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CITY OF
HAYWARD
HEART OF THE BAY

DATE: October 19, 2010

TO: Mayor and City Council

FROM: Fran David, City Manager
Michael Lawson, City Attorney

SUBJECT: Harassment and Retaliation Policy

RECOMMENDATION

That Council adopts the attached Resolution approving the policy against harassment and retaliation for elected and appointed City officials.

SUMMARY

The Council has maintained a longstanding policy against harassment and retaliation in the workplace as set forth in Resolutions No. 84-245 and 85-059 (attached). Such policy applies to all City officers and employees; it does not apply to the members of the Council-appointed advisory bodies. The attached Resolution is intended to update the Council's harassment and retaliation policy and to make it expressly applicable to both elected and appointed City officials. Moreover, it is similar in scope to a policy against harassment and retaliation recently promulgated by the City Manager in an Administrative Rule applicable only to City employees. "Appointed City Officials" in this context does not include the Council's Appointed Officers (i.e., Manager, Attorney, or Clerk), as they are covered by Resolution 85-059 as employees and by its companion Administrative Rule.

BACKGROUND

In 1984, the Council adopted Resolution No. 84-245 "expressing its policy against sexual harassment." The policy was limited to sexual harassment and applies to "all City officers and employees, including management, supervisory and non supervisory employees." In 1984 and in conjunction with such policy, the City Manager issued two Administrative Rules, the first "Concerning Sexual Harassment" and the second "Concerning Racial Harassment." Both Administrative Rules were applicable to City employees and did not apply to either elected or

appointed City officials. Both rules have since been revised on two different occasions to conform to evolving legal standards governing workplace conduct.

In Resolution No. 85-059, the Council reiterated its policy against sexual harassment and also expressed its opposition to discrimination. In it, the Council provided a statement that the City, "as an employer, [must be] free from employment or personnel practices, which discriminate against persons based on the basis of race, color, national origin or ancestry, religion or sex; which constitute unlawful discrimination on the basis of age or handicap; which foster invidious discrimination on the basis of sexual preference, marital status or responsibility for dependents; and which constitute sexual harassment." The policy also intended to implement an affirmative action program to diversify the City's workforce and make it more reflective of the appropriate labor market.

DISCUSSION

The attached Resolution, if adopted, would update the Council's policy against harassment, broaden it to include other forms of harassment, and, perhaps most importantly, make it expressly applicable to both elected and appointed City officials, excluding the Council's Appointed Officers, who are covered by Resolution 85-059 and its companion Administrative Rule. The attached Resolution prohibits harassment because of an individual's "actual or perceived protected classification," and it defines "protected classification" to include sex, race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, age, or sexual orientation." "Sexual orientation" is defined to include "heterosexuality, homosexuality, bisexuality, and gender identity and expression."

The Resolution applies to "City Council Members and appointees of a City board, commission, committee or task force (hereinafter "Appointees")…." It defines several types of harassment, to include verbal, physical, sexual, and visual forms of harassment.

The Resolution then lists seven "Guidelines for Identifying Harassment" and emphasizes that it includes any unwelcome conduct; voluntary consent to such conduct is no defense; the failure to complain does not mean that such conduct is welcome; such conduct can constitute harassment even if it is not specifically directed at an individual; such conduct does not require the intent to harass; knowledge of harassment by the City Council Members or Appointees may prompt an obligation to take immediate and appropriate corrective action; and, that a single act can constitute harassment.

"Retaliation" is defined as "any adverse conduct" taken against an individual "by a City Council Member or Appointee because the individual has reported harassment or has participated in the complaint procedure." This section also includes examples of "adverse conduct."

The Resolution contains a "Complaint Procedure," which first encourages the harassment victim to contact the harasser and advise him/her that such harassment is unwelcome and offensive and ask that it stop. The Resolution contains a formal procedure if the informal procedure is unproductive. If the complaint is against the Mayor, then the victim should report such conduct to the Mayor Pro

Tempore. The complaint can be made orally or in writing, and if in writing, the victim is encouraged to use the City Council's Harassment/Retaliation complaint form. While interviewees must maintain the confidentiality of their interview, the City Council will maintain the confidentiality of its investigation consistent with its legal obligations, recognizing that complete confidentiality may not be possible "due to the need to fully investigate and the duty to take effective remedial action."

