

CITY OF OAKLAND
Agenda Report

2007 NOV 20 PH 7:43

To: Council President Ignacio De La Fuente
and Members of the City Council
From: Lupe Schoenberger, Rules Committee Legislative Analyst
Date: December 4, 2007
Re: Proposed State Legislative Agenda for 2008

SUMMARY

Each year, the City prepares a legislative agenda to serve as the foundation for a focused advocacy strategy in Sacramento. A list of proposed legislative priorities for 2008 has been prepared by the City's state lobbyist, Townsend Public Affairs, Inc., (TPA) based on input received from the Mayor, City Council and City Department Heads.

This report provides the City Council with a list of recommendations to consider for inclusion in the City's 2008 State Legislative Agenda.

On November 15, 2007, the Rules Committee reviewed the proposed agenda and made a request for more detail about the legislative proposals and also requested a matrix listing all legislative activity on the current priorities. That information is provided through various attachments to the report. In addition, the priorities listed in the report were re-organized to reflect consistency with the Mayor and City Council's strategic goals for 2007/09.

The proposed agenda does not include every issue or concern that may arise throughout the course of the year. Therefore, staff will continue to work with TPA to identify and monitor other important legislative issues and submit them to the City Council for consideration. Additionally, TPA will also work to support grant proposals submitted by the City and to identify additional funding opportunities for City proposals as they arise throughout the year.

RECOMMENDATION

Staff is requesting that the City Council approve the recommendations.

Respectfully submitted,



Lupe Schoenberger
Rules Committee Legislative Analyst



MEMORANDUM

To: City of Oakland
From: Townsend Public Affairs, Inc.
Date: December 4, 2007
Subject: 2008 State Government Advocacy Priorities for the City of Oakland

Townsend Public Affairs (TPA) submits for your consideration the following agenda of 2008 state government advocacy priorities for the City of Oakland. In development of the agenda, TPA has included input from the Mayor, City Council, City Attorney, and Department Heads of the City of Oakland. TPA presents the following memo for your review, which is compiled in the following three sections:

1. **Overall Priorities & Dynamics for 2008:** The state advocacy priorities for the city represent and seek to achieve the Mayor and Council's strategic goals. The dynamics that must be considered in implementing its agenda are the constantly changing but dominating issues of the day that provide threats to be mitigated or overcome and opportunities to be leveraged.
2. **City Sponsored Legislative Proposals:** The 2008 agenda includes legislative proposals in which the City will take the lead and sponsor in partnership with one of our State representatives. The Council is being asked to approve the proposals in concept. Once bill language is drafted and introduced to the Legislature, the City Council will take an official position to support or oppose the final bill language.
3. **Legislative "Watch" List:** The needs of the City of Oakland are broad and diverse. Legislation is constantly introduced and amended that can affect positively and negatively the priorities of the city. The legislative watch list is the best effort at a comprehensive list of issues that matter to the city. When legislation is introduced or may be introduced affecting one of these priorities, it is brought to the attention of the city for analysis and action.
4. **Funding Opportunities:** In addition to legislation, the city must focus on bringing additional financial resources to the community from the state budget and grant programs. The funding opportunities section lists those funding streams that have already passed through the legislative process and are now being implemented through the regulatory process and may therefore have grant deadlines in the coming year.

If there are any questions, suggestions, or requests for additional information regarding any of the content of this agenda, please do not hesitate to contact us.

OVERALL PRIORITIES & DYNAMICS FOR 2008

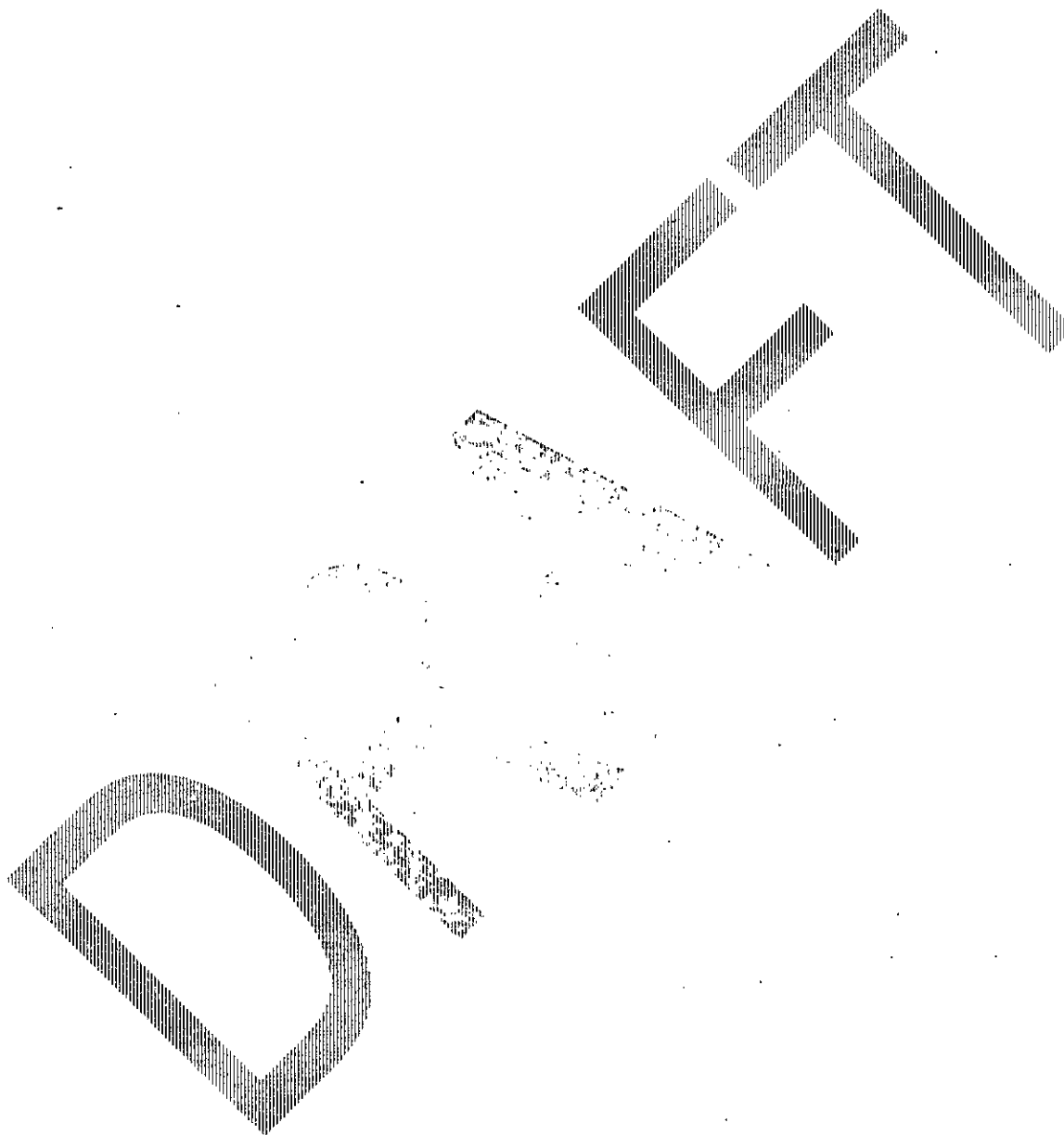
Priorities: The City of Oakland's legislative agenda for 2008 will reflect the priorities for the City Council and the Mayor's vision of Oakland as *The Global Model City*. The strategic agenda includes advocating for legislation, regulations and funding that are consistent with the City's adopted goals:

- **Economic Development:** Promote economic and workforce development in the City of Oakland, thus providing residents with job opportunities and the skills required to succeed in the workplace and thereby reducing poverty, and the conditions that lead to poverty.
- **Efficiency and Responsiveness to Residents:** Improve the administration of the city to more quickly address the everyday issues brought forward by the residents of Oakland.
- **Healthcare:** Increase access to affordable comprehensive health care services and increase rates of health care coverage for residents of the City.
- **Infrastructure:** Maintain and modernize the transportation and other City infrastructure, with a focus on Transit Oriented Development. By maintaining existing roadways; increasing housing near public transportation, and expanding the reach of public transportation to more City residents will decrease their dependence on cars, reduce congestion, as well as pollution, and increase their quality of life.
- **Public Safety:** Ensure public safety, with a strong focus on crime prevention, intervention, enforcement, and sustainability measures.
- **Sustainable City:** Improve the quality of the environment in Oakland. By promoting activities that reduce air, water, and other forms of pollution, the City will not only appear more attractive, but will improve the health and quality of life of residents.
- **Youth and Seniors:** Improve access to educational and vocational opportunities for City youth, as well as provide programs to improve the quality of life for the City's seniors and fully integrate them into the fabric of their communities.

Dynamics: It is important to be aware of the political landscape in Sacramento entering the 2008 legislative session. Any legislative proposals that the City pursues in 2008 to achieve the above goals will be affected by the following dynamics.

- **Very Significant State Budget Deficit:** The non-partisan California Legislative Analyst's Office has recently estimated that deficit for the 2008-09 budget at \$10 billion. While this figure could shrink with constantly fluctuating tax receipts, it is unlikely that the current downturn in the housing market will reverse itself resulting in an increase in revenue for the State. If the \$10 billion deficit figure holds, the Legislature will be required to deal with the third largest budget deficit in the history of the state. As a result, legislators will be reluctant to carry legislation that has a significant cost, as it is highly unlikely that these measures will ultimately become law.
- **The "Year of Education" in Sacramento:** The Governor and Legislature have responded to a major research project on school finance by Stanford University by declaring 2008 to be the "Year of Education". The Superintendent of Public Instruction recently hosted a Summit on the Achievement Gap in California and has declared his intent to work on initiatives to improve the performance of minority students. There will be significant debates and proposals concerning various education policies. This could dovetail with the City's interests on various fronts.

- **2008 is a Presidential Election Year:** In 2008, there will be three statewide elections, the most in any calendar year in the history of the state. 100 of the 120 state legislative seats will be up for election, with 34 legislators terming out (unless the term limits extension passes in February). We also have the Presidential election. Every election year brings with it unique political dynamics. It is too early to know exactly how the electoral politics will affect the implementation of the City's priorities, but it is important that we be aware and consider the ramifications.



CITY SPONSORED LEGISLATIVE PROPOSALS:

The City of Oakland considered six city-sponsored legislative proposals in 2007, of which one was passed and signed into law, one was passed and vetoed, and one was resolved locally without the need for legislation. The remaining three became two-year bills, as is common in the two-year legislative process, and are eligible to move again through the legislative process beginning in January 2008. The City can pursue these three proposals as well as introduce new, City-sponsored legislation, in 2008. The list below includes the 2007 proposals that are still active as well as the potential 2008 proposals.

To reiterate the overall policy priorities of the city, each of the legislative proposals below is rooted in a commitment to improve the overall quality of life for all Oakland residents while addressing public safety for all members of the Oakland community and further enhancing the economic vitality of the city. The following initiatives embody the commitment of the Mayor and City Council to lead a statewide urban agenda. The City Council is being requested to approve the proposals in concept. Once a bill number is assigned to the legislation, the City Council will have an opportunity to review the bill and determine if the final language meets the city's objective.

Two-Year Bills Originally Proposed by the City in 2007 that are still Active:

1. **Providing Services for Sexually-Exploited Minors:** AB 499 (Swanson) was referred to the Assembly Public Safety committee; however, the measure was never taken up by the committee. This measure was originally sponsored by Alameda County and the City of Oakland. The City Council voted to take a support, if amended, position on June 5, 2007, given the constitutional issues. TPA is working with city staff, Assemblyman Swanson, Public Safety committee staff, the American Civil Liberties Union, as well as the County, to craft language that is acceptable to the committee and other stakeholders.
2. **Increasing Access to Healthcare:** AB 516 (Swanson) was held on the suspense file in the Assembly Appropriations committee. The committee indicated that the costs associated with the measure were slightly above the suspense file threshold of \$150,000. The City and TPA will engage in further discussions with the author about amendments to the bill to include a healthcare access pilot program for the City.
3. **Reducing Nuisance Liquor Stores:** AB 960 (Hancock) was held in the Assembly Governmental Organization committee after a hearing on April 25, 2007. The committee requested, and the Department of Alcoholic Beverage Control submitted a report on problem liquor stores and revocation of liquor licenses. The committee is considering an informational hearing on this topic in Oakland prior to the Legislature reconvening in January 2008.

Additional Proposals for City-Sponsored Legislation for 2008:

1. **Crime Prevention via Red-light Cameras (Police Department):** [Attachment One] The City Council adopted Resolution 80790 on July 17th, 2007 directing the State lobbyist to develop legislation that would enable law enforcement agencies to utilize photographic evidence captured on red-light cameras for use as evidence for non-traffic related crimes. Such legislation would help the city deter and solve crimes, leading to a long-term improvement in public safety. *Council Goal: Public Safety*
2. **Municipal Whistleblower Protection (City Auditor):** [Attachment Two] The City of Oakland would like to provide whistleblower protections for municipal employees not

currently provided under state law. The proposal by the city would replicate whistleblower protections that currently exist only for state employees and apply these same protections to municipal employees, ultimately with the objective of improving public service in Oakland. *Council Goal: Efficiency and Responsiveness to Residents*

3. **Seismic Safety (Council Member Quan):** [Attachment Three] This multifaceted proposal is designed to increase the efficiency of seismic retrofitting in the City. As many as 36,000 or more single family dwellings in Oakland, one third of the City's housing, are not properly prepared for a potential earthquake along the Hayward fault. In order to increase public safety when the inevitable earthquake strikes, the City proposes sponsoring a comprehensive proposal with the Association of Bay Area Governments (ABAG), which would include the following elements: State-level certification and licensing of seismic retrofitting contractors; limited permit inspections for retrofitting; and authorization for the California Earthquake Authority to release existing funds. *Council Goal: Public Safety and Infrastructure*
4. **Financial Incentives for Seismic Retrofit (Council Member Nadel):** [Attachment Four] Provide property owners with financial incentives to retrofit seismically substandard residential buildings. The proposal would provide property owners with incentives to have their buildings retrofitted to ensure structural integrity in the event of an earthquake. *Council Goal: Public Safety and Infrastructure*
5. **Fair Lending (City Attorney):** [Attachment 5] Oakland, like much of the rest of the country, has been severely and negatively affected by the downturn in the housing market. Much of this downturn is due to lenders taking advantage of those looking to become homeowners. In order to ensure fair lending practices, the City proposes sponsoring the following comprehensive legislation that includes the following components: Real protections against predatory lenders; mortgage banker reforms; the translation of lending documents into native languages; and the authority for local law enforcement to vigorously enforce all applicable laws. *Council Goal: Economic Development*

2008 Legislative Calendar:

Below are the significant dates and deadlines for legislative actions through the end of the 2007-08 Legislative Session. These are firm deadlines. Any legislation not meeting the deadlines below will no longer be eligible to be considered in the 2007-08 Legislative Session. These dates are relevant for both City-sponsored legislation and the legislative watch list:

January 7: Legislature reconvenes and 2008 bills can be introduced.

January 18: 2007 Bills must be heard and passed out of Policy Committee in the House of Origin.

January 25: Last day to submit bill language for new bills.

January 31: 2007 Bills must be passed off the Floor in the House of Origin.

February 22: Last day to introduce new bills.

April 18: All bills with a fiscal component must be passed out of Policy Committee in their House of Origin.

May 23: All bills must be passed out of Fiscal Committee and sent to the Floor in their House of Origin.

May 30: All bills must be passed off the Floor in the House of Origin.

June 27: All bills must be passed out of the Policy Committee in the Second House.

August 15: All bills must be passed out of Fiscal Committee in the Second House and sent to the Floor.

August 31: Last day for **any bill** to be passed. Final Recess begins upon adjournment.

September 30: Last day for the Governor to sign or veto bills.



LEGISLATIVE ISSUE "WATCH" LIST:

It is important for the City of Oakland to take an active role in shaping all potential legislation that could affect the city and community. The following issues have been identified by the Mayor, Councilmember's, and City staff as priorities. "Watch" means TPA will monitor for legislative activity related to these issues. TPA maintains a constantly updated matrix of bills for the City of Oakland, providing additional analysis and information to inform the development of a position by the city. If legislation is introduced that impacts any of the priorities, staff will be asked to analyze and evaluate the need for City Council action. The City Council may choose to take a position on a measure, continue to monitor without a position, or determine if any further response or reaction is needed.

Attached is a matrix [Attachment 6] which outlines the active bills that were introduced in 2007 that fall into at least one of the priority categories below. As additional measures are introduced in 2008 they will be added to the attached matrix.

Economic Development

- **Business Incubator Development:** Monitor and support legislation that promotes public private partnerships to expand small business opportunities in the City.
- **California Enterprise Zone Program:** Develop and implement a lobbying strategy for the re-designation of Oakland as an Enterprise Zone. Monitor legislative proposals related to the California Enterprise Zone Program and other tax credits. Advocate in support of measures that strengthen the Enterprise Zone program and provide economic benefit to the City's business climate and oppose measures that aim to weaken or eliminate the program.
- **Vocational and Workforce Training:** Monitor and support legislation that provides funding for workforce development, specifically in the fields of construction and building trades.
- **Affordable Housing:** Support legislation that expands affordable housing opportunities throughout the community, including addressing smart growth principles.
- **Funding Priority for Housing Element Compliance:** Support legislation that links a jurisdiction's eligibility for state funding to compliance with housing element policies.
- **Proposition 1C Implementation:** Monitor legislation that proposes to implement the provisions of Proposition 1C and support measures that maximize the ability of the City to access these funds for priority housing needs.
- **Redevelopment and Eminent Domain:** Advocate for the City regarding proposals to modify redevelopment agency and eminent domain law. The City supports measures that provide protections to property owners while still allowing cities with flexibility to carry out needed projects.
- **Residential Care Facilities:** Support legislation that would grant the City more local control over certain residential care facilities. Oakland is the site of a disproportionate share of transitional housing. Some facilities are poorly run, causing problems for the neighborhoods in which they operate. The City of Oakland has limited control over their regulation and with more control could ensure that these facilities operate safely and effectively.

