

February 4, 2016

Ms. Laura Warner, Chair
Citizens' Equal Opportunity Commission
1200 Third Avenue, Suite 200
San Diego, CA 92101

Dear Chair Warner:

The City is in receipt of the Citizens' Equal Opportunity Commission (CEOC) correspondence dated November 4, 2015, requesting a written response to items discussed with City Staff that the CEOC has identified to improve equal opportunity in City contracting. This City's response is as follows:

1. Request for a Disparity Study

In the City Attorney Report to the Budget and Government Efficiency Committee dated December 16, 2015, the City Attorney's Office reviewed the legality of utilizing the disparity studies conducted by CALTRANS or SANDAG and has determined the City may not use the results of those studies to implement a race or gender-conscious preference program. Race or gender-conscious programs must be based on particularized findings of discrimination in the specific location and industries targeted by the program. As such, Staff is continuing to discuss and research options regarding a disparity study. Several key factors such as cost, length of study, and development and implementation of remedies (if warranted) are currently being reviewed. The estimated expense of a study and implementation of remedies (if warranted) range from \$500,000 - \$1,000,000.

2. Amend San Diego Municipal Code section 26.16 to include Women and Disabled Veterans

San Diego Municipal Code section 26.16, Citizens Equal Opportunity Commission, is under review by the City Attorney's Office. We note that the City Attorney's Office recently analyzed San Diego appointments to City Boards and Commissions under San Diego Charter section 42. City Attorney MOL No. 2015-17 (Nov. 3, 2015).

3. Request improvements to the bidding and contracting process by all Contracting Departments

With the assistance of the CEOC, several streamlining measures were identified and have been implemented over the past two years by both the Public Works Department and the Purchasing and Contracting Department. This includes updates to Council Policy 100-10¹

¹ Small and Local Business Preference for Goods, Services, and Consultant Contracts

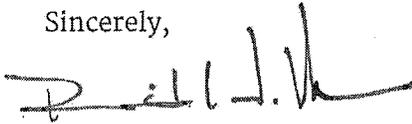
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adopted by the City Council in October 2015. Staff continue to evaluate and identify areas for potential improvement to the bidding and contracting process.

4. Request increased staffing for the Equal Opportunity Contracting Program (EOCP) Division

The City is committed to increasing opportunities for all contractors wanting to do business with the City and recognize the important work of EOCP and the CEOC. As such, the City is constantly analyzing departmental needs and continue to discuss staffing levels with all departments citywide during the budget process.

Sincerely,



Ronald H. Villa
Deputy Chief Operating Officer, Internal Operations Branch

RV/mr

Enclosures: 1. City Atty. Report 2015-11 (Dec. 16, 2015)
2. City Atty. MOL No. 2015-17 (Nov. 3, 2015)
3. Council Policy 100-10

cc: Stacey LoMedico, Assistant Chief Operating Officer
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Enclosure 1

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December 16, 2015

REPORT TO THE BUDGET AND GOVERNMENT EFFICIENCY COMMITTEE

RECENT CASE LAW AND THE CITY'S USE OF OTHER AGENCIES' DISPARITY STUDIES

INTRODUCTION

At the November 19, 2015, Budget and Government Efficiency Committee, the Equal Opportunity Program (EOCP) presented its Fiscal Year 2015 Business Diversity Annual Report detailing the City's utilization of Small and Local Business Enterprises (SLBEs) and Emerging Local Business Enterprises (ELBEs) in the award of City contracts. Report to Council No. 15-098 (Nov. 2, 2015). Councilmembers Cole and Alvarez inquired if the City of San Diego (City) may utilize the results of the 2014 California Department of Transportation (CALTRANS) or 2014 San Diego Association of Governments (SANDAG) disparity studies to address potential disparities in the City's award of contracts to Minority or Women Owned Business Enterprises (MBEs or WBEs).

QUESTION PRESENTED

May the City utilize the results of the CALTRANS or SANDAG disparity studies to implement a race¹ or gender-conscious alternative to the City's SLBE/ELBE preference program?²

SHORT ANSWER

No. The City may not use the results of the CALTRANS or SANDAG disparity studies to implement a race or gender-conscious preference program. Race or gender-conscious programs must be based on particularized findings of discrimination in the specific location and industries targeted by the program.

ANALYSIS

This Office previously analyzed the legality of utilizing the 2007 CALTRANS disparity study to implement a race or gender-conscious preference program in lieu of the City's SLBE/ELBE preference program. 2009 City Att'y Report 601 (2009-26; Oct. 22, 2009). We recommended that the City first commission a disparity study specific to the San Diego

¹ Throughout this Report the word "race" will be used to refer to race, color, ethnicity, and/or national origin.

