

INTERIM REPORT NO. 30

**AN OPEN, PUBLIC PROCESS IS
NEEDED TO DETERMINE THE FUTURE OF
THE SAN DIEGO FAMILY JUSTICE CENTER**

**REPORT OF THE
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28 May 2008

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I.

INTRODUCTION

The San Diego Family Justice Center (FJC) was originally created by an informal partnership in 1998 between Casey Gwinn, the former San Diego City Attorney, and David Bejarano, the former San Diego Police Chief, to bring together under one roof the entire domestic violence units of a police department and prosecutor's office. This unique collaboration was the first in the nation to provide comprehensive services to families who were victims of domestic violence, which also included intervention and prevention services. At that time, the FJC functioned as part of the City Attorney's Office. In late 2004, for political reasons involving the end of Casey Gwinn's tenure as City Attorney and his desire to keep control of the FJC from his successor, the FJC became a City Department under the City Manager.¹

In a March 27, 2008 letter, the Young Women's Christian Association [YWCA] of San Diego County, under the leadership of Executive Director Casey Gwinn, proposed taking over the management of the FJC Department as of July 1, 2008, and ultimately eliminating the FJC Department altogether.² The City Attorney's Office, as well as several long-standing community partners of the FJC, were not involved, nor consulted about, any of the planning for this proposal.³ On May 1, 2008, the Mayor issued a memorandum supporting and recommending the adoption of this proposal in short order, to be effective July 1, 2008.⁴ The City Attorney's Office received a copy of the Mayor's memo on May 2, 2008 from Casey Gwinn.⁵

Neither the City Attorney's Office, nor the FJC Steering Committee – the governing body charged with overseeing the FJC under the San Diego Municipal Code [SDMC] – were consulted in the preparation of the YWCA proposal or its recommended adoption by the Mayor.⁶ Nor were many longstanding FJC community partners consulted until the process was nearly complete, leading at least some to object when they were finally informed of the plan.⁷ This proposal did not go through any meaningful public process, much less the public process set forth in SDMC section 22.2203.⁸ Such actions are improper as they violate the City's municipal code. If a proper, open public process had been utilized, it would have become clear to all that the proposal raises substantial concerns relating to labor laws governing meet and confer obligations, City Charter provisions governing managed competition, numerous mandatory requirements of City service procurement, and the Establishment Clauses of the Federal and State Constitutions.

The management of the FJC should never have been moved from the City Attorney's Office and hastily transformed into a City department, since this move was motivated by politics,

¹ Exhibits 37-39.

² Exhibit 15.

³ Exhibits 10, 12 and 14.

⁴ Exhibit 13.

⁵ Exhibits 10 and 12.

⁶ Exhibits 17, 18, 20, 24, 25, 31, 32, 35 and 36.

⁷ Exhibits 10, 12 and 14.

⁸ *Id.*

days before the newly elected City Attorney assumed office in December 2004. The Council now has an opportunity to make a considered, thoughtful, and publicly debated judgment about where and how the FJC would function best. We urge the City Council to take this opportunity and to reject the politically motivated proposal to move the management of the FJC completely out of the City's control and into private hands, while still having the City pay a significant share of its expenses.

The YWCA's proposal is fraught with serious problems, as discussed below. This is to be expected from a proposal that was concocted behind closed doors for political reasons. Instead, the City should consider the FJC's future in a series of public forums that invite input from the widest possible range of people, including those community partners currently serving the public at the FJC, victims and survivors of family violence, experts in the various fields that serve victims and survivors, and members of the general public.⁹

II.

BACKGROUND

A. EARLY HISTORY OF THE SAN DIEGO FAMILY JUSTICE CENTER

After several years of informal coordination between Casey Gwinn, the former City Attorney, and the former Police Chief, on October 10, 2002, the FJC formally opened at 707 Broadway in downtown San Diego.¹⁰ Over 24 community partners participated, creating the most comprehensive facility of its kind in America, and providing a wide range of services to victims of domestic violence and their children.¹¹ Immediately upon opening, the FJC made available over 120 child abuse and domestic violence professionals and volunteers, who provided services to victims of family violence and sexual assault at the FJC.¹² In addition, the FJC provided services to 600-800 women, men and children each month.

In October 2003, President George W. Bush announced the President's Family Justice Center Initiative to create family justice centers across America modeled after the San Diego FJC. Over the next two years, the United States Department of Justice began to fund 15 sites with approximately \$20 million authorized by the national initiative.¹³

In April of 2004, Mr. Gwinn recommended, and the City Council approved, expanding the lease at 707 Broadway to add 12,000 square feet of space on the second floor, allowing for the addition of other community partner organizations.¹⁴ In addition, this expansion created enough space to allow the San Diego Family Justice Center Foundation, of which Casey Gwinn

⁹ Exhibit 61.

¹⁰ Exhibit 45.

¹¹ Exhibit 39.

¹² Exhibit 45.

¹³ *Id.*

¹⁴ *Id.*

was the founder and Executive Director, to move out of the City Attorney's Office and into the FJC at 707 Broadway.

B. CASEY GWINN'S EFFORTS TO MAINTAIN CONTROL OF THE FJC AFTER LEAVING OFFICE

In a report dated November 2, 2004, just one month before Casey Gwinn's tenure as the City Attorney would end due to term limits, Mr. Gwinn proposed that the Mayor and Council establish the FJC as a City department under the authority of the City Manager.¹⁵ The new Department would be overseen by a Director that reported directly to the City Manager.¹⁶ There would be no increases in the City budget because the positions would be cut and transferred from the City Attorney's Office budget to the new FJC Department. Among the reasons for the creation of the new department, Mr. Gwinn's report cited concerns that the FJC should continue operating in the same manner "irrespective of the individual priorities of a future Police Chief, Fire Chief, City Attorney, or City Manager."¹⁷ Thus, Mr. Gwinn expressly stated that his intent was to isolate control of the FJC from, among others, the incoming City Attorney.

On November 15, 2004, just four days before the City Clerk certified the election of the new City Attorney, the City Council, at Mr. Gwinn's urging, introduced an ordinance establishing an FJC Department under the City Manager.¹⁸ In supporting Gwinn's proposal, the Mayor and City Council approved the transfer of three critical positions from the Domestic Violence & Special Victims Unit of the City Attorney's Office to the City Manager's Office (director/assistant city attorney, administrative assistant/city attorney legal secretary, and a grants analyst/city attorney grants analyst). In total, approximately \$450,000 was cut from the newly elected City Attorney's budget just days before he was to take office.

The ordinance had its second reading and was adopted on November 29, 2004,¹⁹ just one week before the newly elected City Attorney was sworn into office on December 6, 2004. This prevented the newly elected City Attorney from reviewing the ordinance and evaluating the staffing and budgetary needs of the City Attorney's Office and how it would be affected by these cuts.

The ordinance also created the FJC Steering Committee. This Committee consists of the Director of the FJC, the City Attorney, the Chief of Police, and the current Chair of the Public Safety and Neighborhood Services Committee of the City Council.²⁰ According to the ordinance, the San Diego District Attorney shall be invited to participate, but is not a member of the Committee.²¹ The FJC Steering Committee was to meet periodically, but no less than once a quarter, to develop and oversee the operational guidelines for the FJC, and to make

¹⁵ Exhibit 39.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Exhibit 37.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

recommendations to the Mayor and the City Council for development of a Long Range Strategic Plan for the FJC, and to make recommendations pertaining to programs, priorities, and the annual budget for the FJC.²²

Three months later, a working group was tasked to evaluate two new governance approaches, other than being a City Department: (1) a public benefit corporation administered through a community-based governance board, or (2) a joint powers authority between the City of San Diego and the County of San Diego.²³ Thus, unlike the current proposal, a prior proposal to restructure the FJC was discussed through an open, public process. Ultimately, the 2005 proposals were not adopted.²⁴

In addition, a subcommittee of the FJC Steering Committee met in March of 2005 to consider three other types of governing structures for the FJC: 1) a City Department, maintaining the status quo; 2) a joint powers authority; and 3) a 501(c)(3) organization. Notably, the subcommittee specifically concluded that “the non-profit structure [sic] not feasible because of complexity of partners involved” and that “serious conflict of interest issues are inherent in this model.”²⁵ Thus, the subcommittee recommended “eliminate[ing] any serious discussion about [the FJC] becoming a 501(c)(3).”²⁶ Yet, a mere three years later, a behind the scenes deal has emerged that would put the FJC under the control of a 501(c)(3) corporation.²⁷

After leaving office in December 2004, Casey Gwinn worked for District Attorney Bonnie Dumanis on her Regional Family Justice Center Network Plan [Regionalization Plan] to open and control all FJCs within San Diego County.²⁸ During this time, Mr. Gwinn was also the Executive Director of the San Diego Family Justice Center Foundation, the non-profit 501(c)(3) corporation, charged with raising money for the FJC and applying for and administering its grants.²⁹ Immediately after the FJC became a City Department, Gael Strack, who had been Casey Gwinn’s lead Assistant City Attorney on family violence issues and the head of the FJC as it had existed up to that time, was appointed by the City Manager to become the first Director of the newly created FJC Department,³⁰ while she continued to be the Director of the FJC Foundation.³¹ As such, although Mr. Gwinn was no longer the City Attorney, he continued to exert control and influence over the FJC Department.

Ms. Strack was the FJC Department Director until May of 2007.³² Currently, Ms. Strack is the Chief Executive Officer of the National Family Justice Center Alliance [Alliance], the

²² *Id.*

²³ Exhibit 34.

²⁴ *Id.*

²⁵ Exhibit 32 and 33.

²⁶ Exhibit 33.

²⁷ Exhibit 15.

²⁸ Exhibit 19 and 40

²⁹ Exhibits 1, 28 and 29.

³⁰ Exhibit 6.

³¹ Exhibits 28 and 29.

³² Exhibits 6 and 18.

entity that she and Mr. Gwinn created to take over the work of the FJC Foundation when it was dismantled in 2007.³³ The Alliance took over the FJC Foundation's corporate identification number and its grant monies. Currently, Mr. Gwinn is President of the Board of Trustees of the Alliance, which is run out of the YWCA's office at 1012 C Street, San Diego, California 92101, the proposed future location of the FJC.³⁴

It is important to note that Casey Gwinn was found to be negligent in the fulfillment of his duties as the City Attorney with regard to financial disclosures.³⁵ Further, the Report of the Audit Committee of the City of San Diego [the Kroll Report] questioned Casey Gwinn's billing practices as City Attorney.³⁶ The conclusions of the Kroll Report call into question the wisdom of turning over a City Department, once again, to Casey Gwinn.

