COUNTY OF LOS ANGELES

OFFICE OF THE COUNTY COUNSEL

648 KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012-2713

LLOYD W. PELLMAN
County Counsel

TDD
(213) 633-0901
TELEPHONE
(213) 974-1904
TELECOPIER
(213) 687-7300

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TO: SUPERVISOR DON KNABE, Chairman
SUPERVISOR GLORIA MOLINA
SUPERVISOR YVONNE BRATHWAITE BURKE
SUPERVISOR ZEV YAROSLAVSKY
SUPERVISOR MICHAEL D. ANTONOVICH

FROM: LLOYD W. PELLMAN
County Counsel

RE: **Legal Issues Regarding Same-Sex Marriage Licenses**

This memorandum is written in response to Supervisor Yaroslavsky's request at the February 24, 2004 Board meeting for County Counsel to provide a report on the legal issues facing the County concerning the refusal of the Registrar-Recorder/County Clerk ("County Clerk") to issue same-sex marriage licenses. The specific issues which Supervisor Yaroslavsky requested that we address are outlined below.

1. <u>The Case Filed Against the County of Los Angeles</u>

On February 23, 2004, a lawsuit was filed against the County of Los Angeles acting through the County Clerk concerning the denial of marriage licenses to two same-sex couples. The lawsuit, *Tyler, et al v. County of Los Angeles,* Case No. BS088506, was filed in Los Angeles County Superior Court and is assigned to Judge David Yaffe. On Thursday, February 25, 2004, Judge Yaffe allowed Equality California, a same-sex marriage advocacy group, to intervene and become a party. No date has yet been set for trial of the matter.

The plaintiffs seek a writ of mandate commanding the County Clerk to issue marriage licenses to plaintiffs and other same-sex couples who are otherwise qualified to obtain a license, as well as attorneys' fees.

Plaintiffs erroneously allege that the County of Los Angeles and the County Clerk have a "policy" of denying marriage licenses to same-sex couples which violates the equal protection and due process clauses of the California Constitution. However, neither the County nor the County Clerk have a "policy" concerning the issuance of marriage licenses. The County Clerk simply carries out the ministerial duty of issuing marriage licenses in compliance with State law for issuance of marriage licenses statewide as set forth in the California Family Code.

It is recommended that further consideration of this particular case pending against the County be deferred to Closed Session under Item CS-2.

2. The Obligation of the County Clerk if the State Law Restricting Marriage to People of Opposite Sex is Found Unconstitutional

If the California Supreme Court or California Court of Appeal determines that State law restricting marriage to same-sex couples is unconstitutional, the County Clerk would be obligated to follow the mandates in such a decision. Likewise, if Judge Yaffe finds that State law is unconstitutional in the case filed against the County, the County Clerk would also be bound by that decision. However, a ruling by the San Francisco Superior Court, where Los Angeles County is not a party, would not be binding.

3. The Responsibilities of the County Clerk Concerning the Granting of Marriage Licenses

"The duties of the county clerk in issuing a marriage license are governed by Family Code ("FC") §§ 300 et seq." 29 Ops.Cal.Atty.Gen. 103, 104. Pursuant to FC § 350, before marriage, parties must obtain a marriage license from the County Clerk. The County Clerk may require an applicant to present authentic identification as to name, examine the applicants under oath, or request additional documentary proof as to the accuracy of the facts provided. FC § 354. The form used for a marriage license is prescribed by the State Department of Health Services and must be adapted to set forth the facts required by statute. FC § 355. The County Clerk shall number each marriage license issued and transmit to the county recorder a list or copies of the licenses issued. FC § 357. A brochure created by the State Department of Health Services containing information on genetic defects and diseases, and AIDS must be distributed to each applicant for a marriage license. FC § 358.

