OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

John W. Witt
CITY ATTORNEY

CITY ADMINISTRATION BUILDING
202 "C" STREET
SAN DIEGO, CALIFORNIA 92101-3863
TELEPHONE (619) 236-6220
FAX (619) 236-7215

JOHN M. KAHENY
ASSISTANT CITY ATTORNEY
CURTIS M. FITZPATRICK
ASSISTANT CITY ATTORNEY
(SPECIAL PROJECTS)
STUART H. SWETT
SENIOR CHIEF DEPUTY CITY ATTORNEY
JED BROMFIELD
LESLIE J. GIRARD
HAROLD O. VALDERHAUG
CHIEF DEPUTY CITY ATTORNEYS
MARY KAY JACKSON
DEPUTY CITY ATTORNEY

MEMORANDUM OF LAW

DATE: September 12, 1995

TO: Marcia McLatchy, Director, Park and Recreation Department

FROM: City Attorney

SUBJECT: Recreation Councils

QUESTION PRESENTED

This Memorandum of Law is in response to your request that we advise you on the nature of the relationship between Recreation Councils ("Rec Councils") and the City. You specifically inquired about indemnification of Rec Council members and about the status of instructors of Rec Council programs -- whether those instructors are independent contractors or employees.

SHORT ANSWER

The current relationship between the Rec Councils and the City is unclear. This lack of clarity increases any problems regarding indemnification of Rec Council members, and also in defining the status of recreational program instructors, as discussed below.

DISCUSSION

I. City's Relationship to Recreation Councils

Rec Councils were originally formed to create closer community contact with the Park and Recreation Department ("Department") and to advise the Department at a neighborhood level on the operation of recreation centers ("Centers"). After the loss of funds caused by the passage of Proposition 13, Rec Councils took over operation of most of the Park and Recreation programs offered at neighborhood Centers.

The City Council formally recognized Rec Councils in Council Policy 700-42, originally adopted in 1981. The Policy states, "The purpose of Recreation advisory groups shall be to promote the recreation programs in the community through planning, publicizing, coordination and interpretation." A 1986 revision of the Council Policy added the word "administering" to the advisory activities of the Rec Councils. That revision gave the Rec Councils considerably more power, and removed them from the status of purely advisory boards. They were then able to handle many of the Center operations that staff and funding cuts would have forced the City to eliminate. The addition of authority to administer programs helped the City maintain recreational programs, however, it also created much more ambiguity as to the extent of the Rec Councils' authority and autonomy.

That ambiguity has created some tension between the Rec Councils and the City -- apparently the Rec Councils would like to increase their independence by running each Center as the particular Rec Council sees fit. However, since the City does provide indemnification, as set forth below, the City would like to have more control over the actions of Rec Council members. Whether the City Manager or City Council decides to increase or curtail the Rec Councils' powers, it would be advantageous to more clearly define the role and extent of their authority.

II. Indemnification of Recreation Council Members

At the present time, the City provides a limited defense to Rec Council members ("Members"). Generally, Council Policy 700-42 provides indemnification only as to acts of Members performed under the direction, control, and supervision of Park and Recreation personnel.[1]

---

[1]CP 700-42 provides in pertinent part: "City, in consideration of the volunteer services rendered by recreation councils; . . . agrees[s] to provide legal defense to and indemnify such members from liability for acts of such members performed while engaged in assisting the Park and Recreation Department community recreation programs when such acts are done under the direction, control or supervision of Park and Recreation personnel. The City shall further provide a legal defense to, and indemnify such members from liability for acts of such members performed in connection with recreation councils acting as a body within the policy guidelines of the City of San Diego. The City shall not, however, defend or indemnify any member of recreation councils for any act or acts with regard to damages or liability resulting from same, alleged to have occurred as a result of any criminal act of any such members."

Indemnification of Members protects those citizens who volunteer large amounts of their time and energy to the City. Without some assurance of that protection while acting as Members, citizens would be hesitant to place themselves in a position of personal liability when donating their time and skills to ensure the continued operation of the City's recreational programs. Without the Rec Councils' (and Members') assistance, recreational programs would be severely restricted, and perhaps eliminated.

The ideal situation would be for a member of the City Attorney staff to be present at all Rec Council meetings to ensure that actions taken by the Rec Council Members are legally defensible. Present budgetary considerations and work load, unfortunately, make that impossible. If, however, City Council policies and approved bylaws are followed, indemnification may be provided without City Attorney staff representation at the Rec Council meetings. That conclusion was reached in a 1988 Report by this office to the Rules Committee, attached as Appendix A, concerning Community Planning Committees and it is applicable here.

In addition, since the extent of the Rec Councils' authority is unclear, the question of the degree to which the City must defend Members is also unclear. There has been recent litigation in which the City has had to defend Members where the propriety of a Rec Council's actions has been questionable. Because of the current indemnification policy, the City has had to provide a defense for Rec Councils, which includes the potential for monetary damages which would have to come out of the General Fund. If the authority and duties of the Rec Councils were more clearly defined, the City's obligation to defend Members would also be clarified.

Another, more drastic, solution would be for the City to cease all indemnification of Rec Councils. In that case, the City would then be faced with the very real possibility of losing Rec Council support and services.

III. Program Instructors - Independent Contractors or Employees?

The issue which initially generated your request for advice is whether instructors of recreational programs, who are hired by Rec Councils, should be considered independent contractors or City employees. This issue is important because, according to the Internal Revenue Service ("IRS"), possible tax sanctions for miscategorization of instructors can be serious and would apply whether any mistake were intentional or inadvertent. See Appendix B, **Independent Contractor or Employee? Only the IRS Knows For Sure**; and Appendix C, 26 USCS § 3509 regarding employment taxes.

There are generally three types of instructors at Centers:

1) Instructors who work for an outside entity that contracts formally with the City;

2) Private citizens who contract individually with Rec Councils to provide instruction in some activity;

3) City employees who provide instruction as a sideline activity after hours and outside of their regular City employment.

It is sometimes difficult to classify an instructor as either an employee or independent contractor. The IRS and courts use guidelines which help in the classification. Attached as Appendix D is a 1992 Memorandum from Kent Lewis, Assistant Personnel Director, entitled **How to Spot an Employee Masquerading as a Contractor**, which contains these guidelines.

There are approximately twenty factors used as part of the analysis. Control of the worker is the most important factor: if the employer exerts considerable control over the worker, then an employee/employer relationship exists. In discussing the issue of control, the California Supreme Court has held: "[T]he right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship. . . ." Tieberg v. Unemployment Ins. App. Bd., 2 Cal. 3d 943, 950 (1970). The Court noted that federal courts utilize the same test:

> For the purpose of determining liability for federal unemployment insurance taxes, [federal decisions] hold that the right to control and direct the individual who performs services as to the details and means by which the result is accomplished is the most important consideration but not the only element in determining whether an employment relationship has been created.

Id., quoting United States v. W.M. Webb, Inc., 397 U.S. 179, 189 (1970).

The IRS guidelines are useful in determining the status of recreational program instructors, analyzed below by category:

a) Private employees. These instructors are employed by separate entities, such as the YMCA, which contract with Rec Councils to provide programs. These instructors are easily classified as independent contractors, since there is no control over the instructors by either the Rec Council or the City.

b) Private citizens. Private citizens who provide recreational instruction and have no other contact with either the City or the Rec Councils should be classified as independent contractors. These instructors sign an Agreement to Provide Services, an example of which is attached as Appendix E. Using the guidelines at pages 6-11 of Appendix D, particularly the issue of control, it is clear that the private instructors are independent contractors. Those individuals must then comply with all federal and state laws applicable to independent contractors.

c) City employees.

1) Whether City employees who provide Rec Council instruction on their own time are independent contractors is also a problematic issue. If these instructors were classified as City employees, the City would be required to make the required federal and state tax contributions, as well as provide appropriate employee benefits such as insurance and overtime pay. Although these instructors may be performing similar work for Rec Councils as they do for the City, the issue is still employee control. The City has no control over the instructors when they work for Rec Councils, nor over how the Rec Councils run the programs. Since the Agreements for Services are exclusively between the Rec Councils and the instructors, the employees should be classified and treated as independent contractors when they work for the Rec Councils. However, even though these workers are classified as independent contractors, the impression may be that the City is attempting to avoid paying additional taxes, overtime, and other employee benefits. Because of this potential for confusion regarding the status of Rec Council workers, it is important that the City's relationship with Rec Councils is carefully scrutinized and managed.

2) A related question you asked is whether City employees who perform services for Rec Councils violate any City policies or regulations. Pursuant to the following policies and regulations, City employees may engage in outside employment so long as such outside work neither interferes, nor is incompatible, with their duties as City employees, and so long as City regulations and policies are followed.

(a) City Personnel Regulations, Index Code: G-6, § 1.B, attached as Appendix F, prohibits local agency employees from engaging in any employment, activity, or enterprise for compensation which is "inconsistent, in conflict with, or inimical to his duties as a local agency officer or employee or with the duties, functions or responsibilities of his appointing power or the agency by which he is employed."

(b) City Administrative Regulation No. 95.60, Conflict of Interest and Employee Conduct, § 3.5, subsection b, attached as Appendix G, prohibits City employees from engaging "in any collateral employment or business activity which is incompatible or in conflict with the duties, functions, or responsibilities of the City, the appointing authority, the department, or the employee." An employee is also prohibited from outside employment if that work is subject to review or approval by a City Department.

(c) Council Policy No. 000-4, Code of Ethics, attached as Appendix H, states that "[n]o . . . employee 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."

The problem of categorizing recreational program instructors as employees or independent contractors is exacerbated by the ambiguity of the relationship between the City and the Rec Councils. Therefore, it is important that the City take exceptional care in dealing with the Rec Councils.

IV. City's Options Regarding Rec Councils

Since the City currently indemnifies Rec Council Members, the argument could be made that those Members are, in fact, agents of the City, and the instructors are City employees. At this point, we are unable to say for certain whether a City claim that Rec Councils are not agents of the City would be successful. In order to alleviate any potential liability arising from a mischaracterization of the status of Rec Council instructors, we offer the following options for clarification of Rec Council instructors:

1) Formally acknowledge all instructors as independent contractors; or

2) Formally acknowledge all instructors as employees of both the City and of the Rec Councils, an agent of the City; or

3) Remove financial autonomy from the Rec Councils and create a "recreation council" account with the City Auditor's office, in which the City would manage the funds and costs of recreational programs (this may require additional auditor staff time); or

4) Remove administration of recreational programs from Rec Councils to City staff. This could result in elimination of many programs due to the lack of City funds.

CONCLUSION

It is important to clarify the relationship between the City and the Rec Councils: Should they administer recreational programs and otherwise act in a quasi-independent fashion, or should they act only as advisory groups to the Park and Recreation Department? We will be happy to work with the Department further on this in order to provide recommendations to the City Council.

JOHN W. WITT, City Attorney

By Mary Kay Jackson
Mary Kay Jackson
Deputy City Attorney

MKJ:mb:263(x043.2)
Attachments
ML-95-64

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JOHN W. WITT
CITY ATTORNEY

CITY ADMINISTRATION BUILDING
SAN DIEGO, CALIFORNIA 92101-3865
(619) 236-6220

JOHN M. FITZPATRICK
ASSISTANT CITY ATTORNEY
RONALD L. JOHNSON
SENIOR CHIEF DEPUTY CITY ATTORNEY
ART H. SWETT
SENIOR CHIEF DEPUTY CITY ATTORNEY

March 14, 1988

REPORT TO THE COMMITTEE ON RULES, LEGISLATION, AND INTERGOVERNMENTAL RELATIONS

LEGAL REPRESENTATION AND INDEMNIFICATION FOR COMMUNITY PLANNING COMMITTEES

Pursuant to the March 2, 1988 request of the committee, I have prepared a draft ordinance which would authorize my office to defend and The City of San Diego to indemnify community planning groups and their members against claims for damages arising from activities conducted by the groups in accordance with the provisions of Council Policies 600-9 and 600-24. A copy of the draft ordinance is attached. Also attached are copies of memorandums from Chief Deputy City Attorney Frederick C. Conrad to Councilmember Judy McCarty, dated March 1, 1988, and Councilmember Bruce Henderson, dated March 10, 1988, which address the issues that have been raised concerning representation and indemnification.

My office has expressed concerns about the problems associated with the need to provide a representative from my office at community planning group meetings. To the extent that I am authorized to defend community planning groups, the defense can be undertaken effectively so long as careful records are kept and the applicable council policies and community planning groups' bylaws are adhered to. The level of representation to be provided by my office for this purpose would be my decision based on my determination of the staffing necessary to fulfill the responsibility to defend provided by the draft ordinance. Since the draft ordinance also contains indemnification provisions there is also a policy decision to be made by the City Council.

Indemnification against a claim for damages would impact the fiscal resources of the City if a judgment is rendered in favor of the plaintiff. If the City Council determined that the potential fiscal impacts from indemnification of community planning groups appear to be minimal and, therefore, it is unnecessary for my office to provide representation at community planning group meetings, provided the council policies and approved bylaws are adhered to, the City Council could advise me that it does not require, by adoption of the draft ordinance,

that such representation be provided in the proper discharge of my obligations under the City Charter or the draft ordinance.