² The SLBE/ELBE preference program for public works construction contracts is codified in Chapter 2, Article 2, Division 36 of the Municipal Code. The SLBE/ELBE preference program for goods, services, and consultant contracts is set forth in Council Policy 100-10.

marketplace to assess whether and to what extent such discrimination exists. *Id.* at 10. We also advised that California courts had not resolved whether disparity study results would support a race or gender-conscious program in light of Proposition 209. Proposition 209, codified in California Constitution, prohibits preferences based on race or gender in public employment, public education, or public contracting. Cal. Const. art. I, § 31 (Prop. 209). Specifically, the California Constitution states, “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”³

On August 2, 2010, the California Supreme Court issued its final decision regarding the constitutionality of a 2003 San Francisco ordinance (Ordinance) granting bid discounts based on the level of MBE or WBE participation. *Coral Construction, Inc., v. City and County of San Francisco*, 50 Cal. 4th 315 (2010). San Francisco argued that despite Prop. 209, the federal equal protection clause⁴ compelled San Francisco to provide bid preferences for MBEs and WBEs to remedy its own past discrimination. *Id.* at 335. The Supreme Court held that the federal equal protection clause did not compel San Francisco to enact the Ordinance unless the City could prove: (1) it purposefully or intentionally discriminated against MBEs and WBEs; (2) the purpose of the Ordinance is to provide a remedy for such discrimination; (3) the Ordinance is narrowly tailored to achieve that purpose; and (4) a race or gender-conscious remedy is necessary as the only, at least the most likely, means of rectifying the past discrimination. *Id.* at 337-38. Lacking evidence in the record, the Court remanded the issue to a lower court for San Francisco to present evidence supporting the City’s decision to enact the Ordinance. *Id.* at 335-37. In a footnote, the Court seemingly cautioned San Francisco on their ability to prevail. It noted that the City “appear[ed] to concede” that it had not been the City’s policy to discriminate against MBEs and WBEs for almost 30 years, that the City could not identify a single a prime contractor who discriminated against a MBE or WBE subcontractor since 1996, and that the City did not identify discrimination in any specific contract awarding authority in awarding a City contract since 1996. *Id.* at 336 n.18.

Unfortunately, *Coral* offers little guidance on the sufficiency of evidence required to create a legally defensible race or gender-conscious preference program. Rather than presenting the evidence required by the Supreme Court to determine the extent and severity of discrimination in its public contracting, San Francisco repealed its Ordinance. In its place, San Francisco enacted their equivalent of San Diego’s SLBE/ELBE preference program. San Francisco Administrative Code Chapter 14B.

It is clear, however, that the City cannot use the 2014 CALTRANS or SANDAG disparity studies to determine its own potential disparities. Federal law requires that a race or gender-conscious preference program survive “strict scrutiny” review, meaning that the program is: (1) necessary to serve a compelling state interest; and (2) narrowly tailored to address that interest. *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 496-97, 507 (1989). As such,

³ Last year, the Supreme Court upheld the constitutionality of a Michigan Constitutional amendment nearly identical to Prop. 209. *Schuette v. BAMN*, 134 S. Ct. 163 (2014).

⁴ The federal equal protection clause prohibits states from denying any person within its jurisdiction equal protections of the law. In other words, the laws of the state must treat an individual in the same manner as others in similar conditions and circumstances.

a program may not be based on generalized findings of discrimination in the national or statewide marketplace. *See, e.g., Fullilove v. Klitznick*, 448 U.S. 448, 504-05 (1980). Rather, race or gender-conscious programs must be based on particularized findings of discrimination in the specific location and industries that the program targets. *Id.*⁵

The CALTRANS and SANDAG disparity studies are not specific to San Diego's marketplace and therefore do not meet the specificity requirements of *Fullilove*. The CALTRANS study, issued in December 2014, examines contracts awarded throughout the state. CALTRANS District 11 includes all of San Diego and Imperial County, not analysis specific to San Diego's marketplace. The SANDAG study, issued in May 2014, provides a regional analysis focused on San Diego, Imperial, and Orange Counties. Since these studies offer a statewide or regional analysis with limited data specific to San Diego and its industries, a court is not likely to find the data sufficiently particularized to support a race or gender-conscious preference program.

CONCLUSION

If the City wishes to adopt a race or gender-conscious preference program to remedy any perceived discrimination in the City, we recommend that the City first commission a disparity study specific to the San Diego marketplace to assess whether and to what extent such discrimination exists. The City may not use the results of the 2014 CALTRANS or SANDAG disparity studies. Once completed, the City must meet the *Coral* requirements in providing sufficient evidence that the City's intentional discrimination of MBEs or WBEs is sufficiently severe that its race or gender neutral program, such as the SLBE/ELBE preference program is not sufficient to rectify the problem.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Lara E. Easton

Lara E. Easton
Deputy City Attorney

LEE:cfq:cw:ccm:cw

RC-2015-11

Doc. No. 1178231_2

cc: Marshall Anderson, Policy Advisor, Office of the Mayor
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Kristina Peralta, Director, Purchasing and Contracting
Henry Foster III, Program Manager, Equal Opportunity Contracting
Laura Warner, Chair, Citizens Equal Opportunity Commission

⁵ For a complete discussion of the *Croson* and *Fullilove* decisions, see 2007 City Att'y MOL 114 (2007-13; Sept. 10, 2007).

