February 2, 1998

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

USE OF DIRECTORS' AREAS AT QUALCOMM STADIUM
AND OTHER RELATED ISSUES

INTRODUCTION

On January 12, 1998, J. Bruce Henderson filed a letter complaint with the San Diego County District Attorney alleging violations of the California Public Reform Act of 1974 [Act] and the California open meeting law, commonly known as the Brown Act. The allegations primarily concern the consumption of food and drink, provided by Service America Corporation [Service America], at the Directors' Areas of Qualcomm Stadium [Stadium]. Mr. Henderson also complains about a closed session of the City Council on December 16, 1997. Previously, Alfred C. Strohlein filed a complaint regarding the consumption of food and drink at the Directors' Areas with the California Fair Political Practices Commission [FPPC].

Mr. Henderson makes four specific complaints in his letter to the District Attorney:

1. That City Council Members accepted gifts from Service America in excess of the maximum allowed for the years 1994 through 1997 by the consumption of food and drink at the Directors' Areas;[1]

2. That the City Council failed to report the gifts received from Service America;

3. That the receipt of the gifts from Service America created a conflict of interest for the City Council on its votes regarding various matters concerning the Stadium and the San Diego Convention Center [Convention Center]; and,

4. That a violation of the Brown Act occurred on December 16, 1997, because the City Council failed to report an "action" taken in closed session that day to commence negotiations with the Padres concerning an extension of the Padres' lease at Qualcomm Stadium.

A copy of Mr. Henderson's letter to the District Attorney is enclosed as Attachment 1. Mr. Strohlein's complaint, a copy of which is enclosed as Attachment 2, mirrored items 1 through 3 of Mr. Henderson's complaint.

On January 30, 1998, Mr. Henderson filed a supplemental complaint with the District

Attorney and the City Attorney contending that the City Council has a conflict with regard to a planned vote on February 2, 1998, concerning the referendum on the proposed expansion of the Convention Center. In particular, Mr. Henderson contends that the purchase of tickets to the Super Bowl by the City Council constitutes a gift from the National Football League [NFL]. Mr. Henderson also contends that the purchase of Super Bowl tickets, and the presence of City Council Members in the owners' box during Padres games, creates a conflict of interest in regard to Service America thus precluding a vote on February 2 concerning the referendum. Mr. Henderson contends this is so because Service America has a contract for services at the Convention Center and the Stadium, and had one with the NFL for the Super Bowl. Mr. Henderson also claims that certain violations of Council Policy No. 000-4 have occurred. A copy of Mr. Henderson's supplemental complaint is enclosed as Attachment 3.

This Report addresses the issues raised in all three complaints, as well as other issues related to the use of the Directors' Areas. The Report concludes there is no legal merit to any of these complaints.

QUESTIONS PRESENTED

1. Is the use of the Directors' Areas at Qualcomm Stadium reportable as either income or gift?

2. Does the use of the Directors' Areas create a conflict of interest?

3. Is the consumption of food and drink in the Directors' Areas reportable as either income or gift?

4. Does the consumption of food and drink at the Directors' Areas create a conflict of interest?

5. Is the provision of parking at Qualcomm Stadium in connection with the use of the Directors' Areas reportable as either income or gift?

6. Does the provision of parking at Qualcomm Stadium in connection with the use of the Directors' Areas create a conflict of interest?

7. Did a violation of the Brown Act occur at the December 16, 1997, closed session of the City Council?

8. Is the purchase of tickets to the Super Bowl at face value a gift from the NFL when the tickets can be resold for many times that price?

9. Is there any conflict of interest present for the Mayor and Council concerning the vote on the Convention Center referendum on February 2, 1998, arising from the purchase of Super Bowl tickets or attendance at Padres games in the owner's box?

10. Has Council Policy No. 000-4 been violated as a result of any of these matters, or

any matter raised in Mr. Henderson's letters?

