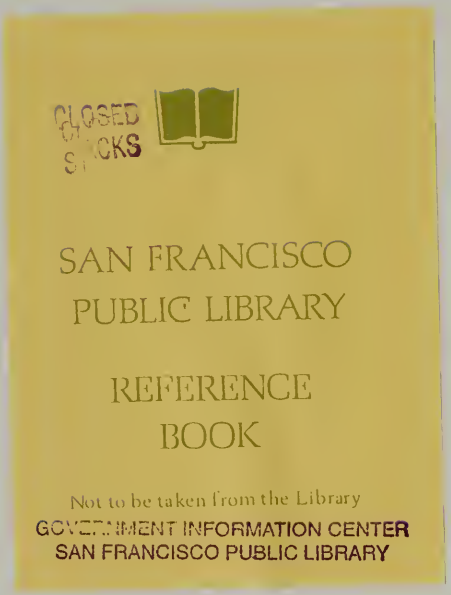

OPINIONS OF THE CITY ATTORNEY

CITY AND COUNTY OF SAN FRANCISCO

1987

LOUISE H. RENNE

CITY ATTORNEY

ERRATA 1987

OPINION NO.	
87-4	Passim should read office of citizen complaints
	Page 2, Line 34 for as much as read as much a
87-9	Page 8, line 36 date should read November 2, 1971
87-15	Passim should read CAL/OSHA
	Page 4, line 14 citation should read 62 Ops.Cal.Atty.Gen. 115
	Page 9, line 22 for futher read further
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City and County of San Francisco: Office of City Attorney

Louise H. Renne,
City Attorney

January 13, 1987

OPINION NO. 87 - 1

SUBJECT: Qualification of Retired Employees For Lifetime Health Service Benefits

REQUESTED BY: Randall B. Smith
Director, Health Service System

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Terry J. Mollica
Student Intern

QUESTION PRESENTED

What are the requirements for retiring employees to qualify for lifetime health care subvention in the Health Service System under Charter Section 8.428?

CONCLUSION

The Charter requires that a retiring employee have been a member of the Health Service System at some time during his or her employment and that he or she retire under any provision of the Retirement System.

INTRODUCTION

Employees who retire from service with the City and County may qualify for lifetime health care benefits under the Health Service System. To qualify, the retiree must be a "retired person" as defined in Charter Section 8.428. That section provides, in part,

> A retired person as used in this section means a former member of the health service system retired under the San Francisco City and County Employees' Retirement System . . .

Once a retiree qualifies, he or she is entitled to participate in the Health Service System and to receive subvention from the City and County towards the System premiums. Section 8.428 of the Charter provides:

> The costs of the health service system shall be borne by the members of the system and retired persons, the City and County of San Francisco because of its members and retired persons and because of members and retired persons of the parking authority of the City and County of San Francisco, the San Francisco Unified School district because of its members and retired persons and the San Francisco Community College District because of its members and retired persons. [Emphasis added.]

Section 8.428, subd. (c), provides that the City and County shall further subsidize "retired persons" in order that they not be required to pay any greater percentage of their premiums than that paid by active employees (or "members"):

> Monthly contributions required from retired persons . . . shall be equal to the monthly contributions required from members in the system, except that the total contributions required from retired persons who are also covered under medicare shall be reduced by an amount equal to the amount contributed monthly by such persons to medicare; provided, however, that for the fiscal year commencing July 1, 1973, and for each fiscal year thereafter, the city and county, the school district and the community college district shall contribute funds sufficient to defray the difference in cost to the system in providing the same health coverage to retired persons . . . as is provided for active employee members. [Emphasis added.]

This subvention is essentially a lifetime health care benefit. Once an employee qualifies, he or she can look forward to a contribution by the City and County for the rest of his or her life.

The Health Service Board has the responsibility for interpretation of the Charter and for the promulgation of rules and regulations for the administration of these benefits to employees, retirees and surviving spouses. Charter Section 3.681. Two questions have been presented respecting the Board's current interpretation of the Charter.

The first question relates to the interpretation of Charter Section 8.428 in light of recent changes in the Retirement System. As already mentioned, Section 8.428 provides for a lifetime health benefit from the City and County when an employee retires under the Retirement System. You have informed this office by your memo of May 23, 1986, that changes in the requirements of the Retirement System over the years have led to situations where employees with as little as five years of service have been able to retire under the Retirement System. Employees who retire under these rules are eligible for the lifetime health benefit because they are "retired persons" as defined by Charter Section 8.428. You have expressed concern over the inequity of extending the same lifetime health benefit to these short-term employees as is afforded to long-term employees, and have inquired whether this practice is consistent with the intent of the Charter.

The second question relates to the propriety of a current rule of the Health Service System. Rule 3(c) of Part II of the Health Service Board's Rules and Regulations requires that a retiring employee achieve retired status within thirty days of resignation in order to qualify for the health benefit. That rule states:

> A member who is resigned and thereafter receives a retirement allowance from the Retirement System may continue coverage by the System at the rate established for retired employees, provided his retirement is effective not later than thirty days after such resignation . . . [Emphasis added.]

This rule is designed to deal with the problem of employees who resign early but leave their retirement contributions in the Retirement System to mature. Under the Retirement System, an

employee can resign and leave his or her retirement contributions in the Retirement System until he or she reaches the age at which employees normally become eligible to receive retirement benefits. These individuals frequently achieve retired status years after they have resigned. Once they achieve retired status, they qualify as "a retired person" under the Health Service System. They then become entitled to the lifetime health benefit of the Health Service System even though they have been resigned for many years.

The Health Services Board interprets the Charter as not being intended to provide the health benefit to employees who resign early under the rules of the Retirement System. The Board has interpreted the Charter as providing the health benefit only to employees who make an immediate transition into retirement and has therefore promulgated Rule 3(c). The Rule prevents employees who resign early from obtaining the health benefit of the Health Service System unless they achieve retired status within thirty days after resignation. The second question presented is, therefore, whether the Health Service Board is empowered to adopt such a rule.

ANALYSIS

Are Retired Short Term Employees Entitled to Lifetime Health Benefits?

The Charter is clear on its face regarding what is required of retirees in order to qualify for lifetime health benefits. As already mentioned, to qualify for the benefit an employee must be "a retired person" as defined by Charter Section 8.428. That section requires that the employee: (1) be both a "former member of the health service system"; and, (2) "retired under the San Francisco City and County Employees' Retirement System." Neither requirement is ambiguous. Neither is therefore subject to interpretation. Braun Bryant & Austin v. McGuire (1927) 201 Cal. 134; Squire v. City and County of San Francisco (1970) 12 Cal.App.3d 974. Each must be given the plain meaning which its words import. The plain meaning of Section 8.428 is that anyone who at any time was a member of the health service system, for whatever length of time, and who retires under the Retirement System qualifies for lifetime health benefits. Thus, employees who earn the right to retire under the Retirement System, after having been members of the health service system at any time, have also earned the right to the benefits of the Health Service System.

Even if Charter Section 8.428 were ambiguous, it would likely be given a liberal construction favoring the extension of benefits. Such liberal construction is generally applied to statutes interpreting employee benefits. Adams v. City of Modesto (1960) 53 Cal.2d 833. In Adams, the court adopted the rule of liberal construction from cases construing pension benefits and applied it to the interpretation of a statute providing compensation to police officers for overtime worked on holidays. The court reasoned that the adoption of the rule was appropriate because both pensions and overtime benefits are "reasonable and proper inducement[s] to competent persons to enter and remain in public employment". Adams v. City of Modesto, supra, 53 Cal.2d at 841. Health Service benefits are also an inducement for employees to enter City service, and therefore the rule would also likely be applied here.

Giving Section 8.428 a liberal construction leads to the conclusion that lifetime health benefits are to be extended to any employee who retires under the Retirement System. To suggest that some employees who retire under that system are not entitled to lifetime health care benefits is inconsistent with a liberal interpretation; it is unlikely that a court would uphold such a construction of the Charter.

Similarly, the Charter does not require that retired City employees have been members of the health service system for any specific length of time. The Health Service Board's rule-making authority, as discussed infra, does not authorize it to abridge the rights of City employees. Given that the Charter does not restrict participation by retired persons based on the length of time the retiree was a member of the health service system, it cannot be argued that an employee who was a member of the health service system for one month at the time he or she retired is somehow "more entitled" to lifetime health service benefits than an employee who was a member for a year at the start of his or her career with the City.

May the Health Service Board Adopt A Rule Abridging the Right of Employees to Receive Lifetime Health Care Benefits?

Having concluded that any employee who retires under the Retirement System is entitled to lifetime health care benefits provided by Charter Section 8.428, the question remains whether employees who resign early and sometime thereafter receive retirement benefits are entitled to such benefits. As already discussed, Rule 3(c) of Part II of the Health Service System's

Rules and Regulations prevents resignees from receiving continued health benefits unless their retirement is effective within thirty days of resignation. The question is therefore whether the Health Service Board may adopt such a rule under the Charter.

The Charter provides the Health Service Board with the authority to "make rules and regulations for the transaction of its business." Charter Section 3.681, subd. (e). The Charter does not grant the Board the power to alter or modify the rights of employees as granted by the Charter; Section 3.681 does not give the Board discretion to allow or withhold benefits. Rather, the Section simply authorizes the Board to create procedures for the implementation of its business transactions. These procedures must be consistent with the Charter-granted rights of employees.

Rule 3(c) purports to prevent retiring employees from continuing in the Health Service System unless they achieve retired status within thirty days of resignation. This requirement is not one that is created by the Charter. The Charter only requires that an employee retire under the Retirement System. Despite their early resignation, these retirees nevertheless "retire under the Retirement System" for the purposes of the Health Service System. They are therefore entitled to the benefits of the Health Service System and no rule of the system may abridge that right. Rule 3(c) requiring immediate transition into retirement is therefore contrary to the vested rights of retirees and is beyond the authority of the Health Service Board to adopt.

CONCLUSION

Retiring employees must comply with the requirements of the Charter in order to qualify for lifetime health care subvention under the Health Service System. Specifically, a retiree is entitled to benefits when he or she is: (1) a "former member" of the Health Service System; and, (2) retires under the Retirement System. Assuming "former membership", a retiree qualifies for lifetime health care benefits when he or she retires under any provision of the Retirement System. This is true regardless of the fact that the Retirement System has adopted rules in recent years curtailing its tenure requirements. So long as an employee may be characterized as having retired under that system, that retiree is entitled to lifetime health care benefits from the Health Service System. We emphasize at this point that City employees who resign upon "vesting" of their pension rights are

not eligible for health benefits until they actually retire from City service.

Further, the Health Service System may not adopt or enforce rules which would unduly restrict the rights of retirees to receive such benefits. The intent of the voters in enacting the relevant provisions of the Charter cannot be frustrated by rules of administration adopted by the Health Services Board. Rule 3(c) imposes additional qualifications upon retirees seeking lifetime health care benefits. It requires that the retiree make the transition to retired status within thirty days of resignation. This policy is not supported by the Charter provisions. The rule therefore is invalid.

Respectfully submitted,

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Louise H. Renne,
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January 13, 1987

OPINION NO. 87 - 2

SUBJECT: Simultaneous Participation By Superior Judges In State and Local Health Care Systems

REQUESTED BY: Randall B. Smith
Director, Health Service System

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Terry J. Mollica
Student Intern

QUESTION PRESENTED

May superior court judges participate in both the State health care system and the City and County Health Service System simultaneously?

CONCLUSION

Yes.

INTRODUCTION

The Meyers-Geddes State Employees' Medical and Hospital Care Act, commonly referred to as "the Public Employees' Medical and Hospital Care Act" (hereinafter "PERSMHCA"), established a health care system for state officials and employees. PERSMHCA is codified in Government Code Section 22751 et seq. The purpose of the statute is to promote good health care among employees of the State and to provide health benefits to public employees on a competitive basis with the benefits offered to employees in the private sector.

The Legislature also authorized the counties of the State to establish health care systems for county employees. Government Code Sections 53200 et seq. The counties are authorized to contribute toward all or part of the health care premiums of its employees. Government Code Section 53205. Superior court judges, even though they are not generally considered "county employees," are included in the definition of "county employees" under Section 53200.3 for the purpose of permitting their participation in the county health care systems. Section 53200.3 provides:

> For the limited purpose of the application of this article, judges of the superior and municipal courts whose salaries are paid either in whole or in part from the salary fund of the county are county employees and shall be subject to the same or similar obligations and be granted the same or similar employee benefits as are now required or granted to employees of the county in which the court of said judge, officer, or attache is located.

The City and County of San Francisco provides health care benefits through the Health Service System for all municipal employees in Charter Section 8.420 et seq. By a memorandum of this office dated December 10, 1985, you were advised that judges of the superior and municipal courts were entitled to participate in the Health Service System based upon the language of Government Code Section 53200.3. [1/] You now inquire whether superior court judges may participate in both PERSMHCA and the Health Service System simultaneously. The answer to this inquiry depends upon the provisions of both the Health Service System and of PERMSCHA.

[1/] The Attorney General has opined that Government Code Section 53200.3 is an unconstitutional delegation of the Legislature's duty to prescribe the compensation of judges under Article VI, Section 19, of the California Constitution. 61 Ops.Cal.Atty.Gen. 388 (1978). Since the statute only requires the county to provide the same or similar benefits as granted to county employees, the Attorney General argues, the legislation allows counties to determine if, and in what form, and to what extent judges will be compensated with county-sponsored health insurance benefits, in violation of the Constitution. (cont.)

ANALYSIS

Provisions of the Health Service System

The Health Service System is established by San Francisco Charter Section 8.420 et seq. The Charter does not specifically provide for the exclusion of employees who already carry other health insurance. Rather, Section 8.420 provides,

> The health service board shall have the power to exempt any person whose compensation exceeds the amount deemed sufficient for self coverage and any person who otherwise has provided for adequate medical care.

This provision is the only portion of the Charter which relates to members of the Health Service System who have other health and medical care coverage. It empowers the Health Service Board to exempt members of other health plans, but no current rule or regulation of the Health Service Board exempts employees who have other health and medical coverage. Therefore, superior court judges may, under the existing provisions of the Health Service System, participate in the program simultaneously with other health programs.

Provisions of PERSMCHA

Superior court judges are state employees and are generally eligible for participation in PERSMHCA. See 39 Ops. Cal. Atty. Gen. 60, 64 (1962). But Government Code Section 22754, subd. (b) limits the definition of state employees as follows:

This office respectfully declines to adopt the Attorney General's conclusion. It is clearly the Legislature's duty to "prescribe" the compensation of judges. But the provisions of the Government Code adequately prescribe this compensation. Under the provisions of Section 53200 et seq., the Legislature has specified that superior court judges shall have the same compensation in this respect as other county employees. This provision does not give the county the authority to determine whether judges, as a class of employees, will receive health care coverage; a county must provide these benefits to judges if the county has an employee health care system. The county has no discretion to determine the amount of the judges' compensation, and no influence over judges as a result of the law, as intended by Article VI, Section 19.

> "Employee" means any officer or employee of the State of California or of any agency, department, authority, or instrumentality of the state . . . except persons employed on an intermittent, irregular or less than half-time basis, or employees similarly situated, or employees in respect to whom contributions by the state for any type of plan or program offering prepaid hospital and medical care are otherwise authorized by law. [Emphasis added.]

This section could be interpreted as the basis for excluding from coverage under PERSMHCA those superior court judges already participate in other public health care programs. But the contributions of the City and County towards the participation of superior court judges in the Health Service System cannot be characterized as "contributions by the state." Therefore, this provision standing alone does not preclude the simultaneous participation of superior court judges in PERSMHCA and the Health Service System.

Nor do any other provisions of PERSMHCA make superior court judges ineligible to participate in both the State and local health programs simultaneously. Government Code Section 22810 provides for the exclusion of certain employees covered by the state system, but only based upon their short-term, seasonal or intermittent employment. No provision of PERSMHCA excludes employees participating in any county health system from simultaneously participating in the State health system.

CONCLUSION

No provision of either the City and County Health Service System or the State PERSMHCA health system precludes employees from participating in both systems simultaneously. The Health Service Board has the power under Charter Section 8.420 to exclude employees who already have adequate health care coverage, but the Board has not to date promulgated such a regulation. The statutory provisions of PERSMHCA do not provide any basis upon which employees who already participate in county programs may be excluded from simultaneous participation in the State health

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system. Therefore, superior court judges may participate in both the City and County Health Service System and the State PERSMHCA health system simultaneously.

Respectfully submitted,

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City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
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January 15, 1987

OPINION NO. 87-3

SUBJECT: Interpretation of Self-Insurance Provisions of Police Code Section 1080.2

REQUESTED BY: ALFRED J. NELDER, Vice President
San Francisco Police Commission

PREPARED BY: BURK E. DELVENTHAL
JUDITH A. BOYAJIAN
Deputy City Attorneys

QUESTIONS PRESENTED

1. Does Police Code Section 1080.2 permit owners of motor vehicles for hire to self-insure up to the minimum amounts required by Section 1080.1, with excess insurance coverage above those amounts up to $1,000,000?

2. Does Police Code Section 1080.2 require excess insurance coverage above the minimum amounts set forth in Section 16056 of the California Vehicle Code?

CONCLUSIONS

For the reasons set forth below, we conclude that Police Code Section 1080.2 authorizes self-insurance in the minimum amounts set forth in California Vehicle Code Section 16056 -- i.e., not less than $15,000 for bodily injury to or death of one person in any one accident, and (subject to the limit for one person) not less than $30,000 because of bodily injury to or death of two or more persons in any one accident, and not less than $5,000 for property damage -- and requires excess insurance above those amounts to $1,000,000.

However, upon conferring with the City's Risk Manager, we have further concluded that the present statutory scheme is unworkable under current insurance industry practices. The insurance policy or in-lieu bond required by Section 1080.1, as well as the excess insurance coverage above $15,000/30,000/5,000 required by Section 1080.2, are either unavailable or prohibitively expensive. In addition, insurance industry practices are in a constant state of flux. We therefore submit that the only long-range solution to the problem of ensuring

adequate protection of the public at an affordable cost is amendment of the legislative scheme to give the Commission more flexibility in approving forms of insurance or alternative programs of self-insurance.

ANALYSIS

Owners and operators of motor vehicles for hire (hereinafter referred to as "operators") are regulated by Article 16, Sections 1075 et seq., of the San Francisco Police Code.[1/] Section 1080 provides:

> Unless otherwise provided by ordinance, no person, firm or corporation, after the 24th day of February, 1932, shall operate any motor vehicle for hire unless and until such person, firm or corporation shall comply with the provisions of either Section 1080.1 or 1080.2 of this Article.

Section 1080.1 requires operators to:

> file with the Police Commission and thereafter keep in full force and effect a policy of insurance in such form as the Commission may deem proper and executed by a Company approved by the said Commission insuring the public against any loss or damage that may result to any person or property from the operation of such vehicle or vehicles . . .

The minimum amounts of recovery in such policy of insurance for any one occurrence must be not less than $100,000 for each person injured or killed, and (subject to the limit for one person) $450,000 for injury to or death of two or more persons, and $10,000 for property damage. However, for vehicles having a seating capacity of more than ten persons, the minimum amounts of recovery in the policy of insurance shall be not less than $50,000/100,000/10,000.

In lieu of the insurance policy described above, Section 1080.1 permits operators to file with the Commission a surety bond in the amount set forth in that section, which depends on the number of vehicles owned or offered for hire. An additional alternative is authorized by Section 1080.2, which provides:

[1/] All references to section numbers in this opinion refer to the San Francisco Police Code, unless otherwise stated.

> Any person, firm, corporation, association or organization of owners of vehicles for hire who have [sic] a certificate of self-insurance from the State of California pursuant to Sections 16500 and 16056 of the Vehicle Code may file said certificate together with a policy of insurance providing excess insurance over self-insurance retention for single limit of not less than $1,000,000 applying to bodily injuries or property damage or a combination thereof, with the Police Commission, and shall thereupon be deemed in compliance with the provisions of Section 1080.1 of this Article. (Emphasis added.)

In order to obtain a certificate of self-insurance from the State of California, an operator must meet the requirements of Vehicle Code Section 16503 (formerly Section 16056), which provides (in part) as follows:

> (a) The department may in its discretion, upon application, issue a certificate of self-insurance when it is satisfied that the applicant in whose name more than 25 vehicles are registered is possessed and will continue to be possessed of ability to pay judgments obtained against him in amounts at least equal to the amounts provided in Section 16056. . . . (Emphasis added.)

The amounts provided in Vehicle Code Section 16056 for any one accident are not less than $15,000 because of bodily injury or death of one person, and (subject to the limit for one person) at least $30,000 for injury or death to two or more persons, and at least $5,000 for property damage.

In summary, in lieu of complying with the insurance policy requirements of Section 1080.1, Section 1080.2 authorizes an operator to obtain a certificate of self-insurance from the State of California and excess insurance coverage "over self-insurance retention" for a single limit per occurrence of not less than $1,000,000. A question has arisen concerning the proper interpretation of the phrase "over self-insurance retention" contained in Section 1080.2.

Two possible constructions of Section 1080.2 have been presented to the Commission. One interpretation is that the reference in Section 1080.2 to specific sections of the California Vehicle Code establishing minimum limits of self-insurance requires operators electing the provisions of Section 1080.2 to obtain excess insurance coverage over the $15,000/30,000/5,000 limits specified in those Vehicle Code sections. The other interpretation is that, since the self-insurance provision of Section 1080.2 is an alternative to

the insurance policy requirements of Section 1080.1, an operator is permitted to self-insure up to the $100,000/450,000/10,000 amounts of coverage set forth in Section 1080.1, with excess insurance coverage between these limits and $1,000,000.

It is settled that if the language of a statutory provision is free of ambiguity, it must be given its plain meaning. (Sand v. Superior Court (1983) 34 Cal.3d 567, 570; Castaneda v. Holcomb (1981) 114 Cal.App.3d 939, 942.) Hence, rules of statutory contruction are applied only if the language is ambiguous or if a literal interpretation would lead to absurd results unintended by the legislators. (Castaneda v. Holcomb, supra.)

Here, there is no apparent ambiguity. Section 1080.2 expressly provides that, in lieu of complying with the insurance policy or bond provisions of Section 1080.1, an operator may obtain a certificate of self-insurance (pursuant to Vehicle Code Sections 16500 and 16056) together with a policy of insurance "providing excess insurance over self-insurance retention for single limit of not less than $1,000,000" for bodily injuries, property damage, or both. The phrase "self-insurance retention" clearly refers to the amounts set forth in the Vehicle Code sections specified in Section 1080.2 -- i.e., $15,000/30,000/10,000 for each accident.

However, even were we to conclude that the meaning of Section 1080.2 is ambiguous, application of established rules of statutory construction leads to the same conclusion. The fundamental principle of statutory construction is that the intent of the legislators be ascertained so as to give effect to the purpose of the law. (Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645.) Hence, a law should be given a reasonable interpretation which promotes, rather than defeats, the statutory objective. (Massachusetts Mutual Life Insurance Co. v. City and County of San Francisco (1982) 129 Cal.App.3d 876, 880.) In particular, a remedial or protective statute should be liberally construed to achieve its intended purpose and to protect the persons within its purview. (Fitch v. Pacific Fid. Life Ins. Co. (1975) 54 Cal.App.3d 140, 148; Alford v. Pierno (1972) 27 Cal.App.3d 682, 688.)

If there is uncertainty as to the meaning of statutory language, consideration should be given to the consequences which will be produced by a particular construction. (County of San Mateo v. Booth (1982) 135 Cal.App.3d 388, 396.) Statutory language should not be read in isolation but rather should be construed in context and with reference to the entire scheme of which it is a part. (Select Base Materials v. Board of Equalization, supra.) Moreover, whatever is necessarily implied in a statute is as much a part of it as that which is expressed. (Younger v. Superior Court (1978) 21 Cal.3d 102, 113; Bruce v. Gregory (1967) 65 Cal.2d 666, 673-76; Currieri v. City of Roseville (1970) 4 Cal.App.3d 997, 1001.)

Application of these well-established principles leads us to conclude that Section 1080.2 authorizes self-insurance in the minimum amounts set forth in California Vehicle Code Section 16056 -- i.e., $15,000/30,000/5,000 for any one accident. An operator must obtain excess insurance between those amounts and $1,000,000.

The provisions of Sections 1080, 1080.1 and 1080.2 must be read together as one statutory scheme whose express objective is to "insur[e] the public against any loss or damage that may result to any person or property from the operation of" motor vehicles for hire. Such protective legislation must be liberally interpreted to accomplish its purpose.

Compliance with the self-insurance provisions of Section 1080.2 involves two steps: (1) obtaining a certificate of self-insurance from the State of California and (2) obtaining excess insurance coverage "over self-insurance retention" for a single limit per occurrence of not less than $1,000,000 for personal injury or property damage. With respect to the first step, under Vehicle Code Section 16053, supra, the Department of Motor Vehicles may issue a certificate of self-insurance if it is satisfied that a qualifying applicant can respond in damages in amounts "at least equal to the amounts provided in Section 16056"; those limits are $15,000/30,000/5,000 for any one accident.

Title 13, Sections 100.50 et seq. of the California Administrative Code requires that the applicant for a certificate of self-insurance must submit audited financial statements for the previous three years reflecting a net worth of not less than $575,000. We understand that the certificate of self-insurance issued by the State of California does not set forth a specific amount of state approved self-insurance, but merely states that the applicant has been approved as a self-insurer under the Compulsory Financial Responsibility Law and is exempt from the reporting provisions of the law. The Department of Motor Vehicles' Financial Responsibility Area has further informed us that to receive the State's approval to self-insure, an applicant must be able to respond in damages up to an aggregate amount of $575,000 for all accidents. Since some operators have more than 100 vehicles, a capacity to respond up to $575,000 in damages is quite minimal.

Accordingly, if Section 1080.2 were interpreted to permit an operator to self-insure up to the $450,000 figure in Section 1080.1, there would be no assurance that the self-insured operator could in fact respond in damages up to the $100,000/450,000/10,000 minimum limits for each accident required by Section 1080.1. In fact, the City would have to rely solely on the operator to protect the public in the manner intended by Sections 1080 et seq. Since the express objective of the legislative scheme is to protect the public by insuring that

operators can respond in damages in an adequate amount, we cannot presume that the legislators intended this result. Hence, we have concluded that Section 1080.2 authorizes self-insurance in the minimum amounts for each accident set forth in California Vehicle Code Section 16056, and requires excess insurance between those amounts and $1,000,000.