4. California Law Concerning Who May Receive a Marriage License

The County Clerk may not issue a marriage license if either of the applicants lacks the capacity to enter into a valid marriage, or is, at the time of making the application for a license, under the influence of an intoxicating liquor or drug. FC § 352. An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage. FC § 301. If applicants for a marriage license are under the age of 18, the license may be granted only if both parties have the written consent of a parent or guardian of each underage person and a court order granting permission for the underage person to marry. FC §§ 302, 353. Only marriage between a man and a woman is valid or recognized in California. FC § 308.5

5. State Constitutional Guarantees of Equal Rights and the Impact on this Issue

The California Constitution provides that a person may not be denied equal protection of the laws. Cal.Const.Art.I, § 7 (a). The equal protection clauses of the California Constitution and Fourteenth Amendment of the United States Constitution have generally been interpreted to have the same scope and effect. *Brown v. Merlo* (1973) 8 Cal. 3d 855, 861.

However, California's equal protection provisions have, in some circumstances, been held to provide independent protections which are not available under the equal protection provisions of the federal constitution. For example, compare *Serrano v. Priest* (1976)18 C.3d 728 (Education held to be a fundamental interest for purposes of equal protection analysis under the California Constitution) with *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1 (Education held not to constitute a fundamental interest for purposes of equal protection analysis under federal constitution.)

Equal protection guarantees essentially that all persons similarly situated shall be treated equally under the law. *In re Eric J.* (1979) 25 Cal. 3d 522, 530. The analysis requires a reconciliation of the laws with the practical reality that most legislation classifies, for one purpose or another, with resulting advantage or disadvantage to various groups or person. *Flynt v. California Gambling Control Com'n* (2002) 104 Cal.App.4th 1125, 1140, citing *Romer v. Evans* (1996) 517 U.S. 620, 631.

The equal protection clause does not prohibit legislative bodies from making classifications, it simply requires that laws or other governmental regulations be justified by sufficient reasons. *In re Evans* (1996) 49 Cal. App. 4th 1263, 1270. As a general rule, such legislative classifications are presumptively valid. *Flynt v. California Gambling Control Com'n* (2002) 104 Cal.App.4th 1125, 1140.

California courts apply two principal tests in reviewing classifications that are challenged under Article I, § 7, of the California Constitution. *Kasler v. Lockyer* (2000) 23 Cal. 4th 472, 480. Under the rational basis test. If the law neither burdens a fundamental right, nor targets a suspect class, a "rational basis" test will be applied, and a court will uphold the classification as long as there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *Flynt v. California Gambling Control Com'n* (2002) 104 Cal.App.4th 1125, 1140.

However, when a classification affects a fundamental right or is based on a suspect classification, the courts will apply a "strict scrutiny" test, and the legislation will be upheld only if it is narrowly tailored and furthers a compelling governmental interest. *Id.* Strict scrutiny cases generally have involved issues of race, national origin, alienage, or impairment of fundamental rights such as the right to vote. *See City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 440; and *Green v. City of Tuscon* (2003 9th Cir.) 340 F.3d 891, 896.

In limited circumstances, an intermediate level of scrutiny may be applied to suspect classes such as gender or illegitimacy. *City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 440-441. In those cases, the statute will be upheld if the government can demonstrate that the classification substantially furthers an important government interest. *Kirchberg v. Feenstra* (1981) 450 U.S. 455, 460.

The impact of equal protection guarantees on the right to same-sex marriage has never been determined by a California appellate court.[1] A

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[1]Other American appellate courts have addressed the issue with varying results. *See Goodridge v. Dept. of Public Health* (Ma.2003) 440 Mass. 309 (Massachusetts laws denying same-sex couples the right to marry violated the State's equality and liberty guarantees, and were not rationally related to the interests of procreation, ensuring two-parent family with one parent

determination that the State's marriage laws violate the equal protection clause would likely depend on finding a suspect classification or a classification calling for an intermediate level of scrutiny. Under the rational basis test, "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification, [the] inquiry is at an end." *Kasler v. Lockyer* (2000) 23 Cal. 4th 472, 482.

6. Arguments Made by Both Sides in Cases that Have Been Filed

Two separate lawsuits have been filed in Superior Court in San Francisco by entities seeking to enjoin the Mayor, City Clerk, and City and County of San Francisco from issuing marriage licenses to same-sex couples.