SHORT ANSWERS

The answer to each of the Questions Presented is "no," based upon the facts set forth in Mr. Henderson's and Mr. Strohlein's complaints, and based upon facts of which we are currently aware.

BACKGROUND

A. The Stadium and Directors' Areas

The Stadium was built in the mid-1960s by the City of San Diego pursuant to a joint powers agreement [Agreement] with the County of San Diego. *See generally,* 1979 Op. City Att'y 1, 2. The Agreement created a joint powers authority, the San Diego Stadium Authority [Authority], which financed the construction of the Stadium. *Id.*[2]

The Directors' Areas (commonly know as the City Boxes and referred to in this Report as the "Boxes") were originally established in the various agreements for the use of the Stadium between the City and its tenants. The use of the Boxes is governed by Council Policy No. 700-22, first adopted in 1967 by Resolution No. R-191907 and amended from time to time over the years. *Id.* The various tenant agreements provided that the use of the Boxes, one located on the north side of the Stadium Press Level for football and one located on the west side for basesball, were reserved for public purposes consistent with the Agreement and the Council Policy, and are not under the control of the tenants during their games or other events. *Id; see also,* 1979 Op. City Att'y 20, 20-22 (ability to lease the Boxes during Padres' games). The Council Policy sets forth the individuals who have access to the Boxes, persons referred to as "credential holders."[3]

The policy remains essentially the same as when adopted: the Boxes are for the use of the credential holders and their guests to provide access to the Stadium for persons who could aid the growth and promotion of the City and County of San Diego.[4] The original policy also provided for actual credentials (a pocket card and windshield decal), that a credential holder actually accompany guests, and that minors should not be brought to the Boxes. In 1974, the policy was amended to provide for the issuance of tickets to events at the Stadium, rather than credentials, to avoid overcrowding in the Boxes and permit flexibility in the transfer of tickets. The requirement that a credential holder accompany guests and the prohibition on minors were also removed. 1979 Op. City Att'y at 22. A copy of the original policy is enclosed as Attachment 4 and the most recent amendment to the policy is enclosed as Attachment 5. Parking at the Stadium in connection with the use of the Boxes is reserved to the City through its contract with Ace Parking [Ace] for the operation of the parking facility, and through the Council Policy. *See,* 1996 Agreement for Operation of the Parking Facility at San Diego Jack Murphy Stadium, City Clerk Document No. RR-287099, at 3.B, p. 5, and 20.B, p. 25.

B. Service America

The City's contractual relationship with Service America, or its predecessors, for

concession services at the Stadium dates as far back as the Stadium itself. The City first contracted with a predecessor, Servomation Duchess, Inc.[5], in 1967 for concession services at the Stadium. *See generally,* 1983 Agreement for Concession, Restaurant and Catering Services at San Diego Jack Murphy Stadium, City Clerk Document No. RR-259537-1 (10/31/83). That agreement was amended and supplemented by other agreements over the years. *Id.* at Recitals A-F, pp. 1-2. In 1983, the City and Service America entered into a new agreement for concession services [1983 Agreement], which contemplated improvements at the Stadium and which supplanted the original agreements. *Id.* at Recital G, p. 2. By the 1983 Agreement, which expired in the year 2000, Service America agreed to perform concession and other services at the Stadium in return for certain payments. *See, e.g., Id.* at section 4, pp. 5-7; section 6, pp. 8-10.

It is unknown when Service America's practice of providing food in the Boxes was started, as it is not directly provided for in any of the City's agreements with Service America. Former City officials consulted seemed to recall that the practice began in the early 1980s.

In 1995, the City and Service America entered into a Third Amendment to the 1983 Agreement which extended the term of the 1983 Agreement to 2015, provided that Service America should make certain cash payments to the City for improvements to the Stadium, and restructured the fee schedule under the Agreement.

