CITY OF OAKLAND
Public Ethics Commission

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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: October 5, 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)

At its meeting of September 3, 2009, the Commission considered a series of proposed amendments to its "enabling ordinance", O.M.C. Chapter 2.24. The Commission previously approved their submission to the City Council for consideration. Commission staff returned the amendments to the Commission to discuss several issues raised before a City Council Rules Committee meeting last April. The Commission directed staff to prepare this memorandum for further consideration of 1) language regarding the acceptance of gifts by Commissioners, and 2) a proposal by the MGO Democratic Club to restrict certain persons from serving on the Commission and grounds for Commissioner recusal.

I. Proposed Language Relating To The Receipt Of Gifts By Commissioners

Commission staff previously communicated concerns that the Commission's proposed restrictions on the receipt of gifts from certain individuals might be too inflexible and create a burdensome restriction on potential public service to the Commission. In its memorandum of September 3, 2009, Commission staff proposed the following language to address the above-stated concerns:

2.24.050(B) "During his or her service, and for one year thereafter, no member of the Commission shall: . . .(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. For purposes of this section the term "gift" shall have the same meaning as under Government Code Section 82028 and shall not include any payment or benefit that is not required to be disclosed on a Statement of Economic Interest or any payment or benefit specified in Government Code Section 89503(e)."

The Commission expressed general agreement with the proposed language but requested that the language specify the various categories exempted from the definition of "gift" under state law. The following is language intended to address the Commission's request:

2.24.050(B) "During his or her service, and for one year thereafter, no member of the Commission shall: . . .(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. As used in this subsection, "gift" shall have the same meaning, and be subject to the same exceptions, as provided in the California Political Reform Act and the regulations adopted thereto, as amended. For purposes of illustration, exceptions to the definition of "gift" include, but are not limited to, informational materials, returned, donated or reimbursed gifts, gifts from family members, any devise or inheritance, personalized plaques or trophies, tickets to certain non-profit fundraisers, gifts of home hospitality, certain holiday or birthday presents, and certain intra-state travel payments. Payments or benefits which the California Political Reform Act and the regulations adopted thereto define as a "gift" but which are not subject to the annual gift limitation shall ***[OPTION 1: constitute a gift for purposes of this subsection]; [OPTION 2: not constitute a gift for purposes of this subsection]; [OPTION 3: not constitute a gift for purposes of this subsection so long as the value of the payment or benefit does not exceed the amount of the annual gift limitation].***

The California Political Reform Act identifies a small category of payments or benefits that constitute a "gift" but whose value is not subject to the annual gift limitation of $420. The two most common "gifts" that are not subject to the to the annual gift limitation are wedding presents and certain out-of-state travel payments. The Commission may choose to include or exclude such gifts as part of its definition in the above restriction. Option 3 might provide a workable alternative since the occasion for receipt of such gifts is likely to be rare but arguably should not force the resignation or removal of a Commissioner who receives this type of gift whose value falls below the well recognized annual gift limit.

II. Proposal To Restrict Certain Persons From Serving On The Commission And Commissioner Recusal

The MGO Democratic Club presents two issues for Commission consideration: 1) whether to restrict certain persons from serving on the Commission; and 2) whether to require a

Commissioner to recuse himself or herself in matters affected by "nepotism and/or cronyism." ***Attachment 1.***

A. Service Restrictions

Current law requires that each member of the Commission be "a resident of Oakland" and "registered to vote in Oakland elections." It also restricts Commissioners during their service and for one year thereafter from: 1) being employed by, or having any "direct and substantial financial interest in" the City or its business; 2) seeking election to public office or participate in an Oakland campaign; and 3) endorsing, supporting or opposing Oakland candidates or measures. There are currently no express provisions prohibiting the appointment of any person to the Commission.

The MGO Democratic Club proposes to prohibit the appointment of any person who:

1) "is married to, or [is] the domestic partner of, any person whose business activities or conduct are regulated by or subject to Commission review," or

2) "is a City official or employee or the domestic partner or spouse of a City official or employee."

Commission staff notes that the class of persons "whose business activities or conduct are regulated by or subject to Commission review" is arguably vague and potentially overbroad. The potential universe of persons whose business activities or conduct is subject to Commission regulation or review potentially includes lobbyists, persons alleged to be lobbyists, "contractors" and "persons doing business with the City" as defined broadly by the Lobbyist Registration Act, candidates, officeholders, treasurers, City employees, members of City boards and commissions, and even persons alleged to have made "false endorsements" in campaign literature. If the Commission is interested in recommending status restrictions, Commission staff recommends that the criteria of who is excluded be limited to specifically enumerated groups of people, such as "lobbyists," "candidates," "City officers," "City employees," etc. It also might make sense to simply combine the two proposed restrictions such that no person shall be appointed or serve on the Commission if he or she is a registered lobbyist, candidate, officeholder, City official, City employee, etc., or if he or she is the spouse or domestic partner of one of those persons.