In reaching this conclusion, we are mindful of the principle that constructions of a statute or ordinance which render some portions surplusage or lead to absurd results not intended by the legislators are to be avoided. (California Mfrs. Assn. v. Public Utilities Com. (1979) 24 Cal.3d 836, 844.) We further recognize that our interpretation of Section 1080.2 is likely to make the self-insurance alternative so much more expensive than the insurance policy requirement of Section 1080.1 as to render it an impractical alternative. Nevertheless, faced with two possible constructions of Section 1080.2, we must choose the interpretation promoting the legislative objective over the one defeating the purpose even though it may lead to unforeseen or unintended consequences.

Upon conferring with the City's Risk Manager we have further concluded that the present statutory scheme is unworkable under current insurance industry practices. We are informed that the insurance policy or in-lieu bond required by Section 1080.1, as well as the excess insurance coverage above $15,000/30,000/5,000 required by Section 1080.2, are either unavailable or prohibitively expensive. Also, insurance industry practices are in a constant state of flux. We therefore submit that the only long-range solution to the problem of ensuring adequate protection of the public at an affordable cost is amendment of the legislative scheme to give the Commission more flexibility in approving forms of insurance or alternative programs of self-insurance. If asked, this office would be happy to assist in drafting such legislation.

Very truly yours,

LOUISE H. RENNE
City Attorney

Judith A. Boyajian

JUDITH A. BOYAJIAN
Deputy City Attorney

APPROVED:

Louise H. Renne

LOUISE H. RENNE
City Attorney

5015F

Louise H. Renne,
City Attorney

February 23, 1987

OPINION NO. 87-4

SUBJECT: Recalculation of Charter Section 3.530-2 Budget "Cap" for Office of Citizens Complaints

REQUESTED BY: FRANK J. SCHOBER, JR.
Director, Office of Citizens Complaints

PREPARED BY: JUDITH A. BOYAJIAN
Deputy City Attorney

QUESTION PRESENTED

May the costs incurred by the Police Department's Internal Affairs Bureau ("IAB") for the fiscal year ending June 30, 1981 ("base year") be recalculated to include the costs of providing services or facilities that previously were excluded because they were not separately identified and charged to the IAB in the base year?

CONCLUSION

Yes, provided it can be shown that these previously unidentified and excluded costs were actually incurred by the City in operating the IAB during the base year.

ANALYSIS

San Francisco Charter Section 3.530-2, adopted by the voters in the election held on November 2, 1982, establishes an Office of Citizens Complaints ("OCC") within the Police Department ("Department"). The last paragraph provides:

> The annual appropriations for all costs of the office of citizens complaints shall not exceed sixty percent of the costs incurred by the police department internal affairs bureau for the fiscal year ending June 30, 1981, adjusted annually therefore [sic] for inflation. (Emphasis added.)

Hence, there is a Charter-imposed ceiling (or "cap") on the OCC's annual budget. This "cap" is tied to the costs incurred by the IAB in the base year, adjusted annually for inflation.

From time to time, questions have arisen concerning the proper interpretation of the OCC's budgetary cap. In City Attorney Opinion No. 83-18, issued on March 15, 1983, we advised that the phrase "all costs of the office of citizens complaints" means precisely what it says: namely, every cost incurred in operating the OCC. Therefore, the ceiling on the OCC's annual budget cannot reasonably be interpreted to apply only to the OCC's personnel costs, or to any other portion of all costs.

You now inquire whether the ceiling on the OCC's budget for fiscal year 1987-88 can be raised by recalculating the costs of operating the IAB in the base year. Specifically, you have informed us that certain "indirect" costs (such as rent, heat, electricity, water, security services, and the like) actually incurred by the City in operating the IAB in the base year were not separately identified and charged to the IAB. Rather, they were included in the Department's overall budget. Hence, these costs were not considered when the initial IAB base-year calculations were made in 1983 or in any subsequent recalculations.

The OCC will soon move to a new location. As a result, these previously unidentified and uncounted indirect costs will become identifiable, direct costs of operating the OCC. You ask whether the base-year figures can now be recomputed to include these costs. The effect will be to raise the ceiling on the OCC's budget for fiscal year 1987-88.

It is settled that if the language of a statutory provision is free of ambiguity, it must be given its plain meaning. (Sand v. Superior Court (1983) 34 Cal.3d 567, 570; Castaneda v. Holcomb (1981) 114 Cal.App.3d 939, 942.) It is equally well established that whatever is necessarily implied in a statute is as much as part of it as that which is expressed. (Welfare Rights Organization v. Crisan (1983) 33 Cal.3d 766, 771; Johnston v. Baker (1914) 167 Cal. 260, 264.)

Here, there is no ambiguity. The intent expressed by the voters in Charter Section 3.530-2 is that all costs of operating the OCC be no greater than 60 percent of the costs of operating the IAB in the base year, with annual adjustments for inflation. We previously have advised that the Charter requires all costs in operating the OCC be included in determining whether the OCC has exceeded its budget cap. This cap is tied specifically to the costs incurred in operating the Department's IAB in the base year. Therefore, it is necessarily implied that in calculating the base-year costs, all costs actually incurred by the City in operating the IAB must be included, regardless of whether these costs were separately identified and charged to the IAB or were included in the Department's overall budget.

However, as we advised in City Attorney Opinion No. 83-18, the Controller is responsible for enforcing the Charter-imposed cap on the OCC budget. Ultimately he must determine whether the actual expenditures by the OCC for fiscal year 1987-88 are below the ceiling set by Section 3.530-2. Therefore, the Controller exercises final authority over the methodology and data to be used in calculating the IAB's base-year budget, the annual adjustments for inflation, and the OCC's current operating costs. Included within this authority is the responsibility for determining whether and to what extent costs that were actually incurred in operating the IAB in the base year, but were not separately identified as IAB costs should be used to recompute the OCC cap.

Although the Controller's exercise of discretion in interpreting his mandate under Charter Section 3.530-2 is ordinarily entitled to great weight, he may not override the express legislative intent. (Organization of Deputy Sheriffs v. County of San Mateo (1975) 48 Cal.App.3d 331, 341.) The express intent of Section 3.530-2 is to assure that all costs of operating the OCC not exceed 60 percent of the resources expended by the City in operating the IAB in the base year, with annual adjustments for inflation. The voters' intent would not be achieved if some of the costs actually incurred by the City in operating the IAB in the base year were excluded from the base-year calculations.

Very truly yours,

LOUISE H. RENNE
City Attorney

Judith A. Boyajian

JUDITH A. BOYAJIAN
Deputy City Attorney

APPROVED:

Louise H. Renne

LOUISE H. RENNE
City Attorney

6119F

Louise H. Renne,
City Attorney

March 9, 1987

OPINION NO. 87-5

SUBJECT: Legal Status of Patrol Special Police Officers Appointed Pursuant to Section 3.536 of the San Francisco Charter

REQUESTED BY: FRANK M. JORDAN
Chief of Police

PREPARED BY: BURK E. DELVENTHAL
JUDITH A. BOYAJIAN
Deputy City Attorneys

QUESTIONS PRESENTED

1. Are patrol special police officers ("Patrol Specials") appointed pursuant to San Francisco Charter Section 3.536 peace officers under state law, and hence entitled to the training prescribed by the California Commission on Peace Officer Standards and Training ("POST")?

2. May the Police Commission ("Commission") alter the peace officer status of Patrol Specials by amending the existing Rules and Regulations ("Rules") of the Police Department ("Department") to circumscribe their powers and duties?

CONCLUSIONS

1. Yes.

2. Yes.

INTRODUCTION

In opinions dating back to 1966, the City Attorney has advised that Patrol Specials are peace officers under state law. In Letter Opinion Nos. 66-73-A and 69-55, City Attorney Thomas O'Connor advised that Patrol Specials are peace officers as defined by the California Penal Code, regardless of the fact that the officers are not paid by the City and County of San Francisco

("City"). In Opinion Nos. 80-66 and 85-16, City Attorney George Agnost advised that under the Charter and existing Department Rules, Patrol Specials are peace officers under either Penal Code Section 830.1 (city police officers and sheriffs) or 830.6 (reserve or auxiliary city police officers and sheriffs). Accordingly, the former City Attorney advised that Patrol Specials have full police powers within City boundaries and are entitled to POST-prescribed training and certification. You have requested us to reconsider these prior City Attorney opinions.

We affirm their conclusions, although we reject some of the reasoning supporting those opinions. Specifically, we affirm the following: (1) The City has plenary power under the California Constitution to provide in its Charter for the composition and regulation of its police force; (2) the Charter empowers the Commission to delineate the powers and duties of Patrol Specials, including such powers and duties as would make them City police officers with peace officer status; and (3) by adopting the existing Rules, the Commission has given Patrol Specials powers and duties that render them peace officers within the meaning of state law. With respect to this final point, Commission Rule 2.01 grants Patrol Specials the express power and duty to prevent crime, protect life and property, detect and arrest offenders, preserve the public peace, and enforce all penal laws and ordinances.

However, we reject the dicta contained in Opinion No. 80-66 that Charter Section 3.536 manifests an intent to invest Patrol Specials with peace officer status. In fact, the Charter is silent with respect to the powers, duties and functions of Patrol Specials. Therefore, we conclude that the Charter's description of Patrol Specials as "special police officers" is not determinative. Rather, Patrol Specials are presently peace officers by virtue of the powers and duties conferred upon them by existing Department Rules and the level of supervision and control exercised over them by the Department and the Commission.

Because the Charter does not invest Patrol Specials with peace officer status, we conclude that the Commission may alter that status by amending the Department's Rules to remove the provisions that give peace officer status to Patrol Specials. However, without an amendment to the Charter, the Commission may not eliminate Patrol Specials entirely. Similarly, without a Charter amendment, the Commission may not accomplish a de facto elimination of Patrol Specials by so circumscribing their powers and duties as to render their services worthless.

For the reasons stated below, we further advise that an amendment to the Charter is the preferred approach to resolving the questions concerning the peace officer status of Patrol

Specials. In addition, until the present status of Patrol Specials as peace officers is altered by either amendment of the Charter or of the Department's Rules, Patrol Specials must receive the level of training prescribed by POST.

ANALYSIS

Applicable Provisions of State Law

Penal Code Section 830 provides:

> Any person who comes within the provisions of this chapter and who otherwise meets all standards imposed by law on a peace officer is a peace officer, and notwithstanding any other provision of law, no person other than those designated in this chapter is a peace officer. The restriction of peace officer functions of any public officer or employee shall not affect his status for purposes of retirement. (Emphasis added.)

Penal Code Section 830.1 provides that any police officer of a city is a peace officer. Penal Code Section 830.6 provides that peace officer status is also conferred upon a qualified person who is (1) deputized or appointed by the proper authority as a reserve or auxiliary city police officer or deputy sheriff, (2) "assigned to the prevention and detection of crime and the general enforcement of the laws of this state by such authority," and (3) POST-trained or supervised by a peace officer. State law grants peace officers greater authority to make arrests than it does private citizens.[1]

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[1] A peace officer may make an arrest under the following circumstances: (1) when he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence; (2) when a person arrested has committed a felony, although not in his presence; and (3) when he has reasonable cause to believe that the person arrested has committed a felony, whether or not a felony has been committed. (Penal Code Section 836.) On the other hand, a private citizen may make an arrest only if a public offense has been committed or attempted in his presence or if a felony has, in fact, been committed and he has reasonable cause for believing that the person arrested has committed it. (Penal Code Section 837.)

Hence, under state law, peace officers are those persons specifically authorized to exercise law enforcement powers over other citizens. Penal Code Section 832 requires that every person defined by state law as a peace officer receive a course of training prescribed by POST.

Article XI, Section 3(a), of the California Constitution provides in part:

> For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. . . County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments.

Article XI, Section 5(b), of the California Constitution provides in part:

> It shall be competent in all city charters to provide . . . for . . . the constitution, regulation, and government of the city police force.

Hence, while state law determines that persons vested with certain law enforcement duties are peace officers, the City is empowered to determine which persons will perform those duties.

The San Francisco Charter

San Francisco Charter Section 3.530[2/] provides, in part:

> The police department shall consist of a police commission, a chief of police, a police force, an office of citizen complaints and such clerks and employees as shall be necessary and appointed pursuant to the provisions of this charter, and shall be under the management of a police commission . . . .

Section 3.531 specifies the various ranks or positions in the Department as:

> chief of police, captains, criminologists, lieutenants, inspectors, sergeants, assistant

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[2/] All references in this opinion to sections refer to the San Francisco Charter unless otherwise noted.

> inspectors, police surgeon, police officers, police patrol drivers and women protective officers, and such other ranks or positions as the police commission may from time to time create as provided for in Section 3.530 of this charter. . .

Patrol Specials do not hold ranks or positions within the Department as described in Sections 3.530 and 3.531. Rather, the Commission appoints Patrol Specials pursuant to Section 3.536. This section has been in the Charter since at least 1932. It provides in pertinent part:

> The police commission may appoint patrol special officers and for cause may suspend or dismiss said patrol special police officers after a hearing on charges duly filed with the commission and after a fair and impartial trial . . . . Patrol special police officers who are designated by the police commission as the owners of a certain beat or territory as may be fixed from time to time by said commission or the legal heirs or representatives ~~of~~ said owners, may dispose of their interest in said beat or territory to a person of good moral character, approved by the police commission and eligible for appointment as a patrol special police officer.

Hence, the Charter authorizes (but does not mandate) the Commission to appoint Patrol Specials and designate them as the owners of certain "beats" or territories within the City. The Commission regulates and disciplines Patrol Specials. The Charter does not limit the Commission's authority to delineate the powers and duties of Patrol Specials.

Patrol Specials are City employees for purposes of workers' compensation. However, they are entitled to such benefits only if injured while performing "regular city and county police duties." (Section 8.515; People v. Melchor (1965) 237 Cal.App.2d 685, 692.) In addition, although Patrol Specials contract with private employers to provide security services within specified "beats" and are paid by those private employers, they are deemed "quasi-public" officials when they are performing police functions on the City's behalf. (Maggi v. Pompa (1930) 105 Cal.App. 496, 498, and cases cited therein.)

Patrol Specials differ from private security guards in that they are exempt from the licensing requirements of state law. (Business and Professions Code Section 7522(e).) They are also specially authorized by state law to carry a loaded firearm in a vehicle or public area. (Penal Code Section 12031(c)(1).)[3/]

The Department's Rules

Section 3.536, which authorizes the appointment of Patrol Specials, does not specify the powers and duties of a "special police officer." However, In 1970, the Commission adopted Rules governing Patrol Specials. While there are some provisions of the Rules that suggest Patrol Specials have peace officer powers and duties, other provisions suggest they do not. We highlight the most important ones below:

Patrol Specials Are Peace Officers	Patrol Specials Are Not Peace Officers
1. The Rules define Patrol Specials as "members" of the Department, subject to all applicable rules and regulations of the Department. (Definition No. 6; Rules 1.11 and 3.403)	1. Patrol Specials must summon a "regular" (or sworn) member to perform certain police functions. (Rules 3.411 and 12.03 et seq.)
2. Patrol Specials have the express power and duty to prevent crime, protect life and property, detect and arrest offenders, preserve the public peace, and enforce all penal laws and ordinances. The Commission may discipline them for their failure to do so. (Rules 2.01, 3.401 and 9.39)	2. In advertising their services, Patrol Specials must affirmatively state that they not members of the "regular" Department and their services are in addition to those provided by "regular" members; they are expressly prohibited from implying there are any crime conditions beyond the ability of the "regular" Department to control. (Rule 1.80)

[3/] We note that those persons defined as peace officers in the Penal Code are authorized to carry a loaded firearm in a vehicle or public area pursuant to Penal Code Section 12031(b)(1). Hence, at least in this respect, state law distinguishes between "peace officers" and Patrol Specials.

3. Patrol Specials must report to the district station when they arrive and leave duty. While on duty, they must report to the district station once every two hours through the police signal box system. (Rules 3.419 and 9.41)	3. Patrol Specials are expressly required to observe the terms of their contractual relationship with their clients. (Rule 3.407)
4. Patrol Specials carry police equipment and wear uniforms almost identical to those of "regular" members; they are required to carry firearms on duty; they have the same general authority to arrest and seize evidence as "regular" members. (Rules 7.01 et seq., 3.423, 2.01, 2.73 and 12.00)	4. Patrol Specials may carry firearms off duty only within the City limits. (Rule 3.423) "Regular" members may carry them anywhere in the state.
5. Patrol Specials must participate in training functions ordered by the Chief, and arguably may be assigned to perform police duties in areas of the City other than their regular "beats." (Rules 3.431 et seq. and 9.29)	5. Patrol Specials exercise police functions only on their regular "beats" except under specified circumstances. (Rule 9.29) There is no provision for off-duty Patrol Specials to be called in to perform general police duties.

Thus, while there are factors going both ways, on balance the similarities between Patrol Specials and sworn police officers outweigh the differences. Importantly, in those sensitive areas involving the exercise of law enforcement powers over private citizens, the distinctions are relatively insignificant. Under the Department's Rules, Patrol Specials have substantially the same powers of arrest as regular police officers, can carry loaded firearms both on and off duty, wear police uniforms, carry police equipment, use police radio frequencies and call-boxes, and are under the supervision and control of district commanders. Arguably, the Department may call upon Patrol Specials to perform law enforcement functions in areas of the City other than their regular "beats." Finally, Rule 2.01 mandates Patrol Specials to "prevent crime, protect life and property, detect and arrest offenders, preserve the public peace, and enforce all penal laws and ordinances." Hence, Patrol Specials clearly are "assigned to the prevention and detection of crime and the general enforcement of the laws of

this state" by the proper authority. (Penal Code Section 830.6.) Accordingly, they are peace officers within the meaning of state law. (Ibid.)[4/]

As the above analysis makes clear, it is not the Charter but rather the powers and duties conferred by the Department's Rules which invest Patrol Specials with peace officer status.

The level of supervision and control exercised over Patrol Specials by the Department and the Commission under the Rules also supports the conclusion that Patrol Specials have peace officer status. (See 56 Ops. A.G. 390, 393.) Absent such powers and duties and Departmental supervision, Patrol Specials would not have peace officer status. Accordingly, the Commission may alter that status by amending the Rules to remove those provisions that confer it.

We close with two words of caution. First, while the Commission may limit the powers and duties of Patrol Specials so that they are no longer peace officers, it may not eliminate Patrol Specials entirely without a Charter amendment. Nor may the Commission accomplish a de facto elimination of Patrol Specials by so limiting their powers and duties as to render their services worthless.

This first caveat is based on the fundamental, constitutional principle that the government may not deprive a person of property without due process. Section 3.536 provides that Patrol Specials who have been appointed by the Commission "own" certain beats or territories within City limits. Such

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[4/] We note, however, that there appears to be some discrepancy between the powers and duties of Patrol Specials which the Rules prescribe and the powers and duties which Patrol Specials actually exercise. For example, we understand that Patrol Specials are rarely (if ever) called off their beats to perform general law enforcement duties in areas of the City outside their normal "beats." In addition, the powers exercised and duties performed by Patrol Specials often depend on the aggressiveness of the Patrol Special, the area of the City in which his or her beat is located, and the attitude of the district commander. We also note that many of the Rules applicable to Patrol Specials have been modified and are no longer applicable to sworn members. (See, for example, Rules 3.405, 12.01, 12.03 and 12.05.)

recommending to the Board of Supervisors that a Charter amendment be submitted to the voters. In any event, until the present status of Patrol Specials as peace officers is altered by either amendment of the Charter or of the Rules, Patrol Specials must receive the level of training prescribed by POST.

Very truly yours,

LOUISE H. RENNE
City Attorney

BURK E. DELVENTHAL
JUDITH A. BOYAJIAN
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By Judith A. Boyajian
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APPROVED:

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City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
City Attorney

March 27, 1987

OPINION NO. 87-6

SUBJECT: Jurisdiction of the Art Commission Over Recreation and Park Commission Projects.

REQUESTED BY: Mary E. Burns
General Manager
Recreation and Park Department

PREPARED BY: Mara Rosales
Deputy City Attorney

QUESTIONS PRESENTED

1. Does the Art Commission have jurisdiction to review the installation of a fence proposed by the Recreation and Park Commission as part of a park development plan?

2. Does the Art Commission have jurisdiction to review play area apparatus designed by a landscape architect as part of a landscape improvement plan approved by the Recreation and Park Commission?

3. Does the Art Commission have jurisdiction over those elements of a park development plan proposed by the Recreation and Park Commission pertaining to the landscaping and grading of property placed within its charge?

CONCLUSIONS

1. The Art Commission has jurisdiction to approve or disapprove the design of a proposed fence, but does not have jurisdiction to disapprove the decision of the Recreation and Park Commission to install a fence.

2. The Art Commission has jurisdiction to review the design of the proposed play area rehabilitation structure, but does not have the jurisdiction to disapprove the landscape improvement plan.

3. The Art Commission has jurisdiction only to review and make recommendations regarding landscaping and grading.

INTRODUCTION

You have asked whether the Art Commission has the authority to review elements of a park development plan concerned with landscaping and grading. You also inquire about the jurisdiction of the Art Commission to approve the design of structures such as a fence proposed as part of a park development plan and a play area apparatus as part of a landscape improvement plan.

ANALYSIS

San Francisco Charter Section 3.552[1/] provides in relevant part as follows:

> The recreation and park commission shall have the complete and exclusive control, management, and direction of the parks, playgrounds, recreation centers, and all other recreation facilities, squares, avenues and grounds which are in the charge of the commission . . . .
>
> It shall also have power to construct new parks, playgrounds, recreation centers, recreation facilities, squares and grounds, and to erect and maintain buildings and structures on parks, playgrounds, squares, avenues and grounds . . .

The powers of the Art Commission are contained in Charter Section 3.601, which provides in relevant part as follows:

> No work of art shall be contracted for or placed or erected on property of the city and county or become the property of the city and county by purchase, gift, or otherwise, except for any museum or art gallery, unless such work of art, or a design or model of the same as required by the art commission, together with the proposed location of such work of art, shall first have been submitted to and approved by the commission. The term "work of art" as used in this charter, shall comprise paintings, mural decorations, stained glass, statues, bas reliefs, or other sculptures; monuments, fountains, arches, or other structures of a permanent or temporary character intended for

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[1/] All section references are to the San Francisco Charter, unless otherwise noted.

> ornament or commemoration. . . The commission shall have similar power with respect to the design of buildings, bridges, viaducts, elevated ways, approaches, gates, fences, lamps or other structures erected or to be erected upon land belonging to the city and county . . . Said commission shall so act and its approval shall be required for every such structure which shall hereafter be erected or contracted for, and may advise in respect to lines, grades, and platting of public ways and grounds. (Emphasis added.)

The authority of the Art Commission[2/] to review works of art is set forth in Section 3.601. The Commission must approve any work of art as well as its location before the work is contracted for, acquired by the City, or placed or erected on City property.

Less clear is the authority of the Art Commission over structures which the term "work of art" does not encompass. Section 3.601 first considers in detail the Art Commission's authority over works of art. It then provides that the

> commission shall have similar power with respect to the design of buildings, bridges, viaducts, elevated ways, approaches, gates, fences, lamps or other structures . . ..(Emphasis Added.)

The issue raised by this portion of Section 3.601 is whether the term "similar power" was intended to grant the Commission the same authority over structures other than works of art that the Commission has over works of art. A close reading of section 3.601 reveals that the former authority is more limited than the latter.

As to works of art, the Commission's power is virtually unlimited. Section 3.601 specifically empowers the Commission to disapprove the proposed acquisition or erection of a work of art. In addition, the section authorizes the Commission to disapprove the proposed location. As to structures other than works of art, Section 3.601 permits the Commission to consider

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[2/] All references to "Commission" are to the Art Commission, unless otherwise noted.

their design. However, the section gives the Commission no authority to veto either (a) the proposal to erect the structure or (b) the location of the structure.

Settled principles of statutory construction make clear that the Commission's authority to review the "design" of a structure does not include its location as well as its style. As noted in Martello v. Superior Court (1927) 202 Cal. 400, 405:

> In the grants [of powers] and in the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode . . .

(See also Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 196.) Section 3.601 specifies the Commission's authority to determine the location of works of art but omits such authority with respect to non works of art. Accordingly, under the rule of Martello, the Commission has no such authority.

This conclusion also comports with sound public policy. The term "works of art," as used in Section 3.601, includes specifically enumerated items and "other structures . . . intended for ornament or commemoration." The City acquires and builds works of art to contribute to the public's aesthetic enjoyment. The Charter entrusts the Art Commission with responsibility for establishing aesthetic standards for public property. (See Section 3.601.) Accordingly, it is appropriate that the Art Commission should have broad power to review the proposed acquisition and use of any work of art.

On the other hand, structures other than works of art are intended for more than "ornament or commemoration." They serve a particular function. The function may relate to transportation (e.g., a bridge over which City buses will run) or recreation (e.g., a bandshell). The City agencies entrusted with the responsibility for these functions (e.g., the Public Utilities Commission and the Recreation and Park Commission) have experience and expertise with respect to these functions. Therefore, these agencies are best able to determine whether a proposed structure which is not primarily ornamental or commemorative will serve the public interest and where to locate such a structure.

Prior legal opinions of this office support this conclusion. In City Attorney Opinion No. 71-47, we stated:

> The language of Charter Section 3.601 distinguishes between the jurisdiction of the Art

Commission over "works of art" where the power of the Art Commission extends to placement and location and "buildings" where jurisdiction is specifically concerned only with "design." There may be special circumstances where unsuitability of a design of a building is related to its proposed placement on a particular site. Absent such special circumstances and as a general rule, the Art Commission has no jurisdiction over the selection of a particular site for the construction of a building on property under the jurisdiction of the Recreation and Park Commission.

In addition to works of art and other structures, section 3.601 authorizes the Art Commission to review a third category of projects The Art Commission "may advise in respect to lines, grades and platting of public ways and grounds." (Section 3.601, emphasis added.)

The word "advise" means to "recommend (a course of action)". (Webster's New International Dictionary, (1961) 3rd Ed., ("Webster's"). As noted in State v. Downing (Idaho 1913) 130 P. 461, 462, "under the meaning given to the word 'advise,' it is left optional with the person advised as to whether he will act on such advice or not." (See also People v. Horn (1886) 70 Cal. 17 and People v. Tullos (1943) 57 Cal.App.2d 233, 238.)

Since Section 3.601 provides that the Art Commission may "advise" with respect to "lines, grades and platting," it is clear that the Art Commission's role with respect to "lines, grades and platting" is considerably different from its role with respect to works of art and structures. As to this third category, the Art Commission plays an advisory role only and its recommendations are not binding. It is necessary, therefore, to determine what activities or projects the words "lines, grades and platting" encompass.

