CITY AND COUNTY OF SAN FRANCISCO

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MEMORANDUM

TO: HONORABLE DARRYLL BURTON
County Clerk
HONORABLE NANCY ALFARO
Director of the Office of the County Clerk

FROM: AMY S. ACKERMAN
Deputy City Attorney

DATE: July 22, 2004

RE: Interpretation of Domestic Partnership Ordinance

Questions Presented:

1. You have asked whether Chapter 62 of the San Francisco Administrative Code ("Domestic Partners Ordinance") precludes a couple of the same gender, who are married to one another and whose marriage is not recognized due to state law, from registering together as domestic partners.

2. You have further asked whether a same gender couple registered as domestic partners who subsequently marry each other and whose marriage is not currently recognized by the state law, lose their status as domestic partners.

Short Answers:

1. The purpose of the Domestic Partners Ordinance was to create a way to recognize the committed relationships of same gender couples. The Domestic Partners Ordinance prohibits an individual who is married or has been in a domestic partnership within the past six months from entering into a domestic partnership. The intent of this prohibition was to prevent an individual already married or currently or within the past six months in a domestic partnership from entering into a domestic partnership with someone other than his or her spouse or actual or recent former domestic partner. Prohibiting a married same gender couple from obtaining the status and rights of domestic partners because the couple's marriage is not currently recognized by the State is contrary to the voters' intent. Accordingly, we conclude that two same gender individuals who are married to each other are not prohibited from entering into a domestic partnership with each other. We suggest that you amend the Declaration of Domestic Partnership to conform to this opinion.

2. The Domestic Partners Ordinance provides that a domestic partnership ends when one of the partners marries or the partners no longer live together. The language of the Ordinance supports a conclusion that the domestic partnership ends when one of the partners marries a different individual, not when the partners marry each other. Assuming an ambiguity exists, concluding that a marriage not currently recognized by the State dissolves the domestic partnership would be contrary to the voters' intent. Therefore, we conclude two same gender

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> individuals registered as domestic partners, who subsequently marry each other and whose marriage is not currently recognized by the State, do not lose their status as domestic partners.

Analysis:

The Domestic Partners Ordinance

The voters adopted the Domestic Partners Ordinance as Proposition K on November 6, 1990. The purpose of the Ordinance was to "create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied the right to identify the partners with whom they share their lives." (S.F. Admin. Code §62.1.)[1] The Ordinance provides two methods by which a couple may establish a domestic partnership. First, a couple may sign a Declaration of Domestic Partnership and present it to the County Clerk, who files it and presents the couple with a certificate showing that the Declaration was filed. Alternatively, the couple may sign a Declaration of Domestic Partnership, have it notarized, and give a copy to the person witnessing the signing. (§62.3.)[2]

The County Clerk provides the Declaration. By signing the Declaration, the couple agree to be jointly responsible for basic living expenses incurred during their domestic partnership and that the agreement may be enforced by anyone to whom those expenses are owed. (§62.2(d).) The Declaration also requires each member of the couple to:

> state under penalty of perjury that they met the definition of domestic partnership when they signed the statement, *that neither is married*, that they are not related to each other in a way which would bar marriage in California, and that neither had a different domestic partner less than six months before they signed.

(*Ibid*., emphasis added.)

The Ordinance also establishes a means by which domestic partnerships may be ended. Section 62.4(a) provides:

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[1] Unless otherwise specified, all further statutory references are to the Administrative Code.

[2] In September 2003, the Board of Supervisors adopted section 62.10, authorizing a third way in which a domestic partnership may be recognized. Section 62.10 provides that a couple in a domestic partnership, civil union, or similar legal relationship lawfully entered into in another jurisdiction is entitled to all the rights and benefits available to domestic partners registered under Chapter 62. Section 62.10 further provides that the certificate of domestic partnership, civil union or similar legal relationship issued by another jurisdiction constitutes sufficient proof of entitlement to such rights and benefits.

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A domestic partnership ends when:

(1) One partner sends the other a written notice that he or she has ended the partnership; or

(2) One of the partners dies; or

(3) One of the partners marries or the partners no longer live together.

You now ask whether two persons of the same gender who were married to one another, but whose marriage is not being recognized, are prohibited from registering as domestic partners. Further, you ask whether a same gender couple registered as domestic partners who subsequently marry each other and whose marriage is not currently recognized by the State, lose their status as domestic partners.

Same Gender Couples, Who Are Married To One Another And Whose Marriage Is Not Recognized Due To State Law, Are Not Prohibited From Registering as Domestic Partners

The task in determining the proper application of an ordinance is to ascertain the intent of those enacting it. (See *People v. Adams* (2001) 93 Cal.App.4th 1192, 1197; see also *Woo v. Superior Court* (2000) 83 Cal.App.4th 967, 975; ["[W]e construe a voter-approved amendment to the city charter as we would construe a voter-approved amendment to the state constitution. The voters' intent in approving the measure is our paramount concern."].)

> In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. Thus, we turn first to the language of the statute, giving the words their ordinary meaning. The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. When the language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.

(*People v. Rizo* (2000) 22 Cal.4th 681, 685, citations omitted.) Finally, one must:

> . . . look to the entire substance of the statute in order to determine the scope and purpose of the provision. That is, we construe the words in question in context, keeping in mind the nature and obvious purpose of the statute. We must harmonize the various parts of a statutory enactment by considering the particular clause or section in the context of the statutory framework as a whole. We must also avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend.

