COUNCIL AGENDA: 12/16/2010
ITEM: 3.1

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: **RETIREMENT BOARD PUBLIC MEMBER APPLICANTS**

DATE: December 14, 2010

BACKGROUND

This Office routinely reviews applications for appointment to City boards and commissions for conflicts of interest, appearance of bias and incompatible office. The applications generally do not provide complete information; however, they do occasionally disclose potential conflicts of interest or incompatible offices. The purpose of this memorandum is to summarize our review of the applications submitted by the individuals who will be interviewed by the City Council on December 16, 2010 for the public member trustee positions on the City's two retirement Boards.

BOARD DUTIES

In order to analyze potential conflicts, it is necessary to consider the duties of the particular board or commission for which the applicants are seeking appointment. The Boards of trustees of the City's two retirement plans are established under the Municipal Code to manage, administer and control the City's two retirement plans. The Boards' scope of authority and duties include determining employee eligibility for benefits, establishing contribution rates for employees and the city based on actuarial valuations, commenting on ordinances that propose modifications to the retirement plans and investing retirement funds. The Boards are expressly authorized to secure the following types of contractual services:

1. Actuarial service
2. Auditing services
3. Investment management services
4. Investment performance evaluation services
5. Proxy voting services
6. Other consulting services as the Boards deem necessary to carry out their duties and responsibilities under the retirement plans.

SUBSTANCE OF CONFLICTS REVIEW

Incompatible Office

The doctrine of incompatible offices is contained in Government Code section 1099. To fall within the Doctrine of Incompatible Offices, two elements must be present.

- Hold two public offices simultaneously, and
- A potential conflict or overlap in the functions or responsibilities of the two offices must exist.

Appearance of Bias

There may be facts which would not amount to a legal conflict of interest, but which could require a Board trustee to recuse him or herself from a Board vote or discussion, because of an appearance of bias on the part of the Board. City Council policy requires Board members to be free from bias in their decision making, and may require a Board member to recuse him or herself if the facts could reasonably lead one to conclude that the Board member would be biased for or against a person or entity.

Legal Conflicts That May Preclude Board Contracts

Because these Boards have independent contracting authority, Board member conflicts of interest preclude the Board from contracting with entities in which a trustee has a financial interest. (Government Code Section 1090.) For these Boards, it is not adequate for a trustee to recuse him or herself from participating in a Board discussion or from voting on matters coming before the Board. The trustee with the conflict must either resign, or the Board must forgo the contractual opportunity.

While this list is not complete, conflicts generally arise in one or more of the following situations:

- A trustee has "sources of income" within the 12 months preceding the start of the trustee's term or during the trustee's term, as defined under the Political Reform Act.
- A trustee's spouse or domestic partner has "sources of income" within the 12 months preceding the start of the trustee's term or during the trustee's term, as defined under the Political Reform Act.

- A trustee or trustee's spouse or domestic partner is an Officer or Board Member of an entity other than the Retirement Board and the entity is involved in a matter coming before the Board.

LEGAL REVIEW OF RETIREMENT BOARDS APPLICANTS

Our office reviewed the applications and other information submitted by the applicants who are to be interviewed by the City Council on December 16, 2010. Our review was limited to the information provided by the applicants and was not intended to be comprehensive investigation of potential conflicts involving the applicants. The results of our review are as follows:

- No application discloses incompatible offices
- No application indicates an appearance of bias.
- No application discloses an existing conflict of interest, e.g. no applicant disclosed an existing financial interest in any organization, association, or entity that has an existing contractual relationship with the Board(s) in which the applicant is interested.
- Some applicants disclosed a potential for conflict because they have financial interests, primarily employment, in entities which may seek to contract with one of the Boards. Where such potential for conflict was identified, our analysis briefly addresses the significance of this potential for conflict, based on information received from Retirement Services staff.
- Some applicants who are consultants did not identify their clients and so analyzing existing and potential conflicts was not possible.
- Many applicants indicated that they would not have any financial interests, other than employment, to disclose. Although most applicants indicated that they had read or would read the Fair Political Practices Commission Form 700 Reference pamphlet and all applicants agreed to file form 700s, it is not clear that all applicants understood the breadth of the disclosure that will be required if they are appointed.
- A few applicants acknowledged that they understood that the entities in which they have financial interests will be precluded from contracting with the Board to which they are appointed, but some applicants seemed to mistakenly believe that recusal would be sufficient to avoid the conflict.