Respectfully submitted,

JOHN W. WITT
City Attorney

JWW:FCC:ta:600(x043.1)
Attachments
RC-88-12

Office of
The City Attorney
City of San Diego

MEMORANDUM

236-6220

DATE: March 10, 1988

TO: Councilmember Bruce Henderson

FROM: City Attorney

SUBJECT: Liability of Planning Groups

Your memorandum of February 29, 1988, asked our comments on the letter from the Pacific Beach Planning Committee.

The matter is covered by the attached memorandum addressed to Councilmember McCarty.

The Rules Committee requested that appropriate legislation be sought from the state level not as a means of avoiding the issue, but rather as a means of retaining the independence of the groups with as little involvement by our office as possible. This effort is continuing.

As outlined in my memorandum to Councilmember McCarty, the City Council could adopt an ordinance which would authorize the office of the City Attorney to defend community planning groups in the event an action is filed claiming damages resulting from authorized activities of the groups. The City Council could also provide indemnification. There is no insurance coverage available to the City for matters of this type, the City is self-insured.

I can appreciate the concerns being expressed by community planning groups about the potential for lawsuits. However, since community planning groups are advisory bodies and have no decisionmaking powers, it is not apparent how one could establish that they have been damaged by advice or recommendations being made, pursuant to Council Policy 600-24, to the City since the City is free to accept or reject the advice or recommendations. Land use decisions are made by the City in noticed public hearings at which any citizen or organization is provided the opportunity to be heard. In addition, the environmental review process solicits public input. We are aware of no reported judicial decisions that have addressed, much less sustained, a claim of damages against a private citizen or organization that

has participated in such public hearings. Such actions are brought against the public agency that has the decisionmaking authority.

Your memorandum also asked what steps could be taken to encourage community planning groups to resume providing advice and recommendations pursuant to Council Policy 600-24. I assume the adoption of an ordinance providing legal representation and indemnification would resolve the issue. However, even if the community planning groups elect not to participate based on their concerns about liability, land use decisions will continue to be made at noticed public hearings at which any interested party may appear. The lack of community planning group participation might impact the Planning Department's ability to handle matters expeditiously but they would need to address the matter.

JOHN W. WITT, City Attorney

By Frederick C. Conrad
Frederick C. Conrad
Chief Deputy City Attorney

FCC:fs
Attachment

Office of
The City Attorney
City of San Diego

MEMORANDUM

236-6220

DATE: March 1, 1988

TO: Councilmember Judy McCarty

FROM: City Attorney

SUBJECT: Legal Protection for Community Planning Groups

Your memo of January 26, 1988, asked several questions concerning the matter referenced above.

Initially it needs to be recognized that community planning groups are not official agencies or bodies of The City of San Diego. Community planning groups are private citizens who organize themselves and seek recognition as community planning groups from the City Council under Council Policy 600-24. After initial recognition by the City Council, the membership is established by elections within the community. Community planning groups are volunteer advisory bodies as distinguished from advisory bodies established by the City.

Advisory boards are established by ordinance by the City under the provisions of Charter Section 43(a). Members are appointed by the Mayor with City Council confirmation. Boards established pursuant to this section of the Charter are agencies of the City and legal advice and representation are provided by the office of the City Attorney pursuant to the provisions of Charter Section 40. Since community planning groups are not established pursuant to the Charter, the office of the City Attorney is precluded from providing legal representation to such groups unless the City Council adopts an ordinance authorizing such representation.

Charter Section 40 appears to provide an opportunity for the adoption of an ordinance which would enable the office of the City Attorney to provide legal representation and indemnification against damages to community planning groups. The seventh paragraph of Charter Section 40 authorizes the office of the City Attorney to perform such other duties of a legal nature as the City Council may by ordinance require. If, in enacting such an ordinance, the City Council were to find that providing legal representation and indemnification against judgment to community planning groups was in the best interests of the citizens of the

City and furthered a substantial public goal, the provision of legal representation and indemnification would appear to fit within the provisions of Charter Section 40.

Assuming the City Council were to enact an ordinance authorizing the office of the City Attorney to represent community planning groups, you have asked several questions concerning the ramifications of accepting such representation. Your questions and our responses follow:

1. "Would meetings need to be officially noticed to avoid Brown Act violations?"

The Brown Act is applicable to the City and its official boards and commissions. The Brown Act would not be applicable to community planning groups unless it is contended that providing legal representation transformed an unofficial body into an official one. We have been unable to find any legal authority addressing this proposition but potential problems could be avoided by adhering to the Brown Act provisions for notice and conduct of meetings.

2. "Would the City Clerk need to record the official minutes of each meeting?"

Minutes of all meetings should be prepared. While it is not necessary to record the proceedings, doing so is the best way to insure that an accurate record of what transpired is retained. Recordings of meetings could be made by the City Clerk or the Planning Department.

3. "Would members of your office need to be present at community planning group meetings?"

Yes. Providing legal representation involves not only defending against lawsuits but also involves providing legal advice in an effort to avoid litigation. The only way to do this is to have a representative of this office present at all meetings of community planning groups. Such a program would have significant personnel impacts on this office since there are over thirty community planning groups, most if not all of which meet at night at locations throughout the City.

CONCLUSION

The City Council could enact an ordinance authorizing this office to provide legal advice to and representation of community

planning groups. The ordinance could also provide indemnification against judgments for damages arising out of the authorized activities of community planning groups. If such an ordinance is enacted, this office would be obligated to insure that community planning groups conduct their affairs in compliance with all applicable provisions of law. The impacts on this office would be substantial in terms of personnel assigned to attend the meetings. There would probably be fiscal impacts on other departments if additional staff or equipment was required in order to insure the preparation and maintenance of records of community planning group meetings and activities. It must be recognized that the enactment of an ordinance authorizing City representation and indemnification for community planning groups and members thereof would not preclude a person from bringing an action against an individual, who was a member of a community planning group, alleging harm by the individual that arose from activities beyond the scope of those expected of a community planning group under the provisions of Council Policy 600-24. In such a case, this office would be obligated to review the matter to determine whether or not we were authorized to defend the individual.

JOHN W. WITT, City Attorney

By Frederick C. Conrad
Frederick C. Conrad
Chief Deputy City Attorney

FCC:fs:600

(O-88-draft-c)

ORDINANCE NUMBER O-_____ (NEW SERIES)

ADOPTED ON _____

WHEREAS, the successful implementation of the Progress Guide and General Plan of The City of San Diego requires the thoughtful and deliberate development of community plans; and

WHEREAS, the development of community plans requires the cooperation and participation of citizens who have the personal knowledge of the needs and aspirations of their respective communities; and

WHEREAS, the City Council has adopted Council Policy 600-5 entitled "Community Plans" which provides in part:

1. That in urbanized areas the citizen's group has established, to a reasonable degree, a formal organization structure which is capable of providing proper coordination and communications with City staff forces. In nonurbanized areas the Planning Commission will serve as the citizen's group unless and until a citizen's group is recognized by the City Council; and for whatever period the Commission performs this function, it shall do so with the invited participation of the chairmen of existing citizen groups representing areas contiguous to that which is the subject of a proposed development plan.

2. That said citizen's organization contains as broad a base of local representation as is feasible and

practical, and it is expected that community real property owners will be active in the leadership and the formation of any such programs.

3. That said citizen's organization has an awareness of its duties and responsibilities in participating in the planning process and acknowledges a willingness to accept these responsibilities.

4. That said citizen's organization shall, in collaboration with City staff, select appropriate study area boundaries and present a tentative outline of objectives and its work program.

5. That during an early stage of the work program the citizen planning group shall, in consultation with property owners and City staff, establish and submit reasonable time schedules for the various phases of the program to the Planning Commission.

WHEREAS, the City Council has adopted Council Policy 600-9 entitled "Community Planners Committee" which provides in part:

1. This citizens organization shall be composed of the chairman, or officially designated representative, or alternate of each of the community planning committees as recognized under City Council Policy 600-5, and shall be known as the "Community Planners Committee."

2. In its advisory capacity, this citizens organization shall participate in reviewing and recommending to appropriate bodies actions deemed

necessary and desirable for the timely and continued effectuation of goals, objectives and proposals contained in the General Plan.

3. This citizens organization shall be responsible for participating in an advisory capacity in the comprehensive review of the General Plan as prescribed in City Council Policy 600-7.

4. In the discharge of its responsibility in the five-year comprehensive review of the General Plan, this citizens organization shall function as a nucleus committee to which augmentation may be necessary and desirable to insure maximum utilization of local citizen resources. Selection of such augmentation shall be the responsibility of the Mayor and City Council and shall be only of such duration as is necessary to complete the preparation of General Plan revisions for recommendation to the Planning Commission and City Council for adoption.

5. This citizens organization shall undertake such other studies or make such recommendations on citywide issues related to the General Plan as may be requested by the City Council, Planning Commission and Planning Department, City Manager or other official City agency.

6. This citizens organization shall serve in an advisory capacity to the community planning committees officially recognized under City Council Policy 600-5 primarily to achieve the desired objective of insuring

maximum coordination on a comprehensive or citywide basis and promotion of solutions of matters of mutual concern shared among the communities of San Diego.

WHEREAS, the City Council has adopted Council Policy 600-24 which provides a procedure under which citizens who are interested in participating in the planning process in an advisory capacity may form organizations and request recognition, in their advisory capacity, by the City Council as community planning committees; and

WHEREAS, community planning committees devote countless hours of their time and substantial private resources in assisting The City of San Diego in the development and implementation of community plans and the Progress Guide and General Plan; and

WHEREAS, the voluntary efforts of community planning committees are of inestimable value to the citizens of the City of San Diego; and

WHEREAS, recent developments have caused community planning committees to become concerned about possible exposure to litigation arising from participation in the planning process; and

WHEREAS, the concerns about personal exposure to litigation have jeopardized the vitality of the planning process and, unless eliminated, may cause the collapse of the process that provides essential citizen participation; and

WHEREAS, Section 40 of the Charter of The City of San Diego provides, inter alia, that the City Attorney shall perform such other duties of a legal nature as the Council may by ordinance require; and

WHEREAS, the Council of The City of San Diego finds and declares that the provision of legal services by the City Attorney and the indemnification against damages resulting from a judgment against any community planning committee or the elected or appointed member thereof serving and acting in such capacity would constitute expenditure of public funds which serves the highest public interest and purpose; NOW, THEREFORE,

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. Except as hereinafter provided, the office of the City Attorney shall defend and The City of San Diego shall indemnify the Community Planners Committee established by Council Policy 600-9, and any community planning committee established pursuant to Council Policy 600-24, hereafter collectively referred to as "Committee," and the duly elected or appointed members thereof against any claim or action against such committee or member if all of the following circumstances exist:

A. The person is a duly-elected or appointed member of a committee recognized and operating in accordance with Council Policy 600-9 or Council Policy 600-24;

B. The alleged act or omission occurred during a lawful meeting of the committee or subcommittee thereof;

C. The alleged act or omission was within the reasonable scope of duties of a committee as described in Council Policies 600-5, 600-6, 600-9 and 600-24 and was not in violation of any provision of the bylaws

adopted by the committee and approved by the City Council;

D. The member or committee has made a request in writing to the City for defense and indemnification within five (5) working days of having been served such legal papers; and

E. The member or committee has performed his, her or its duties in good faith with such care, including reasonable inquiry, as an ordinarily prudent person or persons in a like position would use under similar circumstances.

Section 2. The City of San Diego may decline to represent a member or a committee that would otherwise be entitled to defense and indemnification under this ordinance if either of the following circumstances exist:

A. The member or committee does not reasonably cooperate with the City Attorney in the defense of the claim or action; or

B. The member or committee acted or failed to act because of fraud, corruption, actual malice or bad faith.

Section 3. In the event the City Attorney determines that a member or a committee is not entitled to or should not receive a defense and indemnification under this ordinance, the City Attorney shall advise the City Council and the member or committee.

Section 4. The provisions of this ordinance apply only to members of committees established and recognized by the City Council pursuant to Council Policy 600-9 and Council Policy 600-24.

Section 5. Representation and indemnification shall not be provided by The City of San Diego in any administrative or judicial proceeding initiated by a committee or its members against The City of San Diego, its agencies or representatives or any other party or organization nor shall representation and indemnification be provided to a committee or its members against damages to any person or organization which are alleged to have resulted from the initiation of any administrative or judicial proceeding by a committee or its members.

Section 6. This ordinance does not constitute an admission or a waiver of the position of The City of San Diego that committees are not official advisory boards of The City of San Diego and the members thereof are not officers, employees or servants of The City of San Diego.