- **Transit Oriented Development:** Support legislation that appropriates funds and/or offsets the cost for transit village planning, implementation, and construction, particularly replacement parking at the villages in the process of development and construction.
- **Urban Infill:** Monitor legislation that promotes the revitalization of urbanized areas through qualified urban infill projects.
- **Oakland Army Base:** Advocate for and support legislation that creates funding opportunities for new roads, utilities, brownfields, other infrastructure, and site preparation.

Sustainable City

- **Incentives for Green Business:** Monitor and support legislation to create incentives for green business including energy and environmental technology and recycled material product development
- **Producer Liability for Universal Waste:** Monitor and advocate for legislation that provides incentives for the redesign of products to make them less toxic and shift the costs for recycling and proper disposal of products from local governments to the producers of the product.
- **California Environmental Quality Act:** Monitor legislation and regulatory proposals related to climate change and impacts on local government.

Youth:

- **Joint-Use Funding:** Monitor and advocate for measures which appropriate funds, or make it easier to access funding, for joint-use projects between the City and local school districts.
- **Oakland Unified School District:** Advise the Council of opportunities to support legislation that will increase funding to Oakland schools, improve the quality of public education and ensure local control.

Healthcare:

- **Childhood Obesity:** Support legislation that aims to reduce childhood obesity through physical activity and improved nutritional choices.
- **Health Care:** Support legislation that increases the level of health care coverage available to the residents of Oakland. The City will monitor and advocate on behalf of measures that increase residents' awareness of health care facilities and promote healthy lifestyles.
- **HIV/AIDS Transmittal Reduction:** Monitor legislation that would reduce the transmission rate of the HIV virus and support legislation that promotes increased testing in the community.
- **Mental Health:** Monitor legislation that provides additional resources for mental health services in the City, particularly any legislation that appropriates funding from Proposition 63.

- **School Based Health Clinics:** Support legislation that would provide access to health care professionals at school sites.

Infrastructure:

- **Bonds:** Monitor legislation that provides new bond funding for the City's infrastructure needs. The City supports new State bond funding proposals that efficiently utilize valuable taxpayer dollars in order to provide significant funding for the city's education, transportation, public safety, recreational and water infrastructure needs.
- **Flood Control and Storm Water Fees:** Support legislation that would allow local governments more flexibility to achieve reductions in storm water and urban runoff pollution
- **Proposition 84 Implementation:** Monitor legislation that proposes to implement the provisions of Proposition 84 and support measures that maximize the ability of the City to access these funds for Oakland's parks, open space and waterways.
- **Congestion Management:** Support legislation that appropriates funds to help relieve traffic congestion on City streets and highways.
- **Gas Tax Increase:** Monitor State and local efforts to raise the gasoline tax and ensure that, if taxes are raised, funding is available for local street and road projects in the City, as well as public transportation.
- **Proposition 1B Implementation:** Monitor legislation that proposes to implement the provisions of Proposition 1B and support measures that maximize the ability of the City to access these funds for priority transportation projects. This includes ensuring that the City would be eligible for State-Local Partnership funding via property or parcel taxes, bridge tolls, or other voter-approved fees dedicated to specific transportation improvements.
- **Public Transportation:** Monitor and support legislation which promote public transportation.

Public Safety:

- **At-Risk Youth Programs:** Support legislation which provides funding and programming for at-risk youth as an alternative to gangs.
- **Crime and Violence Prevention:** Support legislation that appropriates funds for violence prevention programs, which includes, but is not limited to, anti-gang violence, youth empowerment and after-school program-related legislation.
- **Parolee Re-Entry Programs:** Monitor legislation that provides additional resources and job training for recent parolees re-entering the community.
- **Education during Incarceration:** Support legislation that prevents recidivism by providing inmates educational and training opportunities for job readiness prior to release.

Other:

- **Franchise Tax:** Oppose legislation that hinders the City's ability to generate franchise taxes.
- **State Budget:** Monitor and advocate for the City in the state budget process, including all relevant trailer bills. The City supports maximizing State funds for local projects and programs.
- **Utility User Taxes:** Monitor legislation that addresses utility users' taxes relative to intrastate, interstate and/or international telephone, cellular or wireless communication services.

As a result of the 2007 "Watch" priorities, the City Council took positions on multiple bills in 2007 that are also now two-year bills and will continue to be monitored. They include the following:

	Bill	Oppose	Support
1.	AB 21 (Jones): EITC		X
2.	AB 77 (Lieber): State Parole System Reform		X
3.	AB 161 (Bass): Anti-Recidivism Grants		X
4.	AB 167 (Bass): Cal WORKS Eligibility		X
5.	AB 334 (Levine): Firearms Loss and Theft		X IA*
6.	AB 444 (Hancock): Vehicle Reg. Fee for Congestion Relief		X
7.	AB 1502 (Lieu): Banking Development Districts		X
8.	AB 1648 (Leno): Police Records		X
9.	SB 46 (Perata): Proposition 1C Urban Infill Implementation		X IA*
10.	SB 752 (Steinberg): CA Kids Invest. & Dvlpmt. Savings Acct Act		X
11.	SB 840 (Kuehl): Single Payer Health Care Coverage		X
12.	SB 1019 (Romero): Police Records		X
13.	SB X2 1 (Perata): 2008 Water Bond		X
14.	SB X2 2 (Perata): Safe Drinking Water Act of 2008		X
15.	SCA 12 (Torlakson): Local Government: Property Related Fees		X

FUNDING OPPORTUNITIES:

There are multiple upcoming funding opportunities of interest to the City of Oakland pertaining to Proposition 1B transportation funding, Proposition 1C housing funding, and other state grant opportunities. In addition to the funding listed below, we will keep the City informed of any potential funding opportunities throughout the year.

City staff will work with the City Council to prioritize projects submitted to the state for funding and TPA will advocate for those approved projects as appropriate. The following are upcoming opportunities.

- **CalGRIP Gang Funding:** The 2007-08 state budget included \$13.5 million for cities and community based organizations for gang prevention, intervention and suppression activities. The Office of Emergency Services has issued a Request for Proposal for these funds and anticipates issuing grants in January 2008. The City is working, in coordination with community partners, to submit grant requests for this funding.
- **Proposition 1B Trade Corridors Improvement Funding (TCIF):** Proposition 1B includes \$2 billion for infrastructure improvements along federally designated "Trade Corridors of National Significance" and along other corridors within this state that have a high volume of freight movement. TPA will work with the City to ensure that the I-880 29th/23rd Avenue Improvement Project is given full consideration for funding from TCIF. This project is already included on the Metropolitan Transportation Commission's Tier 1 project list for Trade Corridor funding.
- **Proposition 1C Transit Oriented Development (TOD) Funding:** Proposition 1C includes \$300 million in funding for the development of housing near transit sites. In the FY08 budget, \$95 million was appropriated for this program. The Department of Housing and Community Development is currently developing guidelines for the distribution of these funds, which is anticipated to occur in late 2007 or early 2008 [see Attachment 7]. TPA is focused on advocating for the City's TOD developments – Coliseum, Fruitvale Phase II, MacArthur, and West Oakland – and their priority funding needs, specifically replacement parking, station area improvements, and bike/ped access improvements.
- **Proposition 1C Urban Infill Incentives:** Proposition 1C includes \$850 million in funding for incentives for urban infill development. In the FY08 Budget, \$300 million was appropriated for this program. The Department of Housing and Community Development (HCD) is holding stakeholder workshops in preparation of the grant guidelines. HCD is targeting early to mid 2008 to issue the request for proposals. TPA is working with staff to ensure that this new grant program will fund the priority projects of the City, including the TOD developments and local street and road improvements, especially around Lake Merritt.
- **Recreational Trail Program:** The City of Oakland recently submitted a grant application to the Department of Parks and Recreation for the Cryer Site Waterfront Trail through the Recreational Trails Program (RTP) which provides funding for the development of trails and trail-related projects. TPA will engage with the Department to ensure the City's application receives full consideration.
- **Safe Routes to School (SR2S):** The City of Oakland is working on a grant application for the Safe Routes to School program and TPA will be actively engaged in the submission of the application and advocacy with the key decision makers in Sacramento to ensure the City's application is successful.

There are a number of annual grant opportunities for which the City of Oakland may choose to apply. City staff is familiar with these resources and routinely receives approval from the City Council to apply for and receive grant proceeds. These grant programs include but are not limited to the following:

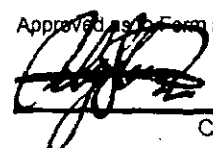
- California Integrated Waste Management Board: Rubberized Asphalt Concrete Grant Program
- California Integrated Waste Management Board: Tire Derived Product Grant
- California Integrated Waste Management Board: Waste Tire Enforcement Grants Program
- California Office of Traffic Safety: Click it or Ticket it Mini Grants
- California Office of Traffic Safety: Sobriety Checkpoint Mini Grants
- California Office of Traffic Safety: Grants Made Easy for Traffic Enforcement, DUI Enforcement and Vehicle Impoundment
- California State Treasurer's Office: Sustainable Communities Grant and Loan Program
- Department of Education: 21st Century Community Learning Centers
- Department of Education: Joint-Use Fund
- Department of Forestry and Fire Protection: An Urban Forest For Every City Grant
- Department of Forestry and Fire Protection: Leaf-It-To-Us Grant
- Department of Forestry and Fire Protection: Urban Forestry: Education Grant
- Department of Forestry and Fire Protection: Urban Forestry: Inventory Grant
- Department of Forestry and Fire Protection: Urban Forestry: Management Plan Grant
- Department of Housing and Community Development: Building Equity and Growth in Neighborhoods
- Department of Housing and Community Development: Emergency Housing and Assistance Program Capital Development
- Department of Housing and Community Development: Multifamily Housing Program: General, Supportive and Homeless Youth
- Department of Parks and Recreation: Habitat Conservation Program
- Department of Parks and Recreation: Land and Water Conservation Fund

As new funding opportunities arise, TPA will make sure to inform the city and consult in the development of the optimal strategy to maximize funding for the City.

As new funding opportunities arise, TPA will make sure to inform the city and consult in the development of the optimal strategy to maximize funding for the City.

OAKLAND CITY COUNCIL

OFFICE OF THE CITY CLERK


City Attorney

RESOLUTION No. 80790 C.M.S.

2007 JUL 14 PM 3:10

RESOLUTION DIRECTING THE CITY'S STATE LOBBYIST TO DRAFT, AND OBTAIN A LEGISLATIVE SPONSOR FOR, STATE LEGISLATION TO MODIFY SECTION 21455.5(e) OF THE CALIFORNIA VEHICLE CODE TO ALLOW THE MONITORING AND USE OF PHOTOGRAPHIC RECORDS CAPTURED BY A RED LIGHT CAMERA OR SIMILAR AUTOMATED ENFORCEMENT SYSTEM, FOR LAW ENFORCEMENT PURPOSES OUTSIDE THE ENFORCEMENT OF RED LIGHT VIOLATIONS

WHEREAS, notwithstanding Section 6253 of the Government Code, or any other provision of law, California Vehicle Code Section 21455.5(e) limits the use of photographic records made by an automated enforcement system to governmental agencies and law enforcement agencies only for the purposes of enforcing the traffic laws related to red light violations; and

WHEREAS, automated enforcement systems are capable of providing streaming video which can be monitored in *real time* or searched for archived images that provide evidence that can be used by law enforcement agencies for valid law enforcement investigative and administrative public nuisance, and public safety purposes, in addition to the enforcement of red light violations; now, therefore be it

RESOLVED: That the City's State Lobbyist is hereby directed to draft an amendment to Section 21455.5(e) of the California Vehicle Code that would allow law enforcement agencies and local enforcement officials to use photographic or any other evidence from red light camera or similar automated enforcement systems for any law enforcement purpose, in addition to red light violation enforcement currently authorized, and to locate a legislative sponsor for the bill.

IN COUNCIL, OAKLAND, CALIFORNIA, JUL 17 2007, 20

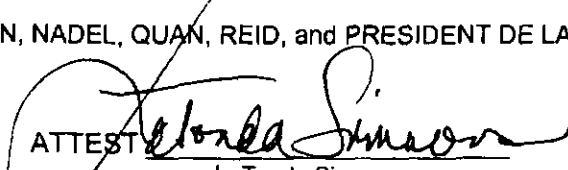
PASSED BY THE FOLLOWING VOTE:

AYES- ~~FRANKS~~, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE - 7

NOES- 0

ABSENT- Brooks - 1

ABSTENTION- 0

ATTEST 
LaTonda Simmons
City Clerk and Clerk of the Council,
City of Oakland, California

CITY OF OAKLAND

2007 FEDERAL/STATE LEGISLATIVE POLICY PROPOSAL

CITY AGENCY: The Office of the City Auditor

Contact: Maggie Raife

Department: The Office of the City Auditor

Telephone: 510-238-3379

Fax: 510-238-7640

E-mail: mraife@oaklandnet.com

TOPIC HEADER:

Municipal Whistleblower Protection

Brief Description of Proposed Legislation:

The City Auditor wants to propose whistleblower protection legislation for municipalities modeled after the following state legislation:

The California Whistleblower Protection Act (Section 8547)

The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.

In March we were informed by the City Attorney's office that the California Whistleblower Protection Act provided no protection in relation to the City of Oakland's municipal code.

Problem under current law legislation seeks to address:

No whistleblower protection for city employees

Support and Opposition *(Please indicate/identify potential support and opposition):*

Support:

Other elected City Auditors in California

LWV and other good government organizations

Other elected officials including Council President, council members, Mayor, City Attorney

Other State and Local elected officials

Opposition:

Media

Anticipated Cost *(Please indicate whether there is a budget request attached to the legislation):*

No fiscal impact anticipated

If there is a cost associated with the legislation, please identify/propose from what potential source/fund?

Has previous legislation been carried in this area or are there similar existing programs in this or other cities/states (please attach copies of legislation or statute, analyses, vote records and other background information)?

We are not aware of similar legislation, however we have not had the resources to adequately research this question.

Do you foresee that this project will benefit only Oakland or does it have a statewide implication?

This project has statewide implications. We believe there are no municipalities at this time that can adequately protect the identity of employees who report waste, fraud, abuse of authority, violation of law or threat to public health or protect such employees from fear of retribution.

The previous City Auditor offered a Good Government Program that stated "confidentiality ensured." However under the California Public Records Act there is no such assurance for an employee. The previous City Auditor did successfully sponsor critical legislation which was ratified as section 36525 of the California Code to provide protection of personal papers and correspondence.

Please attach all the relevant background information, including copies of legislation, statute, letters of support and opposition, analyses, editorials, research data and newspaper articles.

- Exhibit A – Section 8547 California Whistleblower Protection Act
- Exhibit B – Section 36525 Legislation enacted to protect papers and correspondence by former City Auditor Roland Smith
- Exhibit C – City of Oakland Legal Opinion dated April 28, 2003 Re: Disclosure of Records that the City Auditor prepares, owns, uses or retains
- Exhibit D – City of Los Angeles Legal Opinion dated April 10, 2007 Re: Potential Jurisdictional overlap between the Controller's Fraud, Waste and Abuse Unit and other City Agencies (see page 17 Confidentiality for Whistleblowers Communicating with FWA Unit)
- Exhibit E -- Promotional materials related to former City Auditor's Good Government Program

The logo for the Bureau of State Audits, California State Auditor, is a dark, textured banner with rounded corners. The text "Bureau of State Audits" is in a smaller font above "California State Auditor" in a larger, bold font.

Bureau of State Audits
California State Auditor

Laws Governing the Investigative Function

California Government Code Article 3 - Reporting of Improper Governmental Activities

§ 8547. Short title

This article shall be known and may be cited as the "California Whistleblower Protection Act."

§ 8547.1. Legislative intent; disclosure of improper activities

The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.

§ 8547.2. Definitions

For the purposes of this article:

(a) "Employee" means any individual appointed by the Governor or employed or holding office in a state agency as defined by Section 11000, including, for purposes of Sections 8547.3 to 8547.7, inclusive, any employee of the California State University.

(b) "Improper governmental activity" means any activity by a state agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action is within the scope of his or her employment, and that

(1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or

(2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.10, and 8547.11, "improper governmental activity" includes any activity by the University of California or by an employee, including an officer or faculty member, who otherwise meets the criteria of this subdivision.

(c) "Person" means any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing.

(d) "Protected disclosure" means any good faith communication that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.

(e) "Illegal order" means any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or any order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.

(f) "State agency" is defined by Section 11000. "State agency" includes the University of California for purposes of Sections 8547.5 to 8547.7, inclusive, and the California State University for purposes of Sections 8547.3 to 8547.7, inclusive.

§ 8547.3. Use or attempted use of official authority or influence to interfere with disclosure of information; prohibition; civil liability

(a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the rights conferred pursuant to this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) Any employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(d) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.

§ 8547.4. Administrative authority

The State Auditor shall administer the provisions of this article and shall investigate and report on improper governmental activities.

§ 8547.5. Investigative audits

Upon receiving specific information that any employee or state agency has engaged in an improper governmental activity, the State Auditor may conduct an investigative audit of the matter. The identity of the person providing the information that initiated the investigative audit shall not be disclosed without the written permission of the person providing the information unless the disclosure is to a law enforcement agency that is conducting a criminal investigation.

