CITY OF OAKLAND
Public Ethics Commission

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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: June 1, 2009

RE: A Staff Report And Action To Be Taken Regarding Proposed Amendments To O.M.C. Chapter 2.24 (Powers And Duties Of The Public Ethics Commission)

Oakland City Charter Section 202(b)(5) provides that the City "shall by ordinance prescribe the function, duties, powers, jurisdiction and terms of members of the Commission, in accordance with this Article." In 1997, the City Council adopted O.M.C. Chapter 2.24 -- the Commission's so-called "enabling ordinance" setting forth those required functions, duties, powers, etc.

In 2008, the Commission appointed a special task force to examine the Commission's authorizing charter and enabling ordinance and to make specific recommendations regarding their provisions. After a long series of meetings and public discussion, the Commission finally authorized a series of proposed amendments to Chapter 2.24 to be submitted to the City Council for consideration.

On April 23, 2009, the City Council Rules and Legislation Committee ("Rules Committee") was scheduled to consider the proposed amendments for the first time. Unfortunately, the Rules Committee lost its quorum before the item could be considered. The item is awaiting a hearing pending a new scheduling request. Prior to the April 23 meeting, Commission staff received some comments from various members of the Rules Committee and/or their staff regarding the proposed amendments. Rather than re-schedule the item immediately, Commission staff wanted to apprise the Commission of the nature of those comments in the event the

Commission wished to address them formally either in the form of proposing alternative language, or by way of additional explanation to the Rules Committee.

Attached is a copy of the Commission's proposed amendments in "redline" format. Commission staff has annotated specific comments and a discussion under each of the relevant sections. ***Attachment 1.***

Commission staff recommends that the Commission review the attached redline, take public comment and provide Commission staff with any further direction before Commission staff re-agendizes the attached proposal before the Rules Committee for consideration.

Respectfully submitted,

Daniel D. Purnell
Executive Director

ORDINANCE AMENDING CHAPTER 2.24 OF THE OAKLAND MUNICIPAL CODE PERTAINING TO THE FUNCTIONS, DUTIES, AUTHORITY, AND COMPOSITION OF THE PUBLIC ETHICS COMMISSION

WHEREAS, City Charter Section 202(5) provides that the City Council shall "by ordinance" prescribe the function, duties, powers, jurisdiction and the terms of office for the Public Ethics Commission; and

WHEREAS, the amendments set forth below will achieve greater consistency with the provisions of City Charter Section 202 and further clarify and articulate the functions and duties of the Public Ethics Commission; now, therefore

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby adopts and incorporates them into this Ordinance.

SECTION 2. The Municipal Code is hereby amended to add, delete, or modify sections as set forth below (section numbers and titles are indicated in **bold type**; additions are indicated by underscoring and deletions are indicated by ~~strike-through type~~; portions of the regulations not cited or not shown in underscoring or strike-through type are not changed.

SECTION 3. Chapter 2.24 of the Oakland Municipal Code is hereby amended to read as follows:

2.24.010 DEFINITIONS

For purposes of this chapter, the following definitions shall apply:

A. "Commission" shall mean the Oakland Public Ethics Commission as established pursuant to Oakland City Charter Section 202.

B. "Doing business with an Oakland Agency" shall mean soliciting, bidding on, submitting proposals or qualifications for, or entering into or performing, a contract for goods, equipment, services or financial assistance with an Oakland Agency. "Doing business with an Oakland Agency" shall also mean the soliciting, applying for or receiving more than $500 in public funds from an Oakland Agency."]

C. "Governmental ethics laws" shall mean local laws governing campaign finance and communications, public financing of campaigns, lobbyist registration, public meetings and records, elections, conflicts of interest, disclosure of economic interests, use of public resources, incompatible office holding and employment, nepotism and ethical behavior.

