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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

**CITY COUNCIL MEMBERS MUST RECUSE THEMSELVES FROM VOTING FOR
DEFENSE FOR FORMER COUNCIL MEMBERS IN PENSION LITIGATION**

ITEM S500 ON SUPPLEMENTAL DOCKET OF APRIL 25, 2006

INTRODUCTION

The City Attorney issues this supplemental Report after learning at the April 18, 2006 City Council meeting that former Council members have signed and returned to Council President Scott Peters purported “contracts” related to this issue. Those doing so include former Mayor Dick Murphy and former council members Barbara Warden, Ralph Inzunza, Byron Wear, Judy McCarty and George Stevens.¹ (See attachments.) These agreements are void and raise serious legal and ethical issues, compelling this Office to respond and issue a strong warning against a Council vote on this matter.

On April 25, 2006, (after a continuance from the agenda of April 18, 2006), the City Council again will be asked to consider approving City funds for the “defense” of former City Council members whose pension benefits are provided through the Elected Officials Retirement Plan (EORP) and the Legislative Officials Retirement Plan (LORP). These council members seek to intervene in existing litigation to which they are not parties, in order to defend the benefits given to council members under EORP and LORP. Council members seek to authorize up to \$250,000 through Item S500 for the initial representation.

Because this vote would potentially implicate the self-interests of all members of the current City Council,² 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

¹ These are the purported “contracts” on file with the City Clerk. Councilmember Peters may have received other signed “contracts” that have not yet been filed with the Clerk.

² This Office understands that newly elected Councilmember Kevin Faulconer may have taken himself out of the City pension system. If this is correct, Councilmember Faulconer would not have the conflicts detailed in this memorandum. We are unaware of any other councilmember in a similar position; if others have done so, they also would not have the conflicts detailed here.

interests – their future retirement benefits in a plan that covers them all – could constitute improper self-dealing under Government Code section 1090 and other ethics regulations. A willful violation of Government Code section 1090 can be prosecuted as a felony and can result in permanent disqualification from holding any office in this state. Cal. Govt. Code § 1097.

The former Council members at issue are not defendants in the pension litigation. No determination has been made that they are necessary or indispensable parties to the litigation or qualify as real parties in interest. Rather, this item, docketed by Council President Scott Peters, appears to be an improper attempt by Peters to “round up” council members as clients for an outside attorney, then to use City funds to pay for the representation of the interests of both former and current Council members in the pension litigation. Although the agenda item is carefully worded in one paragraph as a vote to pay for representation of “former members of the City Council,” the fact is that the benefits the former council members seek to defend in court are those that are provided to both former and current council members.

Significantly, Council President Peters may have violated the City Charter and other ethics regulations by sending what amounts to a solicitation letter to potential clients (former Council members), then purporting to offer an “agreement” for defense and indemnity on behalf of the City dated before any action was taken by the full Council. The “agreement” signed by Peters on April 10, 2006 raises numerous ethical questions. Moreover, to the extent the letter purports to offer a “contract” to former council members, Peters has no authority to make such a contract on behalf of the City. To the extent that former council members have signed the “contract,” it is void and of no effect.

Moreover, as this Office previously has informed the Council, the counsel proposed to represent the Council members in litigation against the City has a conflict of interest that should preclude that representation: Cooley Godward previously represented the City before the U.S. Attorney’s Office and the Department of Justice in pension-related litigation. (See Letters from City Attorney to attorney Steven M. Strauss, attached to our prior Report.)

Finally, even if the Council were to consider the issue under Government Code Sections 995 and 995.4, Council should not approve a defense. There is no duty to provide a “defense” to individuals who are not defendants and seek to intervene in an action. Moreover, it would be improper to provide such a defense because of the conflicts at issue in the case (i.e., the Council should not approve payment of City funds for litigation adverse to the City).

Because of the serious potential legal and ethical consequences related to the noticed item, this Office strongly encourages the Council to take the matter off calendar. If the matter remains on calendar, we encourage conflicted council members to recuse themselves from hearing it and to understand the potential legal consequences of casting any vote to use City funds to defend their own benefits.

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 *SDCERS v. Aguirre and City of San Diego*, San Diego Superior Court Case No. GIC 841845.

Strauss claimed “no one is currently defending the interests of the elected officials in this action.” 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.”

The City’s Fourth Amended Cross-Complaint in the *SDCERS* action seeks to void illegally created pension benefits. 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). The Cross-Complaint at issue contended that City officials violated California Government Code section 1090, City Charter section 99 and California Constitution, Article XVI, section 18.

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 § 1090.

In a memo to the Mayor and City Attorney dated March 28, 2006, Council President Scott 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.”

Peters, however, then affirmatively sought council members as clients for attorney Steven Strauss and sent a purported “agreement” with them before the Council had even discussed the issue. This was improper.

On April 18, 2006, the Council heard the item, against the strong advice of the City Attorney. The Council then voted to continue the matter one week, to April 25, 2006, to allow council members to confer with their own counsel, if desired. The Council asked Strauss to stipulate to the one-week continuance, because the Council had a deadline to respond to the request, and he did so. The item now docketed for April 25 directs the City Attorney to draft a resolution that would “**Approve retention of outside counsel** to represent former members of the City Council” and authorize \$250,000 for that representation.

