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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PROVISION OF DEFENSE FOR FORMER COUNCIL MEMBERS
IN PENSION LITIGATION - ITEM 330 COUNCIL MEETING APRIL 18, 2006

INTRODUCTION

Item 330 on the City Council docket for Tuesday, April 18, 2006, is to make findings related to: "either providing, or refusing to provide for the representation of former members of the City Council in the case of *SDCERS v. City of San Diego and Aguirre* (GIC 841845) in light of *SDCERS'* Cross Complaint to the City's 4th Amended Complaint as required by Government Code Section 995."

Because this matter was not forwarded to this Office for legal review and analysis before docketing, we provide the following report on the City's obligations as we understand the circumstances surrounding the request.

BACKGROUND

On March 27, 2006, attorney Steven Strauss of Cooley Godward wrote Council President Scott Peters on behalf of former City Council member Judy McCarty to: "tender defense of certain City retirement plans under California Government Code section 995.4 and Charter section 40" in the matter of *SDCERS v. Aguirre and City of San Diego*, San Diego Superior Court Case No. GIC 841845. Mr. Strauss claimed "no one is currently defending the interests of the elected officials in this action." Mr. Strauss asked the City to "retain counsel to intervene" in the action and to allow McCarty "to file a complaint in intervention" to defend certain city retirement benefits "on behalf of the City's current and former legislative officers."

In a memorandum dated March 28, 2006, Council President Peters forwarded Mr. Strauss' request to the City Attorney and the Mayor. The memorandum states that Peters expects other former Council members to request a defense and, because it is not in the City's financial interests to hire separate council for each member, that Mr. Strauss should be used by the former Council members.

On April 5, 2006, this Office responded to Mr. Strauss' letter. We advised that California Government Code section 995 requires that the City provide a defense to any civil action or proceeding *brought against a former employee* in his or her official or individual capacity on account of an act or omission in the scope of employment by the City. At this time, the SDCERS lawsuits do not name Mrs. McCarty or any other Council member as a party to action. Accordingly, the City has no obligation to provide a defense on her behalf. Moreover, to the extent that Mrs. McCarty seeks to file her own complaint in intervention, we can find no authority that would permit the City to fund such litigation.

In response, Mr. Strauss contends in an April 10, 2006 letter that the City has discretion to provide Mrs. McCarty a defense under Government Code section 995.4. This section provides that a public entity may, but is not required to, provide for the defense of: "(a) An action brought by the public entity to remove, suspend, or otherwise penalize its own employee or former employee . . ." or "(b) An action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity. . . ". Again, we note that because the actions are not brought against Mrs. McCarty she is not required to retain legal counsel and the City has no obligation to provide a defense.

In addition to the fact that Mrs. McCarty is not entitled to a defense, either on a mandatory or discretionary basis, in our letter to Mr. Strauss dated April 13, 2006, we advised him that he has a conflict of interest in that he and his firm have represented the City and other officials in pension related matters. For example, Michael Attanasio of Cooley Godward was retained by the City of San Diego to represent the City before the U.S. Attorney's Office and the U.S. Department of Justice in criminal investigations into City financial disclosures and possible violations of federal law related to the pension system. As the City's counsel in this matter directly involving the pension system, his law firm received material, confidential information that may not be used against the City. Second, in 2005, while Mr. Strauss was a partner with Procopio, Cory, Hargreaves & Savitch, he was retained to provide advice to the City with regard to *People v. Grissom et al.* and *SDCERS v. Aguirre, et al.*, the same case in which Mrs. McCarty has requested a defense. During this representation, he personally advised City Manager Lamont Ewell regarding issues related to the City's obligation to provide a defense to individuals named in those actions. Therefore, Mr. Strauss and his firm have a potential conflict of interest in representing Mrs. McCarty in the SDCERS actions. (See, letters between the City Attorney and Mr. Strauss dated 3/27/06, 4/5/06, 4/10/06, and 4/13/06, attached hereto.)

The materials filed with the Clerk's Office related to this item 330 include an April 10, 2006, letter from Council President Scott Peters to various former Council members that advises them of two court filings in the SDCERS actions that "may affect your interests" and to determine whether they will be asking the City to provide a defense at City expense. The letter informs the Council members that the City Council has scheduled a hearing to determine whether to hire counsel for former elected officials on April 18, 2006 and if they wish to be defended by an attorney hired by the City to notify him by signing an enclosed form. (See, letter dated 4/10/06 from Council President Peters, attached hereto.)

The form enclosed with the letter states that: "This document may be signed in counterparts and each of the counterparts will constitute the agreement between the undersigned and the City of San Diego." The form also states that "in consideration of the City of San Diego's agreement to provide outside legal counsel to represent us as it pertains to the case, *SDCERS v. Michael Aguirre, et al.*, the undersigned hereby acknowledges the foregoing matters and hereby consents to such indemnification and representation." As of April 17, 2006, several former elected officials have signed and returned the form.