- ***COMMENT: The collective term "governmental ethics laws" was developed to avoid the repetitive listing of specific laws over which the Commission has jurisdiction. (See Section 2.24.020, below.) It was also developed to encompass the broad range of subject matter over which the Commission has an interest, consistent with the City Charter's broad grant of responsibility for "City regulations and policies intended to assure fairness, openness, honesty and integrity in City government. . ." [Charter Section 202(a)]***

  While the term "governmental ethics laws" is established here only as a definition, specific questions were raised regarding the applicability of this term as further discussed below.

D. "Oakland Agencies" shall mean the City of Oakland, Oakland Redevelopment Agency, Port of Oakland, and the Oakland Unified School District.

2.24.020 FUNCTIONS AND DUTIES

It shall be the function and duty of the Public Ethics Commission, for and on behalf of Oakland Agencies, residents of the City of Oakland and its elected officials, officers, employees, boards and commissions to:

A. Monitor, administer and enforce governmental ethics laws as authorized to the Commission by ordinance.

B. Review and make recommendations to the City Council regarding governmental ethics laws and to report periodically to the City Council concerning the application and effectiveness of governmental ethics laws.

C. Set salary for the office of City Councilmember pursuant to Oakland City Charter Section 202 and advise the City Council regarding issues pertaining to City Council salaries.

D. Provide the City Administrator with an assessment of the Commission's staffing and budgetary needs.

E. Issue opinions, advice and instruction, in consultation with the City Attorney when necessary, regarding governmental ethics laws.

- ***COMMENT:*** ***Consistent with Section 2.24020(A), above, the City Council has adopted a number of laws for which it has delegated specific powers of administration and enforcement to the Commission, such as OCRA, the Sunshine Ordinance, the Lobbyist Registration Act, etc. One of the questions raised was whether the Commission should be authorized to issue "opinions, advice and instruction" on governmental ethics laws that have not been expressly authorized to the Commission to monitor, administer or enforce "by ordinance." For example, should the Commission be authorized by the above language to issue opinions, advice or instruction on governmental ethics laws not currently authorized to the Commission, such as "election law" or "nepotism." While within the Commission's broad general interest, the query is whether the Commission should be permitted to issue formal advice or opinions on such topics.***

  Commission staff is currently comfortable advising the Commission and members of the public regarding specific laws within the Commission's current jurisdiction. Commission staff defers to the Office of the City Attorney for formal opinions, advice or instruction on matters outside the Commission's current jurisdiction. An amendment specifying that the Commission shall "Issue opinions, advice and instruction, in consultation with the City Attorney when necessary, regarding governmental ethics laws as authorized to the Commission by ordinance" would meet the concern and be consistent with current practice.

F. Prescribe forms, reports, statements, notices, and other documents related to governmental ethics laws as authorized to the Commission by ordinance.

G. Develop informational resources and training programs pertaining to governmental ethics laws.

H. Solicit, promote and receive public comment on governmental laws.

I. Perform such other functions and duties as may be prescribed by ordinance or consistent with its responsibilities under the City Charter.

- ***<u>COMMENT</u>: One of the goals which the task force and Commission identified was to clarify the Commission's powers, duties and jurisdiction. After much discussion and debate, the Commission determined that the Commission's specific powers, duties and jurisdiction were best articulated in the specific policy ordinances delegated to the Commission to administer and enforce. Thus a question arose under the proposed language of Section 2.24.020(I) above, what specific "functions and duties" did the Commission have in mind that would be "consistent with its responsibilities under the City Charter" that were not already addressed or identified in the Commission's proposed amendments for Section 2.24.020. The concern was that in creating somewhat of a "catch-all" provision in Section 2.24.020(I), the "functions and duties" of the Commission would remain uncertain by reference to the very broad language of the City Charter.***

  Since City Charter Section 202(b)(5) provides that the City shall "by ordinance" prescribe the function, duties, powers, and jurisdiction of the Commission, an alternative amendment to Section 2.24.020(I) could be:

  "Perform such other functions and duties as may be prescribed by <u>ordinance</u> <u>consistent with Commission responsibilities under the City Charter.</u>

In prescribing the above duties and functions of the Commission, it is not the intent of the City Council to duplicate or overlap the functions, duties, or responsibilities heretofore or hereafter assigned to any other City board or commission or to a City department. As to such functions or responsibilities of another board or commission or of a department of the City, the Commission will render assistance and advice to such board, commission or department as may be necessary. Nothing in this section shall be construed to prevent City of Oakland officers, employees, and elected or appointed officials from seeking advice directly from the City Attorney, or, when appropriate, the Fair Political Practices Commission, concerning governmental ethics laws.