The City Attorney reiterates a strong warning against such a vote. Council members have a conflict of interest and the limited Rule of Necessity is not applicable. This matter does

not meet the requirements of Government Code section 995 such that a vote is even required, as the former council members are not parties to the pension litigation.

1. Councilman Peters Had No Authority and Ignored Legal and Ethical Regulations By Sending a Letter to Seek Former Council Members to be Clients of Attorney Steven Strauss.

On or about April 10, 2006, Peters sent a letter on his Council President stationery 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 attorney Steven Strauss' March 27, 2006 letter to Peters requesting defense and indemnification for Judy McCarty. Peters added the line, "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."

Peters attached a "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."

According to Peters' letter, 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.

The letter and "agreement" were improperly sent and any agreement signed by former council members is void.

First, Council President Peters 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." The Council President has no power under the Charter to enter into such an agreement. The document signed by Peters is void.

Second, Charter section 40 reserves to the City Attorney the duty to provide legal advice on the part of the City. However, Peters is providing legal advice on behalf of the City by issuing the letter to "round up" clients. He also may be providing legal advice when he states, "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.” The letter and this statement violate Charter section 40.

Third, Peters is self-interested in the outcome of the legal determination at issue. To the extent he is interested in getting an attorney for others to intervene in the court action and protect his own retirement benefits, he is making a “contract” that violates Government Code section 1090. We note that he, in fact, signed the agreements on behalf of the City, so there is no ambiguity that it was intended to be a binding “contract.” Any such contract is void under the Government Code.

Fourth, to the extent that Peters is providing legal advice by sending this letter, he may be violating duties under the State Bar of California. According to the State Bar of California, Peters has been on inactive status since December 1, 2000 and may not practice law. To the extent he is advising former council members by sending this letter, he runs afoul of State Bar rules. Although outright “solicitation” requires money to be exchanged, this is arguably solicitation as well: Peters would be receiving a representation by seeking out others to bring the claim that would protect his own benefits.

2. The Council is Interested in the Defense of the Benefits and Must Recuse Itself from Considering the Issue of Providing a Defense.

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, FPPC regulations and common law conflicts of interest. 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.*, 15 Cal.2d 573, 576 (1940). 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*, 38 Cal.3d 633 (1985) [council member]; *City Council v. McKinley*, 80 Cal.App.3d 204 (1978) [council member]; *People v. Vallergera*, 67 Cal.App.3d 847 (1977) [county employee]; *People v. Sobel*, 40 Cal.App.3d 1046 (1974) [county employee]; *Campagna v. City of Sanger*, 42 Cal.App.4th 533 (1996) [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.

3. Even if the Council Were In a Position to Consider the Defense, It Should Not Be Provided Under the Provisions of the Government Code.

Even if the Council were to ignore its conflicts and vote, this Office recommends against the provision of a defense on these facts. For more detail, we refer to the Report issued to the Council last week. However, we briefly detail this law again here.

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. Government Code section 995 provides, in relevant part:

Except as otherwise provided in Sections 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. . .

Cal. Govt. Code § 995 (emphasis added).

The former council members are not parties to the *SDCERS* action. The City thus has no

obligation to provide a defense on their behalf. Moreover, to the extent that they seek to file their own complaint, the City has no obligation to fund it.

To the extent former council members seek a defense in relation to the City's Fourth Amended Cross-Complaint, California Government Code section 995.4 also does not require the City to provide a defense. The 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. . . ."

The City's Cross-Complaint seeks to void illegally created pension benefits. It does not name former council members as defendants. To the extent they characterize the Cross-Complaint as an effort to "penalize" them, by voiding their illegal actions, the argument is flawed. Even so, they are not defendants and thus not entitled to a defense.

Moreover, because the City of San Diego is the Cross-Complainant, and former council members seek to intervene and take a contrary position, the City may refuse to provide a defense. The City need not provide a defense under section 995.2(a)(3) if doing so would create a conflict of interest between the public entity and the former employee. As stated in *Stewart v. City of Pismo Beach*, 35 Cal. App. 4th 1600, 1606 (1995), "it is unreasonable to require a public entity to finance litigation directed against it." When there is an actual conflict between a public entity and its employees "the public entity need not provide any defense whatsoever." *City of Huntington Beach v. Petersen Law Firm*, 95 Cal. App. 4th 562, 567 (2002).

Again, as set forth above and in the advice provided last week to the Council, the proposed law firm has a potential conflict of interest if it represents the former council members. Cooley Godward previously was engaged to represent the City of San Diego before the U.S. Attorney's Office and the U.S. Department of Justice regarding potential violations of securities laws and related matters. These matters appear to be implicated in the representation proposed.

CONCLUSION

The purported defense "contracts" submitted by Council President Scott Peters to former council members are void and raise serious legal and ethical issues, compelling this Office to respond and issue a strong warning against a Council vote on this matter. The City Attorney strongly recommends that the Council recuse itself from participating in this item.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

Honorable Mayor and City Council

-8-

April 24, 2006

SBS:als

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