Enclosure 2

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MEMORANDUM OF LAW

DATE: November 3, 2015

TO: The Charter Review Committee

FROM: City Attorney

SUBJECT: The Legality of Appointment Language in San Diego Charter Section 42

INTRODUCTION

In November 1973, San Diego voters approved Proposition K to amend Charter section 42 to read: "The appointing authority in selecting appointees to commissions, boards, committees or panels shall take into consideration sex, race and geographical area so the membership of such commissions, boards, committees or panels shall reflect the entire community." San Diego Charter § 42.

New legal developments call into question the legality of the appointment language in Charter section 42. On February 5, 2014, our Office published a Report to the City Council identifying sections in the Charter that need legal review. We opined that the language in Charter section 42 that requires appointing authorities to take into consideration "sex and race" in selecting appointees to City commissions, boards, committees or panels "may be prohibited by state and federal discrimination laws." City Att'y Report 2014-3 (Feb. 5, 2014). We suggested that the Charter Review Committee consider the option of amending Charter section 42 "to delete the requirement to consider sex and race in making appointments and provide more appropriate language regarding appointments." *Id.* Upon further review, the Charter Review Committee requested a definitive conclusion on whether the directive in Charter section 42 to take into consideration the sex, race and geographical area of appointees to City commissions, boards, committees or panels violates the law.

QUESTIONS PRESENTED

1. Does Article 1, section 31 of the California Constitution (Section 31) apply to the appointment of members to City commissions, boards, committees or panels?

2. Is the directive in Charter section 42 to take “sex and race” into consideration in selecting appointees to City commissions, boards, committees or panels lawful?
3. Is the directive in Charter section 42 to take “geographical area” into consideration in selecting appointees to City commissions, boards, committees or panels lawful?

SHORT ANSWERS

1. Section 31 likely does not apply to the appointment of members to City commissions, boards, committees or panels. Section 31 prohibits the City from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin – but only in the operation of public employment, public education, or public contracting. Members of the City commissions, boards, committees and panels contemplated in Charter section 42 hold a public office, not public employment, and therefore likely fall outside the reach of Section 31.

2. No. The requirement to take sex and race into consideration in selecting appointees to City commissions, boards, committees or panels violates the California equal protection clause. This Office advises that the language in Charter section 42 should be amended to eliminate sex and race as attributes for appointing authorities to consider.

3. Yes. Appointing authorities may lawfully take into consideration geographical areas when selecting appointees to City commissions, boards, committees or panels. Additionally, appointing authorities may consider the racial and gender demographics of geographical areas, provided that all individuals from the same geographical area are treated equally regardless of his or her race or gender

ANALYSIS

I. ARTICLE 1, SECTION 31 OF THE CALIFORNIA CONSTITUTION PROHIBITS THE CITY FROM DISCRIMINATING AGAINST OR GRANTING PREFERENTIAL TREATMENT TO INDIVIDUALS ON THE BASIS OF RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN.

Effective August 28, 1997, Proposition 209 banned government affirmative action programs that give preferential treatment based on race, sex, color, ethnicity or national origin. Proposition 209 amended the California Constitution to read, “The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Cal. Const. art. I, § 31(a). Proposition 209 (hereafter referred to as “Section 31”) was intended to end government sponsored discrimination and, specifically, all governmental affirmative action programs and preferential hiring, contracting and university admissions practices. *Id.*; *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 562 (2000).

Although the prohibitions in Section 31 are absolute, they are limited in the scope to “the operation of public employment, public education, or public contracting.” Cal. Const. art. I, § 31(a). Therefore, the prohibitions in Section 31 will apply to appointments to City commissions, boards, committees and panels only if a court finds such appointments constitute

public employment, public education, or public contracting. These appointments do not concern public education or public contracting, and likely do not amount to “public employment” as the term is used in Section 31.

A. Members of City Commissions, Boards, Committees and Panels Appointed Pursuant to San Diego Charter Section 42 are Public Officers, Not Public Employees.

Courts have distinguished public officers from public employees. The leading opinion on this distinction is *Coulter v. Pool*, 187 Cal. 181 (1921). In *Coulter*, the Court defined a public office as follows:

A public office is ordinarily and generally defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public.

Id. at 186-187.

More recently, in *Dibb v. County of San Diego*, 8 Cal. 4th 1200 (1994), the California Supreme Court adopted this definition to determine whether members of San Diego County’s Citizens’ Law Enforcement Review Board (CLERB) were public officers rather than public employees. Applying the *Coulter* analysis, the Court held that members of CLERB are public officers rather than public employees because they are “appointed under the law for a fixed term of office and are delegated a public duty to investigate specified citizen complaints against county sheriff and probation department employees, and to make recommendations to the board of supervisors.” *Dibb*, 8 Cal. 4th at 1213.

The City commissions, boards, committees and panels referenced in Charter section 42 are not expressly defined, but the legislative history suggests that this section only applies to those citizen oriented bodies created by local law to advise local officials. *See* City Ballot Pamphlet, General Election (Nov. 6, 1973), argument for Proposition K at 30 (“Only by providing a method for airing the widest views and divergent opinions in our community, can these citizen oriented commissions, boards, committees and panels effectively perform their advisory functions, which have been so important to City officials over the years.”) Similar to San Diego County’s CLERB, members appointed to the positions contemplated in Charter section 42 generally embody the traditional characteristics of a public officer; they are appointed under local law for a fixed term of office and delegated with a public duty “to exercise a part of the governmental functions of the political unit for which [they are] acting.” *Dibbs*, 8 Cal.4th at 1212.