Webster's includes the following definitions for the word "line": (1) "A mark of division or demarcation, of outline or contour, as on a map, hence, a boundary . . .," and (2) "a series of related positions which are or may be represented by a line." Webster's defines "plat" as follows: "a plan, map, or chart; esp. a plan of a town site, a division of land, or the like," and "plan, scheme, or outline as a course of action . . . arrangement; design." The term "grades" refers to a change in the topographical features of the ground with respect to height. (Ibid.)

We now consider the specific examples of projects or structures in your questions. Your first question refers to a fence proposed by the Recreation and Park Commission as a part of a park development plan. Your second question refers to a play area apparatus designed by a landscape architect as part of a landscape improvement plan. Both of these items are structures and not works of art. Thus, the Art Commission has jurisdiction only to review the proposed design of such structures.

As noted above, the Recreation and Park Commission is the City agency entrusted with the "complete and exclusive control, management and direction" of the City's parks and with the authority to construct new parks and playgrounds. (Section 3.552.) The Recreation and Park Commission has had considerable experience in balancing the public interest in recreation against the need to make recreational facilities safe for public use. As such, the Recreation and Park Commission is the appropriate agency to determine whether a fence or play area apparatus is necessary and where they should be placed to best serve their purpose.

The Art Commission "may advise in respect to . . . grades." (Section 3.661.) Hence, although the Commission is authorized to review an element of a park development plan pertaining to grading of property, its recommendation regarding that element is not binding on the Recreation and Park Commission.

We turn, finally, to the authority of the Art Commission over landscaping. Charter Section 3.601 does not refer to landscaping. However, Section 3.600 requires that a landscape architect be appointed as a member of the Commission. Webster's defines the word "landscape architect" as follows: "One whose profession is to so arrange and modify the effects of natural scenery over a given tract as to produce the best aesthetic effect considering the use to which the tract is to be put." Arguably, the requirement that a landscape consultant be appointed to the Commission reveals an intent by the framers of these sections to empower the Commission to approve landscaping proposals. Nonetheless, several considerations compel the conclusion that the jurisdiction of the Commission over landscaping is limited to review and recommendation.

First, Section 3.601, which sets forth the authority of the Commission, consistently uses the term "structure" to describe those projects over which the Commission exercises approval authority. Webster's defines "structure" as "something constructed or built, as a building, a dam, a bridge, esp. a building of some size; and edifice." Landscaping is not a structure.

Rather, landscaping falls more closely within the range of activities contemplated in the use of the terms "lines, grades and platting." Webster's New Collegiate Dictionary (1979 Edition), defines the word "landscaping" as follows: "To modify or ornament (a natural landscape by altering the plant cover). . . ." Since the terms "lines, grades and platting" refer broadly to "demarcations," "topographical features" and "plans or designs," they are applicable to the designed planting and management of vegetation. The terms also apply to the allocation of a piece of property for uses such as setting aside a portion of a park site for grassy open space, for unimproved paths, for sidewalks or for roller skating surfaces. In light of their breadth, the terms "lines, grades and platting" provide the Commission with the power to review and advise a wide variety of land development projects, including landscaping.

The conclusion that the Commission acts only in an advisory capacity as to landscaping is also supported by policy considerations. The Recreation and Park Department, Department of Public Works and other City departments engage in a multitude of landscaping projects. It certainly was not the intent of the framers of Section 3.601 to require Commission approval for the planting of trees, bushes and flowers throughout the City.

The conclusion is also supported by City Attorney Opinions Nos. 59-1402 and 73-124. The former opinion advised that the Art Commission does not have jurisdiction to review the removal or alteration of Portsmouth Square. The opinion reasoned, in part, that the "only authority that the Art Commission has insofar as public grounds are involved is the right to advise with respect to the planting thereof". Opinion No. 73-124 advised that the Commission has no jurisdiction to approve landscaping projects.

CONCLUSION

The Art Commission has the jurisdiction and authority to review works of art, structures other than works of art, and projects concerning landscaping and grading. As to works of art, the Art Commission must grant its approval before the work of art is contracted for, acquired by the City or placed upon City property. The Art Commission also has the authority to approve the proposed location of the work of art.

The design of structures that are other than works of art are subject to the Art Commission's review and approval. However, as to landscaping and grading projects, the Art Commission may only review and make recommendations. These recommendations are not binding.

Very truly yours,

LOUISE H. RENNE
City Attorney

MARA E. ROSALES
Deputy City Attorneys

APPROVED:

LOUISE H. RENNE
City Attorney

1922F

Louise H. Renne,
City Attorney

April 20, 1987

OPINION NO. 87 - 07

SUBJECT: Disclosure of Departmental Disciplinary Charges

REQUESTED BY: Dr. David J. Sanchez, Jr., President
San Francisco Police Commission

PREPARED BY: Burk E. Delventhal
Thomas J. Owen
Deputy City Attorneys

QUESTIONS PRESENTED

(1) Is the formal complaint or statement of charges filed by the Chief of Police against a police officer a public record within the meaning of the Public Records Act and the Brown Act that the Commission must disclose prior to the disciplinary hearing?

(2) Does any other enactment impose any limitation on the duty of the Police Commission under the Public Records Act to disclose a formal complaint or statement of charges filed against a police officer?

CONCLUSIONS

(1) Yes.

(2) No.

ANALYSIS

Tne San Francisco police department is managed by the police commission. See San Francisco Charter Section 3.530. The commission's management authority includes the power to discipline police officers for misconduct under procedures set

forth in Charter Section 8.343. That section provides, in relevant part, as follows:

> Subject to the foregoing members of the uniformed ranks of either department shall not be subject to dismissal, nor to punishment for any breach of duty or misconduct except for cause, nor until after a fair and impartial trial before the commissioners of their respective departments, upon a verified complaint filed with such commission setting forth specifically the acts complained of, and after such reasonable notice to them as to time and place of hearings as such commission may, by rule, prescribe. The accused shall be entitled, upon hearing, to appear personally and by counsel; to have a public trial; and to secure and enforce, free of expense, the attendance of all witnesses necessary for his defense.

This provision includes two important points: (1) the officer is entitled to a public trial, (2) upon a verified complaint filed with the commission setting forth specifically the acts complained of by the department. We must therefore determine whether that complaint, once filed, is a public record which must be disclosed.

The police commission is subject to the provisions of Charter Section 3.500. Section 3.500, subd. (f), requires the commission

> [t]o hold meetings at regular fixed dates and at regular meeting places, which dates or places shall not be changed except as in the manner provided by Section 2.200 for the meeting times and places of the board of supervisors. All such meetings and all special meetings and all meetings of all committees, whether composed of more than or less than a majority of the parent board of commission, shall be open and public; provided, however, that nothing contained in this subsection shall be construed to prevent any board or commission or committee thereof, respectively, from holding executive sessions during a regular or special meeting to:

> (1) consider the appointment, employment or dismissal of a public officer or employee or to hear complaints or charges brought against such officer or employee by another officer, employee or person unless such officer or employee requests a public hearing;
>
> * * *

Under these provisions, police commission meetings are open to the public. The commission may go into closed session to consider disciplinary action against an employee, unless the employee requests a public hearing. The commission is not required to go into executive session on a personnel matter; the decision rests in the commission's sound discretion. The commission cannot go into executive session on a personnel matter if the employee exercises his or her right to a public hearing. But the employee cannot force the commission to hold a closed session on a disciplinary matter.

Meetings of the police commission are also subject to the open-meeting provisions of the Brown Act (Government Code Sections 54950 et seq.). See 61 Ops.Cal.Atty.Gen. 220 (May 4, 1978) (advising that Brown Act applies to board of police commissioners of a chartered city). Government Code Section 54953 requires that all meetings of a local agency as defined in the Act be open and public; Section 54957 creates an exception that allows, but does not require, the governing body of the local agency to hold closed sessions on personnel matters, "unless such employee requests a public hearing."[1/] Again, as under Charter Sections 3.500 and 8.343, the employee may compel a public hearing, but cannot force the commission to hold a closed session.

1/ The language of these two statutes makes clear that closed meetings are permitted but not compelled when agencies consider personnel matters. Section 54953 mandates that "all meetings of the legislative body . . . be open and public, and all persons . . . be permitted to attend . . . except as otherwise provided in this chapter." Section 54957 provides in relevant part that "nothing contained in this chapter shall be construed to prevent any board . . . from holding closed sessions to consider [personnel matters]. . . . "

This conclusion is reinforced by the expressed intent of the Legislature that the open meeting provisions of the Brown Act are minimum requirements. Government Code Section 54953.7 provides that a local agency may adopt rules and procedures guaranteeing even greater access to meetings than those set forth in the Brown Act. Thus, consistent with the Brown Act, the Police Commission could decide to conduct all disciplinary hearings in public and never go into closed session to consider personnel matters.

In Government Code Section 54957.5, subd. (a), the Brown Act further provides that all writings distributed to the commission are public records under the California Public Records Act (Government Code Section 6250 et seq.). Such records, if distributed before the meeting, shall also be made available upon request before the meeting. Government Code Section 54957.5, subd. (b). As mandated by Charter Section 8.343, disciplinary hearings must be based upon a specific, verified complaint. Under the Brown Act, that complaint becomes a public record upon filing with the commission.

The Brown Act does provide that writings distributed at a public meeting do not become public records if they are otherwise exempt from disclosure under Government Code Sections 6253.5, 6254 or 6254.7. Sections 6253.5 (dealing with initiative and referendum petitions) and 6254.7 (dealing with air pollution data) are not relevant to this discussion. Section 6254 sets forth a series of exemptions from the Public Records Act. Two of those exemptions must be considered.

Section 6254, subd. (c), allows (but does not require) the agency to withhold "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Subdivision (k) similarly allows withholding of "[r]ecords the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

The first question is whether public disclosure of the charges brought against a police officer constitutes an unwarranted invasion of personal privacy. Disclosure of the charges does have the potential to embarrass or stigmatize an officer. But the charges are limited to allegations regarding the officer's fitness to occupy a special position of public

trust. Recognizing that peace officers hold a peculiar and delicate position in society requiring a high degree of public respect and confidence, the courts have historically applied very strict standards in reviewing the conduct of peace officers. See Christal v. Police Commission of City and County of San Francisco (1939) 33 Cal.App.2d 564, 567-68; McCain v. Sheridan (1958) 160 Cal.App.2d 174,177; Lukin v. City and County of San Francisco (1986) 187 Cal.App.3d 807, 817; Ludoph v. Board of Police Commissioners (1938) 30 Cal.App.2d 211, 217. The public interest in the proper application of those high standards and in the operation of the police commission outweighs any potential embarrassment to the officer. Hence, we conclude that disclosure of the statement of charges would not constitute an unwarranted invasion of the police officer's privacy. Rather, the public interest in access to those charges is of a compelling dimension.

The remaining question is whether public disclosure of charges brought against a police officer is prohibited by any provisions of state law. Two possible sources of such a prohibition are the Public Safety Officers' Procedural Bill of Rights (Government Code Sections 3300 et seq.) and Penal Code Sections 832.5 et seq.

The Public Safety Officers' Procedural Bill of Rights does not address, let alone prohibit, public disclosure of formal disciplinary charges filed against a police officer. The only relevant provision requires that an officer be allowed the representative of his or her choice in two circumstances: (1) during questioning after the filing of charges, or (2) whenever an interrogation focuses on matters which are likely to result in punitive action. Government Code Section 3303, subd. (h).

Penal Code Section 832.7 requires that all police officer personnel records and citizen complaint records be kept confidential. "Personnel records," as defined in Penal Code Section 832.8, include files "maintained under that individual's name by his or her employing agency and containing records relating to: . . . complaints, or investigation of complaints, concerning an event or transaction in which he participated, or which he perceived, and pertaining to the manner in which he performed his duties. . . ."

In reconciling the confidentiality provisions of Section 832.7 with the open meeting and public records requirements of

the Charter and state law, we are mindful of several principles of statutory construction. Legislative enactments are to be interpreted in a reasonable and workable manner (City of Santa Clara v. Von Raesfeld (1970) 3 Cal.3d 239, 248), consistent with the legislative purpose (Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640,645). "Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided." California Manufacturers Assn. v. Public Utilities Commission (1979) 24 Cal.3d 836, 844.

A court should construe a statute with regard to the whole scheme of laws of which it is a part for the purpose of harmonizing and giving effect to all parts of the law. Select Base Materials Inc. v. Bd. of Equalization, supra, 51 Cal.2d at 645; Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal.3d 801, 814. Hence, all enactments having the same general purpose or relating to the same subject should be read together as if one law, and harmonized if possible. County of Placer v. Aetna Casualty and Surety Co. (1958) 50 Cal.2d 182, 188-89. These principles apply even though apparent inconsistencies may appear in separate codes. Tripp v. Swoap (1976) 17 Cal.3d 671, 679; Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal.App.2d 41, 54. For the purpose of statutory construction, all codes are regarded as consisting of a single statute. Pesce v. Dept. of Alcoholic Beverage Control (1958) 51 Cal.2d 310, 312; Proctor v. Justice's Court of Berkeley (1930) 209 Cal. 39, 43.

The rule of confidentiality in Penal Code Section 832.7 can be harmonized with the public meeting and public record provisions of the Brown Act, in a reasonable and workable manner. In reconciling the relevant provisions of law, we must look to the purposes behind the applicable laws.

Though there are no cases interpreting the legislative intent behind Penal Code 832.7, its manifest purpose is to protect the privacy of individual officers from unwarranted public inquiry into their personnel records. The term "records" is used in §832.7 in conjunction with the term "information." These terms support the conclusion that the Legislature was seeking to provide some protection for the privacy of police officers. See City of San Diego v. Superior Court (1981) 136 Cal.App.3d 236, 237 (holding that statutes which protect from discovery personnel records of police officers and information

from such records also protect the identical information about personnel history which is within an officer's personal recollection). Further, immediate public scrutiny of complaints could discourage citizens from filing such complaints in the future. Such a result would be inconsistent with the Legislature's intent in Penal Code Section 832.5 that citizens be encouraged to report misconduct of police officers.

The legislative intent behind the Brown Act is explicit. Section 54950 expresses the Legislature's intent that the actions of public bodies

> . . . be taken openly, and that their deliberations be conducted openly . . . .
>
> The people insist on remaining informed so that they may retain control over the instruments they have created.

See also Carlson v. Paradise Unified School District (1971) 18 Cal.App.3d 196, 199-200. Government Code Section 54953 reinforces this intent by requiring that all meetings be public except as otherwise provided.

The question, then, is whether these two provisions must necessarily conflict. Penal Code Section 832.5 requires all police agencies, including the San Francisco Police Department, to receive and investigate charges of police misconduct. These charges may or may not have merit. The Chief of Police eventually evaluates the evidence collected and determines whether there is a reasonable basis for concluding that the officer may have engaged in wrongdoing. If the Chief of Police concludes that the complaint is without foundation, he terminates the investigation and that is the end of the matter. In those cases where the Chief of Police concludes that the officer may have engaged in misconduct, the Chief embodies that conclusion in formal, written charges filed with the Police Commission. Thereafter, the Police Commission determines whether the police officer engaged in wrongdoing and, if so, what sanction is appropriate.

The latter proceeding ensues only upon the considered decision of the Chief of Police that there is reasonable cause to believe that the officer is guilty of misconduct. It is that determination, based upon an independent and individual review of

the evidence, that both (1) justifies the decision to file a public statement of charges and (2) protects the officer from unwarranted invasions of privacy.

The public's interest in the contents of a mere complaint that the Chief of Police has determined to be without merit is outweighed by the officer's privacy interest in curtailing the further disclosure of frivolous allegations. But once the Chief is satisfied that sufficient evidence exists to justify a hearing before the Commission, the public interest in the conduct of its police officers becomes preeminent.

The officer may, of course, be completely exonerated in the course of a disciplinary proceeding. Clearing the name of innocent officers is of equal importance as punishing an officer who has engaged in misconduct. The significant concern in this analysis is not whether discipline is imposed in a particular case, but whether the public may satisfy itself that the decision was made fairly and honestly.

The Brown Act makes clear that the Police Commission may conduct such disciplinary proceedings in public. There is no reason to conclude that the Legislature intended to allow the Police Commission to hear the charges in public while not allowing the public to see a copy of the charges upon which the Commission is deliberating. In such a disciplinary proceeding, all the evidence that would be presented against the police officer would be available for public scrutiny. It would defy common sense to conclude that the public is entitled to witness the proceedings and hear all the evidence without knowing the charges. Accordingly, we conclude that the Legislature did not intend to preclude public access to the formal charges of wrongdoing.

CONCLUSION

The Brown Act and the Charter require the police commission, with certain exceptions, to act in public. These requirements make explicit what is essential to the democratic social contract -- "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." Government Code Section 54950.

When the Police Commission holds a public hearing to consider disciplinary action against a police officer, it must do so based upon a specific, verified complaint filed with the commission. The Brown Act provides that a document distributed to the Commission at a public meeting is a public record. Therefore, the formal complaint or statement of charges filed by the Chief of Police against a police officer must be disclosed.

Respectfully submitted,

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APPROVED:

LOUISE H. RENNE
City Attorney

6589F/1-8

City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
City Attorney

OPINION NO. 87 - 8

May 6 , 1987

SUBJECT: Constitutionality of Police Code Section 685

REQUESTED BY: JOHN L. MOLINARI
Member, Board of Supervisors

PREPARED BY: BUCK E. DELVENTHAL
Deputy City Attorney
CARLA OAKLEY
Law Student

QUESTION PRESENTED

Is the San Francisco Police Code Section 685 prohibition against the distribution of commercial advertising an unconstitutional restraint of First Amendment activity?

ANSWER

Yes, the existing prohibition against circulation or distribution of advertising materials unconstitutionally restricts advertisers' freedom of speech.

DISCUSSION

I. Provision at Issue. San Francisco Police Code Section 685 provides in pertinent part as follows:

> (a) It shall be unlawful for any person, firm, association or corporation, upon any street, sidewalk or park . . . to circulate or distribute . . . any handbill, dodger, book, pamphlet, picture, card, print, paper, writing, mold, device or emblem for the purpose of advertising any merchandise, commodity, property, trade, business, service, art or skill, offered, sold or rendered for hire, reward, price, trade or profit.

II. First Amendment Freedom of Speech. The First Amendment to the United States Constitution prohibits the government from making any law abridging the freedom of speech.

This prohibition is made applicable to the states by incorporation under the due process clause of the Fourteenth Amendment. Near v. Minnesota (1931) 283 U.S. 697. Application of Schillaci (1961) 196 Cal.App.2d 591. The California Constitution also protects free speech:

> (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.
> (Article I, Section 2, California Constitution, hereinafter Article I).

Although at least one United States Supreme Court case characterized the state constitution's free speech and press provisions as "more expansive than those conferred by the Federal Constitution," Pruneyard Shopping Center v. Robins (1980) 447 U.S. 74, 81. California courts generally refer to the First Amendment and Article I interchangeably and apply the same test when making an analysis under either provision. See, e.g., Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal.3d 501, 513, Hirsch v. City and County of San Francisco (1956) 143 Cal.App.2d 313, 323.

In construing the breadth of First Amendment and Article I protections, courts make a distinction between commercial and noncommercial speech. Commercial speech includes "speech which does no more than propose a commercial transaction." Posadas de Puerto Rico Assoc. v. Tourism Co. (1986) ___ U.S. ___, 106 S.Ct. 2968, 2976, citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (1976) 425 U.S. 748, 762. The California Supreme Court has said that commercial speech "has but one purpose -- to advance an economic transaction." Spiritual Psychic Science Church, 39 Cal.3d at 510-511, (holding that fortunetelling for consideration is not commercial speech) (emphasis added).

Courts historically held that commercial speech was not entitled to First Amendment or Article I protection. See, e.g., Valentine v. Chrestensen, (1942) 316 U.S. 52; People v. Uffindell (1949) 90 Cal.App.2d Supp. 881; Pittsford v. City of Los Angeles (1942) 50 Cal.App.2d 25. Today, however, it is well-settled that the First Amendment and Article I apply to commercial speech as well as noncommercial speech. See, e.g., Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 505 (upholding a ban on commercial

billboards because it advances the significant governmental interest in traffic safety) and cases cited therein.

The protection of commercial speech, like that of noncommercial speech, is not absolute. The government may impose regulations relating to the time, place or manner of the speech. In Central Hudson Gas and Electric Corp. v. Public Services Commission (1980) 447 U.S. 557, the Supreme Court set forth a four-part test for determining whether government regulation of commercial speech violates the First Amendment: (1) Is the speech protected by the First Amendment (i.e. is it lawful and not misleading)?[1/] If so, then the following questions must be answered affirmatively for the regulation to stand; (2) Is a substantial governmental interest advanced by the regulation? (3) Does the regulation directly advance the governmental interest? (4) Is the regulation the least drastic means available to advance the governmental interest? 447 U.S. at 563-566.

Using the Central Hudson analysis, the Supreme Court has upheld a ban on commercial billboard advertisements since the regulation directly advanced the governmental interest in promoting safe traffic. Metromedia, Inc. 453 U.S. 490. Similarly, the Supreme Court held that a state can require full disclosure of information in advertising provided full disclosure reasonably relates to the state interest in preventing deception and fraud. Zauderer v. Office of Disciplinary Council (1985) 471 U.S. 626 (upholding regulation requiring attorneys who advertise contingency fees to specify whether clients who lose must pay fees or expenses themselves).

Most recently, however, tne U.S. Supreme Court has held that government can regulate advertisements promoting an activity if it has the power to regulate the activity itself. Posadas de Puerto Rico, ___ U.S. ____, 106 S.Ct. 2968, 2979. In Posadas, the Puerto Rican government banned advertisements promoting gambling that would reach territory residents, although it allowed gambling advertisements aimed at tourists. Gambling is legal for residents and nonresidents in Puerto Rico. The Court, in a 5-4 decision, held the government power to prohibit gambling

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1/ If the speech is unlawful or misleading, the regulation need only be rationally related to a governmental purpose to satisfy constitutional requirements.

must include the lesser power to ban gambling advertisements[2/].

III. Applying the Law to the Police Code. Assuming the Police Code's blanket prohibition here is a prohibition against commercial speech, one must analyze the ordinance under the Central Hudson four-part test:

1. Are the prohibited handbills and advertisements constitutionally protected?

Analysis: Yes. The ordinance broadly prohibits sidewalk advertisements including advertisements of lawful and non-fraudulent business activity. Therefore, the ordinance affects constitutionally protected commercial speech under Central Hudson.

2. Does the ordinance further an important governmental interest?

Analysis: Yes. There are at least three substantial governmental interests at stake. First, there is an interest in preventing litter in the sidewalks and streets. Second, the government has an interest in preventing interference with pedestrians and blocking thoroughfares. Third, there is an interest in controlling advertising that promotes materials that are not legally available to minors. Each of these interests is substantial enough to support some type of governmental regulation. See Pittsford v. City of Los Angeles (1942) 50 Cal.App.2d 25; National Delivery Systems, Inc. v. City of Inglewood (1974) 43 Cal.App.3d 573, 579.

3. Is the ordinance directly aimed at the interests it is meant to protect?

Analysis: Yes. The ordinance would help prevent litter by limiting the type of handouts on the street, and thereby limiting the volume of distributions on the sidewalks. It could also help decrease congestion on thoroughfares by allowing fewer people to stand on sidewalks to distribute information. Lastly, the ordinance would help prevent minors from gaining access to materials that they are prohibited from possessing by limiting minors' opportunity to receive the information in an uncontrolled setting.

2/ To some commentators, Justice Rehnquist's Posadas opinion reflects a shift by the court, affording the legislature broader power to regulate commercial speech. See e.g., Kotler, "Commercial Speech Up In Smoke," (1986) California Lawyer, Vol-6, No. 12, pp 21-22.

4. Is the ordinance narrowly drawn so that it is the least drastic means available to advance the governmental interest protected?

Analysis: No. The ordinance fails this prong of the test since there are narrower means to achieve the ends identified. To address litter, the Board of Supervisors has adopted an ordinance prohibiting littering. See Police Code Sections 33 through 37. The Board could further adopt an ordinance requiring those who circulate handbills to pay a fee to cover the cost of clean-up. A fee collection ordinance would have to be drawn narrowly so that it does not infringe on First Amendment rights of those who cannot afford to pay such a fee. There may be other First Amendment limitations upon such fees. To advance the interest in uncongested thoroughfares, an ordinance already exists that penalizes those who willfully or substantially block sidewalks. San Francisco Police Code Section 22; see also San Francisco Public Works Article 5.5 (prohibiting distribution of free merchandise without first acquiring a permit). Lastly, the interest in protecting minors could be advanced by a more narrowly-drawn ordinance prohibiting specific types of advertising similar to regulations that prohibit the sale of various items to minors.

If the ordinance at issue is deemed to be aimed at more than purely commercial speech, then the analysis must follow the Spiritual Psychic Science Church test. In that case, the Court distinguished whether the regulation at issue was aimed at the communicative or noncommunicative impact of the act that is regulated. 39 Cal.3d at 513. If aimed at the former, the regulation is unconstitutional unless the communication being suppressed falls into one of the four categories of speech not entitled to First Amendment protection. These are speech that carries a "clear and present danger", speech that constitutes a defamatory falsehood, obscenity and fighting words. If the ordinance is aimed at a noncommunicative impact, the regulation is constitutional so long as it does not unduly restrict the flow of information and ideas. To determine whether the regulation is too restrictive, a court follows a balancing test similar to that in Central Hudson. Id.

Regardless of whether this regulation has a communicative or noncommunicative impact, it will not pass constitutional muster. If the regulation is aimed at the communicative impact of distributing handbills, then it clearly is unconstitutional as the handbills affected do not pose a "clear and present danger"

and cannot be characterized as falsehoods, obscenity or fighting words. If the regulation is aimed at noncommunicative impacts of handbill distribution, it is unconstitutional because it is not the least drastic means to address the impacts to which it is aimed. See our discussion of part 4 of the Central Hudson test analysis.

Lastly, the ordinance cannot be saved under the reasoning of Posadas de Puerto Rico. If the subject of the advertising is an area which the government has a right to prohibit, then the government can take the lesser step of prohibiting advertising of that subject. The ordinance here, however, applies broadly to lawful business activities which the government has no power to prohibit. Accordingly the rationale of Posadas does not apply.