§ 8547.6. Assistance in conduct of investigative audits

The State Auditor may request the assistance of any state department, agency, or employee in conducting any investigative audit required by this article. If an investigative audit conducted by the State Auditor involves access to confidential academic peer review records of University of California academic personnel, these records shall be provided in a form consistent with university policy effective on August 1, 1992. No information obtained from the State Auditor by any department, agency, or employee as a result of the State Auditor's request for assistance, nor any information obtained thereafter as a result of further investigation, shall be divulged or made known to any person without the prior approval of the State Auditor.

§ 8547.7. Report of improper governmental activities; enforcement authority

(a) If the State Auditor determines that there is reasonable cause to believe that an employee or state agency has engaged in any improper governmental activity, he or she shall report the nature and details of the activity to the head of the employing agency, or the appropriate appointing authority. If appropriate, the State Auditor shall report this information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and to any other authority that the State Auditor determines appropriate.

(b) The State Auditor shall not have any enforcement power. In any case in which the State Auditor submits a report of alleged improper activity to the head of the employing agency or appropriate appointing authority, that individual shall report to the State Auditor with respect to any action taken by the individual regarding the activity, the first report being transmitted no later than 30 days after the date of the State Auditor's report and monthly thereafter until final action has been taken.

(c) Every investigative audit shall be kept confidential, except that the State Auditor may issue any report of an investigation that has been substantiated, keeping confidential the identity of the individual or individuals involved, or release any findings resulting from an investigation conducted pursuant to this article that is deemed necessary to serve the interests of the state.

(d) This section shall not limit any authority conferred upon the Attorney General or any other department or agency of government to investigate any matter.

§ 8547.8. Reprisals or other improper acts for disclosure of improper governmental activities; complaints; limitation of actions; civil and criminal penalties

(a) A state employee or applicant for state employment who files a written complaint with his or her supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 8547.3, may also file a copy of the written complaint with the State Personnel Board, together with a

sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the board, shall be filed within 12 months of the most recent act of reprisal complained about.

(b) Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure, is subject to a fine not to exceed ten thousand dollars (\$10,000) and imprisonment in the county jail for a period not to exceed one year. Any state civil service employee who intentionally engages in that conduct shall be disciplined by adverse action as provided by Section 19572. If no adverse action is instituted by the appointing power, the State Personnel Board shall invoke adverse action as provided in Section 19583.5.

(c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board pursuant to subdivision (a), and the board has failed to reach a decision regarding any hearing conducted pursuant to Section 19683.

(d) This section is not intended to prevent an appointing power, manager, or supervisor from taking, directing others to take, recommending, or approving any personnel action or from taking or failing to take a personnel action with respect to any state employee or applicant for state employment if the appointing power, manager, or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (b) of Section 8547.2.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, manager, or appointing power to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, manager, or appointing power fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or state law or under any employment contract or collective bargaining agreement.

§ 8547.9. Transmission of investigative report to state auditor

Notwithstanding Section 19572, if the State Personnel Board determines that there is a reasonable basis for an alleged violation, or finds an actual violation of Sections 8547.3 or 19683, it shall transmit a copy of the investigative report to the State Auditor. All working papers pertaining to the investigative report shall be made available under subpoena in a civil action brought under Section 19683.

§ 8547.10. University of California employees; complaints or reprisal or other improper acts for disclosure of improper governmental activities; civil and criminal penalties

(a) A University of California employee, including an officer or faculty member, or applicant for employment may file a written complaint with his or her supervisor or manager, or with any other university officer designated for that purpose by the regents, alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts for having made a protected disclosure, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint shall be filed within 12 months of the most recent act of reprisal complained about.

(b) Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a University of California employee, including an officer or faculty member, or applicant for employment for having made a protected disclosure, is subject to a fine not to exceed ten thousand dollars (\$10,000) and imprisonment in the county jail for up to a period of one year. Any university employee, including an officer or faculty member, who intentionally engages in that conduct shall also be subject to discipline by the university.

(c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee, including an officer or faculty member, or applicant for employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be

malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer identified pursuant to subdivision (a), and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents.

(d) This section is not intended to prevent a manager or supervisor from taking, directing others to take, recommending, or approving any personnel action or from taking or failing to take a personnel action with respect to any university employee, including an officer or faculty member, or applicant for employment if the manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of the evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, manager, or appointing power to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, manager, or appointing power fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or state law or under any employment contract or collective bargaining agreement.

§ 8547.11. Use or attempt by UC employees to use official authority or influence to interfere with disclosure of information; prohibition; civil liability

(a) A University of California employee, including an officer or faculty member, may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to a University of California official, designated for that purpose by the regents, or the State Auditor matters within the scope of this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) Any employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(d) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.

§ 8547.12. California State University employees; complaints alleging reprisal or other actual or attempted acts in response to disclosure of improper governmental activities; penalties; conflict with memorandum of understanding

(a) A California State University employee, including an officer or faculty member, or applicant for employment may file a written complaint with his or her supervisor or manager, or with any other university officer designated for that purpose by the trustees, alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts for having made a protected disclosure, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint shall be filed within 12 months of the most recent act of reprisal complained about.

(b) Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a California State University employee, including an officer or faculty member, or applicant for employment for having made a protected disclosure, is subject to a fine not to exceed ten thousand dollars (\$10,000) and imprisonment in the county jail for up to a period of one year. Any university employee, including an officer or faculty member, who intentionally engages in that conduct shall also be subject to discipline by the university.

(c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee, including an officer or faculty member, or applicant for employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as

provided by law. However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer identified pursuant to subdivision (a), and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the trustees. Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months.

(d) This section is not intended to prevent a manager or supervisor from taking, directing others to take, recommending, or approving any personnel action, or from taking or failing to take a personnel action with respect to any university employee, including an officer or faculty member, or applicant for employment if the manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of the evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, manager, or appointing power to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, manager, or appointing power fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or state law or under any employment contract or collective bargaining agreement.

(g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action.

SEC. 9. Nothing in this act is intended to supersede or limit the application of the privilege of subdivision (b) of Section 47 of the Civil Code to informants and proceedings conducted pursuant to Article 3 (commencing with Section 8547) of Chapter 6.5 of Division 1 of Title 2 of the Government Code, as confirmed in *Braun v. Bureau of State Audits* (1998) 67 Cal.App.4th 1382.

SEC. 10. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

[How to File a Complaint](#)

[State Agency Responsibilities](#)

[Back to Top](#)

Assembly Bill No. 2318

CHAPTER 637

An act to add Sections 26908.5 and 36525 to the Government Code, relating to local agency auditors.

[Approved by Governor September 21, 2004. Filed with Secretary of State September 21, 2004.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2318, Hancock. Local agency auditors.

Existing law prohibits the State Auditor from destroying any papers or memoranda used to support a completed audit sooner than 3 years after the audit is released to the public and provides that all documents pertaining to his or her work are public records subject to disclosure under the California Public Records Act except for specified items that are to remain confidential, including personal papers and correspondence of any person providing assistance to the State Auditor when that person has requested confidentiality, documents relating to any audit not completed, and documents not used in support of any report resulting from the audit.

This bill would apply these provisions, except for the prohibition on destruction of records, to a city, county, or special district auditor, as defined.

The people of the State of California do enact as follows:

SECTION 1. Section 26908.5 is added to the Government Code, to read:

26908.5. (a) As used in this section "auditor" includes an elected or appointed officer or full-time employee of a county or a special district who is compensated, but does not include an independent contractor.

(b) All books, papers, records, and correspondence of an auditor pertaining to his or her work are public records subject to Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 and shall be filed at any of the regularly maintained offices of the auditor. However, none of the following items or papers of which these items are a part may be released to the public by the auditor or his or her employees:

(1) Personal papers and correspondence of any person providing assistance to the auditor when that person has requested in writing that his or her papers and correspondence be kept private and confidential.

Those papers and that correspondence shall become public records if the written request is withdrawn or upon the order of the auditor.

(2) Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed.

(3) Papers, correspondence, or memoranda pertaining to any audit that has been completed, which papers, correspondence, or memoranda are not used in support of any report resulting from the audit.

SEC. 2. Section 36525 is added to the Government Code, to read:

36525. (a) As used in this section "city auditor" includes an elected or appointed officer or full-time employee of the city who is compensated, but does not include an independent contractor.

(b) All books, papers, records, and correspondence of the city auditor pertaining to his or her work are public records subject to Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 and shall be filed at any of the regularly maintained offices of the city auditor. However, none of the following items or papers of which these items are a part may be released to the public by the city auditor, or his or her employees:

(1) Personal papers and correspondence of any person providing assistance to the city auditor when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and that correspondence shall become public records if the written request is withdrawn or upon the order of the city auditor.

(2) Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed.

(3) Papers, correspondence, or memoranda pertaining to any audit that has been completed, which papers, correspondence, or memoranda are not used in support of any report resulting from the audit.

CITY OF OAKLAND

Office of the City Attorney

Legal Opinion

To: Roland Smith, City Auditor
From: Tracy Chriss, Deputy City Attorney
Date: April 28, 2003
RE: Disclosure of Records That the City Auditor Prepares, Owns, Uses or Retains

I. Issue

In performing his duties, the City Auditor collects a variety of information from City departments and private entities and individuals who desire to do or are doing business with the City. This information includes, but is not limited to, contracts, financial records, business operational data, tax records and employment information. The Auditor is concerned that disclosure of such records may prove harmful to those who provide the information to his office. He has asked whether there is any legal basis to maintain the confidentiality of these documents.

II. Summary Conclusion

The City Auditor has no privilege to withhold records by virtue of any law. Unlike attorney-client, doctor-patient, and other communications that are privileged, there is no privilege for records that the City Auditor prepares, owns, uses or retains. Therefore, a record that the City Auditor possesses or controls is subject to disclosure pursuant to the California Public Records Act and City of Oakland Sunshine Ordinance unless the record is expressly exempted from disclosure by one of these laws.¹

To protect a record from disclosure, the City bears the burden of showing that the record is exempt under the express provisions of the California Public Records Act and

¹ Compare California Government Code Section 8545 exempts certain records of the **state** auditor: (1) personal records of a person who is receiving assistance from state auditor if that person requests confidentiality, (2) records pertaining to audits that have not been completed, and (3) records that are not used in support of an audit report. These exemptions do not apply to auditors of local agencies.

To: Roland Smith, City Auditor
From: Tracy Chriss, Deputy City Attorney
Re: Disclosure of Records That the City
Auditor Prepares, Owns, Uses or Retains
Date: April 28, 2003

**Attorney-Client Communication
Privileged and Confidential**

the City of Oakland Sunshine Ordinance, or that based on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Accordingly, this Office must conduct a case-by-case legal analysis of the facts and circumstances and applicable law for each record.

III. Analysis

A. The California Public Records Act

1. The Public Records Act Does Not Expressly Exempt Records that the City Auditor Prepares, Uses, Owns Or Retains

Records in the auditor's possession or control are, by definition, "public records" under the California Public Records Act unless they are protected by the Public Records Act and Sunshine Ordinance. The Act defines a "public record" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Cal. Govt. Code §6252(e)). The auditor's records are writings prepared, owned, used or retained by the Office of the City Auditor, an office/department of a local agency, the City of Oakland.

The California Public Records Act expresses a strong policy in favor of disclosure of public records. Any refusal to disclose public information must be based on a specific exemption to that policy. The City bears the burden of demonstrating that a record is either exempt under the express provisions of the California Public Records Act or that based on the facts of a particular case, the interest in nondisclosure clearly outweighs the public interest in disclosure. California courts tend to construe the Act's exemptions narrowly in order to accomplish the general policy that favors disclosure. (Braun v. City of Taft, 154 Cal.App.3d 332, 342(1984).) The Act exempts the following documents from disclosure:

a. Records Containing Private Information

The California Public Records Act provides an exemption for medical records or similar files if their disclosure would constitute an unwarranted invasion of personal privacy. (Cal. Govt. Code § 6254(c)). An exemption under this provision must be based upon the information itself, not its location. (Braun v. City of Taft, 154 Cal.App.3d 332, 341-342 (1984).)

To: Roland Smith, City Auditor
From: Tracy Chriss, Deputy City Attorney
Re: Disclosure of Records That the City
Auditor Prepares, Owns, Uses or Retains
Date: April 28, 2003

**Attorney-Client Communication
Privileged and Confidential**

b. Local Taxpayer Information

The California Public Records Act provides an exemption for information required from any taxpayer in connection with the collection of local taxes that is received in confidence where disclosure of the information would result in unfair competitive disadvantage to the person who provided the information. (Cal. Govt. Code §6254(i)).

c. Criminal Investigation Records

The California Public Records Act provides an exemption for investigatory records compiled by a local agency for correctional, law enforcement or licensing purposes. (Cal. Govt. Code §6254(f)). This exemption applies only where there is a concrete prospect of future criminal law enforcement proceedings. (State of California v. Superior Court (Los Angeles County), 43 Cal.App.3d 778, 784 (1974)).

d. Documents Exempted by Other Laws

The California Public Records Act does not mandate disclosure of records that federal or state law exempts from disclosure, nor does the Act require disclosure if federal or state law prohibits disclosure of a particular record. (Cal. Govt. Code §6254(k)). For instance, attorney-client privileged documents are exempt from disclosure under the Act. Similarly, tax records protected by state or federal law are not subject to disclosure under the Act.

e. Catchall Exception

The catchall exception to the Public Records Act's disclosure requirements authorizes withholding of records if the public interest in nondisclosure of the records *clearly outweighs the public interest in disclosure*. (Cal. Govt. Code § 6255). A *factual* determination must be made on a case-by-case basis.

B. The City of Oakland Sunshine Ordinance

1. The Sunshine Ordinance Requires the Disclosure of Additional Information

Oakland's Sunshine Ordinance provides that some information which is exempt from disclosure under the California Public Records Act must be disclosed upon request. Examples of records that are exempt from disclosure under the Public

To: Roland Smith, City Auditor
From: Tracy Chriss, Deputy City Attorney
Re: Disclosure of Records That the City
Auditor Prepares, Owns, Uses or Retains
Date: April 28, 2003

**Attorney-Client Communication
Privileged and Confidential.**

Records Act, but are subject to disclosure under the Sunshine Ordinance are the following:

a. Contracts

Pursuant to the City of Oakland Sunshine Ordinance, draft versions of an agreement are subject to disclosure after final action is taken. (OMC § 2.20.240 A 2). To comply with this provision, City agencies and departments are required to retain draft contracts. Final contracts are subject to disclosure immediately following bid closure. (OMC § 2.20.240 E).

b. Bid Information

Contracts, contractors' bids, responses to RFPs and all other records or communications between the city and persons or firms seeking City contracts are subject to disclosure immediately following bid closure. (OMC § 2.20.240 E).

c. Financial Information

Disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification of a contract or other benefit is subject to disclosure once the City awards the person or organization a contract or benefit. (OMC § 2.20.240 E).

d. Budget Information

Budgets for the City, Redevelopment Agency and the Port Department, that have been provided to a majority of the Council, Redevelopment Agency or Board of Port Commissioners, or their standing committees, are subject to disclosure. This includes all bills, claims, invoices, vouchers or other records of payment obligation as well as records of actual disbursements showing the amount paid, the payee and the purpose for which payment is made. (OMC §2.20.240 F).

IV. Conclusion

In conclusion, we found no case law or statute that exempts from the disclosure requirements of the Public Records Act or the City of Oakland Sunshine Ordinance records that the City Auditor prepares, uses, owns or retains. Because there is no categorical exemption for Auditor's records, they must be disclosed unless they are

To: Roland Smith, City Auditor
From: Tracy Chriss, Deputy City Attorney
Re: Disclosure of Records That the City
Auditor Prepares, Owns, Uses or Retains
Date: April 28, 2003

**Attorney-Client Communication
Privileged and Confidential**

covered by one of the exemption categories provided by the Public Records Act and City of Oakland Sunshine Ordinance.

A case-by-case analysis is necessary to determine whether a particular document is exempt from disclosure. Accordingly, it is important that you consult with the City Attorney when you receive a public records request to determine whether the records are exempt or must be disclosed.

JOHN A. RUSSO
City Attorney

By:
TRACY CHRISS
Deputy City Attorney

TAC:ke

cc: John Russo, City Attorney



OFFICE OF THE CITY ATTORNEY
ROCKARD J. DELGADILLO
CITY ATTORNEY

REPORT NO. R07-0113
APR 10 2007

REPORT RE:

**POTENTIAL JURISDICTIONAL OVERLAP BETWEEN THE CONTROLLER'S
FRAUD, WASTE AND ABUSE UNIT AND OTHER CITY AGENCIES**

The Honorable Audits and Governmental
Efficiency Committee
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Honorable Members:

This report responds to questions received from the Audits and Governmental Efficiency (AGE) Committee regarding legal issues presented by the Controller's new Fraud, Waste and Abuse (FWA) unit. Those issues involve the Controller's authority to participate in criminal investigations, the possibility of overlap with respect to other City departments and offices, and the admissibility of evidence gathered by the unit. Our analysis of these issues is presented below.

Background:

The City Charter authorizes the Controller to conduct financial and performance audits of the City's accounts and operations. The Controller has noted that during the audit process, as well as through a variety of other sources, information is often received that may warrant investigation beyond or separate from an audit. The purpose of the FWA unit, as described by the Controller's Office, is to allow allegations of fraud or other wrongdoing to be investigated outside of the ordinary audit process.

The City Council has approved funding for three positions for the FWA unit (a Special Investigator I, Special Investigator II, and a Senior Clerk Typist), and has requested that the Controller report back quarterly to the Council on the unit's progress.¹ Complaints and allegations received by the unit have either been pursued further by the

¹See Motion, Los Angeles City Council (Sept. 13, 2005) (adopting Budget and Finance Committee Report) (available at Council File (C.F.) Nos. 04-2415, 04-2368).



unit, referred out (to other City departments, outside agencies or the Controller's audit division), or designated as requiring no further action.