As discussed below, this item is problematic on several levels. First, if the item contemplates providing legal counsel to intervene in the SDCERS actions to protect the legislative retirement benefits of former Council members, the current Council members have a financial interest in the matter and may not vote. Second, the "agreement" was not reviewed by this Office and none of the other employees or former employees have signed an agreement like the one proposed by Council President Peters. Third, the form purports to be an agreement between the City and former elected officials, but fails to follow the procedures required by the City Charter. Fourth, the proposed attorney has potential unresolved conflicts of interests. Fifth, the City is not obligated to provide former Council members a defense and indemnification in the SDCERS actions. The actions have not been brought against the former Council members and they are not named as defendants. The Council members are not even witnesses that have been asked to testify on behalf of the City. Accordingly, no action is required by the City Council at this time.

DISCUSSION

I. To the Extent that Legal Counsel is Retained to Protect the Private Benefits of Former Council Members, the Current Council Members have a Disqualifying Financial Interest in the Decision.

The City's Fourth Amended Cross-Complaint in the *SDCERS* action seeks to void illegally created pension benefits. The Cross-Complaint at issue contends that City officials violated California Government Code section 1090, City Charter section 99 and California Constitution, Article XVI, section 18. It appears that Mr. Strauss seeks to represent McCarty and others to defend the illegal actions, specifically the legality of benefits created by EORP (Elected Officials Retirement Plan) and LORP (Legislative Officers Retirement Plan).

On or about March 24, 2006, SDCERS filed a Compulsory Cross-Complaint that also seeks to declare certain pension benefits as illegal and void. The Fourth Cause of Action, "Violations of Government Code 1090," alleges – as the City's Cross-Complaint does – that members of the City Council acting in their official capacity entered into the agreements despite a disqualifying conflict of interest under California Government Code section 1090.

In Mr. Strauss' March 27, 2006, letter, he argues that the City should provide a defense:

As no one is currently defending *the interests of the elected officials* in this action, Mrs. McCarty requests that the City retain counsel to intervene in the above-entitled action. Upon receiving approval from the Council to provide a defense, Mrs. McCarty intends to file a complaint in intervention to defend these programs *on behalf of the City's current and former legislative officers.* (*emphasis added*).

In a memorandum to the Mayor and City Attorney dated March 28, 2006, Council President Peters stated it "would not be in the City's financial interest for each former council member to hire his or her own individual attorney." Peters then recommended that the City "retain only Ms. McCarty's attorney and require any other former elected official with an affected interest in this case to use the same firm."

To the extent that the decision before Council is to provide an attorney to protect the private retirement benefits of former elected officials, such action would be improper. Further, by providing a defense to former Council members to defend the very benefits the current council members will receive, the current Council is voting for its own self-interest. Any agreement made to fund that defense arguably would violate Government Code section 1090 and be void. Thus, the Council should recuse itself from the vote.

The common law prohibition against "self-dealing" has long been established in California law. *City of Oakland v. California Const. Co.* (1940) 15 Cal.2d 573, 576. Government Code section 1090 provides in pertinent 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." The prohibition applies to virtually all state and local officers, employees and multi-member bodies, whether elected or appointed, at both the state and local level. *Thomson v. Call, supra*, 38 Cal.3d 633 [council member]; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 [council member]; *People v. Vallerga* (1977) 67 Cal.App.3d 847 [county employee]; *People v. Sobel, supra*, 40 Cal.App.3d 1046 [county employee]; *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533 [contract deputy city attorney]; 70 Ops. Cal. Atty. Gen. 271 (1987) [contract city attorney].) Although the term "financial interest" is not specifically defined in the statute, an examination of the case law and the statutory exceptions to the basic prohibition indicates that the term is to be liberally construed. *Thomson v. Call*, 38 Cal.3d. at 645.

A contract made in violation of Government Code section 1090 is void. Government Code section 1092 provides:

Every contract made in violation of any of the provisions of Section **1090** may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided

because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member.

Case law has historically interpreted contracts made in violation of section 1090 to be void, not merely voidable. *Thomson v. Call*, 38 Cal.3d at 646, n.15; *People ex rel. State of Cal. v. Drinkhouse*, 4 Cal.App.3d 931, 935 (1970). Every public officer must be guided *solely* by the public interest and that policy is the foundation of Section 1090.

The purpose of section 1090 is to make certain “every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.” *Thomson v. Call*, 38 Cal.3d at 650. The Court also stated:

It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer’s undivided and uncompromised allegiance that the violation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved. Nor is an actual loss to the city or public agency necessary for a section 1090 violation. *Id.* at 648.

