

TO: Honorable Mayor and City Council **FROM:** Richard Doyle
City Attorney

SUBJECT: Proposition 209 and Equity **DATE:** February 7, 2020
Framework

Background

On February 10, 2020 the City Council will hold a study session entitled: "Equity Framework: An Approach to Achieving Better Outcomes for All." As the Council considers the issues presented in the Study Session it is important that Council also understand the limitations in California imposed by Proposition 209.

Discussion

A. Proposition 209

With the passage of Proposition 209 in 1996, Section 31 was added to Article I of the California Constitution which reads, in part, as follows:

The state shall not discriminate against or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The "state" is defined very broadly and includes charter cities, such as San José. There are limited exceptions for bona fide qualifications based on sex, consent decrees, and federal funding eligibility requirements. After the passage of Proposition 209, the City made changes to various programs as summarized below.

B. Effect of Proposition 209 – Summary of City Programs

1. Public Works Construction Contracts

In 1997, an action was brought by Hi-Voltage Wire Works, Inc. and Allen Jones, a city taxpayer challenging the City's Minority Business Enterprise and Women Business Enterprise construction program (MBE/WBE construction program) as a violation of the California Constitution. The program set MBE/WBE goals in construction projects over \$50,000. To be found responsive, contractors were required either to meet the goals or demonstrate good faith efforts. The lawsuit alleged that it required contractors to afford "unlawful preferences" to minority and women subcontractors by giving them special assistance and information not provided to non-MBE/WBE subcontractors.

After extensive litigation and appeals, the California Supreme Court struck down the City's MBE/WBE Construction Program in Hi-Voltage Wire Works Inc. v. City of San Jose, 24 Cal.4th 537 (2000).

2. Affirmative Action Plan

The City's Affirmative Action Plan included employment goals for City employees by race, gender and ethnicity. The Plan expired on June 30, 2000 and was not renewed because of Proposition 209. The Affirmative Action Plan did not provide preferences but was designed to encourage outreach to those underrepresented groups in the Plan. When an appointing authority had the opportunity but did not select or appoint a member from an underrepresented group to a job classification or job group, the Plan provided for a written explanation to the Director of the Office of Affirmative Action/Contract Compliance on the job-related reasons for the department's selection decision.

3. Name Change of the Office of Affirmative Action

After the passage of Proposition 209, the City Council approved the recommendation of the City Manager to change the name of the Office of Affirmative Action/Contract Compliance to the Office of Equality Assurance. This change was made to reflect the intent of the City's "affirmative action" programs to assure that there is no discrimination and that there is equal opportunity for all. The investigation of discrimination complaints once assigned to the Office is now handled by the Office of Employee Relations. The contract compliance functions are still being handled by the Office of Equality Assurance but the Office is now assigned to the Public Works Department.

4. Nondiscrimination Ordinance

Prior to Proposition 209, the City's Nondiscrimination Ordinance (San Jose Municipal Code Chapter 4.08) required City contractors to implement affirmative action plans and

comply with nondiscrimination provisions. In light of Proposition 209, Chapter 4.08 was amended to reflect then current practices as well as modified to be in compliance with the Proposition. For example, the requirement of contractors to implement affirmative action plans was deleted but requirements for nondiscrimination in construction and purchasing contracts were retained.

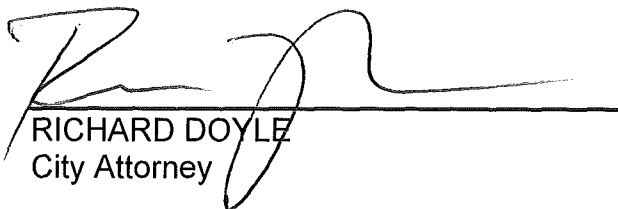
C. Permissible Practices Under Proposition 209

Although Proposition 209 prohibits granting preferential treatment in contracting or the hiring of City employees, it does not eliminate outreach to racial, ethnic groups or groups identified by gender to encourage participation in the contracting or hiring process. Outreach directed specifically at an ethnic group or gender is permissible as long as it is part of a general outreach program for hiring directed at all groups and inclusive of all groups. Outreach can be applied to all groups as a basis to reflect the cultural and ethnic diversity of the City. As long as preferential treatment in contracting or hiring is not granted or provided to individuals or groups on the basis of race, ethnicity, or gender outreach to encourage participation in City contracting or hiring opportunities does not, in our opinion, violate the principles of Proposition 209 and the California Constitution.

Proposition 209 provides a limited exception for programs to meet federal funding eligibility requirements. Required federal DBE programs such as some Public Works or Airport projects are an exception to the prohibitions under Proposition 209.

Conclusion

While race and gender are important elements to consider in any Equity Framework, Proposition 209 restricts the use of race, ethnicity or gender in awarding public employment and contracting. However, analyzing race and gender in City programs is permitted as part of an overall solution to address inequities in those City programs.


RICHARD DOYLE
City Attorney

cc: David Sykes, City Manager