

Regular Meeting
July 9, 2002

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	<u>ADJOURNMENT:</u> Meeting adjourned at 9:13 p.m.....	2

Chairperson Kleinberg called the meeting to order at 7:00 p.m. in the Council Conference Room, 250 Hamilton Avenue, Palo Alto, California.

Present: Freeman (arrived at 7:05 p.m.), Kleinberg, Mossar
Absent: Beecham

1. Oral Communications

None.

2. Approval of a Draft Scope of Services for the Palo Alto South of Forest Avenue (SOFA) Park Architect Professional Design Services

David Bubenik, 420 Homer Avenue, spoke regarding the need for the architect to cooperate with the Historical Resources Board (HRB). The SOFA Park design was fitting in well with the Roth Building. A name was suggested for the Park. In 1891, Mr. Chaunkey moved to Palo Alto from Ohio with two children, purchased a lot, and built a house on 170 Homer Avenue, the first house in Palo Alto, which was only one block from the park.

Tom Wyman, HRB Member, 546 Washington Avenue, spoke about the need for the HRB to be added to the professional design consultant selection committee, including presentations by the consultant. The site was historic, in an historic neighborhood, and the Roth Building was an historical structure.

Carol Kidarski, 800 Cowper Street, spoke about the importance of maintaining the timelines for the park and allowing neighborhood input to continue throughout the process.

Elaine Meyer, 609 Kingsley Avenue, suggested modifications to the staff report (CMR:316:02) to add the St. Thomas Equines Church and the Museum of American History Museum to the second paragraph of page 2 and paragraph 3 of page 1 of Attachment A. On page 3 of Attachment A, Item 9 should include the HRB.

Assistant to the City Manager Chris Mogensen said in April 2000, the Council approved the Coordinated SOFA Area Plan. One of the key proposals for the Council-appointed working group was the development of a new park at the former Palo Alto Medical Foundation (PAMF) site. Community Services staff asked the Policy and Services (P&S) Committee to review the Scope of Services for the SOFA Park architectural design services and provide input.

Director of Parks and Golf Paul Dias said the development of the project was exciting. Staff was interested to hear if the P&S

Committee saw anything in the Scope of Services that should be added or changed.

Council Member Freeman asked whether a person from the neighborhood could be included as part of the selection team for the landscape architect. It was important for the landscape architect to understand that the neighborhood had a voice in the process.

Mr. Dias agreed. Staff already planned to bring the neighborhood into the process early because even in the selection process, staff planned to let the neighborhood know about the timelines.

Chairperson Kleinberg said the first paragraph of page 1 of Attachment A to the staff report (CMR:316:02) described the context and setting, indicating the historic nature of the area and the fact that it was located near Downtown. However, no mention was made to the fact that the community was created and included a mixture of new historic homes, including a childcare center that would be using the outdoor area for a play space. For that reason, mention should be made about the new construction and the different types of construction in the area; i.e., not necessarily single-family homes and denser population.

Mr. Dias agreed.

Chairperson Kleinberg said the last paragraph of page 1 of Attachment A addressed appropriate relationships with the adjacent homes such as the Roth Building, Scott Park, etc. As the park was being designed, she asked about the muse. When the configuration was being considered, a great deal of attention was being paid to the connection between Scott Park, the muse, and the big park. She thought the City had wanted to emphasize the link of the three green areas.

Mr. Dias said that was correct. The original intent was for all three to be designed at the same time. However, the architectural design currently underway would incorporate the theme of the park through the muse and to Scott Park. Staff could add some language to clarify that aspect of the design. The design needed to blend with the Scott Park side.

Chairperson Kleinberg commented about the need for a linkage to make it clear there was more than just the park such as the muse and the Scott Park. Given the density of population using the park, in addition to the tourists who would come to the Museum of American History, etc., it meant intense use. Page 3 of Attachment A to the staff report (CMR:316:02) mentioned presentations and some speakers asked that the HRB be included. The City Council's Finance Committee indicated a question mark.

Mr. Dias said at the time staff drafted Attachment A, no decision had been made as to which Council committee would handle the issue. Issues related to design review would be presented to the P&S Committee, but other areas were vague.

Chairperson Kleinberg suggested language that the Finance Committee would review "where appropriate," so the attachment was clear.

Council Member Freeman mentioned the housing adjacent to the muse on the corner of Waverley Street and Channing Avenue, which was in a cul-de-sac, with respect to comments about the San Antonio property and the issue of being able to get into the school area from the end of a cul-de-sac. In order to get to the park, the children living in the homes might need special access.

Chairperson Kleinberg said the kind of detail mentioned by Council Member Freeman in context of the houses should be included in all of the discussions.

Mr. Dias thought all homes had backyard access to the park.

Council Member Freeman had heard somewhere that one of the parks, either Scott or SOFA, would have more child-friendly apparatus and the other would be quieter.

Mr. Dias said the original concept for the SOFA park was as a passive park, not an athletic field. The determination about exactly how passive or the ages of children had not been made. At the current time, in preliminary discussions, the ages of the children ranged from tiny tots to about 10 years old. The philosophy would play out in meetings with the neighborhoods.

MOTION: Vice Mayor Mossar moved, seconded by Kleinberg, that the Policy and Services Committee recommends approval of the consultant scope of services and authorization to proceed with the project. In addition, the Historic Resources Board and Bicycle Advisory Commission would be included as review bodies; references to the St. Thomas Equines Church, Museum of American Heritage, non-single family, and the child care center would be included in the scope; neighborhood participation would be included in the selection of the architect firm; and attention be given to disability accommodations.

Chairperson Kleinberg hoped attention would be given to disability accommodations. Many people who lived in the area had wheelchairs. Although laws applied to the construction, if the landscape architect could bring that aspect into the design it would be appreciated.

INCORPORATED INTO THE MOTION WITH THE CONSENT OF THE MAKER AND SECONDER that attention be given to disability accommodations with respect to the design.

City Attorney Ariel Calonne said much of concern was expressed about not having condominiums or single-family homes privatize part of the park. Another concern involved conflict of interest issues. The contractors bidding on the project would want to make sure the people who were making the selection were not financially interested. His office would work with staff to make sure that was the case.

MOTION PASSED 3-0, Beecham absent.

