

DATE: September 11, 1989

TO: Councilman Bob Filner

FROM: City Attorney

SUBJECT: Use of Redevelopment Funds for Expansion of the
St. Vincent de Paul Center

This is in response to your memorandum of August 23, 1989 and confirms oral advice given to your assistant, Vince Hall, on September 9 and Francisco Estrada on September 11, 1989.

By memorandum you informed us that you are studying the feasibility of using redevelopment monies (redevelopment as defined by Health and Safety Code section 33000 et seq.) to help finance construction of an additional homeless facility directly adjacent to the St. Vincent de Paul Center (the "Center"). This facility would be operated by the Center, which is an unincorporated, nonprofit, charitable association, originally established by the Catholic Diocese of San Diego in 1958. The specific monies you are interested in using to help finance the homeless facility would be an uncommitted \$200,000 from the Centre City Development Corporation's ("CCDC") Columbia Low and Moderate Income Housing Fund.

Against this background, you ask three primary questions:

1) If you were to propose this allocation, would your membership on the Board of Directors of the Center constitute a conflict of interest? 2) Is it possible to use funds from the Columbia Redevelopment Project Low and Moderate Income Fund in an area outside an adopted redevelopment area? If so, may these funds be used to finance a homeless facility? 3) Would a contribution by The City of San Diego (the "City") to the Center for construction of a homeless facility constitute a violation of the requirement for separation of church and state? If so, are there any other mechanisms by which a contribution could be made?

Each of the questions you ask will be dealt with separately.

1. Would your membership on the Board of Directors constitute a conflict of interest?

The applicable law in this situation can be found in the Political Reform Act (Government Code section 81000 et seq.), Charter section 94, and Government Code section 1090 et seq. In addition, Council Policy 000-4 should also be referenced.
Political Reform Act

The Political Reform Act (the "Act") prohibits a public official who has a financial interest, as defined by the Act, from making, participating in making, or in attempting "to use his official position to influence a governmental decision . . ."

when that decision will have a material effect on the financial interest. Government Code sections 87100 and 87103.

Under Government Code section 87103, an official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on "any business entity in which the public official is a director . . ." Government Code section 87103(a).

A "business entity" as defined by Government Code section 82005, excludes nonprofit corporations. Therefore, City officials who are directors of nonprofit corporations are not considered to have a prohibited financial interest within the meaning of the Act. Therefore, your membership on the Board of Directors of the Center would not present a conflict under the Act.

Charter section 94 and Government Code section 1090 et seq.

Charter section 94 reads in pertinent part:

No officer, whether elected or appointed, of The City of San Diego shall become directly or indirectly interested in, or in the performance of, any contract with or for The City of San Diego . . . No officer . . . shall be construed to have an interest within the meaning of this section unless the contract . . . shall be with or for the benefit of the office . . . with which said officer is directly connected in the performance of his duties and in which he or the office . . . he

represents exercises legislative, administrative or quasi-judicial authority in the . . . performance under said contract . .

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This Charter section has long been interpreted along the same lines as Government Code section 1090 et seq., which prohibits City officials from having financial interests in contracts to which the City is a party.

Government Code section 1091.5, as amended in 1980, holds that there is not a contractual conflict so long as the public officer discloses that he or she is a member or officer of a nonprofit corporation with whom the City is contracting and that the disclosure must appear in the minutes of the legislative body. Government Code sections 1091(a) and (b)(1) and 1091.5(a)(8).

Therefore, if the City entered into any agreement memorializing the allocation of funds to the Center, you would not have a conflict under Charter section 95 and Government Code

section 1090 et seq. provided you disclosed your affiliation at the Council meeting authorizing the allocation and the disclosure was recorded in the Council minutes.

Council Policy 000-4

Council Policy 000-4 holds:

No elected official . . . 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 official duties or would tend to impair his independence or judgment or action in the performance of such duties.

This is a policy, not law, and may be waived by vote of the City Council. Furthermore, it does not necessarily require that you disqualify yourself from participating in decisions regarding the Center. It is a matter of individual conscience as to whether holding the position of Director would tend to impair your independence in making decisions as a Councilmember. If you think it would, you would be advised to refrain from participating in the making of or voting on those decisions.

