October 15, 1990

REPORT TO THE HONORABLE CHAIRPERSON AND
MEMBERS OF THE HOUSING AUTHORITY
HOUSING COMMISSION - PROPOSED ACQUISITION OF MT. AGUILAR AND PENASQUITOS GARDENS PROPERTIES - ALVIN I. MALNIK
HOUSING AUTHORITY AGENDA, OCTOBER 15, 1990 - ITEM NO. 2

At the Housing Authority special meeting on October 1, 1990, the Mayor posed several questions regarding the proposed acquisition of the Mt. Aguilar and Penasquitos Gardens properties. After considerable discussion, the Council continued the item so that the questions could be answered by this office and so that additional investigations could occur regarding the past activities of Mr. Alvin I. Malnik. The District Attorney's office and the City Police Department are cooperating in connection with such investigation.

At the October 1 meeting, reference was made by Councilmember Bernhardt to the task force which had on that date been created by the Housing Commission for the purpose of pursuing answers to questions similar to those raised by the Mayor. The Mayor indicated that she also proposed the formation of a task force. To our knowledge, neither task force has met as of Friday, October 12. We would be pleased to work with either or both task forces to answer legal questions arising from the proposed purchase of the properties, including any issues which may relate to the specific questions posed by the Mayor.

The specific questions raised by the Mayor at the October 1 meeting are:

1. Is the Alvin I. Malnik who owns the subject properties as "California Properties, a partnership," the same Alvin I. Malnik who has been the subject of various allegations regarding connections to major criminal elements?

A discussion with Evan Becker, together with a review of the background documents obtained by the Housing Commission in reviewing the financial background of Mr. Malnik, indicate that the Alvin I. Malnik referred to in news articles presented by Councilmember Henderson is the same person who owns the properties. We understand this fact has also been confirmed by the District Attorney's office.

2. What are the legal aspects of the "liquidated damages" clause in the Agreement to Purchase and Sell?

A copy of sections 1.8, 1.9, 1.10 and 1.21 are attached as Attachment 1. The provisions of sections 1.8, 1.9 and 1.10 relate to the deposits referred to in the liquidated damages clause. We are informed by the Housing Commission that while the Agreement to Purchase and Sell requires a first deposit of $25,000 "upon the opening of escrow," together with an additional deposit of $25,000 "upon removal of all ╒buyer inspectionσ contingencies" in part 2 of the agreement, escrow has not in fact been officially opened so that no deposits have actually been made as of this date. Such deposits would cumulatively constitute the liquidated damages amount called for in section 1.21.

As a legal matter, if the Housing Commission were to default under the terms of the Agreement to Purchase and Sell, the seller would be entitled to retain any deposits made by the Commission under sections 1.8 and 1.9.

It should be noted that section 1.10 provides for additional potential payments in the event the escrow does not close within 240 days of the effective date of the agreement, i.e., June 14, 1990. Therefore, if the Commission wished to extend the escrow beyond early March 1991, the agreement allows such extensions for two additional 30-day periods subject to additional deposits of $25,000 for the first extension and $50,000 for the second extension.

It must also be mentioned, of course, that the agreement provides in part 3 for certain "buyer's financing contingencies" which include requirements that the Housing Authority issue mortgage revenue bonds and that other financing events take place. The Housing Authority has discretion as to whether or not to sell such bonds.

3. The Mayor also mentioned section 1.4 of the agreement and asked whether the Housing Authority constitutes the "policy board" for the purpose of that section.

A discussion of the intent of the phrase "policy board" with the Housing Commission staff indicates that it was the intent of the Housing Commission that the Housing Commission be the "policy board." The Housing Commission did in fact, pursuant to the authority granted to it in Municipal Code section 98.0301, authorize the execution of the agreement for the purchase of the property.

4. The Mayor expressed concern with regard to the effect of section 5.2 "Successors and Assigns." A copy of the section is attached as Attachment 2. The section seems to be more or less "boiler plate" with the exception of the last clause which

specifically allows for the transfer of the Housing Commission's rights.

In summary, the Alvin I. Malnik who has been referred to in various news articles presented by Councilmember Henderson at the October 1 meeting is the same Alvin I. Malnik who owns the Mt. Aguilar and Penasquitos Gardens properties. The Housing Commission has not as yet deposited any of the "liquidated damages" amounts provided for in the Agreement to Purchase and Sell since escrow has not yet been opened. An initial deposit of $25,000 will be required when escrow opens, which amount would be forfeited if the Housing Commission subsequently defaults under the agreement. The agreement contains contingencies including a requirement that the Housing Authority issue mortgage revenue bonds. The Housing Authority retains considerable discretion in reviewing the facts and determining whether or not to sell such bonds. Failure to approve the sale of such bonds would ultimately result in termination of the Agreement to Purchase and Sell but would not subject the Housing Authority or the Housing Commission to the forfeiture of any deposits made into escrow.

By the above conclusions, we do not mean to express or imply any position by this office as to whether or not the Housing Commission should or should not proceed with acquisition of the Malnik properties. While, as attorneys, we are cognizant of injustices which have resulted from applications of the concept of "guilt by association" and by failures to "presume a person innocent until proven guilty," which concepts were discussed briefly at the October 1 meeting, we do not see any impropriety whatsoever in the City's reviewing the general reputation of persons with whom the City deals. Such review is obviously important when long term relationships are proposed, such as when the City leases its property or when the City enters into a disposition and development agreements concerning City property.

Such a review of general reputation may not be as important when the City proposes to purchase property. Obviously, any potential detriments to the citizens of this City which may result from the City's purchasing property from Mr. Malnik should be balanced against any benefits the citizens of this City may receive in the event the City determines to purchase the Malnik properties in the furtherance of the City's low-income housing program.

Respectfully submitted,
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City Attorney

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Attachments 2

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