C. THE YWCA PROPOSAL

As the elected City Attorney, Casey Gwinn founded the San Diego Family Justice Center Foundation in July 2003.³⁷ After leaving the City Attorney's Office, Mr. Gwinn went to work part-time for the San Diego District Attorney's Office [DA] on domestic violence issues. District Attorney Bonnie Dumanis, it should be noted, has been promoting her own plan for a regional network of four to five FJCs.³⁸ It would involve the development of at least two new centers in addition to bringing under her umbrella existing facilities downtown (i.e., the downtown San Diego FJC) and in San Marcos.³⁹ The DA's "Concept Paper" for the development of this network was released in June of 2007.⁴⁰

The alliance between Casey Gwinn and Bonnie Dumanis for the purpose of increasing their control over domestic violence in the area then entered a new phase. On July 1, 2007 Mr. Gwinn was hired as the Executive Director of the YWCA.⁴¹ Since then, he has been actively pursuing the proposal for the YWCA to take over the FJC from the City.⁴²

In a letter to Mayor Sanders dated March 27, 2008, the YWCA under Mr. Gwinn's leadership proposed moving the FJC to the YWCA Main Building by March 2010, eliminating the FJC Department, and moving towards the community-based leadership model envisioned in the District Attorney's Regionalization Plan.⁴³ Under the proposal, the YWCA would immediately take over the management of the FJC as of July 1, 2008 until March 2010 (Phase

³³ Exhibits 6 and 10.

³⁴ *Id.*

³⁵ Exhibit 11.

³⁶ *Id.*

³⁷ Exhibit 1.

³⁸ Exhibits 19, 22 and 23.

³⁹ Exhibit 19.

⁴⁰ *Id.*

⁴¹ Exhibit 41

⁴² Exhibits 10, 12, 13, 15 and 16.

⁴³ Exhibit 15.

I).⁴⁴ Afterwards, in Phase II, the YWCA's proposal calls for the FJC Department to be eliminated and at the same time calls for the City to enter into a 10-year lease to house the FJC at the YWCA, at a cost of approximately \$900,000 each year.⁴⁵ As proposed by the YWCA in its March 27, 2008 letter, this lease would not include space for the City Attorney's 26 domestic violence prosecutors and staff members that currently occupy one floor and approximately 9,100 square feet of the FJC.⁴⁶ However, the lease would include space for some, but not all, of the San Diego Police Department's Domestic Violence and Elder Abuse Units.⁴⁷

During Phase I, the YWCA proposes it enter into a management agreement with the City (effective July 1, 2008) for \$125,000 each year. During this two year agreement, the YWCA would oversee and coordinate the work of the FJC with the partner agencies, thereby taking over the function of an existing City Department.⁴⁸ An additional use of the current 707 Broadway property would be that YWCA clients and staff would also use the FJC for services that would otherwise be provided at the YWCA.⁴⁹ This arrangement would permit the YWCA to have a home for its services and staff during renovation, without having to pay rent.⁵⁰ The YWCA claims that this model will save the City more than \$300,000 per year and allow a two year transition process for the relocation of the FJC to the YWCA Main Building.⁵¹

According to his own memo, Mayor Sanders has been in discussions with the YWCA on the proposal for the last six months.⁵² Yet, on April 14, 2008, after having already received a formal proposal from the YWCA that grew out of those discussions, the Mayor submitted a proposed FJC budget that gave no indication of the seismic change that he was planning.⁵³ This is yet another indication that the Mayor's intention, throughout this process, was to hide his true plans from the public. The back room planning had gone on without consultation with the FJC Steering Committee, as required by ordinance, and without consultation of several longstanding community partners of the FJC, including one of the main partners, the City Attorney's Office.⁵⁴ As noted below, although the timing of the YWCA's takeover has now come into question, it remains clear that the Mayor's May 1, 2008 memo recommends accepting this proposal by the YWCA, while proposing a limited presence by the City Attorney's Office in the new facility.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Exhibit 10, 12, 15, 42-44 and 50.

⁴⁷ *Id.*

⁴⁸ Exhibit 15.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Exhibit 13 and 16.

⁵³ Exhibits 2 and 5.

⁵⁴ Exhibits 10, 12, 14 and 37.

III.

DISCUSSION

A. PUBLIC POLICY CONCERNS

1. Lack of Transparency

That this proposal was created and discussed without the participation of the general public or of many key stakeholders is disturbing at the least, and contrary to law at the worst. The FJC Steering Committee was neither informed nor consulted about this proposal in any meaningful way, as required by the Municipal Code.⁵⁵ At no time was the March 27, 2008 proposal for the YWCA to take over leadership and management of the FJC ever presented to the FJC Steering Committee.⁵⁶ Instead this proposal was developed by the YWCA in consultation with the District Attorney's Office and the Mayor's Office⁵⁷ – all outside of the eyes of the public.

An April 30, 2008 e-mail from Casey Gwinn to the FJC's various providers makes this clear. After inviting the addressees to the YWCA's Centennial Gala, to be held on May 3, 2008, Mr. Gwinn also invites the same people to a May 2, 2008 meeting to discuss what he views as the imminent takeover of the FJC by the YWCA. Mr. Gwinn states, "Though many of the community agency leaders at the Family Justice Center have participated in our planning process over the last six months, the direct service provider staff was not necessarily included in that process." They are therefore invited not to participate in planning the future of the FJC, but to "come over to 1012 C Street and *hear more about the results* of the six month, \$25,000 planning process."⁵⁸ (Emphasis supplied.)

Notably, even at this late point in the process, the staff from the Domestic Violence & Special Victims Unit of the City Attorney's Office was not included in the recipient list on Mr. Gwinn's April 30, 2008 e-mail.⁵⁹ The City Attorney's Office only learned about the meeting after a member of the Criminal Division management team called Mr. Gwinn on May 1, 2008 to inquire about the YWCA's proposal. It was only then that Mr. Gwinn allowed the City Attorney's Office to participate in this meeting. It was during this May 2, 2008 meeting with Casey Gwinn that the City Attorney's Office learned of and received a copy of the Mayor's May 1, 2008 memo.

Following the May 2, 2008 meeting, Mr. Gwinn e-mailed the attendees on Saturday, May 3, 2008 and stated his intent to work "closely with the City during the anticipated transition process *in the next two months*," a clear indication of his understanding at the time that the

⁵⁵ SDMC § 22.2203.

⁵⁶ Exhibits 17, 18, 20, 24, 25, 31, 32, 33, 35 and 36.

⁵⁷ Exhibit 13.

⁵⁸ Exhibit 10.

⁵⁹ *Id.*

YWCA's takeover of the FJC would be completed by July 1, 2008.⁶⁰ Finally, following that meeting, on May 5, 2008, Mr. Gwinn e-mailed the Unit Chief for the City Attorney's Domestic Violence & Special Victims Unit, and offered that he would allow that unit to relocate to the new FJC, contrary to the YWCA's original proposal.⁶¹ But the offer was dependent on a political condition: "I see the DV and Special Victims Unit as central to that vision *if the City Attorney supports having the Unit at 10th and C.*"⁶² (Emphasis supplied.)

While Mr. Gwinn was attempting a political deal to eliminate potential opposition to his attempted takeover of the FJC Department, the Mayor's Office was also advocating for the immediate takeover of the FJC by the YWCA. The Mayor's staff's May 7, 2008 presentation to the Budget Review Committee suggests an apparent intent both to hide the process of developing this proposal from the public and, more important, to mislead the public and the City Council. In his May 1, 2008 memo to the City Council, the Mayor clearly stated that he was recommending acceptance of the YWCA's proposal "for the management of the FJC effective July 1, 2008."⁶³ Such intent is consistent with what had apparently already been communicated to FJC staff at some point prior to the release of the Mayor's May 1, 2008 memo.

In addition to Mr. Gwinn's April 30, 2008 e-mail discussed above, on April 30, 2008, Mark Foreman, the FJC's current director and a direct report to the Mayor, sent an e-mail to all FJC staff members and dozens of people connected with organizations offering services at the FJC, reporting that the YWCA's takeover of the FJC was imminent.⁶⁴ Mr. Foreman stated, "My understanding is that effective July 1, 2008, the City department will cease to exist."⁶⁵ Mr. Foreman stated that his "personal goal" was "to stay on as Director through June 30th."⁶⁶ In addition, during the May 2, 2008 meeting with Casey Gwinn and some community partners, Mr. Gwinn advised them: "Yesterday, the Mayor presented his formal budget adjustment to the City Council which supports the YWCA short and long-term proposal. Next Wednesday is a key event. The Mayor's proposal will be before the Council next Wednesday, May 7 at 9 AM. Please come, wear purple, and show your support for the exciting future of the San Diego Family Justice Center."⁶⁷

Clearly, the Mayor's office, prior to the Budget Review Committee's May 7, 2008 consideration of the FJC budget, intended to fully implement this plan as part of the FY 2009 budget process, to be completed prior to July 1, 2008. Indeed, the stated subject of the Mayor's May 1, 2008 memo to the City Council in support of the takeover was, in part, "Proposed Revision to the Recommended Fiscal Year 2009 Budget."⁶⁸ Yet, at the May 7, 2008 Budget Review Committee hearing, the Mayor's office changed its story. It should be noted that this

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Exhibit 13.

⁶⁴ Exhibit 47.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Exhibit 12.

⁶⁸ Exhibit 13.

change came only after the City Attorney's Office issued a Report to Council dated May 6, 2008 setting forth the many legal and policy questions presented by the YWCA proposal, most notably the fact that the YWCA's proposal was not properly noticed according to California's Open Meetings law, the Ralph M. Brown Act.⁶⁹

The YWCA proposal was to be presented to the Budget Review Committee on May 7, 2008 under the following notice: "FY 2009 Budget Hearing Public Safety and Homeland Security, SDCERs, Business Services, Ethics Commission, City Council."⁷⁰ Such notice violated the Brown Act which requires meetings of legislative bodies to provide adequate notice and description of items to be discussed to the public in advance so all interested community members and organizations can participate in the public discussion.⁷¹ The notice did not even mention that there was a proposal for the YWCA to take over management of this City Department, that there was a proposal to eliminate this City Department, or that the Mayor recommended the transfer of this Department to the YWCA.

As such, the only people who knew what was to be discussed at the hearing were the people who were present at Mr. Gwinn's May 2, 2008 meeting at the YWCA and those who received his May 3, 2008 e-mail.⁷² Community members and organizations who may have been opposed to the proposal had no notice or opportunity to voice their views to the Council.