3. Anti-Discrimination Ordinance

City Attorney Ariel Calonne said the Council allocated finances to support the Human Relations Commission (HRC) report on the legal review of the proposed Anti-Discrimination Ordinance.

Michael Colantuono, Attorney at Law, said the City's HRC proposed an ordinance to update the City's discrimination policies and ordinances. Some time had passed since the policies were initially put on the City's books. Legal water had gone under the bridge and the legal environment had changed. The Council asked for a legal review of the recommendations of the HRC. The bottom line conclusion of his analysis, with which he believed Mr. Calonne agreed, was that the vast majority of what the HRC recommended was lawful, practical and doable. However, there were two areas of non-discrimination law the City could not regulate: residential housing and non-City employment, both of which were regulated by State and Federal governments, thus preempting City control. Palo Alto could not regulate the relationship between landlords and tenants, even if the City was the landlord. However, if a landlord had a contract with the City for subsidies such as ground lease, etc., the City had some opportunities to address nondiscrimination issues. The other obligations under funding arrangements made the issue complicated. The HRC provided a list of social groups worthy of protection, areas of social and economic activities about which it had concern, and proposed exemptions or privileges which reflected social values such as segregating children by age and gender for certain sports activities, etc. The cluster could be summarized into three areas of inquiry for the Council. The relationship between the City and its employees and the legal scope of the City's power to eliminate discrimination in that environment was not clear. However, clarity of the law was unnecessary because the City could make a conclusion by one means or another. There were strategies available to ensure a discrimination-free workplace for employees. The second broad concept was the City's

relationship with contractors, whether contracts for services, subsidizing social activity, or non-residential leases, which was one of the greatest opportunities for the City to move its policy forward. The area was not as well covered by the current City ordinance as it might be. The last broad area was in the area of the City's own programs and services such as the output of the institution. The HRC made recommendations for enforcement of the policies, once adopted. Most of the enforcement mechanisms were sensible and doable. Some required skillful drafting in order to ensure legality and workability. In general, the enforcement machine worked. The City was cautioned against involvement in housing relationships and employment relationships to which the City was not party. Everything else worked. The idea of regulating the activity of people who contracted with the City was not a novelty. San Francisco published a law in 1981, which had stood since that time. The City already used its contract power. He had personally signed a non-discrimination affidavit in order to work for the City. The suggestion was to fine-tune the policy. The City was not preempted from eliminating discrimination from its own services and programs. With a couple of exceptions imposed on the City by the State Legislature, the Council could adopt the HRC's recommendation, if it so chose.

Council Member Freeman thought the City had one entity, the Boy Scouts, about which there was some concern. The City leased property to an organization with restricted participation or, if not participation, movement in the leadership ranks due to sexual orientation.

Mr. Colantuono said it was a religious creed.

Council Member Freeman asked whether the situation had been addressed.

Mr. Calonne said the City was able to address the situation with the notable exception that existing leases could not be changed. The least of which he was aware with the scouts had a renewal clause. The City could change the rules at that point. It was very conceivable that the local scouting group would be able to sign whatever kind of non-discrimination language the Council decided was necessary. It was not clear that the national policy was as compelling as it might have been a few years prior for the local troops. It should not be assumed that the local Scouts were unwilling to comply.

Council Member Freeman had no assumptions, just wondered whether it was addressed. She asked whether any other groups would be affected by the non-discrimination policy that currently fell under the

areas of City employment, City contracting, or City programs and services.

Mr. Calonne thought the HRC was calling for an exception for short-term rentals.

Mr. Colantuono said the HRC was not recommending leases shorter than 30 days.

Mr. Calonne said not requiring a policy for short-term leases would solve a thorny problem with wedding parties, etc. The City would run into many associational freedom issues trying to make such events open, which was some of the motivation for the exception. City employment and contracting was already regulated by a non-discrimination policy. What was not being addressed were some of the more aggressive drilling through contracts to business practices of contractors, which was something that was possible on a lot of fronts. Many cities were addressing issues such as living wage or the provision of medical benefits through contracting powers, which was still fairly broad. The City's ability to choose the manner in which it wished to spend its money remained broad. While not directly related to anti-discrimination, it was an area that many cities had started to move into that Palo Alto had not. Mr. Colantuono had indicated that from a legal standpoint, the enforcement mechanisms described in the HRC proposal were doable, more or less, with some effort. Although correct, the City Manager would need to address the cost and how the organization would be built to do so. He suggested that the P&S Committee make sure the Council engaged the City Manager actively to discuss the organizational implications of putting enforcement measures in place such as whether the City Manager would conduct enforcement, whether hearings would be involved, and how it would work. The suggestion could not be accomplished within the existing budget.

Council Member Freeman asked whether the 30-day exception meant a group that was very discriminatory in nature would have the right to rent the Lucie Stern Ballroom for 29 days, for example, the Ku Klux Klan or John Birch Society.

Mr. Calonne said yes, if the facility could be made available for 29 days. However, he doubted the City would make the facility available for 29 days.

Council Member Freeman clarified one day.

Mr. Colantuono said yes. A forum could be created in which First Amendment expressional activity was allowed. There were three types of forums: 1) traditional public forums such as speeches in public squares and parks, where people were allowed to express themselves no matter what, and the government could not interfere

based on the rules that regulate the content of the speech; 2) non-forums such as the City Attorney's private office, which was not a forum where someone could set up a bullhorn and express political views other than the City Attorney; and 3) designated public forums such as spaces typically owned by government where the government chose by policy to make it available for expressed activities.

Mr. Calonne said bus shelters were designated public forums.

Mr. Colantuono said there were two kinds of rules in a designated forum. One involved the rule designed to preserve the nature of the forum. The second involved reasonable time, place, and manner restrictions. For example, the Council's Chambers was a public forum and people could speak. However, there were restrictions on time and content such as only City business, because of the nature of the forum. Other limited public forums included bulletin boards, library storyteller hours, etc. His understanding from Mr. Calonne was that the City had treated the Community Center as essentially a traditional public forum in which the rules were not content specific. There were rules about alcohol and how long the lease could be and security deposits, but the content of speech was not regulated. Once a forum was created, it was difficult to close. The wrong time to close a forum was right after the Nazis applied for a speaking permit. In general, the whole set of First Amendment concepts set boundaries around the non-discrimination policy because much of the activity that was found offensive in a discrimination context could be used as expressive activity as well. The HRC wisely recommended the 30-day lease exception because it neatly separated the forum issues from discrimination issues in probably 90 percent of the cases.