(*People v. Mendoza* (2000) 23 Cal.4th 896, 907-908, citations omitted.)

The purpose of the Ordinance was to recognize the committed relationships of couples, particularly those of the same gender who, at the time of the initiative were denied legal

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recognition whether by marriage, civil union or domestic partnership. (See §62.2.) As the Proponent's Argument in Favor of Proposition K stated, in pertinent part:

> Proposition K, the Domestic Partners registry, is simply a question of fairness. Proposition K will cost the city nothing.
>
> Proposition K will allow lesbian, gay and other committed couples to register their relationships.
>
> Under state law, lesbian and gay couples cannot get married. Despite their commitment, despite their love, despite all the joy and struggles they've endured, their relationships are neither recognized nor supported. Like all couples, they want visible recognition from their friends, families and neighbors.
>
> This is an issue of choice and civil rights. Everyone has the right to choose whom they [sic] will love. The religious opponents of domestic partners, who want to enforce their view of what constitutes a loving, committed relationship on everyone else, would deny social recognition and support for gay and lesbian relationships. Let's stop the injustices by voting yes on Proposition K.

(San Francisco Voter Information Pamphlet and Sample Ballot, November 6, 1990 Consolidated General Election, Proponent's Argument in Favor of Proposition K, p. 154.)

As stated above, in order to qualify as domestic partners, the couple must declare, under penalty of perjury, that "they met the definition of domestic partnership when they signed the statement, *that neither is married*, that they are not related to each other in a way which would bar marriage in California, and that neither had a different domestic partner less than six months before they signed." (§62.2(d), emphasis added.) The language of the Ordinance – "that neither is married" – is ambiguous. It requires couples who register to declare that they are not "married," without specifically qualifying that language. At the time the voters enacted Proposition K, same gender couples were statutorily prohibited from marrying. No state or local official, agency or court had found that this limitation was unconstitutional. Thus, the voters did not contemplate the issue raised by the Mayor's and County Clerk's recent decision to marry same gender couples – whether a same gender couple married (to one another) but whose marriage is not recognized by the State should be permitted to enter into a domestic partnership to receive at least the benefits attached to that status.

Given this ambiguity, we look at both the language of the Ordinance and voters' intent to interpret this prohibition. The voters' intent supports the conclusion that same gender couples who married but whose marriages are not being recognized by the State should be permitted to enter into domestic partnerships. Interpreting the prohibition against being married as a prohibition against being married to *another* individual, thus allowing couples who married but

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whose marriages are not being recognized by the State to become domestic partners, furthers the voters' goal.

Further, the particular purpose of the prohibition on married persons entering domestic partnerships is consistent with this interpretation. The Ordinance imposes on domestic partners the same standards of commitment required to marry. Domestic partners may not be related in a way that would bar marriage in California. In addition, they must be monogamous, that is not be married or involved in a separate domestic partnership currently or within the last six months. (See then Civil Code §§ 4400 [prohibiting incestuous marriages]; 4401 [prohibiting bigamous and polygamous marriages]; 4514 [requiring six months from the date of service of a copy of summons and petition of dissolution or appearance of respondent before a judgment of dissolution is final].)[3] Thus, the voters intended to impose on domestic partners the same standards of monogamy imposed on married couples. Interpreting the prohibition against being married as a prohibition against being married to *another* individual furthers the voters' goal.

Finally, interpreting the language of section 62.2(d) as prohibiting married same gender couples whose marriages are not being recognized by the State law from registering as domestic partners would lead to an absurd result. The purpose of the Domestic Partners Ordinance was to give legal and community recognition to committed same gender couples with no other way to obtain that recognition. Since the voters adopted Proposition K, the State of California, San Francisco and private parties recognize and have given rights and responsibilities to domestic partners. Prohibiting a same gender couple from obtaining the status and rights as domestic partners because the couple is married when the couple's marriage is not currently recognized by the State is contrary to the voter's intent. Accordingly, we conclude that two same gender individuals who have married, but whose marriage is not currently being recognized by the state, are not prohibited from entering into a domestic partnership with each other. We suggest that you amend the Declaration of Domestic Partnership to conform to this opinion.

Domestic Partners Who Subsequently Marry Each Other And Whose Marriage is Not Currently Recognized By The State Do Not Lose Their Status As Domestic Partners

Applying the same standards articulated above, we next consider whether a same gender couple registered as domestic partners who subsequently marry each other and whose marriage is not currently recognized by the State lose their status as domestic partners. The Ordinance provides that a domestic partnership ends when "[o]ne of the partners marries or the partners no longer live together." (§62.4(a)(3).) The plain language of the ordinance – "*one* of the partners marries" – means that the domestic partnership ends when *one* of the partners marries a *different* individual, not when both partners marry each other. Assuming an ambiguity exists, denying domestic partner status to same gender domestic partners who marry and whose marriages are not currently recognized by the state would be contrary to the voters' intent to give official status to committed same gender couples. Accordingly, we conclude domestic partners who marry and

[3] Those sections are currently in the Family Code. (See Family Code §§ 2200, 2201 and 2339.)

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whose marriage is not currently recognized by the state do not lose their status as domestic partners.

We hope you have found this information to be helpful. If we can provide you with any further assistance, please do not hesitate to call on us.

A.S.A.