October 1, 1990

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
MAYORAL APPOINTMENT (DOCKET OF OCTOBER 2, 1990 - ITEM 332)

On September 18, you asked me for guidance on the rules about the timing of mayoral appointments subject to Council confirmation. Specifically, you wanted to know (1) what procedure should be utilized by the Council to make its own appointments when the Mayor has failed to appoint within 45 days of a vacancy, (2) whether the 45-day period is tolled or otherwise eliminated by mayoral appointments made before the end of the 45-day period or after it has passed but before the Council has acted to make its own appointments and (3) what constitutes a "vacancy" which will trigger the 45-day period in which the Mayor must appoint. My staff has researched the subject thoroughly and, as might be expected, has found no case or statutory law directly on point.

Pertinent to your consideration of appointment procedures are Sections 41 and 43 of the City Charter, those provisions in

1.Section 41 provides:

> The Mayor shall appoint, subject to the confirmation of the Council, members of all commissions established pursuant to this section. Whenever the Mayor does not appoint a member within forty-five (45) days after a vacancy occurs, the Council shall make such appointment.
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> . . . .
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> Paragraph (c) of Section 43 provides:
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> Whenever under the provisions of this Charter or ordinance the Mayor is vested with authority to appoint the members of boards or committees and does not take such action within forty five (45) days after the board or committee has been established or a vacancy occurs, then the Council shall make such appointments . . . .

city ordinances (such as San Diego Municipal Code, Section 98.0515) relating to appointments to particular boards and committees and Council Policy No. 000-13. The latter sets out procedure for Mayor and Council appointments. It provides for notification to the Council of vacancies to be filled by mayoral appointment, sets a 30-day time period for Council nominations

for appointment and requires the Mayor to docket the appointment for the next regularly scheduled Council meeting following the close of the 30-day period. It does not mention the 45-day period in which the Mayor is required to appoint.

In the case of the appointments on your September 18 docket to the Housing Trust Fund Board of Trustees, in accordance with Council Policy No. 000-13, the Mayor gave Council notice of her appointments and docketed them for confirmation on August 6, 82 days after the ordinance creating the board became effective. On that date the matter was continued by a majority of the Council to September 18. Sometime after August 6, four councilmembers attempted to docket a substitute panel for September 17. The argument is that the Mayor, by failing to appoint within 45 days, forfeited her appointment power, giving Council that power. The same argument is made with respect to appointments to the Park and Recreation Board (subject to Charter, Section 43) which were also before the Council on September 18. (Item 337).

A review of the legislative history of Paragraph (c) of Section 43 of the Charter discloses that the purpose of the 45-day rule is "to guarantee that essential advisory functions be continuous" by ensuring that vacancies are filled quickly so that boards and committees can conduct their business. If, by a strict, "mandatory," interpretation of the 45-day rule, the Mayor loses her power of appointment completely, the Council could delay the process by failing to make its own appointment. A more reasonable interpretation of the rule would be that, if the Mayor fails to act within 45 days, the Council may appoint, but the Mayor is not completely stripped of her power. Thus, after 45 days, the Council can act or await the Mayor. The Mayor may

2.Section 98.0515 is part of Division 5 of Chapter IX pertaining to the San Diego Housing Trust Fund. The division was enacted in April 1990. Section 98.0515 provides for the selection of the Housing Trust Fund Board of Trustees. The provision pertinent to the subject at hand reads:

Trustees shall be appointed by the Mayor . . . . Whenever the Mayor does not appoint a Trustee within forty-five days after a vacancy, the Council shall make such an appointment. See ballot argument in favor of Proposition J, election of November 4, 1969.

"vest" her rights and ensure her exclusive appointment power by acting within 45 days, but after this time, the Council may put forth nominations as well.

The question of whether the Mayor's failure to appoint within 45 days after a "vacancy" extinguishes her power to do so

forever is not as simple as it seems. Whether "shall" is mandatory (means "must") or directory (means "may") is a question frequently posed in statutory interpretation. The question boils down to whether "shall" should be given mandatory force despite results which seem contrary to what the legislative body had in mind when it enacted the provision. Though the Charter provisions and the ordinance cited in the footnotes use the mandatory "shall" when referring to what happens if the Mayor fails to appoint within the 45-day period, courts often rule "shall" means "may" to avoid a result difficult to rationalize under the circumstances. This is particularly true when dealing with time or too harsh limitations. See Cochran v. Herzog Engraving Co., 155 Cal.App.3d 405, 411 (1984) 205 Cal.Rptr. 1, 4; In re Charles B., 189 Cal.App.3d 1204, 1209, 235 Cal.Rptr. 1, 3, (1986).