The Mayor (or the Mayor Pro Tempore), with the assistance of the City Manager, may take immediate and appropriate remedial action to stop the conduct at issue. Importantly, if the complaint is against a Council member, the Council designates the Mayor (or the Mayor Pro Tempore if the complaint is against the Mayor) to be the investigator of the complaint, and in his/her discretion, the Mayor, with the assistance of the City Manager, may retain an experienced private attorney, consultant, investigator, or other specialist who is not an official or employee of the City to conduct the investigation and issue a report. If the report finds violations of the City Council's policy against harassment and retaliation, the Mayor (or Mayor Pro Tempore) shall present the report to the City Council for further action, if any, consistent with its legal obligations. Such action may include, but not be limited to, censure.

If the complaint is against an Appointee, the Mayor shall refer the complaint to the City Manager for investigation, and the City Manager shall have the discretion to use City staff or an outside investigator to conduct the investigation and issue a report. Upon receipt, the City Manager shall forward the completed report and a recommendation to the Mayor and the City Council; possible action for an Appointee includes, but is not limited to, dismissal from his/her appointment.

The Resolution also advises individuals that they may also file their complaints of harassment and/or retaliation with either the federal Equal Employment Opportunity Commission or the state Department of Fair Employment and Housing. Finally, the Resolution contains a list of "Individual Responsibilities" for City Council Members and Appointees, including "conducting himself or herself consistently with the anti-harassment and anti-retaliation policy as set forth herein" and to report "any potential violations of this policy of which he or she becomes aware."

ECONOMIC IMPACT

There will be no direct economic impact of this Resolution on Hayward residents.

FISCAL IMPACT

There will be no direct fiscal impact of this Resolution to the City of Hayward.

PUBLIC CONTACT

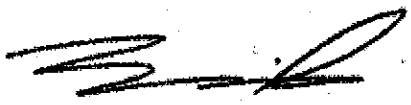
No public notices were published.

NEXT STEPS

If the Council approves this Resolution, it will be referenced in the Council Handbook; further, staff will disseminate the Resolution to advisory bodies and their respective support staff to provide training.

Prepared by: Michael Lawson, City Attorney

Approved by:



Fran David, City Manager

Attachments:

Attachment I:	Resolution Adopting a Policy Against Harassment and Retaliation for Elected and Appointed City Officials
Attachment II:	Attachment Resolution No. 84-245
Attachment III:	Resolution No. 85-059

Attachment I

HAYWARD CITY COUNCIL

RESOLUTION NO. _____

Introduced by Council Member _____

RESOLUTION ADOPTING A POLICY AGAINST HARASSMENT AND RETALIATION FOR ELECTED AND APPOINTED CITY OF HAYWARD OFFICIALS

WHEREAS, the Hayward City Council is unequivocally committed to prohibiting harassment in the workplace and to prohibiting retaliation against those who report or oppose harassment; and

WHEREAS, the Hayward City Council has maintained a long standing policy against harassment and retaliation in the workplace as reflected in Resolutions No. 84-245 and No. 85-059; and

WHEREAS, such policy applies to City officers and employees, including management, supervisory and non supervisory employees but not to the appointed members of the City's various boards, commissions, committees and task forces (hereinafter "Appointee"); and

WHEREAS, the Hayward City Council is now desirous of updating its policy against harassment and retaliation and expressly extending such policy to itself and to all Appointees.

NOW, THEREFORE, BE IT RESOLVED, that the City Council hereby adopts the following policy statement against harassment and retaliation and authorizes the application of such policy to itself and to the appointed members of the City's various boards, commissions, committees and task forces.

POLICY AGAINST HARASSMENT AND RETALIATION

The Hayward City Council is committed to prohibiting all forms of harassment in the workplace that are based upon protected classifications as defined in this policy. In addition, the City Council prohibits retaliation against those who complain of harassment. This policy applies to all City Council Members as well as to all Appointees.