As a result of Mr. Gwinn's e-mail encouraging his supporters to attend the meeting and "wear purple,"⁷³ approximately forty supporters of the YWCA's takeover proposal showed up at the hearing and submitted speaker slips expressing a desire to speak in support of the takeover.⁷⁴

As discussed, in accordance with the City Attorney's obligation to advise the Council, the City Attorney prepared a report setting forth the potential legal issues with the proposal that needed to be addressed during its public discussion,⁷⁵ but first noted that that this item was not properly noticed for public discussion under the Brown Act.⁷⁶ Chairwoman Toni Atkins agreed with the City Attorney's legal advice and stated that the YWCA's proposal could not be discussed at this particular meeting, until it was properly noticed to allow all interested parties an opportunity to be heard.⁷⁷

Indeed, such notification seems particularly appropriate in this case, since numerous stakeholders, including the Navy Family Advocacy Center and the San Diego Volunteer

⁶⁹ Exhibits 8 and 9.

⁷⁰ Exhibit 8.

⁷¹ Gov't Code §§ 54950 *et. seq.*

⁷² Exhibits 10 and 12.

⁷³ Exhibit 12.

⁷⁴ Exhibit 7.

⁷⁵ Exhibit 9.

⁷⁶ Exhibit 8.

⁷⁷ Exhibit 5.

Lawyers Program, both of which have been FJC community partners since the FJC's inception, had previously complained about being excluded from the planning process.⁷⁸

The Mayor's May 1, 2008 memo was transparently prepared in anticipation of the City Council's Budget Review Committee hearing on May 7, 2008, where the FJC Department's FY09 budget was to be discussed. The original FY 2009 budget proposal from the Mayor recommended adding two positions to the FJC Department – a clerical assistant and a security guard.⁷⁹ However, the Mayor had a change of heart after he submitted his original budget for the FJC, resulting in his May 1, 2008 memo recommending immediately shifting FJC management to the YWCA as part of the FY 2009 budget process.

Nonetheless, at the hearing on May 7, 2008, Jay Goldstone, the City's Chief Operating Officer, stated that the Mayor's office was merely asking the Committee to consider "the proposed budget that the Family Justice Center [sic] as presented in the document that you were given on April 14th,"⁸⁰ – that is, to *increase* the FJC Department's budget by two positions. Mr. Goldstone claimed that the "intent of the memo that we distributed last week, that the Mayor distributed was to let the City Council know that we've had discussions with the YWCA and that the Mayor will be coming back at a later date with recommendations that would result in modifications of the budget which would most likely result in a memorandum of understanding between the City and the YWCA."⁸¹ When pressed about the timing of these expected recommendations, Mr. Goldstone stated "I would say in the first quarter [of fiscal year 2009], so probably some time right at the beginning of the fiscal year it could be, this July."⁸²

These statements are in direct conflict with the Mayor's May 1, 2008 memo and with the fact that the Mayor's Office clearly had communicated to the FJC staff that the YWCA's takeover would be fully implemented by July 1, 2008.⁸³ The period between April 30, 2008 and June 30, 2008 would be, according to Mr. Foreman's April 30, 2008 email, a "transition" period.⁸⁴ This is also consistent with Casey Gwinn's May 3, 2008 email referencing this same transition period.⁸⁵ Thus, it appears that the Mayor's Office and the YWCA intended, at least until the City Attorney issued its May 6, 2008 report to Council, to push through the implementation of the transition plan effective July 1, 2008, and that the Mayor's office changed its intention at, or right before, the May 7, 2008 budget hearing.

When directly questioned on this point by Councilmember Donna Frye, Mr. Goldstone directly contradicted the May 1, 2008 memo. Ms. Frye noted that the subject of the memo was "Proposed Revision to the Recommended FY 2009 Budget," but Mr. Goldstone repeatedly

⁷⁸ Exhibit 14.

⁷⁹ Exhibits 2 and 5.

⁸⁰ Exhibit 5.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Exhibits 13 and 47.

⁸⁴ Exhibit 47.

⁸⁵ Exhibit 10.

insisted that the actual implementation of the proposal would only occur “at some future date.”⁸⁶ Only when pressed further by Ms. Frye did he offer an “approximate future date” of “the beginning of the fiscal year it could be, this July.”⁸⁷

The conclusion that Mr. Goldstone intentionally misled the Budget Review Committee as to the original intent of the Mayor’s May 1, 2008 memo appears inescapable. He claimed that the May 1, 2008 memo was only intended to inform the City Council that a transition proposal would be forthcoming in July. In fact, the Mayor’s explicitly stated actual intent in his memo was to implement the proposal immediately, as part of the imminent adoption of the FY 2009 budget.⁸⁸ Such implementation had already begun with the informing of the FJC’s staff and partner organizations.⁸⁹

2. No Clear Savings to Citizens of San Diego

The Mayor’s and the YWCA’s claim of cost savings to the citizens of San Diego does not take into account the fact that the transfer of the FJC to the YWCA does not set aside sufficient office space or parking, as is provided now, for all of the City employees currently housed at the FJC working on family violence issues. Currently, the City Attorney’s Office has 26 employees in its Domestic Violence & Special Victims Unit occupying close to 9100 square feet.⁹⁰ The San Diego Police Department’s Domestic Violence and Elder Abuse Unit has 37 employees occupying 9100 square feet.⁹¹ In addition, the City has use of 80 parking spaces at the FJC at 707 Broadway for its employees and for victims to use while receiving services.⁹² Approximately one-third of those parking spaces are secured spots for SDPD patrol cars.⁹³

First, the YWCA’s March 27, 2008 proposal does not provide any space for the City Attorney’s Domestic Violence & Special Victims Unit.⁹⁴ One and one-half months after the

⁸⁶ Exhibit 5.

⁸⁷ *Id.*

⁸⁸ Exhibit 13.

⁸⁹ Exhibits 10, 12 and 47. Adding to concerns about the Mayor’s apparent intent to shield the proposal from meaningful public scrutiny, Mr. Goldstone has acknowledged the existence of a draft memorandum of understanding [MOU] with the YWCA but has refused, in response to a request from this office to provide the document for City Attorney review. Such an MOU cannot be lawfully entered without the endorsement of the City Attorney’s Office as to “form or correctness,” per section 40 of the San Diego City Charter. See City Attorney Memorandum of Law ML-2008-1. Given the complexity of the proposed arrangement, legal review of such a document may take several weeks, which would seem to counsel in favor of initiating that review as early as possible. Mr. Goldstone’s refusal to provide the document for review at the present time would thus appear to be motivated by an ongoing desire to keep details of the proposed arrangement from public scrutiny for as long as possible.

⁹⁰ Exhibits 42-44 and 50.

⁹¹ *Id.*

⁹² Exhibits 30, 42-44.

⁹³ *Id.*

⁹⁴ Exhibit 15.

YWCA proposal was made to the City and a day after the Mayor accepted it, Mr. Gwinn “offered” some office space to the City Attorney at the proposed new location for the FJC,⁹⁵ but it was 1) an inadequate amount of space – only 7200 square feet, while 9100 square feet is needed⁹⁶; and 2) it was hinged on the City Attorney supporting the YWCA proposal to take over the FJC⁹⁷, in essence stifling the City Attorney from voicing any concerns about the proposal.

In addition, the amount of space being offered to the San Diego Police Department’s Domestic Violence and Elder Abuse Unit is only 7300 square feet⁹⁸, while it currently occupies approximately 9100 square feet.⁹⁹ In addition, no secured parking is provided for SDPD’s patrol cars.¹⁰⁰

As such, the YWCA proposal as written will require the City to lease new space to house the 26 domestic violence prosecutors and support staff who will be displaced. The cost of relocating these employees, including rent for approximately 9100 square feet of office space at a future facility along with parking which is currently provided under the FJC lease at 707 Broadway, would need to be subtracted from any claimed cost savings before a reliable fiscal analysis of the proposal could be completed. In addition, it is unlikely that all of SDPD’s Domestic Violence and Elder Abuse Units would be able to fit into 7300 square feet, as it currently uses 9100 square feet. As such, there would be an additional cost to house those employees who do not have sufficient space at the YWCA. However, reliably evaluating the impact of this factor would be impossible at the present time, since it cannot be known what space might be found to house these attorneys, detectives and staff two years hence, or at what cost.

In addition, it appears from the Regional Family Justice Center Network Plan, as proposed by the District Attorney’s Office in June of 2007, that the intent of the YWCA and the County is that the County should eventually run the downtown FJC,¹⁰¹ although the City would still be funding the operation through a combined lease/management contract in the amount of \$900,000 annually. There is no clear explanation as to why the City would continue to pay for: 1) space for a City department that will no longer exist; 2) space that is inadequate to hold the entire City Attorney’s Domestic Violence & Special Victims Unit; 3) space that is inadequate to hold the entire SDPD’s Domestic Violence and Elder Abuse Unit; 4) space that does not provide for (as it currently does) parking for its employees, including secured parking for SDPD patrol cars. Indeed, the YWCA’s proposal appears to be simply that the City pay rent (in the same amount that is paying now)¹⁰² for an assortment of non-City entities, with only a minimal City presence.

⁹⁵ Exhibit 10.

⁹⁶ Exhibits 12, 42-44 and 50.

⁹⁷ Exhibit 10.

⁹⁸ Exhibit 12.

⁹⁹ Exhibits 42-44 and 50.

¹⁰⁰ Exhibit 15.

¹⁰¹ Exhibit 19.

¹⁰² Exhibits 2, 42-44 and 50.

Nor is there any analysis of whether other space might be available at a more competitive price, or even through grant funding or donations that might result in little or no cost to the City. In addition, the City has an option to extend and renegotiate its lease at 707 Broadway, where the FJC is currently located. There has been no public discussion or analysis as to whether this would be more cost effective, taking into account the cost of relocating four floors, over 44,000 square feet of offices, over 100 people, and over 20 organizations. Even putting aside the question of whether the general structure of the arrangement makes sense, there appears to be no analysis at all of whether the contemplated lease terms, which have not been presented, would provide the City with the best potentially available deal.

B. LEGAL ISSUES RELATING TO THE PROPOSED MANAGEMENT AGREEMENT

1. Proposed Agreement May Conflict with the City Charter

The March 27, 2008 letter proposal by the YWCA to the Mayor is vague in its terms. However the proposal seems to envision, until March 2010, retaining the FJC as a City Department and transferring its supervision from a City officer to a non-profit organization.¹⁰³ It also appears to contemplate transferring some charter officer duties and services to private persons or other agencies.¹⁰⁴ To the extent any proposed agreement contemplates such actions, it could be void from the outset because it would conflict with the City Charter. It could also be an unlawful delegation of authority. It is well established that any City ordinance or other action that conflicts with a City Charter requirement is void.¹⁰⁵

In 2004, the FJC was created as a Department within the City's administrative code by the City Council.¹⁰⁶ The City Charter provides that only the City Council has the authority to "change, abolish, combine, and rearrange the departments" in that Code.¹⁰⁷ It may do so only by a two-thirds vote of its members.¹⁰⁸

Since assuming powers of the City Manager, the Mayor has the authority and duty to appoint the FJC Department Director.¹⁰⁹ However, the Charter does not give *either* the Mayor or the City Council the authority to transfer supervision of an existing City Department to a private entity.