Chairperson Kleinberg asked how the City might conflict with First Amendment law if it tried to limit certain kinds of offensive speeches. For example, the City had a rule that no signage was allowed on utility poles. She asked for an explanation of why the City could not limit the kind of hateful speech or activity that a group such as the John Birch Society or Ku Klux Klan might propagate.

Mr. Colantuono said lawyers referred to the issue as the "heckler's veto." Many cities recognized the difference between a parade of Girl Scouts in terms of the consequences for potential crimes and violence and a Nazi group. The situations were different. There was not a police chief in the country that would not recognize the need for additional officers for one group and not for the other. That was a reality. However, to exempt the Girl Scouts from paying for an insurance policy while the Nazi group had to give \$1 million liquid, allowed the heckler's reaction to the speech to effectively shut down the speech. Long Beach had had a parade ordinance,

requiring \$5 million insurance, but their practice was to routinely waive the insurance for good causes. When the gay pride organization wanted to march in Long Beach and the police chief recognized there would be Bible-thumping opposition requiring more police officers on the beat on overtime, Long Beach sent the bill to the gay pride organization. The gay pride organization took the issue to the Ninth Circuit Court and won. The only way to charge insurance and security was to apply the same policy to every organization without exception.

Chairperson Kleinberg described an extreme scenario in which the Ku Klux Klan wanted to hold its international convention at the Lucie Stern Center on July 4th, and the City knew there would be a lot of angry upset people. In fact, a militia group was living in the Palo Alto hills, indicating they would come down from the hills. The police chief recognized the potential for a riot.

Mr. Colantuono said the easy answer was for the City not to allow critics of a group to shut down the group. The practical answer was that it was very likely the City already had a detailed set of rules for the use of the Lucie Stern Center such as the number of people, the length of time in advance, the nature of the use, alcohol use and insurance. All of the rules were relatively innocuous in and of themselves, the package of which would make it unlikely any real volatile activity would occur.

Council Member Freeman asked whether there was any magical number about the 30-day limit.

Mr. Colantuono said the 30th day in a residential context involved the civil laws regarding tenancies like preventing summarily evicting someone without an unlawful detainer proceeding or some real eviction. If less than 30 days, all of the protections did not apply and was not considered tenancy according to Civil Code purposes.

Human Relations Commissioner Andrew Pierce, 363 Ely Place, said the 29 days came from the San Francisco ordinance. He had perused different ordinances for different ideas when drafting the proposed ordinance. The First Amendment issue was something the HRC wanted to consider. No event would be close to 29 days long. Anything longer was a permanent occupation of City property to the exclusion of other people. The HRC was not thinking about content, but thinking more, for example, about a Jewish religious school that could only find a place to rent at Cubberley once a week. Under the new ordinance, the school could use the facility because other people could use the same room the next day. The HRC did not want to exclude all activities that were religious or had other affiliate qualities.

Council Member Mossar said as a practicality, the Lucie Stern Center was highly popular and highly booked. It was difficult to imagine a block of 29 days being available for a single group to monopolize the facility.

Mr. Calonne said Herb Borock brought to the Council's attention the Building Regulations Report. The City used the Administrative Regulation Authority to draft regulations for the City Manager and the use of City facilities, specifically to deal with real time, place, manner, and prior restraint, and constitutional issues related to regulating the use of City property. The City was in good shape in terms of the practical answer Mr. Colantuono gave regarding a group that was controversial and time and labor intensive.

Council Member Freeman asked whether the 29 days could be reduced.

Mr. Colantuono said there was no magic to the 29 days.

Council Member Freeman asked about other issues that had surfaced since 1999, including how the proposed ordinance affected other City issues like health insurance for partners, and whether anything else was currently an issue in those three areas.

Chairperson Kleinberg asked whether Council Member Freeman's question was related to positive as well as negative issues.

Council Member Freeman said negatively if the City proceeded.

Mr. Calonne said no. In the leasing of City facilities, the City should probably expand what existed. Some of what was slightly disconcerting about the HRC proposal was the level of detail, and the administration was probably bigger than was intended. He had considered a broad policy statement establishing the Council's policy about discrimination with a companion broad direction to the City Manager to implement. More scrutinizing could then be done in the areas where the City had gaps. In other words, rather than trying to create a detailed set of plans supporting the anti-discrimination administration, the City could have a broad policy statement with a broad direction given to the City Manager, letting staff fill the existing gaps such as leasing or contracting.

Chairperson Kleinberg asked why the City Attorney would not want the detailed proposal as presented by the HRC.

Mr. Calonne had concerns about the proposal in terms of tidiness. The State had recently enacted some anti-discrimination changes; a more detailed approach created more opportunity to become out of date and for people to "nit pick" the details, where a broad policy

statement could be applied somewhat more easily. By putting the administration details on the City Manager, particularly in terms of cost, the City would probably not want to create a new administrative enforcement body without the Council being very conscious of doing so such as a civil rights commission with investigatory jurisdiction.

Council Member Freeman asked whether City staff could create a broad statement that included the HRC's recommendations in a more detailed manner.

Mr. Calonne said his suggestion was made intellectually and not as a recommendation, although it was probably possible to address the HRC's issues fairly precisely with a broad statement.

Chairperson Kleinberg said San Francisco was an unusual situation. The question was about communities comparable to the City that did not have as complicated a set of demographics, whether communities like Palo Alto tended to have more broadly stated policies or whether there were detailed ordinances like San Francisco's.

Mr. Calonne said the issue was not the size of the community but the economic power of the community. Palo Alto was economically powerful; therefore, Palo Alto could make a difference in the Bay Area. Comparisons to similarly sized cities would be misleading. A lot of money ran through the organization because of the utilities.

Mr. Colantuono said whenever an attempt was made to accomplish social justice, the match between the institutional resources and the challenge had to be considered. At some level, the comparison could not be a community with the same values or demographics or even economic similarities, but one that had roughly the size of staff. As a contracting lawyer, he had contracted with San Francisco as well as Palo Alto. San Francisco's legal services contract was very thick and was an intellectual exercise in specificity, but was burdensome for both the contractors and the enforcing agency to read and understand. If a city adopted a more ambitious structure than it had the attention span or resources to attend to, it opened itself up to hypocrisy such as inability to enforce its ordinance. The City's ambition should be scaled to its available resources. Idealism and principles, however, did not need to be scaled.