The process of approving funding for the FWA unit began in November 2004 when the AGE Committee, by motion, requested that the Controller report on the establishment of a unit to investigate allegations and complaints "in all City departments and agencies."² The motion further explained the perceived need for such a unit:

The City Controller serves as an aggressive "watchdog" of City departments and entities through management and fiscal audits that have uncovered a myriad of systemic and episodic problems. However, this office is not expressly assigned responsibilities or resources for investigating specific allegations of waste, fraud and abuse. To remedy this shortcoming, especially in light of recent allegations, the City of Los Angeles should create a new Waste, Fraud and Abuse Investigation Unit within the Controller's Office with the necessary staffing and resources.³

The Chief Administrative Officer (CAO) submitted a report discussing the unit in January 2005.⁴ Regarding the unit's purpose, the CAO stated that "[t]he proposed Unit would investigate and examine allegations of irregularities, fraud, collusion, conflict of interest, abuse of City assets and improprieties on the part of City employees and others."⁵ Thereafter, the Council, in September 2005, voted to approve funding for the unit.⁶ In January 2007, the Controller began operating a fraud, waste and abuse telephone hotline on a 24-hour per day basis, which may serve to increase the number of complaints received.

As related in the FWA unit's quarterly reports, a portion of the FWA unit's work has included participating in criminal investigations.⁷ Although the term "criminal investigation" is not specifically defined in the Charter or in state law, the California Penal Code states that, for the purpose of reporting to the California Department of Justice, a criminal investigation "includes the gathering and maintenance of information

² See Motion, AGE Committee of the Los Angeles City Council (Nov. 19, 2004) (available at C.F. No. 04-2415).

³ *Id.*

⁴ See Report from William Fujioka, CAO, Fraud, Waste and Abuse Funding Request, to the Mayor and AGE Committee (Jan. 4, 2005).

⁵ *Id.*

⁶ See Motion, Los Angeles City Council (Sept. 13, 2005) (adopting Budget and Finance Committee Report) (available at C.F. Nos. 04-2415, 04-2368).

⁷ See Letter from Los Angeles City Controller Laura Chick to the AGE Committee (April 26, 2006) (FWA unit activity report for quarter ending March 31, 2006) (noting that 29 allegations and complaints regarding City activities and resources had been received for the quarter, and that two criminal investigations resulted from those allegations); Letter from Los Angeles City Controller Laura Chick to the AGE Committee (August 9, 2006) (FWA unit activity report for quarter ending June 30, 2006) (reporting that FWA activities in that quarter had resulted in two criminal filings).

pertaining to suspected criminal activity.⁸ Similarly, the California Attorney General's Office has stated that "[a] criminal investigation ... embrace[s] the detection and gathering of facts in evidence in preparation for, and would include the prosecution of crime."⁹ Although the FWA unit's work is not exclusively criminal, some of the FWA unit's activities to date would qualify as criminal investigations using these definitions.

In addition to the unit's reported activities, investigation of potential criminal behavior has also been a part of the unit's stated focus. For example, in a letter to the AGE Committee on January 4, 2005, the Controller noted that the unit would investigate, among other issues, theft of funds, time abuse, destruction of City property, and fraud by contractors.¹⁰ All of these issues could potentially give rise to criminal liability.

Discussion:

I. Overview of the Controller's Powers and Duties

The Controller serves as the auditor and general accountant for the City. City Charter §260. Under the Charter, the Controller possesses a wide variety of powers and duties, including, among others: supervising the accounts of City entities that receive, collect or disburse money (Charter §260); prescribing the accounting method of City entities (§261(b)); reviewing the accounting practices of offices and departments, and taking over those functions for entities with deficient practices (§261(c)); maintaining the official financial books of the City (§261(d)); allocating monies held by the City Treasury among various funds (§261(g)); monitoring the City's debt level (§261(j)); and approving demands on the Treasury (§262).¹¹

In addition to the accounting and monitoring functions listed above, the Controller is empowered to conduct financial audits (§§261(e), 262) and performance audits (§261(k)). The scope of the Controller's auditing powers is examined in depth below.

⁸ CAL. PENAL CODE §11107.

⁹ 70 Op. Att'y Gen. Cal. 183 (1987).

¹⁰ See Letter from Laura Chick, City Controller, Criteria for Referring Whistleblower Cases, to the AGE Committee (Jan. 4, 2005).

¹¹ In addition to these Charter-based powers, the Controller may inspect or audit the books of any person charged with the disbursement or safekeeping of public money (LAAC §20.55), and may audit and examine all books and records of any person engaging in business in the City, for the purpose of ascertaining whether proper taxes have been paid (LAMC §21.15). See LAAC §20.55; LAMC §21.15.

A. The Fundamentals of the Controller's Traditional Financial Audit Authority

Charter §261(e) gives the Controller the ability to conduct traditional financial audits. Pursuant to the Charter, the Controller shall, in compliance with generally accepted auditing standards:

[A]udit all departments and offices of the City, including proprietary departments, where any City funds are either received or expended; to be entitled to obtain access to all department records and personnel in order to carry out this function; establish an auditing cycle to ensure that the performance, programs and activities of every department are audited on a regular basis, and promptly provide completed audit reports to the Mayor, Council, and City Attorney and make those reports available to the public....(Charter §261(e)).

This financial auditing power exercised by the Controller under the current charter was essentially the same under the prior City Charter (1925, as amended).¹²

At the most basic level, the financial audit powers of the Controller help to ensure that the financial statements of the City, its departments and other City entities are sound and reliable. The Controller's role in financial auditing is in agreement with the function of auditing as it is understood in the greater financial community at large. For example, the United States Government Accountability Office (GAO) defines "financial audit" in the following way: "Financial audits provide an independent assessment of and reasonable assurance about whether an entity's reported financial condition, results and use of resources are presented fairly...." U.S. GOV'T ACCOUNTABILITY OFFICE, GOVERNMENT AUDITING STANDARDS §1.22 (2007).¹³ Audits, according to the GAO, serve a useful purpose by providing "an independent, objective, nonpartisan assessment of the stewardship, performance or cost of government policies...." *Id.* at §1.01.

In describing the Controller's audit powers, a distinction has been made between the "post-audit" function, which refers to verifying the financial health of a department generally, and the "pre-audit" function, which is the process of pre-approving a particular

¹² The prior City Charter (adopted in 1925, and amended thereafter) ("former Charter" or "prior Charter") set forth a role for the Controller similar to that presented in the new Charter (adopted on June 8, 1999, and operative on July 1, 2000). See Former Charter §§46-47. As the majority of the Controller's duties have remained the same, Section §110(b) of the current City Charter is applicable to interpreting the Controller's role: "to the extent the provisions of this Charter are the same in terms or in effect as provisions of the Charter prior to the Operative Date [July 1, 2000], they shall be construed and applied as a continuation of those provisions." Current Charter §110(b).

¹³ See also CALIFORNIA STATE CONTROLLER'S OFFICE, ACCOUNTING STANDARDS AND PROCEDURES FOR COUNTIES c.32 (2003) (A financial audit is "[a]n audit made to determine whether the financial statements of a government are presented fairly, in conformity with GAAP.").

payment or transaction.¹⁴ In discussing the operation of the Controller's post-audit function, our office set forth the following description in City Attorney Opinion 1977:60, which remains applicable today:

The Controller maintains a staff of professional auditors who are engaged in the auditing of financial records maintained by City Departments. Departments can expect their records to be audited periodically by the Controller's auditors.

The scope of these Departmental audits will normally include but not be limited to, cash receipts, cash disbursements, inventory of materials, equipment inventory, payroll, timekeeping, and accounts receivable.

Departments are expected to maintain up-to-date financial records that are complete and accurate. These records should be available for audit purposes at all times.¹⁵

The "pre-audit" function, in contrast, is not necessarily a wide look at a department or City entity, but rather an approval process for individual disbursements. The pre-audit function is set forth in Charter §262:

The Controller shall, prior to the approval of any demand, make inspection as to the quality, quantity and condition of services, labor, materials, supplies or equipment received by any office or department of the City....(Charter §262(a))

In approving a payment demand, the Controller may evaluate several factors, including: (1) whether the demand has been properly approved by a City employee, officer or board; (2) whether the goods or services have been provided; (3) the lawfulness of the payment; (4) whether an appropriation has been made; (5) the reasonableness of the prices charged; (6) the quality of the goods with respect to the original specifications;

¹⁴A pre-audit relates to "an examination of records or inspection of materials or services to determine whether or not a requested demand is in all respects proper and valid." City Attorney Opinion 1977:60 (Sept. 22, 1977). A post-audit is the procedure by which "books, accounts, funds and securities of every person charged in any way with the safekeeping or disbursement of public money or securities" are inspected and verified. *Id.* (citing former Charter §47(9)); See also Letter from Rick Tuttle, City Controller, to George Kieffer, Chair, Charter Reform Commission (appointed) (March 31, 1998) ("The main tool to keep the budget honest is our pre-audit function. Unless there are funds appropriated and the proper... authority to expend those funds, the Controller does not release the check....The Auditor/Controller also performs a post-audit function. Sometimes this results in discovering unauthorized expenditures....However, it is no substitute for the pre-audit function, which only involves proposed expenditures.").

¹⁵ City Attorney Opinion 1977:60 (Sept. 22, 1977) (citing the "Controller's Guide to Departmental Accounts," June 30, 1977, issued by the Los Angeles City Controller's Office).

and, (7) any other criteria established by ordinance. Charter §262(a). In practice, much of the pre-audit function is delegated to the various offices and departments, per the Charter, unless the Controller finds that an abuse of authority has occurred or determines that an office or department lacks adequate controls to exercise its authority properly. Charter §262(b).

B. The New Charter Added Performance Auditing to the Controller's Duties

In addition to the traditional audit function, the Controller has the power to conduct performance audits. Charter §261(k). This power was granted to the Controller by the new City Charter, which was adopted in 1999.¹⁶ The Charter states that the Controller shall:

[C]onduct performance audits of all departments and may conduct performance audits of City programs, including suggesting plans for the improvement and management of the revenues and expenditures of the City. Nothing in this subsection shall preclude the Mayor or Council from conducting management studies or other review of departmental operations. (Charter §261(k)).

Although performance auditing is not further defined in the Charter, the GAO's definition is instructive: "Performance audits ... provide assurance or conclusions based on an evaluation of sufficient, appropriate evidence against stated criteria, such as specific requirements, measures, or defined business practices....Performance audits provide objective analysis so that management [can] improve program performance... and contribute to public accountability." GOVERNMENT AUDITING STANDARDS §1.25. Performance audits can focus on a variety of objectives, including program effectiveness; economy and efficiency; compliance with legal requirements; and program or policy alternatives, among others. *Id.* at §1.28-32.

C. The Auditing Power Does Not Confer Law Enforcement Authority

Auditors do not generally conduct criminal investigations as part of their duties, except in a limited sense. Traditional financial auditing includes the concept of an "illegal acts" analysis; however, it is best seen as an adjunct to financial reporting rather than a direct goal by itself. The GAO notes that:

¹⁶ See, e.g., IMPARTIAL SUMMARY, RONALD DEATON, CLA, OFFICIAL SAMPLE BALLOT AND VOTER INFORMATION PAMPHLET 26 (June 8, 1999) (noting that section 261(k) of the new Charter "[r]equires Controller to conduct performance audits of all departments and allows for performance audits of City programs" and stating that the then-current Charter had "[n]o equivalent section"). See also RICK TUTTLE, L.A. CITY CONTROLLER, WHAT THE NEW LOS ANGELES CHARTER MEANS FOR THE CITY CONTROLLER 1 (October 7, 1999) (observing that the "Controller's new responsibility for conducting performance audits under the new Charter received considerable attention as a way to promote both accountability and efficiency in government").

For financial audits...auditors should report, as applicable to the objectives of the audit...(1) deficiencies in internal control...(2) all instances of fraud and illegal acts unless inconsequential; and (3) violations of [contracts] and abuse that could have a material effect on the financial statements. GOVERNMENT AUDITING STANDARDS §5.10.

Although the GAO's description of financial audit includes an illegal acts analysis, it is made clear that this analysis is separate and distinct from a criminal investigation:

Avoiding interference with investigations or legal proceedings is important in pursuing indications of fraud, illegal acts, violations of provisions of contracts or grant agreements, or abuse....In some cases, it may be appropriate for the auditors to work with investigators and/or legal authorities, or withdraw from or defer further work on the audit engagement...to avoid interfering with an investigation. GOVERNMENT AUDITING STANDARDS §4.29.

Performance audits can also include an illegal acts analysis,¹⁷ but as with traditional financial audits the GAO makes clear that such an analysis is not a criminal investigation, and reminds performance auditors to not interfere with potential investigations or legal proceedings.¹⁸

II. The Charter's Distribution of Criminal Powers is Not Offended if the FWA Unit Provides Assistance to Other Law Enforcement Entities

As discussed above, the Controller does not have independent law enforcement or criminal investigatory authority.¹⁹ Nonetheless, the Controller, like other City entities, may assist others with law enforcement powers in the performance of their duties.

A. Law Enforcement Powers in City Are Assigned by Charter or Other Law

The Los Angeles City Charter establishes a governmental framework in which authority is distributed among bodies (the City Council and various boards) and officers (elected and appointed), with the administration of the government largely assigned to departments and offices.

¹⁷ See GAO GOVERNMENT AUDITING STANDARDS §7.28 (in performance audits, auditors should "design and perform procedures to...detect[] instances of violations of legal or regulatory requirements").

¹⁸ GOVERNMENT AUDITING STANDARDS §7.35 (stating that performance auditors should take care not to interfere with investigations or legal proceedings).

¹⁹ "Law enforcement," in this Report, refers to both the investigation and prosecution of crime. See, e.g., BLACK'S LAW DICTIONARY 891 (7th ed. 1999) (defining "law enforcement" as "[t]he detection and punishment of violations of the law"). The terms "criminal authority," "criminal powers" and similar terms used herein refer to law enforcement authority.

With respect to law enforcement affairs, the Charter assigns principal responsibility to three entities: the Police Department, the City Attorney's Office, and the Ethics Commission. In the case of the Police Department, the Charter provides a broad law enforcement jurisdiction:

The Police Department shall have the power and duty to enforce the penal provisions of the Charter, City ordinances and state and federal law. In the discharge of these powers and duties, the members of the department shall have the powers and duties of peace officers as defined by state law. (Charter §570).

In exercising these powers, the Police Department has perhaps the widest criminal jurisdiction of any City entity, encompassing felonies, misdemeanors, infractions and other City law. In addition to its line officers, the Police Department employs a number of detectives, crime lab professionals and other investigators. The Department has extensive experience in evidence collection, interrogation, chain-of-custody maintenance and other forensic evidence techniques.

The City Attorney's Office, in criminal matters, is charged with enforcing the Charter, City ordinances, and all misdemeanor offenses (including violations of state law):

The City Attorney shall prosecute on behalf of the people all criminal cases and related proceedings arising from violation of the Charter and City ordinances, and all misdemeanor offenses arising from violation of the laws of the state occurring in the City. (Charter §271(c)).

In fulfilling this duty, the City Attorney's Office works closely with the Police Department, and maintains a staff of prosecutors and criminal investigators separate from the civil litigation and advisory divisions of the office. The City Attorney's Office files and prosecutes criminal misdemeanor cases in Superior Court.

The Ethics Commission has a more tightly-focused jurisdiction in law enforcement than either the Police Department or the City Attorney's Office. Per the Charter, the Ethics Commission shall:

[I]nvestigate alleged violations of state law, the Charter and City ordinances relating to limitations on campaign contributions and expenditures, lobbying, governmental ethics and conflicts of interest and to report the findings to the City Attorney and other appropriate law enforcement authorities. (Charter §702(d)).

Investigations conducted by the Ethics Commission are confidential. Charter §706(a)(2). The Ethics Commission administratively enforces the laws under its jurisdiction and

holds evidentiary hearings, and if it determines that a violation has occurred, issues an order which may include a cease and desist requirement and a fine. Charter §706(c). Reports and other information prepared by the Ethics Commission may be referred to the City Attorney, District Attorney, or other prosecuting agency for potential use in preparing a criminal case. See Charter §706(d).

Beyond these three, a few other City entities regularly perform investigations that can become criminal in nature. The law enforcement authority for these entities is derived from the Charter or ordinances codified in the Administrative Code or the Municipal Code. For example, the Fire Department, per the Charter, enforces laws and ordinances relating to fire and fire hazards, and may investigate the causes of fire;²⁰ the Department of Building and Safety, under the Administrative Code and the Municipal Code, enforces laws relating to buildings and structures;²¹ and the Department of Public Works, among other enforcement duties, investigates stormwater and urban runoff pollution under the Administrative Code.²² In addition, the Harbor Department, Los Angeles World Airports (LAWA) and the General Services Department (GSD) all have separate police forces and employ peace officers who may conduct criminal investigations as an adjunct to their law enforcement duties.²³ Of these, the Harbor and Airport police are authorized by the Charter, while the GSD police force derives its authority (which generally extends to providing security services to certain City facilities) from the Administrative Code.²⁴

B. City Entities Without Law Enforcement Authority May Assist Others in the Investigation or Prosecution of Crime

A City department or office can only act according to the scope of its authority under the Charter or ordinances validly enacted under the Charter. It is a well-established principle of municipal law that a city charter "represents the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law." *Domar Elec. Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994). Neither a city nor its departments or offices may act contrary to the dictates of a city's charter, and any act not in compliance with the charter is void. See *id.* at 171.

City entities must also avoid activities that might encroach upon the Charter's existing arrangement of powers. An authoritative treatise on municipal law states the

²⁰ See Charter §520.

²¹ See Los Angeles Administrative Code (LAAC) §22.20; Los Angeles Municipal Code (LAMC) §98.0403.1.