¹⁰³ Exhibit 15.

¹⁰⁴ *Id.*

¹⁰⁵ *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 171 (1994); *Hubbard v. City of San Diego*, 55 Cal.App.3d 380, 387-388 (1976).

¹⁰⁶ SDMC §§ 22.1801 and 22.2201.

¹⁰⁷ San Diego Charter § 26.

¹⁰⁸ The City Council may transfer to the County a City *function* under certain circumstances, assuming state laws authorize such a transfer and both legislative bodies authorize the transfer and assumption. *Id.*

¹⁰⁹ San Diego Charter § 29; see also SDMC § 22.2202.

a. The Mayor May Not Transfer His Supervisory Responsibilities to a Private Entity

It must be remembered that a mayor in any form of government “has no authority, except what is expressly or impliedly conferred upon him or her by the charter or applicable law, or by the council or governing legislative body acting within the scope of the law.”¹¹⁰ The City Charter places a duty on the Mayor as City Manager to supervise the administration of the affairs of the city, including City Departments.¹¹¹ It gives him the authority and responsibility to assume the duties of department heads.¹¹² The City Charter does not give the Mayor the authority to delegate his administrative supervisory powers, or those of one of his Department heads, to a private party.

b. The Council May Not Transfer the Mayor’s Duties to a Private Entity

The Mayor is the public official given the discretion and duty by the City Charter to supervise City Departments in accordance with City policies established by the City Council. A City Council “cannot relieve a charter officer of the city from the duties devolving upon him by the charter.”¹¹³ Accordingly, any Council action that would transfer the duty to supervise a City Department from the Mayor to a private entity would be unauthorized and void.¹¹⁴

c. The City Council May not Delegate its Authority to a Private Body

Charter section 11.1 limits the City Council from delegating its authority to a private person in the same manner that the California Constitution Article XI, Section 11a limits the state legislature. Article XI, Section 11a provides that “The Legislature may not delegate to a private person or body power to make, *control*, appropriate, *supervise*, or interfere with county or municipal corporation improvements, *money*, or property, or to levy taxes or assessments, or perform municipal functions.” (Emphasis supplied).

To the extent any proposed agreement contemplates that a private body supervise a municipal function, or gives to such a private entity control or supervision of any public monies, without a method to ensure council policy decisions on behalf of its residents are properly implemented, it may violate this charter and constitutional provision. It is the function of a City’s legislative body to resolve truly fundamental policy issues. “It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.”¹¹⁵ Even when a legislative body provides a true administrative *agency* with unrestricted authority to make fundamental policy

¹¹⁰ 3 McQuillin Mun. Corp. § 12.43 (3rd ed. 2005).

¹¹¹ San Diego Charter §§ 28 and 29.

¹¹² San Diego Charter § 28.

¹¹³ *Dadmun v. City of San Diego*, 9 Cal.App. 549, 551 (1908).

¹¹⁴ *Id*; see also *Hubbard*, 55 Cal.App.3d at 387-388.

¹¹⁵ *Kugler v. Yokum*, 69 Cal.2d 371, 376-377 (1968).

decisions, it may violate the constitutional prohibition.¹¹⁶ It is entirely quite likely that a delegation of unlimited authority to a private corporation with no public agency experience would be found similarly deficient.

d. The City Council and the Mayor Cannot Transfer the City Attorney's Duties

Although the City Attorney has not been able to view the terms of the contemplated MOU, from the vague terms that have been described in the YWCA's March 27, 2008 letter and the Mayor's May 1, 2008 memo, it appears that the duty to prosecute certain state law misdemeanors occurring in the City could be assumed by the District Attorney as part of this agreement, and pursuant to the District Attorney's Regionalization Plan. To the extent any proposed agreement might contemplate such a transfer, it too may be void.

Charter section 40 gives the City Attorney the "duty . . . to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law."¹¹⁷ State law requires the City Attorney of San Diego to prosecute such state law misdemeanors because this is a charter city that was situated within a Municipal Court District when it created an office of city prosecutor with the duty to prosecute such state law misdemeanors.¹¹⁸ As the cited cases indicate, our City charter does not permit the City Council or the Mayor to transfer to another duties placed by the charter upon any City officer including the City Attorney.

2. There was a Failure to Follow Managed Competition Procedures as Required by Charter Section 117(c)

a. Introduction and Summary

In the Mayor's May 1, 2008 memo recommending adoption of the YWCA proposal, paragraph 3 states: "The first part of the proposal calls for the YWCA to assume responsibility for the management of the FJC effective July 1, 2008."¹¹⁹ He proposes to eliminate the current City staff at the FJC and contract with the YWCA to manage it, claiming a labor cost savings in using YWCA staff instead of City staff.¹²⁰ In addition to the FJC Director, an unclassified employee, there are currently five full time City positions at the FJC that are represented by a collective bargaining unit, the Municipal Employees Association.

¹¹⁶ See discussion, *Hess Collection Winery v. California Agricultural Labor Relations Board*, 140 Cal.App.4th 1584, 1604-1605 (2006).

¹¹⁷ Charter section 41.1 gives the District Attorney concurrent *jurisdiction* to prosecute state law misdemeanors occurring in the City, but only the City Attorney is given the *duty* to conduct such prosecutions.

¹¹⁸ Cal. Gov't Code § 72193; 79 Ops. Cal. Atty. Gen. 46 (1996); 20 Ops. Cal. Atty. Gen. 234 (1952); *Menveg v. Municipal Court*, 226 Cal.App.2d 569, 572 (1964); contrast *City of Merced v. Merced County*, 240 Cal.App.2d 763, 767 (1966); see also City Atty. MOL No. 2005-11 (May 20, 2005).

¹¹⁹ Exhibit 13.

¹²⁰ *Id.*

Under Charter Article VIII section 117(c), and the implementing Municipal Code sections 22.3701 – 22.3716, Managed Competition is the *exclusive* method for outsourcing City services currently performed by City employees. “Managed Competition *is* the process for determining whether City services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service, while maintaining service quality and protecting the public interest.”¹²¹ To the extent this proposal involves the outsourcing of city services to a non-profit corporation, it does not comply with the requirements of the City Charter section 117 (c) or Municipal Code sections 22.3701 et seq.

The Mayor only has authority to outsource the services of City Departments to private contractors pursuant to Charter section 117(c) and its implementing ordinances. It must be done properly, impartially, and according to the San Diego City Charter procedures. However this is the *exclusive* method for such outsourcing of City services. Incorporating this budgetary suggestion into the appropriations ordinance would make the ordinance conflict with Charter section 117(c). Such an ordinance or agreement that conflicts with a City Charter provision would be void.¹²²

The Charter, Municipal Code, and City policies and regulations provide for a strict process before the City may contract out City services currently performed by City employees. Each step of the process requires a rigorous assessment from a neutral position. The law purposely creates specific and detailed guidelines for internal City review to assure the City does not enter the process with a pre-determined outcome in mind. The process calls for the Mayor, the Business Office, the Chief Operating Officer, the Chief Financial Officer, the Deputy Chief Operating Officers of various departments, the Director of Labor Relations, the Director of Personnel, and the respective Assistant Deputy Chief Operating Officers to each be involved in numerous stages of the process.

The law mandates each step in the process which must be followed. The steps assure that no service of a City department is considered for competitive bidding unless and until the department first has an opportunity to “re-engineer” itself, be analyzed against the Municipal Code factors, and if it is decided to have a competitive process, be allowed to compete with outside contractors in the determination of the Managed Competition Independent Review Board [IRB], final review by the Mayor, and ultimate vote on the winning competitor by the City Council.

¹²¹ SDMC § 22.3701 (emphasis supplied). The Mayor’s proposal involves contracting out of existing bargaining unit work. The San Diego City Charter section 117 (c) and implementing provisions of the Municipal Code require that Managed Competition procedure be used in such cases. The May 1, 2008 memorandum makes clear the impetus of the proposal is the Mayor’s belief that City services currently performed by employees of the FJC Department can be provided more economically and efficiently by the YWCA.

¹²² *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 171 (1994); *Hubbard v. City of San Diego*, 55 Cal.App.3d 380, 387-388 (1976).

The integrity of the process is destroyed if there are any discussions by City management or staff involved in the process with potential competitors about possible contract terms, conditions, or services under consideration for contracting out.

Since the Mayor has not submitted his proposal as required by Managed Competition, none of these mandatory procedures have been followed. The FJC Department has not had the opportunity to bid for the service. The IRB has not been involved, and no bids from competing independent contractors have been solicited. All of these deficiencies are fatal under the mandatory terms of Managed Competition.

An agreement to outsource city services to a non-profit without following the strict requirements of Managed Competition would be a direct violation of Proposition C, City Charter section 117 (c), SDMC section 22.3701 – 22.3716, and the implementing policies and procedures adopted by the City regarding Managed Competition.

b. The Managed Competition Process

The law requires four distinct steps in Managed Competition, prior to the City Council considering a proposal to contract out any City service. Each step is conditional on completion of the previous step. None has been followed regarding the Mayor's proposal to contract out the work of the FJC Department.

i. Pre-managed Competition Process

Before a service can be considered for outsourcing, the City is required to “reengineer” City departments to increase internal efficiencies. This is known as Business Process Re-Engineering [BPR]: “Before proceeding to the managed competition process, a function will be reengineered using the BPR methodology.”¹²³ During this review of a City department, the City is required to identify for the department recommended internal changes to make it the “Most Efficient Governmental Organization” [MEGO].¹²⁴ Until a service within a department has completed BPR, the service is not to be evaluated to determine if it should be procured on a competitive basis.¹²⁵ This allows the department to first make internal changes to upgrade its

¹²³ *Managed Competition Guide*, p 3. According to the Office of the Independent Budget Analyst Report, issued September 5, 2007, Report Number 07-82, on November 9, 2006, the Mayor issued a press release that “indicated that all departments would undergo Business Process Reengineering (BPR) prior to being subject to managed competition.” *Id.* at 2. *The Managed Competition Guide*, referred to herein, is a publication of the City of San Diego. The Guide “summarizes the City’s process, consistent with the authorizing documents including the City Charter and relevant Ordinances and Administrative regulations. Its purpose is to provide a common reference to assist in carrying out the spirit and intent of authorized policy, including individual and organizational roles and responsibilities.” *Id.* at 1. The *Guide* is actually more than a summary. It consists of 53 pages of detailed descriptions of roles, duties and organizational charts.

¹²⁴ *Managed Competition Guide*, p. 3.