Attachment A is a summary and brief analysis of any apparent legal conflicts of interest for each applicant based on the information that was available in the applications and other material submitted by the applicants. This summary and analyses is limited to the applicants who are being interviewed by the City Council on December 16, 2010 and focuses on their relationship if any to

persons or entities that are likely to come before the Board(s) for which they are applying.

Attachment B is a list of the entities with which one or both Boards currently have a contractual relationship. We note that some of these are forms of entities (partnerships or private companies) in which it is unlikely that applicants would have a financial interest if they are not employed by the firm. However, even if the applicants do not currently have a contractual relationship with any firm in which either Board currently has a financial interest, the list of entities with which the Boards contract changes from time to time and we would expect Board member's financial interests to change over time as well. Thus, both staff and the individuals ultimately appointed to these Boards will need to exercise vigilance to avoid conflicts from arising in the future.

CONCLUSION

The applicants did not identify any existing conflicts which would prevent them from serving on the Boards. Several potential conflicts of interest were identified. There may be additional conflicts or potential for conflicts that will be identified once the appointments are made and Form 700s are filed. Further, as noted above, potential for conflicts will arise through the terms of office of these Board members. However, according to Retirement Services staff, an actual conflict could be avoided in almost all cases because the types of contractual services that the Boards normally secure are usually not so unique services that the Boards need to contract with a particular entity.

RICHARD DOYLE
City Attorney

By Mollie Dent
Mollie Dent
Senior Deputy City Attorney

cc: Debra Figone, City Manager
Dennis Hawkins, CMC, Acting City Clerk
Russell U. Crosby, Director Retirement Services

ATTACHMENT A
Retirement Boards Candidates
Conflict of Interest Review

Applicant Elizabeth Rounds

Board
Both

Employer
Self-Employed human Resource consultant

Spouse Employer
Kaiser Permanente

Conflict of Interest
Ms. Rounds' application did not disclose sources of income (clients) from her work as a consultant. Ms. Rounds disclosed that she will have financial interests to disclose and would do so. Without knowing more about any other financial interests that Ms. Round may have, including sources of income to her as a consultant, it cannot be determined if a conflict of interest may exist or arise. We note that an actual conflict would only arise if Ms. Rounds has a financial interest in, or consulting relationship, with an entity with which the Board has, or is contemplating, a contractual relationship, or interests in real estate located in close proximity to Board owned real estate. Ms. Rounds' spouse's employment would not create a financial conflict of interest under the current process for selecting retiree healthcare providers as the City makes this selection, not the Boards.

Applicant Stuart Odell

Board
Police & Fire

Employer
Intel Corporation

Spouse Employer
N/A

Conflict of Interest
Mr. Odell did not identify any organization, association, or entity in which he was active or which he is involved or associated that might be affected by decisions of the Board. He further indicated that he would have no financial interest to disclose other than his interest in his employment.

Applicant Damon Krytzer

Board
Police & Fire

Employer
Oppenheimer & Company

Spouse Employer
GAP, Inc

Conflict of Interest
Mr. Krytzer did not identify any organization, association, or entity in which he was active, involved or associated that might be affected by decisions of the Board. He further indicated that he would have no financial interest to disclose other than the above employment interests. There is no existing conflict of interest arising out of Mr. Krytzer's employment because the Board does not currently contract with Oppenheimer. Although there is potential for conflict because Oppenheimer is a type of entity that the Plan might consider contracting with, it is our understanding, based on conversations with Retirement Services staff, that Oppenheimer does not offer such unique services that the potential conflict would have a substantial impact on Board business. Mr. Krytzer's spouse's employment would not appear to create a potential for conflict of interest.

Applicant Sean Bill

Board
Both

Employer
Seeking employment in corporate treasury or as fixed income portfolio manager (firms mentioned were Symantec, Google, BlackRock).

Spouse Employer
None identified

Conflict of Interest
Mr. Krytzer did not identify any organization, association, or entity in which he was active or which he is involved or associated that might be affected by decisions of the Boards. He further indicated that he would have no financial interest to disclose other than his employment interest. The potential for conflict arising out of employment cannot be evaluated because it appears that Mr. Bill and his spouse are actively seeking employment at this time. If Mr. Bill ultimately obtains employment as a portfolio manager a potential conflict could arise, as the Plans do contract with portfolio managers. BlackRock is one of the Board's current portfolio managers.

