Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
January 5, 2009

In the Matter of)
) Complaint No. 08-19
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David Mix filed Complaint No. 08-19 on November 25, 2008.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 08-19 alleging that the City of Oakland violated the Brown Act and Oakland Sunshine Ordinance by convening a closed session to consider whether to join pending litigation seeking to enjoin enforcement of Proposition 8 (same sex marriage). Mr. Mix also alleges that the City Council violated its own Code of Ethics by challenging a Constitutional amendment recently adopted by California voters. ***Attachment 1.***

II. FACTUAL SUMMARY

On November 4, 2008, California voters amended Article II of the California Constitution to provide that "Only marriage between a man and a woman is valid or recognized in California."

On November 5, 2008, the City and County of San Francisco, County of Santa Clara and the City of Los Angeles announced the filing of a lawsuit to ultimately invalidate the amendment on grounds that the amendment deprives same-sex couples of the right to equal protection of law. In a press release issued by San Francisco City Attorney Dennis Herrera, Mr. Herrera "pledged to enlist additional support and participation from other California cities and counties." ***Attachment 2.***

On November 18, 2008, the City Council agendized for a closed session hearing the following item:

1. Conference with its City Attorney pursuant to California Government Code Section 54956.9(c) regarding:

Anticipated Litigation in one (1) matter.
Attachment 3.

When the City Council convened in open session later that evening, Chief Deputy City Attorney Barbara Parker announced that the City Council had taken final

action in closed session regarding the agendized matter of anticipated litigation. Ms. Parker announced that the City of Oakland was authorized to join as a party-petitioner in litigation with the City and County of San Francisco, City of Los Angeles, and County of Santa Clara. She reported that the petition was filed to invalidate Proposition 8 on grounds that the California Constitution does not permit a "bare majority" to divest a "politically unpopular group of people the rights that are conferred by the equal protection clause of the California Constitution."

III. ANALYSIS

A. Alleged Brown Act And Sunshine Ordinance Violation

Mr. Mix alleges that taking action to authorize the City to join this litigation in closed session constitutes a "blatant violation of the Ralph M. Brown Act".

The Brown Act permits local legislative bodies to discuss certain matters in closed session. Government Code Section 54954.5 provides special agenda language to describe the items that may permissibly be considered in closed session. Local legislative bodies are provided a "safe harbor" from legal challenges over the description of a closed session item if they substantially comply with the descriptions provided in Section 54954.5. The Sunshine Ordinance requires that Oakland local bodies use the specific, pre-approved language of Government Code Section 54954.5 when noticing a permitted closed session agenda item. [O.M.C. Section 2.20.100] It further states that the failure to do so could result in the invalidation of any action not properly noticed. [Id.]

One of the permissible items a legislative body may consider in closed session is to "confer with or receive advice from" its legal counsel regarding "pending litigation." Government Code 54956.9(c) provides that litigation is "pending" when, "[b]ased on existing facts and circumstances, the legislative body of the local agency has decided to initiate ***or is deciding to initiate litigation.***" (Emphasis added.) Government Code Section 54954.5 expressly authorizes a local legislative body to use the "safe harbor" language of "Anticipated Litigation in one [or more] matter" whenever a local legislative body is considering whether to initiate litigation pursuant to Government Code Section 54956.9(c). No other information is required on the agenda. The City's decision to add itself as a "party-petitioner" in the case of <u>San Francisco v. Horton</u> "initiated" litigation on behalf of the City of Oakland and subjects the City to the same rights and liabilities as any of the other local agencies challenging Proposition 8.

Based on the extremely broad agenda descriptions permitted under the Brown Act to describe closed session matters, Commission staff concludes that the City Council met the minimum requirements for agendizing and taking action under the "anticipated litigation" exception.

B. Alleged Violation Of The City Council Code Of Ethics

Mr. Mix alleges that the City Council action "is contrary to their sworn duty to abide by the law." He argues that the City has "absolutely no legitimate reason to be involved and cannot possibly justify spending any of the public's money, or exerting any time or energy on this issue." He alleges the City's decision violates the City Council's Rules of Procedures/Code of Conduct.

1. Commission Jurisdiction

Section 2.24.020(B) of the Commission's enabling ordinance states that it shall be the "function and duty" of the Commission to "oversee compliance with the City Code of Ethics." Section I of the Commission's General Complaint Procedures states that the procedures shall apply to "the review, investigation and hearing" of alleged violations of "The City Council Code of Conduct" and the "City of Oakland Code of Ethics, if adopted by the City Council." Based on these authorities, the Commission has historically considered complaints alleging violations of the City Council's "Code of Conduct."

2. City Council's Code Of Conduct/Code of Ethics

Contained in the City Council's Rules of Procedures is the City Council's "Code of Conduct." [1] The Code of Conduct provides in relevant part:

> *Each member of the City Council has the duty to:*
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> ***1.*** *Respect and adhere to the American ideals of government, the rule of law, the principles of public administration and high ethical conduct in the performance of public duties. . .*
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> *###*
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> ***12.*** *Maintain the highest standard of public conduct by refusing to condone breaches of public trust or improper attempts to influence legislation, and by being willing to censure any member who willfully violates the rules of conduct contained in this Code of Ethics."*

In past complaints, Commission staff has expressed reservations about the administrative enforceability of the City Council Code of Conduct/Code of Ethics. While several provisions are reasonably specific (though not relevant to this complaint), most of the Code is too vague and/or ambiguous to give adequate notice of what type of conduct will or will not constitute a violation. For example, what type of

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[1] The current Code of Conduct has previously been designated as the City Council's "Code of Ethics" in prior versions of the City Council's Rules of Procedure. The current "Code of Conduct" also refers to itself as the "Code of Ethics" in Paragraph 12.

conduct in Paragraph 1 constitutes proper "respect" for the "rule of law" or the "American ideals of government?"

More to the point, the City of Oakland arguably does not abrogate its respect for the rule of law by challenging it in court. The history of American jurisprudence is but a series of legal challenges to legislative and voter-enacted law. Furthermore, there is undoubtedly a significant number of Oakland residents whose rights and/or interests will be affected by a judicial ruling on the merits of this case. Commission staff cannot conclude that there is an issue of whether the Oakland City Council violated its Code of Conduct by initiating this litigation on behalf of its residents and the municipal corporation itself.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 08-19 on grounds that there is no legal or factual basis supporting the allegation that the City Council 1) violated the Brown Act or Sunshine Ordinance in agendizing and taking action in closed session on November 18, 2008, to initiate litigation pertaining to Proposition 8, and 2) violated its Code of Conduct/Code of Ethics in connection with that action.

Respectfully submitted,

Daniel D. Purnell
Executive Director

** *City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*

Attachment E-4