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October 23, 2020

VIA EMAIL

Ms. Carol A. Schwab
City Attorney
Office of the City Attorney
9770 Culver Boulevard
Culver City, CA 90212-0507

Re: Complaint and Request for Independent Investigation
City Council Member Thomas Small
Violations Culver City Policy Nos. 4006 ("Code of Ethics") and
4003 ("Acceptance of Gifts or Gratuities")

Dear Ms. Schwab:

Receipt of the October 20, 2020 response (Response) of the Office of the City Attorney (Office) is hereby acknowledged. Please do not be so eager to "consider this matter closed."

Essentially, the Office: (1) continues to act in violation of the California Rules of Professional Conduct (CRPC); (2) misreads the City of Culver City (City) Policy No. 4006 ("Code of Ethics") in order to alter the longstanding definition of "Gift"; (3) cavalierly abandons any effort to ascertain the economic value of Council Member Small's opportunity to exercise operational control over Culver City Forward; and (4) continues to engage in a straw-man argument concerning irrelevant statutes and uncited regulations.

Recusal

The Office has declined my request that it recuse itself from considering my Complaint against Council Member Small—a current and former client of the Office. In its Response, the Office: (1) claims that the CRPC are not applicable; and (2) states that it is "confident in [its] ability to carry out [its] ethical duties." However, the CRPC provide no exemption based upon the level of a lawyer's confidence in her ability that she will "duly carry out [her] ethical duties."

I previously wrote, "[T]o conduct other than an independent investigation could prove problematic for the Office." More specifically:

The Office previously represented Council Member Small with respect to his relations with Michael Hackman, Hackman Capital Partners, LLP and Culver City Forward. (The

Complaint sets forth the details.) Through that representation, the Office learned facts useful in determining whether Council Member Small received a "gift," which is the subject of my Complaint.

First, CRPC Rule 1.9 states, in part:

(a) A lawyer [Office] who has formerly represented a client [Small] in a matter shall not thereafter represent another person [City] in ... a substantially related matter in which that person's [City's] interests are materially adverse to the interests of the former client [Small] unless the former client [Small] gives informed written consent.

The Office represented Council Member Small in a substantially related matter. Now, the City's interests are materially adverse to those of Council Member Small, i.e., to determine whether City Council Member Small violated Policy Nos. 4003 and 4006. Further, the Office does not claim that Council Member Small gave his informed written consent.

Comment to Rule 1.9 elaborates, in part:

(1) ... The lawyer [Office] may not ... (ii) at any time use against the former client [Small] knowledge or information acquired by virtue of the previous representation. ... (3) Two matters are "the same or substantially related" for purposes of this rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment (1).

Thus, the Office's representation of the City would be hindered as the Office may not use information obtained through its prior representation of Council Member Small against him, whether or not he gives informed written consent. Further, if provided full disclosure, it seems unlikely that Council Member Small would give such consent.

Second, CRPC Rule 1.7 states, in part:

(a) A lawyer [Office] shall not, without informed written consent from each client [Small and City] and compliance with paragraph (d), represent a client [City or Small] if the representation is directly adverse to another client [Small or City] in ... a separate matter.

...

(d) Representation is permitted under this rule only if the lawyer [Office] complies with paragraphs (a) ... and:

(1) the lawyer [Office] reasonably believes that the lawyer [Office] will be able to provide competent and diligent representation to each affected client [City and Small].

The Office does not claim that either the City or Council Member Small gave informed written consent.

Comment to Rule 1.7 elaborates, in part:

(4) The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of each client.

The Office could not reasonably believe that it could "competent[ly] and diligent[ly] represent[] each affected client." As an example, according to the May 27, 2014 City Council Minutes, you stated the Office's methodology in determining whether a Council Member has a conflict of interest, to wit:

Carol Schwab, City Attorney, discussed instances where a conflict of interest arises; the appearance of bias; and she clarified that it is up to the individual Councilmember to make the decision.

Thus, the Office would defer to Council Member Small to decide whether he violated the "Gift" (conflict-of-interest) provisions of Policy No. 4006. Therefore, the Office could not "provide competent and diligent representation" to the City with regard to the Complaint. (Also, see "Gift" and "Anything of Economic Value," below.)

Additionally, the City's responses to my Public Records Act requests indicate that the Office advised Council Member Small on issues of conflicts of interest in the situation which is the subject of my Complaint. Council Member Small might question the quality of that advice by alleging the Office committed malpractice. That could involve the Office placing the Office's interests above those of the City.

Comments to Rule 1.7 further elaborate, in part:

(8) There are some matters in which the conflicts of interest are such that even informed written consent may not suffice to permit representation.

Again, not causing other than an independent investigation could prove extremely problematic for the Office. Violations of CRPC Rules 1.7 and 1.9 are very serious matters.