2.24.030 AUTHORITY

In furtherance of the above enumerated duties and functions, the Oakland Public Ethics Commission is hereby authorized to:

A. <u>Initiate and</u> conduct investigations, audits and public hearings.

B. Issue subpoenas to compel the production of books, papers and documents and take testimony on any matter pending before the Commission. The Commission may

find a person in contempt as provided by the general law of the State for failure or refusal to appear, testify, or to produce required books, papers and documents.

C. Determine the merit of complaints alleging violations and impose penalties, fines and other remedies as authorized to the Commission by ordinance. The Commission's decision with respect to violations, penalties, fines and other remedies shall be final.

- ***COMMENT: Both the task force and the Commission had questions about the existing requirement that any Commission decision "shall be appealable to a mutually agreed upon arbitatrator whose decision shall be final." Since none of the Commission's decisions to impose penalties or fines has ever been appealed, questions arose about what happens if the parties cannot "mutually agree" on an arbitrator; the scope of appeal (i.e., whether the decision is appealable de novo or on narrower grounds such as a mistake of law or an abuse of discretion); and who would bear the cost of the arbitrator. The task force and Commission recommendation was to propose that Commission decisions shall be final.***

  One of the concerns raised was that other major City boards and commissions, such as the Planning Commission and the Rent Adjustment Board permit appeal of their decisions. (An adjudicatory decision of the planning commission is appealable to the City Council; a decision of the Rent Adjustment Board is not appealable to the City Council but a party may seek judicial review of a Rent Board decision pursuant to Code of Civil [Procedure] Section 1094.5, the same review process that the San Diego ethics commission uses.)

  If the Commission wishes to develop an alternative proposal, Commission staff recommends that the Commission propose language identical to the Oakland Rent Adjustment Board and similar to the San Diego ethics commission process: "The Commission's decision is final. Parties cannot appeal to the City Council. A party may seek judicial review of a final decision of the Commission pursuant to California Code of Civil Procedure Section 1094.5 within the time frames set forth therein." A judicial review pursuant to Civil Procedure Section 1094.5 would be limited to questions of whether the Commission 1) proceeded without or in excess of its jurisdiction; 2) whether there was a fair hearing; or 3) whether there was a prejudicial abuse of discretion. Alternatively, the Commission can develop additional language within the framework of an appeal to a "mutually agreeable arbitrator" that

would attempt to address the procedural questions first identified by the task force and Commission.

D. Issue letters of guidance or concern to Oakland Agencies, their officials, officers, candidates for elected office, employees, local bodies and any other persons regarding an alleged violation of a governmental ethics law that the Commission is authorized to enforce where it appears, after an investigation, that there is an issue sufficient to justify a formal evidentiary hearing but the Commission chooses not to proceed with a hearing.

E. Issue written opinions and written advice with respect to a person's duties under governmental ethics laws that the Commission is authorized to enforce so long as the procedures for issuing such opinions and advice have been approved pursuant to Section 2.24.070. No person who relies in good faith upon a written opinion issued by the Commission shall be subject to enforcement proceedings by the Commission provided that the material facts are as stated in the opinion request. The good faith reliance upon written advice from Commission staff shall be a complete defense in enforcement proceedings by the Commission provided that the material facts are as stated in the advice request.