Section 7. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: JOHN W. WITT, City Attorney

By _____
Frederick C. Conrad
Chief Deputy City Attorney

FCC:cc:ta:600
03/15/88
Or.Dept:Plan.
O-88-draft-c
Form=o.none

(O-88-185 REV. 1)

ORDINANCE NUMBER O- 17086 (NEW SERIES)

ADOPTED ON APR 25 1988

AN ORDINANCE PROVIDING FOR LEGAL REPRESENTATION TO AND INDEMNIFICATION OF COMMUNITY PLANNING COMMITTEES AGAINST CLAIMS FOR DAMAGES.

WHEREAS, the successful implementation of the Progress Guide and General Plan of The City of San Diego requires the thoughtful and deliberate development of community plans; and

WHEREAS, the development of community plans requires the cooperation and participation of citizens who have the personal knowledge of the needs and aspirations of their respective communities; and

WHEREAS, the City Council has adopted Council Policy 600-5 entitled "Community Plans" which provides in part:

1. That in urbanized areas the citizens' group has established, to a reasonable degree, a formal organization structure which is capable of providing proper coordination and communications with City staff forces. In nonurbanized areas the Planning Commission will serve as the citizens' group unless and until a citizens' group is recognized by the City Council; and for whatever period the Commission performs this function, it shall do so with the invited participation of the chairmen of existing citizens' groups representing areas contiguous to that which is the subject of a proposed development plan.

2. That said citizens' organization contains as broad a base of local representation as is feasible and practical, and it is expected that community real property owners will be active in the leadership and the formation of any such programs.

3. That said citizens' organization has an awareness of its duties and responsibilities in participating in the planning process and acknowledges a willingness to accept these responsibilities.

4. That said citizens' organization shall, in collaboration with City staff, select appropriate study area boundaries and present a tentative outline of objectives and its work program.

5. That during an early stage of the work program the citizen planning group shall, in consultation with property owners and City staff, establish and submit reasonable time schedules for the various phases of the program to the Planning Commission.

WHEREAS, the City Council has adopted Council Policy 600-9 entitled "Community Planners Committee" which provides in part:

1. This citizens' organization shall be composed of the chairman, or officially designated representative, or alternate of each of the community planning committees as recognized under Council Policy 600-5, and shall be known as the "Community Planners Committee."

2. In its advisory capacity, this citizens' organization shall participate in reviewing and recommending to appropriate bodies actions deemed necessary and desirable for the timely and continued effectuation of goals, objectives and proposals contained in the General Plan.

3. This citizens' organization shall be responsible for participating in an advisory capacity in the comprehensive review of the General Plan as prescribed in Council Policy 600-7.

4. In the discharge of its responsibility in the five-year comprehensive review of the General Plan, this citizens' organization shall function as a nucleus committee to which augmentation may be necessary and desirable to insure maximum utilization of local citizen resources. Selection of such augmentation shall be the responsibility of the Mayor and City Council and shall be only of such duration as is necessary to complete the preparation of General Plan revisions for recommendation to the Planning Commission and City Council for adoption.

5. This citizens' organization shall undertake such other studies or make such recommendations on citywide issues related to the General Plan as may be requested by the City Council, Planning Commission and Planning Department, City Manager or other official City agency.

6. This citizens' organization shall serve in an advisory capacity to the community planning committees officially recognized under Council Policy 600-5 primarily to achieve the desired objective of insuring maximum coordination on a comprehensive or citywide basis and promotion of solutions of matters of mutual concern shared among the communities of San Diego.

WHEREAS, the City Council has adopted Council Policy 600-24 which provides a procedure under which citizens who are interested in participating in the planning process in an advisory capacity may form organizations and request recognition, in their advisory capacity, by the City Council as community planning committees; and

WHEREAS, community planning committees devote countless hours of their time and substantial private resources in assisting The City of San Diego in the development and implementation of community plans and the Progress Guide and General Plan; and

WHEREAS, the voluntary efforts of community planning committees are of inestimable value to the citizens of the City of San Diego; and

WHEREAS, recent developments have caused community planning committees to become concerned about possible exposure to litigation arising from participation in the planning process; and

WHEREAS, the concerns about personal exposure to litigation have jeopardized the vitality of the planning process and, unless eliminated, may cause the collapse of the process that provides essential citizen participation; and

WHEREAS, Section 40 of the Charter of The City of San Diego provides, inter alia, that the City Attorney shall perform such other duties of a legal nature as the City Council may by ordinance require; and

WHEREAS, the Council of The City of San Diego finds and declares that the provision of legal services by the City Attorney and the indemnification against damages resulting from a judgment against any community planning committee or the elected or appointed member thereof serving and acting in such capacity would constitute expenditure of public funds which serves the highest public interest and purpose; NOW, THEREFORE,

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. Except as hereinafter provided, the office of the City Attorney shall defend and The City of San Diego shall indemnify the Community Planners Committee established by Council Policy 600-9, and any community planning committee established pursuant to Council Policy 600-24, hereafter collectively referred to as "Committee," and the duly elected or appointed members thereof against any claim or action against such committee or member if all of the following circumstances exist:

A. The person is a duly-elected or appointed member of a committee recognized and operating in accordance with Council Policy 600-9 or Council Policy 600-24; and the person attended a community planners' training course conducted by the Planning Department of The City of San Diego prior to participating in the

activity which gave rise to the claim or action against the committee or member;

B. The alleged act or omission occurred or was authorized during a lawful meeting of the committee or subcommittee thereof;

C. The alleged act or omission was within the reasonable scope of duties of a committee as described in Council Policies 600-5, 600-6, 600-9 and 600-24 and was not in violation of any provision of the bylaws adopted by the committee and approved by the City Council;

D. The member or committee has made a request in writing to the City for defense and indemnification within five (5) working days of having been served such legal papers; and

E. The member or committee has performed his, her or its duties in good faith with such care, including reasonable inquiry, as an ordinarily prudent person or persons in a like position would use under similar circumstances.

Section 2. The City of San Diego may decline to represent a member or a committee that would otherwise be entitled to defense and indemnification under this ordinance if either of the following circumstances exist:

A. The member or committee does not reasonably cooperate with the City Attorney in the defense of the claim or action; or

B. The member or committee acted or failed to act because of fraud, corruption, actual malice or bad faith.

Section 3. In the event the City Attorney determines that a member or a committee is not entitled to or should not receive a defense and indemnification under this ordinance, the City Attorney shall promptly advise the City Council and the member or committee.

Section 4. The provisions of this ordinance apply only to members of committees established and recognized by the City Council pursuant to Council Policy 600-9 and Council Policy 600-24.

Section 5. Representation and indemnification shall not be provided by The City of San Diego in any administrative or judicial proceeding initiated by a committee or its members against The City of San Diego, its agencies or representatives or any other party or organization nor shall representation and indemnification be provided to a committee or its members against damages to any person or organization which are alleged to have resulted from the initiation of any administrative or judicial proceeding by a committee or its members.

Section 6. In no event shall representation or indemnification be provided against a claim or judgment for punitive damages.

Section 7. This ordinance does not constitute an admission or a waiver of the position of The City of San Diego that committees are not official advisory boards of The City of San

Diego and the members thereof are not officers, employees or servants of The City of San Diego.

Section 8. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: JOHN W. WITT, City Attorney

By Frederick C. Conrad
Frederick C. Conrad
Chief Deputy City Attorney

FCC:cc:ta
03/31/88
04/12/88 REV. 1
Or.Dept:Plan.
O-88-185
Form=o.none

LAW OFFICES
HANSON, BRIDGETT, MARCUS, VLAHOS & RUDY
333 MARKET STREET, SUITE 2300
SAN FRANCISCO, CALIFORNIA 94105-2173
(415) 777-3200

FACSIMILE (415) 541-9366
TELEX 6502628734 MCI

INDEPENDENT CONTRACTOR OR EMPLOYEE? ONLY THE IRS KNOWS FOR SURE

By Joan L. Cassman and Marti Y. Paschal

I. INTRODUCTION

A. Distinction has been an issue for many years.

B. Increasing use of independent contractors by industries and governmental entities.

C. Stepped up efforts to reclassify by IRS: implementation of "matching program" - an audit technique in which the IRS will match an employer with any independent contractor who obtains all of his/her compensation from one employer in the year in question.

D. Parties' designation/description of relationship is irrelevant if an employment relationship otherwise exists.

E. Importance of consistency of treatment.

II. DETERMINING NATURE OF RELATIONSHIP

A. General principles:

> Generally [an employment] relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.... In general, if an individual is subject to the control or

19.1

direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. (Regs. §31.3121(d) - 1(c)(2).)

B. IRS's 20 factors (Rev. Ruling 87-41), the presence of which is indicative of an employment relationship (or, conversely, the absence of which is indicative of an independent contractor relationship):

1. Instructions - the worker is required to comply with the instructions of the city concerning when, where and how the work is to be performed.

2. Training - the city provides training to the worker.

3. Integration - the services performed by the worker are integrated into the city's operations.

4. Services rendered personally - the worker must render the services personally.

5. Hiring, supervising and paying assistants - the city hires, supervises and/or pays the worker's assistants.

6. Continuing relationship - the relationship between the worker and the city is a continuous one.

7. Set hours of work - the city sets the hours of work.

8. Full-time required - the worker is required to devote full-time to the city's business.

9. Doing work on employer's premises - the worker performs the job on the city's business premises.

10. Order of sequence set - the city directs the order or sequence of the work performed.

11. Oral or written reports - the worker is required to provide regular oral or written reports to the city.

12. Payment by hour, week, month - the worker is paid by the hour, week or month rather than by the job or on commission.

13. Payment of business and/or traveling expenses - the worker's business and travel expenses are reimbursed by the city.

14. Furnishing of tools and materials - the city furnishes the tools and materials necessary for the provision of services by the worker.

15. Significant investment - the worker does not have a significant investment in the facilities used in performing the services.

16. Realization of profit or loss - the worker lacks any potential for profit or loss in connection with the performance of services for the employer.

17. Working for more than one firm - the worker performs no more than de minimis services to persons or firms other than the city.

18. Making service available to general public - the worker's services are not made available to the general public.

19. Right to discharge - the city has the right to discharge the worker for reasons other than nonperformance of contract specifications.

20. Right to terminate - the worker has the right to terminate his/her relationship with the employer at any time without liability for failure to complete a job.

C. IRS's Factors re Professionals.

1. Definition of professional independent contractors:

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees. (Regs. §31.3401(c) - 1(c)

2. The foregoing definition is narrowly applied.

3. The IRS will scrutinize the relationship by applying the following criteria:

   a. The degree to which the professional has become integrated into the operating organization of the city for which the services are performed;

   b. Whether the professional's work for the city is substantial, regular and continuous;

   c. Whether the city for which the services are performed may require the professional to comply with its general policies;

   d. The degree to which the professional has been accorded the rights and privileges of the nonprofessional employees of the city.

D. California Definition:

"Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished. (California Labor Code §3353)

III. STATUS OF INDEPENDENT CONTRACTOR.

A. Federal taxes.

1. City has no obligation to withhold or pay income tax, FICA (Federal Insurance Contributions Act) or FUTA (Federal Unemployment Tax Act).

2. City must file Form 1099 for compensation to an independent contractor of $600 or more per year.

3. Worker must pay self-employment tax.

   a. 12.4% OASDI (Old-Age, Survivors and Disability Insurance) on first $53,400 of self-employment income.

b. 2.9% for hospital insurance (Medicare) on first $125,000 of self-employment income.

B. State Income Taxes:
City has no withholding obligation.

C. Unemployment and Disability Insurance Taxes:
City has no obligation to pay these taxes.

D. Workers' Compensation.

1. City has no obligation to obtain workers' compensation insurance or to self-insure to cover an independent contractor.

2. Independent contractor may sue city in tort for job-related injury or death.

E. Vicarious Liability:

1. City is liable for injury proximately caused by a tortious act or omission of an independent contractor of the city to the same extent that the city would be subject to such liability if it were a private person. The city is not liable for the act or omission of an independent contractor if the city would not have been liable for the injury had the act or omission been that of an employee of the city. (Cal. Gov. Code §815.4)

2. "Peculiar risk doctrine": City not insulated from application of this doctrine by virtue of an independent contractor relationship. This doctrine does not depend on degree of control over work retained by employer, but, rather, depends upon risk peculiar to work contracted to be performed, whether by an independent contractor or an employee. (Castro v. State, 170 Cal.Rptr. 734, 114 C.A. 3d 503 (1981))

F. Other Labor/Employment Law Issues.

1. City has no obligation to meet and confer with independent contractors under the Meyers-Milias-Brown Act.

2. Wage/hour requirements inapplicable to independent contractors.

3. Independent contractors specifically excluded from membership in Public Employees' Retirement System. (Cal. Gov. Code § 20330(b))

4. Query: is SB 198 (illness/injury prevention program) applicable?

IV. EFFECT ON CITY OF RECHARACTERIZATION OF RELATIONSHIP FROM INDEPENDENT CONTRACTOR TO EMPLOYEE.

A. Employment taxes.

1. City would be required to withhold (pay) federal income taxes whether or not tax was actually paid by worker.[1]

2. City would be required to withhold (pay) employees' share of FICA taxes as well as to match the withheld amount. Each share is equal to 6.20 percent of annual compensation of up to $53,400 (OASDI) and 1.45 percent of compensation of up to $125,000 (HI).