¹²⁵ *Managed Competition Guide*, p. 4.

efficiency, which might lead to the conclusion that the services are adequately provided by the department and no competition between the department and outside contractors is justified. The City has not gone through the Pre-Managed Competition Process with its FJC Department.

ii. Pre-Competition Assessment Process

Once a service within a department that has completed BPR, it can be evaluated or “assessed” to determine if the City department providing the service should compete for the work with outside contractors.¹²⁶ This determination is made by a “Pre-Competition Assessment Team” made up of City management and departments evaluating six components described in the Municipal Code, to decide if a service qualifies for possible competitive bidding.¹²⁷ The process again assumes a neutral position at this point, and a rational analysis, not predetermined, to decide if a City service is appropriate for consideration of competitive bidding.

The decision as to whether or not to consider contracting out a City service is based upon evaluating six components:

- (i) whether the service is inherently governmental,
- (ii) whether a competitive market for the function exists,
- (iii) whether significant legal limitations exist, with analysis by the City Attorney,¹²⁸
- (iv) whether more efficiencies may be gained,
- (v) whether the function is too complex thus making the likelihood of failure too great, and
- (vi) whether failure of performing the function would be too detrimental to the public welfare.¹²⁹

If the Mayor decides that a City service may be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service, while maintaining service quality and protecting the public interest, the Mayor can select

¹²⁶ If the Mayor selects a City service for Pre-Competition Assessment, this results in a “decision point” being reached, i.e., “Should the functions be competitively procured?” *Managed Competition Guide*, p. 4.

¹²⁷ The Business Office of the Mayor is required to provide assistance to the assessment team. *Managed Competition Guide*, “Task B: Pre-Competition Assessment Report,” p. 9. Under the City of San Diego organization, the Business Office reports to the Chief Operating Officer, through Support Services. The Chief Operating Officer reports to the Mayor.

¹²⁸ The City Attorney’s Office is to participate in the analysis, either doing the analysis itself, or reviewing and commenting on analysis done by the Pre-Competition Assessment Team. *Managed Competition Guide* A-5.5 “Legal Limitations,” p.9. The City Attorney’s Office has not been included in the process regarding contracting out of FJC services.

¹²⁹ *Managed Competition Guide* “Managed Competition Overview” page 4; SDMC § 22.3702 (b). If the decision is *not* to place the service into competition, the department implements its recommended internal changes and that ends the matter. In addition, after concluding his pre-competition assessment, irrespective of the results, the Mayor has discretion to grant a department reasonable time and resources to improve its operations before deciding whether to subject its services to Managed Competition. SDMC § 22.3704.

appropriate services for Managed Competition.¹³⁰ In making that decision, the Mayor is required by the Municipal Code to “consider such factors as type of service provided, the abilities of the current and projected competitive market, potential efficiencies that could be achieved, the capacity of the City to deliver essential services in the event of contractor default, and overall welfare of the public.”¹³¹

In addition to the above criteria in the Pre-Competition Assessment stage, certain City functions can not be recommended for contracting out, under any circumstances. The Mayor “*will not recommend for Managed Competition, inherently governmental services, or those services so intimately related to the exercise of the public interest as to mandate their performance by City employees.*”¹³²

If the Mayor concludes after review of the six factors that a service is appropriate for contract bidding, the Mayor prepares and sends to the Managed Competition IRB for its consideration a preliminary written Statement of Work for the particular city service and a report presenting the rationale for requesting the City service be placed in competition.¹³³ The Mayor has not gone through the Pre-Competition Assessment process with regards to the FJC Department.

iii. The Competitive Procurement Process

If the Mayor recommends a competitive process for a particular service, the Mayor develops a Statement of Work [SOW] and an acquisition plan. The SOW defines the services and tasks to be performed, and forms the basis of the Request for Proposals [RFP] upon which the department and outside applicants will compete.¹³⁴ The Mayor’s SOW must include twelve (12) detailed contract standards designed to protect the quality and reliability of public services.¹³⁵

The Mayor receives help in creating the SOW from a Statement of Work Team, consisting of his “Managed Competition Steering Committee,” i.e., all the same city department managers and staff that were on the Pre-Competition Assessment Team, and includes the Business Office, the Chief Operations Officer, the Chief Financial Officer, the Deputy Chief Operating Officers of various departments, including Community & Legislative Services, the Director of Labor Relations, the Director of Personnel, the respective Assistant Deputy Chief Operating Officers, and Purchasing and Contracting which creates the final RFP.¹³⁶ Thus, the same City managers, departments, and staff continue to have decision making roles from one step in the process to the next.

¹³⁰ SDMC § 22.3702(a).

¹³¹ SDMC § 22.3702.

¹³² SDMC § 22.3702 (emphasis supplied).

¹³³ SDMC § 22.3702 (a).

¹³⁴ *Managed Competition Guide*, p.4. The Statement of Work “will be a vital component in this decision process.” Office of the Independent Budget Analyst Report, “Managed Competition,” issued January 10, 2008, IBA Report Number 08-2, p.5.

¹³⁵ SDMC, § 22.3703.

¹³⁶ *Managed Competition Guide* pp.12-13.

Requirements for bidders include, among others: proof of adequate level of liability insurance consistent with City of San Diego risk management requirements; that the independent contractor has committed to complying with the City of San Diego Living Wage Ordinance;¹³⁷ that the independent contractor’s employees maintain the same certifications as required by City employees performing the service;¹³⁸ performance standards and consequences for non-performance, up to and including termination of the contract; that if background checks will be required of City employees performing a particular service, that the independent contractor will perform background checks on employees performing those same services.¹³⁹

The Business Office in conjunction with the Managed Competition Steering Committee (which includes all the City department managers referenced above) establishes an “Acquisition Plan” of competition timelines, notes concerning key assumptions, and assessment risks, among other items. The schedule cannot be changed without approval of the Business Office in consultation with the Steering Committee.¹⁴⁰

Importantly, under the Managed Competition law, the City department which currently performs the services *must* be allowed the opportunity to compete for the service, and the City *must* provide the department with resources to develop the department’s proposal.¹⁴¹ “This measure [Proposition C] permits City Departments and independent contractors to submit proposals to provide public services.”¹⁴²

City employees involved in Managed Competition will be provided with resources, such as information, technical assistance and staff support, to develop strategies for optimized efficiency, economy and effectiveness, in order to respond to a solicitation.¹⁴³

Since the City department is entitled to compete for the service and receive City assistance in reviewing data and drafting their proposal, Managed Competition sets up a “firewall” between the City staff involved in the RFP and selection process and the City staff working with the Department’s team (known as the ADEPT team) in the competition. However,

¹³⁷ The Living Wage Ordinance would cover at least three positions in the FJC Department, two Clerical Assistant II positions and one Executive Secretary.

¹³⁸ Two positions in the FJC Department that may require certifications are the Assistant Management Analyst and Associate Management Analyst.

¹³⁹ City employees are fingerprinted and criminal background records checks performed. It is unknown what, if any, background checks would be required of YWCA employees.

¹⁴⁰ *Managed Competition Guide*, “Task E: Acquisition Plan and Schedule” p.12-13.

¹⁴¹ San Diego Charter § 117(c).

¹⁴² Proposition C, City Attorney’s Impartial Analysis. “City employees will be given an opportunity to develop plans for improving the efficiency and effectiveness of a targeted service, while qualified outside providers will be invited to submit proposals for providing the service.” Ballot Argument in Favor of Proposition C, signed by, among others, Jerry Sanders, Mayor of San Diego.

¹⁴³ SDMC § 22.3704.

the City staff working on both sides of the “firewall” come from the same City departments, most importantly the Chief Operating Officer’s Office and the Business Office.¹⁴⁴

As the *Managed Competition Guide* explains under the heading “Firewall Components:” “With the goal of creating a ‘level playing field’ for public-private competition, stringent actions must be taken to avoid giving either an independent contractor or the City an advantage in the development of their response to any solicitation.”¹⁴⁵

And again: “During this phase [Competitive Procurement] it is critical to ensure a fair and equitable process. This includes the appropriate safeguarding of all working and final papers leading to the solicitation’s formal release and all proposers’ technical and price proposals. The Business Office has the responsibility of ensuring the integrity of the process as well as overseeing and administering the process detailed below.”¹⁴⁶

Under Managed Competition, certain department redundancies give those positions greater influence. For instance, both the department employee proposal team and the City’s SOW team (the team that puts together the RFP) report to the Managed Competition Steering Committee, which includes the Chief Operating Officer as a member. The Steering Committee in turn reports to the Chief Operating Officer, again.¹⁴⁷ Such positions have a heightened obligation to maintain absolute neutrality and demonstrate no conduct which could be construed as having made a contracting out decision before the entire processes of Managed Competition plays out.

The City’s *Managed Competition Guide* repeatedly addresses the need for neutrality. In guidance on conflicts of interest, with reference to competition between a City department team proposal to continue a service (known as the ADEPT team) versus outside vendors, the Guide warns:

Roles and responsibilities must be defined in such a way as to avoid both the actual and perceived conflicts of interest. Potential conflicts of interest may leave the City open to questions from City residents, or employees, and they may even result in protests. With the goal of creating a ‘level playing field’ for public-private competition, stringent actions are taken to avoid giving either an independent contractor or the ADEPT an advantage in the development of their response to any solicitation.¹⁴⁸

iv. The Selection Process

The law creates a Managed Competition Independent Review Board [IRB] to determine whether the City department’s proposal or an independent contractor’s proposal will better serve

¹⁴⁴ *Managed Competition Guide* pp. 10-11.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*, p. 13.

¹⁴⁷ *Managed Competition Guide* pp. 12-13.

¹⁴⁸ *Managed Competition Guide*, “Roles & Responsibilities, Avoiding Conflicts of Interest,” p. 35.

the City. Only after that determination is made by the IRB is it given to the Mayor. “The City Manager shall establish the Managed Competition Independent Review Board to advise the City Manager whether a City department’s proposal or an independent contractor’s proposal will provide the services to the City most economically and efficiently while maintaining service quality and protecting the public interest.”¹⁴⁹

(a) Absolute neutrality of the IRB and City staff working with it is required to protect the integrity of the Managed Competition Process

Any discussion by the IRB or City officials with a potential competitor of terms, conditions, or services under consideration for contracting out would destroy the integrity of the process, which purposely creates rigorous guidelines for independent review by the Managed Competition IRB. The IRB is supposed to assure the decision-makers awarding the contract do not enter the process with a pre-determined outcome in mind. Firewalls are created to assure no information is leaked or shared with anyone outside the selection team. The Business Office of the Mayor is specifically designated as the staff for the IRB. Any discussion by City staff, including the Business Office, with potential outside contractors during any stage of the Managed Competition Process would destroy the integrity of the process and defeat the purpose of this detailed law.¹⁵⁰

The IRB cannot endorse contracting out of a service unless certain specific conditions are met, as spelled out in the Municipal Code. These conditions assure the process is fair, independent, and is not done for reasons other than the best business interest of the City and the welfare of the public. The entire purpose of this well thought-out process is to determine, when the possibility of contracting out a service is under consideration, “whether a City department’s proposal or an independent contractor’s proposal will provide the services to the City most economically and efficiently while maintaining service quality and protecting the public interest.”¹⁵¹ The importance of this purpose for the law and each step required cannot be overemphasized.

