

## Appointment of Our Next City Attorney

Dear Mayor and City Councilmembers,

The hiring of a City Attorney is one of the most important decisions the Council makes and one of the three top jobs in City government. Full resident input is essential.

SMCLC has interacted with the City Attorney on a host of issues for over a decade. We, along with others from the community, have a special perspective and first-hand information on the functioning of the office and the critical attributes and skills needed. Those seeking to provide input should be able to meet with the recruiters as occurred with the search for a City Manager.

Listed below are the attributes our next City Attorney should have *demonstrated to possess and be strongly committed to*. Next we discuss areas in which our last City Attorney fell short. We need a new appointee who will give close attention to and make improvements in these areas.

Santa Monica needs a City Attorney dedicated to restoring public confidence in the office, which has been weakened. One who:

- Will **commit to an open and transparent City government**, to the full extent of the law, and not be **hostile and resistant to public records requests**, which is a foundation of a progressive, democratic government.
- Will **stand up to pressure from developers**, and agrees that as a highly desirable community for developers, we should negotiate from strength and not be out-negotiated or legally bullied with threats of pulling out of a deal or a lawsuit.
- Will **enforce laws uniformly**, not selectively, regardless of whether powerful individuals and interests are involved.
- Will recognize that **the City itself, through the Council as a whole, is the City Attorney's client**, not individual Councilmembers, the City Manager or staff.
- Will provide the City with the **best, independent legal advice**, knows and keeps up with the law, and is scrupulous in reviewing documents and matters to protect the City and its residents' interests.
- Will **fully inform the Council of important matters**, even uncomfortable ones.
- **Will provide a complete range of options** for full consideration by the Council and input from the public, and will timely, not selectively, respond to Council requests.

## Santa Monica's Code of Ethics

Three tenets of our *Code of Ethics* are important for a new City Attorney to affirm:

- I value all stakeholders.
- I facilitate public involvement in decision making process.
- I support the public's right to know by making information accessible.

## Some Areas Where our Next City Attorney Needs to Improve Performance

### Not Holding its Own When Dealing with Powerful Developers

All too often the City gets out-negotiated by prominent developers and their attorneys even though it is in a superior power position. The City Attorney plays an important role in this, including approving development agreements and providing legal advice. When the City Attorney too easily relents in the face of developer threats public confidence is reduced.

Here are a few examples:

- **Village Trailer Park**—A recent development project involving the displacement of long-term low-income, often elderly, tenants. The City claimed (1) the project provided the affordable housing required by law; (2) to have secured the best deal possible as to affordable units and other community benefits; and (3) that the developer could give no more and still have a viable deal.

Yet when threatened with a lawsuit by the Western Center, representing SMCLC, for failing to meet the legally required affordable housing, the developer gave more. When sued by residents of the Park, it gave more again. And then the developer sold the entitlements for its approved project for a huge profit. The City Attorney gave bad legal advice, didn't do its due diligence and was out-negotiated.

- **St. John's Hospital**—The City negotiated a Development Agreement with St. John's for its expansion, which the City understood required underground parking. St. John's never built it and the City gave in because St. John's said the DA didn't *legally require* it.
- **Shore Hotel**—In approving the Shore Hotel on Ocean Avenue the City claimed it would be a moderately priced hotel badly needed in Santa Monica. Despite this claim, the DA contained a provision allowing the developer to pay a relatively modest fee to convert the lodging into a luxury hotel, which is exactly what it eventually did. Neither the City Council nor residents were informed of this when the project was approved.
- **NMS**—NMS is the City's largest developer and the biggest contributor to City elections. A Court recently found that NMS committed fraud, forgery, perjury and "massive, intentional, coordinated efforts to destroy evidence." Previously the Court had issued

strong orders against NMS, which has a litigious history, including lawsuits with business partners, and suing its opponents' lawyers for hundreds of millions of dollars.

Despite this, the City Attorney apparently didn't warn the Council or assess the dangers of doing business with NMS—and may not have even done the appropriate legal due diligence before the City continued to approve NMS projects. The City Attorney also didn't build in any additional protections into agreements for new NMS projects. At last count, there are some 26 NMS projects in Santa Monica.

### Lessons From the Riel Investigation—City Attorney's Mistakes Were a Major Factor

The Elizabeth Riel matter that occupied so much of the City's attention last year grew out of her firing by then City Manager Rod Gould after intense pressure in rapid-fire emails from then Mayor Pam O'Connor. Mayor O'Connor was angry that Ms. Riel had donated to a campaign against her election 8 years earlier.

SMCLC eventually uncovered these facts, but only after *two* public records requests. It then disclosed them to the City Council and called for an investigation. The Council authorized an investigation by former Enron prosecutor John Hueston. He found, among other things, that Mayor O'Connor had violated the City Charter, and that City Manager Gould had given in to her improper pressure and fired Ms. Riel.