Vice Mayor Mossar asked why the City would want so much specificity if a strong policy statement would suffice.

Commissioner Pierce said specificity came in three areas. The list of groups was a simple policy issue such as whether sexual orientation should be on the list or not. He got a strong message

from the Council three years prior that sexual orientation should be on the list without question. The HRC added housing status in an attempt to designate between homelessness versus housed and renters versus owners. The family status was according to the number of children in the household. The Council could decide that less categories were necessary than recommended by the HRC. The HRC had understood the specificity in activities was doable in one sense or another like funding, City employment, and facilities. The enforcement specificity was probably of greatest concern to the City Attorney. The HRC deliberately left enforcement fairly vague and as broad as possible, knowing it could be pared down later. Some of the items were more self-enforcing than others. If the City had a contract that indicated discrimination could not occur, contractual remedies could determine enforcement. The City could have a policy that tennis courts and other similar areas not discriminate. The area of concern for the City Attorney was whether administrative enforcement hearings and compliance officers would be necessary. The HRC considered that level of detail was appropriate for the City Attorney and City Manager to work out. There was room for discussion.

Mr. Colantuono said Commissioner Pierce's comments were consistent with his own opinion.

Vice Mayor Mossar presented a scenario using Commissioner Pierce's example of discrimination on the tennis courts, for example, a person might go before the Council during Oral Communications to claim they were unable to play because they fell into one of the designated groups.

Commissioner Pierce said the HRC had not addressed the private right of action such as whether someone could sue the City.

Vice Mayor Mossar asked what the City would do to deal with the situation.

Commissioner Pierce said the HRC's recommendation gave clear policy direction to City employees, who would not do things unless policy direction was given. The City's employees wanted to do the right thing; the Council was giving them the direction, which was an important step.

Vice Mayor Mossar asked what would occur in such an extreme case.

Mr. Calonne said contracts could be enforced and enforcement methods could be applied to City employees who misbehaved on the job. He would not want to see an administrative enforcement mechanism created without input from both the City Attorney and

City Manager. Staff would examine the City's current enforcement mechanisms to determine whether or not adequate.

Chairperson Kleinberg said the City already had some enforcement mechanisms anyway, which could be extended.

Mr. Colantuono said if someone came before the Council claiming to have been shut out of a park for reasons that were inappropriate, the complaint would be referred to the City Manager, staff would investigate the issue, a determination would be made as to whether the behavior was appropriate, and, if a good reason was not found, an apology would be made to the concerned citizen and staff instructed accordingly. At some level, the City was already handling the issue and already had enforcement mechanisms in place. However, the City had not tied its hands by creating a tribunal body.

Mr. Calonne said Commissioner Pierce argued effectively that some of the policy recommendations were simply good risk management. Some of the discrimination in the recommendation reflected behavior that was already unlawful. It was just good risk management for the City to have policies and practices that involved training people to behave appropriately, of which he heartily approved. Mr. Colantuono's comment was appropriate about the City's ambition outstripping its ability. Tailoring the two was an art he was pleased to see raised. His concern was whether the organization could be engaged in a way that made it happen effectively.

Chairperson Kleinberg wanted the P&S Committee's discussion to focus on the affected groups and categories. Implementation, enforcement and finance issues would be addressed at a later time.

Council Member Freeman had been liaison to the HRC and had seen people use the HRC as a vehicle, rather than the Council, to discuss forms of discrimination or City ordinances that discriminated against specific groups of people who lived in certain places. She questioned the appropriateness of such actions administratively. One of the questions was whether or not obesity was included in any of the categories and whether any current law covered obesity.

Mr. Colantuono said yes. There was a fat liberation organization, which used the term "fat" without euphemisms, with legislative proposals. There was activism on the subject of obesity. The categories, however, included people who were so obese that it affected them only to the extent that it was considered a disability. Most people who were fat were not disabled within State and Federal standards because meaningful life activity was not prohibited. If the Council wanted to address obesity, a

category would have to be added. If the category was added, something like physical appearance would be more appropriate. The way in which the category was labeled was sensitive. He would be inclined to ask Commissioner Pierce to continue researching.

Mr. Calonne was unaware of the current politically appropriate way of dealing with the issue of obesity. The only context in which he had dealt with obesity was with respect to size limitations in terms of employment discrimination.

Chairperson Kleinberg gave an example of how the issue of obesity could apply to the City such as the size of seats at the Lucie Stern Theater. Accommodations were provided for people in wheelchairs, so other situations might arise dealing with the vagueness. She was interested in whether the disability issue included different health and fitness aspects, and whether there was a health and safety issue related to someone's disability. For example, a child with HIV might be excluded from a camp where there was rough and tumble play and blood might be spilled.

Mr. Colantuono said the proposal suggested the City use the term "disability" as defined in State and Federal law. Federal law involved the Americans With Disabilities Act (ADA), which largely eclipsed the Vocation Rehabilitation Act. State law had recently been amended to cast a wider net than even Federal law. HIV infection was a disability and triggered legal protection. The protected status did not prevent reasonably necessary regulations for the protection of public health and safety.

Chairperson Kleinberg said the City was already subject to State law when it offered services to its residents.

Mr. Colantuono said a person who had been involved in male-on-male sexual contact since 1977 could not donate blood.

Chairperson Kleinberg asked whether any State law directed Palo Alto to allow an HIV positive resident child to enroll in a karate camp where the child could get cut and bleed.

Mr. Colantuono said the City was required to reasonably accommodate the disability.

Chairperson Kleinberg clarified the City's ordinance would not change the protection.

Mr. Colantuono said the City's ordinance would not mean the City could ignore the disability. In a recent case, a worker in a chemical plant had a liver condition and wanted a job that exposed him to fatal risk. The employer did not want to put the worker at

risk. The worker said it was his choice and not the employer's. The Supreme Court decided the employer had the right to not allow the employee to be exposed to the risk.

Chairperson Kleinberg clarified the stricter rules were State and Federal rules, which applied anyway.

Mr. Colantuono said yes; the City's ordinance called out the State and Federal rules.