This conclusion is germane only to appointments to City commissions, boards, committees and panels that qualify as a “public office.” Our Office has not reviewed the characteristics of every City commission, board, committee or panel. Therefore, an individualized inquiry should be done to ensure that members of any particular City commission, board, committee or panel qualify as “public officers” as defined in *Coulter* and *Dibbs*.

B. Appointments to a Public Office Fall Outside the Scope of the Prohibitions in Article 1, Section 31 of the California Constitution.

In construing constitutional provisions, “courts look first to the language of the constitutional text, giving the words their ordinary meaning.” *Powers v. City of Richmond*, 10 Cal. 4th 85, 91 (1995). Where a text is “clear and unambiguous” courts “need look no further.” *Bowens v. Superior Court*, 1 Cal. 4th 36, 48 (1991). Section 31 limits its reach to the “operation of public employment” and there is no support to inflate this term to include public office.

Because the California Supreme Court had established a distinction between public office and public employment prior to voter approval of Proposition 209, the absence of any mention of public office in Proposition 209 is significant. Voters are deemed to have been aware of existing laws and judicial constructions of laws when they enact an initiative measure such as Proposition 209. *Wilson v. John Crane, Inc.*, 81 Cal. App. 4th 847, 855 (2000); *Hill v. National Collegiate Athletic Assn.* 7 Cal.4th 1, 23 (1994) (“When an initiative contains terms that have been judicially construed, the presumption is almost irresistible that those terms have been used in the precise and technical sense in which they have been used by the courts.”). Thus, a court would likely presume that the voters intended Section 31 to be consistent with existing law, and did not intend the language “operation of public employment” to include the selection of public officers.

Likewise, interpreting Section 31 to apply to public officers would conflict with other California constitutional provisions that require the consideration of racial, ethnic, and gender diversity in the appointment of public officers. For instance, the California Constitution directs the Governor to “strive insofar as practicable to provide a balanced representation of the geographic, gender, racial, and ethnic diversity of the State” in appointing members to the Citizens Compensation Commission. Cal. Const. art. III, § 8(c).¹ The California Constitution also provides that the Governor’s selection of the Regents of the University of California “shall be able persons broadly reflective of the economic, cultural, and social diversity of the State, including ethnic minorities and women.” Cal. Const. art. IX, § 9(d). The only way to harmonize these constitutional provisions with Section 31 is to limit Section 31 to the operation of public employment, and not extend its reach to the appointment of public officers. *Greene v. Marin County Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277, 290 (2010) (“Rudimentary principles of construction dictate that when constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted.”)²

¹ Although not binding as precedent here, a trial court in Sacramento recently held that Section 31 does not apply to the appointment of public officers to the Citizens Compensation Commission. See *Connerly v. State*, 229 Cal. App. 4th 457 (2014).

² Although a court need not look to voter intent to interpret Section 31, its historical context reaffirms the notion that it was intended to cover only conventional public employment. The Legislative Analyst – the only ballot material that provides any insight into the type of “public employment” covered under Section 31 – specifies that the measure “would eliminate affirmative action programs used to increase hiring and promotion opportunities for state and local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions.” Ballot Pamp. analysis for Proposition 209 by the Legislative Analyst, p. 31, prepared for the voters, Gen. Elec. (Nov. 5, 1996) (emphasis added). The appointment of a members to City commissions, boards, committees and panels, does not neatly fall within these categories of hiring, promotion, training, or recruitment for public employment.

C. San Diego Charter Section 117 Likely Does Not Change The Status Of Members On City Commissions, Boards, Committees or Panels From Public Officers to Public Employees.

As a charter city, the City is empowered under article XI, section 5 of the California Constitution to regulate, control, and govern its internal affairs, including its role as an employer. *Johnson v. Bradley*, 4 Cal. 4th 389, 395–96 (1992). A court will look to the City’s Charter for guidance on the parameters and employment rights of City employees. *Estrada v. City of Los Angeles*, 218 Cal. App. 4th 143, 152 (2013); *Williams v. Department of Water & Power*, 130 Cal. App. 3d 677, 680 (1982).

There is an argument that Charter section 117 creates a public employment relationship between the City and members on City commissions, boards, committees and panels because it provides that “members of all boards and commissions” are part of the “unclassified service” of City employment. San Diego Charter §117(a)(2). Further, our Office has previously advised that members of certain boards and commissions are entitled to limited benefits such as indemnification and workers’ compensation similar to public employees. See 2010 City Att’y MS 919 (2010-2; Apr. 8, 2010); City Att’y MS 2014-23 (Nov. 17, 2014) (The city would likely be required to indemnify the City’s Airport Advisory Committee members as “employees” under the California Government Claims Act).