"Gift"

The Response inaccurately states, "[A]s used in that Policy, although perhaps unclear and written many years ago, incorporates into its definition the term 'gift' as used in Government Code section 82028." No incorporation alters the meaning of "Gift" with respect to my Complaint. Culver City Code of Ethics Policy No. 4006 broadly defines "Gift" by stating:

"Gift" means anything of economic value, regardless of the form. It does not include the solicitation, acceptance, receipt, or regulation of political campaign contributions regulated in accordance with provisions of federal, state, or local laws governing campaign finances. It does not include the items *excluded* under Section 82028 of the Government Code, or a gift provided to a group of Employees which is to be shared by the group.

(Bold emphasis in original; Underline and Italics emphasis added.) The Policy's definition of "gift" incorporates only the exemptions in Government Code 82028, to-wit: "(b) The term 'gift' does not include: [informational material, returned or donated items; items from relatives, campaign contributions, inheritance, plaques and trophies]."

Here, Section 82028 exceptions are not applicable. Thus, Policy No. 4006's broad definition of "gift," i.e., "anything of economic value, regardless of the form," is not altered.

The Response misleadingly states, "Section 82028 makes clear something is not a gift to the extent consideration of equal or greater value was received by the giver. Carrying out an executive's assigned duty of operational control over an entity would be consideration equal in value to that operational control." (Emphasis added.) That portion of Section 82028 was not incorporated into the Policy, and, thus, is irrelevant. (If the Office believes otherwise, it should explicitly set forth its statutory analysis supporting its "makes clear" assertion.)

Assuming Section 82028 is applicable, it provides further evidence that the Office cannot meet the requirement of CRPC Rule 1.7(d)(1) of "competent and diligent representation" of the City. Section 82028 states, "Any person ... who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value." Without analysis, the Response states, "Carrying out an executive's assigned duty of operational control over an entity would be consideration equal in value to the operational control." Thus, while representing the City, the Office admitted that Council Member Small met his burden.

The Policy's broad definition of "Gift" is not unclear. The Office approved the verbiage before it was adopted by the City Council. If it is not clear, the Office would have caused it to be clarified sometime in the past 24 years. ¹

It is true that the Policy was "written many years ago." This is irrelevant. If it were relevant, the same argument could be made to justify ignoring provisions of the U.S. Constitution. The Office has no authority to change the definition of "Gift."

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¹ Policy No. 4006 states, in part, "**PROCEDURES A. Where to Seek Advice** ... 2. Members of the City Council ... who are uncertain whether a conflict of interest or ethical problem may exist should contact the City Attorney for advice...." (Bold emphasis in original.)

"Operational Control"

Without the initial gift of the opportunity to exercise operational control, Council Member Small would have no future benefit.

My Complaint specifically states that the "gift" to Council Member Small was the opportunity to exercise operational control over Culver City Forward, e.g., determine his own salary, direct employment of various corporate assets of the fully funded corporation, offer jobs to retired City employees. It was not limited to "salary received."

"Anything of Economic Value"

The Response seems to allude to the concept that it is my responsibility to prove all allegations, and if I do not prove them to the Office's unfettered satisfaction, the Office has no obligation to investigate diligently a violation of the City's Policies.

Without citing any authority, the Response concludes, "[H]aving or exercising that operational control, by itself, has no quantitative or qualitative value. Certainly, the salary one earns as compensation from exercising such control has a determinable value." As previously stated, operational control over one's future salary is only one aspect of the value of the opportunity to exercise operational control over the fully funded corporation.

Again, even though CRPC Rule 1.7(d)(1) requires "competent and diligent representation," the Office fails to do so. Exercising diligence, the Office could determine the monetary value of Council Member Small's opportunity to exercise operational control over Culver City Forward. The Office should consider cases involving the tort of interference with prospective economic advantage. (See, e.g., *J'Aire Corporation v. Gregory* (1979) 24 Cal.3d 799, 804 ["Even when only injury to prospective economic advantage is claimed, recovery is not foreclosed."].) From its prior representation of Council Member Small, the Office most likely knows the advantages Council Member Small expected to enjoy as the Chief Executive Officer of Culver City Forward. Further, Council Member Small has controlled Culver City Forward since June 2020. Thus, one can objectively value the benefits that were only opportunities in June, and discount them to their present value as of June 2020. Additionally, experts in the field of executive placement are available for consultation.

The Office should reasonably assume that Council Member Small would not take on corporate responsibilities where the opportunity had an economic value of less than Policy No. 4006's maximum limit of \$25. His prospective economic advantage was worth much more than \$25. Council Member Small could not credibly deny that.

Straw-Man Arguments

The Office engages in an illogical straw-man argument. The Complaint is not based upon Political Reform Act of 1974, Fair Political Practices Act or any associated regulation.

Ms. Carol A. Schwab

October 23, 2020

Page 6

My Complaint is based upon alleged violations of Culver City's Ethics Policy and Guidelines. Policy No. 4006 specifically states, in part:

Violations of the Ethics Policy and Guidelines may expose a public official ... to a variety of consequences, including reprimand, removal from office, or termination of employment.

Policy Nos. 4003 and 4006 are self-contained.

Please communicate with me if further information is desired. Now that the Office has heard from me, again, please do not "consider this matter closed."

Yours truly,

LES GREENBERG

LG:pg

ec: Assistant City Attorney Heather Baker