Any City Council Member found to be in violation of this policy may be subject to censure by the City Council. Any Appointee found to be in violation of this policy may be subject to dismissal from his/her appointment.

I. Definitions.

A. Protected Classifications. This policy prohibits harassment because of an individual's actual or perceived protected classification. "Protected classification" includes sex, race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, age, or sexual orientation. "Sexual orientation" includes heterosexuality, homosexuality, bisexuality, and gender identity and expression. Harassment because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or other related conditions.

B. Policy Coverage. This policy prohibits City Council Members and Appointees from harassing applicants, officers, officials, employees, persons providing services to the City pursuant to a contract, or clients because of: (1) an individual's protected classification; (2) the perception that an individual has a protected classification; or (3) the individual associates with a person who has or is perceived to have a protected classification.

C. Harassment. Depending upon the circumstances, a single act of harassment, as defined below, can violate this policy.

1. Verbal Harassment: Includes, but is not limited to, epithets, jokes, comments or slurs that identify a person on the basis of his or her protected classification, intimate or other nicknames, and comments on appearance or stories that tend to disparage those with a protected classification.

2. Visual Forms of Harassment: Includes, but is not limited to, gestures, posters, notices, bulletins, cartoons, emails, photography, or drawings that tend to disparage those with a protected classification.

3. Physical Harassment: Includes, but is not limited to, the following conduct taken because of an individual's protected classification: assault, impeding or blocking movement, physically interfering with normal work or movement, pinching, grabbing, patting, propositioning, leering, making express or implied job threats or promises in return for submission of physical acts, mimicking, stalking or taunting.

4. Sexual Harassment: Is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, physical, or visual conduct of a sexual nature which occurs under any one of four circumstances:

a. Submission is made either explicitly or implicitly a term or condition of employment, or of a contractual business relationship with the City.

b. Submission or rejection by an individual is used as a basis for employment decisions affecting that individual.

c. Such conduct has the potential to affect an employee's work performance negatively and/or to create an intimidating, hostile, or otherwise offensive working environment.

d. Submission or rejection by a client or vendor is used as a basis for making a business decision by the employee or creates an intimidating, hostile, or otherwise offensive working environment.

D. Guidelines for Identifying Harassment.

5. Harassment includes any conduct which would be "unwelcome" to an individual of the recipient's same protected classification and which is taken because of the recipient's protected classification.

6. It is no defense that the recipient appears to have voluntarily "consented" to the conduct at issue. A recipient may not protest for many legitimate reasons, including the need to avoid being insubordinate or to avoid being ostracized.

7. Simply because no one has complained about a joke, gesture, picture, physical contact, or comment does not mean that the conduct is welcome. Harassment can evolve over time. Small isolated incidents might be tolerated up to a point. The fact that no one is complaining now does not preclude anyone from complaining if the conduct is repeated in the future.

8. Even visual, verbal, and/or physical conduct between two Council Members or two Appointees who appear to welcome it can constitute harassment of a third applicant, officer, official, employee, contractor or appointee who observes the conduct or learns about the conduct later. Conduct can constitute harassment even if it is not explicitly or specifically directed at an individual.

9. Conduct can constitute harassment in violation of this policy even if the individual engaging in the conduct has no intention to harass. The City Council recognizes that it is legitimate for those in protected classifications to have heightened sensitivities to harassment as a result of their life experiences. Even well-intentioned conduct can violate this

policy if the conduct is directed at or implicates a protected classification, and if an individual of the recipient's same protected classification would find it offensive (e.g., gifts, over-attention, endearing nicknames).

10. The conduct of an individual other than a City Council Member or an Appointee, with respect to harassment of employees, applicants or persons providing services pursuant to a contract in the workplace, may violate this policy if the City, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

11. A single act can violate this policy and provide grounds for appropriate sanctions. Therefore, if in doubt as to whether any particular conduct may violate this policy, do not engage in the conduct and seek guidance from the City Manager's Office or the City's Human Resources Department.