In In re Charles B., the Children's Protective Services failed to submit and serve a status report in a dependency proceeding 16 days prior to the status review hearing as required by Welfare and Institutions Code section 366.2(c). The trial court held that the use of the word "shall" in section 366.2 made the statute mandatory and therefore jurisdictional. It dismissed the proceeding for failure to comply with the statute. The Court of Appeal, relying on the underlying purpose of section 366.2 and its relation to other similar statutes, found that the Legislature did not intend this harsh result and reversed, holding the procedural requirements of section 366.2 were merely directory. The Court stated, "Courts have generally held time requirements to be directory rather than mandatory or jurisdictional, absent a clearly expressed contrary intent." In re Charles B., 189 Cal.App.3d 1204, 1209, 235 Cal.Rptr. 1, 3 AT1

Were a court to rule on the appropriate interpretation of our Charter with respect to this issue, we believe it could follow the rule expressed in In re Charles B., but it is difficult to predict that result with any certainty. One could argue that the Mayor's appointment process has by and large met the City's needs and to hold her to an absolute 45-day deadline may not always be in the best interests of the City. However, it could also be contended that dilatory appointments do not serve City government well.

I am extremely reluctant to express a final opinion on the present status of the appointments in question since there is no

dispositive rule to apply. A general concern over the appointment process has arisen from time to time in my 21 years as the City Attorney, however, and on each occasion a

satisfactory compromise was found. I trust that will be the case here as well. If not, my advice to you for purposes of the precise issue before you, the appointment of the members of the Housing Trust Fund, is that the Council consider the Mayor's appointments as if they had been made within the 45-day time period. I advise in this fashion because the Council continued the item from August 6, 1990 without raising any question of timeliness and is arguably estopped from raising it at this time.

In light of the lack of explicit guidelines, it would seem appropriate that the Council establish its own rules on the subject, recognizing that a specific compromise procedure fully understood by Mayor, Council and the public will substitute progress for the present stalemate on appointments. To assist you in formulating such rules, I have some proposals which I believe would establish fair and workable procedures. They are merely suggestions and I recommend you refer them to the Rules Committee for consideration and eventual formulation of rules for referral to the full Council. Specific rules will be drafted at your direction.

The rules my staff and I suggest would provide that the 45-day requirement is met when the Mayor places the appointments for confirmation on the docket for a day which will fall within the 45-day period. If the Council does not affirm the appointments, the 45-day period would be tolled until the Council acts affirmatively (by five votes) to affirm or reject the appointments. If the latter, a new 45-day period would then begin. The same process would be followed until confirmation occurs or until the Mayor fails to make the appointments within a succeeding 45-day period. Such a procedure is necessary to prevent a Council majority from frustrating the Mayor's appointment power by refusing to confirm until the 45 days have run and the Mayor has lost appointment power.

If the Mayor fails to appoint within the 45-day period, we suggest the rules provide a Councilmember may require docketing of a resolution calling for Council appointments in the manner normal when the Council has appointment power in the first place. See Council Policy No. 000-13. At that point, mayoral appointment power would be terminated, unless the Council, by failing to adopt the resolution, decides to return it to the Mayor.

If no Councilmember requests docketing of the resolution and the Mayor dockets appointments to be given confirmation consideration after the 45-day period has run, the Council may

treat the appointments as timely submitted or it may reject them

and adopt a resolution calling for Council appointment. In such a situation, if more than one appointment is before the Council, it may affirm some and subject the rest to its own appointment procedure.

We suggest you adopt rules having the objective of making the 45-day requirement meaningful. They should preserve the Mayor's power of appointment while giving the Council the power contemplated to require the appointments to be made in a timely fashion. The question of whether 45 days is a long enough period to give the Mayor opportunity to find qualified appointees willing to serve and comply with Council Policy No. 000-13 is left to your discretion.

The rules I am suggesting would also answer the third question by providing that a "vacancy" causing the 45-day period to begin will happen when (1) an incumbent appointee terminates his or her office by resigning, being properly removed from office or coming to the end of a fixed term, regardless of language that provides the appointee continues in office until his or her successor takes office, or (2) the effective date of legislation creating a new office.

Respectfully submitted,
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