CONCLUSION

The broad prohibition in Section 685 against all commercial handbilling on sidewalks does not pass constitutional muster. It is well-settled that commercial speech is afforded protection under the First Amendment and Article I. Since the ordinance acts as a restraint on commercial speech, the ordinance must pass the Central Hudson four-prong test in order to be valid. We conclude that the ordinance fails to meet the fourth prong of the test since there are narrower means to achieve the governmental purposes behind the ordinance.

Moreover, the ordinance must also fail under Spiritual Psychic Science Church. The regulation is aimed at protected speech and does not use the least restrictive means to regulate the conduct in question.

Respectfully submitted,

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Law Student

APPROVED:

LOUISE H. RENNE, City Attorney

2628F/1-6

Louise H. Renne,
City Attorney

OPINION NO. 87 - 09

May 7, 1987

SUBJECT: Applicability of Salary Standardization Ordinance to Community College

REQUESTED BY: The Hon. Nancy G. Walker
President, Board of Supervisors

Natalie Berg
Director, Personnel Relations
San Francisco Community College District

PREPARED BY: Mark B. Kertz
Deputy City Attorney

QUESTIONS PRESENTED

(1) Whether compensation for the classified employees of the San Francisco Community College District is established pursuant to the City Charter Section 8.407?

(2) Whether the classified employees of the San Francisco Community College District are entitled to pay equity adjustments pursuant to City Charter Section 8.407-1?

(3) Whether the San Francisco Community College District must provide compensation to its College Aides pursuant to Charter Section 8.407?

CONCLUSIONS

(1) Yes.

(2) Yes.

(3) No.

ANALYSIS

The Honorable Nancy G. Walker, President of the Board of Supervisors, and the San Francisco Community College Board ask whether the San Francisco Community College District (Community College) "is obligated to follow the provisions of the Salary Standardization Ordinance for its classified employees." They also ask whether Charter Section 8.407 is part of the City's merit (civil service) system, and if so, whether the merit system includes pay equity adjustments. The Community College also asks whether it must provide compensation to its College Aides pursuant to Charter Section 8.407.

The first three questions are answered by provisions of the State Education Code. The fourth question requires review of both the federal college Work-Study Programs, 42 U.S.C. 2751, its applicable administrative regulations, and the state Education Code.

Applicability of Charter Section 8.407

The San Francisco Community College is part of the California public school system.1/ State Constitution, Article 9, Section 14. Such public school system is matter of State-wide not local concern. State Constitution Article 9, Sections 5 and 6; Kennedy v. Miller (1893) 97 Cal. 29; Esberg v. Badaracco (1927) 202 Cal. 110; Butler v. Compton Junior College District (1947) 77 Cal.App.2d 719.

The internal operations of the public schools are subject only to state law. Hall v. City of Taft (1956) 47 Cal.2d 177. State law controls because although a school district may comprise the same territory as the City, each derives its power from, and is subject to, a different body of law. Id.; Esberg v. Badaracco, supra. The foundational body of law for the City is the Charter, the foundational body of law for the public schools is the State Education Code. Los Angeles School District v. Longden (1905) 148 Cal. 380. When the state engages in sovereign

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1/ Prior to 1968, the Community Colleges were known as Junior Colleges. The term "Community College" will be used in this opinion for Junior College whenever the context permits.

activities it is not subject to local regulation unless the Constitution declares that it is, or the Legislature has consented to such regulation. Hall v. City of Taft, supra. The Community College is a state entity separate from the City and it enjoys only those powers delegated to it by the Legislature. The rights and benefits of the Community College employees, therefore, are determined by state law.

The rights of Community College classified employees are promulgated in Title 3, Division 7, Part 51, Chapter 4, Sections 88000 - 88263 of the Education Code. Those sections detail, inter alia, a merit system (§§88050, 88060) and a salary setting procedure. (§88160). Education Code Section 88000, "Application of Provisions to Classified Employees", provides, in relevant part, that:

> These provisions [including sections on the merit system and salary procedures] shall not apply to employees of a community college district lying wholly within a city and county which provides in its charter for a merit system of employment for employees employed in positions not requiring certification qualifications.

Education Code Section 88137 provides:

> In every community college district coterminous with the boundaries of a city and county, employees not employed in positions requiring certification qualifications shall be employed, if the city and county has a charter providing for a merit system of employment, pursuant to the provisions of such charter providing for such system and shall, in all respects, be subject to, and have all rights granted by, such provisions; provided, however, that the governing board of the district shall have the right to fix the duties of all of its noncertificated employees.

Section 88000 expressly provides that the classified employees of the Community College are excluded from the employment provisions of Part 51, Chapter 4 of the Education Code. Section 88137 provides that classified employees of the

San Francisco Community College shall in all respects be entitled to all rights and benefits granted by the Charter's merit (civil service) system.

Article VIII of the Charter sets forth such rights and benefits of employment. Article VIII covers sections 8.100 through 8.588-15. These sections detail (1) a method of job classification, (2) rules regarding discipline, and (3) procedures for setting salaries and retirement benefits. As an integrated whole, Article VIII establishes the rights of employees to be classified according to their duties, be protected from improper discipline or termination, and be compensated according to their classification. That is the scheme of employee rights under the Charter civil service (merit) system.

Education Code Sections 88000 and 88137 expressly exclude the San Francisco Community College classified employees from the employment provisions of Part 51, Chapter 4 of that Code. Instead, under Sections 88000 and 88139, these employees are subject to the City Charter. The language of sections 88000 and 88137 is direct and certain. The fundamental rule of statutory construction is to give effect to statutes according to the usual, ordinary import of the language employed in framing them. Rich v. State Board of Optometry (1965) 235 Cal.App.2d 591. "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. People v. Knowles (1950) 35 Cal.2d 175, 183.

The Community College, however, argues that Section 88137 is ambiguous. If a statute is ambiguous, the fundamental objective is to ascertain and give effect to the Legislature's intent. Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645; California Teachers Assn. V. San Diego Community College Dist. (1981) 28 Cal.3d 592; Code of Civil Procedure Section 1859; County of Ventura v. Stark (1984) 158 Cal.App.3d 1112. The derivation and legislative history of Education Code Section 88137, therefore, must be considered.

Education Code Section 88137 is derived from, and is identical in all relevant respects to, the earlier enacted Education Code Section 45318. Section 45318 pertains to the San

Francisco Unified School District. A proper interpretation of Section 88137 requires an examination of the legislative history of Section 45318 and the Community College's relationship with the school district.

California's public system of higher education consists of the University of California, the California State University and the California Community College. The University and the State University were independent when formed. The Community College was originally a division of the State Department of Education. See e.g. "Inadequate Financial Accountability in California's Community College System", Commission on California State Government Organization and Economy, February 1986.

In response to the need for post-high school vocational and academic training on a local level, in 1907 the Legislature authorized high school districts to offer some college level courses. Tyler, H. "Full Partners in California's Higher Education," Junior Colleges: 50 States/50 Years, (1969). The first two-year college program was established in 1910. Simpson, R. "The Neglected Branch: California Community College", Senate Office of Research, January, 1984. In 1921, the Legislature authorized the formation of junior college districts. Statutes 1921, Chapter 495, p.756; see also, Statutes 1925, Chapter 96, p. 232; Chapter 97, p. 233; Chapter 215, p. 431.

In November of 1926, Article 9, Section 14 was added to the California Constitution providing for the establishment of public school districts including community college districts. In response to that constitutional amendment the Legislature enacted the predecessor to Education Code Section 35010 requiring that school districts be governed by their own boards. Prior to 1926, all public schools in the City and County were under the School Department. 1929 Charter, Article VII, Chapter II, Section I. There was a Board of Education, but its members were appointed by the Mayor. 1929 Charter, Article VII, Chapter I, Section 1. Salaries "for teachers and all employees of the School Department" were set by the Board of Education. 1929 Charter, Article VII, Chapter III, Section 4.

By the time of the adoption of the 1932 Charter, a separate Board of Education for the Unified School District was

established. State law delineated the powers, duties and limitations of the school district. Still, Section 135 of the 1932 Charter provided that the classified employees of the School District "shall be employed under the civil service provisions of this charter and the compensations of such persons shall be fixed in accordance with the salary standardization provisions of this Charter."

The establishment of a separate school board placed in doubt the status of the classified school district employees. Were they subject only to state law or also to Charter Section 135? In response to the confusion and uncertainty, in 1945 Assembly Bill 1488 was presented to the State Legislature through the joint efforts of the San Francisco Municipal Employees Association, San Francisco Civil Service Commission and the San Francisco Board of Education. That bill is now codified as Education Code Section 45318.

Education Code Section 45318 was enacted to ensure civil service coverage for noncertificated school employees of the San Francisco Unified School District. In interpreting that section, we must consider the object in view, evils to be remedied, legislative history and public policy. People v. Aston (1985) 39 Cal.3d 481. Although statements of the author are not definitive in the interpretation of legislation [California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692] they can be instructive. San Diego County v. Superior Court (1986) 176 Cal.App.3d 1009. In a letter from the San Francisco Board of Education to then Governor Earl Warren, dated April 11, 1945, the School Board said:

> This bill [AB 1488, now Education Code Section 45318] was originated by the concurrent agreement of the San Francisco Municipal Employees Association, the San Francisco Civil Service Commission and the San Francisco Board of Education, in order definitively to clarify tne status of the noncertificated employees of the San Francisco Unified School District as to whether or not such employees came within the provisions of the merit system as set up by the City Charter . . . . All of the interested parties, therefore, in the interest of harmony,

> prepared the present bill, which definitely places these employees under the Civil Service protection of the Charter and at the same time, reserves to the Board of Education the right to fix the duties of these employees . . . .

By letter dated April 13, 1945, the State Department of Education wrote to Governor Earl Warren stating:

> . . . [The] effect of [AB 1488] . . . is to affirm and make certain the present control of the Civil Service Commission of the City and County of San Francisco over those employees of the San Francisco Unified School District who are not employed in positions requiring certification qualifications. The bill means that the Board of Education in the City and County of San Francisco relinquishes all jurisdiction over such employees and has only the right to fix their duties . . . .
>
> * * *
>
> . . . in view of the conditions which I know brought about the introduction of [AB 1488], I believe that its enactment into law will do much to bring about a measure of the peace and harmony which has long been absent in the affairs of the San Francisco Unified School District with obvious ill effects upon the public schools of San Francisco and the pupils and employees of the district. . . .

The plain purpose of AB 1488 was to "affirm and make certain" that San Francisco Unified School District classified employees would derive the same benefits as the miscellaneous employees of the City for Civil Service purposes.

The letters make obvious that the intent of the City, the School Board, interested labor organizations and the State Board of Education, was to clarify and affirm the existing status of the classified employees. There is nothing in those letters that speaks to changing the status or rights of the classified employees. Under Education Code Section 45813, the Legislature

decided that the rights and benefits of the school district classified employees is to be determined by the Charter.

By the late 1950s, the California State Legislature believed that education was better served by having separate boards for community college districts. The division was understood to be necessary as the needs of older students and adults are different from that of children.

In 1959, the Legislature adopted a resolution directing the Liaison Committee between the Regents of the University of California and the State Board of Education to develop a Master Plan for the expansion and coordination of higher education in the state. The basic principles of the Master Plan, codified in the Donahoe Higher Education Act of 1960, identified community colleges as full partners in higher education.

Despite the recognition of the Community College's unique mission, the responsibility for coordinating the Community Colleges remained in the State Board of Education until July of 1968. In August of 1967, Senate Bill 669 (Stiern) was approved establishing an independent governing board at the state level. In 1968 the Legislature also amended the Education Code to provide that "no district, except a junior college district, shall maintain a junior college on and after July 1, 1970." See Statutes 1968, Chapter 705, p. 1404.

The 1968 State Code provided there could either be separate governing boards or a single common governing board. Individuals served as the governing board for both the Unified and the Community College districts. State law also provided that a school board could on its own initiative establish a separate community college board. See 1959 Education Code Section 25451.9. A Charter amendment was required to permit the creation of a separate governing board for the Community College District in San Francisco.

In November of 1972 the electors of the City and County adopted Proposition "L" adding Section 136.1 [now, §5.104] to the Charter permitting a separate Community College District. Prior to the adoption of Charter Section 136.1 the Community College was subject to the rules of the school district. Included among such rules was Education Code Section 45318, discussed above.

As noted above, the legislative origin of the Community College District is the Unified School District. The creation of a separate community college district raised the same issues regarding classified employees faced by the School District when it was made an entity separate from the City. In 1976 (operative 1977), in response to those identical issues, Education Code Section 88137 was added to provide that the classified employees of the San Francisco Community College District would be employed pursuant to, and in all respects have rights granted by, the merit system provisions of the City Charter. Education Code Section 88137 is in all applicable respects identical to Education Section 45318 regarding classified employees of the school district. When faced with the problem of the Community College classified employees, the Legislature took the same action as it did with regard to the classified employees of the school district. In construing a statute, a court may consider other statutes that bear on the meaning of the statute at issue. People v. Corey (1978) 21 Cal.3d 738. As the language of the two sections, the circumstance, and the purpose are in all relevant respects identical, their meanings must be identical.

Charter Salary Procedure As Part of Merit System

Community College contends that even if Education Code Section 88137 applies, the City's salary setting procedure (Charter §8.407) is outside of the City's merit system. Community College bases this theory on the fact that Section 8.407 appears in a different chapter of the Charter, albeit the same article, from those sections on classification, examination and discipline.

The Community College's contention is not persuasive for a simple reason: the Charter necessarily governs the salaries of these employees because there is no other provision of law which does so. As noted above, Education Code Section 88000 provides that Articles 1 through 4 of Chapter 4, Part 51 (§§88000-88263) do not apply to the classified employees of the San Francisco Community College. Article 4 contains the provisions for the setting of salaries. Since the Education Code's provisions for setting salaries do not apply to employees of the San Francisco City College, the Legislature has implicitly left such salary setting to the San Francisco Charter. Otherwise, there would be

no provision for setting of salaries and classified employees would not be paid. To construe the provisions at issue here in such a manner would be unreasonable and would produce an absurd result. In Re Atiles (1983) 33 Cal.3d 805; Lampley v. Alvares (1975) 50 Cal.App.3d 124.

Community College has referred this office to Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 as holding that salary setting is not part of a merit system. There, petitioners sought a writ of mandate to invalidate the State Employer-Employee Relations Act (SEERA) [Gov. Code §3512 et. seq.] because SEERA establishes collective bargaining within the State's merit system of employment.

Pacific Legal Foundation stands for the settled rule that (1) there is "no conflict between the general collective bargaining process . . . and the merit principle civil service employment . . .". [Id. at 186.] and (2) an administrative agency's power to set job classifications does not include the legislative power to set salaries. Id. at 188.

The issues in Pacific Legal Foundation v. Brown are not relevant here. The issue here is not whether the City, can have both a civil service system and a collective bargaining process in the absence of an express Charter prohibition. Nor is the issue here whether compensation should be set by the Civil Service Commission or the Board of Supervisors. Rather, the question in this opinion concerns the Legislature's intent in providing that classified employees of the Community College shall have all the rights granted by the Charter's "merit" system. What is dispositive here is that Education Code Section 88000 expressly excludes the classified employees of the San Francisco Community College District from the salary setting provisions of the Education Code, while granting them all rights to the "merit provisions" of the Charter. If Charter Section 8.407 did not apply to the classified employees, there would be no provision in law for setting of their salaries.

Pay Equity

Community College next argues that Charter Section 8.407-1, the recently enacted pay equity Charter amendment, does not apply to it. The Community College contends that since pay equity

adjustments derive from collective bargaining agreements, and not from the salary survey of Section 8.407, the pay equity adjustments are not part of the "merit system" to which Community College employees are subject.

The argument fails for two reasons. First, the fact that salary adjustments result from collective bargaining does not take them outside the scope of the merit system. That conclusion is clear from the pertinent legislative history. As discussed above, Education Code Section 88137 mandates the setting of San Francisco City College employees' salaries under the San Francisco merit system. Section 88137 was approved by the Governor before enactment of Charter Section 8.407. At that time, salaries of employees within the merit system could be set as a result of collective bargaining.2/ In light of this history, it is clear that in enacting Section 88137, the Legislature did not intend that salary adjustments which derive from collective bargaining be outside the scope of San Francisco's merit system.

Second, the language of Section 88137 makes clear that City College classified employees are entitled to pay adjustments if other employees in the merit system regardless of the source of those pay adjustments. Education Code Section 88137 provides that classified employees are entitled to the rights available "pursuant to the provisions of [the] Charter . . . and shall, in all respects, be subject to, and have all rights granted by, such provisions . . . ." (Emphasis added.) Charter Section 8.407-1 grants miscellaneous City employees the right to pay equity adjustments as determined by the Mayor and the Board of Supervisors. Under Section 88137, classified City College employees are entitled to have those same rights "in all respects."

2/ Before Section 8.407 was enacted, the City set salaries under Charter Sections 8.400 and 8.401. Under 8.401, the Civil Service Commission annually transmitted a proposed salary schedule to the Board of Supervisors. The Board of Supervisors could then amend the proposed schedule as a result of collective bargaining.

College Aides

The Community College next asks "can the San Francisco Community College District remove the College Aide Classification 3591 from the provisions of the Salary Standardization Ordinance and the Pay Equity Adjustments?" Such student-employees are employed pursuant to Education Code Section 88076 and the federal college Work-Study Program. 42 U.S.C. §§2751 et. seq.

Education Code Section 88076 specifically exempts from the classified service full-time students employed part-time (Ed. Code §88076(b)(2)) and part-time students employed part-time in certain college work-study program. Education Code Section 88076(b)(4).

Under the Federal College Work-Study Program, the federal government enters into agreements with eligible institutions to assist in the operation of College Work Study Programs ("CWS"). Federal administrative regulations 34 CFR Sections 675 et seq. contain the general provisions which regulate such agreements. Section 675.24 establishes the minimum wage rate for a student employee under the CWS program as the minimum wage required under The Fair Labor Standards Act of 1938. Section 675.27(a)(1) sets forth the federal share limitation for a CWS student's wage as follows:

> The federal share of CWS compensation paid for a student may not exceed 80%, unless the Secretary approves a higher share.

The federal regulations require that an institution pay its CWS students at least minimum wage and the regulations limit what the federal government will contribute to that wage They do not, however, limit what an institution may set as a maximum hourly wage for work study students.

For the reasons above, the Community College is a state entity subject only to state law. Where the Community College operates pursuant to provisions of the City Charter, it does so as a requirement of state law. The state Education Code provides that the student employee is not part of the classified service. The Education Code also provides that the rights of the classified employees are those promulgated in the Charter. As

the student-employee is not part of the classified service, his or her compensation is set according to state and federal law, not Charter Section 8.407.

Respectfully submitted,

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City Attorney

MARK B. KERTZ
Deputy City Attorney

APPROVED:

LOUISE H. RENNE
City Attorney

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City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
City Attorney

May 20, 1987

OPINION NO. 87 - 10

SUBJECT: Health Service Benefits For Surviving Spouses

REQUESTED BY: Randall B. Smith
Director, Health Service System

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Terry J. Mollica
Student Intern

QUESTIONS PRESENTED

1. Are surviving spouses who were never enrolled in the Health Service System prior to the death of their employee-spouse entitled to enroll in the Health Service System?

2. Do surviving spouses who were not allowed to continue in the Health Service system prior to 1972 have a right to reinstatement into the Health Service System?

CONCLUSIONS

1. Yes, if the individual survives (a) a spouse who had retired from City service and who had been a member of the Health Service System at some time prior to his retirement; or, (b) a spouse who was an active employee of the City at the time of his death.

2. Yes, if the individual is otherwise qualified to participate in the Health Service System.

QUESTION NO. 1: INTRODUCTION

The Health Service System is established by San Francisco Charter Section 8.420 et seq. The Health Service System provides health care benefits for permanent employees, retired employees and surviving spouses of active and retired employees.

All permanent employees are eligible to be "members" in the system. Charter Section 8.420 defines "members" as:

> . . . all permanent employees, which shall include officers of the city and county, of the San Francisco Unified School District, and of the Parking Authority of the City and County of San Francisco and, such other employees as may be determined by ordinance, subject to such conditions and qualifications as the board of supervisors may impose. [Emphasis added.]

Permanent employees may be exempted from membership in the system under Charter Section 8.420 if their religious beliefs so require, or if they earn an "amount deemed sufficient for self coverage [or] otherwise [have] provided for adequate medical care." Though not "members" of the system, retired employees are eligible to participate in health service benefits. Charter Section 8.428.

All non-exempted employees and retirees receive a health service subvention from the City, i.e., the City pays part of their health insurance premiums. Charter Section 8.428 provides:

> The costs of the health service system shall be borne by the members of the system and retired persons, the City and County of San Francisco because of its members and retired persons and because of members and retired persons of the parking authority of the City and County of San Francisco, the San Francisco Unified School district because of its members and retired persons and the San Francisco Community College District because of its members and retired persons.

The amount of the subvention paid by the City and County towards employee premiums is equivalent to the average of the

contributions made to employee medical care programs by the ten most populated California counties. Charter Sections 8.423, 8.428(a).

Prior to July of 1985, spouses of members or retired employees could only enroll in the system as dependents during the lifetime of the employee or retiree. Though all individual plans offered through the System made provision for continuing coverage of the surviving spouse after the death of the employee or retiree, the premiums had to be paid entirely by the surviving spouse. In 1984, the voters of San Francisco approved an amendment to the Charter (Proposition "E", effective July 1, 1985) which permitted surviving spouses to receive a subvention from the City under Section 8.428 after the death of the employee or retiree.

In San Francisco City Attorney Opinion No. 85-25, this office reviewed the purposes of Proposition "E" and concluded that the amendment was intended, inter alia, to provide benefits to surviving spouses of employees or retirees who had died prior to its adoption. This opinion did not, however, distinguish between surviving spouses who had at one time been enrolled in the Health Service System as a dependent of an employee or retiree and those surviving spouses who had never been enrolled in the program at any time.

By your memorandum of May 23, 1986, you have requested clarification as to whether Section 8.428 is intended to allow surviving spouses who were not "in the system" prior to the death of their spouse -employee or -retiree to receive a subvention from the City and County. More specifically, the question presented is whether this subvention should be available to all surviving spouses or only to those surviving spouses who were enrolled in the Health Service System as dependents before the death of the employee or retiree.

ANALYSIS

For the purpose of this discussion, it is useful to distinguish between two situations in which an employee's spouse would not be enrolled as a dependent in the Health Service System. In the first category are the surviving spouses who never enrolled as a dependent even though their spouse -employee or -retiree was a member in the system. This category includes any person who could have elected to enroll as a dependent of an employee but chose not to do so. The second category includes

surviving spouses who could not enroll as dependents because their spouse -employee or -retiree was exempt from membership in the system under the provisions of Section 8.420 of the Charter. Each category is discussed separately below.

Surviving Spouses of Members and Former Members

In 1984, surviving spouses were added to the Health Service System by including them in the definition of "a retired person." As already mentioned, under Section 8.428 of the Charter the City and County pays a subvention on behalf of "its members and retired persons." By adding surviving spouses to the definition of "a retired person", Proposition "E" enabled surviving spouses to receive the same subvention paid by the City and County on behalf of active or retired employees. The amended Charter section now reads:

> A retired person as used in this section means a former member of the health service system retired under the San Francisco City and County Employees' Retirement System, and the surviving spouse of an active employee and the surviving spouse of a retired employee, provided that the surviving spouse and the active or retired employee have been married for a period of at least one year prior to the death of the active or retired employee. 1/ [Emphasis added.]

A surviving spouse under this section becomes entitled to a subvention in one of two ways: (1) by surviving an active employee; or, (2) by surviving a retired employee. The Charter does not distinguish surviving spouses who were formerly enrolled in the system as dependents from those who were not. The Charter clearly states that to qualify for benefits the spouse need only survive his or her active or retired employee-spouse. Since the Charter is not ambiguous here, it must be given its plain meaning. California Teachers Association v. San Diego Community College Dist. (1981) 28 Cal.3d 692; Squire v. City and County of

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1/ For the purposes of this discussion, it will be assumed throughout that the surviving spouse and the employee or retiree had been married for at least one year.

San Francisco (1970) 12 Cal.App.3d 974. Therefore, surviving spouses are entitled to benefits even though they were never previously enrolled in the Health Service System as a dependent.

Surviving Spouses of Exempt Employees and Retirees

The critical question, however, relates to the second category of surviving spouses: the surviving spouse who was never enrolled in the system as a dependent because his or her spouse was exempt from membership. It is unclear from the language of the Charter whether a surviving spouse of an active or retired employee can receive the subvention even if the employee or retiree was never entitled to it. Because the Charter has different requirements for surviving spouses of retired employees than it does for surviving spouses of active employees, the two categories are discussed separately in the following analysis.

We conclude that the surviving spouse of the retired employee who was exempt during his entire time of service with the City is not entitled to surviving spouse benefits. A retired employee who was exempt during his entire time of service with the City is not entitled to become a member of the Health Service System after his retirement. After his death, his spouse has no greater right to enroll than he did.

The surviving spouse of the exempt employee who was still working for the City and County at the time of his death is in a different situation. Though that employee was exempt at the time of his death, he had a right to become a member of the Health Service System voluntarily. Since the Charter gives the same rights to surviving spouses as the employees themselves enjoyed, the surviving spouse of a City employee in active service at the time of his death is entitled to participate in the Health Service System.

Surviving Spouses of Exempt Retired Employees

As already mentioned, Charter Section 8.428 provides a health service subvention for "retired persons" and for "the surviving spouse of a retired employee [emphasis added]." The use of the two terms "retired employee" and "retired persons" raises the question whether any difference was intended. Under Section 8.428, "retired person" means a person who was both a "former member" of the Health Service System and retired under

the Retirement System. The Charter does not define a "retired employee". If the voters intended the term "retired employee" to include the surviving spouse of any employee, regardless of whether that employee was also a "former member" of the Health Service System, then surviving spouses of retirees would be entitled to a subvention from the City and County even under circumstances where the retiree himself or herself would not have been entitled.

But Charter Section 8.428(c) further provides:

> Monthly contributions required from retired persons and the surviving spouses of active employees and retired persons participating in the system shall be equal to the monthly contributions required from members in the system . . . [Emphasis added.]

This subdivision of the Charter reverts to the defined term "retired person." The use of this term interchangeably with the term "retired employee" supports the conclusion that no difference in meaning was intended.

Application of accepted rules of statutory construction also supports this conclusion. The provisions of the Charter must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers. DeYoung v. City of San Diego, (1983) 147 Cal.App.3d 11; United Business Comm. v. City of San Diego, (1979) 91 Cal.App.3d 156; City of Costa Mesa v. McKenzie, (1973) 30 Cal.App.3d 763. In construing the intent of the people in enacting Charter provisions, we may look to the voter information pamphlet and the summary and arguments contained therein. See Amador Valley Joint Union High School District v. State Board of Equalization (1978) 22 Cal.3d 208.