None of these mandatory steps has been taken regarding the Mayor’s proposal to contract out the services of the FJC Department.

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¹⁴⁹ San Diego Charter § 117(c).

¹⁵⁰ “[T]he Business Office functions as staff to the IRB.” *Managed Competition Guide*, p.21.

¹⁵¹ San Diego Charter § 117(c).

- (b) **There can be no consideration of contracting out the services of a City department such as the FJC, unless at least two outside contractors bid for the job**

The San Diego Municipal Code section 22.3713 (a)(1)states:

§ 22.3713 “Consideration of Proposals by the Independent Review Board”

- (a) In determining whether a proposal of an independent contractor or a City Department will provide a service to the City most economically and efficiently while maintaining service quality and protecting the public interest, the Independent Review Board will consider the following factors:

- (1) the Independent Review Board should not recommend awarding a contract to an independent contractor unless there have been at least two bids by independent contractors for the service subject to Managed Competition.

- (c) **The IRB must determine if the bids are responsive to the solicitation**

Unless it can be demonstrated that the bid of one of the two or more outside bidders is more than ten percent lower than the bid by the City department itself, the IRB will not recommend awarding the service to an outside contractor.¹⁵² As the Managed Competition ordinance provides:

In determining whether a proposal of an independent contractor or a City Department will provide a service to the City most economically and efficiently while maintaining service quality and protecting the public interest, the Independent Review Board will consider the following factors:

- (4) *unless the bid of an independent contractor is more than ten (10) percent lower than the bid of a City Department currently providing the service for the proposed term of the contract, the Independent Review Board should not recommend awarding the service in question to the independent contractor.* This minimum cost differential is meant to discourage the City from implementing a significant change in service delivery on the basis of marginal estimated savings, and to account for such difficult to estimate factors as the potential costs of reduced productivity and service disruption during transition. In reviewing this factor, the Board will utilize a cost analysis, the purpose of which is to

¹⁵² SDMC § 22.3713(a)(2).

calculate the costs that are saved and the costs that are generated by contracting the service.¹⁵³

- (d) If one or more of the outside bids provides a greater savings than 10%, the IRB must then decide whether the outside contractor or the City department can provide the “best overall value” to the City, considering other factors than cost**

The IRB is empowered to recommend the award of the services to a bidder such as the City department, if those other factors outweigh the cost differential, if any, of a lower bidder:

In determining whether a proposal of an independent contractor or a City Department will provide a service to the City most economically and efficiently while maintaining service quality and protecting the public interest, the Independent Review Board will consider the following factors:

- (5) which independent contractor or City Department can provide the best overall value to the City. *The Independent Review Board will not necessarily recommend the low bidder, as the low bidder may not be the party that is presenting the most responsible and responsive bid ,i.e., the low bidder may not always be the party that can provide the best and most reliable service to the City, perhaps because the low bidder has less experience or lacks the proven track record of a City Department or an independent contractor with a higher bid.*¹⁵⁴

If the Managed Competition IRB determines that an independent contractor both meets the minimum contract standards and provides the best overall value to the City, it recommends to the Mayor that the contract be awarded to the independent contractor.

The IRB, as a part of its recommendation to the Mayor, must include a written explanation providing the rationale for its recommendation.¹⁵⁵

- (g) When the Mayor receives the Independent Review Board written recommendation that a City service should be awarded to an outside contractor, the Mayor must either accept or reject that recommendation in its entirety.¹⁵⁶

The Mayor may choose to have the City department continue to provide the services, despite the recommendation.

¹⁵³ SDMC § 22.3713(a)(4). (Emphasis supplied).

¹⁵⁴ SDMC § 22.3713(a)(5). (Emphasis supplied.)

¹⁵⁵ SDMC § 22.3713(b).

¹⁵⁶ SDMC § 22.3714.

- (h) If the Mayor accepts the Independent Review Board’s recommendation to award a contract to an independent contractor, before forwarding it to the City Council for its consideration, the Mayor must first notify all labor organizations whose members would be affected by the agreement, as well as the City Personnel and Labor Relations Department.
- (i) The Mayor must forward to the City Council for its consideration (1) the Independent Review Board’s recommendation, (2) a “transition strategy that addresses contract monitoring, service interruption and affected employee procedures,” and (3) a proposed agreement with the independent contractor.¹⁵⁷

v. The City Council’s Role

Only after completion of all the above steps, is the City Council called upon to decide the issue. In order to approve awarding a contract to an independent contractor as opposed to the City staff, the City Council *must specifically determine* that the City service can (1) be provided more economically and (2) efficiently by an independent contractor than by the employees of the department, and that this can be done while (3) maintaining service quality and (4) protecting the public interest.¹⁵⁸ The City Council can only accept or reject the proposed agreement in its entirety.¹⁵⁹

c. Conclusion

The City’s Managed Competition Guide states in clear language on the City’s website:

Managed competition is a structured, transparent process that allows public sector employees to be openly and fairly compared with independent contractors (normally private sector firms) for the right to deliver services. This strategy recognizes the high quality and potential of public sector employees, and seeks to tap their creativity, experience and resourcefulness by giving them the opportunity to structure organizations and processes in ways similar to best practices in competitive businesses, yet still compatible with public sector realities. Inherently Governmental functions are not considered for this procurement strategy.¹⁶⁰

Managed Competition purposely creates rigorous guidelines for internal City review to assure the City does not enter the process with a pre-determined outcome in mind. Any discussion by City staff with potential competitors of possible terms, conditions, or services under consideration for contracting out would destroy the integrity of the process. The Mayor’s May 1, 2008 memo to the City Council indicates this has happened. The Mayor, contrary to the Charter process, has publicly recommended to the Council that it should contract out the work of

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Managed Competition Guide*, p. 1.

the FJC Department employees to the YWCA. According to the Mayor, the City has been in discussions with one potential subcontractor, the YWCA, for six months.¹⁶¹ He indicates he is already preparing an MOU contracting out the Department's services, which he intends to present to the Council.¹⁶²

It is not possible to have a structured, transparent process that allows open and fair competition when the Mayor and his high level staff have privately met and discussed with the YWCA the Mayor's proposal to contract out work to them, and are now preparing a contract to do so. Managed Competition was designed to prevent exactly this conduct by City officials. The City cannot contract out the work of the FJC to the YWCA for all of the above reasons.

An agreement to outsource city services to a non-profit without following the strict requirements of Managed Competition would be a direct violation of Proposition C, City Charter section 117(c), SDMC sections 22.3701 – 22.3716, and the implementing policies and procedures adopted by the City regarding Managed Competition.

3. There is a Requirement to Meet and Confer with Recognized Labor Unions

As referenced above, the exclusive method for outsourcing San Diego City services currently performed by City employees is Managed Competition.¹⁶³ Therefore, the following discussion is abbreviated. However, as a word of caution noted below in subsection (2), the City's bargaining obligations with union employees of other City departments affected by a proposal to outsource services of the employees of the FJC Department is controlled by the labor law discussed in this section.

a. The labor laws of California require any proposal to contract out bargaining unit work be negotiated with the union representing the affected employees

Even if the City had not adopted the Managed Competition law, the proposal of the Mayor, if enacted at this time, would violate Government Code sections 3500 et.seq. commonly referred to as the Meyers-Milias Brown Act. Section 3505 of the Government Code requires a city to meet and confer with its bargaining units over wages, hours, and working conditions. A proposal by a public agency to contract out the work of its bargaining unit employees is a mandatory subject of bargaining.¹⁶⁴

Under California law, a city cannot contract out the work of the affected bargaining unit members in a City Department or eliminate their positions, without first negotiating with the union representing those employees.¹⁶⁵ The negotiations must involve both the decision to contract out work, and the impact of the decision on any affected bargaining unit employees.

¹⁶¹ Exhibit 13.

¹⁶² *Id.*

¹⁶³ San Diego Charter § 117(c); SDMC §§ 22.3701 – 22.3716.

¹⁶⁴ *Lucia Mar Unified School District* (2001) PERB Decision No. 1440.

¹⁶⁵ *Building Material and Construction Teamsters Union, Local 216 v. Farrell, as Controller* (1986) 41 Cal.3d. 651.

The union is permitted to offer alternative proposals, including, but not limited to, the City not contracting out the work of its bargaining unit members.¹⁶⁶

A city must go through the same negotiation process with unions over this issue as it does over any other negotiable issue. That is, (a) reasonable notification must be given the union of the proposal to contract out work and eliminate the positions, (b) negotiate with the union over the proposal itself to contract out work as well as the effects of the proposal, (c) reach agreement with the union or, if impasse is reached, follow a city's impasse procedures by holding an impasse meeting, and subsequently an impasse hearing before the city council. During the process, a city must provide the union with information sufficient for it to intelligently negotiate. No vote can take place on the Mayor's proposal to contract out work and eliminate these positions, until the negotiation process, and if necessary, the impasse process, is complete.

Contracting out work without allowing the affected labor union to bargain over both the proposed decision and its effects is an unfair labor practice, not tolerated by the Public Employment Relations Board. Voting on the Mayor's proposal, before the completion of the negotiation process, would likewise show the City Council had prematurely made a decision prior to required input by the union and possible alteration of a Mayor's proposal in negotiations.¹⁶⁷ This too would be an unfair labor practice.

The remedy for a city imposing contracting out, prior to the completion of negotiations, would be to return to the status quo ante, i.e., reinstating all the city employees released, with full back pay and benefits from the date they were let go, reinstating the city run program with city staff managing it, and returning to the negotiating table to do what should have been done initially, negotiate with MEA over the proposal.¹⁶⁸

The city would be required to do this, despite having spent city funds each year in paying the outside contractor to perform these services. In essence, the city would be required to pay twice, once to the outside contractor and again to reinstate all the employees that were previously performing those functions, with full back pay and benefits.

b. A proposal that would affect the assignment of work to bargaining unit employees of the City Attorney's Office cannot be implemented without first negotiating with the affected bargaining units

An additional word of caution to the City is appropriate regarding its bargaining obligations with union employees of other departments affected by a proposal to outsource services of the employees of the FJC Department. Currently, matters of family violence which may be misdemeanors are referred to attorneys and support staff of the City Attorney's Office, which provides staff as a part of the FJC. Those employees are bargaining unit employees of

¹⁶⁶ *Rialto Police Benefit Association v. City Rialto* (2007) 155 Cal.App.4th 1295.