E. Retaliation. Any adverse conduct taken against an individual by a City Council member or Appointee because the individual has reported harassment, or has participated in the Complaint Procedure described below, is prohibited. "Adverse conduct" includes taking sides because an individual has reported harassment, spreading rumors about a complainant, shunning and avoiding an individual who reports harassment, or real or implied threats of intimidation to prevent an individual from reporting harassment. The following individuals are protected from retaliation: those who make good faith reports that harassment occurred, those who are accused of harassment, and those who associate with an individual who is involved in reporting harassment or participating in a harassment complaint procedure.

II. Complaint Procedure. An individual who believes he or she has been harassed or retaliated against by a City Council Member or Appointee in violation of this policy should report the conduct immediately and according to the following procedure so that the complaint can be resolved quickly and fairly. The City Council encourages prompt reporting of harassment or retaliation so that an investigation can be commenced and if necessary immediate and effective remedial action taken to stop such conduct.

A. Reporting to the Offending Individual. The City Council strongly encourages any individual who feels that he or she has been harassed in violation of this policy to let the offending person know immediately and firmly that the conduct at issue is unwelcome, offensive, in poor taste, and/or inappropriate and must stop.

B. Reporting to the Mayor. If an individual who has been harassed by a City Council Member or Appointee prefers not to confront the offending person, he or she need not do so. Instead, the City Council strongly encourages that individual to immediately report the conduct orally or in writing to the Mayor; in the event of

a complaint against the Mayor, such conduct should be reported to the Mayor Pro Tempore. If the report is to be made in writing, the City Council encourages the individual to use the City's Harassment/Retaliation Complaint Form to make such report; a copy of the form is attached to this policy. The individual should provide all details of the incident or incidents, names of individuals involved, and the names of any witnesses.

C. Confidentiality. The City Council recognizes that confidentiality is important to all parties involved in a harassment and/or retaliation investigation. Complete confidentiality cannot occur, however, due to the need to fully investigate and the duty to take effective remedial action. As a result, confidentiality will be maintained to the extent consistent with the City Council's legal obligations.

D. Duty to Maintain Confidentiality of Interview. An individual who is interviewed during the course of an investigation is prohibited from discussing the substance of the interview, except for discussing it with his/her representative.

III. Response to Complaint.

A. Interim Relief. Upon receipt of a harassment or retaliation complaint, the Mayor (or if the complaint is against the Mayor then the Mayor Pro Tempore), with the assistance of the City Manager, may take immediate and appropriate remedial action to stop the conduct at issue and/or to diffuse any volatile circumstances associated with the conduct.

B. Investigation.

1. Complaint Against a City Council Member or the Mayor: Under this policy, the City Council designates the Mayor to be the investigator of a harassment and/or retaliation complaint against a City Council Member; in the event of a complaint against the Mayor, the Mayor Pro Tempore is the person so designated. The Mayor, at his/her discretion and with the assistance of the City Manager, may retain an experienced private attorney, consultant, investigator or other specialist who is not an official or employee of the City to conduct the investigation. The investigation shall be commenced as soon as practicable, and the specialist shall be responsible for completing a report on his/her investigation, to include findings. The investigation will normally include interviews of the reporting individual, the accused and any other individuals who are believed to have relevant knowledge concerning the allegations. The investigator will remind all witnesses to maintain the confidentiality of the content of their interviews and admonish them that retaliation against those who report alleged harassment or who participate in the complaint procedure is prohibited. The investigation shall also include, but not be limited to, the retrieval and review of documents or evidence such as work schedules, letters, computer records, telephone messages, personnel files, gifts or cards.

2. Complaint Against an Appointee: Upon receipt of a complaint against an Appointee, the Mayor shall refer the complaint to the City Manager for investigation. The City Manager shall have the discretion to use city staff or an outside investigator to conduct the investigation. Such investigation shall be conducted consistent with the guidelines set forth in Section III(B)(1) above.

C. Investigation of Unreported Potential Violations. The City Council takes a proactive approach to the problem of harassment, and the Mayor (or the Mayor Pro Tempore) will initiate an investigation consistent with this policy if he/she becomes aware that harassment may be occurring, regardless of whether the recipient or a third party reports a potential violation.