Because this vote potentially would implicate the self-interests of all members of the current City Council, Council members should recuse themselves from the matter and should not consider it. A vote taken to provide funding for counsel to protect the Council’s own self interests – their future retirement benefits in a plan that covers them all – would constitute improper self-dealing under Government Code section 1090 and other ethics regulations.

II. The Letter to Former Council Members and Form Agreement Violates the Procedures Required by the City Charter and other City Policies.

On or about April 10, 2006, Council President Peters sent a letter to a dozen former Council members, to inform them of the pending pension litigation in *SDCERS v. Michael Aguirre, et al.* The letter lifted verbatim language from Mr. Strauss’ March 27, 2006, letter to Peters requesting defense and indemnification for Mrs. McCarty: “Because the City Attorney has taken a position in this matter that is adverse to the interests of elected officials, he and his office are unable to represent those individuals.” Peters added, “If you wish to be defended by an attorney hired by the City, please notify me no later than April 17 by signing and returning the enclosed form.”

Attached to the letter was a form entitled “Request for Indemnification,” which stated in relevant part: “This document may be signed in counterparts and each of the counterparts will constitute **the agreement between the undersigned and the City of San Diego.**” It is then signed April 10, 2006 “By Scott H. Peters Council President.” It asks council members to sign

after the following paragraph:

After carefully reviewing the foregoing, **and in consideration of the City of San Diego's agreement to provide outside legal counsel to represent us as it pertains to the case, *SDCERS v. Michael Aguirre, et al.***, the undersigned hereby acknowledges the foregoing matters and hereby consents to such indemnification and representation.

It appears that this letter and "agreement" were sent by Peters to Susan Golding, Judy McCarty, George Stevens, Barbara Warden, Ralph Inzunza, Dick Murphy, Harry Mathis, Byron Wear, Christine Kehoe, Valerie Stallings, Juan Vargas and Michael Zucchet. For the reasons described below, the letter and "agreement" were improperly sent and any agreement signed by former Council members is void.

First, the Council President has no authority to enter into contracts on behalf of the City. Charter section 265(a) confirms that the Mayor is the official head of the City "for the signing of all legal instruments and documents." Accordingly, the "agreement" signed by the Council President is unenforceable and void. Second, Charter section 40 reserves to the City Attorney the duty to provide legal advice on the part of the City. However, the Council President did not seek legal advice from this Office before preparing or signing the "agreement." Third, to the extent the Council President is assisting in getting an attorney for others to intervene in the court action and protect his own interests, the "agreement" may violate Government Code section 1090 and be void. Finally, the letter from Council President to former Council members in the context of the surrounding circumstances could be construed as an improper solicitation of clients on behalf of Mr. Strauss. The letter, combined with the offer of an "agreement" by the City to pay the defense and indemnity before any action was taken by the full Council, raises numerous ethical questions.

III. Government Code section 995 Does Not Require that the City Provide a Defense to Former Council Members Under These Circumstances.

The City Council agenda indicates that the matter is to determine whether to provide representation to former Council members as required by California Government Code section 995. That section provides, in relevant part:

Except as otherwise provided in Section 995.2 and 995.4, upon request of an employee or former employee, *a public entity shall provide for the defense of any civil action or proceeding brought against him*, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity. . .

As noted above, the SDCERS actions have not been brought against any former Council

members in that they are not named as defendants. Accordingly, it is not necessary to examine whether the exceptions under sections 995.2 and 995.4 might apply. For reference, some of these exceptions are discussed in the April 5, 2006, letter from the City Attorney to Mr. Strauss.

Government Code section 995.9 would permit the City to defend or indemnify any witness who has testified on behalf of the public entity in any criminal, civil, or administrative action. The decision to defend or indemnify such a witness rests within the sound discretion of the City and may be based on any relevant factors, including, but not limited to, whether the provision of defense or indemnity would serve the public interest. Cal. Gov't Code § 995.9. In this case, the information provided in support of the action does not indicate that the former Council members have been asked to testify as a witness in the SDCERS actions. Accordingly, there is no need for legal representation at this time.

CONCLUSION

To the extent that the item is to retain outside counsel to protect the "interests of the elected officials" by intervening or otherwise, we recommend that the Council members recuse themselves from a vote on the matter because it appears that they have a potential financial interest in protecting their own retirement benefits. With respect to the "agreement" prepared without legal advice from this Office and contrary to procedures, it should be deemed void. Finally, because the former Council members are not parties to the SDCERS actions, Government Code section 995 does not require that the City provide them legal counsel. At this time, there does not appear to be any City interests that would justify proactively providing legal counsel to former Council members.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

MJA:SS:jb
RC-2006-15
Attachments