interests are codified at Government Code §§1090, 1091, and 1091.5, respectively.

Government Code §1090 codifies the general prohibitions against conflicts of interest involving public officers by reciting in relevant part:

Members of the legislature, state, county, district, judicial district, and city officers or employees **shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.** [emphasis supplied.]

The test of the statute's applicability is whether the officer or employee participated in the making of the contract in his official capacity. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 568-571; *Old Town Dev. Corp. v. Urban Renewal Agency* (1967) 249 Cal.App.2d 313, 328; see also *Bradley Co. v. Ridgeway* (1936) 14 Cal.App.2d 326, 335; *City of Oakland v. California Constr. Co.* (1940) 15 Cal.2d 573, 577.) California courts have not interpreted the word 'made' in section 1090 in either a narrow or technical sense but interpreted it in a broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. (*Stigall v. City of Taft, supra*, 58 Cal.2d at 569.) Such construction is predicated upon the rationale that government officers and employees are expected to exercise absolute loyalty and undivided allegiance to the best interests of the governmental body or agency of which they are officers or employees, and upon the basis that the object of such a statute is to remove or limit the possibility of any personal influence, either directly or indirectly, which may bear on an officer's or employee's decision. (*Ibid.*)

In other words, the basic purpose of Government Code §1090 is to preclude public officials from having either a direct or indirect interest in a contract made either by them in their official capacity or their boards. A public official's direct interest in a contract is typically characterized by monies flowing directly from a public agency to the public official, an immediate family member, or a business in which the public official has an interest. An indirect interest, by contrast, is usually identified by a more attenuated nexus between a public agency's funding of a contract and some type of financial benefit to the public official, a member of the public official's immediate family, or a business in which the public official has an interest.

Section 1090 unequivocally applies to any decision rendered by any officer or employee of the Commission to adopt a retirement plan because: (1) the decision would involve the employee acting in an official capacity; and (2) the decision would financially benefit the decision maker. The financial interest is direct, as opposed to indirect, because the decision maker directly receives the benefits offered under the retirement plan. (See Government Code §82048 [defining "public official"].)

1. Government Code §1091

The general provisions of Government Code §1090 (discussed above) only apply in those circumstances in which no exemption is provided under either Government Code §1091 or

§1091.5. Section 1091, subdivision (b)(13), codifies a potentially applicable “remote interest” exception by providing:

(a) An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

(b) As used in this article, "remote interest" means any of the following:

(13) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity. [Emphasis supplied.]

The above-quoted remote interest does not precisely fit the issue under consideration because the plain language of the exception does not specify whether the phrase “that of a person receiving salary” covers those instances in which an employee of a public agency acts on a decision affecting that employee’s salary. Since the language of the statute is not clear on its face, it is appropriate to examine the legislative history of Section 1091, subdivision (b)(13). (*Halbert’s Lumber v. Lucky Stores* (1992) Cal.App.4th 1233, 1238-1239; *Duty v. Abex Corp.* (1989) 214 Cal.App.3d 742, 749; *Petaluma v. Sonoma* (1993) Cal.App.4th 1239, 1244; *J.A. Hones Const. Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1575.)

The legislative history of section 1090, subdivision (b)(13) indicates that the legislature intended to exempt public employees engaged in the negotiation or formation of contracts in which they may have a financial interest, so long as the contract was made and executed with another governmental agency:

According to the sponsor, the California Attorney General's Office, the problem addressed by this legislation arises when two factors are present: 1) Two government entities seek to enter into a contract with one another; and, 2) When one entity is a board or commission, and a member of the board or commission is employed by the other governmental entity. (Stats. 1999, S.B. 689, Senate Third Reading, as amended June 30, 1999.)

As stated in the quoted legislative history, the pertinent issue for the applicability of section 1091(b)(13) appears to turn largely on whether the contract at issue exists between two government entities. For purposes of example, CalPERS, a state retirement entity, is a unit of the California State and Consumer Service Agency (Government Code §20002.). A contract between the Housing Commission and CalPERS appears to satisfy the legislative intent of section 1091(b)(13). A similar analysis would also apply to any other retirement plan where two governmental entities are involved. The interest of any employee of the Housing Commission would, thus, constitute a remote interest under section 1091(b)(13), which would allow the Housing Commission to act on the contract, so long as the financially interested person[s] disclosed their interest to the board; had it noted in the official record; and abstained from participating or voting on the contract proposal.

