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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

RESCISSION OF INDEMNIFICATION RESOLUTION R-297335

INTRODUCTION

On November 18, 2002, the City Council approved resolution R-297335 that provided indemnification to members of the board of the San Diego City Employees' Retirement System [SDCERS] in connection with any claim or lawsuit arising from any act or omission in the scope of the performance of their duties as board members. Since then, several SDCERS board members have requested that the City pay their defense in lawsuits filed against them on behalf of the City.¹ The City Council did not approve these requests so a lawsuit was filed entitled *Torres v. City of San Diego*.² On January 20, 2006, the court in the *Torres* case found that the board members were entitled to a defense based on the resolution providing indemnity and the requirements under Government Code section 995. On March 7, 2006, the City Council voted 4-2 in favor of rescinding the resolution providing indemnity. Because 5 votes were required, the resolution remains in effect.³

Recently SDCERS filed a complaint for subrogation against the City, a copy of which is attached for reference. (*San Diego City Employees' Retirement System v. The City of San Diego*, San Diego Superior Court Case No. GIC 861125). The complaint alleges that SDCERS has paid certain legal costs on behalf of its board members and now seeks reimbursement from the City. In particular, the complaint seeks reimbursement of legal costs related to the defense of board

¹*People v. Grissom, et. al*, in which among others, employees Ronald L. Saathoff, John A. Torres, Sharon K. Wilkinson, Terri A. Webster, Cathy Lexin and Bruce Herring were named as defendants. (Case No. GIC 850246.) The City Attorney also filed a cross-complaint in *SDCERS v. San Diego City Attorney Michael Aguirre, et. al.*, in which, among others, employees John Torres, Ron Saathoff, Mary Vattimo, Cathy Lexin, Terri Webster, and Sharon Wilkinson were named as defendants. (Case No. GIC 842845.)

² On August 11, 2005, plaintiffs John A. Torres, Ronald L. Saathoff, Cathy Lexin, Terri A. Webster, and Sharon K. Wilkinson filed *Torres v. City of San Diego* (Case No. GIC 852293). On September 14, 2005, plaintiff Bruce Herring filed a complaint intervention to the case.

³ The rescission of the resolution was considered by the City Council in connection with the City's proposed motion for reconsideration in *Torres v. City of San Diego*. (See, City Att'y Report No. 06-10 (Mar. 2, 2006).)

members in *James F. Gleason, et al. v. San Diego City Employees' Retirement System, et al.* (San Diego Superior Court Case No. GIC 803779) and for more than \$700,000 in attorney's fees incurred in connection with investigations by the United States Attorney, the Securities and Exchange Commission, San Diego District Attorney, and the City's Audit Committee. The complaint asserts that the resolution granting indemnity should be "considered determinative of the City's defense and indemnity obligations regarding, among others, SDCERS Board Members." For the reasons discussed below, the City Attorney recommends that the City Council again consider rescinding resolution R-297335.

DISCUSSION

On November 18, 2002, the City Council approved resolution R-297335 that provided indemnification to members of the board of the San Diego City Employees' Retirement System [SDCERS] in connection with "any claim or lawsuit arising from any act or omission in the scope of the performance of their duties as board members." The pertinent paragraphs of Council resolution R-297335 read as follows:

BE IT RESOLVED, by the Council of the City of San Diego that the City shall defend, indemnify and hold harmless all past, present and future members of the Retirement Board against all expenses, judgments, settlements, liability and other amounts actually and reasonably incurred by them in connection with any claim or lawsuit arising from any act or omission in the scope of the performance of their duties as Board Members under the Charter.

The resolution goes on to say:

BE IT FURTHER RESOLVED, that the City shall have no obligation to provide any defense or indemnification under this Resolution to any Board Member who: (1) fails or refuses to cooperate with the City Attorney or such other attorney who may be engaged to represent the Board Member; or (2) refuses to consent to a settlement (a) which does not require the Board Member to make any payment or perform any act; and (b) by which the settling plaintiff(s)/claimant(s) dismiss the Board Member from the complaint (if any) and generally release the Board Member from all liability arising from the acts or omissions which are the subject of the claim or lawsuit.

