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2006 JAN -5 PM 4:07

CITY HALL • 1 FRANK H. OGAWA PLAZA • OAKLAND, CALIFORNIA 94612

Office of the City Administrator  
Deborah A. Edgerly  
City Administrator

(510) 238-3301  
FAX (510) 238-2223  
TDD (510) 238-2007

January 17, 2006

President De La Fuente and Members  
Oakland City Council  
Oakland, CA

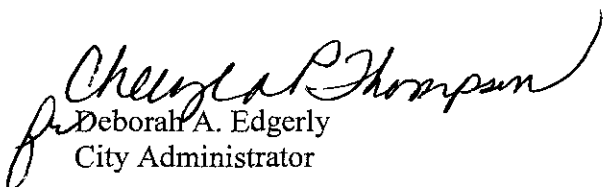
RE: Ordinance Amending Title 5 of the Oakland Municipal Code to Add Chapter 5.82, *Proprietary Interest Franchise Labor Requirements – Card Check, Procedure for Determining Employee Preference on Representation by Labor Organization*, Which Will Require Franchises in Which the City Has Proprietary Interest to Enter into a Card Check Agreement, a Procedure for Determining Employee Preference on the Subject of Whether or Not to be Represented, with a Labor Organization that Requests Such an Agreement

President De La Fuente and Members of the City Council,

At the December 6, 2005 Finance and Management Committee, the staff was asked to prepare an ordinance for City Council consideration that would amend the Oakland Municipal Code to require recipients of franchises granted by the City of Oakland to establish card check agreements for their employees.

The City Attorney's Office has prepared such an ordinance for City Council approval. The City Attorney reviewed the ordinance submitted by the Communication Workers of America and made revisions in accordance with direction from Council, as well as amendments consistent with the confidential legal advice, analysis, and opinions that the City Attorney provided to Council and the City Administrator's Office. The legal analysis has been provided in separate confidential opinions and will not be discussed in this report

Respectfully submitted,

  
Deborah A. Edgerly  
City Administrator

INTRODUCED BY COUNCILMEMBER \_\_\_\_\_  
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\_\_\_\_\_  
CITY ATTORNEY

**ORDINANCE NO. \_\_\_\_\_ C.M.S.**

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**ORDINANCE AMENDING TITLE 5 OF THE OAKLAND MUNICIPAL CODE TO ADD CHAPTER 5.82, PROPRIETARY INTEREST FRANCHISE LABOR REQUIREMENTS - CARD CHECK, PROCEDURE FOR DETERMINING EMPLOYEE PREFERENCE ON REPRESENTATION BY LABOR ORGANIZATION, WHICH WILL REQUIRE FRANCHISES IN WHICH THE CITY HAS AN PROPRIETARY INTEREST TO ENTER INTO A CARD CHECK AGREEMENT, A PROCEDURE FOR DETERMINING EMPLOYEE PREFERENCE ON THE SUBJECT OF WHETHER OR NOT TO BE REPRESENTED, WITH A LABOR ORGANIZATION THAT REQUESTS SUCH AN AGREEMENT**

The Council of the City of Oakland does ordain as follows:

**Section 1 FINDINGS AND DECLARATIONS.**

(a) Public rights of way are constitutionally protected, tangible and valuable real estate. The public streets, alleys, utility easement dedicated for compatible uses, and other right-of-ways within the City are: critical to the travel of persons and the transport of goods and other tangibles in the business of the City; a unique and physically limited resource so that proper management by the City is necessary to maximize the efficiency and to minimize the costs of the foregoing uses. In order to manage the use of these resources, the City must ensure that the City receives fair compensation for ongoing and comprehensive use of public property by private entities, and ensure that administrative costs are covered.

(b) In such situations, the City must make prudent business decisions, as does any private business entity, to ensure efficient and cost-effective management of its public rights of way and other City property, and to maximize benefit and minimize risk. One of those risks is the possibility of labor/management conflict arising out of labor union organizing campaigns. Such conflict can adversely affect: the efficient use of streets and sidewalks; the City's emergency communications systems, public services; and receipt of revenue, including but not limited to franchise fees, by causing delay or cessation in the delivery of services, completion of projects, and/or by reducing revenues or increasing costs of the project when they are completed.

(c) To minimize the risks of circumstances where costly labor/management conflict has arisen in the past, the City enacts this Section which requires that franchise grantees agree to non-confrontational and expeditious procedures by which their workers can register their preference regarding union representation.