In the first case, *Randy Thomasson and Campaign for California Families v. Gavin Newsom and Nancy Alfaro*, plaintiffs argue that Article III, § 3.5 of the California Constitution, which prohibits state agencies from declaring statutes unconstitutional or unenforceable, does not give the mayor the power to declare a statute unconstitutional or refuse to enforce a state law unless an appellate court has made this determination. They further allege that the City acted beyond its authority by issuing licenses without public comment.

Plaintiffs seek a declaration that defining marriage is not a municipal function in California and defendants are without authority in this regard. They also seek a declaration that defendants have failed to comply with state marriage laws and all same-sex marriage licenses issued are invalid. In addition, plaintiffs seek an injunction prohibiting defendants from further issuing same-sex marriage licenses and a mandate directing defendants to comply with

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from each sex, and preserving the state's financial and private resources.); *Standhardt v. Superior Court* (Az.Ct.App.2003) 77 P.3d 451 (No fundamental right to same-sex marriage, the state has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and limiting marriage to opposite-sex couples is rationally related to that interest.); *Baker v. State of Vermont* (Vt. 2000) 170 Vt. 194 (Same-sex plaintiffs were entitled to the same benefit and protections afforded opposite-sex, married couples, but the Court did not rule that plaintiffs were entitled to marriage licenses.); and *Baehr v. Lewin* (Hi. 1993) 74 Haw. 530 (Sex-based classifications were subject to an intermediate scrutiny under Hawaii's constitution, and case was remanded to determine if state's marriage license laws furthered a compelling state interest and were narrowly drawn. The state later passed a constitutional amendment giving the legislature the power to limit marriage to opposite-sex couples, which it did, making the appeal moot.)

the provisions of the California Family Code with regard to this issuance of marriage licenses.

In the second case, *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco, Gavin Newsom, and Nancy Alfaro*, plaintiffs also argue that defendants have a mandatory duty to comply with state marriage laws, as set forth in the California Family Code, and that the County Clerk's issuance of marriage licenses to same-sex couples violates Article III, § 3.5 of the California Constitution. They further allege that San Francisco's authority to redefine marriage is preempte
d by State law and that marriage is not a matter of municipal authority. Lastly, plaintiffs allege that Defendants have made illegal expenditures of public funds and should be enjoined from issuing marriage licenses to same-sex couples pursuant to California Code of Civil Procedure ("CCP") 526(a).

In response, the City Attorney on behalf of the City and County of San Francisco, Mayor of San Francisco, and County Clerk, filed a cross-complaint against the plaintiffs, as well as a counter suit naming the State of California. The complaint alleges that FC §§ 300, 301, and 308.5 violate Article 1, § 7 of the California Constitution by discriminating on the basis of sexual orientation and gender, and violate the liberty and privacy interests of the state due process clause. They seek a declaration that FC §§ 300, 301, and 308.5 are unconstitutional in denying marriage licenses to same-sex couples, and an order compelling the state to recognize and record marriage certificates issued to same-sex couples in San Francisco.

On February 26, 2004, the State Attorney General filed an emergency writ directly with the California Supreme Court defending State law prohibiting the recognition of same-sex marriage, and asked the Court to intervene immediately. Although refusing to immediately halt San Francisco's issuance of the licenses, the Court ordered San Francisco to present arguments by March 5, 2004, as to why the Court should not immediately order the City to stop issuing the licenses and invalidate the 3,400 licenses already issued.

7. <u>What Can Be Expected in the Next Few Weeks/Procedural Issues/ Timing</u>

The State Supreme Court is under no obligation to rule on the Attorney General's writ. If the State Supreme Court chooses to consider the matter, the ruling would have binding effect throughout the state. If the Court

does not take the matter, the legal issues will be resolved in the normal course through the superior and appellate courts, before ultimately reaching the State Supreme Court. This would take considerably more time.

Both San Francisco cases have been consolidated and are scheduled for hearing on March 29, 2004. It is anticipated that arguments on the merits of the case will be heard at that time unless the State Supreme Court decides to rule on the issue.

LWP:JWW:ds

c: David E. Janssen
Chief Administrative Officer

Violet Varona-Lukens, Executive Officer
Board of Supervisors

Conny McCormack
Registrar-Recorder/County Clerk