Although section 1091(b)(13) denotes the interest of any employee of the Commission as remote, General Counsel recommends that the appearance of any potential impropriety be vitiated by the formation of an ad hoc committee to consider the retirement issue and make a recommendation to the Board of Housing Commissioners concerning the advisability of the Housing Commission adopting a retirement plan. The ad hoc committee should not contain any employees of the Housing Commission, but it may contain less than a quorum of the Housing Commissioners.¹

2. Government Code §1091.5

Government Code §1091.5, subdivision (a)(9) codifies an analog provision to section 1091, subdivision (b)(13) [quoted above] by defining the following non-interest:

(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

¹The formation of the ad hoc committee is not a substitute for the Housing Authority making the ultimate decision on whether to authorize the Housing Commission to implement a retirement plan. It is simply a means of vitiating a perceived conflict of interest created by Housing Commission employees making recommendations directly to the Board of Housing Commissioners on a matter in which they may have an economic interest.

The difference between section 1091(b)(13) and section 1091.5(a)(9) focuses upon whether the contract at issue involves the department of the government entity that employs the interested officer or employee. Clarifications made during the legislative process highlight this difference by providing in pertinent part:

The committee may wish to consider the meaning of the word "department." It seems clear that the author's intent is to define as a "remote interest" a situation where the contract is with the specific unit that employs the official which does not result in any direct financial gain to that official. However what is a department? (Stats. 1999, S.B. 689, Assembly Committee on Local Government, July 7, 1999.)

Since any proposed contract between a governmental entity and the Housing Commission will financially benefit all Housing Commission employees, and the making of the contract does not involve any isolated department, section 1091.5(a)(9) does not appear to offer any exemption to the general provisions of section 1090.

B. Government Code §87100.

Chapter 7, Article 1 of the Political Reform Act codifies California's legislative efforts to eliminate the presence of conflicts of interest among all aspects of government service performed by public officials. Government Code §87100 contains the general prohibition against conflicts of interest within government by providing:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know, he has a financial interest. [emphasis supplied.]

A "public official" is broadly defined to include "every member, officer, employee or consultant of a state or local government agency..." (Government Code §82048.) The plain language of this definition encompasses the CEO and all subordinate employees of the Housing Commission.

All employees of the Housing Commission qualify as "public officials" within the scope of the PRA. Thus, the only real issue governing the applicability of the PRA is whether the employee has a prohibited financial interest in a decision to recommend the adoption of a retirement plan. Government Code §87103 codifies the criteria defining a "financial interest" by providing in pertinent part:

A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following:

(c) Any source of income...aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

Every employee of the Housing Commission has a financial interest in a recommendation and/or decision to adopt a retirement plan because such a plan would result in a source of income aggregating five hundred dollars (\$500.00) or more to the employee of the Housing Commission. Although the economic benefit of a retirement plan would not inure to Housing Commission employees "prior to the time the decision is made", it is reasonably foreseeable that a positive recommendation for the adoption of a retirement plan to the Housing Authority will result in a decision authorizing the adoption of such a plan. (See *Smith v. Superior Court* (1994) 31 Cal.App.4th 205 [discussing the term "reasonably foreseeable"].)

1. 2 Cal. Code Regs. §18702.4

The provisions of the PRA set forth above are not absolute, but instead state the scope of the basic prohibition. The Fair Political Practices Act has established a host of exemptions that allow members of local commissions and public agencies to engage in advocacy that does not violate the letter and intent of the state's conflict of interest laws. In particular, 2 Cal. Code Regs. §18702.4(a) establishes exemptions from the general prohibition against a public official "participating in making a governmental decision" by providing in pertinent part:

(a) Making or participating in making a governmental decision shall not include:

(2) Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official's personal interests as defined in Title 2, California Code of Regulations, section 18702.4(b)(1); or

(3) Actions by public officials relating to their compensation or the terms or conditions of their employment or contract....

2 Cal. Code Regs. §18702.4(b) further establishes the following exemptions from the prohibition against a public official using his or her official position to influence a governmental decision:

(b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:

(3) Negotiates his or her compensation or the terms and conditions of his or her employment or contract.