There does not appear to be any "legal" prohibition or conflict of interest in your proposing the allocation of redevelopment funds to the Center. However, you are advised to closely examine whether your capacity as a Director of the Center would impair your independence as a Councilmember in making a decision on the allocation.

2. Is it possible to use funds from the Columbia Redevelopment Project Low and Moderate Income Fund in an area outside an adopted redevelopment area, and if it is possible, may those funds be used to finance a homeless shelter?

The use of funds for an adopted redevelopment area is controlled by Health and Safety Code section 33000 et seq. Health and Safety Code section 3334.2 holds that 20 percent of the taxes allocated to the redevelopment agency ("tax increment") be set aside for the purpose of "increasing and improving the community's supply of low- and moderate-income housing available at affordable housing cost . . ."

Of particular importance to the analysis here is Health and Safety Code section 3334.2(e)(2) which states, "In carrying out the purpose of this section, the agency may exercise any or all of its powers, including the following . . . (2) Improve land or building sites with on-site or off-site improvements, but only if the improvements directly and specifically improve or increase the community's supply of low- or moderate-income housing."

In addition, Health and Safety Code section 3334.2(g) allows for these funds to be used outside of a project area if 1) done by resolution of the agency and 2) there are findings in the resolution to demonstrate that the use of the funds outside the project area "will be of benefit to the project." It is stated in the same section that the "provision of replacement housing pursuant to Section 33413 is always of benefit to a project." Section 33413 requires that whenever a redevelopment project destroys or removes dwelling units of low or moderate income persons, "an equal number of replacement dwelling units at affordable housing costs" must be provided "within the territorial jurisdiction of the agency."

It would appear that a homeless shelter would increase the community's supply of low income housing and that the Columbia Low and Moderate Housing Fund could be used for that purpose.

However, as the Center is outside the adopted Columbia Redevelopment area, the findings required by 3334.2(g) must be made a part of the legislative action authorizing the allocation of Redevelopment Agency funds, and that action must be done by resolution. Specifically the factual findings that would have to be made include 1) that due to redevelopment projects in the Columbia Redevelopment Area, there has been relocation of low- or moderate income persons (including homeless persons) due to the destruction or removal of dwelling units, (perhaps even contributing to the large number of homeless persons in the Centre City area) and 2) that the construction of a facility for the homeless would have specified benefits to the Columbia Redevelopment Area.

3. Would a contribution by The City of San Diego to the Center for construction of a homeless facility constitute a violation of the requirement for separation of church and state?

In determining whether the allocation of funds to the Center by the City constitutes a violation against the separation of church and state, both the United States and California Constitutions must be researched.

The Establishment Clause of the First Amendment of the United States Constitution states:

Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The First Amendment is made applicable to the states by the Fourteenth Amendment which holds, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."

Article XVI, Section 5 of the California Constitution states:

Neither the Legislature, nor any county, city and county township, school district or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed or sectarian purpose, or help to support or sustain any school, college, university, hospital or other institution controlled by any religious creed, church or sectarian denomination whatever

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Each Constitution will be dealt with separately. It should be noted, however, that neither the Federal or State prohibitions against the advancement or prohibition of religion should be viewed as antagonistic to religion. In *Hunt v. McNair*, 413 U.S. 734, 742 (1973), the Supreme Court held, "whatever its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected."

Similarly, in *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593 (1974), Justice Mosk, speaking on behalf of the California Supreme Court state on page 605, that Article XVI, Section 24 of the California Constitution ". . . has never been interpreted . . . to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose."

United States Constitution

In determining if there would be a violation of the Establishment Clause three criteria must be examined according to the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Those criteria are:

1. Does the state action have a secular purpose?
2. Does the state action have a primary effect which advances or inhibits religion?
3. Does the state action foster excessive governmental entanglement with religion?

1. Secular Purpose

The City's purpose in allocating the funds for construction of an additional facility for the Center would be to make more temporary housing available to homeless persons. As this purpose does not involve religion or the establishment of such, it would be viewed as secular.

2. Primary Effect

In *Hunt v. McNair*, *supra*, at 743, the Supreme Court held that aid would have "a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . ."

The California Supreme Court in *California Educational Facilities v. Priest*, held that the important issue is not whether state aid, "provides such a benefit to religion and/or a religious institution, but whether the benefit is incidental to a primary public purpose." *Priest*, *supra*, at 605.