²² See LAMC §§64.70.05-07.

²³ See Charter §636 (authorizing airport police); Charter §657 (authorizing port police); LAAC §22.545 (creating Office of Public Safety in GSD).

²⁴ *Id.* The California Penal Code specifies that GSD may employ peace officers. See CAL. PENAL CODE §830.31 ("The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty....A peace officer of the Department of General Services of the City of Los Angeles....").

general principle: "[T]he duties and powers imposed upon the mayor, designated departments and officers are considered in the nature of public trusts and cannot be delegated or surrendered to other officers or departments, or to other persons."²⁵ Accordingly, the integrity of the governmental structures set up by the Charter must be respected.

Given the absence of specific Charter authority, the above principles indicate that the FWA unit, as part of the Controller's Office, lacks jurisdiction to independently perform criminal investigations. However, the FWA unit, like other City departments, offices and agencies, may assist entities possessing law enforcement authority. In our view, the Charter's framework is not unduly disturbed if, for example, a City department without criminal authority provides assistance to the Police Department or City Attorney's Office in furtherance of an authorized investigation or prosecution. Such assistance must be approved by the management of the assisting department, and should be consistent with the department's expertise and jurisdiction. As the Controller's Office is entrusted under the Charter with matters affecting the City's finances and efficiency, it is appropriate for the FWA unit to provide assistance to investigations involving these areas of expertise, such as financial crimes.

III. The Controller's Hotline Should Not Be Promoted for or Pursue Matters within the Jurisdiction of the Ethics Commission

In addition to the FWA unit's relationship with respect to other City entities in criminal matters, discussed above, the Controller's operation of a whistleblower hotline presents another jurisdictional question. Although the Controller's FWA unit does not plan to seek out matters within the Ethics Commission's jurisdiction, it is likely that some complaints which would otherwise be received by the Ethics Commission will be received by the FWA unit's new hotline.

The Ethics Commission operates a whistleblower hotline under the authority of Charter §702(g), which reads: "The City Ethics Commission shall have the following duties and responsibilities...to maintain a whistle-blower hotline...."²⁶ The Ethics Commission acquired this Charter responsibility in 1990 through the passage of City Proposition H, which established the Ethics Commission and included the hotline requirement.

Although the Charter does not specify the types of whistleblower complaints to be received, it is reasonable to expect the Ethics Commission hotline to receive complaints within the Commission's jurisdiction. The Ethics Commission's jurisdiction encompasses a number of different subject areas, including campaign contributions

²⁵ MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §10.42 (3rd ed. 2004) [hereinafter MCQUILLIN].

²⁶ Charter §702(g).

and expenditures, lobbying, governmental ethics and conflicts of interest.²⁷ However, historical practice shows that the Ethics Commission's hotline has operated more broadly, accepting complaints relating to waste, fraud and abuse. In doing so, the Ethics Commission inherited a role formerly performed by the CAO.

From 1985 to 1991, before the establishment of the Ethics Commission, the CAO operated a hotline for reporting instances of "fraud, waste or misuse" of City Funds.²⁸ In a joint report to the City Council from the CAO and Chief Legislative Analyst (CLA) in July 1990, it was stated that as a result of the passage of Proposition H, the Ethics Commission would assume the whistleblower hotline function from the CAO's office.²⁹ Thus, as it was understood at that time, the Ethics Commission hotline would receive complaints of waste, fraud and abuse in addition to the Ethics Commission's other specialized responsibilities. To the extent that these complaints did not fall within their jurisdiction, the Ethics Commission's procedure has been to refer these complaints to other appropriate authorities, including the Controller's Office.

In practice, the Ethics Commission has received and acted upon complaints received by its hotline and within its jurisdiction that could also be characterized as fraud and abuse. For example, one tip collected by the hotline involved City employees allegedly using "fraudulent Social Security numbers to collect additional paychecks," and resulted in the filing of criminal charges.³⁰ In another reported complaint, a City employee was alleged to have "directed that City supplies be delivered to a private residence."³¹ After investigation, restitution to the City was demanded of the employee.

Thus, given the close relationship between fraud, waste and abuse and ethical issues, the Controller's new hotline may inadvertently receive complaints that would have been received directly by the Ethics Commission. To avoid this problem, any new hotline should not be promoted or operated in a way that might encroach upon the Charter-mandated functions of the Ethics Commission. To the extent that the FWA hotline has been described or promoted in the past for "conflicts of interest" or "misuse of position," those practices should be discontinued, as those topics fall under the specific jurisdiction of the Ethics Commission.³² Additionally, all complaints inadvertently received by the FWA hotline regarding ethics matters should be referred to the Ethics Commission.

²⁷ See Charter §702(d); §706; see also LAMC §48.01 *et seq.* (City ordinances covering municipal lobbying); LAMC §49.5.1 *et seq.* (the City's Governmental Ethics Ordinance); LAMC §49.7.1 *et seq.* (City ordinances covering campaign financing).

²⁸ See C.F. Nos. 84-2129, 84-2129-S1.

²⁹ See Report from Keith Comrie, CAO and William McCarley, CLA, Re: Actions Necessary as a Result of the Passage of Proposition H (the Ethics Proposal) on June 5, 1990 to the City Council (July 9, 1990).

³⁰ WHISTLEBLOWER HOTLINE (BROCHURE), L.A. City Ethics Commission (January 2002).

³¹ *Id.*

³² Conflicts of interest are in the Ethics Commission's jurisdiction under the Charter. See Charter §702. "Misuse of Position" falls under the Ethics Commission's jurisdiction because it is prohibited by §49.5.5 of the City's Governmental Ethics Ordinance, which the Ethics Commission enforces. See LAMC §49.5.5.

IV. The Use of an Appropriate Referral Protocol Can Help Avoid Jurisdictional Issues Which May Arise Between the FWA Unit and Other City Agencies

The FWA unit has developed a protocol for the processing and referral of complaints that are best handled elsewhere or with the assistance of another entity. The FWA unit protocol currently classifies complaints into one of four general categories: (1) take no action; (2) refer to the Audit Division of the Controller's Office (responsible for traditional financial or performance audits); (3) refer to another agency for investigation; or (4) designate for further investigation by the FWA unit.

In matters in which a criminal action is a possibility or where civil litigation is pending, the FWA unit has notified the City Attorney's Office, which assists in either developing the case further or referring the case to another prosecutorial agency.³³ For issues potentially involving the jurisdiction of the Ethics Commission, the FWA unit has referred the complaint to the Ethics Commission for its development.³⁴ Disciplinary or other personnel matters without additional factors are referred to the Personnel Department or the particular department head involved.

This protocol has functioned adequately to date; however, a few principles should be kept in mind to ensure that jurisdictional boundaries are observed and to avoid duplication of effort. First, as issues within the jurisdiction of the Ethics Commission are often subtle or hard to identify (i.e. issues involving alleged violations of state and City law relating to campaign contributions and expenditures, lobbying, governmental ethics and conflicts of interest), the Ethics Commission should have the opportunity to evaluate all complaints unless they are clearly not within the Ethics Commission's purview. As the Charter gives the Ethics Commission specific jurisdiction over ethical, campaign-related and lobbying matters,³⁵ the Ethics Commission should determine whether it will proceed with its own investigation of a particular complaint. In that case, the FWA unit can provide assistance to the Ethics Commission if requested.

As the FWA unit has no independent criminal jurisdiction, the City Attorney's Office or other entity with law enforcement authority should continue to be consulted on matters of a potentially criminal nature. Misdemeanor offenses can be further developed with the Criminal Division of the City Attorney's Office and felonies can be referred to the District Attorney or other appropriate agency. The Police Department

³³ See Letter from Laura Chick, L.A. City Controller, Fraud, Waste and Abuse Unit, to the Budget and Finance Committee (May 25, 2005) (stating that "[a]ll cases that involve pending litigation with the City or that may result in potential criminal indictment will be immediately referred to the City Attorney"); Letter from Luis Li, Chief Assistant City Attorney, Criminal Branch, to Marcus Allen, Chief Deputy Controller (January 3, 2005) (stating that an adequate protocol for the FWA would include weekly meetings with the City Attorney's Office and a 1-week determination as to whether a criminal investigation should proceed).

³⁴ See Letter from Laura Chick, L.A. City Controller, Fraud, Waste and Abuse Unit, to the Budget and Finance Committee (May 25, 2005) ("[I]ssues related to campaign financing, lobbying, and related ethics violations will be referred to the City Ethics Commission.").

³⁵ See Charter §702.

can also receive referrals directly from the unit. Due to difficulties in evidence preservation, chain of custody, admissibility of defendant statements and other forensic issues, criminal matters can be most effectively developed with prosecutorial or other law-enforcement guidance. The Police Department, even when not directly receiving a referral, should also be notified in appropriate cases to avoid duplication of effort and to ensure that standard investigatory practices are followed. After referral of a criminal matter, the FWA unit can provide ongoing investigatory assistance as needed.

Finally, matters of interest to the City because of impacts on finances or efficiency but without potential criminal implications may be referred to the non-criminal (civil or administrative) branch of the Controller's Office for possible audit or other action. For reasons discussed more fully in Part V, below, a clear separation between the criminal and civil operations of the Controller's Office will help to ensure that any potential criminal prosecutions resulting from the unit's work will successfully resist court challenges regarding the admissibility of evidence.

V. The FWA Unit Should Follow Special Protocols Beyond Those Used in the Controller's Office Generally

A. Civil/Administrative Operations and FWA Unit Criminal Investigations in the Controller's Office Should Be Kept Separate

The criminal investigatory functions of the FWA unit raise a number of evidentiary and constitutional rights issues which make it advisable to maintain a separation between the criminal and civil/administrative operations of the Controller's Office. Such a separation will assist the FWA unit and law enforcement agencies working with the unit in obtaining admissible evidence that can withstand judicial scrutiny.

Case law indicates that when a potential defendant is simultaneously investigated in a criminal and civil context for the same conduct, there is a risk that a court could suppress evidence or even dismiss charges, if the civil investigation is conducted for the purpose of obtaining evidence for the criminal case. Such simultaneous investigations are termed "parallel proceedings."³⁶ The case of *United States v. Scrusby*, 366 F. Supp. 1134 (N.D. Ala. 2005), provides an example of an unsuccessful prosecution in which key evidence was suppressed because civil and criminal investigations had become impermissibly mixed.

In *Scrusby*, Richard Scrusby was simultaneously investigated by the United States Attorney's Office (USAO) in a criminal proceeding and by the Securities and Exchange Commission (SEC) in a civil proceeding. The matter involved alleged accounting fraud at HealthSouth, where Scrusby was the chief executive officer. In the

³⁶ See, e.g., Mark D. Hunter, *SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends*, 68 Mo. L. REV. 149 (2003) (a "parallel proceeding" is a "simultaneous civil investigation or proceeding...and [a] criminal investigation or proceeding....").

course of its civil investigation, the SEC agreed with the USAO's request to change the location of a deposition (in order to make criminal prosecution easier due to venue concerns) and to ask questions which would assist the USAO in developing a criminal case. *Scrushy*, 366 F. Supp. at 1136-1138. The USAO also instructed the SEC not to ask about certain topics which might reveal the existence of the criminal investigation to *Scrushy*. *Id.* at 1138. After testifying to the SEC and subsequently learning of the coordination between the civil and criminal investigations, *Scrushy* sought to suppress his civil deposition testimony in his criminal case. *Id.* at 1135.

The court granted *Scrushy's* motion and excluded his testimony. *Id.* The court found that the USAO's conduct in mixing the two investigations and the failure to inform *Scrushy* of the criminal investigation, "depart[ed] from the proper administration of criminal justice." *Id.* at 1140. The court noted that a "special danger" exists in parallel proceedings because "the government can effectively undermine rights that would exist in a criminal investigation by conducting a de facto criminal investigation using nominally civil means." *Id.* (citations omitted). As a result of the suppression of the deposition testimony, three counts of perjury against *Scrushy* were dismissed. *Id.* at 1140.

In another recent case, *United States v. Stringer*, 408 F. Supp. 2d 1083 (Or. 2006), a court dismissed an attempted prosecution for conspiracy and wire fraud because the USAO influenced and advised an SEC investigation but concealed this fact from the defendants. The court noted that the USAO had impermissibly hidden "behind the civil investigation to obtain evidence, avoid criminal discovery rules, and avoid constitutional protections." *Id.* at 1089. The court concluded that the defendants' Fifth Amendment rights had been violated because they were not informed of the criminal investigation before testifying to the SEC. *Id.* at 1086, 1089. Other cases have set forth similar legal principles emphasizing the importance of separating civil and criminal proceedings.³⁷

Although evidentiary problems can arise when civil and criminal investigations are mixed, information gathered in a civil context can be used in a later criminal matter provided that the two types of investigations are properly kept apart. A representative statement of this principle was given by the court in *United States v. Teyibo*, 877 F.Supp. 846 (S.D. NY 1995), another case involving parallel proceedings: "[t]he

³⁷ See, e.g., *United States v. Kordel*, 397 U.S. 1, 11-12 (1970) (stating that a criminal prosecution may be unconstitutional if the government brought a civil action solely to obtain evidence for a criminal case or failed to inform a suspect that a criminal proceeding is contemplated); *United States v. Mahaffy*, 446 F. Supp. 2d 115, 124 (E.D. NY 2006) (noting that "a court may find that the government has departed from the proper operation of criminal justice" where it mixes simultaneous criminal and civil investigations for its own purposes) (citing *Scrushy*); *United States v. Teyibo*, 877 F. Supp. 846 (S.D. NY 1995) (evidence acquired in a civil proceeding may not be used in a criminal case if its use would violate constitutional rights) (citing *Kordel*); see also *United States v. Parrott*, 248 F.Supp. 196, 202 (D.C. 1965) ("The Court holds that the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution.").

prosecution may use evidence acquired in a civil action in a subsequent criminal proceeding unless the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of criminal justice." Additionally, criminal and civil investigations can occur simultaneously, provided that the parallel proceedings are separate. As stated by the court in *Scrushy*, "the separate investigations should be like the side by side train tracks that never intersect." *Scrushy*, 366 F.Supp. at 1139.

The case law discussed above suggests that the best way to maintain the integrity of FWA unit criminal investigations is to keep them distinct and separate from the regular civil or administrative functions of the Controller's Office. After intake, an FWA unit complaint or allegation should not be criminally investigated jointly or in concert with the financial, performance audit, or other non-FWA operations of the Controller's Office. Such a separation will increase the likelihood that evidence gathered through FWA unit criminal investigations will be admissible in a future judicial proceeding. This approach will also ensure that the traditional functions of the Controller's Office continue unimpeded, as persons involved in financial or performance audits will not have a basis to challenge an audit request or assert additional due process rights on the grounds that a request from the Controller's Office may stem from a criminal investigation.

The experience of Los Angeles County, which operates a criminal investigatory unit in the Office of the County Auditor-Controller, is instructive in this regard: The County Board of Supervisors, by official County policy, has authorized the Auditor-Controller to conduct criminal investigations.³⁸ Criminal investigations within the Auditor-Controller's Office are conducted by the 22-member staff of the Office of County Investigations (OCI), which also operates a fraud hotline.³⁹ Many of OCI's investigators have Peace Officer Standards and Training (POST) certifications, and can serve warrants for the collection of evidence pursuant to California Penal Code §830.13.⁴⁰ Members of OCI are organizationally and physically separate from the audit division and

³⁸ See Los Angeles County, Board of Supervisors Policy Manual §9.040 ("The Board of Supervisors has designated the Sheriff, District Attorney, and Auditor-Controller as the only County agencies with the authority to conduct criminal investigations.").

³⁹ The County hotline accepts a variety of complaints including fraud; missing cash; abuse of work hours; internet/email abuse; contractor and procurement improprieties; theft in the workplace and theft of equipment; and bribery, among others. See <http://www.lacountyfraud.org/FAQ.html>.

⁴⁰ California Penal Code §830.13 reads, in part, as follows: "The following persons are not peace officers but may exercise the power to serve warrants....Persons employed as investigators of an auditor-controller or director of finance of any county or persons employed by a city and county who conduct investigations under the supervision of the controller of the city and county...provided that the primary duty of these persons shall be to engage in investigations related to the theft of funds or the misappropriation of funds or resources, or investigations related to the duties of the auditor-controller...." CAL. PENAL CODE §830.13. However, as this code section does not include "cities," as opposed to counties or a "city and county," (San Francisco is the only governmental entity in California that qualifies under this combined description), the City of Los Angeles cannot use this penal code section to grant investigators of the Controller's Office the power to serve warrants.

other departments of the Auditor-Controller's Office, and use distinct access control mechanisms. To further this separation, OCI operates internal email and data servers that are inaccessible to other office divisions. Although it is not necessary for the FWA unit to follow all of the County's practices, they are a useful guide for the FWA unit as it develops its own internal protocols.

B. Additional Procedural Safeguards Are Necessary When Interviewing Employee/Suspects in a Criminal Investigation

Criminal investigations often involve a number of complex areas such as the constitutional rights of suspects, evidence collection and preservation, and search and seizure procedures, among others. One area of particular concern, raised by both the Controller's Office and the AGE Committee, is the risk that an employee's rights may be violated or that a statement may be excluded as result of an interview that is part of a criminal investigation.

The basic rule regarding public employee interviews in the criminal context is set forth by the case of *Garrity v. New Jersey*, 385 U.S. 493 (1967) and its progeny. A public employee cannot refuse to answer questions related to his or her job; however, any statements received from such an employee under threat of discipline or job loss may not be used in a subsequent criminal case against that employee. A statement given voluntarily, on the other hand, can be used for any purpose. See *Garrity*, 385 U.S. at 500 ("the Fourteenth Amendment...prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office"); *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Chavez v. Martinez*, 538 U.S. 760, 768 n.2 (2003) (compelled statements from public employees cannot be used in criminal proceedings). A suspect will be granted use plus "fruits" immunity for a statement given involuntarily, that is, neither the involuntary statement nor evidence derived from it will be admissible in a criminal action. See, e.g., *Lefkowitz* at 78.

