CITY OF OAKLAND

CITY ATTORNEY'S OFFICE

LEGAL OPINION

TO: City Council

CC: Mayor Dellums

FROM: John Russo
City Attorney

DATE: February 5, 2009

RE: **Applicability of Anti-Nepotism Ordinance No. 12908's Cronyism Provision to Mayoral Appointment of City Administrator**

INTRODUCTION

A member of the public, Carlos Plazola, has complained that the Mayor's appointment of Daniel Lindheim to the positions of Interim Director of the Community and Economic Development Agency and Acting City Administrator violates the cronyism provision of the City's recently adopted Anti-Nepotism Ordinance. As the City of Oakland's legal officer, the City Attorney does not usually issue advice or opinions at the request of members of the public. In this case, however, Councilmember Pat Kernighan has asked this office's opinion concerning this complaint and has also represented that another Councilmember would like this Office's opinion concerning the complaint. Mr. Plazola's complaint raises genuine legal questions that challenge the foundations of the Mayor's and City Administrator's authority, are matters of first impression concerning a recently enacted ordinance, and may result in questions by the City Council when it considers whether to confirm the Mayor's appointment of Mr. Lindheim. For these reasons, the Office has decided to issue its opinion now.

QUESTION

Does Ordinance 12908 apply to the Mayor's participation in the appointment of the City Administrator?

SUMMARY CONCLUSION

No. The Oakland City Charter, Section 500, enacted by the people of Oakland, is the supreme law of the City. It can be amended only by a vote of the electorate. No enactment by the City Council, whether by resolution, motion or ordinance can override the Charter's dictates. Sections 1 and 6 of Ordinance No. 12908 violate the City Charter as applied to the Mayor's appointment of a City Administrator. Accordingly, those sections are void and unenforceable as applied to the Mayor's appointment of the City Administrator.

Because the City Council has plenary authority to consider and confirm the Mayor's appointment, Councilmembers are free to exercise their own judgment and consider the relationship between the Mayor and appointee in making their decisions on his appointment. An ordinance, however, cannot legally preclude the Mayor from exercising his own Charter authorized powers and making the appointment.

This opinion is only applicable to the appointment of the City Administrator. This Office offers no opinion at this time regarding the enforceability of the cronyism sections of Ordinance 12908 in any other employment context.

BACKGROUND

In December 2007, City Administrator Deborah Edgerly appointed Dan Lindheim as Interim Director of Economic Development. In June 2008, Mayor Ronald V. Dellums appointed Mr. Lindheim as Acting City Administrator.

On December 9, 2008 the City Council passed Ordinance No. 12908 C.M.S., which added a new chapter to the Oakland Municipal Code entitled, "Prohibition on Nepotism in City Employment." The ordinance includes a new prohibition on "cronyism."

On January 22, 2009, Oakland resident Carlos Plazola wrote a letter to the City Attorney's Office complaining that the Mayor's earlier appointment of Mr. Lindheim to the two positions violated Ordinance No. 12908. It states:

> Complaint: Acts of cronyism, by Mayor Dellums, by appointing an unqualified person, Dan Lindheim, as Interim City Administrator and Interim Director of Economic Development based on a 25-year relationship, irrespective of Mr. Lindheim being unqualified for both positions.

On January 29, 2009, the Mayor appointed Mr. Lindheim as the City Administrator.

ANALYSIS

THE APPOINTMENTS OCCURRED *BEFORE* THE PASSAGE OF ORDINANCE 12908

The two appointments complained of by Mr. Plazola occurred before the passage of Ordinance 12908. Nothing in Ordinance 12908 specifies that it was to be effective retrospectively. Without such specific language, it is presumed to not apply retrospectively. *Brenton v. Metabolife Intern., Inc.,* 116 Cal.App.4th 679, 688 (2004). There is no basis here to depart from this rule. Accordingly, Ordinance 12908 cannot apply to the Mayor's appointment of Mr. Lindheim to the positions of Interim Director of Economic Development and Acting City Administrator.

ORDINANCE 12908 AS APPLIED TO THE MAYOR'S APPOINTMENT OF A CITY ADMINISTRATOR VIOLATES THE CITY CHARTER

While the complaint is moot on its face, on January 29, 2009, the Mayor announced his decision to appoint Mr. Lindheim as the City Administrator pending City Council confirmation. Since Mr. Plazola's complaint raises issues of public controversy that can be raised again – now

regarding Mr. Lindheim's appointment as the City Administrator -- we choose to address the substance of the technically moot complaint.

Article V and IX of the City Charter

The City Charter is the City's constitution; it is the supreme law of the City with respect to municipal affairs. California Constitution Article XI sections 3(a) and 5(a) provide: "The provisions of a charter are the law of the State and have the force and effect of legislative enactments." "City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." City Charter provisions are controlling in the absence of preemptory state law. *United Public Employees v. City and County of San Francisco*, 190 Cal.App.3d 419, 422 (1987).

A City Council ordinance "can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the State Constitution." *Hubbard v. City of San Diego,* 55 Cal.App.3d 380, 392 (1976). Ordinances must be consistent with the City Charter; otherwise they are void. *Skaggs v. City of Los Angeles*, 43 Cal.2d 497, 501 (1954); *Howard Jarvis Taxpayer's Assn. v. City of Roseville*, 106 Cal.App.4th 1178, 1186 (2003). In order to change a City Charter, the people of the City must vote to change it. (California Constitution Article XI sections 3(a).)