(d) A major potential source of labor/ management conflict that threatens the economic interests of the City is the possibility of economic action taken by labor unions against franchise grantees when labor unions seek to organize their workers. Organizing drives pursuant to formal and adversarial union certification processes may deteriorate into protracted and acrimonious labor/management conflict. That conflict potentially can result in construction delays, work stoppages, picketing, strikes and, in consumer

boycotts or other forms of "corporate campaigns" that can generate negative publicity and reduced revenues. Reductions in a franchise grantee's revenues as a result of a work stoppage, delay, picketing, strikes etc, will directly result in a reduction in the franchise fees the City receives which are based on the franchise grantee's gross revenues.

(e) One way to reduce the City's risk where it has a proprietary interest in a franchise is to require that franchise grantees agree to a lawful, non-confrontational alternative process for the preference of employees regarding whether or not they wish to be represented by a union. That alternative process is a so-called "card check" wherein employee preference regarding whether or not to be represented by a labor union to act as their exclusive collective bargaining representative is determined based on signed authorization cards. Private employers are authorized under existing federal law to agree voluntarily to use this procedure in lieu of NLRB-supervised election procedures.

(f) The Oakland City Council finds based on history that compliance with these procedures will help reduce the possibility of labor/management conflict jeopardizing the City's proprietary interest in a franchise agreement. To ensure that card check procedures are required only to the extent necessary to ensure the goal of minimizing labor/management conflict, an employer who agrees to such procedures and performs its obligations under a card check agreement will be relieved of further obligation to abide by those procedures if a labor organization engages in economic action such as striking, picketing or boycotting the employer in the course of an organizing drive and at a site covered by this Section.

(g) This Article is not enacted to favor any particular outcome in the determination of employer preference regarding union representation, nor to skew the procedures in such a determination to favor nor hinder any party to such a determination. Likewise, this Article is not intended to enact or express any generally applicable policy regarding labor/management relations, or to regulate those relations in any way, but is intended only to protect the City's proprietary interest in certain narrowly prescribed circumstances where the City commits its economic resources and/or its related interests are put at risk by certain forms of labor/management conflict.

## **Section 2. DEFINITIONS.**

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

(a) "Card check agreement" means a written agreement between an employer and a labor organization providing a procedure for determining employee preference on the subject of whether or not to be represented by a labor organization for collective bargaining, and if so, by which labor organization to be represented, which provides, at a minimum, the following:

(1) Determining employee preference regarding union representation shall be by a card check procedure conducted by a neutral third party in lieu of a formal election;

(2) All disputes over interpretation or application of the parties' card check agreement, and over issues regarding how to carry out the card check process or specific card check procedures shall be submitted to binding arbitration;

(3) Forbearance by any labor organization from economic action against the employer at the worksite of an organizing drive covered by this Article, and in relation to an organizing campaign only (not to the terms of a collective bargaining agreement), so long as the employer complies with the terms of the card check agreement;

(b) "Franchise grantee" means any grantee of a franchise granted by the City pursuant to City Charter Article X, section 1000 for the use of public streets or places.

(c) "Collective bargaining agreement" means an agreement between an employer and a labor organization regarding wages, hours and other terms and conditions of employment of the employer's employees. For purposes of this Article, a collective bargaining agreement does not include a card check agreement as defined herein.

(d) "Economic action" means concerted action initiated or conducted by a labor union and/or employees acting in concert therewith, to bring economic pressure to bear against an employer, as part of a campaign to organize employees or prospective employees of that employer, including such activities as striking, picketing, or boycotting. A lawsuit to enforce this Article is not "economic action."

(e) "Labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(f) "Proprietary interest" means any non-regulatory arrangement or circumstance in which the financial or other non-regulatory interests of the City in a franchise agreement for the provision of utility services or for the use of public streets or places could be adversely affected by labor/management conflict or consumer boycotts potentially resulting from a union organizing campaign, in the following circumstances:

(1) The City receives significant ongoing revenue under a franchise in the form of:

- i. franchise fees;
- ii. capital facilities improvements or grants;
- iii. equipment and/or support for public educational and governmental channels or institutional networks;
- iv. reimbursement for expenses of an Independent Evaluator;
- v. cash payments;
- vi. and other in kind contributions that are not fees, including but not limited to provision of communication services to community service facilities pursuant to a franchise agreement.