D. Action.

1. City Council Member or Mayor: If the specialist's report concludes that harassment or retaliation in violation of the City Council policy against harassment and retaliation has occurred, the Mayor (or Mayor Pro Tempore) shall present the report to the City Council for further action, if any, consistent with its legal obligations. Such action for a City Council Member may include, but not be limited to, censure.

2. Appointee: Upon completion of his/her report, the City Manager shall forward it and a recommendation to the Mayor and the City Council. Possible action for an Appointee includes, but is not limited to, dismissal from his/her appointment.

E. Option to Report to Outside Administrative Agencies. Individuals also have the option to report harassment or retaliation to the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH). These governmental agencies offer legal remedies and a complaint process. The nearest DFEH and EEOC offices are listed in the government section of the telephone book .

F. This policy is not to be construed nor is it intended to prohibit mutually welcome, social relationships freely entered into between people.

IV. Individual Responsibilities.

A. Individual City Council Member or Appointee. A City Council Member or an Appointee is required to:

1. Conduct him or herself consistently with the anti-harassment and anti-retaliation policy as set forth herein; and

2. Report any act which he or she believes in good faith constitutes harassment as defined herein to the Mayor (or the Mayor Pro Tempore); and

3. Maintain the confidentiality of any investigation conducted by the Mayor or his/her specialist pursuant to this policy by not disclosing the substance of any investigatory interview, except for discussing it with his or her representative; and

4. Cooperate fully with such investigation into alleged violations of this policy by responding fully and truthfully to all questions posed during the investigation; and

5. Be familiar with this policy and modeling behavior that is consistent with it; and

6. Report any potential violations of this policy of which he or she becomes aware.

IN COUNCIL, HAYWARD, CALIFORNIA _____, 2010

ADOPTED BY THE FOLLOWING VOTE:

AYES: COUNCIL MEMBERS:
MAYOR:

NOES: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ATTEST:_____
City Clerk of the City of Hayward

APPROVED AS TO FORM:

_____
City Attorney of the City of Hayward

HAYWARD CITY COUNCIL

RESOLUTION NO. 84-246 C.S.

ACG

INTRODUCED BY COUNCILMEMBER Bradley

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HAYWARD EXPRESSING ITS POLICY AGAINST SEXUAL HARASSMENT

BE IT RESOLVED that the City Council of the City of Hayward adopts the following policy statement against sexual harassment in the City of Hayward workplace.

The City of Hayward is committed to providing a work environment that is free of sexual harassment. In keeping with this commitment, the City maintains a strict policy prohibiting unlawful harassment, including sexual harassment: Sexual harassment in the workplace or in the conduct of employment or other personnel practices of the City will not be condoned and such conduct on the part of any employee of the City will result in the taking of immediate and appropriate corrective action including disciplinary action if warranted.

This policy applies to all City officers and employees, including management, supervisory, and non-supervisory employees. Furthermore, it prohibits harassment in any form, including verbal, physical, and visual harassment.

Sexual harassment includes, but is not limited to, making unwanted sexual advances and requests for sexual favors where any of the following exists:

(1) Submission to such conduct is made an explicit or implicit term or condition of employment; or

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose of or effect of substantially interfering with an individual's work performance or of creating an intimidating, hostile, or offensive working environment.

BE IT FURTHER RESOLVED that the City Manager is hereby directed to develop procedures for the implementation of this policy, such procedures to include but not be limited to:

(1) Dissemination of this policy to all employees of the City of Hayward;

(2) The education of employees as to what constitutes sexual harassment and the kinds of behavior which must be avoided;

(3) The development of a procedure for the reporting, investigation, and timely resolution of complaints of sexual harassment; and

(4) The provision of training to all City employees, but most particularly to management and supervisory employees, on the legal considerations and practical consequences of sexual harassment, methods for taking preventative action, and techniques for the investigation and resolution of sexual harassment situations.

IN COUNCIL, HAYWARD, CALIF., August 7th, 19 84

ADOPTED BY THE FOLLOWING VOTE:

AYES: COUNCILMEMBERS Jimenez, Bradley, Campbell, Bras, Sweeney, Ward
MAYOR Giuliani

NOES: NONE

ABSENT: NONE

ATTEST: [signature]
CITY CLERK OF THE CITY OF HAYWARD, CALIF.