As you know, the Convention Center was built and is owned by the San Diego Unified Port District [Port]. The City leases the Convention Center from the Port for the purpose of operating it. In turn, the City leases the Convention Center to the San Diego Convention Center Corporation [SDCCC], which operates and manages the Convention Center. Service America has a contract for concession and catering services at the Convention Center currently with Service America, however, that contract is not with the City, but rather with SDCCC. The City has not reviewed nor approved that contract.

ANALYSIS

I

RELEVANT PROVISIONS OF THE POLITICAL REFORM ACT AND OTHER STATE LAWS

A. Substantive Provisions of the Political Reform Act

The Act, codified at California Government Code sections 81000 through 91014, was designed in part to require disclosure of the income of public officials "which may be materially affected by their official actions," and to disqualify officials from acting "in appropriate circumstances . . . in order that conflicts of interest may be avoided." Cal. Gov't Code 81002 (c).[6]

The general prohibition on action by public officials[7] is contained in Section 87100 which provides:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

The Act further sets forth the circumstances under which a public official is considered to have a "financial interest in a decision." Section 87103 provides, in pertinent part:

> A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material effect, distinguishable from its effect on the public generally, . . . on any of the following:
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> . . . .
>
> (c) Any source of income, other than gifts . . . aggregating two hundred and fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.
>
> . . . .
>
> (e) Any donor of, . . . a gift or gifts aggregating two hundred and fifty dollars ($250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.[8]

In sum, public officials may not participate in a decision where the decision will have a material effect on sources of income or gifts to the public official.[9]

The pertinent disclosure requirements of the Act are set forth in Sections 87200 through 87210. Generally, the Act requires public officials to file annual statements indicating certain sources of income and gifts for the preceding 12 months. The general threshold for reporting income is $250, and for gifts, $50. Sections 87203, 87207 (a) (1) - (4). These disclosures are made on forms commonly known as Statements of Economic Interest [SEI].

The prohibition on receipt of gifts is contained in Section 89503 which prohibits the Mayor, City Council Members, City Attorney, City Manager and other designated City employees from accepting gifts from any one source in any calendar year with a total value of more than $250, adjusted for inflation. Section 89503 (a), (c) and (f). The current threshold is $290. Cal. Code Regs. tit. 2, 18940.2 (a).

Finally, the Act establishes the FPPC and authorizes it to establish rules and regulations to implement the purposes and provisions of the Act. Sections 83100, 83112. Any person may request an opinion or written advice from the FPPC regarding the duties under the Act. Section 83114. Good faith reliance on an opinion or written advice from the FPPC is a complete defense to any complaint to the FPPC, or any civil or criminal action. *Id.* The FPPC has adopted a series of regulations pursuant to section 83112. Cal. Code Regs. tit. 2, 18109 - 18995. Rather than set forth the pertinent regulations here, those regulations will be discussed as necessary throughout this Report.

The effect of each of the prohibitions and requirements of the Act on the use of the Boxes depends on the definitions of the various terms used throughout the Act.

B. Definitions in the Political Reform Act

The most crucial definition concerning these issues is the definition of "income." Section 82030 provides:

> (a) "Income" means, except as provided in subdivision (b), a payment received, including but not limited to any salary, wage, . . . gift, including any gift of food or beverage, . . . paid by any person other than an employer . . . .
>
> (b) "Income" does not include:
>
> . . . .
>
> (2) Salary and reimbursement for expenses or per diem received from a . . . local . . . government agency . . . .

Thus, state law requires the reporting of income to officials from *outside* sources, not from the employer or from other local government agencies.

Although separately defined in Section 82028, [10] "gift" is included in the definition of income. Because a "gift" is merely a subset of "income" for purposes of the Act, any exclusion from the larger set (income) cannot be a member of the subset "gift." Thus, salary and reimbursement for expenses or per diem from a local government agency, *excluded from income* pursuant to Section 82030 (b) (2), are also not gifts for purposes of the Act.

C. Other Statutory Provisions

1. Prohibited Interest in Contracts

The Act is not the only statutory provision relating to conflicts of interest. Section 1090 provides in relevant part:

[C]ity officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.