The voter pamphlet which presented Proposition "E" to the electorate in 1984 posed the question as follows:

> Shall the City subsidize the surviving spouse of active [or] retired employees on the same basis that the City subsidizes the active or retired employees in the health service system? [Emphasis added.]

The "same basis" language conveys the intent of the voters that surviving spouses would have a right to the subvention benefit only when the spouse -employee or -retiree was so entitled. The right of the surviving spouse to enroll in the Health Service System and to receive a subvention from the City and County is therefore derivative of the right of the retiree to the benefit. This rule means that if a retired employee was not entitled to benefits because he or she was not a "former member" of the Health Service System, then that employee's surviving spouse would also not be entitled to those benefits. In other words, neither retired employees who were exempt from membership in the Health Service System under the provisions of Section 8.428 nor their surviving spouses would be eligible to receive the subvention. This construction avoids the unreasonable result of giving the surviving spouse of a retired employee benefits to which the retired employee was not entitled.

Surviving Spouses of Exempt Active Employees

The Charter also provides for the subvention of the "surviving spouse of a[n] active employee." Charter Section 8.428. There is no ambiguity in the Charter regarding the term "active employee" similar to that for "retired employee." The term "active employee" is consistently used throughout Section 8.428. Its meaning is also clear on its face. The term means any employee, regardless of whether the employee was exempt from membership in the Health Service System. Because it is not ambiguous, the provision must be given its plain meaning. California Teachers Association v. San Diego Community College Dist. (1981) 28 Cal.3d 692; Squire v. City and County of San Francisco (1970) 12 Cal.App.3d 974. The plain meaning of the provision is that the surviving spouse of any active employee is entitled to enroll in the Health Service System and to receive a subvention from the City and County. Had the voters intended that only the surviving spouses of non-exempt active employees should receive subvention, the term "member" could have been used instead of "active employee." Use of the term cannot be presumed to be merely surplusage. California Manufacturer's Association v. Public Utilities Commission (1979) 24 Cal.3d 836. It must be presumed that the use of a broader term was intended and that it is to serve a particular purpose.

This construction is in accord with the intent of the 1984 amendment that the surviving spouse enjoy the same rights as the employee. Although the employee was exempt at the time of his death, he had a right to become a member of the Health Service

System voluntarily. Therefore, the surviving spouse enjoys the same right.

QUESTION NO. 2: INTRODUCTION

A substantial number of individuals who became surviving spouses prior to 1972 were excluded from continued membership in the Health Service System because then valid rules prevented spouses from continuing in the system after the death of the employee. These rules were valid because the Charter at that time did not entitle surviving spouses to participate in the Health Service System. The subsequent amendment of the Charter permitted surviving spouses to participate in the Health Service System. This change has given rise to inquiries from individuals who were excluded under the old rules as to whether they are now entitled to reenter the system and receive subvention from the City and County.

The current Rules and Regulations of the Health Service System provide that once a participant leaves the system he or she may not reenter it. Rule No. 3(g) of Part II(A) states:

> Coverage of a retired or resigned member must be continuous and if lapsed may not be reinstated without Board approval.

Because surviving spouses are "retired persons" as defined by Section 8.428 of the Charter, this rule operates to prevent many of these individuals from being reinstated.

The Health Service Board is charged with the responsibility of hearing appeals from its members. Under Charter Section 3.681, the Board is authorized to "make rules for the transaction of its business." Under this authority, the Board has promulgated rules for the submission of appeals by members of the system having grievances. Some of the surviving spouses in question have sought review by the Health Service System under these appeals procedures. You have asked by your letter of June 4, 1985 whether these surviving spouses are entitled to be readmitted to the system and whether the Board should hear their appeals.

ANALYSIS

In Question No. 1 of this opinion and in San Francisco City Attorney Opinion No. 85-25, this office has advised that the amendment to the Charter which provided health care benefits to surviving spouses was to have "retroactive" effect, applying to all surviving spouses. This advice includes those who were forced to leave the system under the old rules and regulations. These individuals have a right under the Charter to participate in the Health Service System and to receive a subvention from the City and County.

As mentioned, the Charter empowers the Health Service Board to "make rules and regulations for the transaction of its business." Charter Section 3.681(e). This grant of power includes the authority to promulgate rules which are consistent with the rights of members and beneficiaries created by the Charter. When the rules prohibiting surviving dependents from remaining in the system were promulgated, they constituted a permissible interpretation of the Charter prior to the 1984 amendment. Since the Charter has been amended, however, those rules conflict with the policy of the Charter amendment. Even though the surviving spouses could be excluded from the benefits of the system prior to the amendment, under the new amendment surviving spouses have a right to a subvention and cannot be excluded.

The continued application of Rule 3(g) would prevent some surviving spouses from receiving benefits to which the Charter amendment entitles them. Rule 3(g) is intended to prevent complications in the administration of the system caused by repeated withdrawals and reinstatements of retirees and resignees. While such a regulation may fall within the Board's authority to make rules "for the transaction of its business," it

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conflicts with the rights of these surviving spouses who await appeal. The Board therefore must make provision for these surviving spouses who are otherwise qualified to participate in the Health Service System.

Respectfully submitted,

LOUISE H. RENNE
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TERRY J. MOLLICA
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APPROVED:

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City Attorney

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CITY AND COUNTY OF SAN FRANCISCO

LOUISE H. RENNE
CITY ATTORNEY
CITY HALL

June 1, 1987

OPINION NO. 87-11

SUBJECT: War Memorial Board of Trustees' Hearing on Charges of Discrimination Against the American Legion War Memorial Commission Filed by Alexander Hamilton Post 448 of the American Legion

REQUESTED BY: CLAUDE M. JARMAN, JR.
President, War Memorial Board of Trustees

PREPARED BY: BURK E. DELVENTHAL
KATHRYN A. PENNYPACKER
MARA E. ROSALES
Deputy City Attorneys

QUESTIONS PRESENTED

1. May the War Memorial Board of Trustees order that the American Legion War Memorial Commission be dismantled and no longer act as agent for the San Francisco Posts of the American Legion with respect to use of space in the War Memorial Veterans Building dedicated to the Posts by the Board?

2. May the War Memorial Board of Trustees order an inventory of all space presently available to veterans in the War Memorial Veterans Building?

3. May the War Memorial Board of Trustees order the American Legion War Memorial Commission to account for all revenues collected and expended for the past two years?

4. May the War Memorial Board of Trustees order that projects of the American Legion War Memorial Commission be approved by the Board?

5. May the War Memorial Board of Trustees order that the American Legion War Memorial Commission pay attorneys' fees to Alexander Hamilton Post 448 of the American Legion with respect to the complaint of discrimination heard by the Board's Special Ad Hoc Committee?

6. Does the Human Rights Commission have jurisdiction over a complaint of discrimination against the agent of a beneficiary of the 1921 War Memorial Trust Agreement?

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CONCLUSIONS

1. The War Memorial Board of Trustees may not order that the American Legion War Memorial Commission be dismantled. However, the Board may require the Commission to cease unlawful discrimination, if any be found, in the allocation of space dedicated by the Board for the use of the San Francisco Posts of the American Legion.

2. Yes.

3. Yes, provided that the accounting is limited to City funds.

4. No. However, if the Board determines that the American Legion War Memorial Commission is engaging in a project in connection with the War Memorial which is inconsistent with the Trust purposes, the Board may order the Commission to cease the project.

5. No.

6. No.

GENERAL BACKGROUND

You have informed us that a Special Ad Hoc Committee of the War Memorial Board of Trustees has conducted several hearings on a complaint of discrimination against the American Legion War Memorial Commission. This complaint, which was filed with the Human Rights Commission on behalf of Alexander Hamilton Post 448 of the American Legion, alleged discrimination on the basis of sexual orientation and race.

You have requested our advice with respect to the relief that the Board of Trustees may afford as a result of the Special Ad Hoc Committee hearings. We conclude that the Board may grant certain relief sought by the Alexander Hamilton Post if the facts adduced at the hearings support the remedies. You may also grant certain relief as a function of your duties and obligations as trustees of the San Francisco War Memorial.

In responding to your letter, we have made a careful review of the 1921 Trust Agreement, Charter provisions and various other relevant laws and resolutions creating the War Memorial and establishing your duties as trustees of that memorial. We begin with a review of certain key aspects of the history of the War Memorial. This review is essential for the purpose of determining the scope of your authority to afford the relief requested by the Alexander Hamilton Post.

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On August 19, 1921, the Regents of the University of California and certain private citizens named as "Trustees" entered into a trust agreement for the construction and maintenance of a San Francisco war memorial. The Trust Agreement was intended to honor the memory of the soldiers, sailors, marines and war workers who had contributed to winning World War I (Trust, first "Whereas" clause). The War Memorial was to consist of

> ". . . a Memorial Court enclosed or partially enclosed by a building or group of buildings, viz.: a theatre or auditorium building, a building to be used by the San Francisco Art Association, also called the San Francisco Institute of Art (and sometimes known as the Mark Hopkins Institute of Art) and a building to be used by the San Francisco Posts of the American Legion, an organization composed of veterans of the late World War, all for the purpose of commemorating in perpetuity the victory achieved by the United States of America and it is contemplated that said group of buildings, or a part thereof, will be used for educational purposes in connection with the University Work and University Extension Work of the University of California . . . ." (Trust, second "Whereas" clause, emphasis added).

The initial trustees were persons who specifically represented the San Francisco Art Association, the Musical Association of San Francisco and the San Francisco Posts of the American Legion (Posts). In the event of a vacancy occuring in this number, the remaining trustees were to "appoint a successor from the particular organization from which the vacancy occurs . . ." (Trust, par. 1). Thus the Trust insured that the interests of the three beneficiaries[1/] would always be represented. (See also Article XIV-D, 1928 Charter Amendment and Charter Section 3.610.)

The Trust clearly contemplated that three buildings would be built to house the beneficiaries - the Art Association, the Musical Association and the Posts (Trust, second "Whereas" clause; par. 6, 7, 9 and 10). The Trustees were to equip the

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[1/] The San Francisco Posts of the American Legion constitute a single, collective beneficiary under the Trust.

> "(2) The said building to be occupied by the San Francisco Posts of the American Legion shall be used by them as club and meeting-rooms and for executive offices and auditorium purposes.
>
> "(3) Should said San Francisco Posts of the American Legion or their successor by consolidation or merger cease to exist, then said building may be used by said Regents for any purpose the Regents may determine." (Trust, par. 10C)[2/]

The Trust required that the occupation of the respective buildings to be used by the Posts and the San Francisco Art Association be subject to certain covenants. (Trust, par. 9.) These beneficiaries were required, for example, to

> " . . . comply with all laws, rules, orders, ordinances and regulations, Federal, State, County and Municipal, or any of their departments, which shall impose any duty upon the occupants with respect to the premises, including health, police and fire regulations." (Trust, par. 9(c).)

In order to raise sufficient additional funds to complete the War Memorial, the voters of San Francisco approved a $4 million bond issue for the project in 1927. The ballot measure

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[2/] Under the heading, "General Provisions," the 1921 Trust Agreement also provides:

> "(3) In case the San Francisco Posts of the American Legion should cease to exist and there be no similar patriotic organization of like membership in existence at that time, the building to be erected for use by the San Francisco Posts of the American Legion shall hereafter be under the exclusive direction and control of the Regents."

By Trust Amendment of June 1928, the Regents were limited to using any unused portion of the Posts' building for "charitable or patriotic purposes."

described the project as follows:

> "The construction, completion and equipment of permanent buildings in or adjacent to the Civic Center in the City and County of San Francisco, to be used as a memorial hall for war veterans and for educational, recreational, entertainment and other municipal purposes and the purchase of all equipment and furnishings necessary for said building" (June 14, 1927 Ballot Propositions, p. 7, Ordinance No. 7516, Section 1, emphasis added).

The following year, the voters approved a Charter amendment creating a City War Memorial Board of Trustees. The amendment provided, in pertinent part:

> "Section 1. There shall be a Board of Trustees of the San Francisco War Memorial to be erected and maintained in the Civic Center in the City and County of San Francisco, which said Board shall be known as the "Board of Trustees of the War Memorial."
>
> Sec. 2. The Trustees of the War Memorial shall, under such ordinances as the Board of Supervisors may from time to time adopt, have charge of the construction, administration, management, superintendence and operation of the War Memorial to be constructed in the Civic Center, and of the grounds set aside therefor, and of all of its affairs.
>
> Sec. 3. The Trustees of said War Memorial shall consist of eleven members, who shall be appointed by the Mayor, subject to confirmation by the Board of Supervisors. The terms of said eleven members shall be for six years each; provided, that those first appointed shall so classify themselves by lot that the term of four of said Trustees shall expire on the 2nd day of January, 1931; four on the 2nd day of January, 1933, and three on the 2nd day of January, 1935. Thereafter appointments to said Board shall be for the full term of six years. Vacancies on said Board shall be filled by the Mayor, subject to confirmation by the Board of Supervisors, for the unexpired term becoming vacant. In making appointments to said Board, the Mayor shall give due consideration to veterans of all wars engaged

in by the United States, and to such other classes of persons who may have a special interest in the purpose for which said War Memorial is to be constructed and maintained. All persons appointed to said Board shall be residents of the City and County. The members of said Board shall serve without compensation.

Sec. 4. The said Board of Trustees shall have power:

(a) To receive, on behalf of the City and County, gifts, devises and bequests for any purpose connected with said War Memorial or incident thereto.

(b) To administer, execute and perform the terms and conditions and trusts of any gift, devise or bequest which may be accepted by the Board of Supervisors of San Francisco for the benefit of said War Memorial or incident thereto, and to act as trustee under any such trust when so authorized to do by said Board of Supervisors

. . . ." (Article XIV-D, added by amendment November 6, 1928, emphasis added)[1/]

[1/] The present Charter provision governing the War Memorial reads as follows:

"3.610 Board of Trustees; Composition, Functions, Powers and Duties.

The board of trustees of the San Francisco War Memorial shall, under ordinance, have charge of the construction, administration and operation of said war memorial and of the grounds set aside therefor. The board shall consist of 11 members appointed by the mayor, subject to confirmation by the board of supervisors. The terms of office of the incumbent trustees shall

Footnote [3/] continued on next page

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On November 10, 1930, the City's Board of Supervisors accepted the Regents' and Trustees' offer of all the property held under the 1921 Trust Agreement subject to the following conditions:

> "(a) The City and County of San Francisco accepts all cash, choses-in-action, and other property so assigned and transferred, upon the trusts, terms, and conditions set out in that certain agreement dated August 19, 1921, hereinabove in Section 1 hereof referred to, and all amendments thereto heretofore made, and said City and County agrees to perform or cause to be performed all the duties which by the terms of said agreement devolved upon the Regents of the University of California and/or Walter S. Martin, Charles Templeton Crocker, John D. McKee, E. S. Heller, Charles H. Kendrick, Frank F. Kilsby, Milton H. Esberg, Herbert Fleishhacker, William H. Crocker, and John S. Drum, and/or their successors, as trustees.
>
> (b) The title to all real property so conveyed to the City and County of San Francisco, in trust, shall vest in said City and County, but said real property shall be used only as a site for the War Memorial referred to in that certain agreement of August 19, 1921.

Footnote 1/ continued

> expire as heretofore classified by lot, as follows: the terms of four of said trustees shall expire on the second day of January, 1933; three on the second day of January, 1935; and four on the second day of January, 1937. Thereafter appointments to said board shall be for the term of six years. Vacancies on said board shall be filled by the mayor, subject to confirmation by the board of supervisors, for the unexpired term becoming vacant. In making appointments to said board, the mayor shall give due consideration to veterans of all wars in which the United States may have engaged, and to such other classes of persons who may have a special interest in the purpose for which said war memorial is to be constructed and maintained. The members of said board shall serve without compensation." (Emphasis added.)

(c) All cash, choses-in-action, and all other personal property of every kind and sort so assigned and transferred to the said City and County, together with all income and interest therefrom, shall be set aside for the use and benefit of the "Board of Trustees of the War Memorial", which said Board was created by an amendment to the Charter of the City and County of San Francisco, designated as Article XIV-d of said Charter.

(d) The Supervisors of the City and County of San Francisco hereby authorize the said Board of Trustees of the War Memorial to administer, execute, and perform the terms and conditions of the trust set forth in that certain agreement of August 19, 1921, hereinabove in Section 1 hereof referred to, and all amendments thereto heretofore made.

(e) The cash, choses-in-action, and personal property of every kind and sort, so assigned and transferred, in trust, to the City and County of San Francisco, together with all income and interest therefrom, and such sums of money as may be added thereto, shall be used by the said "Board of Trustees of the War Memorial" only in conjunction with the proceeds from the War Memorial bond issue, and only for the purpose of constructing a War Memorial in the City and County of San Francisco as provided in that certain agreement dated August 19, 1921, hereinabove in Section 1 hereof referred to and all amendments thereto heretofore made." (Emphasis added).

The War Memorial was completed in the fall of 1932. In November of that year, anticipating occupation of the War Memorial Veterans Building, the City War Memorial Board of Trustees invited all American Legion Posts in San Francisco to name representatives to meet with the Board regarding allocation of space in the building. (Minutes of the War Memorial Board of Trustees [Minutes], November 17, 1932.) The 25 American Legion Posts which responded authorized the San Francisco County Council of the American Legion Department of California to act for them in connection with the occupancy of the Veterans Building. (Minutes, December 8, 1932.)

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The American Legion War Memorial Commission (ALWMC) is a standing committee of the County Council, chaired by the County Council Commander. It has:

> ". . . . the power and authority granted to the San Francisco Posts of the American Legion concerning the Veterans' Building of the San Francisco War Memorial, and also [has] full power and authority to adopt, make, enforce, amend, alter and repeal rules and regulations therefor or in connection therewith and/or for its own government and procedure as a body." (By-laws of the San Francisco County Council, the American Legion, Department of California, dated May 1951, Article VIII, par. 11(c).)

The ALWMC has represented the San Francisco Posts of the American Legion with respect to the War Memorial Veterans Building for over fifty years to the present time.

We conclude from our review of the history of the War Memorial that complete control of and ultimate responsibility for the War Memorial is vested in its Board of Trustees, subject only to the provisions of the 1921 Trust Agreement. (See Article XIV-D, 1928 Charter Amendment; Board of Supervisors' Resolution, November 10, 1930; Charter Section 3.610, City Attorney Opinions No. 621 (November 14, 1932), No. 651 (January 12, 1933).) Complete control of the War Memorial necessarily includes authority over the allocation and reallocation of space among the three beneficiaries of the Trust for all the purposes of the War Memorial.

We further conclude that the Board of Trustees has a nondelegable responsibility to assure equitable sharing of space in the War Memorial in light of the purposes of the Trust. In this regard, no particular beneficiary is entitled to greater consideration than the other two beneficiaries with respect to its needs for space in the War Memorial complex. Indeed, the Trust itself contemplated that space requirements might change over the years. (See Trust, par. 10A, 10C(3), General Provisions 3 and 4.)

We also note that in addition to duties and responsibilities imposed upon the War Memorial Board of Trustees through the Charter and by the Board of Supervisors, the Board has duties imposed upon it as trustees of a charitable trust. In this regard, "[t]he duties of a trustee of a charitable trust

resemble those of a trustee of a private trust (Rest. 2d Trusts, §379)." Gbur v. Cohen (1979) 93 Cal.App.3d 296, 301 [55 Cal.Rptr. 507]. Thus the Board has the following duties, among others:

(1) To administer the trust solely in the interest of effectuating the charitable purposes (Civil Code §2258; Rest. 2d Trusts, §169);

(2) To exercise the highest good faith toward the beneficiaries (Civil Code Section §2228; Rest.2d Trusts, §170); and

(3) To exercise at least ordinary care and diligence in the execution of the trust (Civil Code §2259; Rest.2d Trusts, §174).

ANALYSIS

QUESTION NO. 1

Paragraph 10C of the Trust Agreement clearly establishes a trust in favor of the "San Francisco Posts of the American Legion." The language itself contemplates a group of individual posts as a collective beneficiary. In 1932, however, twenty-five posts authorized the San Francisco County Council of the American Legion Department of California to act for them in connection with the occupancy of the Veterans Building. (Board of Trustees' Minutes, November 17 and December 8, 1932.) The City Attorney advised that this was lawful, stating specifically:

> "[The County Council] constitutes a banding together for united action. In the absence of direct authority from the San Francisco Posts, it is my opinion that the County Council cannot answer for the various posts in this city, but I believe that the American Legion posts, individually, may, with propriety, authorize the County Council to act for them in connection with all War Memorial matters." (City Attorney Opinion No. 621, November 14, 1932, p. 2.)

The ALWMC, which is a committee of the San Francisco County Council of the American Legion, is a body separate and distinct from the Board of Trustees. It is an organization that is constituted, empowered, and supervised by one beneficiary under

the Trust -- the San Francisco Posts of the American Legion. The Posts have given the ALWMC the power and authority to act on their behalf regarding such rights as they possess under the Trust to occupy and use space in the Veterans Building. (By-Laws of the San Francisco County Council, the American Legion, Department of California (May 1951), Article VIII, paragraphs 11(c).)

The prerogative to appoint an agent to act on their behalf reposes exclusively in the San Francisco Posts of the American Legion. The Board of Trustees is without authority to control the decision of the Posts to constitute, empower or dismantle the ALWMC or the County Council. Neither the Trust nor the Charter authorizes the Board to control the inner workings of one of the designated beneficiaries or its agent.

The Board does have a duty, however, to insure that the three beneficiaries of the Trust enjoy the Trust's benefits. Should the Posts collectively delegate to an agent responsibility to act on their behalf, which agent in turn unlawfully discriminates in the allocation of space dedicated by the Board for the Posts, the Board is then responsible for taking remedial steps. Hence, if the Board finds that the ALWMC has unlawfully discriminated against any post in the allocation of space, the Board should order the ALWMC to appropriately revise the allocation. If the ALWMC then fails to comply, the Board should warn both the Posts and their agent that it will have to explore further remedial measures in order to effectuate the Trust with respect to the Posts.

Whether the ALWMC has discriminated in the allocation of space dedicated by the Board for the benefit of the Posts is a question of fact. If the Special Ad Hoc Committee does make such findings of fact, the Board should explore the available avenues of remedial action.

QUESTION NO. 2

Under its broad, continuous mandate to administer and operate the War Memorial, subject to the 1921 Trust Agreement, the Board has the authority at any time to order an inventory of all the space in the War Memorial complex. The Board could order, for example, an inventory of all the space in the Veterans Building presently being devoted to the uses of the Trust beneficiaries (the Museum and the Posts) and to the uses of any veterans organizations which have been authorized to occupy space under paragraph 10C of the Trust.

This broad mandate empowers the Board to allocate and reallocate space among the three beneficiaries of the Trust. There is no set amount of space in the War Memorial to which any beneficiary is entitled as a matter of right. (See City Attorney Opinions No. 651 (January 12, 1933), No. 75-127 (December 12, 1975), No. 85-3, (March 4, 1985).) The decision how best to allocate trust assets among the beneficiaries rests in the sound discretion of the Board of Trustees. The Board has a continuing duty to consider the needs of all three beneficiaries and to make space allocations that best promote the purposes of the Trust.

Although the Trust contemplated the construction of a separate building for each beneficiary, only two buildings were actually constructed. The practical result has been that two of the beneficiaries have continuously shared one of the buildings for more than fifty years. While the Trust did not specifically provide for any tenancy arrangements in the event that fewer than three buildings were made available, the Trust appears to give equal deference to each beneficiary's need for space to carry out the purposes set forth in that agreement. Reallocation of space by the Board may therefore be necessary from time to time in order to fulfill the several purposes of the Trust, and, indeed, may be required in order for the Board to carry out its duties to properly administer the Trust. (See Civil Code §§ 2228, 2258, 2259.)

Thus any inventory of space "available" to veterans in the War Memorial necessarily begins with an inventory of space which is presently being utilized by the Posts. The inventory must also include any space allocated by the Posts to other veterans' groups under paragraph 10C of the Trust. (See City Attorney Opinion No. 621, (November 14, 1932).) Again, however, the Board is responsible for the allocation and, when necessary, reallocation of space to fulfill the trust purposes.[4/] If the Posts believe more space needs to be made available to them, they must address this need to the Board. The Board must ultimately assess any such need in light of the space requirements of the Museum, the other beneficiary located in the building.

[4/] The Trust directed that the building to be occupied by the San Francisco American Legion Posts be used by them for club and meeting rooms, executive offices and auditorium purposes (Trust, par. 8 and 10C(2)).

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QUESTION NO. 3

The Board of Trustees may require the Posts, through their agent, the ALWMC, to account for City funds in the ALWMC's possession. Therefore, the Board could order such an accounting for the previous two years. To the extent that the ALWMC collects and expends non-City funds, however, the Board may not order an accounting. The Trust does not require the Posts to account to the trustees for revenues derived from the use of space allocated to them by the Board.

QUESTION NO. 4

The Board's duty is to administer and operate the War Memorial, subject only to the terms of the Trust. The ALWMC, as the representative of one beneficiary of the Trust, has a duty to abide by the conditions and covenants set forth in the Trust. So long as the ALWMC's activities and projects comply with these covenants and so long as such undertakings are reasonably related to the stated function of space for use of the Posts (see Trust, par. 8, 10C(2)), the Board has no authority to require that the ALWMC secure prior approval of its projects in connection with the Veterans Building.

On the other hand, if the Board discovers that the ALWMC is engaged in or proposes to engage in a project in connection with the War Memorial which is inconsistent with the Trust purposes, the Board has the authority to order the ALWMC to cease the project. Indeed, the Trustees must take remedial action under such circumstances since they owe a duty to administer the Trust solely in the interest of effectuating its purposes and such an activity is not within the scope of the Trust.

QUESTION NO. 5

Neither the Charter nor the Trust Agreement authorizes the Board of Trustees to award attorneys' fees.[5/] In the absence of any express authorization, the Board may not order an award of such fees. We observe that the Trust states that resolution of disputes between the Regents and the Trustees shall be submitted

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[5/] Awards of attorneys' fees are generally made by courts pursuant to statute or the agreement of the parties (Code of Civil Procedure §1021 et seq.).

to a specific arbitration panel before a suit may be instituted, but no mention is made of attorneys' fees. (General Provisions, par. 9.)