A well-known California case has reiterated these principles. In *Lybarger v. City of Los Angeles*, 40 Cal. 3d 822 (1985), Lybarger, a police officer with the vice unit of the Los Angeles Police Department, was being investigated by the internal affairs division on a number of allegations, including false arrest, false imprisonment, and conspiracy. *Id.* at 825. During an administrative interview, Lybarger was informed that if he refused to cooperate, he could be charged with insubordination and lose his job. Lybarger refused to testify, and was charged with insubordination. An administrative board, after a hearing, recommended that Lybarger be removed from his position with total loss of pay. *Id.* at 826. The officer filed a petition in court, alleging that his due process rights had been violated under the Public Safety Officers Procedural Bill of Rights Act (Public Safety Officers Act).⁴¹ The trial court found no deprivation of the officer's rights and

⁴¹ CAL. GOV'T CODE §3300 et seq. (the California Public Safety Officers Procedural Bill of Rights Act).

concluded that the order of removal against the officer was justified. The California Supreme Court disagreed with the trial court, finding that the officer's rights had been violated by the failure to advise him in the administrative interview that any statements made under compulsion could not be introduced in a subsequent criminal proceeding. Although the case primarily focused on the Public Safety Officers Act, the court noted that all public employees have the protection of the constitutional rights set forth in *Garrity* and subsequent cases. *Id.* at 827.

The rule expounded in *Garrity/Lybarger* and other cases mandates that investigators must take care when interviewing potential suspects, because received statements may be inadmissible in a criminal case if an employee's participation is involuntary.⁴² The County's OCI unit, in addressing this issue, has developed an interview protocol that includes informing the interviewee that questioning is voluntary, stating that the employee is free to leave, and indicating that no disciplinary action will be taken if the employee does not wish to participate. As a regular practice, the OCI unit mandates that two interviewers be present and the questioning is digitally recorded. Statements received in this manner are more likely to be admissible in subsequent proceedings in criminal court.

It should be noted that additional safeguards apply to peace officers under the Public Safety Officers Act if they undergo interrogation regarding their conduct. See CAL. GOV'T CODE §3300 *et seq.* In order to not run afoul of the Act's provisions, it is advisable that any allegation or complaint involving a peace officer as a potential suspect be referred to the internal affairs division of the Police Department or other appropriate agency. The FWA unit can then provide assistance in the matter upon request.

C. Confidentiality for Whistleblowers Communicating with the FWA Unit

As the FWA unit will be operating a whistleblower hotline and investigating criminal matters, it is important that strict confidentiality be maintained with respect to information received by the unit, to the extent permitted under the law. Lack of confidentiality could have detrimental effects, including discouraging persons from making reports and compromising the integrity of ongoing investigations.

In the event of a California Public Records Act (CPRA) request, the City may assert that the records of the unit are shielded from public disclosure under certain CPRA exemptions. In general, the CPRA mandates the disclosure of all public records, unless a specific exception applies. *Williams v. Superior Court*, 5 Cal. 4th 337, 346 (1993). With respect to criminal matters, however, a CPRA exception exists under Government Code §6254(f) for files created by a local agency for law enforcement

⁴² Note that because an employee in an interview situation is not "in custody," the rules of *Miranda v. Arizona*, 384 U.S. 436 (1966) are inapplicable, and *Miranda* warnings, as such, need not be given.

purposes. CAL. GOV'T CODE §6245(f); *see also Haynie v. Superior Court*, 26 Cal. 4th 1061 (2001); *Rackauckas v. Superior Court*, 104 Cal. App. 4th 169 (2002).

The FWA unit may also be able to resist disclosure of records by asserting other available CPRA exemptions. These include, for example, the privilege provided by Government Code §6255(a), which allows non-disclosure if it is shown that "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." CAL. GOV'T CODE §6255(a). The City may also assert that Government Code §6254(k) and California Evidence Code §1040 (the official information privilege) provide another basis for non-disclosure. *See* CAL. GOV'T CODE §6254(k); CAL. EVID. CODE §1040.

Although it cannot be guaranteed that in a particular case information will be shielded from disclosure, the public's interest in this City-operated hotline will probably weigh heavily in the decisionmaking of any reviewing court. In the case of the Ethics Commission, a specific Charter provision mandates that the Ethics Commission's investigations remain confidential.⁴³ However, even without the benefit of a specific Charter provision, it remains likely that requests for FWA unit information can be successfully denied under the CPRA.

Conclusion:

The Controller's FWA unit provides the City with a new resource to help ensure that wasteful, fraudulent and abusive practices are investigated and eliminated. In addition, the new whistleblower hotline offers another avenue for employees and City residents to report alleged improprieties that may have a negative impact on the finances or efficiency of the City.

In practice, the FWA unit has operated with a referral protocol mandating that certain other City agencies, such as the Ethics Commission, the City Attorney's Office, and the Police Department, are notified when allegations are received in their respective jurisdictional areas. Those agencies have had the option to investigate the case on their own, or to work in cooperation with the FWA unit in developing the case, if it falls within the Controller's area of expertise. Other matters have been referred to the Personnel Department or other City departments, when appropriate. This protocol is adequate and will help to avoid jurisdictional overlap issues.

As the Controller's new unit is participating in criminal investigations, case law suggests that the best way to ensure that evidence collected by the unit is admissible is to separate the criminal and non-criminal operations of the Controller's Office. In this regard, the organizational and physical separation used by the County of Los Angeles in its OCI unit provides a good model for the Controller's Office. In addition, interviews

⁴³ Charter §706(a)(2) ("Records of any investigations shall be considered confidential information....").


conducted by the unit should be voluntary and undertaken with the general principles outlined in the *Garrity/Lybarger* line of cases. The City Attorney's Office will provide ongoing advice to the FWA unit to help avoid potential problems with the admissibility of statements and other evidence.

The Controller's Office has expressed interest in an ordinance that would codify the above principles and set forth the FWA unit's operational guidelines. Such an ordinance could also mandate that whistleblower information and other data collected by the FWA unit remain confidential, to the extent permitted by law. It should be noted, however, that an ordinance is not strictly necessary. If the Council desires to adopt such an ordinance, the City Attorney's Office stands ready to draft an ordinance embodying the above principles.

If you have any questions, please contact Deputy City Attorney Lonnie Eldridge at (213) 978-8136. Either he or another member of this office will be available when you consider this matter to answer any questions you may have.

Sincerely,

ROCKARD J. DELGADILLO, City Attorney

By 

DAVID MICHAELSON
Chief Assistant City Attorney

DM:LJE:lee

cc: Laura Chick, Controller
LeeAnn M. Pelham, Executive Director
City Ethics Commission
William J. Bratton, Chief
Los Angeles Police Department



SPEAK OUT *for Good Government* PROGRAM

Sponsored by the Office of the City Auditor.

The Good Government Program is a fair, neutral and confidential process through which employee and citizen complaints of wrong doing, dereliction of duty and improper behavior are provided a thorough review.

Issues appropriate for reporting:

- Arbitrary or unreasonable administrative activity
- Criminal activities
- Negligence
- Unsafe conditions
- Abuse
- Activities that place the City at risk

You can bring information to the Office of the City Auditor by:

- Telephone: (510) 433-9983
- Private Fax: (510) 763-4086
- E-mail: roland@dna1.com
- Letter: Roland E. Smith, City Auditor
Good Government Program
P.O. Box 70155
Oakland, CA 94612
- Visit the office in person, by appointment.

SPEAK OUT for Good Government PROGRAM



An employee program
sponsored by the
Office of the City Auditor
Roland E. Smith, Auditor



CITY OF OAKLAND

Roland E. Smith
City Auditor
Good Government Program
One Frank Ogawa Plaza, 4th Floor
Oakland, CA 94612

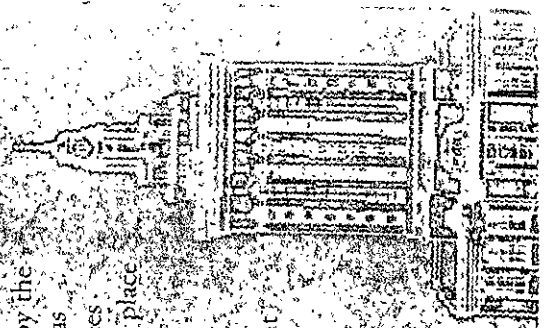
Graphics: Coleen Patterson Design

Recently a 15-year employee with the IRS was saved from being fired through the last minute efforts of both a member of Congress and the head of the IRS. Why would these two powerful institutions need to become involved in such a matter? The woman in question testified in 1997 against unfair and illegal practices of the IRS. In other words, she was a *whistleblower*.

Whistleblowers, or people who see wrongdoing and report it, have become more prevalent in today's society because making government work better is such a widespread concern. Frequently, employees are frustrated with the emphasis on "don't rock the boat" and decide to take matters in their own hands. In most cases, they do so at their own peril.

No employee or private citizen should have to refrain from reporting wrongdoing out of fear of retaliation and punishment.

This program, launched by the Office of City Auditor, was created to enable employees and citizens to have a safe place to report concerns and to seek resolution. The goal of the program is to save Oakland City Government wasted and misused resources and materials.





Purpose of the Program

The purpose of the program is to establish a fair, neutral and confidential process through which all employee and citizen complaints of wrong doing, dereliction of duty and improper behavior are provided a thorough review for the purpose of satisfactorily resolving the complaint.

When to Use the Good Government Program

The Good Government Program is used when other avenues for registering a concern or complaint are not appropriate or available. Individuals should first consider working through normal channels if possible for resolution. If employees are unsure how to proceed with a concern they are encouraged to contact the Auditor's office.

Issues Appropriate for Reporting:

- Arbitrary or unreasonable administrative activity
- Criminal activities
- Negligence
- Unsafe conditions
- Abuse
- Activities that place the City at risk



Confidentiality Ensured

The Auditor's Office believes that confidentiality is the highest priority of the Good Government Program. Every complaint will be given a number and held under lock and key. All communications outside the Auditor's office will refer to the number, not a name. The Auditor will work closely with the employee to ensure that he or she is aware of how the inquiry is proceeding and who is involved. Confidentiality is extended to citizen inquiries as well.

How you can bring information to the Office of the City Auditor

- Telephone (510) 433-9983
- Private Fax (510) 763-4086
- E-mail: roland@dnai.com
- Letter (*send to*):

Roland E. Smith
 City Auditor
 Good Government Program
 P.O. Box 70155
 Oakland, CA 94612

- Visit the office in person or call for an appointment.

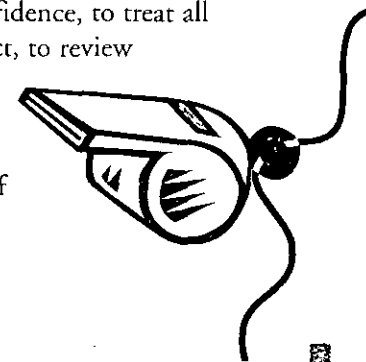
The City Auditor is elected by the citizens of Oakland and is independent of city administration.

The Process of Analysis and Investigation

- Employee communicates with Auditor's office.
- Auditor determines the nature of the complaint and recommends next steps.
- Information is given a file number for security and confidentiality.
- Background information is locked in secure file.
- Auditor meets with employee, if necessary and agreeable.
- Investigation proceeds.
- Recommendations for action made to appropriate parties.

Pledge of the City Auditor

The City Auditor pledges to hold all information in confidence, to treat all inquires with respect, to review every complaint thoroughly, and to communicate to all parties the results of the inquiry.



Speak Out for Good Government

Attachment 3
CITY OF OAKLAND
2007 FEDERAL/STATE LEGISLATIVE POLICY PROPOSAL

CITY AGENCY: City of Oakland

Contact: Sue Piper
Department: Council District 4
Telephone: (510) 238-7042
Fax: (510) 238-6910
E-mail: spiper@oaklandnet.com

TOPIC HEADER: Seismic Safety Legislative Package

Brief Description of Proposed Legislation: A series of three legislative proposals designed to increase the efficiency of seismic retrofitting, because without retrofitting, when the inevitable earthquake comes, as many as 36,000 or more single family dwellings in Oakland—one third of our housing--will be wiped out or nearly so, which is a public safety issue bar none. The following are inducements to safe and effective retrofitting:

1. **Establish a specific certification or license for retrofit contractors**
 - The goal is to assure that contractors doing seismic retrofits are qualified, certified and insured, to ensure that consumers are getting quality work.
 - Allowing State to act as a re-insurer for liability insurance for companies that typically insure retrofit contractors.
 - Allowing the retrofit contractors to incorporate as a non-profit to work to improve quality and professional practices in exchange for more affordable insurance rates (a model used by foundation and structural engineers)
2. **Limited Permit Inspections for Retrofitting**, allowing that a seismic retrofit permit inspection does not trigger an inspection for other building issues, except for obvious life safety issues.
3. **Authorizing the release of funding from the California Earthquake Authority** to fund much needed projects that would support proactive structural mitigation.

Problem under current law legislation seeks to address:

Oakland is interested in encouraging as many older homes as possible to be seismically strengthened--experts have predicted that Oakland could lose more than 1/3 of its housing in the next major earthquake—36,600 homes. We want homeowners to consider retrofitting a great investment—and need to find ways to topple the current barriers to that perspective.

1. Oakland and other cities along the Hayward fault want to establish minimum standards for retrofitting so that consumers know they are at least getting what they paid for. Traditionally, the State has been reluctant to have yet another contractor specialty. A special certification or license to do this work would be one way to increase retrofit quality. It seems a bit strange that a contractor must prove 4 years of experience to put up sheet rock—but that no similar specialty license is required for retrofitting work. The effort to mandate licensing may be a “Catch 22” problem, however, because contractors who become “certified” or “licensed” by the State may find that they can no longer obtain affordable liability insurance. The State Contractors License Board has the authority to create another specialty. The State Seismic Safety Commission had hearings after the Northridge earthquake to look into this requirement, but the effort to mandate the CSLB to create this specialty was abandoned.
2. Many seismic retrofits are being conducted without building permits. Some have conjectured that this is because homeowners are concerned about inspectors finding other problems with their older homes. ABAG staff has talked with both retrofit contractors and city building officials about this issue. This is not a major issue in most cities because the inspectors have been told to not go looking for problems, and access to the crawl space is typically from the outside, so the inspector does not even go inside the home. One possible explanation is that homeowners may “assume” aggressive inspections will be an issue before they talk to a contractor about obtaining a permit. It may also be created as a false problem by contractors who do not want their work inspected.
3. One of the ways to encourage more homeowners to be proactive about retrofitting is to develop prescriptive retrofitting plans that have been pre-approved by structural engineers and other professional organizations so that homeowners do not have to incur the expense of having custom retrofit plans designed by seismic engineers. The California Earthquake Authority (CEA) was established by the legislature following the Northridge earthquake because the residential insurance companies were unwilling to offer homeowner insurance in California because of their losses. As a quasi-public-private entity, the CEA does not have sovereign immunity. While the CEA is required to spend millions on mitigation, much of this money remains in a special fund because agency legal staff is concerned that any substantive projects related to structural mitigation would expose the agency to potential lawsuits following an earthquake. Yet these projects are precisely what are needed.

Support and Opposition *(Please indicate/identify potential support and opposition):*

Support:

Association of Bay Area Governments

Cities, particularly those along the Hayward Fault and in other earthquake-sensitive zones

Opposition:

State Contractors License Board

California Building Officials

Anticipated Cost *(Please indicate whether there is a budget request attached to the legislation):*

Unknown, but potentially in the hundreds of thousands of dollars per year.

If there is a cost associated with the legislation, please identify/propose from what potential source/fund?

Funds used may include funds already collected by the California Earthquake Authority. Additionally, some General Fund dollars may be necessary for the creation of a licensing authority.

Has previous legislation been carried in this area or are there similar existing programs in this or other cities/states (please attach copies of legislation or statute, analyses, vote records and other background information)?

AB 1598 (Corbett) extended the sunset date for the Earthquake Grant and Loan Program to July 1, 2007. Additionally, this measure increased the amount of money paid into this program to \$2.9 million.

Do you foresee that this project will benefit only Oakland or does it have a statewide implication?

Earthquake faults run throughout the State of California. Cities in the Bay Area, Central California Coast, and Southern California all live under the threat of earthquake activity. Ensuring and encouraging proper seismic retrofitting work will not only be beneficial to the individual residents of a structure, but to the State as a whole.

Please attach all the relevant background information, including copies of legislation, statute, letters of support and opposition, analyses, editorials, research data and newspaper articles.

CITY OF OAKLAND

2008 FEDERAL/STATE LEGISLATIVE POLICY PROPOSAL

CITY AGENCY:

Contact: Alice Glasner
Department: City Council
Telephone: 238-4991
Fax:
E-mail: aglasner@oaklandnet.com

TOPIC HEADER: Financial incentives for seismic retrofit of soft-story, multi-unit residential buildings

Brief Description of Proposed Legislation:

Legislation would provide property owners with incentives to upgrade substandard residential buildings, specifically those with one or more floors above a garage or other "soft story".

Problem under current law legislation seeks to address:

Currently, there are many older multi-unit residential buildings which could prove unstable during a strong earthquake. These buildings potentially represent many lives lost, injuries sustained, or property damage because of substandard construction.

There is no requirement for property owners to seismically upgrade these buildings. The proposed legislation could provide necessary incentives for property owners to upgrade their buildings on a voluntary basis.