3. City would be required to pay FUTA taxes of 6.2 percent of each employee's compensation of up to $7,000.

4. City would be required to withhold (pay) state income taxes whether or not tax was actually paid by worker.

5. City would be required to pay state unemployment insurance taxes equal to 3.4 percent of compensation of up to $7,000.

B. Employment Benefits.

1. Employment benefits otherwise applicable to the position must be made available to the employee.

2. City would be required to take recharacterized workers into account in determining whether the city's employee

---

[1] Employee could apply for a refund of the amount overpaid as a result of the city's required payment of taxes if within the statute of limitations.

benefit plans are qualified plans for tax purposes.

3. Employee becomes a member of the Public Employees' Retirement System upon his/her entry into employment if the city is a contract member. (Gov. Code §20303)

C. Workers' Compensation.

1. Stop order may be issued prohibiting use of employee labor until city secures payment of workers' compensation (i.e., until it obtains insurance); in that case, city would have to pay employee for time lost up to 10 days (Calif. Labor Code § 3710.1) and penalty assessment of $500 per employee at time of stop order. (Cal. Labor Code § 3722(a)).

2. Director of Industrial Relations may bring action to impose monetary penalties and restrain further conduct of business as long as violation continues (Cal. Labor Code § 3712).

D. Vicarious Liability:
City may be liable for torts of employees to the extent permitted by law. (Cal. Gov. Code § 815 et seq.)

E. Other Labor/Employment Requirements or Consequences.

1. Wage/hour requirements may be applicable.

2. City may have an obligation to meet and confer if the employee is a covered employee but the position is not otherwise described in the collective bargaining agreement.

3. SB 198 (illness/injury prevention program) is applicable.

4. Employees need to produce verification of their right to work in the U.S. If city knowingly has hired worker who isn't legally entitled to work in this country, it will be subject to fines and/or imprisonment.

5. Unpaid Minimum Wages/Overtime Pay/Liquidated Damages:

Section 16 of Fair Labor Standards Act, Section 11 of Portal to Portal Act of 1947, and Sections 98.1, 1193.6, and 1194 of the California Labor Code authorize suits for these payments in spite of California Labor Code Section 220's exemption (exemption of public employees from statutory requirements as to payment of wages).

F. Officers' Personal Liability (IRC § 6672(a)).

1. City officers or other persons responsible for withholding may be personally liable for unpaid taxes.

2. Tax Liability: 100% of worker's income tax and share of FICA.

3. IRS regards this 100% penalty only as secondary collection device assessed only if city is unable to pay any tax liability determined by the IRS.

G. Tax Penalties and Consequences.

1. Failure to file correct information returns (IRC § 6721)/ Failure to furnish correct payee statements, i.e., W-2 or 1099 (IRC § 6722)/ Failure to comply with information reporting requirements (IRC § 6723).

   a. Penalty = $50 per violation to annual maxima of $250,000, $100,00 and $100,000 for each of the respective penalties.

   b. $50 per-violation penalty may be assessed at lower rate if amended information returns correcting the errors are filed.

2. Understatement of tax liability due to negligence or disregard of rules or regulations (IRC § 6662(b)(1)).

   a. Penalty = 20% of understated tax liability reported on return.

   b. Additional penalties possible for substantial understatement or fraud (IRC §§ 6662(d) and 6663).

3. Failure to file a return/information statement/registration statement or pay a tax or make a deposit of taxes (IRC §§ 6651, 6652, 6656).

   a. Penalties range from 2-15% of taxes due.

   b. Amount of penalty depends on how delinquent city has been.

V. SAFE HARBORS AND RELIEF FROM FEDERAL TAX PENALTIES.

A. Taxpayer's treatment of an individual as a nonemployee will be upheld if conditions set forth below are satisfied (Section 530(a) of the Revenue Act of 1978):

1. Reasonable basis exists for classifying employee as independent contractor.

   a. judicial precedent, published rulings or technical advice or letter rulings issued to the city;

   b. a past audit of the city in which there was no assessment attributable to employment tax treatment of individuals holding position substantially similar to that of the worker in question; or

   c. a longstanding recognized practice of a significant segment of the industry in which the worker is engaged (Rev. Proc. 85-18, 1985-1C.B.518)

2. Consistent non-employee treatment has been given the individual worker and all similar workers.

3. City has filed all of its required returns.

4. City did not treat the worker as an employee for any period.

5. Query: is this relief available to governmental entities?

B. Limit on liability for withholding (Internal Revenue Code Section 3509)

1. §3509 applies if city did not intentionally disregard requirement to deduct and withhold

FICA or income taxes; it does not apply if any income taxes were withheld but FICA was not.

2. Limits city's liability for withholding of income taxes to 1.5% of wages involved.

3. Limits city's liability for employee's share of FICA taxes to 20% of such taxes otherwise payable.

4. If city failed to issue 1099 Forms to worker with respect to his/her compensation, the above percentages are doubled to 3% and 40%, respectively.

C. Offsetting worker payments (Internal Revenue Code Section 3402(d)):

1. City may offset any income taxes actually paid by the worker against its withholding tax liabilities.

2. City must obtain statement from worker (on IRS Form 4669) under penalty of perjury regarding compensation received from city on which taxes were not withheld, the return on which worker reported the compensation, and the self-employment tax paid on the income.

3. City then must submit this information to IRS with Form 4670 (Request for Relief From Payment of Income Tax Withholding).

D. Interest-Free Adjustments (Internal Revenue Code Section 6205(a)(1)):
IRS may assess additional income withholding and FICA taxes without interest if underpayment of tax is reported by the city on a return or on supplemental return on or before last day for filing returns for period in which error in classification was ascertained.

E. Offset of Self-Employment Tax (Internal Revenue Code Section 6251):
City may get offset against its liability for employee's share of FICA taxes based on employee's overpayment of self-employment taxes that cannot be recovered by the employee because of expiration of statute of limitations for refund claim.

VI. PRACTICAL TIPS TO MINIMIZE RISK OF RECHARACTERIZATION.

A. Request determination letter from IRS.

B. Consistent treatment of workers in similar situations.

C. Avoid "full-time" independent contractor arrangements.

D. Drafting of agreements.

1. Express any control that city wishes to maintain over the project in terms of monitoring the result of the work, not the means by which the work is accomplished.

2. Provide for consequences for breach of contract invent the event of premature contract termination.

3. Do not refer to the independent contractor as an employee in the contract.

4. Do not require that the independent contractor follow all of the rules and regulations required of employees.

5. State in the contract that city has no obligation to pay or withhold state or federal taxes, or to provide workers' compensation or unemployment insurance. Conversely, clearly specify that it is the independent contractor's obligation to pay self-employment taxes, etc.

6. Structure compensation in terms of a completed job, i.e., a lump sum or a sum not to exceed.

7. Specify in contract that independent contractor has a separate office and will not primarily draw on city resources to accomplish the work.

8. Provide indemnity protection to the city to minimize any vicarious liability exposure.

9. Include provisions which assure cooperation of independent contractor in obtaining information and documents relating to contractor status.

000598

(A) such individual is a licensed real estate agent,

(B) substantially all of the remuneration (whether or not paid in cash) for the services performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and

(C) the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee with respect to such services for Federal tax purposes.

(2) Direct seller. The term 'direct seller' means any person if—

(A) such person

(i) is engaged in the trade or business of selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary prescribes by regulations, for resale (by the buyer or any other person) in the home or otherwise than in a permanent retail establishment, or

(ii) is engaged in the trade or business of selling (or soliciting the sale of) consumer products in the home or otherwise than in a permanent retail establishment,

(B) substantially all the remuneration (whether or not paid in cash) for the performance of the services described in subparagraph (A) is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and

(C) the services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for Federal tax purposes.

(3) Coordination with retirement plans for self-employed. This section shall not apply for purposes of subtitle A to the extent that the individual is treated as an employee under section 401(c)(1) (relating to self-employed individuals).

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

In 1982, P.L. 97-248, Sec. 269(a), added Code Sec. 3508, effective for services performed after 12/31/82.

CODE OF FEDERAL REGULATIONS

General provisions relating to employment taxes, 26 CFR §§ 31.3501(a)-1T et seq.

RESEARCH GUIDE

Am Jur:

33 Am Jur 2d, Federal Taxation (1993) ¶ 3402.
33 Am Jur 2d, Federal Taxation (1988) ¶ 3608.
33 Am Jur 2d, Federal Taxation (1991) ¶ 3317.
33 Am Jur 2d, Federal Taxation (1992) ¶ 3422.

Social Security Law and Practice:

Soc Sec LP § 5:23.

RIA Coordinators:

Federal Tax Coordinator 2d, P H-4923.

INTERPRETIVE NOTES AND DECISIONS

"Consumer products" for purposes of § 3508 include both tangible consumer goods and intangible consumer services; consumer products include home study educational courses for instruction-by-mail educational institute; accordingly, direct sellers of home study educational courses who meet other § 3508 requirements can be considered independent contractors. Cleveland Inst. of Electronics, Inc. v United States (1992, ND Ohio) 787 F Supp 741, 92-1 USTC P 50182, CCH Unemployment Ins Rep P 16583A, 69 AFTR 2d 92-1015.

Definition of "consumer product" includes both tangible consumer goods and intangible consumer services, and accordingly persons who sell home study educational courses sell consumer products. Cleveland Inst. of Electronics, Inc. v United States (1992, ND Ohio) 787 F Supp 741, 92-1 USTC ¶ 50182, CCH Unemployment Ins Rep ¶ 16583A, 69 AFTR 2d 92-1015.

Specialty advertising products, such as pens, key chains, coffee mugs, and like distributed by business as form of advertising are not consumer products since personal or household use of item is subordinate to its purpose of conveying advertising message. Private Letter Ruling 9143046.

§ 3509. Determination of employer's liability for certain employment taxes.

(a) In general. If any employer fails to deduct and withhold any tax under chapter 24 or subchapter A of chapter 21 with respect to any employee by reason of treating such employee

as not being an employee for purposes of such chapter or subchapter, the amount of the employer's liability for—

(1) Withholding taxes. Tax under chapter 24 for such year with respect to such employee shall be determined as if the amount required to be deducted and withheld were equal to 1.5 percent of the wages (as defined in section 3401) paid to such employee.

(2) Employee social security tax. Taxes under subchapter A of chapter 21 with respect to such employee shall be determined as if the taxes imposed under such subchapter were 20 percent of the amount imposed under such subchapter without regard to this subparagraph.

(b) Employer's liability increased where employer disregards reporting requirements. (1) In general. In the case of an employer who fails to meet the applicable requirements of section 6041(a), 6041A, or 6051 with respect to any employee, unless such failure is due to reasonable cause and not willful neglect, subsection (a) shall be applied with respect to such employee

(A) by substituting '3 percent' for '1.5 percent' in paragraph (1); and

(B) by substituting '40 percent' for '20 percent' in paragraph (2).

(2) Applicable requirements. For purposes of paragraph (1), the term 'applicable requirements' means the requirements described in paragraph (1) which would be applicable consistent with the employer's treatment of the employee as not being an employee for purposes of chapter 24 or subchapter A of chapter 21.

(c) Section not to apply in cases of intentional disregard. This section shall not apply to the determination of the employer's liability for tax under chapter 24 or subchapter A of chapter 21 if such liability is due to the employer's intentional disregard of the requirement to deduct and withhold such tax.

(d) Special rules. For purposes of this section—

(1) Determination of liability. If the amount of any liability for tax is determined under this section—

(A) the employee's liability for tax shall not be affected by the assessment or collection of the tax so determined,

(B) the employer shall not be entitled to recover from the employee any tax so determined, and

(C) sections 3402(d) and section 6521 shall not apply.

(2) Section not to apply where employer deducts wage but not social security taxes. This section shall not apply to any employer with respect to any wages if—

(A) the employer deducted and withheld any amount of the tax imposed by chapter 24 on such wages, but

(B) failed to deduct and withhold the amount of the tax imposed by subchapter A of chapter 21 with respect to such wages.

(3) Section not to apply to certain statutory employees. This section shall not apply to any tax under subchapter A of chapter 21 with respect to an individual described in subsection (d)(3) of section 3121 (without regard to whether such individual is described in paragraph (1) or (2) of such subsection).

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

In 1990, P.L. 101-508, Sec. 5130(a)(4), substituted 'subsection (d)(3)' for 'subsection (d)(4)' in para. (d)(3), effective for remuneration for agricultural labor paid after 12/31/87.

In 1988, P.L. 100-647, Sec. 2003(d), substituted 'subsection (d)(4)' for 'subsection (d)(3)' in para. (d)(3), effective for remuneration for agricultural labor paid after 12/31/87.

In 1982, P.L. 97-248, Sec. 270(a), added Code Sec. 3509, effective 9/3/82, except for assessments made before 1/1/83.