QUESTION NO. 6

The answer to this question turns on whether a trust or the acts of a beneficiary of a trust are subject to the provisions of Administrative Code Chapters 12B and 12C. We examine each ordinance separately.

Chapter 12B applies to discriminatory employment practices by City contractors during the performance of a City contract. (Adm. Code Section 12B.5.) The definition of "contract" is as follows:

> "'Contract' shall mean and include an agreement to provide labor, materials, supplies or services in the performance of a contract, franchise, concession or lease granted, let or awarded for and on behalf of the City and County of San Francisco." (Adm. Code Sec. 12B.1(a).)

In a closely analogous context, this office has advised that an identical definition of the term "contract" found in Administrative Code Chapter 12D contemplates a relationship under which the City tenders consideration and in exchange procures services, labor, supplies and/or materials it desires for its operational needs from the private sector. (City Attorney Letter Opinion, dated 2/18/87 to Moira Shek So; see also City Attorney Opinion No. 84-29, p. 3.) Since Chapter 12B uses the same language, we conclude the term "contract" in Chapters 12B and 12D has the same meaning.

The Trust is not an agreement or arrangement by the City to procure services, labor, or materials from the beneficiaries. Moreover, the City has not granted or awarded the beneficiaries of the trust the privilege of using property owned by the City. (See definitions of "concession" and "franchise" in Adm. Code Section 12B.1(a).) The Trust beneficiaries are entitled to use City property by virtue of the Trust. The City, by its acceptance of the Trust by the Board of Supervisor's Resolution of November 10, 1930, owes a duty through the Board to the three beneficiaries, including the Posts, to administer the Trust and to secure for the beneficiaries their rights under the Trust. (Trust, par. 9.) Accordingly, Chapter 12B is inapplicable in this case.

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Administrative Code Chapter 12C, like 12B, concerns agreements involving the use of City property by lessees, concessionaires, franchisees and permittees. In particular, Chapter 12C covers all " . . . contracts, franchises, leases, concessions or other agreements . . ." involving the lease, rental or other use of real property and improvements thereon of the City and County of San Francisco.

Section 12.C.2 defines a contract to " . . . mean and include an agreement to operate from or make use of real property of the City and County of San Francisco in the operation of a business, social or other establishment or organization." It is evident that neither the relationship between the City and County of San Francisco, through the Board, and the Posts nor the relationship between the City and the prior trustees and Regents of the University of California constitutes a contract within the meaning of Section 12.C.2.

Section 12.C.2 defines a lease as a contract by which the City grants a person temporary possession and use of property for compensation. As described in this opinion, the tenure of the Posts in the War Memorial facilities does not emanate from a lease.

Section 12.C.2 defines a concession as, " . . . a grant of land or other property by or behalf of the City and County of San Francisco to a person for the purpose or use specified in said grant." The tenure of the Posts in the War Memorial facilities does not emanate from a grant of land or property from the City and County of San Francisco. Rather, the City retains title to the property and holds it in trust for the benefit of the three beneficiaries. The Board administers that trust on behalf of the City. In exercising its power to allocate space under the terms of the Trust, the Board is not granting any property by or on behalf of the City and County of San Francisco.

Section 12.C.2 defines the term "franchise" as a " . . . grant of land or other property by or on behalf of the City and County of San Francisco for the purpose or use specified in said grant". As explained above, neither the City nor the Board has made a grant of property to the Posts.

Finally, in its general statement of policy in Section 12.C.1, the Administrative Code refers to, "all contracts, franchises, leases, concessions or <u>other agreements</u>" (emphasis added). It is apparent that the drafters of Section 12.C contemplated consensual relationships. The duties owed by the

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Board to the beneficiaries emanate from the Trust rather than from any consensual relationships. Hence, Chapter 12C does not confer authority upon the Human Rights Commission to investigate, mediate or resolve the questions at issue.

In summary, under Administrative Code Chapters 12B and 12C, the Human Rights Commission has no jurisdiction to mediate, investigate or adjudicate the charge of discrimination against the ALWMC.

Respectfully submitted,

LOUISE H. RENNE
City Attorney

By _____
BURK E. DELVENTHAL
Deputy City Attorney

By _____
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APPROVED:

_____
LOUISE H. RENNE
City Attorney

4187F

Louise H. Renne,
City Attorney

July 2, 1987

OPINION NO. 87-12

SUBJECT: Berth Fees at the San Francisco Yacht Harbor

REQUESTED BY: John L. Taylor
Clerk, Board of Supervisors

PREPARED BY: Burk E. Delventhal
Deputy City Attorney

Rose Miksovsky
Deputy City Attorney

QUESTION PRESENTED

Does San Francisco's Recreation and Park Commission have the authority to set a differential berth fee structure based upon residency in San Francisco for berthing boats at the San Francisco Yacht Harbor?

CONCLUSION

No.

INTRODUCTION

On behalf of Supervisor Hongisto, you request this office to advise you whether San Francisco's Recreation and Park Commission ("Commission") has the authority to charge San Francisco residents a lower berth fee than nonresidents for berthing boats at the San Francisco Yacht Harbor (Harbor). The San Francisco Yacht Harbor is located on tidelands. The State of California granted San Francisco title to these lands pursuant to granting statute Chapter 437, Statutes of 1935.[1] The property is now administered under the Commission's jurisdiction.

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[1] Chapter 437 of the Statutes of 1935 states in relevant part:

> All of the above described real property hereby granted shall be forever held by said City and County of San Francisco and by its successors in trust for the uses and purposes and upon the express conditions following, to wit: said real property shall be used solely for aquatic, recreational, boulevard, park and playground purposes.

This statute was amended twice, once to extend the period of time for which an assignment or lease could be made to the period of twenty (20) years (Statutes of 1963, Chapter 1298) and a second time to extend it to forty (40) years (Statutes of 1970, Chapter 670).

Your inquiry raises the question whether there are any limitations on the Commission's authority to set a differential berth fee structure based upon residency in San Francisco. The response requires an analysis of the tideland trust doctrine which imposes specific limitations and conditions upon the use of tidelands.

ANALYSIS

Under the tideland trust doctrine "the public owns the right to tidelands for purposes such as commerce, navigation, fishing." City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 521. This doctrine "originated in Roman law, which held the public's right to such lands to be illimitable and unrestrainable" and incapable of individual exclusive appropriation. Ibid. The English common law developed similar limitations, and after the American revolution, the people of each place acquired "absolute right to all . . . navigable waters, and the soils under them, for their own common use. . . ." [Citation omitted.] Ibid.

San Francisco Yacht Harbor is located on tidelands, and therefore, is impressed with a public trust. See, City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 521. Title to these tidelands devolved to the State of California in 1850. Ibid. As trustee for the public, the State can only use tidelands for the benefit of all the people of the State and for trust purposes. Ibid. The public trust purposes were traditionally defined as fishing, navigation and commerce. Marks v. Whitney (1971) 6 Cal.3d 251, 259-260. However, courts now recognize that the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state as ecological units for scientific study, for environmental purposes, and as open space. Ibid.

San Francisco obtained the lands upon which the Harbor is located through grants from the State of California. The effect of these legislative grants is the creation of a trust in which the grantee (San Francisco) becomes trustee of the land and the State is the settlor-beneficiary. State Lands Commission, A Report on the Use, Development and Administration of Granted Tidelands and Submerged Lands, p. 43 (1976).

These lands must be used for activities which promote statewide, rather than purely local, purposes. See, Mallon v. City of Long Beach (1955) 44 Cal. 2d 199, 209. This means that all developments, leases, revenues, etc., relating to granted tide and submerged lands must contribute to the benefit of the

State's population as a whole and not merely to the local population. Id. at 211. Furthermore, all revenues generated as a result of San Francisco's administration of the lands must be used to further trust purposes and benefit the people of the State, rather than merely local concerns. See, City of Long Beach v. Morse (1947) 31 Cal.2d 254, 258.

The State Lands Commission is the state agency which is charged with the administration of the granted lands program. Public Resources Code Section 6216. The State Lands Commission adopts the principle that all activities, developments, and leases, relating to the granted tidelands and submerged lands must contribute to the benefit of the people of the State of California and not merely to the local population. State Lands Commission, A Report on the Use, Development, and Administration of Granted Tidelands and Submerged Lands, p. 44 (1976). The State Lands Commission holds that "local trustees who orient their use of granted lands toward purely local interests are in violation of the public trust they have chosen to administer." Ibid. It follows that all revenues generated from the administration of these lands must be used to further trust purposes and benefit the people of the State, not just local concerns. Id., at 44 and 45.

Finally, the State Lands Commission states that while each local trustee has the authority to establish the rates to be paid by lessees, "the trustees must, at the minimum, establish lease and permit rates which are reasonably consistent with those charged for land of similar location and value or for uses of similar nature." Id. at 45. In addition "any failure of a trustee to maximize such revenue may be considered a violation of Section 25, Article 13 of the State Constitution (prohibition of gift of public funds, property, etc., to private individuals, corporations, etc.)." Ibid.

A lower fee for berths at the Harbor based upon residency in San Francisco clearly favors local over statewide interests. To the extent that this dual fee structure favors residents over nonresidents, the use of the tidelands promotes local over statewide purposes. The tideland public trust doctrine prohibits such favored treatment. See, Mallon at 211.

Moreover, if revenues generated from this dual fee structure are utilized to enable San Francisco residents to pay a lower fee, this violates the public trust requirement that all revenues be used to benefit the people of the State, rather than local concerns. Finally, a disparate fee structure based upon residency would manifest San Francisco's failure to maximize the

revenues that could be generated. Hence, such a fee structure would be a violation of Section 25, Article 13 of the State Constitution which prohibits a gift of public funds.

We conclude that the tideland public trust doctrine prohibits the Commission from developing a fee structure for the use of tideland property that gives preferential treatment to local residents. Therefore, the Commission does not have the authority to charge San Francisco residents a lesser berth fee than nonresidents for berthing boats at the Harbor.

Respectfully submitted,

LOUISE RENNE
City Attorney

BURK E. DELVENTHAL
Deputy City Attorney

ROSE MIKSOVSKY
Deputy City Attorney

Approved:

LOUISE H. RENNE
City Attorney

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Louise H. Renne,
City Attorney

July 2, 1987

OPINION NO. 87-13

SUBJECT: Sanitation Requirements for Vending Machines

REQUESTED BY: PAUL SCHWABACHER, DIRECTOR
Bureau of Environmental
Health Services

PREPARED BY: ROBERT S. MAERZ
Deputy City Attorney

QUESTIONS PRESENTED

1. Has the State of California preempted San Francisco Health Code section 467 with respect to vending machines which dispense bulk coffee and soft drinks by enactment of section 27541 of the California State Health and Safety Code?

2. Must the San Francisco Health Department place under permit those vending machines as defined by the state which were previously exempted by local ordinance?

CONCLUSIONS

1. Yes.

2. Yes.

ANALYSIS

1. You inquired of this office whether Health and Safety Code section 27541 preempts San Francisco Health Code section 467 with respect to the regulation of vending machines. If so, you have inquired whether the Department of Health must place under permit those vending machines which were previously exempted by local ordinance. The questions arose because current San Francisco Health Code provisions concerning the regulation of vending machines are in conflict with the California Uniform Retail Food Facilities Law (CURFFL).[1]

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[1] CURFFL (California Health and Safety Code sections 27500 et seq.) replaced the California Restaurant Act (former California Health and Safety Code sections 28520 et seq.) in 1984.

San Francisco Health Code section 467 subsection (a) defines "Vending Machine" as follows:

> (a) "Food vending machine" means any self-service device which, upon insertion of a coin, coins, or token, or by similar means, dispenses unit servings of food or beverage, either in bulk or in package, without the necessity of replenishing the device between each vending operation, that in operating has food product contact surfaces or dispenses foods of a perishable nature, including wrapped sandwiches or pastry goods, but not including devices dispensing peanuts, wrapped candy, gum, bottled beverage or ice exclusively.

Section 467 further specifies the procedure for obtaining a permit which is required prior to the use and operation of any vending machine.

California Health and Safety Code section 27541 defines "Vending Machine", as follows:

> "Vending machine" means any self-service device which, upon insertion of money or tokens, dispenses food without the necessity of replenishing the device between each vending operation. "Vending machine" does not include any such device dispensing exclusively peanuts, nuts, popcorn, ballgum, or hard candy; prepackaged candy, cookies, crackers, or similar snacks and beverages which are not potentially hazardous as defined in Section 27531, and prepackaged ice.

San Francisco Health Code section 467 is in conflict with Health and Safety Code section 27541 to the extent the latter section excludes from the definition of vending machine devices which dispense "nuts, popcorn . . . hard candy, . . . cookies, crackers or similar snacks and beverages which are not potentially hazardous as defined in section 27531. . . ."

Section 27531 defines "Potentially hazardous food" as " . . . food capable of supporting rapid and progressive growth of microorganisms that may cause food infections or food intoxications. 'Potentially hazardous food' does not include . . . foods that have a ph level of 4.6 or below, a water activity (Aw) value of 0.88 or less under standard conditions, or food products in hermetically sealed containers processed to prevent spoilage."

Whether beverages such as bulk coffee and soft drinks are "potentially hazardous foods" depends upon a factual determination of the beverage's ph level, water activity value and the ability of the beverage to support rapid and progressive growth of microorganisms that may cause food infections. Devices which dispense beverages which are not "potentially hazardous foods", as defined in section 27531, are not considered vending machines under the state definition. Health Code section 467, however, contains no equivalent exclusion for such devices and requires that vendors obtain a permit prior to operation.

The constitutional authority for San Francisco to enact ordinances regulating vending machines is set forth in Article XI, section 7 of the California Constitution which confers authority upon cities and counties to exercise the police power of the state. That section provides:

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." California Constitution, Article XI, section 7.

The City's constitutionally derived police power co-exists with that of the state. However, where local law conflicts with state law, local law is preempted. Lancaster v. Municipal Court (1972) 6 Cal.3d 805. Under the doctrine of preemption, a local ordinance conflicts with State law if it attempts to regulate an area that has been expressly preempted by state law or if it duplicates or contradicts existing state law. (Id.)

In this instance, San Francisco Health Code section 467 attempts to regulate an area that state law has expressly preempted. California Health and Safety Code section 27501 provides:

§ 27501. Legislative findings

> The Legislature finds and declares that the public health interest requires that there be uniform statewide health and sanitation standards for retail food facilities to assure the people of this state that food will be pure, safe, and unadulterated. It is the intention of the Legislature to occupy the whole field of health and sanitation standards for these food facilities, and the standards set forth in this chapter and regulations adopted pursuant to its provisions shall be exclusive of all local health and sanitation standards relating to these facilities. [Emphasis added.]

Section 27501 of the CURFFL evinces a clear legislative intent to occupy the entire field of health and sanitation standards of food facilities such as vending machines. Thus, the legislature has superceded the power of the Board of Supervisors to enact similar legislation.

Accordingly, California Health and Safety Code section 27541 preempts San Francisco Health Code section 467.

2. As discussed above, any conflict between provisions of the City's Health Code and the CURFFL must be resolved in favor of state law. Therefore, if there are vending machines which were previously exempt under local ordinance but fall within the definition of vending machine as set forth in Health and Safety Code section 27541, those devices are subject to state permit procedures.

In reality, however, local law appears more restrictive than state law, rather than the reverse. As discussed above, San Francisco Health Code section 467 includes more devices within the definition of vending machine than does Health and Safety Code section 27541. Accordingly, local law appears to require permits for a broader range of devices than does the CURFFL.

The City's permit procedure for vending machines should be amended to conform with the enforcement, permit and inspection provisions of the CURFFL which are found at sections 27550-27584 of the Health and Safety Code. Provisions of the CURFFL concerning vending machines are found generally at sections 27650-27659.

Respectfully submitted,

ROBERT S. MAERZ
Deputy City Attorney

APPROVED:

LOUISE H. RENNE
City Attorney

RSM:dls/3751w

Louise H. Renne,
City Attorney

July 17, 1987

OPINION NO. 87 - 14

SUBJECT: Authority of the War Memorial Board of Trustees To Adopt A Blanket Policy Regarding Abstention

REQUESTED BY: THELMA SHELLEY
Executive Director, San Francisco War Memorial

PREPARED BY: BURK E. DELVENTHAL
Deputy City Attorney

QUESTION PRESENTED

May the War Memorial Board of Trustees adopt a policy that automatically allows Board members to abstain from voting on decisions affecting tenant organizations, where the trustee also sits on the board of directors of the tenant organization?

CONCLUSION

No.

ANALYSIS

Your request for advice is related to two earlier opinions of this office. In San Francisco City Attorney Opinion No. 79-37, this office concluded that positions on the War Memorial Board of Trustees and on the board of directors of a nonprofit tenant organization of the War Memorial were not incompatible offices. Our conclusion was based on the historical relationship between the War Memorial and the tenant organizations, as well as the history of the trust creating the War Memorial.

In Opinion No. 84-02, we advised that though the offices were not incompatible, a member of the Board of Trustees owed a duty of undivided loyalty to the War Memorial Board. Accordingly, when a matter came up affecting a tenant organization, a trustee who was also on the board of directors of the tenant organization had to disclose his or her positions, ask that his/her dual status be noted in the official records, and abstain from voting.

You now ask whether the War Memorial Board of Trustees may adopt a blanket rule authorizing trustees to abstain from voting on matters that affect tenant organizations for which they serve as directors. We conclude that the War Memorial Board may not adopt such a rule.

The Charter imposes certain prohibitions on the activities of public officers, including a prohibition against an officer becoming

> ". . . directly or indirectly interested in any contract, franchise, right, privilege, or sale or lease of property awarded, entered into, or authorized by him in his capacity as an officer or employee or by an officer or employee under his supervision and control, or by a board or commission of which he a member. . . ."

We have opined in the past that this prohibition extends beyond matters in which an individual has a personal financial interest. The prohibition includes circumstances where the individual sits on the board of directors of an nonprofit entity and where the individual also serves on a City board or commission that is about to award a contract or lease to that nonprofit entity. See San Francisco City Attorney Opinion No. 75-83.

Charter Section 8.105 does not prohibit an official from continuing to sit on a board or commission when

> ". . . the official has only a remote interest in the transaction and the fact of the interest is disclosed and noted in the official records of the board or department and thereafter the board or commission authorizes, approves or ratifies the transaction in good faith by a vote of its membership sufficient for the purpose without

counting the vote or votes of the officer or member with remote interest."

San Francisco Charter Section 8.105(h).

Among the remote interests identified by Section 8.105 is that of "a nonsalaried officer of a nonprofit corporation." Section 8.105 recognizes that this situation will occur from time to time. The section establishes a procedure that prevents the official with the conflict from acting out of potentially divided loyalties, while allowing that official to continue to serve both the public and the nonprofit entity. That procedure requires the official to disclose the conflict, note the conflict in the record, and abstain from participating in the decision.

A blanket rule that relieves certain members of the Board from voting on specified matters would circumvent this rule. It would frustrate one of the purposes of the Charter provision, which is to notify the public each time an official has an interest in a matter that comes before the board or commission on which he or she sits.

In addition, a blanket rule would be inconsistent with Charter Section 3.500(a). That section requires all boards and commissions to adopt a rule requiring each member present at a meeting to vote for or against every question that is put before the commission for a vote, unless the member is excused from voting by a majority of the members present.

In considering the relationship between Charter Sections 8.105 and 3.500, we have orally advised that members with conflicts such as those described above must disclose and abstain, but need not obtain leave of the board or commission to abstain from voting. The specific provisions of Section 8.105(h) prevail over Section 3.500, but the latter section does manifest an intent that public officials be accountable for their participation or non-participation on every matter that comes before them. A rule automatically allowing trustees to abstain would negate the disclosure requirement. Such a rule would deprive the public of information on why an official was abstaining on a particular matter.

/ / /

Accordingly, you are advised that the War Memorial Board of Trustees may not adopt a blanket rule excusing certain members from participating in decisions affecting particular outside nonprofit agencies with which the Board has some business relationship.

Respectfully submitted,

Burk E. Delventhal

BURK E. DELVENTHAL
Deputy City Attorney

APPROVED:

Louise H. Renne

LOUISE H. RENNE
City Attorney

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Louise H. Renne,
City Attorney

July 21, 1987

OPINION NO. 87 -15

SUBJECT: Duty of SFUSD to Provide Medical Examinations to Employees and Students When Asbestos Is Found in School Buildings.

REQUESTED BY: Ramon Cortines
Superintendent of Schools
San Francisco Unified School District

PREPARED BY: Elaine C. Warren
Deputy City Attorney

QUESTIONS PRESENTED

(1) Do occupational safety and health laws and regulations providing for no cost medical examinations require the San Francisco Unified School District (SFUSD) to provide medical examinations to past or present employees who believe they have been exposed to asbestos?

(2) Do occupational safety and health laws and regulations require SFUSD to provide no cost medical examinations to past or present students who believe they have been exposed to asbestos?

(3) Do provisions in the Salary Standardization Ordinance allowing for no cost medical examinations for stationary engineers require SFUSD to provide medical examinations to stationary engineers who believe they have been exposed to asbestos?

CONCLUSIONS

(1) Occupational safety and health regulations require employers to provide no cost medical examinations to present employees who are or, in the judgment of a trained expert, may be reasonably expected to be exposed to airborne asbestos fibers in concentrations at or greater than 0.1 fiber per cubic centimeter. Employers are not required to provide medical examinations to former employees.

(2) No.

(3) The Salary Standardization Ordinance, 1986-87, Section IV.M, which is applicable to classified SFUSD employees, requires the SFUSD to provide annual medical examinations, on request, to stationary engineers who are exposed to conditions hazardous to health. Under this provision, a stationary engineer who reasonably believes he has been exposed to asbestos is entitled to a medical examination.

ANALYSIS

Ramon Cortines, Superintendent of the San Francisco Unified School District, asks whether occupational safety and health regulations or any local laws or SFUSD labor contracts require SFUSD to provide free medical examinations to all past and present employees and students who believe they may have been exposed to asbestos in school buildings. The first part of this opinion analyzes the circumstances under which Cal-OSHA Rule 5208 and new federal OSHA regulations require the school district to provide free medical examinations to persons exposed or possibly exposed to airborne asbestos.

The second part of this opinion analyzes provisions in the Salary Standardization Ordinance which provide for free medical examinations for stationary engineers under specific circumstances.

I. Scope of OSHA Asbestos Regulations

California regulates employee exposure to asbestos through the California Division of Industrial Relations (Cal-OSHA)1/. The Cal-OSHA asbestos regulation, 8 CAC 5208, imposes duties on an employer to provide a safe place of employment for his or her employees. The terms "employer", "employee", "employment" and "place of employment" applicable to 8 CAC 5208 are defined in the

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1/ As provided in the federal Occupational Safety and Health Act, California has opted to take over responsibility from the federal Department of Labor for enforcement of worker safety regulations. 29 U.S.C. Section 667 (1985). The California program is uncertain at this writing because of a proposal by the Governor to turn the Cal-OSHA program over to the federal government. Even if this occurs, however, Cal-OSHA will continue to set standards and enforce occupational safety regulations in the public sector, as the federal Act does not encompass public sector employees. 29 U.S.C. Section 652(5)(1985).

California Occupational Safety and Health Act of 1973. Labor Code Sections 6300 et seq. Employers covered by Cal-OSHA regulations are defined in Labor Code Section 3300 as:

> (a) the State and every State agency, (b) each county, city, district, and all public and quasi public corporations and public agencies, (c) every person including any public service corporation, which has any natural person in service, and (d) the legal representative of any deceased employer.

See also Labor Code Section 6300. As the Act covers all state and local governmental entities in California, including school districts, the San Francisco Unified School District is an employer within the meaning of the Occupational Safety and Health Act.

The Act covers all locations where SFUSD carries out any type of employment activity. The Act defines "places of employment" in Labor Code Section 6303(a) as:

> [Any] place, and the premises appurtenant thereto, where employment is carried on, except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division.

Employment is defined in Labor Code Section 6303(b) as:

> [T]he carrying on of any trade, enterprise, project, industry, business, occupation or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire except household domestic service.

Thus the SFUSD is an employer, and any location where it carries out work for hire is a place of employment.

The Act extends worker safety protections to "employees" of the employer. Employee is defined in Labor Code Section 6304.1 as:

> [E]very person who is required or directed by any employer, to engage in any employment, or to go to work or be at any time in any place of employment.

The SFUSD has a duty to provide a safe place of employment only to persons who are engaged in employment at a SFUSD location. Absent an employer-employee relationship, an employer

is not bound by the safety and health requirements imposed by Cal-OSHA which would otherwise be applicable under that Act. Elder v. Pacific Tel. & Tel. Co. (1977) 66 Cal.App.3d 650, 662-663. Thus, once an individual is no longer "required or directed by any employer, to engage in any employment, or to go to work or be at any time in any place of employment," the individual is no longer an employee within the meaning of the California Occupational Safety and Health Act. Lab. Code § 6304.1.

Furthermore, the term "employee" does not encompass persons such as students or members of the public who are not engaged in employment for SFUSD. See 62 Op. A.G. 114, 116 (1979) concluding that volunteer firefighters are not employees under Cal-OSHA because they do not work "for hire." The SFUSD owes a duty to provide a safe work environment to a student only if the student works for hire for the SFUSD in addition to attending school. In such a case, the SFUSD's duty to provide a safe work environment applies only to locations where the individual engages in employment.

To summarize, 8 CAC 5208 imposes a duty on the SFUSD, as an employer, to comply with the specific requirements in the regulation as they apply to individuals who are presently employed by SFUSD. The worker protection provisions in 8 CAC 5208 do not extend to past employees of the SFUSD or past or present students attending SFUSD schools but not employed by SFUSD.

II. Medical Examination Requirements in OSHA Regulations

Cal-OSHA Safety Order No. 5208 requires employers to assure that their employees are not exposed to asbestos levels above a "permissible exposure limit" or PEL. The regulation also sets an "action level" for asbestos, which is an asbestos concentration lower than the PEL. When asbestos concentrations reach or may be expected to reach the action level, the employer must perform air monitoring, keep records, provide medical examinations to employees and train employees in how to protect themselves from asbestos exposures. 8 CAC 5298(g), (j), (n).

The permissible exposure limit is expressed as an 8-hour time-weighted average (TWA) concentration. The current Cal-OSHA 8-hour TWA concentration is 2 fibers, longer than 5 micrometers, per cubic centimeter (2 f/cc). However, the federal Occupational Safety and Health Administration (federal OSHA) has recently revised its 8-hour TWA exposure limit, lowering it from 2.0 f/cc to 0.2 f/cc. California was required to revise its asbestos standard to make it at least as stringent as the federal standard by December 20, 1986. See 51 Fed. Reg. 22733 (June 20, 1986).