Although Charter section 117 may confer some members of boards and commissions with certain limited protections traditionally provided to public employees, it does not change the crucial terms or conditions that distinguish these members as public officers. Specifically, Charter section 117 does not change the fixed tenure of these positions, the incumbent terms of its members, or the delegated public duty to advise the Mayor, Council, or Civil Service Commission. See *Spreckels v. Graham*, 194 Cal. 516 (1924). Since these terms and conditions remain intact, Charter section 117 cannot transform an otherwise clear public office into an “operation of public employment” within the scope of Section 31.

As public officers, the appointment of members to City commissions, boards, committees, and panels, as prescribed in Charter section 42, likely fall beyond the scope of Section 31.

II. THE EQUAL PROTECTION CLAUSE REQUIRES LIKE PARTIES TO BE TREATED EQUALLY UNDER THE LAW.

The equal protection clause of the California constitution requires that governmental decision makers treat parties equally under the law if those parties are alike in all relevant respects. Cal. Const. art. I, § 7; *Las Lomas Land Co., LLC v. City of L.A.*, 177 Cal. App. 4th 837, 857 (2009).³ In considering whether legislation violates the equal protection clause, courts apply different levels of scrutiny depending on the classifications used to treat two or more similar parties differently.

³ The Fourteenth Amendment to the United States Constitution similarly provides that “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. However, since the directive in Charter section 42 to consider race and gender in the appointment of a public office violates the California equal protection clause, this Memorandum will not conduct a separate federal equal protection clause analysis.

Legislative classifications are presumptively valid and may not be rejected by the courts unless they are palpably unreasonable. *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 33 (2001). But legislative acts that treat similarly situated parties differently on the basis of “suspect classifications” or “fundamental rights” are not presumptively valid and must pass strict judicial scrutiny – which means such acts will only survive an equal protection challenge “if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available.” *Id.*; *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 298 (2007).

A. The City Must Survive Strict Judicial Scrutiny to Consider Gender and Race in the Appointment Process of Charter Section 42.

In California, a classification based on gender or race is considered “suspect” for purposes of an equal protection analysis. *See Sailer Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17–20 (1971) (“classifications based upon sex should be treated as suspect”)⁴; *C & C Const., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284, 298 (2004) (discussing race); *State Pers. Bd.*, 92 Cal. App. 4th at 34 (“the core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions”). Likewise, the opportunity to participate in public office, such as a City commission, board, committee or panel, is a “fundamental right.” *Bay Area Women’s Coal. v. City & Cnty. of S.F.*, 78 Cal. App. 3d 961, 969 (1978).

Consideration of suspect classifications in the appointment of public officers triggers strict judicial scrutiny. The recent decision in *Connerly v. State*, 229 Cal. App. 4th 457 (2014), illustrates that, as a matter of law, legislative directives similar to Charter section 42 violate the equal protection clause without justification strong enough to survive strict scrutiny. In *Connerly*, the American Civil Rights Foundation challenged the constitutionality of California Government Code section 8252, which requires the California Citizens Redistricting Commission to be comprised of members that “reflect [California’s] diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity.” *Id.* at 461 (emphasis added). The trial court dismissed the lawsuit as to the alleged violation of Proposition 209 (Cal. Const., art. I, § 31), but the court of appeal permitted the lawsuit to proceed on its merits past a demurrer stage on the legal theory that the selection process for the Citizens Redistricting Commission violated the federal equal protection clause. *Connerly*, 229 Cal. App. 4th at 460, 466. The court held that *Connerly* could show a *prima facie* case of federal equal protection violations because such a selection process “must be subjected to strict judicial scrutiny in its implementation ... [and] must be narrowly tailored to meet the goal of diversity without straying into invidious discrimination.” *Id.* at 466.⁵

⁴ The federal equal protection clause applies a slightly less strict “intermediate scrutiny” for classifications based on gender, but this does not affect our analysis under the California equal protection clause. *State Pers. Bd.*, 92 Cal. App. 4th at 32; *Molar v. Gates*, 98 Cal. App. 3d 1, 16-17 (1979) (“in light of the repeated affirmations by our [California] Supreme Court that gender-based classifications are suspect and on that basis alone are subject to strict scrutiny, even if the [US] Supreme Court should adopt an intermediate level of analysis, we are satisfied that sex-based classifications will continue to be subjected to the highest level of review.”)

⁵ Although the California constitutional guarantee is independent of the federal guarantee, “California courts consider decisions of the United States Supreme Court and other federal courts as persuasive authority because the equal protection provision of the California Constitution is substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution.” *Walgreen Co. v. City & Cnty. of S.F.*, 185 Cal. App. 4th 424, 434 (2010).

Connerly is currently ongoing in the Superior Court of Sacramento County where the court will decide whether the challenged selection provisions can survive strict scrutiny.

The selection language in Charter section 42 is similar to the challenged selection language in *Connerly*. Both require appointing authorities to consider gender and race in the appointment process. As such, a court will likely find, as in *Connerly*, that the Charter section 42 selection process violates the California equal protection clause unless the City can provide the justification needed to survive strict judicial scrutiny.