Applicant Andrew Lanza

Board
Both

Employer
Retired

Spouse Employer
Robert and Ruth Halperin/Silver Giving Foundations

Conflict of Interest
Mr. Lanza did not identify any organization, association, or entity in which he was active or which he is involved or associated which might be affected by decisions of the Board. Mr. Lanza further indicated that he would have no financial interest to disclose other than his financial interest in his and his spouse's employment. Mr. Lanza did indicate he serves on over a dozen for profit and non profit boards, but a potential for conflict would only exist is these boards are for entities that are likely to come before the retirement boards, Mr. Lanza's spouse's employment would not appear to create a potential for conflict of interest.

Applicant Bijan Forrodian

Board
Police & Fire

Employer
Self employed consultant to financial services industry

Spouse Employer
N/A

Conflict of Interest
Mr. Foroodian indicated that he assumed that he was not involved or associated with any organization, association, or entity that might be affected by decisions of the Board. He further indicated that he would have no interest to disclose other than the above employment interests. Without knowing more about Mr. Foroodian's sources of income as a consultant, it cannot be determined if a conflict of interest may exist or arise out of his consultancy. Mr. Foroodian's resume also indicates that he is Co-CIO of Inflection Point Capital Management. It is our understanding, based on conversations with Retirement Services staff, that Inflection Point Capital Management is not a firm with which the Board is likely to contract.

Applicant Michael Flaherman

Board
Police & Fire

Employer
New Mountain Capital LLC

Spouse Employer
University of California San Francisco

Conflict of Interest
Mr. Flaherman did not identify any organization, association, or entity that might be affected by decisions of the Board. He further indicated that he would have no interest to disclose other than the above employment interests. Although there is potential for conflict because New Mountain Capital is a type of entity that the Plan might consider contracting with, it is our understanding, based on conversations with Retirement Services staff, that New Mountain does not offer such unique services that the potential conflict would have a substantial impact on Board business. Mr. Flaherman's spouse's employment would not appear to create a potential for conflict of interest.

Applicant Vincent Sunzeri

Board
Both

Employer
Morgan Stanley Smith Barney (Global Wealth Management)

Spouse Employer
N/A

Conflict of Interest
Mr. Sunzeri indicated that he would have no financial interest to disclose other than the above employment interest. With respect to organizations, association or entities which might be affected by Board decisions, Mr. Sunzeri stated that if either Board were to retain Morgan Stanley Smith Barney as either a consultant or a money manager, he would resign his position. It is our understanding, based on conversations with Retirement Services staff, that Morgan Stanley Smith Barney is not a firm with which the Board is likely to contract.

Applicant Jeffrey Perkins

Board
Federated

Employer
Pacific Capital Bank

Spouse Employer
N/A

Conflict of Interest
Mr. Perkins indicated that he would have no financial interest to disclose other than the above employment interest. Mr. Perkins did not identify any organizations, associations or entities in which in is active, involved or associated which might be affected by decisions of the Board.

Applicant Michael Armstrong

Board
Police & Fire

Employer
Algorithmics, Inc.

Spouse Employer
Apple Inc.

Conflict of Interest
Mr. Armstrong identified his employer as the only organization, association, or entity in which he was active or which he is involved or associated that might be affected by decisions of the Board. He indicated that he would recuse himself for any possible engagement between the Board and his employer if he were appointed. Although we note that recusal would not be adequate in order to avoid the conflict, and Algorithmics is a type of entity that the Plan might consider contracting with, it is our understanding, based on conversations with Retirement Services staff, that Algorithmics does not offer such unique services that the potential conflict would have a substantial impact on Board business. Mr. Armstong's spouse's employment would not appear to create a potential for conflict of interest.

Applicant Franklin Atkinson

Board
Police & Fire

Employer
Self employed financial consultant and serves on boards of directors of US and International firms

Spouse Employer
Self employed

Conflict of Interest
Mr. Fisherman identified the following as entities with which he is associated which might be affected by decisions of the Board, but stated that this was highly improbable and highly unlikely: The Trinity Group; The Perreault Birmingham Group; MACH Energy. His resume also identified relationships with a European boutique investment banking firm and a venture investment incubator. Retirement Services staff agrees with the applicant that it is highly unlikely and improbable that the Board would contract with the identified entities. Mr. Atkinson's spouse's employment would not appear to create a potential for conflict of interest.