Cal-OSHA has not yet revised its asbestos regulation to bring it up to the new federal standard. It is assumed however, that an asbestos standard at least as strict as the federal standard will eventually be in effect in California. Therefore, this opinion points out instances in which the new federal medical examination requirements are more stringent than California's existing rule.2/ The SFUSD should follow the new federal standard to the extent it is stricter than the state standard to assure adequate protection for its employees.

The California air monitoring requirements are set out in 8 CAC 5208(g)(A) as follows:

> The employer shall sample the air and determine the concentration of asbestos fibers within the breathing zone of employees whose exposure to airborne asbestos may exceed an 8-hour time-weighted average concentration of 0.1 fiber, longer than 5 micrometers, per cubic centimeter due to work assignments(s) at or near operations with asbestos or asbestos-containing products which result in the release of asbestos fibers.

The new federal standard for monitoring is similar in that it specifies that monitoring is required when workers may reasonably be expected to be exposed to airborne concentrations at or above the action level of 0.1 f/cc. 51 Fed. Reg. 22733, to be codified at 29 CFR 1910.1001(d)(2).

2/ The new federal OSHA standard for asbestos contains two separate standards: one for general industry and one for the construction industry, which protects employees performing alterations, repairs, maintenance or renovation of structures. California has not adopted an asbestos standard specifically for construction workers. Thus at this time, 8 CAC 5208 applies to all workers. The medical examination provisions for the construction industry are similar to those for general industry, except for the employees who are covered. Construction workers are covered when they are (1) exposed to levels of asbestos at or above the action level for 30 or more days per year or (2) required to wear negative pressure respirators. 51 Fed. Reg. 22760 (June 20, 1986), to be codified at 29 CFR 1926.58(m). This opinion does not discuss the construction industry standard. Where this opinion discusses the federal standard, it is referring to the federal standard for general industry.

Under California regulation, monitoring must be repeated every six months if exposure to airborne asbestos may exceed an 8-hour TWA of 0.5 f/cc or a ceiling concentration (i.e. maximum reading at any time) of 5 f/cc. 8 CAC Section 5208(g) The federal standard is stricter, in part, in that it requires monitoring at least every six months where exposures may reasonably be foreseen to exceed the action level of 0.1 f/cc (measured as an 8-hour TWA). 51 Fed. Reg. 22734, to be codified at 29 CFR 1910.1001(d)(3).3/

When airborne asbestos levels have been determined to exceed or may be reasonably expected to exceed the 0.1 f/cc level, the Cal-OSHA regulation requires the employer to provide no cost medical examinations. 8 CAC Section 5208(j). The federal standard is nearly identical, except that it requires medical examinations for employees who are or will be exposed to airborne concentrations at or above the action level. 51 Fed. Reg. 22737, to be codified at 29 CFR 1910.1001(l)(1).

Specifically, 8 CAC 5208(j) states:

> The employer shall provide or make available at no cost to the employee a comprehensive medical examination by a licensed physician in accordance with this subsection for each employee engaged in an occupation where exposure to airborne asbestos, without regard to the use of respiratory protective equipment, has been determined to exceed, or may be reasonably expected to exceed, an 8-hour time-weighted average concentration of 0.1 fiber, longer than 5 micrometers, per cubic centimeter.

Thus the no cost medical examination requirements are triggered either when monitoring establishes that the action levels are exceeded or the employer has reason to expect that the action level may be exceeded. In either case the employer must provide or make medical examinations available to his or her employees who are engaged in work where they may be exposed or

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3/ The California standard is arguably stricter in part because in addition to requiring monitoring when a specific 8-hour TWA concentration is exceeded, it requires monitoring when a ceiling level is exceeded. Federal OSHA has interpreted its action level of 0.1 f/cc to result in effect in a ceiling level of 6.4 f/cc, which is higher than the California ceiling level of 5 f/cc. 51 Fed. Reg. 22682.

are exposed to asbestos. In sum, the monitoring and medical examination requirements go hand in hand. If airborne asbestos levels may exceed (or in the case of the federal standard, reach) the action level, the employer must both monitor and provide medical examinations.

Cal-OSHA requires medical examinations to be conducted within 30 days of the initial assignment and within 30 days of termination of employment, if an examination has not been performed within the last year. The new federal standard is stricter in that it requires a medical examination prior to placement of employees in an occupation where they will be exposed to airborne concentrations of asbestos at or above the action level. 51 Fed. Reg. 22737, to be codified at 29 CFR 1910.1001(l)(2).

Cal-OSHA requires periodic medical examinations after the initial examination. The frequency varies depending on the age of the employee and the number of years that have past since the initial exposure to asbestos. 8 CAC 5208(j)((l)(B). The new federal standard takes a different approach, requiring annual medical examinations for all employees, although chest x-rays may be given less frequently for employees under 40 or exposed to asbestos for less than 10 years. 51 Fed. Reg. 22737, to be codified at 29 CFR 1910.1001(l)(3).

Finally, medical examinations must be provided within 30 days before or after termination of employment, if no examination has been performed within the last year. 8 CAC 5208(j)(l)(A); 51 Fed. Reg. 22737, to be codified at 29 CFR 1910.1001(l)(4).

Neither 8 CAC 5208 nor the new federal standard requires employers to monitor and provide medical examinations to every employee who believes he or she has been exposed to asbestos. Rather, employers are required to provide medical examinations when exposure levels reach 0.1 f/cc or may be reasonably expected to reach this level. Thus, the employer must make a factual determination on a case by case basis as to whether the conditions present in the work place trigger the monitoring and no cost medical examination requirements.

If an employer has conducted monitoring and established that asbestos levels reach 0.1 f/cc, it is evident that the employer should institute a medical examination program. It may be less clear to employers, however, as to when they should "reasonably expect" that asbestos levels may reach or exceed the action level.

The Occupational Safety and Health Appeals Board (OSHAB), has authority to review appeals arising from action taken by Cal-OSHA to enforce its safety orders. OSHAB has issued some

opinions which provide guidance on this issue. As a general rule, monitoring and no cost medical examinations are required when employees are exposed to a potential danger of exposure to asbestos fibers. One OSHAB decision stated the rule as follows:

> A reasonable interpretation of the [monitoring] section is that if there is a potential danger of exposure to harmful asbestos fibers, the employer is required to monitor the breathing zone of employees.

Brassbestos Mfg. Corp, 5 Cal-OSHA Rep (Digest Section) (Sten-O-Press) Para. 13,482 (Jan. 21, 1980).

Applying this rule to factual situations, OSHAB has upheld Cal-OSHA citations where the facts would lead a qualified person such as an industrial hygienist to conclude that airborne asbestos levels might be exceeded. For example, OSHAB upheld a Cal-OSHA citation for failure to monitor and provide no cost medical examinations where Cal-OSHA provided opinion evidence by an industrial hygienist that the action level or ceiling concentration would be exceeded given the employer's work practices. The industrial hygienist drew such a conclusion based on a combination of his observations at the work site, a laboratory report showing a high asbestos content in the material sampled and experience gained in air sampling for asbestos at other work sites. Capri Manufacturing Co., 11 Cal-OSHA Rep (Digest Section) (Sten-O-Press) Para. 16,158R (Oct. 21, 1985).

In another instance, OSHAB upheld a Cal-OSHA citation alleging failure to monitor and provide no cost medical examinations where the employer failed to monitor and provide examinations despite knowledge that material containing asbestos was present in amounts that might raise airborne asbestos dust sufficient to trigger the monitoring requirement. Rockwell International Space, Transportation Division, 12 Cal-OSHA Rep (Digest Section) (Sten-O-Press) Para. 16,404 (May 26, 1986).

In sum, the employer should monitor and provide no cost medical examinations to employees whenever the employer has knowledge that asbestos is present and the work activities or condition of the asbestos would lead an industrial hygienist or other qualified person to conclude that employees may be exposed to airborne asbestos at or above the action or ceiling levels.

One issue that remains open is whether an employer must continue to provide no cost medical examinations once the employer establishes that asbestos is not present or if present, is not reasonably expected to exceed the action level.[4/]

4/ Conversation with Len Welch, Cal-OSHA San Francisco Legal Office, May 8, 1987.

The wording of the medical examination requirement in 8 CAC 5208(j) supports an interpretation that medical examinations are only required during the time the employee is actually engaged in work where asbestos exposure is reasonably expected to occur. The medical examination requirements state that an employer shall provide or make available at no cost to the employee a comprehensive medical examination "for each employee engaged in an occupation where exposure to airborne asbestos, without regard to the use of respiratory protective equipment, has been determined to exceed, or may be reasonably expected to exceed" an 8-hour TWA concentration of 0.1 f/cc. It is reasonable to conclude from the wording "engaged in" an occupation to mean that the employer's responsibility to provide periodic no cost medical examinations ends when the employee is no longer engaged in an occupation where exposure to airborne asbestos may be expected to reach or exceed 0.1 f/cc.

The employer, however, is responsible for providing a medical examination to the employee upon termination of employment because the termination examination applies to all employees who have been exposed to asbestos. Futher, while the regulation may be reasonably interpreted not to require periodic medical examinations once an employee is removed from a situation where the employee may be exposed to asbestos, the employer may wish to continue to do so for two reasons. One, periodic medical examinations may provide useful information to the employer as to whether the employee can be safely exposed to asbestos in the future. Two, since asbestos disease has a long latency period, the effects of previous asbestos exposure may not be evident until many years after the exposure. Early diagnosis may be useful in treating any asbestos related disease.

In conclusion, the medical examination provisions of 8 CAC 5208 and the more stringent requirements of the new federal standard require employers to provide medical examinations to employees who are or may reasonably be expected to be exposed to airborne concentrations of asbestos at or above the action level of 0.1 f/cc. It does not require the SFUSD to provide medical examinations to every employee who believes he or she has been exposed to asbestos. However, it does require SFUSD to provide medical examinations if the conditions to which an employee are exposed would lead a qualified person, such as an industrial hygienist, to conclude that employees were likely to be exposed to airborne concentrations of asbestos at or above the action level. Finally, the regulation does not appear to require the SFUSD to continue to provide medical examinations to employees who are no longer engaged in work where they are exposed to asbestos. However, the SFUSD may, for other than regulatory compliance reasons, wish to continue to provide such examinations.

III. Medical Examination Provisions in the Salary Standardization Ordinance

A provision in the current salary standardization ordinance adopted by the Board of Supervisors of the City and County of San Francisco, entitles Stationary Engineers and related classifications to receive an annual medical examination if the employee is exposed to conditions hazardous to health and the employee requests an examination. Salary Standardization Ordinance, 1986-87, Section IV.M. This provision states as follows:

> In instances when Stationary Engineers and related classifications are exposed to conditions hazardous to health said employees may voluntarily request and be entitled to a medical examination provided, however, that in no instance will more than one (1) medical examination be given in any twelve (12) month period. Medical examinations will be considered time worked.

This provision raises two questions: (1) is the SFUSD bound by this provision in the Salary Standardization Ordinance, and (2) if so, does the provision require the SFUSD to provide free annual medical examinations to employees who believe they have been exposed to asbestos?

The first question can be answered by reference to City Attorney Opinion 87-09. In that opinion, this office concluded that the SFUSD and the Community College District are bound by provisions in the Salary Standardization Ordinance adopted by the Board of Supervisors. See City Attorney Opinion 87-09 at 9 - 10. As to the SFUSD, this conclusion is based on the provisions in Education Code Section 45318 which state that the rights and benefits of classified employees of the school district, other than certified employees, are to be determined by the Charter. The Salary Standardization Ordinance has been adopted pursuant to the salary setting procedure provided for in Charter Section 8.407. Thus it is our conclusion that SFUSD is bound by the provisions in Section IV.M of the Salary Standardization Ordinance, 1986-87.

An answer to the second question requires an analysis of the meaning of Section IV.M in the Salary Standardization Ordinance, 1986-87. A fundamental rule of statutory construction is that the intent of the legislators should be ascertained so as to give effect to the purpose of the law. Select Base Materials v. Board of Equalization (1959) 51 Cal.3d 640, 645. If the language of the statute is free of ambiguity, it must be given its plain meaning. Sand v. Superior Court (1983) 34 Cal.3d 564, 570; Castaneda v. Holcomb (1981) 114 Cal.App.3d 939, 942.

However, where the meaning is ambiguous, the court may look to the legislative intent. Select Base Materials v. Board of Equalization, supra, 51 Cal.3d at 645.

Whether Section IV.M requires the SFUSD to provide free medical examinations to employees who believe they have been exposed to asbestos is not clear from the wording of the provision. It states that annual medical examinations are required when employees "are exposed to conditions hazardous to health." The ordinance does not define "hazardous" nor does it indicate who should make a determination that a condition is hazardous.

The dictionary defines "hazardous" as "depending on hazard or on chance; exposed or exposing one to hazard; involving risk of loss." Webster's Third New International Dictionary at 1041. Thus the ordinary meaning of "conditions hazardous to health" would appear to mean "conditions exposing one to hazard or involving a risk of loss of health." This definition does not clarify whether a "belief" of exposure to asbestos is sufficient to trigger the requirement for a medical examination.

The factual conditions under which an employee may risk a loss of health are wide ranging and open to varying interpretations. The recent revision to the federal asbestos standard for "permissible exposure limits" for employees exposed to asbestos is an illustration of how difficult it is to set standards for "safe" exposure levels for substances such as asbestos. The previous federal standard set the acceptable exposure limit at 2 fibers per cubic centimeter. The new standard reduces the exposure limit by a factor of 10. In explaining the new standard, federal OSHA devoted 35 pages in the Federal Register to explaining studies on the health effects of exposure to asbestos and the risk assessment process that it went through to arrive at the new standard. 51 Fed. Reg. 22615-22650 (June 20, 1986). Section IV.M contains no definition of "hazardous condition", no objective standard for determining when conditions are hazardous, and no procedure for determining hazardous conditions. Thus the language in Section IV.M, is ambiguous and unclear because it is susceptible to varying interpretations.

Since the language of Section IV.M is ambiguous, it is appropriate to look to the legislative intent behind the provision. Select Base Materials v. Board of Equalization, supra, 51 Cal.3d. at 645. Section IV.M is part of an ordinance setting salaries and benefits for City and County employees, including classified employees other than certified employees, of the SFUSD. Courts have generally concluded that the purpose of statutes setting government employee wages and benefits is to

induce competent persons to enter government service to and promote the efficiency, morale and general welfare of public employees. Adam v. City of Modesto (1960) 53 Cal.2d 833, 840. For this reason, such statutes are generally construed liberally in favor of providing benefits to employees. San Francisco Police Officers Assn. v. City and County of San Francisco (1982) 133 Cal.App.3d 498, 504; Alameda County Employees Assoc. v. County of Alameda (1973) 30 Cal.App.3d 518, 531.

In this case, a liberal construction of Section IV.M entitles an employee to an annual medical examination upon request whenever it is reasonable to conclude that the employee may have been exposed to hazardous health conditions. Providing annual medical examinations on request in such circumstances is consistent with the presumed legislative intent of the wage setting ordinance of promoting efficiency, morale and the general welfare of the public. Therefore, we interpret Section IV.M of the Salary Standardization Ordinance to require the SFUSD to provide stationary engineers and related classifications with annual medical examinations when employees, based on a reasonable belief that they may have been exposed to asbestos or other hazardous health conditions, request such an examination. However, we do not interpret Section IV.M to require the SFUSD to provide an annual medical examination to a stationary engineer who has no reason to believe that he or she has been exposed to asbestos or other health hazards. This would include stationary engineers who have never worked in a building or environment found to contain asbestos or other hazardous conditions.

Respectfully submitted,

LOUISE H. RENNE
City Attorney

ELAINE C. WARREN
Deputy City Attorney

APPROVED:

LOUISE H. RENNE
City Attorney

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Louise H. Renne,
City Attorney

August 10, 1987

OPINION NO. 87-16

SUBJECT: POWER OF THE BOARD OF PERMIT APPEALS TO AUTHORIZE DWELLING UNITS NOT COMPLYING WITH CURRENT PLANNING CODE REQUIREMENTS

REQUESTED BY: ROBERT PASSMORE
ZONING ADMINISTRATOR
Department of City Planning

PREPARED BY: PAULA JESSON
CHRISTINA L. DESSER
Deputy City Attorneys

QUESTION PRESENTED

May the Board of Permit Appeals grant a building permit authorizing an existing dwelling unit which does not meet current Planning Code density or parking requirements if the unit was built without a building permit?

ANSWER

No.

SUMMARY

A dwelling unit violating the density or parking requirements of the current Planning Code is legal as a nonconforming use or noncomplying structure if it was built or authorized pursuant to a building permit issued by the City and was in compliance with Planning Code requirements in effect at the time of the permit. If such a unit is not a nonconforming use, or noncomplying structure, it is prohibited under the Planning Code and the Board of Permit Appeals may not grant a permit authorizing its use. This is so whether or not the unit complied with Planning Code density and parking requirements when it was built.

ANALYSIS

The City Planning Code prohibits the issuance of a permit for a use which is prohibited by the Code:

> [No] permit or license shall be issued by any City department which would authorize a new use, a change of use or maintenance of an existing use of any land or structure contrary to the provisions of this Code.

Planning Code §175.

A dwelling unit that does not comply with the requirements of the current Planning Code is unlawful unless it qualifies as a "nonconforming use" or a "noncomplying structure."

> 1. A "nonconforming use" is a use which existed lawfully at the effective date of this Code, or of amendments thereto, and which fails to conform to one or more of the use limitations under Articles 2 and 6 of this Code that then became applicable for the District in which the property is located.
>
> 2. A "noncomplying structure" is a structure which existed lawfully at the effective date of this Code, or amendments thereto, and which fails to comply with one or more of the regulations for structures, including requirements for off-street parking and loading, under Articles 1.2, 1.5, 2.5 and 6 of this Code, that then became applicable to the property on which the structure is located.

Planning Code §180.

It is unlawful to commence construction of any structure without first obtaining a permit from the Bureau of Building Inspection. Building Code §301.* Therefore, to have "lawfully existed at the effective date" of the Planning Code, a dwelling

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* The Building Code has required a building permit prior to construction since at least 1895. See Building and Fire Ordinance of the City and County of San Francisco, Section 4, Handbook of the Builders' Exchange of San Francisco, 1895-1896.

unit must have been built pursuant to a lawfully issued building permit, or authorized by a subsequent permit at a time when it conformed to the then-existing Planning Code.

> The legal doctrine of preexisting nonconforming use is not applicable and cannot be invoked where the prior "nonconforming use," as herein, was founded on the owner's illegal acts, i.e. the result of the owner's actions in violating duly enacted ordinances [requiring a building permit]. [Citations.]

Mang v. County of Santa Barbara 182 C.A.2d 93, 102, 5 Cal.Rptr. 724 (1960).

The burden of proof regarding the lawfulness of the use or structure when it was built rests with the person asserting the right to the nonconforming use or noncomplying structure. Melton v. City of San Pablo 252 C.A.2d 794, 804, 61 Cal.Rptr. 29 (1967).

While the Board of Permit Appeals has broad discretion (Municipal Code §26; Lindell v. Board of Permit Appeals 23 C.2d 303 (1943)), it is not permitted to sanction a violation of the Planning Code. Section 175 of the Planning Code and case law deny the Board of Permit Appeals authority to authorize a use or structure which is prohibited by current zoning restrictions, even if the property owner could have obtained a permit at the time of construction:

> There can be no doubt that the board of permit appeals is bound by the relevant law as enunciated by appropriate ordinances. [Citations.]

Board of Permit Appeals vs. Central Permit Bureau 186 C.A.2d 633, 640, 9 Cal.Rptr. 83 (1960). See also City and County of San Francisco v. Superior Court 53 C.2d 236, 250-251, 1 Cal.Rptr. 158 (1959); City Attorney Opinion 79-48, June 27, 1979; and City Attorney Opinion 47-3927, March 17, 1947.

The principle that the Board's authority is limited by the provisions of the Municipal Code was reaffirmed in City and County of San Francisco v. Pace (1976) 60 C.A.3d 906. In Pace, the court held that the Board acted in excess of its jurisdiction in granting a permit for electrical work to an unlicensed contractor in violation of the San Francisco Electrical Code.

Thus, the Board must act within its jurisdiction and in accordance with existing zoning ordinances. Former Planning Code Section 202.1 provided for the legalization of certain illegal units in R-1 districts. See City and County of San Francisco v. Pacello 85 Cal.App.3d 637, 643, 149 Cal.Rptr. 705 (1978). That provision, however, is no longer in effect. The omission of any new mechanism for legalizing unlawful units is evidence of a legislative intent to preclude these units from obtaining legal status. Until the zoning ordinances are amended, any attempt to legalize these unlawful units would subvert this intent and result in de facto rezoning by the Board of Permit Appeals. (Compare City and County of San Francisco v. Padilla 23 C.A.3d 388, 100 Cal.Rptr. 223 (1972), holding that the Board of Permit Appeals has no jurisdiction to authorize dwelling units which exceed density restrictions where it purported to grant a variance but did not have before it an applicant who complied with the procedures applicable to a variance.)

For the reasons discussed above, the Board of Permit Appeals may not legalize dwelling units that are in violation of the Planning Code and were built without a building permit, irrespective of whether they complied with the provisions of the Planning Code at the time of construction.

Respectfully submitted,

CHRISTINA L. DESSER
Deputy City Attorney

APPROVED:

LOUISE H. RENNE
City Attorney

CD:dms/4501j

Louise H. Renne,
City Attorney

OPINION NO. 87 - 17

August 18, 1987

SUBJECT: MARINA SMALL CRAFT HARBOR REVENUES

REQUESTED BY: THE HONORABLE DIANNE FEINSTEIN
Mayor

PREPARED BY: BURK E. DELVENTHAL
ROSE MIKSOVSKY
Deputy City Attorneys

QUESTION PRESENTED

May the City and County of San Francisco use monies generated from the Marina Small Craft Harbor for other than water-oriented purposes?

CONCLUSION

No. However, there is a broad range of permissible uses within the statutorily imposed water-oriented limitations on revenue generated from the Marina Small Craft Harbor. These uses are further restricted by the terms of a loan agreement between the State of California and the City and County of San Francisco.

ANALYSIS

You have asked this office to advise you whether the City and County of San Francisco may use monies generated from the Marina Small Craft Harbor (Harbor) for other than water-oriented recreational purposes. To answer this question we must determine whether there are limitations on the use of the lands on which the Harbor is located or on the revenues generated from the Harbor. In responding to your inquiry, we emphasize that the revenues from the Harbor are generated by a recreational facility and must be devoted to recreational uses. (See, San Francisco Charter §§3.550, 3.552, and 6.200 et seq.) Therefore, the initial determination of how these monies shall be spent must be made by the Recreation and Park Commission through the customary budgetary process as provided in the Charter. (Ibid.)

The Harbor is located on tidelands, and therefore impressed with a public trust. (See, City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 521, cert. denied, 449 U.S. 840.) Traditionally, the public trust purposes were characterized as fishing, navigation and commerce. (Marks v.

Whitney (1971) 6 Cal.3d 251, 259-260.) Courts now recognize that the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state as ecological units for scientific study. (Ibid.)

San Francisco obtained the lands on which the Harbor is located in trust from the State of California. (See, State Lands Commission, A Report on the Use, Development, and Administration of Granted Tidelands and Submerged Lands (Report), p. 43 (1976).) As trustee, the City must use the lands for activities that promote statewide, rather than local, purposes. (Mallon v. City of Long Beach (1955) 44 Cal. 2d 199, 209.) Under the specific limitations imposed by the state in the granting conveyance, San Francisco may only use the property on which the Harbor is situated for aquatic, recreational, boulevard, park and playground purposes.1/

1/ California granted San Francisco title to the Harbor in Chapter 437 of the Statutes of 1935 which states in relevant part:

> "All of the above described real property hereby granted shall be forever held by said City and County of San Francisco and by its successors in trust for the uses and purposes and upon the express conditions following, to wit: said real property shall be used solely for aquatic, recreational, boulevard, park and playground purposes.
>
> Provided, however, that said City and County of San Francisco shall have power to set apart and assign, or lease, any of said property hereinbefore described for a period not to exceed ten years, to any corporation, club or association organized for the purpose of developing and promoting aquatic sport; provided, that no part of said property shall be set apart and assigned, or leased to any corporation, club or association the object of which is pecuniary profit."

This statute was amended twice, extending the period for which an assignment or lease could be made to twenty (20) years (Statutes of 1963, Chapter 1298) and later to forty (40) years (Statutes of 1970, Chapter 670).

These restrictions on the public trust lands also apply to revenues generated from the lands. (See, State of California ex rel. State Lands Commission v. County of Orange (1982) 134 Cal.App.3d 20; Marlon at 209; Report at 44 and 45.) In addition, the City may only use the revenues for services, purposes and improvements located on or related to the granted lands. (See, National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 440 cert. denied 464 U.S. 977; County of Orange at 25; Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Michigan L.Rev. 472, 477, 536 (1970).)

We next consider additional limitations imposed by a loan agreement with the State of California.

In 1974 the City and County of San Francisco entered into a loan agreement with the State of California. The loan was for a construction project at the Harbor. The loan agreement limits the City's use of Harbor revenues to loan payments, advance loan repayment, operating and maintenance expenses and reserve funds until the loan repayment schedule ends on August 1, 2007.2/ Operating and maintenance expenses mean labor and materials for the operation of the Harbor and the indirect expenses of City administration up to 15% of the revenues.

Should the City elect to repay the loan in advance, the City would then be able to develop alternative uses for expenditures of the revenues within the limitations of the

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2/ Paragraph 13 of the loan states:

> Any surplus of funds arising from operation of PROJECT remaining after deduction from gross revenues of funds necessary for repayments to DEPARTMENT, operating and maintenance expenses and reserve funds as herein provided, shall be retained by APPLICANT and may be invested in reasonably liquid assets. No transfer of such funds other than for advance repayment of the loan to DEPARTMENT shall be made to APPLICANT so long as any principal or interest thereon remains unpaid. Whenever such funds exceed TWO (2) years PROJECT operating and loan repayment expenses as indicated in EXHIBIT A, all surpluses in excess of this amount may be required by DEPARTMENT to be used for advance repayment of the loan.

tideland trust doctrine and the granting statute. For example, the revenues could be used to fund a class on marine biology or boating at the Harbor, to fund ecological study at the Harbor, or to finance any water-oriented recreational activities at the Harbor, to repair the breakwater or to repair streetlights at the Harbor. While the matter is not free from doubt, we are of the view that Harbor revenues may also be used to pay the Harbor's pro rata share of capital costs of sewer construction and operation based upon the benefits the Harbor receives from such construction and operation. The aforementioned list is merely illustrative.