B. The City Has Not Shown a Compelling Reason to Consider Gender and Sex in the Selection Process of Charter Section 42.

Even though Charter section 42 was enacted via voter initiative, it is still subject to the same constitutional limitations that apply to statutes adopted by the Legislature. *In re Marriage Cases*, 43 Cal. 4th 757, 851 (2008) (“our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution.”) (superseded on other grounds by Constitutional Amendment); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981) (“It is irrelevant that the voters rather than a legislative body enacted [the challenged law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.”) To survive an equal protection challenge, the City must articulate a compelling interest to consider suspect classifications in the appointment of members to City commissions, boards, committees or panels. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). This compelling interest must have existed at the time Charter section 42 was enacted and must be supported, with some degree of specificity, by convincing evidence that the need for such remedial action was necessary. *State Pers. Bd.*, 92 Cal. App. 4th at 37. The language of Charter section 42 and its associated legislative history falls short of this standard.

The ballot language in support of Proposition K provides the only available justification for the consideration of gender and race in the selection process. It reads:

The proposal includes another requirement aimed at diminishing discrimination and establishing a broader representative base in the appointment of persons to city commissions, boards, committees and panels. The appointing authority would be required to take into account such factors as race, sex and residence of appointees to the end that membership on much city organized citizen groups reflects as broad and varied segment of the entire community as is possible.

Only by providing a method for airing the widest views and divergent opinions in our community, can these citizen oriented commissions, boards, committees and panels effectively perform their advisory functions, which have been so important to City officials over the years.

City Ballot Pamphlet, General Election (Nov. 6, 1973), argument for Proposition K at 30.

Clearly, the goal of Proposition K was to “diminish discrimination” and “establish[] a broader representative base in the appointment of persons to city commissions, boards, committees and panels.” *Id.* But this generalized assertion of past discrimination is not sufficient

to show a compelling interest needed to survive strict judicial scrutiny. *State Pers. Bd.*, 92 Cal. App. 4th at 38 (Merely “conceding past discrimination” or recognizing “societal discrimination” is not enough to satisfy this criterion.). “Only the most exact connection between justification and classification will suffice.” *Woods v. Horton*, 167 Cal. App. 4th 658, 675 (2008).

The ballot language also shows that the voters considered Proposition K the “only” method to end discrimination and achieve a broader representative base. But this assertion, alone, will not provide a compelling interest. The City must prove that it considered nonracial and nongender-based alternative measures and determined that the least restrictive method to achieve the stated goal of the legislation was Proposition K. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 732 (2007). No such legislative record exists. The City cannot cite to any report, study, or testimony to clearly identify any compelling interest to support Proposition K. Thus, a court will likely find the directive in Charter section 42 to consider sex and race in selecting appointees violates the equal protection clause of the California constitution.⁶

C. The City Has a Rational Basis to Consider “Geographical Area” in the Appointment of Members to City Commissions, Boards, Committees or Panels.

The directive to consider “geographical area” in selecting appointees on City commissions, boards, committees and panels does not implicate any suspect classifications. An individual’s area of residence is not a “suspect” class. *Ostrager v. State Bd. of Control*, 99 Cal. App. 3d 1, 7 (1979) (status as a “resident” or “nonresident” is not a suspect classification); *Spurlock v. Fox*, 716 F.3d 383, 395 (6th Cir. 2013) (“the requirement that legislative classifications be color-blind does not demand demographic ignorance during the policymaking process”). To survive a federal or state equal protection clause challenge, the City need only show that distinguishing appointees on the basis of geographical area rationally achieves a legitimate purpose. *Warden v. State Bar*, 21 Cal. 4th 628, 642 (1999); *Spurlock*, 716 F.3d at 402. The language in the ballot materials for Proposition K likely satisfies this standard.

The purpose of Charter section 42 was to have members of City commissions, boards, committees and panels fairly represent “all segments of the community.” Proposition K. Requiring appointing authorities to consider the geographical area of appointees is a rational

⁶ This requirement also risks violating California anti-discrimination laws. Both Title VII of the Civil Rights Act of 1964 (Title VII) and The California Fair Employment and Housing Act (FEHA) prohibit employers from discriminating against employees or applicants for employment on the basis of certain protected characteristics, including sex and race. 42 U.S.C.A. §§ 2000e – 2000e-17; Cal. Gov. Code. § 12900 - 12907. Appointees to City commissions, boards, committees or panels must be “employees” to receive protection under FEHA and Title VII. It is unclear whether these appointees would be covered under Title VII because this law generally does not cover individuals who render unpaid, volunteer services. *See Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 439-40 (5th Cir. 2013). However, FEHA may cover these appointees. California courts have expressly permitted city charters to create statutory employment relationships for purposes of FEHA liability. *Estrada v. City of L.A.*, 218 Cal. App. 4th 143, 152 (2013). Charter section 117 establishes that “members of all boards and commissions” are within the City’s “Unclassified Service.” This may be enough to trigger FEHA liability, however, this analysis is beyond the scope of this Memorandum because any consideration of gender or race in the appointment process of Charter section 42 violates the state equal protection clause.