2. City Code of Ethics

The City has its own code of ethics, embodied in Council Policy No. 000-4. It provides in pertinent part as follows:

First: No elected official, officer, appointee or employee of The City of San Diego . . . shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgment or action in the performance of such duties.

Second: No elected official, officer, appointee or employee shall engage in any . . . activity which shall result in any of the following:

. . . .

(e) Receiving or accepting, directly or indirectly, any gift or favor from anyone doing business with The City of San Diego under circumstances from which it could reasonably be inferred that such was intended to influence him in his official employment or duties, or as a reward for official action.

Violations of Council Policies are not a basis for criminal action, as they are not adopted by ordinance and codified in the Municipal Code.[11] In addition, Council Policies do not provide for a private right of action against any City official, appointee or employee.

With these statutory provisions and definitions in mind, we turn to an analysis of the questions presented.

II

USE OF THE BOXES IS NOT REPORTABLE AS INCOME OR GIFT

In February of 1979, the question of whether the use of the Boxes constituted a gift under the Act was asked of this Office by then Council Member Bill Lowery. In Opinion 79-1, this Office concluded that it was not a gift or reportable as such. A copy of the Opinion is enclosed as Attachment 6. Citing several FPPC opinions and advice letters, the Opinion concluded that the use of the Boxes was not reportable income under the Act because, amongst other reasons, the use of the Boxes was reserved to the City in its agreements with the various tenants and the Boxes were used for City purposes consistent with Council Policy 700-22. Nothing has changed since the issuance of that Opinion to cause us to modify or disagree with the position expressed in it.

Later in 1979, in a Report to the Honorable Mayor and City Council (June 18, 1979), the City Attorney reported that, upon request, the FPPC had issued an advice letter (No. 79-006) that concurred in the City Attorney's opinion that the use of the Boxes was not a reportable gift. A copy of that Report and the FPPC opinion is enclosed as Attachment 7. In pertinent part, the FPPC stated: "[T]his conclusion was based on . . . testimony that, . . . the passes are provided by the City to its own employees and to members of a joint powers agency in which it is a participant. The passes therefore fall within the exception provided in Government Code Section 82030 (b) (2)." In other words, the FPPC ruled that the use of the Boxes was part of the salary, expenses or per diem provided to the City officials by a local agency, either the City itself or the Authority, and thus was not "income" under the Act. In essence, the FPPC has recognized that use of the Boxes is part of the job of the City officials, thus exempting its use from the reporting requirements for outside income. Furthermore, because use of the Boxes is excluded for the definition of "income," it also cannot be a gift. The use of the Boxes thus is not required to be reported as either income or gift on an SEI pursuant to Sections 87203 or 87207; and is not subject to the gift limitations of section 89503. *See also, In re Sato,* FPPC Priv. Adv. Ltr. I-93-352.

This issue was later addressed by the FPPC in its adoption of former Title 2, California Administrative Code section 18726.7 (now California Code of Regulations, title 2, section 18944.1).[12] Originally proposed in 1985,[13] (FPPC memorandum (10/24/85)), the regulation was finally adopted in 1987. As originally adopted, it provided in relevant part:

> Passes or tickets which provide admission or access to facilities, goods or services, or other tangible or intangible benefits (including passes to motion picture theaters, amusement parks, parking facilities, country clubs, and similar places or events, but not including travel or lodging), which are provided to an agency official are not gifts to the official whenever (a), (b), (c) or (d) applies:
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> . . . .
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> (c) The tickets or passes are provided to the agency as part of the contract for the use of the facility and the distribution and use of the passes or tickets are regulated by an officially adopted policy of the agency.

As originally proposed, the regulation implemented Section 82028. "Initial Statement of Reasons" re: 2 Cal. Admin. Code Section 18726.7 (9/6/85). The parenthetical describing the various types of passes included in the regulation, and, importantly, excepting out of its coverage travel and lodging, was a late addition to the regulation, based upon comments received by the FPPC. FPPC Memorandum re: sections 18726.7 and 18726.8 (January 16, 1987).