Thus, it must be determined to what extent the Center has ties to the Catholic Church and the primary purpose of the City in providing financial assistance to the Center.

In looking to see the degree to which the Catholic Church, influences the Center's mission, the Center's By-Laws, attached to this memorandum as Exhibit A, explain in Section III. Purposes, that the Center "is a charitable organization and is not organized for the private gain of any person." Membership in the Center (Section IV of the By-Laws), "shall be comprised of those persons who are also Directors of this Association." Section C.1 of the By-Laws states that ". . . The qualifications for Directors are that they must possess the degree of skill and knowledge necessary to perform the duties of this office of a Director of the Association." Directors are elected by the Membership of the Association (Section V.A.1).

The Mission Statement of the Center states:

St. Vincent de Paul Center for the Homeless
will provide comprehensive services dedicated
to impacting the immediate needs of the
homeless person and assisting in breaking the
cycle of homelessness, while respecting the
dignity of the homeless person.

From this information it does not appear that the Center's purpose is religious in nature. The Catholic Church does not determine the Center's Membership or Directors. The Center serves homeless persons, regardless of their religious affiliation (if any).

However, we are informed and believe that should the Center, as a legal entity, dissolve, the Center's assets would revert to the Catholic Church. Assuming this to be the truth, allocating funds for a capital asset that could become the property of the Catholic Church at a future date, would be considered more than an incidental benefit.

3. Excessive Entanglement

In looking to determine if the state action involved excessive entanglement between religion and government, the Court in *Priest* considered both the "extent to which religion permeated the institution," and the "degree of state involvement in the day-to-day financial and policy decisions in the institution." *Priest*, *supra*, at 602.

The question of the degree of permeation was discussed in the subsection immediately above. The second questions with regard to the City's involvement with the Center is somewhat more complicated.

The Center is a private, nonprofit institution with no ties to City government, and the services provided by the Center to the homeless are provided without discrimination to those who need them. There is no City involvement with the day-to-day administration of the Center.

The troubling point is the one mentioned above with respect to the Center's assets. As all assets of the Center ultimately belong to the Catholic Church, that would very likely be seen as City involvement of a very substantial financial nature with a religious institution and as such, prohibited under the *Lemon v. Kurtzman* criteria.

California Constitution

Article XVI, Section 5 of the California Constitution is more restrictive than the Establishment Clause of the United States Constitution. "In essence, this provision of the constitution prohibits the use of any public funds to aid any religious or sectarian purpose and constitutes the definitive statement of the principle of government impartiality in the field of religion." 37 Ops. Cal. Atty. Gen. 105, 107 (1961)

In *Frohliger v. Richardson*, 63 Cal. App. 209 (1923), the Court of Appeal struck down a statute authorizing \$10,000 for restoration of the San Diego Mission de Alcalá on the basis of what is now Article XVI, Section 5 of the California Constitution. The Court held that the fact the Mission was owned by the Catholic Church was sufficient in and of itself to prevent the use of public funds for its restoration.

While several factors serve to distinguish *Frohliger* from the present situation, including the fact that religious services were being conducted at the Mission, and the Mission was not providing social services to those in "indigent circumstances (see *Frohliger*, *supra*., at page 211), the fact that the Catholic

Church would for all intents and purposes "own" the Center's additional facility would seem to put it right on point.

The City could allocate government funds for the provision of social services to an organization affiliated with a religious

entity provided those services were given without regard to religious beliefs and/or affiliation, that the services served a primary public purpose and in no way advanced or inhibited the cause of religion.

It would be a violation of both the United States and California constitutions to fund the construction of a building that would become the property of a religious institution.

Options that could be explored further include funding the construction of a building provided there was an agreement between the Center and the City which had a reversion clause that held the new facility would revert to the City should the Association dissolve as a legal entity, or using agency funds to build a shelter and contracting with the Center (or some other entity) to run the facility.

As indicated above, redevelopment funds can be used to fund the construction of a facility for the homeless. In fact redevelopment funds can only be used to fund capital assets. However, these funds cannot be used to fund construction of a building for a religious organization. Given this, it is suggested that the matter of who or what owns and/or operates the facility, should the Agency decide to use the \$200,000 for this purpose, be referred back to the City Manager, CCDC and this office to explore all the options available.

JOHN W. WITT, City Attorney

By

Allisyn L. Thomas

Deputy City Attorney

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Attachment

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