CODE OF FEDERAL REGULATIONS

General provisions relating to employment taxes, 26 CFR §§ 31.3501(a)-1T et seq.

RESEARCH GUIDE

Am Jur:

33 Am Jur 2d, Federal Taxation (1993) ¶ 3392.
33 Am Jur 2d, Federal Taxation (1988) ¶ 3699.
33 Am Jur 2d, Federal Taxation (1990) ¶ 3502.
33 Am Jur 2d, Federal Taxation (1992) ¶ 3412.

RIA Coordinators:

Federal Tax Coordinator 2d, P H-4964.

City of San Diego
Memorandum

DATE: July 10, 1992

TO: Assistant Department Directors

FROM: Kent Lewis, Assistant Personnel Director

SUBJECT: How to Spot an Employee Masquerading as a Contractor

---

As we discussed at the last Assistant Directors meeting, both the City Charter and IRS regulations require that individuals working for the City be treated as employees and not contractors unless specific conditions are met. The mere fact that you have a contract with the Person or firm will not be sufficient.

Attached is an IRS case history which includes the 20 common law factors that the courts have developed to determine when an individual is an employee. If, after reviewing this, you have any situations that concern you, please give me a call.

APPENDIX D

Includes Common Law Factors

000600

vs. EE

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer CONSTRUCTION		Year/Period Ended 1987, 1988

- Whether or not individuals providing services as latherers, erers, bookkeeper, Corporate President were employees for Federal yment tax purposes and therefore, subject to FICA, FUTA and Income Tax olding.

- XYZ Construction was incorporated in the State of California in 1982 he purpose of carrying on the business of a General Contractor. ident and sole shareholder is Mr. X. Current Corporate status is pended" according to the Secretary of State.

ng 1987 & 1988, XYZ was engaged in constructing residential buildings, additions, framing, plastering, painting and concrete work. The owing additional facts were uncovered:

Mr. X, Corporate President, received payments from the Corporation in and 1988. The payments were identified by examination of the check ster and certified payroll records filed by the Corporation for the County Library Project.

Miss Y, the company bookkeeper received payments in 1987 and 1988. These nts were identified by examination of the check register. Miss Y at no owned her own business or offered her services to the general public, did she advertise. Examiner requested proof that she worked for other nesses, none was provided. According to the check register, Miss Y was a standard amount on a weekly basis. XYZ set the rate of pay which was same, no matter how much work she did. She did not bill for her services. was told by Mr. X what needed to be done on a weekly basis.

All other workers in question were plasterers, latherers, laborers. One worker, Mr. Q, gave the following testimony:

Q. found out about the job through word of mouth down at the materials . Mr. Q. had worked for the company back in 1982. At that time he was on oll. When there was work, Mr. Q. would get a call from Mr. X, Corporate sident, to see if he wanted to work. Mr. Q was told where to report, what s to do. If there was a problem he would go to Mr. X, the President, who at the job site working and inspecting jobs. The work was sporadic, but there was work he worked full time.

Corporation provided the materials, jobs and the contractor's license do the job. Mr. Q did not have a contractor's license, a business license, advertise his services to others. He did not bill XYZ for his services. X set the price for all jobs and paid Mr. Q on an hourly basis with no

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer CONSTRUCTION		Year/Period Ended 1987, 1988

uctions. (This fact is supported by Certified Payroll records in 1987. kers were reported on the ABC Library Project as "employees", paid a rate $25/hour, with no deductions taken.)

Q. provided his own hand tools which he valued at $300. He drove himself the job sites. There was no reimbursement. There was no written or oral ntract between XYZ and Mr. Q. Mr. Q felt he was an "employee" because he always been a laborer.

could provide no information that any of the workers were in business for emselves. Contractor's License Board inquiries were sent to determine if y of the persons who worked as plasterers, latherers, drywallers were censed. None were reported to have Contractor's licenses in the State of lifornia.

XYZ Corporation has a filing history of filing employment tax returns. anscripts indicate returns filed in 1982 and 1983, with wages paid and tax e.

liability returns were filed for periods 03-31-87, 06-30-87, 09-30-87, 2-31-87, 03-31-88, 06-30-88, 09-30-88. A no liability 940 was filed for 2-31-87. The other periods at issue are unfiled.

1099's were filed for 1987. 1099's filed for 1988 were $76,589.

In a telephone conversation on 9-6-90, Corporate President agreed that , as an officer was an employee and that bookkeeper was also an employee. indicated that he had started to file returns in 1990 to show himself and ookkeeper on payroll. (IRS transcripts reflect this fact.)

this same conversation, Mr. X stated that he did not feel the plasterers, rywallers and latherers were employees. He said that when he needed workers would go down to the materials yard and if he had work and workers needed ork, he would give it to them. He said they had their own trucks and tools. claimed he did not supervise them, just told them where to go and they id the job. He said that most workers had been in business longer than he ad and were more skilled that he was.

LE OF LAW - Internal Revenue Code section 3306(i) provides in pertinent art that . . ."Employee has the meaning assigned to such term by section 121(d), except that subparagraphs (B) and (C) shall not apply."

Internal Revenue Code section 3121(d) provides in pertinent part that . . . Employee means. . .(2) any individual who under the usual common law rules

886-A April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer CONSTRUCTION		Year/Period Ended 1987, 1988

icable in determining the employer-employee relationship, has the status
n employee under paragraph (1) or, (2) who performs services for
neration for any person. . ."

rnal Revenue Code section 3401(c) provides in pertinent part that . . .
loyer means the person for whom an individual performs or performed any
vice, of whatever nature, as the employee of such person. . ."

ject to a base limit, the compensation of every employee is subject to
taxes at a rate specified in section 3101(a) of the Code, which the
loyer is required by section 3102(a) to withhold from the employee's pay.
the employer fails to withhold the tax, the employer is liable for payment
the tax under section 3102(b). In addition, the employer is required by
tion 3111 to match withheld amounts.

ther the employer pays the employee in cash or otherwise, the employer
ll deduct and withhold income taxes from the wages paid an employee. See
tion 3402(a) of the Code. Under section 3403, the employer is liable for
payment of the withholding taxes, whether or not the taxes are actually
hheld.

n employer fails to deduct and withhold employee social security taxes by
son of treating the employees as non-employees, the amount of the
loyer's liability is generally determined under section 3509 rather than
tion 3102(b). An employer's liability for failure to deduct and withhold
ome taxes by reason of treating the employees as non-employees is generally
rmined by section 3509.

ver, section 3509(c) stipulates that this section shall not apply to
rmination of the employer's liability for tax if such liability is due to
employer's intentional disregard of the requirement to deduct and
hhold such tax.

rnal Revenue Code section 3301 stipulates "the federal unemployment tax
any calendar year is measured by the amount of wages paid by an employer
ng such year with respect to employment.

viduals are employees for Federal employment tax purposes if they have
status of employees under the usual common law rules applicable in
rmining the employer/employee relationship. Guides for determining that
tionship are found in three substantially similar sections of the
loyment Tax Regulations, namely, sections 31.3121(d)-1(c), 31.3306(i)-1
31.3401(c)-1. Generally, the relationship of employer and employee
sts when the person for whom the services are performed has the right to
trol and direct the individual who performs the services not only as to

886-A April 1962)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer CONSTRUCTION		Year/Period Ended 1987, 1988

results to be accomplished by the work, but also as to the details and
ns by which the result is accomplished. That is, the employee is subject
the will and control of the employer not only as to what shall be done but
it shall be done. In the connection, it is not necessary that the
loyer actually direct and control the manner in which the services are
formed; it is sufficient if he has the right to do so. The right to
charge is also an important factor indicating that the person possessing
t right is an employer.

Regulations provide that if the relationship of employer-employee exists,
designation or description of the relationship by the parties as anything
er than employer and employee is immaterial. Actual direction or control
not necessary. It is sufficient if the employer has the right to do so.
right to control is treated as the test. See Alsco Storm Windows v.
S., 311 F 2d 341 (9th Cir 1962). United States v. Silk, 331 U.S. 704
947) 1947-2 C.B. 167 ruled that when the success or continuation of a
siness depends to an appreciable degree upon the performance of certain
rvices, the workers who perform those services must be subject to a certain
ount of control by the owner of the business. A continuing relationship
y exist where work is performed at frequently recurring although irregular
tervals.

. Rul. 55-694 states when the individuals perform personal services on a
ntinuing basis in the ordinary course of and as an integral and principal
t of the corporation's business activities, that their personal services
e contracted for; that, while detailed direction and supervision over them
the performance of their services is neither necessary nor warranted, the
rporation is vested with the ultimate right to direct and control them to
extent necessary under the usual common law rules, and employer-employee
lationship is established.

degree of the requisite control is dependent upon the nature of the work
employment. See McGuire v. United States, 65-2 USTC 9616 (9th Cir 1965).
is sufficient if the employer controls the general nature of the services
be used in accomplishing the desired result. See Rev. Rul. 56-528, 1956-2
610 and Rev. Rul. 65-26, 1965-2 CB 391.

. Rul. 55-144 states that an individual who performs services for another
ncipal does not negate the existence of an employer-employee relationship.

. Rul. 55-660 states a worker who makes his or her services available to
general public on a regular and consistent basis indicates an independent
ntractor status.

446 F.S 699
311 F 2d 341

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer UNSTRUCTION		Year/Period Ended 1987, 1988

Rul. 70-309 states that a worker who can realize a profit or suffer a as a result of the workers services is generally an independent ractor, but the worker who can not is an employee.

Rul. 75-41, 1975-1 CB 323 clarified that an employer exercises contro ugh the threat of dismissal. An independent contractor cannot be fired ong as the independent contractor produces a result that meets the ract specifications.

rker who is required to comply with the other person's instructions about , where and how he or she is to work is ordinarily an employee. This rol factor is present if the person for whom the services are performed the right to require compliance with instructions. See Rev. Rul. 68-598, 8-2 CB 464, and Rev. Rul. 66-381, 1966-2 CB 449.

worker must perform services in the order or sequence set by the person whom the services are performed, that factor shows that the worker is not to follow the worker's own pattern of work, but must follow the ablished routines and schedules of the person for whom the services are formed. Often, because of the nature of an occupation, the person for the services are performed does not set the order of the services, or s the order infrequently. It is sufficient to show control, however, if h person retains the right to do so. See Rev. Rul. 56-964, 1956-2 CB 694.

Rev. Rul. 56-155 and Rev. Rul. 70-618, the Service held that penters/construction workers working under similar loyees.

Chase Manufacturing Company v. United States, 446 F. Supp 698 (ED MO 1978) e Court held that aluminum siding installers, working under similar ditions, were employees. Where indications of control exist, the courts e discounted such factors as freedom to work for others and supplying of ir own hand tools as actions that many employees take.

. Rul. 87-41 refers to 20 common law factors to be considered in termining whether an individual is an employee or an independent ntractor. A discussion of each factor follows under Government's Argument.

Code Sec. 3401(c) the term "employee" also includes an officer of a rporation.

PAYER'S ARGUMENT - Corp. President stated in a telephone interview with nt on 09-06-90 that he agreed that the bookkeeper and Corp. President were loyees and is treating them as employees at the present time.

5

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer CONSTRUCTION		Year/Period Ended 1987, 1988

President also stated that he believes that the plasterers, latherers, ers were not employees because most had been in business longer than he were more skilled that he, had own tools, and were not supervised by

RNMENT'S ARGUMENT - The Internal Revenue Code provides that Corp. cers are employees, and therefore, Mr. X, Corp. President, is an employee Federal employment tax purposes.

regard to the bookkeeper, plasterers, latherers, and laborers, an lysis of the facts in relation to the 20 common law factors follows:

INSTRUCTION - This factor is present when a person is required to comply instructions about when, where, and how he is to work. In those uations in which the employee is highly proficient, he may receive very tle, if in fact, any instructions. The right to control under the law uires only such supervision as the nature of the work requires. See uire v. United States, 65-2 USTC 9616.(9th circuit 1965). In this tance Mr. X told workers where to go and what to do. The fact that they e experienced construction workers and had been in business longer than he allowed the work to be performed with a minimum of supervision but the still had the right to control the workers. It is highly unlikely that X would just pick up a worker off the yard and provide no supervision when business and reputation depended on the job that was done.

ilarly, the bookkeeper performed work at the firm's premises and was told t needed to be done on a weekly basis. That the bookkeeper is currently sidered an employee attests to this element of control.

TRAINING - Training a worker by requiring an experienced employee to work h the worker, by corresponding with the worker, by requiring the worker to end meetings, or by using other methods, indicates that the person for whom e services are performed wants the services performed in a particular manner method, Rev. Rul. 70-630, 1970-2 C.B. 229. Mr. X stated he hired perienced workers who would not have required substantial training, thus is element should be given little weight.