¹⁶⁷ *Oxnard Harbor District* (2004) PERB Decision No. 1580-M; *Riverside County* (2003) PERB Decision No. 1577-M.

¹⁶⁸ *Oakland Unified School District* (2005) PERB Decision No. 1770 (School district ordered to reinstate school police officers with back pay and benefits, despite district paying city \$1,000,000 per year to patrol the district's schools).

two unions, the Municipal Employees Association and the Deputy City Attorney Association. If the Mayor's proposal affected the assignment of work currently handled by bargaining unit employees of the City Attorney's office, by reducing or eliminating the work currently performed by those bargaining unit employees, it would be a violation of the City's duty under Government Code section 3505 to fail to negotiate the transfer of work out of the bargaining units, prior to implementing a plan with such an outcome.

Similarly, if the proposal shifts work currently handled by the City Attorney's Office to the District Attorney's office, this would be contracting out of work, and a shift in work out of the current bargaining units, and could not occur without a violation under the Meyers-Milias Brown Act until and unless negotiations were held with the respective unions, and an agreement was reached, or impasse procedures (including a vote by the City Council), completed.

4. There Must Be Compliance with the City's Contracting Policies

Even if it were permissible for the City to contract out management of the FJC Department to a private organization without addressing the managed competition and meet and confer issues discussed above, entering such a contract would still have to be consistent with the City's generally applicable procurement laws and policies. In this arena, the proposal also raises significant legal questions regarding the non-competitive method by which the proposed contractual relationship between the City and the YWCA has been conceived.

Under the provisions of Chapter 2, Article 2, Division 32 and related sections of the Municipal Code, services must be procured on a competitive basis unless an exception to this requirement applies.¹⁶⁹ It is not at all clear that, in view of the entirety of the proposal, any exception applies. While section 22.3222 permits special treatment of contracts with non-profit organizations, this exception only applies where the contract will not exceed \$500,000 per year. It appears that this requirement would only be met in the first years of the proposed relationship between the City and the YWCA, when the only cost to the City would be an annual management fee of \$125,000. In all subsequent years, the management fee would be combined with a rent obligation at the YWCA's own facility. The total obligation of the City, then, for both rent and management costs, would be \$900,000 annually. Thus, it appears that this exception to competitive bidding would not be applicable beyond the first two years of a proposed ten year arrangement. The proposed arrangement would therefore be unlawful on this basis.

While it might be suggested that breaking out the contract for the first two years from the subsequent years would allow the City to enter into an initial, short term contract under SDMC section 22.3222 while searching for a separate justification for later years, this is specifically forbidden by section 22.3204. That section prohibits breaking out contracts that would otherwise be unified into smaller agreements for the purpose of avoiding competitive procurement. Likewise, it might be suggested that the dollar limit of section 22.3222 could be circumvented by separating the lease and management aspects of the proposal, since leases are not subject to Division 32 and the management fee, taken alone, is less than \$500,000. However, since it is apparent that the management and lease aspects of the proposal are intended to be integrated, we

¹⁶⁹ SDMC §§ 22.3202; 22.3211.

doubt that this would be permissible under section 22.3204, if the purpose were to avoid the limitation of section 22.3222.

Although City contracts are sometimes entered on a “sole source” or “no bid” basis under sections 22.3037 and 22.3212(e) (where competitive procurement would be “unavailing, or would not produce an advantage, or would be undesirable, impractical, or impossible”), we are not aware of any legitimate sole source justification in this case. To the contrary, it appears that City staff has been actively engaged in discussions with YWCA officials for at least six months.¹⁷⁰ During that time, if the City staff believed that operation of the FJC Department could be more effectively managed in the private sector (and if there were no unsatisfied meet and confer or Managed Competition obligations), it presumably could have developed a Request for Proposals and invited various organizations to compete for the right to serve. This was not done. Moreover, the current FJC lease extends through March of 2010. There is no reason to believe that, if the pending proposal is rejected, there will not be more than adequate time to engage in an extensive public dialogue about the future of the FJC, and to follow that dialogue, if appropriate, with a full meet and confer, Managed Competition, and competitive procurement process through which any new provider of City services may be lawfully hired.

5. There are Operational and Liability Issues

Neither the proposal by the YWCA, nor the acceptance memo by the Mayor, specify how the operation of the FJC will be handled. While some operational details of such a proposal would be worked out after the proposal is properly presented and accepted, there is a lack of detail here sufficient to warrant concern about how the City intends to protect itself from liability, and whether and how sensitive operations such as the police and prosecutor functions will be accessible to non-City staff.

The FJC, under the proposal, would remain a City department for the next two years, albeit under private management. The City is the legal entity that currently engages in purchasing supplies, paying for utilities, applying for and receiving grant funds, entering into and maintaining agreements with the partners, providing security, and doing background checks. It is unclear what would happen to these functions under the proposal. For example, it is impossible to determine, without reviewing a document implementing the proposal, whether the YWCA would have, in addition to the presumed contract with the City, contractual arrangements with each of the partners. In the alternative, the City might maintain separate contracts with each of the partners.

The proposal does not specify by whom or how partners would be engaged. Indeed, it is not apparent whether the City would even have a voice in such matters, and if so, through whom that voice would be exercised. If a non-profit entity managed the contracts, would the contracts nonetheless be competitively bid? Would the management be otherwise bound by all the City’s regulations? Can the non-profit allow or include partners who do not provide direct services to victims? The current proposal does not give a picture of what the actual arrangement would look like.

¹⁷⁰ Exhibits 10, 12, 13 and 16.

Before a decision can be made on the merits of the proposal, assuming it is otherwise properly before the Mayor and Council, the issues around which party (YWCA or the City) and/or partner will bear the risk for negligence and intentional misconduct, and who will be indemnified or held harmless should be settled. Other important issues merit consideration, including the following:

- Scope of Work – limiting the work of the providers to the needs of the FJC
- Confidentiality of records, waivers, sharing of information
- Ownership of data and records; responsibility for responding to subpoenas and other legal processes for those records
- City’s obligations to provide workspace, computer use, etc, and the City’s right to inspect the premises occupied by a provider
- Inclusion of all standard city requirements, such as the ADA provisions and conflict of interest; adoption of City regulations
- Volunteers and interns – who is responsible and liable for the volunteers to, at and for the FJC, and for service provider volunteers
- Subcontractors – when they are and are not allowed, and under what terms
- Maintenance of appropriate licenses by professionals
- Who will have access to confidential City information including police and city attorney information? The files maintained by the police department and city prosecutors are confidential.¹⁷¹ Access to such files must be limited.

While not every detail need be worked out ahead of time, it is difficult to understand how an informed decision can be made in the absence of any specificity as to how the FJC will operate, what implications that has for other City departments, and how the City may be retaining liability while losing control over the very functions it needs to manage to limit liability.

6. There are Establishment Clause Concerns

The YWCA USA’s mission is “nourished by its roots in the Christian faith...”¹⁷² The local organization, YWCA of San Diego County, states that its mission is “to increase safety, promote healing, foster empowerment, and give hope to women and families through innovative programs, services and advocacy.”¹⁷³ The website of the YWCA USA links to the website of the YWCA of San Diego County,¹⁷⁴ but the precise relationship and degree of influence between the organizations cannot be discerned. Because this relationship cannot be discerned and the national organization is clearly faith-based, potential issues regarding the federal Establishment Clause and California Constitution must be resolved before the YWCA of San Diego County could be authorized to lease space to and manage the FJC.

¹⁷¹ California Penal Code §§ 1203.05, 11105, 11140-11144, 13300-13305; Gov’t Code § 6254(f).

¹⁷² Exhibit 51.

¹⁷³ Exhibit 52.

¹⁷⁴ Exhibit 53.

a. The United States Constitution’s Establishment Clause

The First Amendment of the United States Constitution states in part that “Congress shall make no law respecting an establishment of religion . . .”¹⁷⁵ This portion of the First Amendment has commonly been referred to as the “Establishment Clause.” While the Supreme Court has noted that “[t]he language of the Religion Clauses of the First Amendment is at best opaque,”¹⁷⁶ analysis under the Establishment Clause has been distilled to three cumulative tests, based on the three main evils the Establishment Clause was intended to provide protection from: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”¹⁷⁷

The three tests are that, for any proposed state activity implicating Establishment Clause concerns: 1) the activity must have a secular purpose, 2) its principal or primary effect must be one that neither advances nor inhibits religion, and 3) the activity must not foster an excessive government entanglement with religion.¹⁷⁸ In *Lemon*, the Supreme Court held that two separate state programs violated the Establishment Clause. The State of Rhode Island provided salary supplements to teachers of secular subjects in non-public schools and the State of Pennsylvania provided for reimbursement to non-public schools for teachers’ salaries, textbooks, and instructional materials. The large majority of students in both states who attended non-public schools attended parochial schools affiliated with the Roman Catholic Church.

The court found that the “cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.”¹⁷⁹ In order to make this determination, the court examined “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”¹⁸⁰ The court warned against “programs . . . whose very nature is apt to entangle the state in details of administration.”¹⁸¹

In the particular facts presented in the *Lemon* case, the court noted the physical proximity of the schools to the churches, the religious symbols present, the integration of the schools to the religious mission of the Catholic Church, and in the case of Pennsylvania, the direct financial aid to the schools. The court did not make any findings that religious values inevitably or necessarily intruded into the content of the secular subjects, nor did it consider such a finding necessary to establish a violation of the Establishment Clause. Rather, the need by the government for careful controls and surveillance was itself “excessive and enduring entanglement between state and church.”¹⁸²

¹⁷⁵ U.S. CONST. amend. I

¹⁷⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

¹⁷⁷ *Id.* (citing *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)).

¹⁷⁸ *Lemon* at 612-13.

¹⁷⁹ *Lemon* at 614.

¹⁸⁰ *Lemon* at 615.

¹⁸¹ *Lemon* at 615 (citing *Walz at 668* (Harlan, J., concurring)).

¹⁸² *Lemon* at 619.

Later, in *Larkin v. Grendel's Den*, the Supreme Court applied the third *Lemon* test to invalidate a Massachusetts statute that allowed churches and schools to veto liquor licenses granted to any establishment within 500 feet of the church or school.¹⁸³ The Court held that even this minimal governmental authority violated the establishment clause. In light of this finding, a proposal to empower a faith-based organization to perform a government function raises grave concerns.

The Supreme Court later refined the third prong of the *Lemon* test, excessive entanglement, by including that analysis in a revised second prong, which is whether the act or aid has the effect of advancing or inhibiting religion, or the effect test.¹⁸⁴ This newer analysis of whether the act has the effect of advancing or inhibiting religion is determined by (i) whether governmental aid results in governmental indoctrination, (ii) whether recipients of the aid are defined by reference to religion, and (iii) whether the aid creates excessive entanglement with religion.¹⁸⁵ This is now known as the *Lemon-Agostini* test.