The conditions for exclusion under subsection (c) of the regulation are met in regard to the Boxes. The tickets or passes to the Boxes are reserved to the City pursuant to the agreements with the tenants for the use of the Stadium, and their the distribution and use of the tickets or passes is governed by Council Policy No. 700-22. The FPPC has acknowledged that "[t]he tickets or passes [to the Stadium] provided to the city [of San Diego] officials are covered by subdivision (c) of Regulation 18726.7 and are, thus, not deemed to be gifts to the city officials," not required to be reported on SEIs, and do not give rise to disqualifications. FPPC Memorandum re: amendment to Regulation 18726.7 at p. 1-2 (3/1/90)[FPPC Memorandum]. A copy of that memorandum is enclosed as Attachment 8. *See also, In re Sato,* FPPC Priv. Adv. Ltr. I-93-352.

The regulation was amended in 1990 at the request of the County of San Diego. Apparently, the County felt that, while the City's officials were covered by application of Regulation 18726.7, the County's credential holders were not, and requested the FPPC to amend the regulation to specifically provide for members of a joint powers authority. FPPC Memorandum. Subsection (e) was added to the regulation to specifically cover the County. *Id.*

In 1994, the regulation was renumbered to the current Regulation 18944.1 without change. At that time, Common Cause urged the FPPC to do away with much of the regulation as it allegedly allowed circumvention of the limits and prohibition on gifts otherwise set forth in state law. *See,* Letter from California Common Cause to FPPC re: Prenotice Discussion of Gift and Honoraria Regulations at p. 6-7 (7/2/91). The FPPC did not adopt Common Cause's position, but merely renumbered the regulation. FPPC Minutes of Meeting, April 7, 1994 at p. 6.

In sum, the FPPC has specifically acknowledged, in both an Advice Letter interpreting Section 82030 and in a memorandum interpreting Regulation 18944.1, that the use of the Boxes by City officials is neither income nor gift under state law. The use of the Boxes is therefore not subject to disclosure on SEIs and does not give rise to disqualifications. In light of the attempt to limit the regulation's scope and the FPPC's refusal to do so, this application of the statute and regulation has been confirmed.

III

USE OF THE BOXES DOES NOT CREATE A CONFLICT OF INTEREST

Pursuant to Section 87100, a public official may not take an action on a matter only if there is a material financial affect on any source of income or gifts. Because the use of the Boxes is neither income nor gift, as more particularly set forth above, the use of the Boxes does

not create a conflict of interest for any of the City officials.

In addition, the use of the Boxes is not a violation of Section 1090. Access to the Boxes is not provided pursuant to any contract, it is *reserved* to the City, the owner of the Stadium, specifically through the various agreements between the City and its tenants at the Stadium, and Council Policy No. 700-22. The tickets or passes are merely an accommodation to allow the access reserved to the City. Thus, there is no contract regarding the use of the Boxes in which any City official can become interested, and, based on these facts, Section 1090 cannot be violated.

IV

CONSUMPTION OF FOOD AND DRINK IN THE BOXES IS NOT REPORTABLE AS INCOME OR GIFT

As set forth above, Regulation 18944.1 excepts from the definition of gift, passes or tickets which provide access to goods, services or other tangible or intangible benefits. That provision of the regulation has been present since its adoption in 1987 and, from a review of its legislative history, has never been a source of controversy. Certainly food and beverage can be counted among the types of items set forth in the regulation. In addition, the specific exclusion of travel and lodging, but no other specific types of benefits, leads to a conclusion that consumption of food and beverages were types of benefits deliberately included in the regulation's coverage. We thus conclude that the consumption of food and beverages in the Boxes is not reportable as gift or income because access to them was provided by the tickets or passes to the Stadium, which, as more fully explained above, are neither gift nor income under state law. *Cf., In re Burns,* FPPC Priv. Adv. Ltr. A-93-111, p. 6; *In re Raye,* Priv. Adv. Ltr. A-87-091 (food and beverage consumed at government dinner not gift under Regulation 18726.7).