Article V, Section 500 of the City Charter specifies the required qualifications and method of appointment of the City Administrator. Charter Section 500 grants the Mayor the exclusive authority to appoint the City Administrator subject to City Council confirmation. Charter Section 500 specifies the qualifications of the City Administrator. He shall be "a person of demonstrated administrative ability." He shall have "experience in a responsible, important executive capacity." He cannot be a member of the City Council or have been a Councilmember one year previous to the appointment. The Mayor shall choose him "solely on the basis of his executive and administrative qualifications."

> **ARTICLE V**
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> **Section 500. Appointment**. The Mayor shall appoint a City Administrator, subject to the confirmation by the City Council, who shall be the chief administrative officer of the City. He shall be a person of demonstrated administrative ability with experience in a responsible, important executive capacity and shall be chosen by the Mayor solely on the basis of his executive and administrative qualifications. No member of the Council shall, during the term for which he is elected or appointed, or for one year thereafter, be chosen as City Administrator. (Emphasis added.)

The City Charter specifies when issues such as nepotism may bar the Mayor from making an appointment of a City Administrator. Such bar is limited to relatives within the third degree of the Mayor. (City Charter Section 907.)

> **Section 907. Nepotism.** The Mayor or City Council shall not appoint as an employee or officer, to receive any compensation from the City, any person who is a relative by blood or marriage within the third degree of the Mayor or anyone or more of the members of the Council, nor shall the City Administrator or any other appointing authority appoint to any such position any relative of his or of the Mayor or any member of the Council within such degree of kinship.

The cronyism sections of Ordinance No. 12908 go beyond the anti-nepotism prohibitions in the City Charter. That is not, in itself, a Charter conflict; however, to the extent that the cronyism sections purport to intrude upon the Mayor's Charter granted right to appoint a City Administrator, those sections are inconsistent with the Carter and are not legally enforceable. The cronyism provision, if enforced, would prohibit the Mayor from choosing a City Administrator in the manner not specified by the Charter. The Charter must take precendence over a mere ordinance when the two are in conflict.

Section 6. Prohibition on Participation or Use of Influence in Hiring and in Setting or Changing Terms and Conditions of Employment

> No official, manager or employee may engage in cronyism and/or attempt to influence the City or any official, manager or employee, to hire, promote, or change the terms and conditions of employment of any individual with whom that person has a family relationship, consensual romantic relationship or cohabitant relationship. No official, manager or employee may delegate such authority to a subordinate in order to participate in such personnel decisions. (Ordinance No. 12908, emphasis added.)

The definition of cronyism starts with a subjective test. The definition prohibits participating in an employment decision that may be "viewed" as a conflict of interest that would compromise the "appearance" of fairness.

> "'Cronyism' means participating in any employment decision that may be <u>viewed as</u> a conflict of interest, such as one involving a close friend, a business partner, and/or professional, political, or commercial relationship, that would lead to preferential treatment or compromise the <u>appearance of</u> fairness." (Ordinance No. 12908, section 1, emphasis added.)

The ordinance gives illustrative examples of decisions that may be "viewed as a conflict of interest: decisions involving a "close friend, a business partner, and/or professional, political, or commercial relationship." (Ordinance No. 12908, section 1.)

While there is some overlap between the City Charter and the ordinance, the ordinance limits the Mayor's power to appoint the City Administrator. For example, even if the Mayor complies with the mandates of the Charter and chooses a candidate "solely on the basis of his executive and administrative qualifications" and the appointee is "of demonstrated administrative ability with experience in a responsible, important executive capacity," Ordinance No. 12908 would prohibit a Mayoral appointment based on whether the appointment <u>appears to involve a conflict of interest of the type set out in the ordinance</u>. This imposes restrictions beyond those in the City Charter.

Because Ordinance No. 12908 inhibits the exercise of the Mayor's Charter granted appointment powers, the ordinance violates the City Charter as applied to the Mayor's appointment of a City Administrator. Accordingly, Section 1 and 6 of Ordinance No. 12908 are void and unenforceable as applied to the Mayor's appointment of a City Administrator.

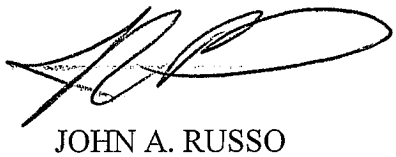
CONCLUSION

The two appointments complained of by Mr. Plazola occurred before the passage of Ordinance 12908. Accordingly, Ordinance 12908 cannot apply to the Mayor's appointment of Mr. Lindheim to the positions of Interim Director of Economic Development and Acting City Administrator.

The City Charter grants the Mayor the sole power and responsibility to appoint the City Administrator. The City Council is not deprived of a role in the process of hiring a City Administrator. The Charter gives the Council the specific power to confirm or reject the Mayor's appointment. The Mayor proposes and the Council disposes. That is the process the people of Oakland have established in our City's Charter.

Councilmembers may decide whether or not to confirm the Mayor's appointee for a variety of reasons. Those reasons may properly include the types of issues and concerns which undergird the cronyism sections of the Anti-Nepotism Ordinance. The City Charter was enacted by the people of Oakland and is the supreme law of the City. It can be amended only by a vote of the people. No enactment by the City Council, whether by resolution, motion or ordinance can override the Charter's dictates.

Very truly yours,



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