Chairperson Kleinberg thought to a certain extent, the City's proposed ordinance extended beyond the rules to add other categories or situations and might cost more money because currently the City was not required by State or Federal rules.

Mr. Colantuono said the categories the HRC recommended were all traditional, well-defined, and well-understood categories with two exceptions. Housing status was a novelty behind which there was not a lot of case law. Familial status was a new way of expressing a category that was already protected under California law; e.g., marital status and childbearing were protected. The obesity and physical appearance issue might have some precedent to which the City should look.

Chairperson Kleinberg clarified when the term "disability" was defined the category would be included. She asked whether disability was a term already defined in case law.

Mr. Calonne said yes.

Chairperson Kleinberg asked Mr. Colantuono about his comment in the opening of the memorandum on the open question about whether the City made legislation against discrimination in City employment.

Mr. Colantuono said one principle involved the fact that charter cities had very broad power to determine how to staff the institution such as what positions to fill, what to pay the staff, qualifications, etc. Palo Alto was a charter city and had that power. The other principle was that no city could discriminate in employment in violation of State laws. Notwithstanding the fact that Palo Alto was a charter city, it could not discriminate against a certain people. The open question was whether the City could affirmatively protect from discrimination categories of people in the labor force that were not protected under State law. An old case from the early 1960s involved a firefighter in Los Angeles who was disciplined for refusing to eat dinner with his mates, including an African American firefighter. The city enforced its non-discrimination policy and forced the firefighter to eat with his mates or find another job. The court said, notwithstanding

the City's right to regulate discrimination, it was okay. A recent case involved Los Angeles' charter that created ample civil service commission remedy. An employee alleged discrimination against him and was terminated for the wrong reasons. He received a right-to-sue letter from the Fair Employment and Housing Commission (FEHC) but he had not exhausted the city's internal administrative procedure. The city demurred to the complaint, saying the employee had not exhausted administrative remedies. The Second District Court of Appeals said in a recent published decision that it would not take the case. Such cases did not give him a lot of comfort because the first case was very old and was a pattern where the court would look to do the right thing and pre-dated current language, which was much more preemptive than what was applied in 1965. The exhaustive administrative remedies were as much about case management for judges as the elimination of discrimination in the world. It was a no-brainer that a charter city that wanted to discriminate against Armenians would lose. If the question was framed: "Does the city have the right to discriminate?" it would lose. If the question was framed: "Does the city have the right to prevent discrimination?" it might win, but intellectually the two were so linked that he sensed the City would not have to go that route. Instead, the City should have a broad framework of employer/employee relations mechanisms designed to create fair treatment for all people in the workplace and should use the mechanisms to ensure that the policy concerns were addressed. He would not handle the issue through legislation, but through management.

Chairperson Kleinberg clarified through the implementation enforcement criteria.

Mr. Calonne asked whether the open question was whether the City could direct that the City Manager and City Attorney not discriminate based on housing status in the hiring of employees for the City of Palo Alto. On the other hand, the Council could direct the City Manager not to discriminate based on obesity and physical appearance in the qualifications for City employment.

Chairperson Kleinberg asked whether the City could administratively or managerially require top executives, firefighters, and utility workers to live in the City.

Mr. Calonne said no. Constitutionally, the City could not make a policy of that nature.

Mr. Colantuono said employee unions and the Constitution directed that cities could not make that kind of policy.

Chairperson Kleinberg asked for a definition of a non-profit sheltered workshop.

Mr. Colantuono said such workshops were designed to train developmentally disabled individuals by creating a work-class environment as a way of transitioning people into a more productive lifestyle. The term "sheltered" workshop was used because it was not open to the world at large.

Chairperson Kleinberg asked about the Palo Alto Police Department (PAPD). Having been liaison to the HRC for a couple of years, the most common complaint people presented to the HRC involved allegations of disparate treatment by a police officer based on race and racial profiling. The PAPD was dealing with the issue. In speaking with people in the community, the issue was not resolved in many people's minds. A recent case involved someone who was hawking anti-Semitic materials in front of a Palo Alto grocery store. A PAPD officer did not treat the person as politely as should have been the case. She asked whether, under the proposed ordinance, the City would be asking for greater enforcement of the PAPD administration than already existed.

Mr. Calonne said greater enforcement was possible. He suggested the City Manager direct the Police Chief to create a general order establishing guidelines for non-discrimination, particularly if categories not already constitutionally protected or under State and Federal law were being added. If the issue of appearance was included, it should be addressed through a general order in the PAPD. The general order became the basis for general discipline or misconduct of a police officer. Police general orders were a very detailed set of conduct guidelines, far more detailed than the regular employees lived with and were strictly a function of the liability and the fact the PAPD was dealing with risks to the officers and threat of death. Police regulations were massive compared with the regular employees.

Chairperson Kleinberg asked Kathy Espinosa-Howard to describe implementation and administration, including the costs.

Human Services Administrator Kathy Espinosa-Howard said the City had experience in the area of dealing with the treatment of the mentally ill, which was a good example of how managers and front-line people could attempt to implement the policy with the proper training. Many mentally ill, homeless people visited Palo Alto facilities and libraries. The City had a policy not to discriminate or decrease access to that population. Facility managers and front-line people were directed through a training program. When in such a situation, the employee was given a way to behave and a means by which to resolve the issue or find help. With

the implementation of the policy, she could see contractors with whom the City engaged who provided with training and the ability to deal with such instances. For example, at the tennis courts at Cubberley, a person felt they were being discriminated against and not allowed to play. Hopefully, the individual would approach the facility manager on site and explain the situation. The intention was for the facility manager to address the situation immediately, thus de-escalating the situation. The facility manager would have been trained in the policy and how to handle the issue, thus resolving the problem at that point rather than allowing it to move further through the organization. The goal was to resolve issues at the closest level to the problem rather than having a hearing officer and a hearing. Most situations could be resolved and even investigated on site rather than waiting for someone to come from elsewhere after the situation was over.

Chairperson Kleinberg asked about the training aspect; whether it was something new and whether it involved a cost.

Ms. Espinosa-Howard said the training would be integrated into the existing training. The City already had a good training program to address discrimination and that could be modified to include any new policy.