The recitals in the resolution state that the indemnification was being provided because board members may be subjected to claims and lawsuits for actions taken in their official capacity and that there is a need to protect and encourage individuals who volunteer their time and talent to serve the public interest. Pursuant to the resolution, the City agreed to defend and indemnify all past, present and future SDCERS Board Members for "all expenses, judgments,

settlements, liability and other amounts actually and reasonably incurred by them in connection with any claim or lawsuit arising from any act.” The only available exceptions to defense and indemnity under the resolution occur when an employee “fails or refuses to cooperate with the City Attorney or such other attorney who may be engaged to represent the Board Member; or refuses to consent to a settlement.”

Although the resolution provided some exceptions to protect the City, it did not provide exceptions for situations when it may not be in the City’s best interests to provide a defense. For example, California Government Code section 995 sets forth exceptions to a public agency’s obligation to provide a defense to employees and former employees. To adequately protect the City’s interests, it would have been appropriate to include these exceptions in the resolution, that is: when the City determines that: (1) the act or omission was not within the scope of the board member’s duties; (2) the board member acted or failed to act because of actual fraud, corruption, or actual malice; (3) the defense of the action by the public entity would create a conflict of interest between the public entity and the board member; (4) an action is brought by the public entity to remove, suspend, or otherwise penalize the board member; or (5) an action or proceeding is brought by the public entity against the board member as an individual and not in his official capacity.

In addition to not providing the above exceptions, the adoption of the resolution in connection with the decision to underfund the pension system has raised questions. On the same date the City Council approved resolution R-297335, the City Council approved the agreement between the City of San Diego and SDCERS allowing the City to continue to underfund its contributions to the retirement system, commonly referred to as Manager’s Proposal II [MPII]. Since then, lawsuits have challenged the legality of MPII on several bases, including allegations that SDCERS board members and City Councilmembers took actions that violated California Government Code section 1090 and the liability limit law. The legal issues surrounding MPII and the inadequate protections for the City in the resolution providing indemnity lead this Office to recommend rescission.

A legislative body may rescind a previous vote and order, if consistent with the law of its creation and its rules, at any time before the rights of third persons have vested. *Clark v. Patterson*, 68 Cal. App. 3d 329 (1977). In that case, the court stated:

It seems self-evident that this rule of law merely enunciates what common sense dictates. Legislative bodies, no less than private individuals or commercial entities, require a measure of flexibility in their dealings and transactions. They, acting as representatives of the people, must have the ability to undo what they have done, given compelling circumstances. *Id.* at 335.

The City Charter provides that all substantive actions of the Council shall be passed by adoption of an ordinance or resolution. San Diego Charter § 270. Implicit in the power to initiate an action is the power to withdraw. *Id.* at 339. Accordingly, the City may rescind or modify previous

resolutions provided that such action does not affect the vested rights of third persons. In this situation, future board members would not have any vested rights that would prevent the rescission of the resolution. Further, we do not believe that the rights of past or present board members, to the extent that any exist, will be inappropriately affected by rescission of the resolution.

First, if the resolution is rescinded, the City's decision whether to provide a defense to SDCERS board members would fall under the requirements of California Government Code section 995 and any applicable exceptions thereto. As such, the board members would have the same rights to a defense and indemnification as an employee or former employee of the City, instead of potentially greater rights under the indemnity resolution. Second, the broad scope of the indemnity provided under the resolution and the questionable circumstances under which it was adopted is contrary to public policy in that it does not provide protections reasonably afforded public agencies.⁴ For these reasons, we do not believe that rescission of the resolution will substantially affect any rights of past and present board members to a defense or indemnification.

CONCLUSION

The City Council approved the resolution indemnifying SDCERS board members at a time when it needed SDCERS' agreement to the City continuing to underfund its retirement contributions. The indemnity resolution did not include reasonable protections for the City similar to those authorized under California Government Code section 995. At this point, the City will continue to face demands for indemnification and defense from SDCERS board members. Rescission of the resolution will put board members on the same level as employees and former employees of the City, instead of providing greater protection. Such inequity is contrary to public policy and is not in the best interests of the City. Accordingly, we recommend that the City Council rescind resolution R-297335.

Respectfully submitted,

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RC-2006-14

⁴ A party may rescind a contract if the public interest will be prejudiced by permitting the contract to stand. Cal. Civ. Code § 1689(b)(6).