We note that Regulation 18941.1, adopted in 1994, provides that a "payment" made to an elected officer for his or her food is a gift. "Payment" is defined elsewhere as including a "rendering" (*see,* fn.11) therefore the provision of food and beverage at the Boxes might otherwise be defined as a gift. However, Regulation 18941.1 provides that its provisions apply "except as provided in . . . section 82028." Regulation 18944.1 was adopted to implement the provisions of Section 82028, and, accordingly, we conclude that Regulation 18941.1 does not otherwise limit or override the provisions of Regulation 18944.1.

V

CONSUMPTION OF FOOD AND DRINK IN THE BOXES DOES NOT CREATE A CONFLICT OF INTEREST

As with the use of the Boxes, the consumption of food and beverages at the Boxes does not give rise to a conflict of interest under Section 87100 because such consumption is neither gift nor income under state law. We also believe that the consumption of food and beverage

does not give rise to a prohibited interest in a contract pursuant to Section 1090.

The prohibition contained in Section 1090 is a broad one, broader than the prohibitions contained in the Act. *See, People v. Honig*, 48 Cal. App. 4th 289, 313-317 (1996). "Financially interested" as used in Section 1090 is not defined in the statutes, however, case law has provided guidance on what it means. Section 1090 does not require that a transferrable interest in a contract exists, nor that a public official share directly in the profits of a contract. *Id.* at 315. "[F]orbidden interests extend to expectations of benefits by express or implied agreement and may be inferred from the circumstances." *Id.* A review of the cases, however, reveals that the benefit derived from a contract, in order to be a forbidden interest, must have some relationship to a payment or other financial benefit to the official, family member, or financial partner or business associate of the official *arising out of the performance of the contract*. *See generally, Id.* at 315-317, and cases cited therein.

Here, there are no facts of which we are aware that show that any of the City officials who have access to the Boxes stand to gain financially from the performance by Service America of its contract with the City, or that family members or business associates of those officials stand to gain financially from the performance of that contract. We cannot see how the consumption of food and beverage supplied by Service America to the Boxes generally, which is not a requirement of the contract and is provided without regard to who is using the Boxes on any given occasion, can give rise to a prohibited financial interest in a contract under Section 1090. In sum, and based upon the facts as we know them, we conclude that there is no prohibited financial interest in the Service America contract by any City official.

VI

PARKING AT THE STADIUM IN CONNECTION WITH THE USE OF THE BOXES IS NOT REPORTABLE AS INCOME OR GIFT

In connection with the passes to the Boxes, each credential holder is given a parking pass for parking at the Stadium. We believe that the parking pass falls both within the FPPC's reasoning regarding the use of the Boxes, and the specific provisions of Regulation 18944.1.

The FPPC has ruled that use of the Boxes is not income because, essentially, such use is part of the duties of the City officials. Parking at the Stadium for purposes of using the Boxes must also be viewed as related to the exercise of official duties. Thus, we believe that the provision of parking at the Stadium is exempted from the reporting requirements and gift limitation for the same reason as the use of the Boxes themselves.

In addition, however, Regulation 18944.1 specifically makes reference to passes or tickets to parking facilities as not being gifts, provided the other requirements of one of the subsections are met. We believe that, for the same reason that the use of the Boxes falls within either subsection (c) or (e) of Regulation 18944.1, the availability of parking at the Stadium also falls within those subsections and is not a gift within the meaning of state law. *In re Blomo,* FPPC Priv. Adv. Ltr. I-95-129.

VII

PARKING AT THE STADIUM DOES NOT CREATE A CONFLICT OF INTEREST

As with the use of the Boxes, and the consumption of food and beverages at the Boxes, parking at the Stadium in connection with the use of the Boxes does not give rise to a conflict of interest under Section 87100 because the parking is neither gift nor income under state law.