In any future loan negotiations for future projects at the Harbor, the City may wish to preserve its options to make alternative uses of surplus revenues.

In summary, an existing outstanding loan from the state restricts the City's use of these revenues to loan payments and operation and maintenance of the Harbor. Whether to accelerate the loan payments in order to pursue other permissible uses involves economic and public policy questions. Were the City to accelerate the repayment of the loan, then Harbor revenues could be used for purposes consistent with the limitations of the tideland trust doctrine and the granting statute. Within these limitations, however, are a broad range of permissible uses. Past practices regarding the use of Harbor revenues have not exhausted all the available options.

Very truly yours,

LOUISE H. RENNE
City Attorney

BURK E. DELVENTHAL
Deputy City Attorney

ROSE MIKSOVSKY
Deputy City Attorney

APPROVED:

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City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
City Attorney

October 19, 1987

OPINION NO. 87 - 18

SUBJECT: APPLICABILITY OF ADMINISTRATIVE CODE CHAPTERS 12B and 12C TO AGREEMENT FOR THE USE OF CANDLESTICK PARK FOR PAPAL MASS

REQUESTED BY: GRANT S. MICKINS
DIRECTOR
HUMAN RIGHTS COMMISSION

PREPARED BY: MARA E. ROSALES
DEPUTY CITY ATTORNEY

QUESTIONS PRESENTED

1. Does Administrative Code Chapter 12B apply to a permit issued by a City department to an organization allowing the use of City property for the exercise of First Amendment protected rights?

2. Is a 36 hour agreement among the Recreation and Park Commission, the San Francisco Giants and the San Francisco Archdiocese for the use of Candlestick Park for a Papal Mass subject to the provisions of San Francisco Administrative Code Chapters 12B and 12C relating to nondiscrimination by City contractors?

CONCLUSION

1. No.

2. No.

RELEVANT FACTS

On August 20, 1987, the City and County of San Francisco ("City") through its Recreation and Park Commission ("the Commission") approved an agreement ("Use Agreement") among the Commission, the San Francisco Giants ("Giants") and the Archdiocese of San Francisco ("the Archdiocese"). The Use Agreement authorized the Archdiocese to use Candlestick Park for 36 hours for the purpose of conducting a Papal Mass. The Archdiocese agreed to pay the Commission a use fee of $50,000 and to deliver to the Commission immediately after the event "one bottom turf cover with cobs."

The Papal Mass was held on September 18, 1987. Under the City's pre-existing lease with the Giants, the Giants had exclusive rights to Candlestick Park and all concession privileges on September 18, 1987, which was normally a baseball day. To accommodate the Pope's visit, the Giants waived their right to play baseball on that date and granted use of Candlestick Park to the City. The City, in turn, granted the Archdiocese use of Candlestick Park for the Papal Mass.

The Giants released to the City their right to play baseball only after reaching agreement with the Archdiocese on several key items. The Archdiocese agreed to defend, indemnify and hold harmless the Giants from any claim or liability resulting from the event. Further, the Archdiocese agreed to pay the Giants for cleaning the stadium and to compensate the Giants if the Mass caused cancellation of the baseball game scheduled for September 19, 1987. The Archdiocese also agreed to post a $400,000 bond in favor of the Giants to cover potential damages from the cancellation of the September 19th game.

In substance, the Use Agreement is merely a permit authorizing the Archdiocese to use Candlestick Park. Due to the complexity of the permit, including arrangements regarding the sound system, the concession facilities, and the clean up, the permit was titled an "agreement." However, a close reading of the Use Agreement reveals that the Commission gave the Archdiocese a permit to use Candlestick Park; the Archdiocese agreed to pay a use fee and to comply with other obligations that the Commission regularly imposes upon groups and organizations making use of park property for large events.

The property in question, Candlestick Park, is open to use by anyone year round except during baseball season and days when the San Francisco 49ers play football. Though the Giants and the 49ers use Candlestick on a regular basis, the Commission's practice and policy is and has been to allow use of Candlestick Park for other athletic and nonathletic events. Park Code

Article 7 specifically sets forth standards and criteria to govern Commission review of applications for activities impressed with First Amendment rights. Park Code Section 7.07 directs the General Manager of the Commission to grant any application for the use of park property unless subject to one or more of the content-neutral exceptions not applicable here.

During the August 20, 1987 proceedings before the Commission, a member of the public asserted that the San Francisco Administrative Code Chapter 12B applied to the Use Agreement.[1/] Acting on the advice of the City Attorney, however, the Commission approved the Use Agreement without a provision stating that it was subject to Chapters 12B or 12C. You have sought an explanation of the City Attorney's advice.

ANALYSIS

The narrow question presented is whether Chapter 12B[2/] applies to the agreement for the use Candlestick Park for a Papal Mass. The simple answer to this question is no. However, in order fully to understand the reasons underlying our conclusion we must first address the broader issue: Is Chapter 12B intended to apply to an agreement whereby a City department authorizes use of its property to an organization for the exercise of First Amendment rights? We turn to an examination of the provisions of Chapter 12B.

Section 12B.5 provides in relevant part:

> This chapter [12B] . . . shall have application only to discriminatory employment practices by contractors . . . engaged in the performance of City and County contracts. (Emphasis added.)

Section 12B.1 requires "all [City] contracts, franchises, leases, concessions, or other agreements involving real or personal property" to include a non-discrimination provision,

> . . . obligating the contractor, franchisee, lessee, concessionaire, or other party of said agreement not to discriminate on the ground or because of race, color, creed, national origin, ancestry, age, sex,

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[1/] All code, chapter and section references are to the Administrative Code, unless otherwise noted.

[2/] The applicability of Chapter 12C will be discussed separately infra.

> sexual orientation, disability or Acquired Immune Deficiency Syndrome or AIDS Related Condition (AIDS/ARC), against any employee of, or applicant for employment with, such contractor, franchisee, lessee, or concessionaire, and shall require such contractor, franchisee, lessee or concessionaire to include a similar provision in all subcontracts, subleases or other subordinate agreements let, awarded, negotiated, or entered into thereunder.

Section 12B.2 states that every contract subject to Section 12B.1 shall include nondiscrimination provisions. Under these provisions a City contractor agrees that "[w]herever the work is performed or supplies manufactured the contractor . . . will not discriminate against any employee or applicant for employment.. . ." Among other things, the contractor promises to notify those unions with which he/she has a collective bargaining agreement of the contractor's commitments under Chapter 12B. (Section 12B.2(e).)

A breach of the nondiscrimination provisions is a basis for determining the contractor "an irresponsible bidder as to all future contracts for which such contractor may submit bids." (Section 12B.2(i).) This sanction bars the contractor from competing for any contract for "public works, goods or services for or on behalf of the City and County of San Francisco." (Ibid.) Upon a finding of a violation of Chapter 12B, the City may cancel, suspend or terminate the contract. (Section 12B.2(h).) The Human Rights Commission ("HRC") and its Director are empowered to implement the provisions of Chapter 12B. (Section 12B.3.)

Section 12B.4. applies to all "contracts" subject to Chapter 12B and requires all contractors to submit an affirmative action program that meets the requirements of the HRC. The HRC regulations implementing the provisions of Section 12B.4 pertain to contracts where the City receives services from: (1) general construction contractors in the performance of public works contracts; and (2) architects and engineers in the performance of consulting contracts.

In order to ascertain the legislative intent of Chapter 12B fundamental rules of statutory construction must be considered. First of all, one needs to look to the words themselves. However, particular words and phrases must be construed in context, considering the express or apparent purpose of the statutory scheme as a whole. (Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School District (1978) 21 Cal.3d 650, 658-59.) Thus, words of general import may be given a contracted meaning depending upon their context; words will not

be given their literal meaning when to do so would make the provisions of statute applicable to situations never contemplated by the legislative body. (Farnsworth v. Nevada-Cal Management (1961) 188 Cal.App.2d 382, 387.)

Here, the Board of Supervisors has made clear that all of the provisions of Chapter 12B apply only to the discriminatory employment practices of City "contractors" while they perform City "contracts." (Sec. 12B.5.) These terms are defined in Section 12B.1 as follows:

> "Contract" shall mean an agreement to provide labor, materials, supplies, or services or the performance of a contract, franchise, concession or lease granted, let or awarded for and on behalf of the City and County of San Francisco.
>
> "Contractor" means any person . . . who submits a bid and/or enters into a contract with department heads and officers empowered by law to enter into contracts on the part of the city and county for public works or improvements to be performed, or for a franchise, concession or lease of property, or for goods, services or supplies to be purchased, at the expense of the city and county or to be paid out of moneys deposited in the treasury or out of trust moneys under control or collected by the city and county." (Emphasis added.)

In City Attorney Opinion No. 87-11, we concluded that the definitions of "contract" in Chapters 12B and 12D were identical and hence should receive a parallel construction. (City Attorney Opn. 87-11, p. 15.) When we examined the meaning of the word "contract" in Chapter 12D, we determined that it "contemplated a relationship under which the City tenders consideration and in exchange procures services, labor, supplies and/or materials it desires for its operational needs from the private sector." (Ibid; City Attorney Letter Opinion, dated 2/18/87 to Moira Shek So; see also City Attorney Opinion No. 84-29, p. 3.) Most recently, consistent with these prior opinions, we noted that Chapter 12B and particularly its language about "other agreements involving real or personal property" pertained to "enforceable business arrangements between the City and third parties." (City Attorney Letter Opinion dated July 9, 1987 to Supervisor John Molinari.) The agreement at issue falls outside of these categories.

The City, through its Recreation and Park Commission, did not procure services, goods, or services for its operational needs. To the contrary, the Pope in the Papal Mass provided a

religious service to those individuals who attended the religious ceremony. In applying for permission to use Candlestick Park, the Archdiocese merely sought to exercise its right to express its religious beliefs and did not in any fashion propose a business transaction between the City and the Archdiocese within the contemplation of Chapter 12B.

In our opinion, a business relationship necessarily entails a situation where both parties are in an equal bargaining position. Agreements struck between the City and a general construction contractor, an engineer, architect, lessee, or concessionaire, for instance, allow the City to require compliance with the City's social policies as prerequisites to doing business with the City. (See generally Alioto Fish Co. v. Human Rights Commission of San Francisco (1981) 120 Cal.App.3d 594, 605. cert den. 455 U.S. 944.) Here, the agreement merely allows use of City property for the expression of constitutionally protected activity. The City has no bargaining power with the Archdiocese since the City may only focus on content-neutral time, place and manner restrictions . (Perry Educ. Assn. v. Perry Local Educators' Assn. 460 U.S. 37, 45 (1983).) Because the Commission has by practice and policy made Candlestick Park a public forum, the City cannot deny the Archdiocese use of Candlestick Park for a religious ceremony if the property is available.

Other factors support our conclusion that the Board of Supervisors did not intend Chapter 12B to apply to First Amendment activities. First, the sanctions for violating Chapter 12B, disbarring a contractor from use of City property or canceling the agreement or permit to use the property, are clearly inconsistent and violative of the First Amendment if the sanctions are directed to the expression of constitutionally protected activity. (Intern. Soc. for Krishna Consciousness v. Eaves (1979) 601 F.2d 809, 832-833; Perrine v. Municipal Court (1971) 5 Cal.3d 656, 664-665.)

Second, use of City property for First Amendment activities is generally for a very short time, i.e., hours or a few days. Under Section 12B.4, these groups would be required to submit extensive work force and employment data before being able to use City property. Such preconditions would need to be justified as reasonable time, place and manner restrictions before they could be imposed on First Amendment activities. (See U.S. Postal Service Council of Greenburgh (1981) 453 U.S. 114, 132; Park Code Section 7.01) More importantly, such time consuming and burdensome preconditions to the exercise of constitutionally protected rights would be invalid under the First Amendment as a form of "prior restraint". Indeed, consistent with the Constitution, the City, through its Human Rights Commission, could not prevent the use of its public facilities based on its

disagreement with the expression of constitutionally protected activities. (Cinevision v. City of Burbank (1984) 745 F.2d 560.) Content based distinctions are censorship plain and simple. They are prohibited by the First Amendment. (Ibid.)

Third, the Human Rights Commission has administratively construed the requirements of Chapter 12B to be applicable to agreements whereby the City procures goods, services, materials and the like for its own operational needs. To our knowledge, City departments including the Human Rights Commission, the Recreation and Park Commission and the Police Department have never applied Chapter 12B to an agreement or permit for the use of public facilities for a First Amendment activity.

The conclusion that Chapter 12B is inapplicable in this instance is also consistent with prior advice of this office. Nine years ago, this office advised the Clerk of the Board of Supervisors that the City was obligated to rent park property to Nazi organizations because that property had been made available to other groups for meetings and social gatherings. (City Attorney Opinion No. 78-18, p. 2.) Moreover, we concluded that allowing the occasional use of park property by Nazi organizations who discriminate on the basis of race and religion did not violate the provisions of Administrative Code Chapters 12B and 12C. (Id., p. 5.)

In short, Chapter 12B applies only to arms-length bargaining agreements whereby the parties retain full discretion to do business with each other. The legislature did not intend to have Chapter 12B's provisions imposed by any City department on an organization seeking to use City property for First Amendment activities. We now consider the applicability of Chapter 12C.

By its terms, Chapter 12C, relating to nondiscrimination in agreements for the use of City real property, has a broader scope than Chapter 12B.

Section 12C. 1. provides:

> All contracting agencies of the City and County of San Francisco, or any department thereof, acting for or on behalf of the City and County, shall include in all contracts, franchises, leases, concessions or other agreements involving the lease, rental, or other use of real property and improvements thereon of the City and County of San Francisco, for a period exceeding twenty-nine (29) days in any calendar year, whether by singular or cumulative instrument, a provision obligating the

> contractor, franchise, lessee, concessionaire, or other party of said agreement not to discriminate on the ground or because of race, color, creed, national origin, ancestry, age, sex, sexual orientation ((or)) disability or Acquired Immune Deficiency Syndrome or AIDS Related Conditions (AIDS/ARC), against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, operating from or making use of said real property, and shall require such contractor, franchisee, leasee, or concessionaire to include a similar provision in all subcontracts, subleases, or other subordinate agreements for a period exceeding twenty-nine (29) days in any calendar year, whether by singular or cumulative instrument, let, awarded, negotiated or entered into thereunder. (Emphasis added.)

The term "contract" in Chapter 12C is defined as "an agreement to operate from or make use of real property of the City and County of San Francisco in the operation of a business, social, or other establishment or organization." (Sec. 12C.2.) Even assuming that this agreement falls within the definition of a "contract", Chapter 12C is inapplicable because the agreement is for less than 29 calendar days.

CONCLUSION

Chapter 12B does not apply to uses of the City's public facilities for First Amendment activities such as religious ceremonies, charitable soliciting, presentation of musical events, rallies, speeches and the like. Since the agreement at issue is for use of Candlestick Park for a religious event, Chapter 12B is not required to be included therein. Even assuming the agreement is a "contract" under Chapter 12C, Chapter 12C is not applicable in the instant case because the use of the City's property is less than 29 days.

OTHER EVENTS EXEMPT FROM CHAPTER 12B

You have asked us to identify other events similar to the Papal Mass where a City department has not applied Chapter 12B. The Police Legal Department and Recreation and Park Department inform us that none of the permits issued for First Amendment activities have included Chapter 12B as a condition to granting permission for the use of City property. Examples of well known annual events exempt from Chapters 12B and 12C are: Bay to Breakers, Martin Luther King Rally, Freedom Day Parade, all street fairs and street parades. Moreover, agreements between

organizations and the office of the Chief Administrative Officer for the use of City Hall for special events do not include references to Chapters 12B and 12C. The Recreation and Park Department informs us that for large events, negotiation with the permittee/user of the property is customary with regard to items such as security, chemical toilets, plan of operation, coordination with the Police and other City departments. (See Rec. and Park Commission Resolution No. 14375.)

Very truly yours,

LOUISE H. RENNE
City Attorney

MARA E. ROSALES
Deputy City Attorney

APPROVED:

LOUISE H. RENNE
City Attorney

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City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
City Attorney

December 8 , 1987

OPINION NO. 87-19

SUBJECT: ACCEPTANCE OF GIFTS

REQUESTED BY RICHARD WALSH
Library Commission Secretary

PREPARED BY ELAINE C. WARREN
Deputy City Attorney
MARCIA F. CUTLER
Legal Assistant

QUESTIONS PRESENTED

1. What steps need to be followed when a cash gift of more than $5,000 is offered to the Library?

2. What steps need to be followed when a cash gift of $5,000 or less is offered to the Library?

CONCLUSIONS

The City's procedure for accepting a cash gift involves three basic steps: receipt, acceptance and administration.

1. For cash gifts over $5,000 given to the Library for library purposes: the Library Commission receives the gift, the Board of Supervisors accepts the gift, and the Library Commission administers the gift in accordance with its terms and conditions.

2. For cash gifts of $5,000 or less given to the Library for library purposes: the Library Commission receives the gift, the City Librarian accepts the gift and the Library Commission administers the gift in accordance with its terms and conditions.

ANALYSIS

Gifts to the Library of more than $5,000.

The questions you have asked relate to the acceptance and expenditure of cash gifts. Hence, this opinion is confined solely to the subject of cash gifts.

Receipt

San Francisco Charter, Section 1.101 grants the City and County the authority to receive gifts and to do all acts necessary to carry out conditions attached to such gifts. See City Attorney Opinion 85-34. Under Charter Section 2.101, all powers of the City and County are given to the Board of Supervisors, except those powers specifically delegated to other officials, boards or commissions. Thus, unless the Charter specifies otherwise, the Board of Supervisors is the appropriate body to receive gifts and to authorize acts to carry out the purposes of such gifts.

Section 3.500 of the Charter specifically gives boards and commissions authority to "receive" gifts for any purpose connected or incidental to the department placed under its charge. Section 3.500 provides in relevant part:

> Each board and commission appointed by the mayor, or otherwise provided by this charter, shall have powers and duties as follows:
>
> . . .(d) to receive, on behalf of the city and county, gifts, devises and bequests for any purpose connected with or incidental to the department or affairs placed in its charge, and to administer, execute and perform the terms and conditions of trusts or any gifts, devise or bequest which may be accepted by vote of the people or by the board of supervisors for the benefit of such department or purpose. . . .

Hence, the Library Commission is the appropriate body to receive gifts made to the library.

Any officer or employee who receives any money, including a cash gift, is subject to Charter Section 6.311. This section provides, in relevant part:

> All moneys and checks received by any officer or employee of the city and county for, or in connection with the business of, the city and county, shall be paid or delivered into the treasury <u>not later than the next business day after its receipt</u>, and shall be receipted for by the treasurer. (Emphasis added.)

This provision applies to the receipt of any cash gift and must be followed regardless of whether the gift is accepted.

Acceptance

The authority granted boards and commissions to receive gifts and administer them for purposes under their jurisdiction is distinct from the authority to accept gifts. Charter Section 3.500 does not give boards and commissions authority to accept gifts. This authority remains vested with the voters and the Board of Supervisors.

Pursuant to its authority to accept gifts, the Board of Supervisors has enacted Sections 10.116 through 10.116-3 of the Administrative Code delegating authority to department heads to accept gifts of $5,000 or less (see discussion infra). However, the Board has not delegated to department heads the authority to accept gifts valued at more than $5,000. Hence, the Board of Supervisors retains authority to accept gifts valued in excess of $5,000. Such gifts must be accepted by the Board of Supervisors before the Library Commission may administer the gift and authorize expenditure of any money from the gift.

Administration of the Gift

Section 3.500 gives boards and commissions authority to "administer, execute and perform the terms and conditions" of the gifts once the gifts are accepted by the Board of Supervisors. Therefore, the Library Commission, as the administering body, authorizes expenditures pursuant to the terms and conditions of the gift.

However, expenditure of a cash gift is also subject to the Charter provisions governing the expenditure of money. Charter Sections 6.303 and 6.302 prohibit expenditures unless they are made pursuant to the annual appropriation ordinance. These sections provide, in relevant part:

> 6.303
> No money shall be drawn from the treasury of the city and county nor shall any obligation for the expenditure of any money be incurred except in pursuance of appropriations . . . made as in this charter provided.
>
> 6.302
> Accounts shall be kept by the controller showing the amount of each class or item or revenue as estimated and appropriated in the annual appropriation ordinance, and the amount collected. Accounts shall also be kept by the controller of each expense appropriation item authorized by the board of supervisors. Every

warrant on the treasury shall state specifically by title and number the appropriation item against which such warrant is drawn.

* * *

No obligation involving the expenditure of money shall be incurred or authorized by any officer, employee, board or commission of the city and county unless the controller first certifies that there is a valid appropriation from which the expenditure may be made, and that sufficient unencumbered funds are available in the treasury to the credit of such appropriation to pay the amount of such expenditure when it becomes due and payable.

Thus, before the City expends revenues received from a gift, that expenditure must be authorized by an appropriation of the revenues by an appropriation ordinance and an account of the expenditure must be kept by the Controller. Section 11.1 of the administrative provisions of the annual appropriation ordinance appropriates cash gifts. This section provides, in relevant part:

Whenever the City and County of San Francisco shall receive for a special purpose from the United States of America, the State of California, or from any public or semi-public agency, or from any private person, firm or corporation, any moneys, or property to be converted into money, the Controller shall set up on the books of his office a special fund or account evidencing the said moneys so received and specifying the special purposes for which they have been received and for which they are held, which said account or fund shall be maintained by the said Controller as long as any portion of said moneys or property remains.

* * *

The expenditures necessary from said funds or said accounts as created herein, in order to carry out the purpose for which said moneys or orders have been received or for which said accounts are being maintained, shall be approved by the Controller and said expenditures are hereby appropriated in accordance with the terms and conditions under which said moneys or orders

> have been received by the City and County of San Francisco, and in accordance with the conditions under which said funds are maintained.

Thus, the Board of Supervisors, by including Section 11.1 in the annual appropriations ordinance, has appropriated gifts received by the City and County of San Francisco in accordance with the terms and conditions of the gifts.

In conclusion, cash gifts over $5,000 received by the Library Department must be deposited with the Treasurer by the end of the next business day. The gift must be formally accepted by the Board of Supervisors or by vote of the people. Thereafter, expenditure of the cash gift must be authorized by the Library Commission and approved by the Controller.

Gifts to the Library Valued at $5,000 or Less.

Receipt

The procedure for receiving, accepting and administering cash gifts of $5,000 or less is set forth in Administrative Code Sections 10.116 et seq. Administrative Code Section 10.116-1 provides that cash gifts of $5,000 or less, when received, shall be deposited with the Treasurer. This must be done before the end of the next business day after receipt of the cash gift (Charter Section 6.311).

Pursuant to Administrative Code Section 10.116-3, the Library Commission must submit an annual report to the Board of Supervisors showing all gifts it has received in the last year that were valued at not more than $5,000, the nature or amount of each gift and the disposition of each gift. The Library Commission must furnish this report to the Board of Supervisors during the first two weeks of July. Id.

Acceptance

The Board of Supervisors, in Administrative Code Section 10.116, has delegated to department heads the authority to accept gifts of $5,000 or less, provided they are for the benefit of that department and for purposes within its jurisdiction.

Section 10.116 provides:

> The Board of Supervisors does hereby authorize department heads to accept any gift of cash in an amount not to exceed $5,000, or goods of market

> value not to exceed $5,000, which may from time to time be offered to the City and County of San Francisco through any department, board or commission thereof, for the benefit of the designated department, board or commission and for such purposes within its prescribed legal jurisdiction as may be specified by the donors. The Board of Supervisors does hereby authorize said departments, boards and commissions to receive and to administer such gifts in accordance with the wishes of the donors.

Therefore, the City Librarian, as the head of the library department, may accept gifts valued at no more than $5,000, provided that the gift is given for a library purpose.

Administration of the Gift

In Section 10.116, the Board of Supervisors authorizes "departments, boards and commissions to receive and to administer" gifts accepted by department heads in accordance with the wishes of the donors. However, boards and commissions created pursuant to charter provisions already have the power to receive and administer gifts pursuant to Charter Section 3.500. The Board of Supervisors therefore does not have the power to authorize department heads under boards and commission formed pursuant to charter provisions "to receive and to administer" gifts. It must be concluded that the Board of Supervisors did not intend to empower department heads acting under boards and commissions to exercise powers, control over which is reposed by the Charter in boards and commissions. In departments such as the library where the department head reports to a board or commission, the board or the commission, rather than the department head, is the entity empowered by the Charter to authorize the expenditure of gifts accepted by the department head. Where a department does not have a board or commission overseeing its affairs, then Section 10.116 empowers the head of the department to authorize (i.e. administer) the expenditure of gifts valued at not more than $5,000.

As the Library Department is overseen by the Library Commission, the Commission must authorize the expenditure of any gifts valued at $5,000 or less that are accepted by the City Librarian. The librarian's power to accept does not include the authority to expend the gift. The proper procedure requires the Library Commission to authorize the expenditure of such gifts.

Section 10.116-1 provides that the Controller will establish procedures for setting up special accounts for the gifts and for disbursements from these accounts. We have discussed these

procedures with members of the Controller's staff. Under the normal procedure, the department in question provides the Controller with information about the gift so that the Controller can set up a separate account for each gift that is given for a unique purpose. Thus, if the City Librarian receives and accepts a gift for the purchase of books, he or she should then request the Controller to set up an account for that purpose. If the City Librarian receives and accepts cash gifts for general library purposes, that information should be given to the Controller so that an account can be set up for all such general gifts. By setting up accounts in this fashion, the Controller and the Library will be able to verify and account for the fact that gifts have been expended in compliance with the terms and conditions of the donor.

In conclusion, the Library Department should deposit cash gifts with the Treasurer no later than the next business day after receipt of the gift. The City Librarian may accept cash gifts valued at not more than $5,000, provided the gifts are intended for a purpose under the jurisdiction of the Library. The Library Commission administers the gifts as requested by the donor and may authorize expenditures pursuant to the budgetary provisions of the Charter. Finally, the Library Commission should submit an annual report to the Board of Supervisors, in the first two weeks of July, listing the gifts valued at not more than $5,000 that it received in the last year, and explaining the disposition of each gift.

Very Truly Yours,

LOUISE H. RENNE
City Attorney

By: _____
ELAINE WARREN
Deputy City Attorney

APPROVED:

_____
LOUISE H. RENNE
City Attorney

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