### **Section 3. POLICY, REQUIREMENTS AND PROCEDURES TO MINIMIZE LABOR/MANAGEMENT CONFLICT WHEN CITY HAS PROPRIETARY INTEREST.**

(a) **General Policy.** The Oakland City Council declares as a matter of general policy that when the City has a proprietary interest in a franchise, it is essential for the protection of the City's investment and/or business interests to require that franchise grantees agree to abide by card check procedures for determining employee preference on the subject of labor union representation, as specified in this Article.

(b) **Primary Obligations.** Pursuant to the policy stated in Subsection (a), the following requirements are imposed, except no franchise grantee shall be responsible for obligations under this Article if that person or entity is otherwise exempt from those obligations pursuant to Section 4 (b), or if the City does not have a Proprietary Interest in the franchise:

(1) **Employers.** A franchise grantee who employs employees shall:

(i) Enter into a card check agreement, as specified in this Article, with a labor organization which requests such an agreement for the purpose of seeking to represent those employees.

(ii) If the parties are unable to agree to the terms of a card check agreement within 60 days of the commencement of such negotiations, they must enter into expedited binding arbitration in which the terms of a card check agreement will be imposed by an arbitrator. In such proceedings, to be conducted by an experienced labor arbitrator selected as provided by the rules of the American Arbitration Association or equivalent organization, the arbitrator shall consider any model card check agreement provided by the City and/or to prevailing practices and the terms of card check agreements in the same or similar industries, except that such card check agreement must include the mandatory terms identified in Section 2(1);

(iii) Comply with the terms of that card check agreement and this Article; and

(iv) Include in any contract/subcontract which contemplates or permits a contractor/subcontractor to perform, work, services or labor on a franchise grantee's behalf, a provision requiring that contractor/subcontractor to comply with the requirements provided in this Article. This provision shall be a material and mandatory term of such contract/subcontract binding on all successors and assigns, and shall state (modified as necessary to accommodate particular circumstances):

"The City of Oakland has enacted Chapter 5.82 of the Oakland Municipal Code, which may apply to [contractor/subcontractor]. Its terms are expressly incorporated by reference hereto. To the extent [contractor/subcontractor] or its successors or assigns employs employees in a franchise within the scope of that Ordinance, [contractor/subcontractor] hereby agrees as a material condition of this [contract/subcontract] to enter into and abide by a Card Check Agreement with a Labor Organization or Organizations seeking to represent [contractor's/subcontractor's] employees, if and as required by that Article, and to otherwise fully comply with the requirements of that Article. [Contractor/Subcontractor] recognizes that, as required by that Article, it must enter into a Card Check Agreement with a Labor Organization(s) as specified by that Article before executing this [contract/subcontract], and that being party to such a Card Check Agreement(s) is a condition precedent of rights or obligations under this [contract/subcontract]."

Notwithstanding the requirements provided in (i)---(iv), any employer who has in good faith fully complied with those requirements will be excused from further compliance as to a labor organization which has taken economic action against that employer at that site in furtherance of a campaign to organize that employer's employees at that site for collective bargaining. This clause shall not be interpreted, however, to apply to economic action against an employer at other locations where that employer does business, or at any location for purposes other than organizing the employer's employees; nor shall economic action by one labor organization excuse an employer from the obligations of this Article or a card check agreement as to a different labor organization.

(2) **Model Card Check Agreement.** To facilitate the requirements imposed by this Section, the City Attorney or his/her designee may provide a model recommended card check agreement that includes the mandatory terms identified in Section 2(1) and which provides the maximum protection against labor/management conflict arising out of an organizing drive, and make such model recommended agreement available to parties required to enter into such agreement. The City may also prepare guidelines establishing standards and procedures related to this Article. Notwithstanding this provision regarding the preparation of a model card check agreement or related guidelines, this Article shall be self-executing, and shall apply in all circumstances and to the extent provided in this Article, in the absence of or regardless of such model card check agreement or guidelines.

(3) **Requests for Proposals ("RFPs").** Any commission, department, authority or officer of the City which issues/reviews a proposal to obtain a new franchise, transfer a franchise, renew or extend an existing franchise or otherwise modify a franchise after the effective date of this ordinance, must include in such document a summary description of and reference to the policy and requirements of this Article. Failure to include description or reference to this Article in an RFP or similar document shall not exempt any franchise grantee, manager/operator or employer otherwise subject to the requirements of this Article.