Support and Opposition *(Please indicate/identify potential support and opposition):*

Support:

Emergency Response providers.
Residents
Property owners effected
Other property owners
Chambers of Commerce

Opposition:

Tax-payer associations

Anticipated Cost *(Please indicate whether there is a budget request attached to the legislation):*

Unknown, but potentially significant, as millions of dollars annually would likely be necessary to provide enough of an incentive to result in any noteworthy action by property owners.

If there is a cost associated with the legislation, please identify/propose from what potential source/fund?

Funds would likely come out of the state General Fund. It is possible that there is a fund within the Department of Housing and Community Development, but more analysis is needed to determine if the seismic upgrade of substandard residential buildings is an appropriate use for any particular HCD funding.

Has previous legislation been carried in this area or are there similar existing programs in this or other cities/states (please attach copies of legislation or statute, analyses, vote records and other background information)?

It does not appear that any legislation has been carried in California to address the seismic retrofit of substandard buildings. Assemblymember Davis did carry a measure (AB 864) in 2007 to address the notification of buyers and sellers when substandard buildings are transferred between owners, but no reference is made specifically to seismic safety.

Do you foresee that this project will benefit only Oakland or does it have a statewide implication?

Earthquake faults run throughout the State of California. Cities in the Bay Area, Central California Coast, and Southern California all live under the threat of earthquake activity. Ensuring and encouraging proper seismic retrofitting work will not only be beneficial to the individual residents of a structure, but to the State as a whole.

It will certainly benefit Oakland as the City resides in an earthquake prone area, but it could have Statewide implications for cities in other earthquake prone regions.

It could also be possible to craft this measure as a pilot project for the Oakland/Bay Area and one other earthquake region in Southern California.

Please attach all the relevant background information, including copies of legislation, statute, letters of support and opposition, analyses, editorials, research data and newspaper articles.

Attachment 5
CITY OF OAKLAND

2008 FEDERAL/STATE LEGISLATIVE POLICY PROPOSAL

CITY AGENCY: OFFICE OF THE CITY ATTORNEY

Contact: Alexander Nguyen
Department: City Attorney
Telephone: 510-238-6628
Fax: 510-238-6500
E-mail: anguyen@oaklandcityattorney.org

TOPIC HEADER: Fair Lending Legislation

Brief Description of Proposed Legislation:

1. Real protection against predatory lenders

Ban on prepayment penalties and yield spread premiums (kickbacks by lenders to mortgage brokers for getting borrowers into bad loans).

Assignee Liability (ending the practice of having unfair loans sold to large institutions and Wall Street investors who are then shielded from liability for the actions of predatory lenders - while still making huge profits).

Require diligent income verification and reasonable underwriting practices in the making of loans.

2. Mortgage Broker Reforms

Establish rigorous affirmative duties requiring mortgage brokers to serve the best interests of their customers – just like real estate brokers.

Prohibit brokers from steering families into unnecessarily expensive loans.

Require that any person compensated in any way in the placement of mortgage loans be licensed and bonded.

3. Require Translation of Mortgage Documents for Limited English Speakers

Support AB 512 (Leiber)

Most contracts in California have to be translated if the negotiations are handled in a language other than English. However, there is a sizable loophole allowing mortgage lenders to avoid this requirement. There is no reason why a home mortgage – which is usually by far the most important contract a family will enter – should be exempt from this requirement.

4. Vigorous Enforcement

The State of California should enforce these protections once they pass. However, District Attorneys, City Attorneys, and County Counsels also must have enforcement authority to ensure that the people's business will get done

Problem under current law legislation seeks to address:

- Prepayment penalties and yield spread premiums (kickbacks by lenders to mortgage brokers for getting borrowers into bad loans).
- Lack of Assignee Liability, where unfair loans sold to large institutions and Wall Street investors who are shielded from liability for the actions of predatory lenders.
- Lack of diligent income verification and reasonable underwriting practices in the making of loans.
- Lack of standards requiring mortgage brokers to serve the best interests of their customers – just like real estate brokers.
- No licensure requirement for any person compensated in any way in the placement of mortgage loans.
- No requirement for translation of loan documents into language that the loan was negotiated in.

Support and Opposition *(Please indicate/identify potential support and opposition):*

Support:

ACORN
Bay Area Legal Aid
California Reinvestment Coalition
Center for Responsible Lending
Centro Legal de la Raza
Consumers Union
East Bay Community Law Center
Eviction Defense Center
Housing & Economic Rights Advocates
Lao Family Community Development
Oakland City Attorney's Office
Oakland NAACP
Sentinel Fair Housing
Urban Strategies Council
Unity Council

Opposition:

Lending industry

Anticipated Cost *(Please indicate whether there is a budget request attached to the legislation):*

If there is a cost associated with the legislation, please identify/propose from what potential source/fund?

Has previous legislation been carried in this area or are there similar existing programs in this or other cities/states (please attach copies of legislation or statute, analyses, vote records and other background information)?

AB 512 (Leiber) for language translation requirements.

Do you foresee that this project will benefit only Oakland or does it have a statewide implication?

Statewide.

Please attach all the relevant background information, including copies of legislation, statute, letters of support and opposition, analyses, editorials, research data and newspaper articles.



Attachment 6

1127 11th Street
 Suite 514
 Sacramento, CA. 95814
 Phone: (916) 447-4086
 Fax: (916) 444-0383

<http://www.townsendpa.com/>

City of Oakland Legislation

BILL/ AUTHOR	TOPIC	NEXT DATE	POSITION	TOPIC	STATUS
Economic and Workforce Development					
<u>AB 21</u> Jones	Income taxes: earned income tax credit.		support		Assembly Appropriations
<u>AB 121</u> Maze	Income and corporation taxes: credits: enterprise zones: foster youth hiring preference.		watch	Enterprise Zone Program	Assembly Revenue & Taxation
<u>AB 1134</u> Dymally	Enterprise zones: residency training programs: tax credits.		watch	Enterprise Zone Program	Assembly Revenue & Taxation
<u>AB 1398</u> Arambula	Targeted economic development areas: tax credits.	01/08/08 9 a.m. - Room 447 ASM JOBS, ECONOMIC	watch	Enterprise Zone Program	Assembly Jobs, Economic Development, and the Economy
<u>AB 114</u> Blakeslee	Public resources: carbon dioxide containment program.		watch	Incentives for Green Business	Assembly Appropriations (Suspense File)
<u>AB 154</u> Nakanishi	Personal income tax and corporation income tax: energy efficient commercial buildings.		watch	Incentives for Green Business	Assembly Appropriations (Suspense File)
<u>AB 564</u> Brownley	Building standards: carbon neutral buildings..		watch	Incentives for Green Business	Assembly Rules
<u>AB 1527</u> Arambula	Income and corporation taxes: credits: California Cleantech Advantage Act of 2008.		watch	Incentives for Green Business	Assembly Revenue & Taxation

BILL/ AUTHOR	TOPIC	NEXT DATE	POSITION	TOPIC	STATUS
<u>SB 73</u> Florez	Income and corporation taxes: credit: biodiesel fuel.		watch	Incentives for Green Business	Senate Revenue & Taxation
<u>AB 806</u> De La Torre	Career technical education.		watch	Vocational and Workforce Training	Senate Appropriations (Suspense File)
<u>AB 999</u> Hancock	Career technical education: partnership academies: green technology and goods		watch	Vocational and Workforce Training	Assembly Appropriations (Suspense File)
<u>SB 765</u> Ridley- Thomas	Economic development: California Partnership for Urban Communities: pilot project.		watch	Vocational and Workforce Training	Assembly Floor (Inactive File)
Education					
<u>AB 471</u> Carter	School facilities: joint-use projects.		watch	Joint-Use	Assembly Education
<u>SB 361</u> Scott	School facilities: joint-use projects.		watch	Joint-Use	Senate Rules
Health and Human Services					
<u>SB 48</u> Alquist	Community development: healthy food choices.		watch	Childhood Obesity	Assembly Appropriations (Suspense File)
<u>AB 1</u> Laird	Health care coverage.		watch	Health Care	Passed Senate. Held at Senate Desk
<u>AB 167</u> Bass	CalWORKs eligibility: asset limits.		support	Health Care	Senate Appropriations (Suspense File)
<u>AB 516</u> Swanson	Health care.		Sponsor	Health Care	Assembly Appropriations (Suspense File)
<u>AB 1472</u> Leno	Public health: California Healthy Places Act of 2008.		watch	Health Care	Assembly Appropriations (Suspense File)

BILL/ AUTHOR	TOPIC	NEXT DATE	POSITION	TOPIC	STATUS
<u>SB 32</u> Steinberg	Health care coverage: children.		watch	Health Care	Assembly Floor (Inactive File)
<u>SB 752</u> Steinberg	The California Kids Investment and Development Savings (KIDS) Account Act: state-funded investment accounts.		support	Health Care	Senate Revenue & Taxation
<u>SB 840</u> Kuehl	Single-payer health care coverage.		support	Health Care	Assembly Appropriations
<u>AB 53</u> Dymally	Office of HIV/AIDS Prevention and Education.		watch	HIV/AIDS Transmittal Reduction	Assembly Health
<u>AB 760</u> Coto	Pupil health: school health services.		watch	School Based Health Clinics	Assembly Appropriations (Suspense File)
Housing and Redevelopment					
<u>AB 232</u> Price	Housing and community development: Economic Opportunity Initiative Program.	01/08/08 9 a.m. - Room 447 ASM JOBS.	watch	Affordable Housing	Assembly Jobs, Economic Development, and the Economy
<u>AB 872</u> Davis	CEQA: urban infill affordable housing developments: exemption.		watch	Affordable Housing	Assembly Natural Resources
<u>AB 884</u> Dymally	Low-income housing tax credit allocation program.		watch	Affordable Housing	Assembly Housing and Community Development
<u>AB 971</u> Portantino	Housing: Community Workforce Housing Innovation Program.		watch	Affordable Housing	Assembly Housing and Community Development
<u>AB 1205</u> Salas	Affordable housing.		watch	Affordable Housing	Assembly Rules
<u>AB 1254</u> Caballero	Property tax revenue allocations: ERAF reduction: affordable housing.		watch	Affordable Housing	Assembly Appropriations (Suspense File)
<u>AB 1502</u> Lieu	Banking development districts.		support	Affordable Housing	Senate Banking and Finance
<u>SB 934</u>	Housing and infrastructure		watch	Affordable Housing	Assembly Appropriations

BILL/ AUTHOR	TOPIC	NEXT DATE	POSITION	TOPIC	STATUS (Suspense File)
<u>Lowenthal</u>	zones.				
<u>AB 1213</u> Price	Local governments: housing elements.		watch	Housing Element	Assembly Local Government
<u>AB 1256</u> Caballero	Density bonus: exemption: local inclusionary ordinance.		watch	Housing Element	Assembly Local Government
<u>AB 1449</u> Saldana	Density bonus.		watch	Housing Element	Assembly Local Government
<u>AB 1497</u> Niello	Local government: housing elements.		watch	Housing Element	Assembly Local Government
<u>SB 303</u> Ducheny	Local government: land use planning.		watch	Housing Element	Assembly Local Government
<u>AB 29</u> Hancock	Infill development: incentive grants.		watch	Proposition 1C Implementation	Assembly Housing and Community Development
<u>AB 792</u> Garcia	Environmentally Sustainable Affordable Housing Program.		watch	Proposition 1C Implementation	Assembly Housing and Community Development
<u>AB 1315</u> Ruskin	Bond funds: Housing and Emergency Shelter Trust Fund Act: park projects.		watch	Prop 1C Implementation	05/02/2007-Failed Deadline pursuant to Rule 61(a)(2). Last location was W.P. & W.
<u>AB 1493</u> Saldana	Affordable Housing Innovation Fund: housing trust fund.		watch	Proposition 1C Implementation	Assembly Housing and Community Development
<u>AB 1536</u> Smyth	Parks: Housing and Emergency Shelter Trust Fund Act of 2006.		watch	Proposition 1C Implementation	Assembly Water, Parks and Wildlife
<u>SB 46</u> Perata	Housing and Emergency Shelter Trust Fund Act of 2006		Support if Amended	Proposition 1C Implementation	Assembly Appropriations

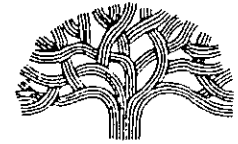
BILL/ AUTHOR	TOPIC	NEXT DATE	POSITION	TOPIC	STATUS
<u>AB 1161</u> Tran	Eminent domain.		watch	Redevelopment and Eminent Domain	Assembly Appropriations (Suspense File)
<u>ACA 2</u> Walters	Eminent domain.		watch	Redevelopment and Eminent Domain	Assembly Rules
<u>ACA 8</u> De La Torre	Eminent domain.		watch	Redevelopment and Eminent Domain	Failed Passage on the Assembly Floor
<u>SCA 1</u> McClintock	Eminent domain: condemnation proceedings.		watch	Redevelopment and Eminent Domain	Senate Judiciary
<u>AB 327</u> Horton	Residential facilities.		watch	Residential Care Facilities	Assembly Health
<u>AB 411</u> Emmerson	Residential care facilities: overconcentration.		watch	Residential Care Facilities	Assembly Appropriations (Suspense File)
<u>AB 724</u> Benoit	Sober living homes.		watch	Residential Care Facilities	Senate Health
<u>SB 709</u> Dutton	Residential care facilities.		watch	Residential Care Facilities	Senate Appropriations (Suspense File)
<u>SB 992</u> Wiggins	Substance abuse: adult recovery maintenance facilities.		watch	Residential Care Facilities	Assembly Floor (Inactive File)
<u>AB 1221</u> Ma	Transit village developments: tax increment financing.		watch	Transit Oriented Development	Senate Local Government
<u>AB 1675</u> Nunez	Transit-Oriented Development Implementation Program.		watch	Transit Oriented Development	Assembly Rules

BILL/ AUTHOR	TOPIC	NEXT DATE	POSITION	TOPIC	STATUS
Infrastructure Bonds					
<u>AB 10</u> De La Torre	Children's Hospital Bond Act of 2008.		watch	Proposed 2008 Bonds	Senate Rules
<u>AB 100</u> Mullin	Kindergarten-University Public Education Facilities Bond Act of 2008.		watch	Proposed 2008 Bonds	Assembly Education
<u>SB 156</u> Simitian	California Reading and Literacy Improvement and Public Library Bond Act of 2008.		watch	Proposed 2008 Bonds	Senate Appropriations (Suspense File)
<u>SBX2 1</u> Perata	Water quality, flood control, water storage, and wildlife preservation.		support	Proposed 2008 Bonds	Senate Floor (Failed passage)
<u>SBX2 2</u> Perata	Safe Drinking Water Act of 2008.		support	Proposed 2008 Bonds	Senate Floor (Failed passage)
<u>SBX2 3</u> Cogdill	Water Supply Reliability Bond Act of 2008.		watch	Proposed 2008 Bonds	Senate Natural Resources and Water
Local Government Revenue and Taxation					
<u>SCA 5</u> McClintock	State and local government finance: taxes: voter approval.		watch	Franchise Tax	Senate Revenue & Taxation
<u>SCA 12</u> Torlakson	Local government: property-related fees.		support	Storm Water Fees	Senate Floor
<u>AB 231</u> Eng	Emergency Telephone Users Surcharge Act.		watch	Utility User Taxes	Senate Floor (Inactive File)

BILL/ AUTHOR	TOPIC	NEXT DATE	POSITION	TOPIC	STATUS
Parks and Recreation					
<u>AB 31</u> De Leon	Statewide Park Development and Community Revitalization Act of 2007.		watch	Proposition 84 Implementation	Senate Rules
<u>AB 772</u> Portantino	Park and nature education centers grant program.		watch	Proposition 84 Implementation	Assembly Appropriations (Suspense File)
<u>AB 1380</u> Ruskin	Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal		watch	Proposition 84 Implementation	Assembly Water, Parks and Wildlife
<u>AB 1489</u> Huffman	Resource bond funds: Integrated Regional Water Management Planning Act.		watch	Proposition 84 Implementation	Senate Appropriations (Suspense File)
<u>AB 1602</u> Nunez	Environment: Sustainable Communities and Urban Greening Program.		watch	Proposition 84 Implementation	Assembly Environmental Quality
<u>SB 292</u> Wiggins	State bond funds: allocation.		watch	Proposition 84 Implementation	Senate Appropriations (Suspense File)
<u>SB 375</u> Steinberg	Transportation planning: travel demand models: sustainable communities strategy		watch	Proposition 84 Implementation	Assembly Appropriations (Suspense File)
<u>SB 732</u> Steinberg	Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal		watch	Proposition 84 Implementation	Assembly Floor (Inactive File)
<u>SB 931</u> Ridley-Thomas	Parks and nature education facilities.		watch	Proposition 84 Implementation	Senate Appropriations (Suspense File)
Public Safety					
<u>AB 407</u> Swanson	Probation Youth Success Act.		watch	At-Risk Youth Programs	Assembly Appropriations (Suspense File)
<u>AB 499</u> Swanson	Sexually exploited minors.		Sponsor	At-Risk Youth Programs	Assembly Public Safety