Council Member Freeman said the policy or ordinance was important. Anything that was done differently in the City would require funding. Implementation should not stop the forward movement of an important policy that affected the group. She had only been a liaison to the HRC for a short time, but had received calls and heard from people who had not been able to receive the answer they wanted. They had tried to go through the local manager or even the Police Chief, City Attorney, or City Manager and had not received responses or been able to obtain clarification to the issues. She was not sure what mediation covered such as discrimination issues, but in her short time of talking with people who felt discrimination by the City, they did not know where to go and often when they made a decision, were not satisfied with the action or inaction. She was concerned. It might be because the City did not really have training for something because it was not in existence. The question was whether Ms. Espinosa-Howard thought training would help the situation about which she had so often heard.

Ms. Espinosa-Howard asked whether the situations occurred on City facilities.

Council Member Freeman said the situations were all different. One was the noise ordinance and whether or not the City following the noise ordinance to the letter of the law. A group of individuals came to the HRC and the HRC told the group they did not know where

to send the individuals. She hoped something more concrete would help individuals obtain answers. The question was whether training of the nature referred to by Ms. Espinosa-Howard would assist.

Ms. Espinosa-Howard said if the issue occurred on City property and City staff and managers were responsible, she was comfortable the employees could be held accountable for complaints. The City was obligated to inform managers and staff members who ran the facilities about the policy or ordinance and make sure the proper training was given. Once the City had implemented the policy and the conducted training, it could then hold people accountable for inappropriate behavior or not following through. The managers were obligated to follow through on policies of that nature.

Vice Mayor Mossar said some people would never be satisfied with the answer. It would be foolhardy for the City to assume that the process or training or policy would handle all situations. Reasonable people could disagree with the outcome.

Council Member Freeman said some people would never be happy with a response, but a non-response was unacceptable.

Mr. Calonne said the City had a policy and procedure that specified what was to happen depending on the communication being carefully characterized as a complaint. There was already something on the books to tell the City Manager what to do when a citizen complained about anything. The broader area was more difficult and could be considered a case of the "fox guarding the hen house." Whenever an organization was responsible for monitoring its own behavior, it raised suspicion in the eyes of the victim. The issue was addressed in some areas with auditors and police conduct commissions. The police had been the focal point for much of the discrimination issue because their behavior had the greatest potential for harming people in many instances. The other concept was some kind of City ombudsman person who would be available to address complaints. The issue needed to be addressed from a very broad human relations and psychological standpoint that no one would ever trust a self-assessment where the judge concluded that the judge did nothing wrong.

Mr. Colantuono said the issue of teaching the sexual harassment law and policies was that multiple points of access were necessary. Each face behind the counter would have a particular resonance with the particular face on the other side of the counter. The more openings that were given to someone to find the place where they felt comfortable having their needs met, the more likely it would happen. Within the constraints of budget, buildings, and other logistical details, multiple points of access were better than fewer.

Chairperson Kleinberg asked whether the P&S Committee could forward on the ordinance while leaving the manner of implementation and enforcement with the City Manager, which would return to the Council or other body with an implementation plan along with any attendant costs.

Mr. Calonne agreed. The P&S Committee was encouraged to provide staff with guidance on categories. If the P&S Committee were comfortable expanding into the leasing of City facilities, it would also be helpful.

Chairperson Kleinberg said the P&S Committee probably had many questions but did not know how to implement. It would be better for administrative managers and others who knew how to implement and keep costs down.

Lakiba Pittman, Vice Chair HRC, 365 Olive Avenue, spoke in support of the intent of the proposed ordinance. When she first came on board the HRC, the anti-discrimination ordinance was already well underway. She was unclear how the City would be operationalized and administrated but wanted to voice her support. Although in her 55-year residence in Palo Alto, she had not experienced excessive discrimination, discrimination existed in the City and many people had not figured out how to resolve some of their challenges, complaints, and issues.

Commissioner Pierce spoke briefly about the history of the anti-discrimination ordinance, which began in 1998 and 1999 with the advent of Proposition 209, the anti-affirmative action law. The HRC wanted to ensure that the City complied with Prop 209. The City's ordinances did not contain a comprehensive ordinance similar to San Jose's. Some policy statements had been created since that time, but were not official City ordinances or Council statements. The HRC felt there should be a general policy statement but that there was a problem with preemption of some of the existing City ordinances. For example, the policy about families with children was probably not enforceable. The purchasing ordinance might have conflicted with Prop 209 but enforcement had been scaled back. He said former Mayor Fazzino and City Attorney Calonne made some suggestions, that the HRC was a good forum in which to take up the issue. The HRC set out to do something that was both legal and more comprehensive than existed on the books. A couple of attorneys had sat on the HRC at the time and consulted with the Council in January of 1999 or 2000. A public hearing was held. Exemptions were added at the suggestion of the Palo Alto Housing Corporation. The shelter workshop idea came from elsewhere. The City could not regulate rental housing, per se. If the rules were not obeyed, funds could be withheld from projects, which was the intention. It was possible for the City to bar sexual orientation discrimination

as a condition of giving money. There was no magic to the 30-day figure, but was something that was gleaned out of other ordinances. Enforcement was always something the HRC knew required more development but had not wanted to hold up the process by trying to figure out how to handle everything. The City Manager could be given the list of suggestions for enforcement and give his opinion on whether doable and save a lot of work. Some administrative work could be handled by the City Manager. The previous City Manager was presented with the proposal but action was held up for a long time due to a concern about an indefinite time period. With regard to City staff, the people he spoke with were all supportive. His impression from both the City Attorney and City Manager's Offices was the spirit of accomplishing it. The City Manager and City employees needed direction on policy. Staff found it difficult to move forward when simply told the right thing to do. However, when given a policy, staff was able to move forward. Some aspects of the San Francisco ordinance were not applicable to Palo Alto; however, some were. Federal standards were adopted, when appropriate. Although the policy might cost money to implement, it might cost more money not to implement the policy. Much of what was mentioned was already unlawful or unconstitutional. However, without a comprehensive policy, the accuser could say the City never told its employees or had a policy and be held liable. Private corporations found that having a policy on sexual harassment protected them from liability. Concerning the Boy Scouts, they had never spoken or given an official position at any of the HRC hearings. However, during a breakfast meeting, he was told that depending on the details of the enforcement, the local Boy Scouts did not discriminate and were willing to take their chances that no one could prove that they discriminated locally. The Boy Scouts also had some functions that never discriminated such as educational functions that were open to everyone. He wanted to divorce the whole issue from the Boy Scouts because the policy was much more important than how it affected one organization. The reasons for moving forward with a policy included the fact that other cities had policies including San Francisco, Oakland, Santa Clara County, Hayward, Santa Monica, Long Beach, Anaheim, Los Angeles, Cook County, and Portland, Oregon. He also researched the ordinances of cities around the country that were available on the Internet. Hayward and Redding both had ordinances. The proposed language covered some areas not currently covered by State or Federal law and gave clear policy direction to City employees, protected against liability, and was the right thing to do.