INTEGRATION - As a factor integration is present when the success or ntinuation of a business depends to an appreciable degree upon the rformance of certain services. The people who perform those services must essarily be subject to direction and control by the owner of the business. e firm is engaged in general construction. XYZ apparently did a variety of rk (framing, plastering, lathering, concrete) without sub-contracting the

86-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
f Taxpayer NSTRUCTION		Year/Period Ended 1987, 1988

ut. The workers performed plastering and lathering services as an al part of the business and without these individuals the business would to operate.

RVICES RENDERED PERSONALLY - This factor is present if services must be ed personally, presumably the employer is interested in the methods as s the results. Rev. Rul. 55-695, 1955-2 C.B. 410. Per the facts of ase there were no contracts between the parties, which would indicate a ntract arrangement where the sub-contractor would hire workers. There s to be nothing more than an hourly rate set and individual workers paid eir own efforts. No helpers were involved and the workers performed the ersonally.

ookkeeper also performed the work personally and on the taxpayer's ses.

IRING, SUPERVISING AND PAYING ASSISTANTS - Hiring, supervising and g assistants generally shows control over the individual on a job. A an who hires, supervises or pays assistants, usually does so at the tion of the employer. However, if one worker hires, supervises, and the other assistants pursuant to a contract under which the worker s to provide materials and labor and under which the worker is nsible only for the attainment of a reult, this factor indicates an endent contractor. Compare: Rev. Rul. 63-115, 1963-1 C.B. 178 with Rev. 55-593, 1955-2 C.B. 610.

ated in 4 above, there were no contracts, the workers were paid nally by the Corp. and there were no helpers. The certified payroll ds indicating hours worked and rate of pay support this conclusion. ookkeeper was also paid by the firm and had no helpers.

ONTINUING RELATIONSHIP - A continuing relationship may include work rmed at frequently recurring though somewhat irregular intervals, either ll of the employer or whenever work is available. If the arrangement mplates continuing or recurring work, the relationship is considered nent even if the services are part-time, seasonal, or of short duration. L. S. v. Silk.

acts of the case indicate the bookkeeper and construction workers were on a weekly basis in 1987 and 1988. The bookkeeper and Mr. Q. were paid y every week in January 1988 thru Sept. 1988. The other workers seem to had a continuing relationship as long as there was work to be done. No eceived one, lump sum, payment.

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer ONSTRUCTION		Year/Period Ended 1987, 1988

ET HOURS OF WORK - The establishment of set hours of work by an employer element of control. Such a condition bars the worker from being a r of his own time, which is the right of an independent contractor. Rul. 73-591, 1973-2 CB 337.

ified payroll records in the file, indicate most workers worked an 8 hour (40 hour week) during 1987.

FULL TIME REQUIRED - This element is a factor if the worker must devote full time to the business of the employer, or the employer has control the amount of time the worker spends working and by implication restricts worker from doing other gainful work. An independent contractor, on the r hand, is free to work when and for whom he or she chooses. See Rev. 56-694, 1956 CB 694.

ified payroll records indicate workers worked full time (8 hours per day, ours per week) during the 1987 Library project.

DOING WORK ON THE EMPLOYER'S PREMISES - If the work is performed on the ises of the person or persons for whom the services are performed, that or suggests control over the worker, especially if the work could be done where. See Rev. Rul. 56-660, 1956-2 CB 693. Work done off the premises the person or persons receiving the services, such as at the office of the er, indicates some freedom from control. However, this fact by itself s not mean that the worker is not an employee. The importance of this or depends on the nature of service involved and the extent to which an loyer generally would require that employees perform such services on the loyer's premises. Control over the place of work is indicated when the son or persons for whom the services are performed have the right to compel worker to travel a designated route, to canvass a territory within a ain time, or to work at specific places as required. See Rev. Rul 56-694.

bookkeeper did her work on the firm's premises. Because of the nature of construction business, the other workers performed their services at the site and not on the employer's premises.

ORDER OR SEQUENCE - If a person must perform services in the order or ence set by the employer, it shows that the worker is not free to follow own pattern of work but must follow the established routine of the oyer. Often because of the nature of an occupation, the employer does set the order of services or sets the order infrequently. It is ficient to show control, however, if the employer retains the right to do so. Rev. Rul. 56-694.

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
Name of Taxpayer CONSTRUCTION		Year/Period Ended 1987, 1988

bookkeeper was told by Mr. X what had to be done on a weekly basis. the testimony of Mr. Q. Mr. X always told him where to report and what s to do. Mr. X was at the job sites working and inspecting the jobs.

ORAL OR WRITTEN REPORTS - A requirement that the worker submit regular l or written reports to the person or persons for whom the services are formed indicates a degree of control. See Rev. Rul. 70-309, 1970-1 CB , and Rev. Rul. 68-248, 1968-1 CB 431.

ere is no evidence of oral or written reports. Obviously, some record of irs worked was maintained by someone for the Certified Payroll Records to completed in 1987 for the library project.

PAYMENT BY HOURS, WEEK OR MONTH - Payment by the hour, week or month nerally points to an employer/employee relationship, provided that this thod of payment is not just a convenient way of paying a lump sum agreed on as the cost of a job. Payment made by the job or on a straight mission generally indicates that the worker is an independent contractor. v. Rul. 74-389, 1974-2 CB 330.

e bookkeeper and construction workers were paid on an hourly basis. This evidenced by the Certified Payroll records and check registers.

BUSINESS OR TRAVEL EXPENSE - If the firm pays the business and/or travel penses, the person is ordinarily an employee. An employer, to be able to ntrol expenses, generally retains the right to regulate and direct the rker's business activities. Rev. Rul. 55-144, 1955-1 CB 330.

this case, the only expenses incurred by the workers were commuting penses to and from the job sites. Few, if any, employers pay their ployees for commuting expenses.

FURNISHING OF TOOLS AND MATERIALS - The fact that the firm furnishes nificant tools, materials and other equipment tends to show the existence an employer-employee relationship. Rev. Rul. 71-524, 1971-1 CB 346. In e taxpayer's case the firm provided materials while the workers provided nd tools.

Chase Manufacturing Company v. United States, 446 F. Supp 698 (ED MO 1978) e Court held that aluminum siding installers, working under similar nditions, were employees. Where indications of control exist, the courts ve discounted such factors as freedom to work for others and supplying of eir own hand tools as actions that many employees take.

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer INSTRUCTION		Year/Period Ended 1987, 1988

SIGNIFICANT INVESTMENT - Lack of investment in facilities indicates a dence on the person or persons for whom the services are performed for facilities and, accordingly, the existence of an employer-employee onship. See Rev. Rul. 71-524.

orkers did not have a significant investment in materials, tools, etc. only had hand tools valued at approximately $300. Therefore, there was sk factor involved for the workers.

REALIZATION OF PROFIT OR LOSS - A worker who can realize a profit or a loss as a result of his services is generally considered to be an endent contractor, but the worker who cannot is an employee. See Rev. 70-309. The risk that a worker will not receive payment for his or her tes is common to both independent contractors and employees and thus ot constitute sufficent economic risk to support treatment as an endent contractor.

orkers in this case, construction workers and bookkeeper, were paid an y rate. Check with the contractor license board shows that the ruction workers were unlicensed and none of the workers were in business hemselves. The only profit realized was the hourly wage and there was tential for loss.

WORKING FOR MORE THAN ONE FIRM AT A TIME - If a worker performs more de minimus services for a multiple of unrelated persons or firms at the time, that factor generally indicates that the worker is an independent actor. See Rev. Rul. 70-572, 1970-2 CB 221. However, a worker who rms services for more thjan one person may be an employee of each of the ns, especially where such persons are part of the same arrangement.

workers were doing jobs for XYZ in 1987 on the Library Project they d 8 hours a day, 40 hours a week/full time. They may have worked for s when that job was completed but that does not mean they were not yees while being paid by XYZ. The bookkeeper did not provide any proof she worked for others.

MAKING SERVICES AVAILABLE TO THE GENERAL PUBLIC - The fact that a worker his or her services available to the general public on a regular and stent basis indicates an independent contractor relationship. See Rev. 56-660.

orkers did not advertise their services to the general public nor did hold contractor's licenses. They do not appear to have been in business themselves.

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer ONSTRUCTION		Year/Period Ended 1987, 1988

RIGHT TO DISCHARGE - The right to discharge a worker is a factor cating that the worker is an employee, and the person possessing the is an employer. An employer exercises control through the threat of ssal, which causes the worker to obey the employer's instructions. An endent contractor cannot be fired so long as he produces a result that the contract specifications. Rev. Rul 75-41, 1975-1 CB 323.

were no written agreements between the parties which would qualify as a act. Mr. X hired the workers out of the materials yard and had the to fire them at any time.

RIGHT TO TERMINATE - An employee has the right to end his relationship his employer at any time without incurring a liability. See Rev. Rul. 9. An independent contractor usually agrees to complete a specific job; responsible for its satisfactory completion or legally obligated to make for failure to complete the job.

were no written contracts between the parties. It would appear that workers had the right to quit at any time without incurring liability.

USIONS: In considering the 20 common law factors, the facts weigh ly in favor of employee treatment of the construction workers and keeper. The Corp. President is an employee by definition in the Internal ue Code. That the Corp. filed employment tax returns at one time and stopped shows inconsistent treatment, and willful disregard of the ~~rement to~~ collect, account for and pay over. Therefore, the provisions c. 3509 have not been utilized.

MUST ADDRESS §3509

PENALTIES

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer CONSTRUCTION		Year/Period Ended 8712,8812

E - Whether the negligence penalty as defined under Internal Revenue Code ions 6653(a)(1)(A), 6653(a)(1)(B), 6653(a)(1) applies to non-payment of oyment taxes by the taxpayer with regard to workers who performed services him during 1987, 1988. In other words, was there intentional disregard of s and regulations in not treating the workers as employees?

ther the taxpayer must pay the failure to deposit penalty with regard to employment taxes determined as a result of this examination.

ther there should be a failure to file penalty charged for employment tax urns filed after the due date.

TS - See facts under employment tax issue.

OF LAW - Internal Revenue Code section 6653(a)(1)(A) applies to returns, due date for which (determined without regard to extensions) is after mber 31, 1986, but before January 1, 1989. This section stipulates that any part of any underpayment (as defined in subsection (c) is due to ligence or disregard of rules or regulations, there shall be added to the 5 percent of the amount of the underpayment."

ernal Revenue Code section 6653(a)(1)(B) applies to returns, the due date which (determined without regard to extensions) is after December 31, 6, but before January 1, 1989. This section stipulates that "if any part any underpayment (as defined in subsection (c) is due to negligence or regard of rules or regulations, there shall be added to the tax an amount al to 50 percent of the interest payable under section 6601 with respect the portion of such underpayment which is attributable to negligence for period beginning on the last date prescribed by law for payment of such rpayment (determined without regard to any extension) and ending on the e of the assessment of the tax (or, if earlier, the date of the payment of tax.)"

ernal Revenue Code section 6653(a)(1) applies to returns, the due date for ch (determined without regard to extensions) is after December 31, 1988. It vides: "If any part of any underpayment (as defined in subsection "c") of required to be shown on a return is due to negligence (or disregard of es or regulations), there shall be added to the tax an amount equal to 5 cent of the underpayment."

ernal Revenue Code section 6653(a)(3) defines negligence: "For purposes this subsection, the term "negligence" includes any failure to make a sonable attempt to comply with the provisions of this title, and the term isregard" includes any careless, reckless, or intentional disregard."

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer CONSTRUCTION		Year/Period Ended 8712,8812

nal Revenue Code section 6656(a) applies to deposits required to be made e January 1, 1990. It provides: "In case of failure by any person red by this title or by regulation of the Secretary under this title to it on the date prescribed therefore any amount of tax imposed by this in such government depository as is authorized under section 6302(c) to ve such deposit, unless it is shown that such failure is due to nable cause and not due to willful neglect, there shall be imposed upon person a penalty of 10 percent of the amount of the underpayment. For ses of this subsection, the term "underpayment" means the excess of the t of the tax required to be so deposited over the amount, if any, of deposited on or before the date prescribed therefore."

nal Revenue Code Section 6651 provides for a failure to file penalty of r month to be computed on the amount required to be shown on the return. um penalty is 25%.

YER'S ARGUMENT - None was presented. . . the taxpayer does not feel they iable for the underlying deficiency.

NMENT'S ARGUMENT & CONCLUSIONS - The taxpayer corporation filed yment tax returns in earlier years and stated that the Corp. officer and eeper are now being treated as employees. The treatment of laborers as endent contractors is rampant in the construction industry when there is ue basis for treating them as non-employees. The workers are paid an y wage, told when to report, have no contractor's license or business se, do not hold themselves out to the general public as being in business hemselves. Sec. 3509 rates were not allowed due to intentional disregard he negligence penalties also apply.

it penalties apply to the employer's portion of the FICA.

quency penalties apply to the returns filed late as follows:

703 - filed 05-26-88 penalty rate 25%
706 - filed 05-26-88 penalty rate 25%
709 - filed 05-23-88 penalty rate 25%
712 - filed 05-23-88 penalty rate 20%
712 - filed 05-31-88 penalty rate 20%

303 - filed 05-23-88 penalty rate 05%
306 - filed 07-31-88 no penalty
309 - filed 10-31-88 no penalty
312 - filed not filed penalty rate 25%
312 - filed not filed penalty rate 25%

§530

000613

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer CORPORATION		Year/Period Ended 1987, 1988

- Whether or not Section 530 of the Revenue Act of 1978 is applicable
he employment tax issue raised in this report.