(c) **Applicability of This Article.** The policy and obligations established above shall apply to Franchise grantee whenever the City has a proprietary interest in that franchise, except as otherwise provided hereunder. The determination whether or not the City has a proprietary interest in a franchise, and if so, whether an exemption applies under Section 4(b), shall be made on a case-by-case basis by the City Administrator, or his/her designee, in accord with the standards and principles described herein. Any party otherwise subject to the terms of this Article because the City has a proprietary interest in a franchise that claims an exemption from the terms of this Article under Section 4(b) below shall have the burden of demonstrating that the basis for such exemption is clearly present.

#### **Section 4. SCOPE AND EXEMPTIONS.**

(a) **Scope.** The requirements of this Article apply to franchises defined herein and only to the procedures for determining employee preference regarding whether or not to be represented by a labor organization for purposes of collective bargaining and/or by which labor organization to be represented. Accordingly, this Article does not apply to the process of collective bargaining in the event a labor organization has been recognized as the bargaining representative for employees of employers subject to this Article. Moreover, nothing in the Article requires an employer or other entity subject to this Article to recognize a particular labor organization; nor does any provision of this Article require that a collective bargaining agreement be entered into with any labor organization, or that an employer submit to arbitration regarding the terms of a collective bargaining agreement.

(b) **Exemptions.** The requirements of this Article shall not apply to:

(1) Any employer which has entered into a card check agreement with a labor organization regarding such employees which agreement provides at least equal protection from labor/management conflict as provided by the minimum terms provided in Article; or

(2) Any franchise grantee where the employer is an agency of the federal government or a statewide agency or entity ("public agency") and that public agency would prohibit application of this Article.

(3) Any franchise grantee where the City Attorney or his/her designee determines that the risk to the City's financial or other nonregulatory interest resulting from labor/management conflict is so minimal or speculative as not to warrant concern for the City proprietary or other nonregulatory interest.

#### **Section 5. ENFORCEMENT.**

(a) The requirement that franchise grantees enter into and comply with card check agreements with labor organizations in the circumstances provided in this Article, and the requirement they contractually obligate their successors, assigns or subcontractors to be bound by that former requirement are essential consideration for the City's agreement to any City franchise containing that requirement.

(b) The City shall investigate complaints that this Article has been violated and may take any action necessary to enforce compliance, including but not limited to instituting a civil action for an injunction and/or specific performance.

(c) In the event the City brings a civil enforcement action for violation of this Article, any taxpayer or any person or association by or with a direct interest in compliance with this Article may join in that enforcement action as a real party in interest.

(d) In the event the City declines to institute a civil enforcement action for violation of this Article, a taxpayer or directly interested person or association may bring a civil proceeding on its own behalf and on behalf of the City against that employer and seek all remedies available for violation of this Article available under state law, including but not limited to monetary, injunctive and declaratory relief.

(1) The Court shall award reasonable attorney's fees and costs to the prevailing party in any enforcement action brought pursuant to this section.

(2) Notwithstanding any provision of this code or any other ordinance to the contrary, no criminal penalties shall attach for any violation of this article.

(3) No remedy set forth in this chapter is intended to be exclusive or a prerequisite for asserting a claim for relief to enforce any rights hereunder in a court of law.

#### **Section 6. COLLECTIVE BARGAINING AGREEMENT SUPERSESSION**

All of the provisions of this chapter, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms.

#### **Section 7. EFFECTIVE DATE**

This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

#### **Section 8. APPLICABILITY**

The provisions of this chapter shall apply to a franchise granted by the City pursuant to City Charter Article X, section 1000 for the use of public streets or places, that is negotiated, entered into,

amended, renewed, extended, or otherwise renegotiated prior to, on or after the effective date of the ordinance to the extent not prohibited by applicable law.

**Section 9. SEVERABILITY**

If any part or provision of this chapter, or the application of this chapter, to any person or circumstance, is held invalid, the remainder of this chapter, including the application of such part or provisions to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this chapter are severable.

**Section 10. CODIFICATION**

This ordinance shall be codified at Oakland Municipal Code, Title 5, Chapter 5.82 or at such other appropriate place in that chapter.

IN COUNCIL, OAKLAND, CALIFORNIA, JANUARY 17, 2006

**PASSED BY THE FOLLOWING VOTE:**

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

NOES-

ABSENT-

ABSTENTION-

ATTEST:

LATONDA SIMMONS  
City Clerk and Clerk of the Council  
of the City of Oakland, California