On its face, the YWCA proposal satisfies the first prong: the proposal has the stated secular purposes of better coordinating services, a more regionalized approach for providing services, and saving the City money.¹⁸⁶ However, the second prong, whether the proposal has the effect of advancing or inhibiting religion, is less clear because at present, there is insufficient information regarding the YWCA's status as a religious organization and its current or proposed operating practices. In *Community House*,¹⁸⁷ the court found that the City's agreement with Boise Rescue Mission [BRM] to operate a homeless shelter violated this second prong. Specifically, the court found that there was governmental indoctrination into religion because BRM was provided with a publicly financed facility in which to spread its religious message. BRM's lease was substantially below market and the record was clear that BRM conducted religious activities on the premises. Although BRM had been selected through a neutral Request for Proposal process, the court found that initial neutrality insufficient in light of the diversion of government funds for religious indoctrination. The court did not find that the plaintiffs had raised serious questions regarding excessive entanglement, but found an Establishment Clause violation in spite of this.

Conversely, in some cases where leases of governmental property to religious organizations were awarded after public notice and opportunity to bid and on competitive terms,¹⁸⁸ the agreements have been upheld. In *Woodland Hills*, the community college district's ground lease to a Jewish congregation was challenged as violating both the federal Establishment Clause and the California Constitution, discussed below. The court reviewed the purpose of the lease and found that it was solely to increase revenue for the district by leasing out surplus land.

¹⁸³ *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

¹⁸⁴ *Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁸⁵ *Id.* at 234.

¹⁸⁶ Exhibit 13.

¹⁸⁷ *Community House, Inc. v. City of Boise*, 490 F.3d 1041 (9th Cir. 2007).

¹⁸⁸ *Woodland Hills Homeowners Organization v. Los Angeles Community College District*, 218 Cal. App. 3d 79 (1990); *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010 (9th Cir. 1986).

The district had previously attempted to sell the land and had received no offers. Upon deciding to lease the parcel, the district posted and mailed hundreds of notices, mailed 42 bid packages to interested parties, and received only the one bid from the congregation. Based on all these facts, the court found that neither the federal Constitution nor the California Constitution were violated.

It bears noting here, however, that the YWCA has not won the proposed contract through a competitive process. No such process was conducted. In addition, in the *Woodland Hills* case, government entanglement with the religious organization did not extend beyond the entering of the lease of land. In stark contrast, in the proposed arrangement, the City and the YWCA would have a continuing relationship under which the YWCA would oversee the provision of social services pursuant to a management agreement with the City.

b. The State of California Constitutional Concerns

The Constitution of the State of California addresses the relationship between the state and religion in several places:

Article I, section 4: The free exercise of religion and enjoyment of religion without discrimination or preference are guaranteed. The Legislature is prohibited from making a law respecting the establishment of religion.

Article XVI, section 5: Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever....However, aid granted pursuant to Article XVI, section 3 is allowed.¹⁸⁹

Article IX, section 8: Prohibits the appropriation of public money for any sectarian or denominational school not under the exclusive control of the officers of the public schools.

Article I, section 4, known as the “No Preference Clause,” has been interpreted as being more protective of the principle of separation of church and state than the federal guarantee.¹⁹⁰ This provision is violated when governmental action endorses a religious view or gives favored status to religion in general.¹⁹¹ Even the appearance of preference is to be avoided, regardless of

¹⁸⁹ Ca. Const. Art. XVI, §3 allows support for hospital, orphans, children of disabled, aged, blind, needy, and physically handicapped persons.

¹⁹⁰ *Fox v. City of Los Angeles*, 22 Cal. 3d 792 (1978).

¹⁹¹ *Barnes-Wallace*, 275 F.Supp.2d 1259, 1276 (S.D. Cal. 2003).

the governmental purpose.¹⁹² The City of San Diego's lease of land in Balboa Park to the Boy Scouts of America, an admittedly religious organization, violated this provision because the lease was exclusively negotiated for a nominal fee. However, in *Woodland Hills*, the government was not found to have violated this section because of the equal opportunity for both religious and secular groups to obtain the government benefit.

Article XVI, section 5, known as the "No Aid Clause," prohibits any governmental aid, in whatever form, for a sectarian purpose. This prohibition may be violated even by the government lending its prestige and power to a sectarian purpose.¹⁹³ A governmental act with a secular purpose may violate this provision, if it has a direct, immediate, and substantial effect of promoting a sectarian purpose.¹⁹⁴ However, indirect, remote, or incidental benefits that have a primary public purpose do not violate this section.¹⁹⁵ If the benefit is available on an equal basis to sectarian and secular organizations and does not have the substantial effect of supporting religious activities, it is considered indirect, remote, or incidental.¹⁹⁶

c. The Status of the YWCA of San Diego County

The first issue to be resolved is whether the YWCA of San Diego County is a religious organization. The extent to which the local YWCA may or may not be a religious organization is unknown. The name itself is undeterminative: the local YWCA is at times identified as the "YWCA of San Diego County"¹⁹⁷ and at times as the "Young Women's Christian Association of San Diego County"¹⁹⁸ and yet at other times, by both names.¹⁹⁹ For the purpose of determining State or Federal Constitutional issues, it is irrelevant whether the YWCA is sectarian or non-sectarian.²⁰⁰ Additionally, endorsements of religious belief over non-belief are not permissible.²⁰¹

¹⁹² *Id.*

¹⁹³ *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002).

¹⁹⁴ *Id.* at 1130.

¹⁹⁵ *Id.* at 1131.

¹⁹⁶ *Id.*, *Woodland Hills*; and *Christian Science Reading Room*.

¹⁹⁷ Exhibits 54-56: California Secretary of State - corporate registration, <http://kepler.ss.ca.gov>; Internal Revenue Service -charities, <http://www.irs.gov/charities>; and US Housing and Urban Development - code of conduct, <http://www.hud.gov/offices/adm/grants/codeofconduct/cc-ca.doc>.

¹⁹⁸ Exhibit 57: California Attorney General Registries of Charitable Trusts, <http://ag.ca.gov/charities>.

¹⁹⁹ Exhibit 58: San Diego State University Library and Information Access, http://infodome.sdsu.edu/about/newsletter/winter_2007/newandnotable.html#christian (last visited May 7, 2008); Exhibit 59: San Diego Foundation News, *The San Diego Foundation Awards \$400,360 In Grants to the San Diego Community*, <http://www.sdfoundation.org/news/001222.shtml> (last visited May 7, 2008); and Exhibit 60: San Diego Magazine, <http://www.sandiegomagazine.com/media/San-Diego-Magazine/April-2008/Shelter-from-the-Storm> (last visited May 7, 2008).

²⁰⁰ *Barnes-Wallace*, at 1273.

²⁰¹ *Id.*

One case regarding the YWCA that touched on religion found that a YWCA in North Carolina could terminate the employment of an unwed mother because her plan to “advocate an alternative lifestyle of unmarried parenthood to her community youth groups and such conduct would be contrary to the purpose and functions of the YWCA in its service to young women and girls.”²⁰² The purpose referred to by the court, and relied upon by the YWCA, read as follows:

The Young Women’s Christian Association of the United States of America, a movement rooted in the Christian faith as known in Jesus and nourished by the resources of that faith, seeks to respond to the barrier-breaking love of God in this day.

The Association draws together into responsible membership women and girls of diverse experiences and faiths, that their lives may be open to new understandings and deeper relationships and that together they may join in the struggle for peace and justice, freedom and dignity for all people.²⁰³

The court did not state what particular portion of this purpose the plaintiff’s status was contrary to, nor was there any analysis as to how plaintiff’s status was contrary to the purpose.

In verbal conversations in recent weeks, at least one board member of the local YWCA has claimed that the YWCA of San Diego County is an exclusively secular organization. The YWCA of San Diego County may be able to provide information regarding their status as either a religious or secular organization, or perhaps a combination of both. Such information would need to be reviewed, verified, and analyzed before the City could prudently embark upon a course of action that might violate the constitutionally mandatory separation of church and state.

d. Negotiations with a Religious Organization

Should the YWCA of San Diego County be determined to be, in whole or in part, a religious organization, the City must ensure any negotiations are at arm’s length, awarded after public notice, on competitive terms.

Additionally, there has been no proposal submitted regarding the management of the FJC by the YWCA, such that the concerns regarding the Establishment Clause, particularly “excessive entanglement,” could be reviewed. A management proposal should be submitted for review for determination as to whether the concerns expressed by the courts, as cited above, could be addressed.

²⁰² *Harvey v. Young Women’s Christian Association*, 533 F.Supp. 949, 952 (W.D. N.C. 1982).

²⁰³ *Id.* at 950.

IV.

CONCLUSION

The future of the FJC should be decided through an open, public, and maximally inclusive process. The City Attorney strongly recommends that the Mayor and City Council take the time to review these issues to allow for public participation in the process before moving forward.

When the FJC opened its doors, it was part of the City Attorney's Office, run by the staff of the office. In November 2004, the outgoing City Attorney, Casey Gwinn, and the City Council quickly pushed through an ordinance making the FJC a separate city department. This change was politically motivated, and was not publicly scrutinized the way it should have been. As time has gone by, the efficiency and success of the FJC has declined and a change is needed. The mistake of making policy behind closed doors inevitably leads to bad policy. This mistake must not be repeated.

The overwhelming majority of all domestic violence that occurs in the City of San Diego is misdemeanor conduct. Ninety percent of all domestic violence arrests are prosecuted as misdemeanors.²⁰⁴ These crimes fall within the City Attorney's prosecutorial jurisdiction, making this office an indispensable and central partner in any properly conceived FJC. The current City Attorney has consistently demonstrated his dedication to ensuring the most efficient and comprehensive approach to helping victims of domestic violence and to hold batterers accountable. This dedication has been demonstrated with the ongoing support the City Attorney provides to the community through its Domestic Violence & Special Victims Unit, despite having its budget drastically cut three times in the last three years by the City Council.

Because of his commitment to both serving the victims of family violence and ensuring open government, the City Attorney's Office has invited stakeholders and the general public to an ad hoc planning committee meeting at the FJC from 12:00 to 1:30 p.m. on Wednesday, June 4, 2008, which we expect will be the first of a series of such meetings.²⁰⁵ We are confident that such an open process will produce a plan for the future of the FJC that maximizes the ability of all of the community partners to serve all victims of family violence.

The most important priority in deciding the future of the FJC is to ensure that the entire community is part of the solution. If the Mayor and his management team are unable to effectively continue to carry out the mission of the nationally recognized San Diego FJC, then the community, and not private parties trading on the spoils of political alliances, should decide what the future of the FJC will be.



Michael J. Aguirre
San Diego City Attorney

²⁰⁴ Exhibit 25.

²⁰⁵ Exhibit 61.