Council Member Freeman asked about the difference between ordinance and policy.

Mr. Calonne said an ordinance established criminally enforceable rules. A policy would be implemented by an administrative

direction by the City Manager or other Council-Appointed Officer (CAO). It might be that an ordinance simply established the policy or it might do both. The ordinance might not specify criminal enforcement remedies. In the case of a contractor, the City might be better off with financial penalties than criminal sanctions. Ordinance and policy were not exclusive; ordinance added a dimension that was not possible with a policy alone. The question was whether the criminal enforcement dimension was necessary for effectiveness.

Mr. Colantuono said a policy was a statement of where the City wanted to go. The ordinance was one of the tools to get there. At the current time, staff had not developed a specific regime of which tools.

Council Member Freeman asked what the HRC had recommended.

Commissioner Pierce said the HRC had recommended an ordinance because it wanted the Council to make a decision and not the City Manager. The political arm of the City was the appropriate place for direction about discrimination. It was fine to the extent the issue could be evolved or some of it could be handed off to other departments of the City. However, something as important as the anti-discrimination ordinance should not depend on what the City Manager thought. A policy decision needed to be made at the highest level. The enforcement tools were something the Council should be thinking about, not just the City Manager.

Council Member Freeman asked whether the P&S Committee could ask the City Attorney to provide an analysis of the best way to proceed as the next step.

Mr. Calonne thought Commissioner Pierce was suggesting that the City Manager would be better equipped. A range of policies was already in existence. Part of the job was to collate the materials, and see how they fit together, which could be handled by the City Manager. If the P&S Committee and the Council believed there was a need to articulate a policy, it could announce it and give staff direction to create implementation. Staff might return with an ordinance that stated policy or a resolution that stated policy and a series of administrative regulations for implementation. Commissioner Pierce might have been alluding to it by indicating staff needed policy direction before it acted. A policy should not be hung up by the implementation element. The policy could stand alone and staff could be asked to return with implementation.

Vice Mayor Mossar said making a policy decision included finances, risk management, and time. The Council had established a set of

priorities that did not include having staff spending hundreds of hours developing a program and recommendations for adoption. The HRC's concern was that the Council adopt a policy that eventually fell into a chasm and not rise again for many years. At the same time, the Council had to be reasonable about what it expected to have happen. If anti-discrimination was the "hot button" item, the City Manager would be well within his responsibilities to return with a clear statement of the tradeoffs.

MOTION: Vice Mayor Mossar moved, seconded by Freeman, that the Policy and Services Committee recommend that the Council make a strong anti-discrimination policy that included protected groups and dealt with the leasing of City facilities with direction to the City Manager to return with a proposal for implementation strategies that would be returned to the Council for discussion and implementation.

Council Member Freeman wanted to respect the HRC recommendation for an ordinance and not simply a policy. Along with the motion, she wanted to include direction to the City Attorney to evaluate the possibility of an ordinance. The City Attorney already budgeted working with the HRC.

Vice Mayor Mossar said the reason for her motion was the belief in the importance of adopting strong policy, which was within the Council's purview like research. The need for an ordinance was something that should be addressed. Her motion, however, was to move the Council quickly forward on adopting a strong anti-discrimination policy.

Mr. Calonne said the two were not inconsistent. Staff could do something in the form of an ordinance that was also a policy statement and still be directed to return with implementation. The Council could still act on the policy by ordinance without creating a problem for staff.

Council Member Freeman asked whether she had to make a separate motion.

Vice Mayor Mossar said there was not agreement.

Council Member Freeman asked whether in order to move in the direction that Mr. Calonne had just described, would she have to make a substitute motion.

Chairperson Kleinberg agreed with the motion as a minimum statement of where the City should go. She also agreed with Council Member Freeman's desire to do something much stronger. The item had sat around for a number of years. The information that was presented

to the P&S Committee was very good, and a decent ordinance could be fashioned without doing much more research. The P&S Committee had anecdotally heard that there was a need in the community for an anti-discrimination ordinance stronger than the accumulation of policies already in existence. The Council did not need a march on City Hall to be convinced there were people in the community who might not have given testimony about discrimination in small and large ways. Some of them were considered anathema to ideas held by others, yet were still being discriminated against. There were many small discriminations that did not rise to the level of acknowledgement because people were so accustomed to them. Lives would be greatly enhanced if no longer subject to discrimination. There was a fundamental policy in Palo Alto that all residents had a certain level of privilege and experience in pursuing their lives, which was the fundamental hook on which was hung the anti-discrimination ordinance. It went back to the Constitution in terms of the rights and privileges enjoyed in the Constitution. An ordinance made it a stronger law. The reasoning behind going for a simple policy statement seemed to be a finessing of the issue because it was not a top priority item such as moving it through without the discussion. She understood the desire not to spend a lot of staff time and money on the issue, which might be a politically correct way to get it done. On the other hand, there would never be a date in time when anti-discrimination would be one of the top five priorities because it was not an all-encompassing City crisis. It affected the people who were being discriminated against, who were by definition a group of minority and different interest groups and circumstances. It behooved the people in the majority and the people in power to step up and do everything it could, including an ordinance, to protect people who were entitled to privileges and experiences. It was not a top priority because it did not affect everyone in the City equally, which was why it needed a special place in the attention of the Council. There would never be a better time than the present for the Council to step up to the challenge and declare that Palo Alto stood for certain things and certain people needed to be protected. That could happen only by the force of an ordinance, not general policies. Then the Council could ask what it would cost to enforce it, which could be step two. It might take a while. The first step was to draft an ordinance.

Vice Mayor Mossar said her intention was not to finesse the issue of priorities, but was to move the City to a strong statement.