S - Refer to the employment tax segment of this report.

OF LAW - Section 530 of the Revenue Act of 1978 provides in pertinent
for the interim relief for taxpayers involved in an employment tax
us controversy with the Service. In those situations in which the
ayer has a reasonable basis for treating a worker other than an employee
act terminated the taxpayer's potential liability. The act established
following guidelines to be used to determine whether a taxpayer has a
sonable basis for treating an individual as an employee.
Judicial precedent or published rulings whether or not relating to the
particular industry or business in which the taxpayer is engaged, or
technical advise, a letter ruling, or a determination letter pertaining
to the taxpayer;

A past Internal Revenue Service examination (not necessarily for
employment tax purposes) of the taxpayer, if the examination entailed no
assessment attributable to the taxpayer's employment tax treatment of
individuals holding substantially similar positions to the positions held
by the individuals whose status is at issue; or

Long standing recognized practice of a significant segment of the
industry in which the individual was engaged. It is not necessary that
the practice be uniform throughout an entire industry.

taxpayer should fail to meet any of the above safe havens they may never
less be entitled to the relief if they can demonstrate, in some other
er, a reasonable basis for not treating the individuals as employees.
Safe haven relief as allowed by this section will only apply if the
owing criteria have been met:
All federal tax returns (including information returns) required to be
filed by the taxpayer with respect to the individuals for the periods are
filed on a basis consistent with the taxpayer's treatment of the
individuals as not being employees, and
The treatment is consistent with the treatment for periods beginning
after December 31, 1977.

AYER'S ARGUMENT - None raised.

RNMENT'S ARGUMENT - Absent a reasonable basis for not treating the
vidual as an employee, an incorrect treatment, in itself, does not "safe
or" a taxpayer under section 530 of the Revenue Act of 1978. Refer to
Proc. 85-18, amplifying and superseding Rev. Proc. 81-43, 1981-2 C.B.

14

86-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
Taxpayer PORATION		Year/Period Ended 1987, 1988

which provides instructions for implementing the provisions of section the Revenue Act of 1978:

dressing Section 530 each item will be addressed separately as follows:
UDICIAL PRECEDENT - The taxpayer cannot rely on judicial precedent because there are no known court rulings or revenue rulings in favor of the taxpayer, when as in this case, he or she treats the same workers as both employees and independent contractors(bookkeeper and Corp. Officer.) There is also no judicial precedent for treating the construction workers over whom the company has a great deal of control as independent contractors.

PRIOR AUDIT - The taxpayer did not have any known prior Internal Revenue Service examination in which the taxpayer had workers holding substantially similar positions to the positions held by the individuals whose status is at issue in this case. A complete transcript was secured and reviewed.

LONG STANDING INDUSTRY PRACTICE - The taxpayer may not rely on Section 530 for the following reasons:
1. The statute and the Committee Reports refer to a long standing practice of the industry, or a significant segment thereof. It is the Government's position that this depends upon the age of the segment of the industry, and the practice should go back far enough to establish that this is the recognized practice of long standing. In order to meet these requirements there should have been a large percentage of the segment (nearly all) participating in the practice for a long period and not merely a recent mushrooming of noncompliance within the segment. The practice of hiring workers as independent contractors in the drywall industry is spotted. Some contractors do pay workers as employees, and other contractors do not arguing that they cannot bid jobs competitive when they must pay employment taxes.

lly, Section 530(a)(1) of the Act, as amended, provides that if a ayer did not treat an individual as an employee for any period, then th vidual will be deemed not to be an employee for that period, unless the ayer had no reasonable basis for not treating the individual as an oyee.

530 provides: "for any period after December 31, 1978, the relief applies if (1) all federal tax returns (including information returns) required e filed by the taxpayer with respect to the individual for the period are d on a basis consistent with the taxpayer's treatment of the individual as being an employee, and (2) the treatment is consistent with the treatment periods beginning after December 31, 1977.

15

886-A (April 1968)	EXPLANATION OF ITEMS	Schedule No. or Exhibit
of Taxpayer CORPORATION		Year/Period Ended 1987, 1988

ver, in the case before us the taxpayer doesn't qualify since he did treat bookkeeper and Corp. officer as employees in later years. (Additionally, Corp. president is an employee by statute.) In this case we also know no 1099s were filed for 1987.

CLUSION - The taxpayer does not qualify for safe haven treatment under tion 530.

CITY OF SAN DIEGO PARK AND RECREATION DEPARTMEN
SERRA MESA PARK AND RECREATION COUNCIL

REEMENT AND UNDERSTANDING TO PROVIDE SERVICES

NTRACTUAL EMPLOYEES ARE HIRED BY THE INDIVIDUAL RECREATION UNCILS NOT THE CITY OF SAN DIEGO TO PROVIDE:
ECIALIZED INSTRUCTION ( ) SUBSTITUTE INSTRUCTION ( )
FICIATE ( ) SCOREKEEPER ( ) SPECIAL PROGRAM (_____)

HE CITY OF SAN DIEGO DOES NOT PROVIDE MEDICAL OR DISABILITY NSURANCE FOR CONTRACTUAL EMPLOYEES.

_____, WILL BE A CONTRACTUAL EMPLOYEE AT ERRA MESA PARK AND RECREATION CENTER MY RELATIONSHIP WITH THE ERRA MESA PARK RECREATION COUNCIL WILL BE THAT OF AN INDEPENDENT ONTRACTOR.I AGREE TO DEFEND, INDEMNIFY,PROTECT AND HOLD CITY AND T'S AGENTS, OFFICERS AND EMPLOYEES HARMLESS FROM AND AGAINST ANY ND ALL CLAIMS ASSERTED OR LIABILITY ESTABLISHED FOR DAMAGES OR NJURIES TO ANY PERSON OR PROPERTY, INCLUDING INJURY TO ANY OF MY MPLOYEES, AGENTS OR OFFICERS WHICH ARISE FROM AND ARE CONNECTED ITH OR ARE CAUSED OR CLAIMED TO BE CAUSED BY THE ACTS OF MISSIONS OF MYSELF, MY AGENTS, OFFICERS OR EMPLOYEES, IN ERFORMING THE WORK OR SERVICES HEREIN, AND ALL EXPENSES OF NVESTIGATING AND DEFENDING AGAINST SAME; PROVIDED, HOWEVER, THAT Y DUTY TO INDEMNIFY AND HOLD HARMLESS SHALL NOT INCLUDE ANY LAIMS OR LIABILITY ARISING FROM THE ESTABLISHED SOLE NEGLIGENCE R WILLFUL MISCONDUCT OF THE CITY, IT'S AGENTS, OFFICERS OR MPLOYEES.

CONTRACTOR _____ DATE _____
SIGNATURE

ADDRESS _____
CITY STATE ZIP

S.S. #_____ PHONE (DAY) _____ (EVEN.)_____

COUNCIL AGENT (STAFF REP.) _____

SERRA MESA PARK DOES HEREBY HIRE, _____,
TO PROVIDE SERVICES IN THE FOLLOWING PROGRAM _____.
PAY TO BE: _____.
THIS AGREEMENT SHALL BE ACTIVE FROM ____/____/____ TO ____/____/____.
THE CONTRACTOR UNDERSTANDS THAT THE COUNCIL MAY CANCEL THIS AGREEMENT TO PROVIDE THE AFOREMENTIONED SERVICES SHOULD PROGRAM ENROLLMENT NOT BE SUFFICIENT TO SUPPORT THE PROGRAM OR; SHOULD CONTRACTOR NOT PROVIDE THE SERVICES AGREED TO IN THIS CONTRACT AND PROCEDURES GUIDE.

PAYMENT OPTIONS:
_____ EVERY TWO WEEKS FOR LENGTH OF SESSION.
_____ AT MIDDLE AND COMPLETION OF COMPLETION OF SESSION.
_____ AT COMPLETION OF SESSION.

APPENDIX E

Probationary Periods and Standards of Performance

REGULATION OF OUTSIDE EMPLOYMENT OR ENTERPRISE

I. AUTHORITY:

A. Civil Service Rule XI, Section 3. CAUSE FOR REMOVAL OR SUSPENSION.

B. California State Government Code, Section 1126.

(a) A local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his duties as a local agency officer or employee or with the duties, functions or responsibilities of his appointing power or the agency by which he is employed. Such officer or employee shall not perform any work, service or counsel for compensation outside of his local agency employment where any part of his efforts will be subject to approval by any other officer, employee, board or commission of his employing body, unless otherwise approved in the manner prescribed by subdivision (b).

(b) Each appointing power may determine, subject to approval of the local agency, those outside activities which, for employees under its jurisdiction, are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or employees. An employee's outside employment, activity or enterprise may be prohibited if it:
(1) involves the use for private gain or advantage of his local agency time, facilities, equipment and supplies; or the badge, uniform, prestige or influence of his local agency office or employment or, (2) involves receipt or acceptance by the officer or employee of any money or other consideration from anyone other than his local agency for the performance of an act which the officer or employee, if not performing such act, would be required or expected to render in the regular course or hours of his local agency employment or as a part of his duties as a local agency officer or employee or, (3) involves the performance of an act in other than his capacity as a local agency officer or employee which act may later be subject directly or indirectly to the control, inspection, review, audit or enforcement of any other officer or employee or the agency by which he is employed, or (4) involves such time demands as would render performance of his duties as a local agency officer or employee less efficient.

The local agency may adopt rules governing the application of this section. Such rules shall include provision for notice to employees of the determination of prohibited activities, of disciplinary action to be taken against employees for engaging in prohibited activities, and for appeal by employees from such a determination and from its application to an employee.

Probationary Periods and Standards of Performance

REGULATION OF OUTSIDE EMPLOYMENT OR ENTERPRISE

II. POLICY:

A. It is the policy of the Civil Service Commission not to impose unnecessary restraints on the personal lives of City employees. However, the Commission recognizes that some standards should be provided in order to prevent conflicts that may occur between employees' outside employment activities and their City work. Existing rules and procedures provide for appropriate disciplinary action in the event outside employment activities begin to impact on a City employee's efficiency, sick leave usage, or other performance criteria. In addition, it is the Commissions's policy that City employees shall not accept employment outside City service or participate actively in the management or operation of any business or enterprise that:

1. Is incompatible with their City employment or would result in a conflict of interest with their responsibilities and obligations to the City; or

2. Could result in criticism or discredit to the City.

B. Employees whose outside employment may prolong recovery while on injury, industrial, or sick leave, or while on light duty assignments for the City, are in violation of this policy.

C. The City Manager or other department head may formulate and adopt reasonable standards and procedures to ensure conformance to this policy.

D. Violators of this policy are subject to appropriate disciplinary action.

CITY OF SAN DIEGO, CALIFORNIA
ADMINISTRATIVE REGULATION

SUBJECT	Number	Issue	Page
CONFLICT OF INTEREST AND EMPLOYEE CONDUCT	95.60	2	1 of 8
	Effective Date		
	May 23, 1990		

1. PURPOSE

1.1 The purpose of this regulation is to:

a. Summarize in a single document a code of ethics and acceptable employee conduct which will apply equally to all employees, regardless of individual job duties and responsibilities.

b. Emphasize that each employee in our city occupies a position of public trust which demands the highest moral and ethical standard of conduct.

c. Ensure that citizens are given efficient, productive, and high quality services in a courteous impartial manner. Such services should be equally available, with no special advantage given any citizen beyond that available to all citizens.

1.2 Policies and regulations governing the conduct of City employees appear in the California Government Code, City Charter, Municipal Code, Council Policy Manual, Administrative Regulations, Personnel Manual, and Departmental Instructions. Employees shall familiarize themselves with the pertinent sections of these documents and consult them as necessary for information and guidance.

2. SCOPE

2.1 This regulation applies to all City of San Diego Employees.

(Supersedes Administrative Regulation 95.60, Issue 1, effective March 27, 1970)

Authorized

CITY MANAGER

CITY ATTORNEY

PERSONNEL DIRECTOR

CITY CLERK

INTERGOVERNMENTAL RELATIONS DIRECTOR

AUDITOR & COMPTROLLER

PLANNING DIRECTOR

APPENDIX G

CITY OF SAN DIEGO, CALIFORNIA
ADMINISTRATIVE REGULATION

SUBJECT	Number	Issue	Page
CONFLICT OF INTEREST AND EMPLOYEE CONDUCT	95.60	2	2 of 8
	Effective Date: May 23, 1990		

3. POLICY

3.1 Responsibility of Ethical Conduct

It is the responsibility of all City of San Diego employees to engage in ethical behavior and practices. Every employee is responsible for both the actual and perceived conflict of interest that may arise as a result of the employee's actions and it is the employee's responsibility to reduce or eliminate to the extent possible such actual and perceived conflicts of interest.