HAYWARD CITY COUNCIL

RESOLUTION NO. 85-059 C.S.

Introduced by Councilmember WARD

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HAYWARD ADOPTING AND PROCLAIMING A PROGRAM OF AFFIRMATIVE ACTION IN THE CONDUCT OF CITY EMPLOYMENT AND PERSONNEL PRACTICES

WHEREAS, in order to safeguard rights guaranteed under the Federal and State Constitutions the Congress of the United States of America and the Legislature of the State of California have enacted certain laws to prohibit discrimination against persons on the basis of race, color, national origin or ancestry, religion, sex, age, or handicap and to prohibit sexual harassment in the area of employment; and

WHEREAS, it is the desire of the City Council not only to safeguard these rights and implement the clearly defined purpose of these State and Federal laws, but to adopt policies in the administration of employment and other personnel practices of the City of Hayward to overcome the more subtle effects of discrimination based on race, color, national origin or ancestry, religion, sex, age, or handicap and the effects of sexual harassment;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Hayward that the following statement is hereby adopted as the policy of the City of Hayward in the administration of its employment and other personnel practices and that the City Manager is authorized and directed to carry out this policy.

The City of Hayward is committed to creating an environment which will encourage and bring about mutual understanding and respect among all groups within the City; taking those actions it can to eliminate prejudice and discrimination; and fostering wherever possible equal rights and opportunities for all people so that the negative effects of prejudice and invidious discrimination may be avoided. An essential means of achieving these goals is assuring that the activities of the City of Hayward as an employer are free from employment or personnel practices which discriminate against persons on the basis of race, color, national origin or ancestry, religion, or sex; which constitute unlawful discrimination on the basis of age or handicap; which foster invidious discrimination on the basis of sexual preference, marital status, or responsibility for dependents; and which constitute sexual harassment.

The City Manager shall serve as the Affirmative Action Officer for the City and shall adopt a comprehensive plan, to be known as the Affirmative Action Program of the City of Hayward, to ensure that the employment and personnel practices of the City do not discriminate against any person on the basis of race, color, national origin or ancestry, religion, or sex; which do not constitute unlawful discrimination on the basis of age or handicap; which do not foster invidious discrimination on the basis of sexual preference, marital status, or responsibility for dependents; and which do not constitute sexual harassment. The Affirmative Action Program adopted by the City Manager shall provide for the following:

(1) Achieving representation of women and minorities at all levels of City employment to the extent of their proportionate availability in appropriate labor markets;

(2) Formulating goals and establishing timetables for achieving such representation;

(3) Reporting at least annually to the City Council, City employees, and the public on areas of underrepresentation of women and minorities in City employment and the timetables for eliminating any instances of underrepresentation;

(4) Taking affirmative action to select qualified women and minority candidates for City employment;

(5) Intensifying the City's on-going program of classification review to ensure that employment standards are job-related;

(6) Providing training for all City employees in the intent and content of this policy statement and the Affirmative Action Program; and

(7) Assuring that all City employees are aware of and comply with the provisions of this policy statement and the Affirmative Action Program.

There is hereby established a twelve-member (12) Affirmative Action Committee comprised of five public members and one each from the Personnel Board and Human Services Commission, all of which are to be appointed by the Mayor and City Council; and five employees to be appointed by the City Manager. The City Manager shall serve as an ex-officio

member. The term of the appointment shall be for two years. The initial terms shall be staggered, with four public members and two employee members serving three years and the remaining members serving two years. The Committee shall be responsible for assisting in developing the affirmative action goals and timetables, monitoring program accomplishments, and recommending any needed program improvements.

IN COUNCIL, HAYWARD, CALIF., FEBRUARY 26, 19 85

ADOPTED BY THE FOLLOWING VOTE:

AYES: COUNCILMEMBERS: JIMENEZ, BRADLEY, CAMPBELL, BRAS, SWEENEY, WARD
MAYOR: GIULIANI

NOES: COUNCILMEMBERS: NONE

ABSENT: COUNCILMEMBERS: NONE

ATTEST: Salome R. Weaver
CITY CLERK OF THE CITY OF HAYWARD, CALIF.