means to achieve this purpose, sufficient to survive an equal protection clause challenge. Moreover, an appointing authority may even consider the demographic makeup of particular geographic areas, provided that all individuals from the same geographical area are treated equally regardless of his or her race or gender. *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207, 217-18 (2009) (School district's use of a student's residential neighborhood demographics, which included consideration of household income, education level of adults, and the racial composition of the neighborhood as a whole, to assign students to schools and academic programs did not violate California Constitution because students in a given residential area were treated equally regardless of the student's individual race or other personal characteristics.)⁷

CONCLUSION

Appointees to the City commissions, boards, committees and panels contemplated in Charter section 42 are public officers likely outside the scope of the prohibitions in Article 1, section 31 of the California Constitution. However, the requirement in Charter section 42 to take race and gender into consideration in selecting appointees violates the equal protection clause of the state constitution because there is no evidence in the legislative record to show a compelling interest to treat similarly situated parties differently based on race and gender; further, there is no evidence to support an argument that the goals of Proposition K are accomplished by the least restrictive means. Appointing authorities may lawfully take into consideration geographical area, and the demographics of such areas, when selecting appointees, provided that all individuals from the same geographical area are treated equally regardless of his or her race or gender. To best comply with these legal requirements and decrease the possibility of costly litigation, it is the opinion of this Office that the language in Charter section 42 should be amended to eliminate "sex and race" as attributes for appointing authorities to consider in selecting appointees to City commissions, boards, committees or panels.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Gregory J. Halsey

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ML-2015-17
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⁷ Although this case primarily focuses on whether the challenged school program violated Proposition 209, its analysis of whether the program gave preferential treatment based on race is analogous to the analysis a court would rely on to evaluate an equal protection clause violation.

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CURRENT

SUBJECT: SMALL AND LOCAL BUSINESS PREFERENCE FOR GOODS,
SERVICES, AND CONSULTANT CONTRACTS
POLICY NO.: 100-10
EFFECTIVE DATE: OCTOBER 28, 2015

BACKGROUND:

The City of San Diego expends millions of dollars annually in the procurement of goods, services, and consultants to meet the requirements of the various City departments. Historically, there has been a lack of diversity among City contracts. In particular, small and emerging local businesses have faced challenges competing against established businesses with greater resources and access to capital.

The City desires to provide contracting opportunities to a broader cross-section of the community in order to enhance diversity and increase competition. In addition, the City has a compelling interest in ensuring that it is neither an active nor passive participant in marketplace discrimination. The City also has a compelling interest in stimulating the local economy by providing opportunities for small and local businesses to grow, succeed, and create jobs for the citizens of San Diego.

The City Council has heard testimony from City staff and the community, considered statistical evidence, and reviewed programs in neighboring jurisdictions in an effort to identify a program best-suited to achieve these goals.

Based on this evidence, the City Council declares that a small and local business preference program would provide an effective, race and gender-neutral tool for achieving the City's goals of enhancing diversity in City contracts, ensuring open and fair competition, and promoting a robust local economy.

PURPOSE:

The purpose of this policy is to establish a small and local business preference program for goods, services, and consultant contracts. This program is intended to provide a race and gender-neutral tool to expand opportunities for, and develop the capacity of, small and local firms so that all segments of the community will be able to participate in City contracts.

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The program is intended as a companion program to Chapter 2, Article 2, Division 36 of the San Diego Municipal Code relating to a Small and Local Business Program for Public Works Contracts.

DEFINITIONS:

Defined terms used in this Council Policy appear in italics. For purposes of this Council Policy:

Bidder shall have the same meaning as set forth in Municipal Code section 22.3003.

Consultant contract shall have the same meaning set forth in Municipal Code section 22.3003.

Contract for goods shall have the same meaning set forth in Municipal Code section 22. 3003.

Contract for services shall have the same meaning set forth in Municipal Code section 22. 3003.

Emerging Business Enterprise or *EBE* shall have the same meaning set forth in Municipal Code section 22.3603.

Emerging Local Business Enterprise or *ELBE* shall have the same meaning set forth in Municipal Code section 22.3603.

Job order contract shall have the same meaning set forth in Municipal Code section 22.3603.

Local Business Enterprise or *LBE* shall have the same meaning set forth in Municipal Code section 22.3603.

Maintenance shall have the same meaning set forth in Municipal Code section 22.3003.

Principle place of business shall have the same meaning set forth in Municipal Code section 22.3603.

Public works contract shall have the same meaning set forth in Municipal Code section 22.3003.

Significant employee presence shall have the same meaning set forth in Municipal Code section 22.3603.

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Small Business Enterprise or *SBE* shall have the same meaning set forth in Municipal Code section 22.3603.

Small Local Business Enterprise or *SLBE* shall have the same meaning set forth in Municipal Code section 22.3603.