3.2 Responsibility of Public Services

All City of San Diego employees are bound to uphold the Constitution of the United States and the Constitution of the State of California, and to abide by the laws of the nation, state, and the City. They are bound to observe in their official acts, the highest standards of integrity and to discharge faithfully the duties of their position, recognizing that the lives, safety, health and welfare of the general public must be their primary concern. Their conduct in both their official and private affairs should be above reproach to assure that their public position is not used nor perceived as being used for personal gain. The conduct of all employees shall be such as to provide the best public service to each citizen and the community as a whole. The conduct of all employees shall be consistent with the goals and values of this organization.

3.3 General Rule Regarding Conflict of Interest

Employees shall not engage in any business or transaction, and shall not have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of their official duties or would tend to impair their independence, judgment, or action in the performance of such duties.

3.4 Acceptance of Favors, Gifts, and Gratuities

Persons in the public service shall not accept money or other consideration or favors from anyone other than the City for the performance of an act which they would be required or expected to perform in the regular course of their duties. This prohibition would not normally include items such as plaques, souvenirs, or mementos of nominal value often associated with a given event. Persons shall not accept gifts, gratuities or favors of any kind which might reasonably be interpreted as an attempt to influence their actions with respect to City business.

CITY OF SAN DIEGO, CALIFORNIA
ADMINISTRATIVE REGULATION

SUBJECT	Number	Issue	Page
	95.60	2	3 of 8
CONFLICT OF INTEREST AND EMPLOYEE CONDUCT	Effective Date		
	May 23, 1990		

3.5 Collateral or Outside Employment

a) Notification and Departmental Approval

Persons employed with the City who are engaged in any collateral or outside business activity or employment shall notify the Department Director or other appropriate appointing authority in writing. Persons contemplating such business activity or employment shall obtain departmental approval before accepting such employment.

b) General Prohibition

Pursuant to Council Policy 000-4, employees shall not engage in any collateral employment or business activity which is incompatible or in conflict with the duties, functions, or responsibilities of the City, the appointing authority, the department, or the employee. Activities which may constitute a conflict include: use of their City time, facilities, equipment and supplies, or the use of a badge, uniform, prestige or influence of their City or employment for private gain or advantage. An employee shall not engage in any collateral business activity or employment, which, by its nature, hours or physical demands, would impair the required quality or quantity of the employee's work with the City, impair the employee's independence of judgment or action in the performance of official duties, reduce the effectiveness or efficiency of the employee's department, reflect discredit on the City, or tend to increase the City's payments for Sick Leave, Worker's Compensation benefits, Long Term Disability or Industrial Leave benefits.

c) Specific Prohibitions

1) Employees shall not work within their discipline or profession for a company or as a self-employed consultant when their work is reviewed, or approved, or is subject to issuance of a permit by their City department.

2) Employees shall not submit work they have done for a collateral employer or as a self-employed consultant to the employee's division in the City for review, approval, or issuance of a permit.

3) Employees shall not review, approve, or issue a permit for work done by a collateral employer, whether the work submitted was done by the City employee or other staff of the collateral employer.

CITY OF SAN DIEGO, CALIFORNIA
ADMINISTRATIVE REGULATION

SUBJECT	Number	Issue	Page
CONFLICT OF INTEREST AND EMPLOYEE CONDUCT	95.60	2	4 of 8
	Effective Date		
	May 23, 1990		

4) Employees shall not attempt to influence the City's review, approval, or issuance of a permit pertaining to work submitted by an employee's collateral employer, whether the work submitted was done by the City employee or other staff of the collateral employer.

5) Employees in supervisory positions shall not assign to a subordinate any work a) resulting from the supervisor's collateral employment, and b) requiring the City's review, approval, or issuance of a permit.

6) Employees in supervisory positions shall not attempt to influence the City's review, approval, or issuance of a permit pertaining to any work resulting from the supervisor's collateral employment.

3.6 Use of City Employment and Facilities for Private Gain

Persons in the public service shall not use, for private gain or advantage, their City time or the City's facilities, equipment or supplies. In addition, City employees shall not use or attempt to use their position to secure unwarranted privileges or exemptions for themselves or others. Administrative Regulation 45.50, "Private Use of City Labor, Equipment, Materials, and Supplies Prohibited" is incorporated by reference in this paragraph.

3.7 Use of Confidential Information

Persons in the public service shall not use confidential information acquired by or available to them in the course of their employment with the City for speculation or personal gain. Persons in the public service shall uphold the public's right to know, and in accordance with the Ralph M. Brown Act, uphold the public's right to know not only the decisions taken, but also the deliberations which shape public policies.

Persons in the public service shall not disclose confidential personnel information acquired by or available to them in the course of their employment with the City except in the performance of their duties as required by law.

3.8 City Contracts

In accordance with Government Code section 87100 et seq. and Government Code section 1090 et seq., persons in the public service shall not exercise any discretionary powers for, or make any recommendations on behalf of the City or any department or officer thereof with respect to any contract or sale to which the City or any department thereof is a party and in which such persons shall knowingly be directly or indirectly financially interested.

CITY OF SAN DIEGO, CALIFORNIA
ADMINISTRATIVE REGULATION

SUBJECT	Number	Issue	Page
CONFLICT OF INTEREST AND EMPLOYEE CONDUCT	95.60	2	5 of 8
	Effective Date		
	May 23, 1990		

3.9 Personal Investments

In accordance with Government Code section 87100 et seq., persons in the public service shall not make personal investments in enterprises which they have reason to believe may be involved in decisions or recommendations to be made by them, or under their supervision, or which will otherwise create conflict between their private interests and the public interest. If, however, persons in the public service have financial interests in matters or enterprises coming before them, or before the department in which they are employed, they shall disqualify themselves from any participation therein.

3.10 Discussion of Future Employment

Persons in the public service shall not negotiate for future employment outside the City service with any person, firm, or organization known by such persons to be dealing with the City concerning matters within such person's areas of responsibility or upon which they must act or make a recommendation, when the person's City employment status could create an advantage not available to other individuals, firms or organizations. City employees shall not communicate with former City employees on any issue or matter in which that former employee had official responsibility or participation for a period of one year from the former employees final date of active employment. Council Policy 300-11, "City Contract Provisions with Respect to Hiring City Employees" is incorporated by reference in this paragraph.

3.11 Equal Employment

Persons in the public service shall not, in the performance of their service responsibilities, discriminate against any person on the basis of race, religion, color, creed, age, marital status, national origin, ancestry, sex, sexual preference, medical condition, or handicap and they shall cooperate in achieving the equal employment opportunity and affirmative action goals and objectives of the City.

3.12 Reporting of Improper Government Activities

Persons in the City service are strongly encouraged to fulfill their own moral obligations to the City by disclosing to the extent not expressly prohibited by law, improper governmental activities within their knowledge. Employees are encouraged to contact departmental management with this information.

CITY OF SAN DIEGO, CALIFORNIA
ADMINISTRATIVE REGULATION

SUBJECT	Number	Issue	Page
CONFLICT OF INTEREST AND EMPLOYEE CONDUCT	95.60	2	6 of 8
	Effective Date		
	May 23, 1990		

No officer or employee of the City shall directly or indirectly use or attempt to use the authority or influence of such officer or employee for the purpose of intimidating, threatening, coercing, commanding, or influencing any person with the intent of interfering with that person's duty to disclose such improper activity.

3.13 Favoritism

Supervisory or management employees shall not participate in the appointment or recommend the appointment of any member of their immediate family, or any other person with whom the employee has a close personal or private business relationship, to a classified position of any department, office, bureau or division over which they have administrative control.

Supervisory or management employees shall not participate in the appointment or recommend the appointment of a member of their immediate family, or any other person with whom the employee has a close personal or business relationship, to another supervisory or management position of the City. This regulation permits immediate family members and close personal friends of supervisory or management employees to be appointed as classified employees in any department provided such supervisory or management employees make no recommendation nor otherwise attempt to influence such appointments.

No supervisory or management employee shall: 1) directly supervise any immediate family member or person with whom the supervisor has a close personal relationship (this does not apply to OCA assignments of 30 days or less); 2) influence the approval of any employee rewards for any immediate family member or person with whom the supervisor has a close personal relationship; 3) interfere with any performance evaluation or disciplinary proceeding for any immediate family member or person with whom the supervisor has a close personal or business relationship; and 4) recommend or attempt to influence any contractor or business which has a business relationship with the City to employ a member of his or her immediate family or any other person with whom the employee has a close personal or business relationship.

For purposes of this section, the term "immediate family" shall mean spouse, significant other, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, step-parent, step-child.

CITY OF SAN DIEGO, CALIFORNIA
ADMINISTRATIVE REGULATION

SUBJECT	Number	Issue	Page
CONFLICT OF INTEREST AND EMPLOYEE CONDUCT	95.60	2	7 of 8
	Effective Date		
	May 23, 1990		

3.14 Product Endorsement

City employees, in their capacity as a City employee, shall not endorse a product or service or comment on that product or service if it is the intent of the solicitor of the endorsement, or of the vendor or manufacturer of that product or service, to use such comments for purposes of advertisement. City employees are not prohibited from responding to inquiries regarding the effectiveness of products or services used by the City unless the employee is aware that it is the inquirer's intention to use those comments for purpose of advertisement. Council Policy 000-23 "Product Endorsement" and Administrative Regulation 95.65 "Product Endorsement" are incorporated by reference in this paragraph.

3.15 Duty to Disclose

Every employee shall immediately disclose the nature and extent of any interest, direct or indirect, which may conflict with his responsibility or duty, or which, because of his position, may influence a decision to the benefit of the organization in which he has an interest. Such disclosure shall be in the form of a memorandum to the City Manager, transmitted via the employee's department head.

3.16 Duty to Cooperate

Every employee shall cooperate fully with judicial bodies and courts, and with lawfully constituted investigative commissions, committees, bodies and juries; appear before them upon request; and answer all questions concerning his conduct in office or his performance of official duties or matters within his knowledge pertaining to the property, government or affairs of the City of San Diego. Failure to do so shall be cause for appropriate disciplinary action, including possible dismissal from City service.

SUBJECT	Number	Issue	Page
CONFLICT OF INTEREST AND EMPLOYEE CONDUCT	95.60	2	8 of 8
	Effective Date		
	May 23, 1990		

APPENDIX

Legal References

California Government Code section 87100 et seq.

California Government Code section 1090 et seq.

Administrative Regulation 45.50 PRIVATE USE OF CITY EQUIPMENT AND MATERIALS PROHIBITED

City Charter

Council Policy 000-4 CODE OF ETHICS

Municipal Code

Personnel Manual Section A-2 COMMISSION POLICY STATEMENT: MOTOR VEHICLE VIOLATIONS

Personnel Manual Section G-1 CODE OF ETHICS AND CONDUCT

Personnel Manual Section G-6 REGULATION OF OUTSIDE EMPLOYMENT OR ENTERPRISE

Personnel Manual Section L-2 SEPARATION AND DISCIPLINARY ACTIONS: DISCIPLINE

Object Index

Ethics
Conflict of Interest
Employee Conduct

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

000627

Corrected 1/18/68

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
CODE OF ETHICS	000-4	12/26/67	1 OF 2

BACKGROUND

Every citizen of the City of San Diego is entitled to have complete confidence in the integrity of local government. Each elected official, officer, appointee and employee of The City of San Diego must help to earn that confidence by his own integrity and conduct.

PURPOSE

To adopt a code of ethics setting standards of conduct for all elected officials, officers, appointees, and employees of The City of San Diego. This policy is not intended to supersede, negate or otherwise invalidate any statute, ordinance or City Civil Service rule or regulation.

POLICY

It is the policy of the Council that the following code of ethics be adopted for all elected officials, officers, appointees and employees of The City of San Diego:

First: No elected official, officer, appointee or employee 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.

Second: No elected official, officer, appointee or employee shall engage in any enterprise or activity which shall result in any of the following:

(a) Using the prestige or influence of The City office or employment for private gain or advantage of himself or another.

(b) Using time, facilities, equipment or supplies of The City of San Diego for the private gain or advantage of himself or another.

(c) Using official information not available to the general public for his private gain or advantage or that of another.

(d) Receiving or accepting money or other consideration from anyone other than The City of San Diego for the performance of acts done in the regular course of employment or duty.

Adopted by Resolution No. 192458 12/26/67

(e) Receiving or accepting, directly or indirectly, any gift or favor from anyone doing business with The City of San Diego under circumstances from which it could reasonbly be inferred that such was intended to influence him in his official employment or duties, or as a reward for official action.

(f) Engaging in or accepting private employment or rendering services for private interests when such is incompatible with the proper discharge of his official employment or duties.

Third: Every elected official, officer, appointee or employee of The City of San Diego shall disclose completely the nature and extent of any interest, direct or indirect, which conflicts with his responsibility or duty.

1

lopted by Resolution No. 192458 12/26/67