Taken together, these exemptions generally authorize every employee of the Housing Commission to advocate his or her personal interests to the body or board responsible for making a decision on whether to establish a retirement plan for the Housing Commission. Subdivision (a)(2) and (b)(3) speak in terms of a public official representing only his/her individual interest in connection with making or influencing a public decision pertaining to compensation. Subdivision (a)(3), however, is broader in that it excludes “actions by public officials relating to their compensation or the terms or conditions of their employment...” from the meaning of “making or participating in making a governmental decision” under the PRA. This broad exclusion appears to authorize members of the Housing Commission staff to prepare a report addressing the advisability of a retirement plan on behalf of all employees of the Housing Commission.

2. 2 Cal. Code Regs. §18707.1

2 Cal. Code Regs. §18702.1 contains another possible exemption to the PRA by providing in pertinent part:

(a) Except as provided in Government Code sections 87102.6 and 87103.5, the material financial effect of a governmental decision on a public official’s economic interest is indistinguishable from its effect on the public generally if both subdivisions (b)(1) and (b)(2) of this regulation apply:

(b) Significant Segments and Indistinguishable Effects.

(1) Significant Segment. The governmental decision will affect a “significant segment” of the public generally if any of the following are affected as set forth below:

(D) Governmental Entities. For decisions that affect a federal, state or local governmental entity in which the public official has

an economic interest, the decision will affect all members of the public under the jurisdiction of that governmental entity.

(2) Substantially the Same Manner: The governmental decision will financially affect a public official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation. [Emphasis supplied.]

While the use of the mandatory word "will" in subdivision (b)(1)(D) appears to conclusively determine that all decisions affecting a public entity in which a public official has an economic interest also affect "all members of the public under the jurisdiction of that governmental entity," it appears that in this instance the (b)(2) provisions cannot be satisfied because the approval of a retirement plan for the employees of the Commission does not affect the members of the public in the same **manner** as the public officials.

In short, although this is not clear, it does not appear that this exemption would apply to employees of the Housing Commission.

D. Ethics Ordinance

The conflict of interest rules applicable to City Officials are codified in the City's Ethics Ordinance, which is set forth in Chapter 2, Article 7, Division 35 of the San Diego Municipal Code [SDMC]. The term "City Official" includes any member of a city commission who is required to file an annual statement of economic interest disclosure form pursuant to a conflict of interest code adopted by the City Council. (SDMC §27.3503.) A principle reason behind the adoption of the Ethics Ordinance was "to embrace clear and unequivocal standards of disclosure and transparency in government so as to avoid conflicts of interest and the appearance of conflicts of interest." (SDMC §27.3501.) As a means of achieving this goal, the Ethics Ordinance prohibits City Officials from exercising improper influence on municipal decisions. Section 27.3561 of the SDMC provides in pertinent part:

It is unlawful for any City Official to knowingly influence a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on:

- (a) the City Official or a member of his or her immediate family, if the material financial effect is distinguishable from its effect on the public generally; or
- (b) any of the following economic interests:

(4) any person from whom a City Official or a member of the City Official's immediate family has received (or by whom you have been promised) \$500 or more in income within twelve months prior to the municipal decision.

The above-quoted local prohibition is derived from similar provisions of the PRA (Government Code §§87100, 87103), which preclude a public official from making a decision, participating in the making of a decision, and influencing a decision, in instances where that decision could affect a client from whom he or she has received \$500 or more within the previous twelve (12) months. In interpreting the City of San Diego's ethics ordinance, the Ethics Commission has looked to the decisions and letter opinions of the Fair Political Practices Commission for interpretive guidance because of the strong similarities between the ethics ordinance and the PRA. (See SDEC Informal Advice Letter IA03-08.) The analysis of the issue under consideration in this memorandum is the same under both the PRA and the Ethics Ordinance. Thus, for purposes of brevity the entirety of the analysis set forth herein in connection with the PRA is incorporated herein by reference.