2.24.040 COMPOSITION, TERMS OF OFFICE

A. The Oakland Public Ethics Commission shall have seven (7) members.

B. Members of the Commission shall be appointed as follows: Three (3) members who represent local civic organizations with a demonstrated history of involvement in local governance issues shall be nominated for appointment by the Mayor, with confirmation by the City Council, pursuant to Section 601 of the City Charter. Four (4) members shall be appointed, following a public recruitment and application process, by the affirmative vote of at least four (4) members of the Commission. Commission-appointed members shall reflect the interests and diversity of the greater Oakland neighborhood and business communities. Commissioners shall serve without compensation.

C. Prior to the nomination of a Commission member by the Mayor, each member of the City Council may provide the Mayor with a list of up to three individuals qualified to serve on the Commission. In appointing members to the Commission, the Mayor may consider the recommendations of the City Council.

D. Four (4) members shall constitute a quorum of the Commission.

E. Members of the Commission shall be appointed to overlapping terms beginning on January 22 and ending on January 21. Each Commission term of office shall be three (3) years. The tenure of a member on the Commission shall terminate when the member's term expires.

F. A vacancy on the Commission will exist whenever a member dies, resigns, or is removed. For vacancies caused by the normal expiration of a Mayoral appointee's term, the Mayor shall submit his or her nomination to the City Council no later than 30 days before the end of the term. For vacancies caused by a Mayoral appointee's death, resignation or removal from office, the Mayor shall submit his or her nomination to the City Council within 60 days after the death, resignation or removal from office.

G. There shall be no limit on the number of terms a person may serve on the Commission provided that any term be separated by a period of at least one year from the last date of service on the Commission. No person removed from the Commission pursuant to Sections 2.24.040(H) or 2.24.040(I) shall be eligible to serve on the Commission after his or her removal.

H. A member appointed by the Mayor may be removed pursuant to Section 601 of the Oakland City Charter.

I. A member appointed by the Commission may be removed by the affirmative vote of at least four (4) members of the Commission. No member of the Commission shall be removed except for one or more of the following reasons as determined by the Commission: 1) conviction of a felony, 2) willful or corrupt misconduct in office, 3) inability or unwillingness to perform the duties of office, or 4) absence from three (3) regular meetings during a twelve month period unless because of illness or when excused by the Commission chairperson.

2.24.050 QUALIFICATIONS AND RESTRICTIONS

A. Each member of the Commission shall be an individual whose domicile is located within the City of Oakland.

B. During his or her service, and for one year thereafter, no member of the Commission shall

1) be employed by an Oakland Agency; 2) act as a local governmental lobbyist; 3) seek election to any Oakland public office; 4) participate in or contribute to an Oakland municipal campaign; 5) publicly endorse, support, oppose, or work on behalf of any candidate or measure in an Oakland election; or 6) accept a gift of any value from an Oakland elected or appointed official of any Oakland Agency, from a candidate for election to any Oakland office, from a designated employee of any Oakland Agency, or from a local governmental lobbyist.

- ***COMMENT: A question was raised whether the prohibition from accepting a "gift of any value" was a practical or an enforceable restriction. The proposed language would prohibit Commissioners from accepting anything of value from appointed officials, designated employees or lobbyists, even if Commissioners have pre-existing friendships or relationships***

with people who fall into one of the enumerated categories. One of the hypothetical questions raised was whether the proposed restriction on gifts would preclude a Commissioner from having a holiday meal at a relative's house if the relative is a "designated employee" of the City, or serves on another City board or commission. The proposed language would appear to restrict this practice.

The Commission is certainly entitled to recommend a high standard of conduct for and by its members. The policy question is whether that standard becomes an impediment to current and future members serving on the Commission. If the Commission wishes to consider more flexibility on the issue of gifts, Commission staff can prepare language that would define "gift" as a "reportable gift" under FPPC regulations. A "reportable gift" excludes several types of common exchanges among people such as gifts of home hospitality, holiday exchanges, gifts between family members, tickets to non-profit fundraisers, etc. Such an approach would arguably maintain a high degree of impartiality and fairness within a well defined and recognized set of exceptions.