**The detailed investigation and the unobstructed access to documents provided by discovery in the Riel lawsuit, afford a unique view into the inner operations of the City, including those of the City Attorney. Serious problems were uncovered about the City Attorney's conduct, including withholding key facts negative to the Mayor and City Manager, acting adverse to the public's right to know and providing bad legal advice.**

- The City Attorney provided poor legal advice to Mr. Gould before he fired Ms. Riel, and to the Council after, that it was OK to fire her, and the City would not be subject to liability, including for violation of the First Amendment (the federal judge disagreed.)
- The City Attorney wrongly denied outright that there were **any** documents, including emails, that Gould reviewed about Ms. Riel before he fired her in response to SMCLC's first public records request, enabling the statute of limitations to run and helping Mayor O'Connor to be re-elected in a close election without being held accountable.
- The City Attorney also didn't disclose to the Council the existence of the O'Connor-Gould emails, central to the Riel lawsuit, even when she discussed settlement.

The City Attorney's Office's hostility to public record requests is not unique to this egregious example in Riel. Delay, selectively following the rules and an overly aggressive use of exemptions too regularly occurs today at odds with the law and the *Code of Ethics*.

The Council now has an opportunity with the hiring of a new City Attorney to move positively to correct these ingrained weaknesses to create a stronger and more progressive government.

## Lessons from Oaks—Unsound Legal Advice and Failure to Enforce the Law

Oaks, the backbone of our anti-corruption law, is part of our City Charter. It prohibits public officials, including the City Council and City Manager, from receiving contributions or jobs from those in whose favor they have previously approved a development or contract.

- For 16 years, the City Attorney refused to enforce Oaks. The Hueston Report, which looked at Oaks as well as Riel, found that Oaks **is** readily enforceable and should be enforced.
- Throughout this time, the City Attorney gave bad legal advice about Oaks—that it was legally unenforceable. Research of the law and a review of even more stringent laws in other jurisdictions, including the MTA and federal laws, and of court opinions, discussed at length in the Hueston Report, should have resulted in different advice.
- As a further example, according to then City Manager Rod Gould, the City Attorney advised him Oaks wouldn't apply if he accepted a job from a company for which he had repeatedly approved City contracts. The Transparency Project, a citizens' group, sued Mr. Gould after the City rejected its complaint, and obtained a favorable result, including that he leave the job he had improperly accepted with the company.

This degree of inaction and unsound legal analysis exposes systemic weaknesses in the City Attorney's office.

## Weaknesses in Enacting Progressive Legal Policy

The City Attorney should take the lead in proposing progressive, innovative legal policy as a hallmark of our City. Instead, it has at times been resistant and slow to act.

- In 2012, the City Attorney halted nonprofit **AIDS Walk Los Angeles' (AWLA) annual paid advertising** on Santa Monica's Big Blue Bus, claiming that only commercial businesses were legally allowed to buy bus ads (and that the City had erred in allowing them in prior years). After AWLA representatives appealed directly to the Mayor, the City Council held a hearing to determine how the City could best proceed. The Council directed the City Attorney to analyze the current law and return with options.

For the next four years, the City Attorney "pocket vetoed" the matter until AWLA retained legal counsel to brief the City Council on how other progressive cities had legally enabled "non-commercial" ads to run, with reasonable content restrictions.

Only then did the City Attorney propose an amendment to the Big Blue Bus ad sales policy that would enable AWLA to resume its annual ads.

- With **the lobbying ordinance** covering powerful development interests, the City Attorney's report to the Council, after a lengthy delay, advocated a go-slow, conservative approach with minimal information, well behind other California cities. Powerful interests received what many residents believed was favorable treatment.
- While state law had long required cities to **maintain emails** for two years, until recently the City destroyed them after only one year. SMCLC has also raised with the City Attorney the City's ongoing failure to **retain texts** at all.

### Office Compensation and Limits on City Attorney Tenure

The new City Attorney should be:

- Committed to bringing City Attorney's Office **compensation**—the highest in the State—in line. The compensation levels and subsequent pension benefits are not sustainable.
- Subject to an **outside limit** of no more than 8-10 years as City Attorney. Our last City Attorney's twenty-two-year tenure was too long.

Finally, the new City Attorney should be an outside hire. The office needs new energy and a new approach.

We request that this letter be provided to those involved in the search and to finalist candidates for the City Attorney position. We look forward to meeting with the legal recruiter to discuss these and other issues further.

February 6, 2017

Sincerely,

*Diana Gordon*

Co-Chair, Santa Monica Coalition for a Livable City

Cc: City Manager Rick Cole  
City Clerk Denise Anderson-Warren  
Seltzer Fontaine Beckwith  
Community Leaders