Another policy issue is whether the Commission should draw a distinction between a person who is a member of a restricted class and those who happen to be the spouse or domestic partner of such persons. Finally, if the Commission wishes to adopt some version of the proposed restrictions the Commission may wish to consider whether to make the restrictions effective as to persons appointed after the date the language is adopted by the City Council (i.e., whether the proposed restrictions should apply to current Commission members.)

B. Criteria For Recusal

The MGO Democratic Club also proposes that Commissioners be required to recuse themselves from participating in decisions involving "actual or perceived conflicts of interest, partiality or favoritism. . .due to nepotism, and/or cronyism." Cronyism is defined under the City's current Anti-Nepotism Ordinance as "participating in any [employment] decision that can be viewed as 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 appearance of fairness." The MGO Democratic Club recommends that the Commission adopt this standard for recusals in matters coming before the Commission.

Commission staff has reservations about recommending a standard of recusal as set forth in the City's Anti-Nepotism Ordinance. Commission staff questions what a "perceived" conflict of interest means -- perceived by a Commissioner? By a single member of the public? The same question arises over decisions that can be "viewed" as a conflict of interest -- Again, viewed by whom? Another problem is the expansive and vague definition of "cronyism", which arguably arises whenever a decision involves a "close" friend, a "political" relationship or a "commercial" relationship. At what point does a friendship become "close" enough to trigger a recusal? Under what circumstances does a "political" relationship arise -- Is there a "political" relationship if a Commissioner voted for a councilperson who is the respondent in a complaint? Is there a "commercial" relationship if a Commissioner has ever purchased a good or service from a respondent, or attended an event or facility sponsored by a respondent? The MGO Democratic Club commendably wishes to establish high standards for Commissioner participation in decisions. Commission staff cannot recommend however the criteria contained in the City's Anti-Nepotism Ordinance. The Commission may wish to take up the issue of Commissioner recusals in the form of a future amendment to its Bylaws, which expressly addresses expressly Commissioner voting and recusal.[1]

III. Staff Proposed Modification To Provisions Relating to the Removal Of Commission-Appointed Members

The Commission previously proposed and approved the following amendment to existing Section 2.24.040(I):

> 2.24.040(I) A member appointed by the ~~unanimous vote of the three (3) members appointed by the Mayor and confirmed by the Council may be removed by the unanimous vote of the three (3) members~~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 ~~appointed by the Mayor and confirmed by the Council. Among other things,~~except for one or more of the following reasons as determined by the Commission: 1) conviction of a

[1] "Each member present at a Commission or standing Committee meeting shall vote on all matters put to a vote, unless the member is excused from voting by a motion adopted by a majority of the members present, or unless the member has been advised to recuse himself or herself from the vote by the City Attorney because he or she may have a conflict of interest regarding the item." [Bylaw Article IX, Section 1].

felony, ~~misconduct, incompetence, inattention to or inability to perform duties, or~~2) willful or corrupt misconduct in office, 3) inability or unwillingness to perform the duties of office, or 4) absence from three (3)~~consecutive~~ regular meetings ~~except on account~~during a twelve month period unless because of illness or when ~~absent from the City~~excused by ~~permission of~~ the ~~Commission, shall constitute cause for removal.~~Commission chairperson.

In reviewing the above language, Commission staff notes there is no express provision for removal if, during the course of a person's service on the Commission, he or she fails to abide by the restrictions -- proposed or existing -- contained in Section 2.24.050 (i.e., failure to maintain an Oakland residence or domicile, becoming a City employee, seeking election to local office, etc.) While it can be argued that the failure to abide by the qualifications and restrictions contained in Section 2.24.050 constitutes an "inability or unwillingness to perform the duties of office", as proposed, the Commission would clearly be in a stronger position if Section 2.24.050 was expressly referenced as a basis for removal:

2.24.040(I) A member appointed by the ~~unanimous vote of the three (3) members appointed by the Mayor and confirmed by the Council may be removed by the unanimous vote of the three (3) members~~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 ~~appointed by the Mayor and confirmed by the Council. Among other things,~~except for one or more of the following reasons as determined by the Commission: 1) conviction of a felony, ~~misconduct, incompetence, inattention to or inability to perform duties, or~~2) willful or corrupt misconduct in office, 3) inability or unwillingness to perform the duties of office, 4) absence from three (3)~~consecutive~~ regular meetings ~~except on account~~during a twelve month period unless because of illness or when ~~absent from the City~~excused by ~~permission of~~ the ~~Commission, shall constitute cause for removal.~~Commission chairperson, ***or 5) failure to abide by the qualifications and restrictions set forth in Section 2.24.050.***

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission review the above proposals, take public comment and provide staff with any further direction before Commission staff re-agendizes the proposed amendments before the Rules Committee for consideration.

Respectfully submitted,

Daniel D. Purnell
Executive Director