C. During his or her tenure, no member of the Commission shall have a substantial financial interest in any work, business, property or official action of an Oakland Agency. For purposes of this section, a substantial financial interest includes, but is not limited to, the following situations: 1) the member has a controlling ownership interest in a business entity doing business with an Oakland Agency; 2) the member serves as a director, officer, general partner, or trustee of any business entity doing business with an Oakland agency; 3) the member directly receives more than $500 in the capacity as an employee or contractor from an Oakland Agency during any calendar year. In determining whether a substantial financial interest exists, the Commission shall be guided by the laws, opinions and advice pertaining to financial conflicts of interests pursuant to the California Political Reform Act.

2.24.060 ELECTION OF CHAIRPERSON AND MEETINGS

At the first regular meeting of each year the members shall elect a chairperson and a vice chairperson. The Commission shall hold regular meetings at an established time and place suitable for its purpose. Other meetings scheduled for a time or place other than for regular meetings shall be designated as special meetings. Written notice of special meetings shall be provided the members, the Council, and the public press at least seventy-two hours before the meeting is scheduled to convene.

2.24.070 RULES, REGULATIONS AND PROCEDURES

The Commission shall establish rules, regulations and procedures for the conduct of its business by a majority vote of the members present. The Commission must vote to adopt any motion or resolution. The Commission shall transmit to the City Council any rules, regulations and procedures adopted by the Commission within seven calendar days of adoption. A rule, regulation or procedure adopted by the Commission shall become effective 60 days after the date of adoption by the Commission unless before the expiration of this 60 day period two-thirds of all the members of the City Council vote to veto the rule, regulation or procedure.

2.24.080 STAFF ASSISTANCE

The Office of the City Administrator shall provide the Commission with staff and financial assistance to permit the Commission to fulfill the functions and duties as set forth above including, but not limited to, staffing and funding the positions of Executive Director, an Executive Assistant, and additional personnel as circumstances require. The Executive Director shall be a classified position subject to the civil service rules of the City of Oakland however the City Administrator, or his or her designee, should use his or her best efforts to consult with the Commission prior to the hiring or termination of the Executive Director.

- **Several concerns were raised regarding the Commission's proposal to prescribe, by ordinance, mandatory minimum staffing levels and job classifications for the Commission. Given the City's current financial situation, there may not be sufficient support to reduce the City Council's ability to address staffing levels for Oakland's many boards and commissions. The Commission proposal reflects current staffing levels and job classifications. Commission staff has no recommendation regarding how the Commission should address this likely objection.**

2.24.090 LEGAL ASSISTANCE

The City Attorney is the Commission's legal advisor. The City Attorney shall provide the Commission with legal .assistance in conformity with the California Rules of Professional Responsibility and applicable state law. In the event of a conflict, the City Attorney, after consultation with the Commission, shall retain outside counsel.

2.24.100 PROTECTION AGAINST RETALIATION

A. No officer or employee of the City shall use or threaten to use any official authority or influence to effect any action as a reprisal against a City officer or employee for acting in good faith to report or otherwise bring to the attention of the Commission or other appropriate agency, office or department, information regarding the violation of any regulation or ordinance over which the Commission has authority.

B. No officer or employee of the City shall use or threaten to use any official authority or influence to discourage, restrain or interfere with any other person for the purpose of preventing such person from acting in good faith to report or otherwise bring to the attention of the Commission or other appropriate agency, office or department, information regarding the violation of any regulation or ordinance over which the Commission has authority.

2.24.110 SEVERABILITY

The provisions of this ordinance are severable. If any word, clause, sentence, paragraph, provision, or part of this ordinance, or the application of this ordinance to any person, is declared invalid, preempted or unconstitutional by any court, the court's ruling shall not impair or invalidate any other portion of this ordinance. The City Council finds and declares that it would have adopted this ordinance without the invalid, preempted or unconstitutional word, clause, sentence or provision.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, DE LA FUENTE, NADEL, QUAN, REID, KAPLAN, KERNIGHAN, AND PRESIDENT BRUNNER

NOES-
ABSENT-
ABSTENTION-