Applicant Lara Druyan

Board
Federated

Employer
Allegis Capital

Spouse Employer
Immunet

Conflict of Interest
In addition to the financial interest created by her employment and her spouse's employment, Ms. Druyan disclosed that she will have financial interests created by investment to disclose and would do so. It is our understanding, based on conversations with Retirement Services staff, that neither Ms. Druyan's employer, not her spouse's employer is a firm with which the Board is likely to contract. Without knowing more about the other financial interests that Ms. Druyan may have, it cannot be determined if they will create a conflict. We note that an actual conflict would only arise if Ms. Druyan has a financial interest in, or consulting relationship, with the an entity with which the Board has, or is contemplating, a contractual relationship, or interests in real estate located in close proximity to Board owned real estate.

Applicant Matthew Herrick

Board
Both

Employer
Bank of America Merrill Lynch

Spouse Employer
Homemaker

Conflict of Interest
Mr. Herrick indicated that he would have no financial interest to disclose other than the above employment interest. It is our understanding, based on conversations with Retirement Services staff, that Bank of America Merrill Lynch is not a firm with which the Board is likely to contract. Mr. Herrick did not identify any organization, association, or entity that might be affected by decisions of the Board

Applicant Martin Dirks

Board
Both

Employer
McCullough & Associates, LLC

Spouse Employer
N/A

Conflict of Interest
Mr. Dirks did not identify any organization, association, or entity in which he was active or which he is involved or associated that might be affected by decisions of the Board. He further indicated that he would have no financial interest to disclose other than the above employment interests. There is no existing conflict of interest arising out of Mr. Dirk's employment because the Board doesn't currently contract with McCullough & Associates, LLC. Although there is potential for conflict because McCullough & Associates, LLC is a type of entity that the Plan might consider contracting with, it is our understanding, based on conversations with Retirement Services staff, that McCullough & Associates, LLC does not offer such unique services that the potential conflict would have a substantial impact on Board business.

ATTACHMENT B
Retirement Boards Contractors

Vendor Name

ALLIANCE CAPITAL
AMERICAN REALTY
AQR
ATLANTA CAPITAL MANAGEMENT
AVERY
BINGHAM
BLACKROCK
BLOOMBERG
BLUE SHIELD
BOSTON COMPANY
BOSTON PARTNERS
BRANDES
BRANDYWINE
CALAIS I
CALAMOS
CALAPRS
CBRE
CDW:IT SUPPLIER
CHOICES: FINANCIAL KNOWLEDGE
CINTAS: FIRST AID AND SAFETY
COMPUTER WORLD
DATA MARKETING
DODGE & COX
DRA ADVISORS LLC
EAGLE ASSET
EVESTMENTS
EYEMED
FED EX
FIDELITY
FISHER INVESTMENT
GOVERNMENTAL FINANCIAL OFFICERS ASSOCIATION
GLASS LEWIS
GREAT HILL
GRS SERVICES
HANSON BRIDGETT
HARBORVEST
ICE MILLER
IMAGE X
INTECH
INTEGRA
IRM
IRON MOUNTAIN: SHREDDING
KAISER CA
KAISER HI
KAISER NW
KENNEDY ASSOCIATES
LINA
LOOMIS SAYLES

LRS
MACCORKLE INSURANCE
MACIAS GINI O'CONNELL
MACKAY SHIELDS
MCKINLEY CAPITAL
MEKETA
MERCER
MERCER: GIMD
MIG II REALITY
NEPC
NEW AMSTERDAM
NEWCAL COPY SERVICES
NORTHERN TRUST
NOSSAMAN
PACIFICARE HORIZON
PALO ALTO MEDICAL FOUNDATION
PANTHEON USA GLOBAL VII
PARTNERS GROUP
PATHWAY
PENSION BENEFIT INFORMATION PARTICIPATION RESEARCH SERVICES
PETER G. SEPSIS
PIMCO
PORTFOLIO ADVISORS
PRISA
PRUDENTIAL
RECALL TOTAL
RHUMBLINE
RICOH
ROBERT HALF - ACCOUNT TEMPS
RUSSELL INVESTMENTS
SALTZMAN & JOHNSON
SEGAL
SEIX
SIGULAR GUFF
SIS: CONSULTING
SPRINT
STATE STREET
TCW
UBS GLOBAL ASSET
UPS
VISION SERVICE PROVIDERS
WELLINGTON
WESTERN ASSET
WILFRED JARVIS
WILLIAM BLAIR
WORKPLACE EMPORIUM