D. Council Policy 000-04

The City of San Diego adopted Council Policy 000-04 on September 24, 2002 on the premise that "every citizen of the City of San Diego is entitled to have complete confidence in the integrity of local government." Thereafter, the Housing Commission adopted Council Policy 000-04 with minor revisions as personnel policy PO102.901. Accordingly, the policy is analyzed in connection with this memorandum, and it recites in relevant part:

First: No elected official, officer, appointee or employee of The City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his or her official duties or would tend to impair his or her independence or judgment or action in the performance of such duties.

Second: No elected official, officer, appointee or employee of The City of San Diego shall engage in any enterprise or activity which results in any of the following:

(a) Using the prestige or influence of The City of San Diego office or employment for anyone's private gain or advantage.

(d) Receiving or accepting money or other consideration from anyone other than The City of San Diego under circumstances from which it could reasonably be inferred that such was intended

to influence that elected official, officer, appointee, or employee in his or her official employment or duties, or as a reward for official action.

(f) Engaging in or accepting private employment or rendering services for private interests when such activities are incompatible with the proper discharge of official responsibilities or duties.

The principle distinction added by Council Policy 000-04 is the above-quoted language pertaining to the avoidance of the appearance of impropriety. The recommendations already made in connection with the formation of an ad hoc committee to formulate a recommendation to the Board of Housing Commissioners regarding the advisability of adopting a retirement plan addresses the potential appearance of impropriety associated with members of the Housing Commission directly recommending the adoption of a retirement plan to the Board of Housing Commissioners. Additionally, the submission of the matter to the Housing Authority for final approval removes the appearance of any impropriety that may attach to the Board of Housing Commissioners deciding a matter in which the Housing Commission employees have a financial interest.

CONCLUSION

The Housing Commission may request the Housing Authority to make the determination as to whether the Housing Commission can offer a retirement plan to its employees. The action by the Housing Authority of the City of San Diego, is that of a separate and legally distinct public entity, and decision by this public entity arguably removes any and all conflicts of interest involved. The safety net is substantial.

In pursuing the administrative process necessary to secure a determination from the Housing Authority regarding the creation of a retirement plan, General Counsel recommends that the Housing Commission establish an ad hoc committee to make a recommendation(s) to the entire Board of Housing Commissioners concerning the advisability of the Housing Commission adopting a retirement plan or amending its current plan. The ad hoc committee should not contain any employees of the Housing Commission, but it may contain less than a quorum of the Housing Commissioners.

The decision of the Board of Housing Commissioners should continue to be advisory only to the Housing Authority, so that the Housing Authority would make the final determination as to whether to authorize the Housing Commission to adopt a retirement plan(s) and/or any amendments thereto.

If the Housing Authority authorizes the Housing Commission to adopt a retirement plan(s) and/or amend those plans, then it should also establish mandatory parameters for the

implementation of the retirement plan(s), and it may authorize the Housing Commission to take those administrative actions necessary to fulfill the parameters established for the implementation of the retirement plan. The scope of the administrative actions available to the Housing Commission, however, should continue to be constrained by the breadth of the direction given by the Housing Authority. Consequently, the Housing Authority should be requested to make determinations on each of the material points of the proposed retirement plan(s), so that the implementation of the direction given by the Housing Authority does not violate the governing conflict of interest laws.²

Sincerely,

Charles B. Christensen
Charles B. Christensen

²This memorandum does not specifically address the issue of whether the increase in retirement benefits attendant to the implementation and/or amendment of retirement plan(s) by the Housing Authority complies the constitutional prohibitions against: (1) gifts of public funds (Cal. Const., Art. XIV, Sec. 6); or (2) extra compensation for past services rendered (Cal. Const., Art. IV, Section 4; Art. XI, Sec. 10). If and when this becomes an issue, this will become the subject of a formal opinion. Suffice it to say at this point, that California case law appears to hold that such a retroactive increase in benefits for public employees does not appear to violate the California Constitution. (See *American River Fire Protection District v. Brennan* (1997) 58 Cal.App.4th 20; *City of Downey v. Board of Administration* (1975) 47 Cal.App.3d 621; *Nelson v. City of Los Angeles* (1971) 21 Cal.App.3d 916; *Jorgensen v. Cranston* (1962) 211 Cal.App.2d 292; *Sweesy v. Los Angeles* (1941) 17 Cal.2d 356; *Home v. Souden* (1926) 199 Cal. 508.)