POLICY:

1. Goods and Services Contracts

All *contracts for goods* and *contracts for services* shall comply with the advertising, bidding, and award requirements set forth in Chapter 2, Article 2, Divisions 30 and 32, of the San Diego Municipal Code. In addition, for all *contracts for goods* and *contracts for services* in which the Purchasing Agent is required to advertise for sealed bids or proposals in the City's official newspaper, the City Manager shall:

- a. For bids, apply a discount of: (1) 5% off the bid price for *SLBE* or *ELBE* prime contractors; or (2) 5% off the bid price for prime contractors achieving the voluntary goal of 20% for *SLBE* or *ELBE* subcontractor participation set forth in subsection (c) of this Section 1. The discount will not apply if an award to the discounted *bidder* would result in a total contract cost of \$50,000 in excess of the low, non-discounted bid. In the event of a tie bid between a discounted *bidder* and non-discounted *bidder*, the discounted *bidder* will be awarded the *goods* or *services contract*. The discount shall be taken off the total contract value, including contract option years.
- b. For proposals, apply a maximum of an additional 12% of the total possible evaluation points to the *bidder's* final score for *SLBE* or *ELBE* participation as follows:
 1. If the *bidder* achieves 20% participation, apply 5% of the total possible evaluation points to the *bidder's* score; or
 2. If the *bidder* achieves 25% participation, apply 10% of the total possible evaluation points to the *bidder's* score; or
 3. If the prime contractor is a *SLBE* or an *ELBE*, apply 12% of the total possible evaluation points to the *bidder's* score.

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- c. Include a voluntary subcontractor participation requirement of 20% of the total bid price for *SLBEs* or *ELBEs*.

2. Consultant Contracts

All *consultant contracts* shall comply with the advertising, bidding, and award requirements set forth in Chapter 2, Article 2, Divisions 30 and 32, of the San Diego Municipal Code, Council Policy 300-7 (Consultant Services Selection), and Administrative Regulations 25.60 (Selection of Consultants for Work Requiring Licensed Architect and Engineering Skills) and 25.70 (Hiring of Consultants Other Than Architects and Engineers), as applicable. In addition, the City Manager shall, for all *consultant contracts* valued at over \$50,000:

- a. Apply a maximum of an additional 12% of the total possible evaluation points to the *bidder's* final score for *SLBE* or *ELBE* participation as follows:
 - 1. If the *bidder* achieves 20% participation, apply 5% of the total possible evaluation points to the *bidder's* score; or
 - 2. If the *bidder* achieves 25% participation, apply 10% of the total possible evaluation points to the *bidder's* score; or
 - 3. If the prime contractor is a *SLBE* or an *ELBE*, apply 12% of the total possible evaluation points to the *bidder's* score.

3. Maintaining Participation Levels

- a. Bid discounts and additional points are based on the *bidder's* level of participation proposed prior to the award of the *goods, services, or consultant contract*. *Bidders* are required to achieve and maintain the *SLBE* or *ELBE* participation levels throughout the duration of the *goods, services, or consultant contract*.
- b. If the City modifies the original specifications, the *bidder* shall make reasonable efforts to maintain the *SLBE* or *ELBE* participation for which the bid discount or additional points were awarded. The City must approve in writing a reduction in *SLBE* or *ELBE* participation levels.

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- c. The *bidder* shall notify and obtain written approval from the City in advance of any reduction in subcontract scope, termination, or substitution for a designated *SLBE* or *ELBE* subcontractor.
- d. *Bidder's* failure to maintain *SLBE* or *ELBE* participation levels as specified in the *goods, services, or consultant contract* shall constitute a default and grounds for debarment under Chapter 2, Article 2, Division 8, of the San Diego Municipal Code.
- e. The remedies available to the City under this Council Policy are cumulative to all other rights and remedies available to the City.

4. Commitment to Diversity

Invitations to Bid (ITB) and Requests for Proposals (RFP) for *goods, services, and consultant contracts* may require *bidders* to address their commitment to diversity. The Purchasing Agent, in consultation with Equal Opportunity Contracting, may develop ITB and RFP evaluation criteria, including point allocation, to carry out the intent of this section. *Bidders* may be required to address their commitment to diversity, this includes, but is not limited to, describing their diversity policies, outreach and recruitment efforts, past participation levels, community activities and other programs. However, nothing in this Council Policy shall be construed to permit the City to consider the *bidder's* race or gender, or that of its employees, in awarding a contract.

5. Bonding and Insurance

The Purchasing Agent, in consultation with Equal Opportunity Contracting, may on a contract-by-contract basis, adjust bonding and insurance requirements on *goods, services, and consultant contracts* to enhance opportunities for *SLBEs* and *ELBEs* to the extent permitted by law. The Purchasing Agent and Equal Opportunity Contracting shall consult with the Risk Management Department before making any such adjustment to ensure that the City is adequately protected against liability.

6. Audit and Reporting Requirements

The City shall periodically conduct audits of the Small and Local Business Program for *goods, services, and consultant contracts*. The City Manager shall report annually to the City Council on the impact and costs of implementing the Small and Local Business Preference for *goods, services, and consultant contracts*.

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7. City Manager to Adopt Regulations

The City Manager shall develop and implement administrative policies, rules, and regulations to carry out the intent of this Policy.

HISTORY:

“Local Vendor Preference”

Adopted by Resolution R-260805 - 05/29/1984

Retitled to “Small and Local Business Preference for Goods, Services, and Consultant Contracts” and Amended by Resolution R-305547 - 01/22/10

Amended by Resolution R-310022 - 10/28/15