Chairperson Kleinberg asked why a policy statement would be quicker than an ordinance.

Vice Mayor Mossar said the adoption of an ordinance would not be quick because the ordinance would raise a number of issues, some of

which were raised at the current meeting, requiring weighing issues. An ordinance could not be adopted and determine how it would be enforced later.

Mr. Colantuono said an ordinance could be adopted that was a statement policy calling for further policy development and was not self-implemented. The ordinance was symbolic once it was published.

Vice Mayor Mossar had no problem with an ordinance that was simply a statement of policy. Her motion was that it was at the policy level that could be engaged quickly.

INCORPORATED INTO THE MOTION WITH THE CONSENT OF THE MAKER AND SECONDER to direct the City Attorney to prepare an ordinance that would make a strong policy statement that was not self-implementing and the details of implementation would follow.

Vice Mayor Mossar thought the City Manager should be in charge of the timing.

Chairperson Kleinberg wanted to give the City Manager a time certain, whether a year or 18 months.

Mr. Calonne thought the timing aspect should be held until the City Manager was consulted.

Vice Mayor Mossar said the idea was to flush out high-level concepts. The City Manager needed ample opportunity to present his needs and vision.

Chairperson Kleinberg asked whether the ordinance would have any force of law or was simply a statement.

Vice Mayor Mossar thought there might be three versions of the motion. Mr. Colantuono just said the City could have an ordinance that was a policy statement that was not self-implementing.

Chairperson Kleinberg said there should be a timeframe for implementation.

Vice Mayor Mossar said the City would adopt an ordinance that was a strong policy statement and direct the City Manager to return to the Council with a proposal for how to move forward. The City Manager might return with a proposal that would be implemented in three years.

Chairperson Kleinberg asked whether the report should return to the Council or the P&S Committee.

Vice Mayor Mossar said the P&S Committee was fine. The City Manager should be given an opportunity to respond to the P&S Committee before being directed what to say.

Mr. Calonne said the City Manager had asked that staff return to relay information, so there was nothing to stop from Mr. Benest from discussing implementation on a broad level when the item returned to the Council. Mr. Benest did not want things held interminably in committee.

MOTION PASSED 3-0, Beecham absent.

MOTION: Council Member Freeman moved, seconded by Mossar, that the Policy and Services Committee direct the City Attorney to review the possibility of including physical appearance as a category to be a companion to the report that returned to the Council.

Mr. Calonne said staff could come up with some examples of where it had been done before like survey other cities.

Council Member Freeman said Mr. Colantuono had indicated it was probably preferable to use the term "physical appearance."

Mr. Colantuono said staff might be asked to find out about other ordinances in order to make a policy suggestion about whether to pursue it and, if so, how. The other direction to the City Attorney might be to return with a specific proposal that was sensible in light of what had been done.

Council Member Freeman was interested in the narrow end of the file.

Chairperson Kleinberg agreed. The issue could be studied forever, and she wanted some practical applications on the table.

Vice Mayor Mossar asked whether the question was to return as a policy statement in the ordinance.

Mr. Calonne said in order to address the issue as a companion in the report back to the Council, a simple memo should be submitted.

Chairperson Kleinberg agreed.

Vice Mayor Mossar said if the Council wanted to add the item as a category, information could be given.

Chairperson Kleinberg said currently, the P&S Committee had a unanimous recommendation to the Council that did not include physical appearance, so it would be a companion piece.

MOTION PASSED 3-0, Beecham absent.

MOTION: Council Member Freeman, seconded by Mossar, that the Policy and Services Committee direct the City Manager to respond back to the Council with a timeline when the implementation aspect could fit into his schedule along with any financial implications.

Mr. Calonne was more comfortable having the report returning to the Council because holding the item in committee would delay the process.

Council Member Freeman agreed.

MOTION PASSED 3-0, Beecham absent.

Chairperson Kleinberg thought the item should not return on the Consent Calendar.

4. Human Relations Commission Proposed Recommendation to the City Council to Adopt a Resolution in Support of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Assistant to the City Manager Chris Mogensen said the Convention on the elimination of All Forms of Discrimination Against Women (CEDAW) was adopted in 1979 by the United Nations General Assembly. In 1980, the United States signed on. Currently 97 nations had signed on and 170 countries had ratified the treaty. The Human Relations Commission (HRC) asked the Policy and Services (P&S) Committee to review and recommend approval of a resolution in support of CEDAW.

Human Relations Commissioner Lakiba Pittman, 365 Olive Avenue, said the CEDAW came to the HRC prior to her coming to the HRC but had been discussed and continued to be discussed. It was one more opportunity for the City to adjust differences and values. She was especially motivated by the CEDAW, asking the P&S Committee to adopt the resolution.

Human Relations Commissioner Andrew Pierce, 363 Ely Street, said the executive branch of the government decided the CEDAW should be adopted. The HRC decided CEDAW was a national policy of which the City should go on record as being in favor of. In years prior, when researching the outline for the previous agenda item, he came across the San Francisco Administrative Code implementing CEDAW.

City Attorney Ariel Calonne said there were two kinds of international law: international law created by treaty and international law created by custom. Customary international law

was created by normative standard behavior developing over time among nations so that it became an international custom and enforceable as law. Although the United States had yet to ratify the CEDAW treaty, over time with 170 nations abiding by it, it would become customary international law. The Council would urge the Senate to ratify the treaty. Even if the United States failed to ratify the treaty, it would eventually become customary international law.

MOTION: Council Member Mossar moved, seconded by Freeman, that the Policy and Services Committee recommend to the City Council approval and adoption of a resolution in support of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

MOTION PASSED 3-0. Beecham absent.

Chairperson Kleinberg thought the recommendation was a big step into the 21st century.

Mr. Mogensen said the item would return on the Consent Calendar.

Chairperson Kleinberg thanked the HRC for their many years and staff guidance and support for the work and effort and thinking that went into both of the discrimination matters. All change was slow when it was not in a crisis situation.

5. Discussion for Future Meeting Schedules and Agendas

Assistant to the City Manager Chris Mogensen said the next Policy and Services Committee meeting would be held on September 10, 2002. The agenda would include the Sea Scout Building, Electronic Packet, and Continued Discussion on Council Protocols.

ADJOURNMENT: Meeting adjourned at 9:13 p.m.

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