BILL/ AUTHOR	TOPIC	NEXT DATE	POSITION	TOPIC	STATUS
<u>AB 301</u> Soto	Criminal street gangs: statewide prevention.		watch	Crime and Violence Prevention	Assembly Public Safety
<u>AB 334</u> Levine	Firearms: loss and theft.		Support if Amended	Crime and Violence Prevention	Senate Floor (Inactive File)
<u>AB 511</u> Swanson	After school athletic programs: pilot grant program.		watch	Crime and Violence Prevention	Assembly Rules
<u>AB 802</u> Salas	Criminal street gangs.		watch	Crime and Violence Prevention	Assembly Appropriations (Suspense File)
<u>AB 960</u> Hancock	Alcoholic beverages: licensing restrictions.		Sponsor	Crime and Violence Prevention	Assembly Governmental Organization
<u>AB 1290</u> Mendoza	Community crime prevention.		watch	Crime and Violence Prevention	Senate Public Safety
<u>AB 1625</u> Solorio	Crime prevention: criminal gangs.		watch	Crime and Violence Prevention	Assembly Appropriations (Suspense File)
<u>AB 1648</u> Leno	Peace officer records.		support	Crime and Violence Prevention	Assembly Public Safety
<u>SB 1019</u> Romero	Peace officer records: confidentiality.		support	Crime and Violence Prevention	Assembly Public Safety
<u>AB 77</u> Lieber	Parole reform.		support	Parolee Re-Entry	Assembly Appropriations (Suspense File)
<u>AB 161</u> Bass	Anti-Recidivism Grants.		support	Parolee Re-Entry	Assembly Rules
Transportation					
<u>AB 444</u> Hancock	Congestion management: motor vehicle registration fees.		support	Congestion Management	Senate Revenue & Taxation

BILL/ AUTHOR	TOPIC	NEXT DATE	POSITION	TOPIC	STATUS
<u>AB 575</u> Arambula	The Highway Safety Traffic Reduction, Air Quality, and Port Security Fund of 2006: emission reductions		watch	Proposition 1B Implementation	Assembly Appropriations (Suspense File)
<u>AB 655</u> Swanson	Public contracts: Bond Acts of 2006.		watch	Proposition 1B Implementation	Assembly Rules
<u>AB 901</u> Nunez	Transportation: Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond		watch	Proposition 1B Implementation	Senate Appropriations (Suspense File)
<u>AB 995</u> Nava	Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of		watch	Proposition 1B Implementation	Senate Floor
<u>AB 1209</u> Karnette	State Air Resources Board: emission reduction projects and measures.		watch	Proposition 1B Implementation	Senate Appropriations (Suspense File)
<u>AB 1350</u> Nunez	Transportation bond funds.		watch	Proposition 1B Implementation	Senate Appropriations
<u>AB 1351</u> Levine	Transportation: state-local partnerships.		watch	Proposition 1B Implementation	Senate Appropriations (Suspense File)
<u>SB 9</u> Lowenthal	Trade corridor improvement: transportation project selection.		watch	Proposition 1B Implementation	Assembly Appropriations (Suspense File)
<u>SB 19</u> Lowenthal	Trade corridors: projects to reduce emissions: Goods Movement Emission Reduction Program		watch	Proposition 1B Implementation	Assembly Appropriations
<u>SB 286</u> Lowenthal	Transportation bonds: implementation.		support	Proposition 1B Implementation	Assembly Appropriations
<u>SB 716</u> Perata	Transit operators.		watch	Proposition 1B Implementation	Assembly Appropriations
<u>SB 748</u> Corbett	Transportation: state-local partnerships.		watch	Proposition 1B Implementation	Assembly Appropriations



250 FRANK H. OGAWA PLAZA, SUITE 3315 - OAKLAND, CALIFORNIA 94612-2032

Community and Economic Development Agency
Planning & Zoning Services Division

(510) 238-3941
FAX (510) 238-6538
TDD (510) 238-3254

November 1, 2007

Ms. Lynn Jacobs
Director
California Department of Housing
and Community Development
1800 3rd Street
Sacramento, CA 95814

RE: Comments to HCD on Second Draft of Proposed Guidelines for Implementation of Prop 1C

Dear Ms. Jacobs:

The City of Oakland submits this letter to provide formal comment on the Department of Housing and Community Development's (HCD's) second draft of the proposed guidelines ("Guidelines") for the Transit Oriented Development (TOD) program authorized by Proposition 1C. We do so in the spirit of creating a framework for evaluation that begins to fundamentally change urban growth patterns and increase transit ridership throughout the state.

The City of Oakland is currently working on four large-scale transit village projects at BART stations including the MacArthur Transit Village, the West Oakland Transit Village, the Coliseum Transit Village, and the Fruitvale Transit Village Phase II. These mixed-use, mixed-income projects range between 350 to 800 units for each individual project. These projects meet the primary goals of the TOD Housing Program by locating dense housing directly adjacent to transit, providing affordable units, and increasing transit ridership through both the provision of the housing units and through other infrastructure improvements that will improve pedestrian, bicycle, and inter-modal access to these transit hubs. We believe that these projects are showcases for model transit oriented developments.

Thank you for providing an opportunity to comment on the revisions to the proposed guidelines. We believe that many of the changes made represent very positive steps in the right direction. There are still a few portions of the guidelines that we have concerns about. This letter provides both general comments on the revised guidelines and comments on a section by section basis. City staff would like to meet with you and your staff to discuss these issues, to describe the specific requirements and challenges of actual transit-oriented projects in Oakland, and to develop guidelines that will result in funding for projects that can serve as models for future funding programs. We would also encourage the Department of Housing and Community Development to defer the release of the guidelines until early 2008 to allow for our comments to be addressed in a thoughtful and productive manner.

Steps in the Right Direction

We applaud HCD's decision to make the following changes to the draft guidelines:

1. Allowing for Additive Funding for Affordable Housing

We strongly support the change in the guidelines that allows projects that have reached the maximum funding caps for other affordable housing programs to use the housing funds under this program to assist with financing the incremental units above the cap. This change will increase the number of affordable units included in large-scale TOD projects.

2. Change in the Calculation of the Funding Cap per Project

We support the change in the funding cap allocation which allows projects to have a maximum of \$17 million per project per application round for both the infrastructure and the housing development funds instead of limiting the amount for each type of funding. This change allows large-scale projects with significant infrastructure needs to apply for the funding they require to achieve feasibility.

3. Consideration for Phased Projects

Most large-scale projects are built over several phases since the market cannot absorb all of the units if the project was built at once. We strongly support the changes in the regulations that allow applicants to exclude units from evaluation of affordability if they are not benefiting from program assistance. In addition, we support the change that allows for applications to be submitted for the same transit station during different program years and the change in the requirement for the timeframe under which the project must be complete.

4. Scoring Criteria based on Population Density and Type of Transit Service

We strongly support the selection criteria based on the density range of the existing area and the type of transit service in Section 108 (a). We believe these criteria will help to identify the TOD projects that have the greatest potential to increase transit ridership and thereby reduce regional congestion.

Remaining Concerns

1. Minimum Project Size and Required FARs are too Low

The City of Oakland views transit-oriented development, particularly the transit village projects around BART stations, as large scale, high density, transformative developments designed to be catalysts for future private market-rate and assisted housing and mixed-use development in these areas. The proposed guidelines currently allow for small, low-density (as defined by overly low minimum FARs), projects to compete for the TOD funds as further discussed in our comments on specific sections. Other programs, including the Infill Housing Program authorized by Proposition 1C, already contain preferences for projects located close to transit and are more appropriate for these smaller projects. It is our view that the TOD program should be designed specifically to promote large, high-profile transit-oriented developments since it is the large-scale, dense development projects that make the most significant difference in terms of encouraging transit ridership and meeting regional housing needs.

2. Requirements for Deep Levels of Affordability Not Matched by Level or Type of Assistance

The proposed guidelines would award up to 60 points for housing affordability, which we are encouraging. However, even with the addition of a point category for 50% AMI level units, we are concerned that the program will not provide the type or amount of assistance necessary to achieve these levels of affordability over the long-term. This issue is discussed further in our detailed comments on Section 108(d).

3. Preference for Existing "Transit-Oriented Development"

As discussed further in our comments on Sections 108(c), the proposed guidelines clearly favor projects in areas that already have significant levels of development and investment. In Oakland, our transit villages are located in disadvantaged neighborhoods that have not experienced those levels of investment. The transit village projects are intended to be catalysts for future private and public investment, and the guidelines should favor such projects rather than making them less eligible for assistance.

Comments on Specific Provisions of the Draft Guidelines

Section 102. Definitions (h)--"FAR" (Floor Area Ratio) Definition

Based on the definition provided it appears that the FAR would include any area covered by structured parking and is therefore over-stating the density of a project. The definition of FAR should exclude parking.

Section 102. Definitions (t)---"Restricted Units" Definition

As written, this section stipulates that qualified ownership as well as rental units must be affordable for a minimum of 55 years. On the ownership side of the equation, this is inconsistent with (i) State Redevelopment Law's requirement for 45 year affordability or equity recapture, (ii) the BEGIN program's 30 year typical mortgage term for homebuyers (BEGIN program May 21, 2007 guidelines, Section 111 (e)(7)), and (iii) a requirement for a twenty year monitoring program (BEGIN program guidelines, Section 120 (b)).

Section 103. Eligible Projects (a) (1)—Minimum Project Size.

The 20 unit minimum project size is utterly insufficient if the intent of the program is to sponsor large, viable TOD developments that can make an identifiable impact on their communities. At the minimum project size, only three affordable units would be produced per project, a nearly negligible number. In Oakland, we are looking at proposed TOD projects in excess of 350 units. Especially given the large housing production requirements allocated to urban centers like Oakland, we urge the Department to increase the minimum project size (taking into account all phases/sites) to at least 100 units.

Section 103. Eligible Projects (a) (2) (C)---Qualifying Transit Station

We are concerned about some of the criteria listed as "negative environmental conditions that deter pedestrian circulation." Many BART stations are located in the middle of a freeway, such as MacArthur BART Station. This necessitates that pedestrians walk through a freeway underpass/tunnel to access the station. Mitigating the noise levels in tunnels such as these is difficult and often cost prohibitive. In addition, what is meant by regulated crossings that "prioritize" pedestrian movement? For arterials and highways, we believe a regulated crossing should be sufficient.

Section 103. Eligible Projects (a) (4)---Minimum Net Density

The FAR ratios proposed for the minimum net density requirements are far too low to qualify as transformative TOD projects. We recommend the minimum FAR for a project in a Large City Downtown should be 4.0, an Urban Center should be 3.0, and all other areas should be 2.0.

Section 103. Eligible Projects (b)(2) – Requirements for Housing Developments

While this section allows for Housing Developments that consist of scattered sites with different ownership entities, the requirement that each site meet the requirements of paragraph 103(a)(3) would make ineligible a project that consists of one site containing a 200 unit market rate project and an adjacent site containing a separate 30 unit assisted development. Development of assisted housing on separate parcels as part of an overall master development is frequently used to secure a greater number of affordable units and deeper affordability. The language in this section would require excluding the market rate component from consideration as part of the overall Housing Development, thereby excluding substantial amounts of funding from calculation of leverage in Section 108(i). By contrast, a single 200 unit project that included 30 assisted units would be able to count towards leverage all the funding used for the market rate units in that development.

Section 103. Eligible Projects (d)---Infrastructure Projects

While HCD has revised this Section, we still urge the Department to explicitly state that infrastructure grant funding awarded in conjunction with qualifying restricted units should not trigger State prevailing wage requirements on the associated housing developments unless ~~required by another funding source directly tied to the housing component.~~ For housing developments not otherwise subject to prevailing wage requirements (for example, projects providing affordable housing pursuant to a local inclusionary zoning ordinance), this would have an adverse impact and could make otherwise qualifying projects infeasible, negating the beneficial impact of the infrastructure funding.

Section 104. Eligible Uses of Funds (a)

There should be standard methods for calculating reasonable and necessary costs. There are many factors that are not under a local entity's control – labor, materials, local regulations for living wages, etc.

Section 104 (d) (1) and (2): Eligible Uses of Funds—Infrastructure Projects

Section (1) should be altered to specifically include relocation costs, and section (2) should specifically include permits and fees.

Section 105 (e): Assistance Terms and Limits—Predevelopment Loans

As written, this part of the program places an unfair onus on local Redevelopment Agencies for the first year of the acquisition loan, requiring them to repay the State (with 6% interest) if an enforceable Disposition and Development Agreement is not executed within one year. To alleviate this, we suggest the following options: 1) make the loans available directly to developers, as with the rest of the housing development funds; 2) make the loan payable from the

date of the first disbursement of funds rather than the award; and/or 3) do not charge interest to Redevelopment Agencies during the first year of the loan.

Section 105 (f) (1): Grants for Infrastructure Projects---Repayment Period

Tie repayment trigger date to date of "first disbursement of Program funds" rather than "date of the Program award".

Section 105 (f) (2) Grants for Infrastructure Projects— Required Match

The required match is too low and does not encourage or reward local investment. We recommend that it be changed to a 1:1 match of local funds.

Section 105 (f) (5) Grants for Infrastructure Projects – Windfall Profit Restrictions

This language is very vague; exactly what a windfall profit is considered to be should be defined in greater detail, and it should be clarified that the determination of windfall profit be determined based on information available at the time of the application. Who will be determining what a "reasonable range" of profit is? The concerns about the necessity of the funds would be mitigated through increasing the matching requirement as described in our comments on Section (2).

Section 107(a) (6) Application Threshold Requirements—Underwriting Standards

While the underwriting requirements (operating/replacement reserves, funding amounts, maximum developer fees) of the Uniform Multifamily Regulations may be appropriate for the affordable components of TOD-funded Housing Developments, it may not be appropriate to hold the market rate components of the projects to these underwriting standards, especially with larger projects. Greater specificity and flexibility here would be ideal.

Section 108(b)(1): Application Selection Criteria—Transit Performance

On-time performance for the transit operator is out of the control of the local jurisdiction applying for the funds and therefore should not be given as much weight for judging the merits of a project. We believe that frequency of transit service is a more important criteria than on-time performance and is not adequately reflected in the selection criteria.

Section 108(c) (3): Application Selection Criteria—Area designated for infill/TOD development and with coordinated public/private investment

Sections (A) and (B) may be difficult to meet. We recommend a smaller investment threshold of \$3 million over the past ten years. These requirements strike us as somewhat antithetical to the intent of the program, which is to provide catalyst TOD projects.

Section 108(d): Application Selection Criteria—Income Targeting

While we appreciate the desire to provide for deep income targeting, we remain concerned that the point system in this subsection is unreasonable for TOD projects, particularly in areas with high development and operating costs. Targeting of the restricted units to 20-40% of State Median Income will be very difficult to achieve in a high-cost housing market such as Oakland. Targeting at this level would require rents for a two bedroom unit ranging from \$292 to \$577 per month. These rents are well below typical operating expenses for affordable housing in the Bay Area, and are very difficult to achieve without substantial subsidies for operating support or project-based rental assistance. Such rents are not a reasonable expectation for TOD developments.

The addition of a point category for units at 50% of AMI is a helpful one for project feasibility, and in Oakland would serve a family of two earning up to \$33,500 in a one bedroom unit for a maximum of \$785 per month. However, we feel that 0.25 points per percentage of Restricted Units serving this income category is inadequate, and would propose increasing this to 1 point per percentage of Restricted Units serving the 50% AMI level.

While we generally applaud lower income targeting, we respectfully suggest that this program, which will involve higher construction and possibly operating costs and greater risks given the large projects involved, is not the appropriate venue for pushing deep affordability. As discussed in our comment letter on the first draft of the regulations for this program, we would therefore recommend providing limited points for units at the 60% AMI level, which would allow reaching to two person households earning up to \$40,200 annually.

Section 108(d): Application Selection Criteria—Income Targeting

The reference to leverage points specifies subdivision (h), but as a result of renumbering these subsections, the correct cross-reference should be to subdivision (i).

Section 108 (e) (1) and (2): Transit Supported Land Use

The criteria in this section are not workable. Many of the land uses listed as transit-supportive are very parking or land intensive and therefore at odds with the basic principles of TOD. Examples of these include grocery stores, outdoor recreation facilities, places of worship, and schools. In addition, many transit station sites are in areas that are currently converting from industrial to residential, including the West Oakland and Coliseum BART Stations in Oakland. These projects are attempting to transform the area and put more transit-friendly uses in place and should not be penalized for the existing conditions.

Section 108 (f) (1) Walkable Corridor Features

There still needs to be greater flexibility for built environments where existing infrastructure, such as freeways or the transit station itself, impacts the ability to create through streets in certain locations.

Section 108(g) (2): Application Selection Criteria—Parking Districts

The criteria of whether or not a jurisdiction has created a parking assessment district has no relevance to the quality or success of a TOD project. This criteria should be eliminated.

Section 108(g) (3): Application Selection Criteria—Transit Passes

Paying \$50-\$75 per month in transit passes for tenants will stretch operating incomes (particularly for the restricted affordable units) unreasonably, especially given the potential restricted rents described above.

Section 108(g) (6): Application Selection Criteria—Maximum Parking Spaces

If the maximum number of parking spaces is to be used as a criteria for awarding points to applications, then the parking standards should be stricter to reflect the primary goal of TOD. We recommend that in order to achieve these points the maximum number of parking spaces for 2+ bedroom units in a Large City Downtown be limited to 1.25, the maximum parking spaces in Urban Centers be limited to 1 for 0-1 bedroom units and 1.5 for 2+ bedroom units, and in all other areas the parking ratios should be limited to 1.25 for 0-1 bedroom units and 1.75 for 2+ bedroom units.

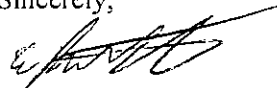
Ms. Lynn Jacobs
November 1, 2007
Page 7 of 7

Section 108(j): Application Selection Criteria—Community Support

This is vague, please provide clarification regarding what documentation is appropriate for constituting public support. In addition, this section should address how to describe both support for and opposition to the project from within the community, since community stakeholders are not one unanimous voice, but reflect multiple voices and perspectives.

Thank you for consideration of each of the comments submitted. We look forward to further discussion regarding the development and implementation of TOD Housing Program. Please feel free to contact me at 510 238-2229 or by email at ccappio@oaklandnet.com.

Sincerely,



Claudia Cappio,
Development Director

CC: Mayor Ron Dellums
City Council Members
City Administrator Edgerly