In addition, parking at the Stadium is not a violation of Section 1090. Just as access to the Boxes is not provided pursuant to contract, parking is not provided pursuant to any contract. Parking is *reserved* to the City, the owner of the Stadium, through the City's contract with Ace and Council Policy No. 700-22. The parking is also incidental to the use of the Boxes. Thus, there is no contract regarding the parking in which any City official can become interested, precluding a violation of Section 1090.

VIII

NO VIOLATION OF THE BROWN ACT OCCURRED AT THE DECEMBER 16, 1997, CLOSED SESSION OF THE CITY COUNCIL

The Ralph M. Brown Act (California Government Code sections 54950 through 54962) is California's open meeting law. Generally, the Brown Act requires all meetings of the City Council to be open to the public, and that all actions of the City Council take place in open sessions. *See generally,* Sections 54953, 54954.2. Certain exceptions to these requirements are provided for, including closed sessions by the City Council to discuss negotiations concerning real estate matters. Section 54956.8. Specifically, the City Council may meet in closed session with its negotiator to grant authority regarding the price and terms for the purchase, sale, exchange or lease of real property. *Id.*

A public report of actions taken in closed session must be made in open session under certain defined circumstances. In particular, Section 54957.1 (a) provides that a public report of an action taken in closed session, and the vote on that action, be made regarding real estate negotiations as follows:

(1) Approval of an agreement *concluding* real estate negotiations pursuant to Section 54956.8 shall be reported *after the agreement is final*, as specified below:

(A) If its own approval *renders the agreement final*, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If *final approval* rests with the other party to the negotiations, the local agency shall disclose the fact of the approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the

local agency of its approval.

In sum, only final approvals of agreements must be reported, and, only if the City's approval makes the agreement final must the matter be reported immediately in open session. If final approval rests with the other party, a report must be made only upon inquiry. No other matter must be reported out of closed session concerning the progress of negotiations.

Mr. Henderson's complaint, based upon a newspaper article in the Union-Tribune, and a subsequent letter to the editor in the same newspaper, is that a public report of a decision to *commence* negotiations with the Padres was not made, and therefore a violation of the Brown Act occurred. *See,* Attachment 1 at page 3 of 15. The privilege regarding closed sessions is held by the Mayor and City Council, and we may not divulge in this Report what occurred in closed session on December 16, 1997. Assuming Mr. Henderson's account to be true, however, that the City Council authorized negotiations to commence, the Brown Act does not require a public report of that action. The decision to commence negotiations is, rather obviously, not a final agreement between the parties, and constitutes part of the process of giving authority to the City's negotiator regarding the conduct of negotiations.

Mr. Henderson's complaint regarding the Brown Act and the December 16, 1997, closed session is completely without foundation both in law and fact, and patently frivolous.

IX

THE PURCHASE OF SUPER BOWL TICKETS AT FACE VALUE IS NOT A GIFT FROM THE NFL

Mr. Henderson, in his supplemental complaint, contends that the ability of various City officials to purchase tickets to the Super Bowl from the NFL at face value represents a "gift" from the NFL because the actual fair market value of the tickets was reported to be many times the face value. This contention has no merit.

To address this issue we must first determine how state law would value the ticket if it had been a gift: at face value or resale value. Regulation 18946.1 addresses the valuation of passes or tickets. At subsection (a) it states that passes or tickets that provide one-time access to sporting events "shall be valued at the face value of the pass or ticket, provided that the face value is a price that was, or otherwise would have been, offered to the general public."

In the case of Super Bowl tickets, the tickets to this one-time event were offered to the general public at the indicated face value. It is true that not all of the general public had the opportunity to purchase the tickets, thus the creation of a resale market for the tickets with highly inflated prices. The regulation, however, simply provides that tickets to one-time sporting events "shall" be valued at their face value, not the value on a resale market. By failing to distinguish between mega-events like the Super Bowl, and other events, tickets for which are not in such high demand, the FPPC has indicated the it will not hold public officials accountable for the resale activity in a limited commodity like tickets to sporting events. Thus, state law would only require the reporting of the face value of the ticket, if the ticket was a gift to the official from the

NFL, and not the resale value. Because the City officials *paid* for their tickets at face value, however, that purchase cannot be a gift under state law.[14]

X

THERE IS NO CONFLICT OF INTEREST PRESENT FOR THE MAYOR AND CITY COUNCIL CONCERNING THE SCHEDULED VOTE ON THE CONVENTION CENTER REFERENDUM

Mr. Henderson makes a very broad and convoluted allegation that the Mayor and City Council have a conflict of interest with regard to the planned vote on the Convention Center referendum. This conflict allegedly arises because Service America has the current contract for concession services at the Convention Center and stands to get the contract for concession services at the expanded center, and because Service America has the contract for concessions at the Stadium and stands to get the contract for concession services at a new ballpark for the Padres. Mr. Henderson also cites to the presence of a City Council Member in the Padres owner's box as contributing to the potential conflict.

We see no potential conflict for the Mayor and City Council. As discussed above, the consumption of food and beverage at the boxes is neither gift nor income under state law, and does not give rise to any conflict of interest. It is not a prohibited financial interest in a contract, which could result in a conflict. Service America does not have a contract with the City for concession services at the Convention Center, but has that contract with SDCCC. In addition, it is pure speculation as to what entity will have concession rights at the expanded Convention Center or proposed ballpark, especially because the future of both of those projects is not assured at this time.

We also cannot see how Service America's contract with the NFL for the Super Bowl creates a conflict for the Mayor and City Council, nor how the mere presence of a City Council Member in an owner's box at the Stadium creates a conflict of interest for the vote on the referendum. Mr. Henderson's allegations are purely speculative as to whether access to the owner's box was a gift and, if so, what value is to be ascribed to that gift, or whether the Council Member paid for admission to the Stadium or had access pursuant to Council Policy 700-22. We do not believe that the conflict laws otherwise prohibit the presence of an elected official in an owner's box, provided the official has other access to the Stadium. Mr. Henderson's letters are completely devoid of any facts upon which it can be concluded that any conflict exists with regard to the vote on the Convention Center referendum.

Finally, even if a potential conflict exists, the rule of necessity, embodied in Section 87101, would be invoked because the law requires the Council to either rescind the legislative action on the Convention Center or set the matter for an election. *See, e.g., Kunec v. Brea Redevelopment Agency,* 55 Cal. App. 4th 511 (1997); Regulation 18701. If the Council were recused there could be no decision. The Council must of necessity be the decision maker.

XI

NO VIOLATIONS OF COUNCIL POLICY NO. 000-4 HAVE OCCURRED

Mr. Henderson contends that one City Council Member in particular violated the "First" prohibition of Council Policy No. 000-4, regarding incompatible transactions, by transferring her right to purchase tickets to the Super Bowl at face value to a member of the City Task Force on Ballpark Planning. We fail to see how the transfer of the ability to purchase a ticket at face value, which right does not represent a gift or income in itself, is a violation of the Council Policy. There are no facts set forth in Mr. Henderson's supplemental letter, or of which we are aware, that lead to a conclusion that the transaction described, if true, impairs the ability of the Task Force member to perform his or her duties.

Mr. Henderson additionally contends that the purchase of tickets to the Super Bowl by the Mayor and City Council violated subsection (e) of the "Second" prohibition in the Council Policy, concerning prohibited gifts. We have already concluded that the purchase of the tickets is not a gift from the NFL, therefore we conclude that the purchase of the tickets also does not represent a gift for purposes of the Council Policy. In addition, however, there are no facts presented from which it can be reasonable inferred that the purchase of the tickets from the NFL, even if a gift, was intended to influence action or be a reward. In fact, the hosting of the Super Bowl is an event in such demand, and subject to such competition, that the NFL neither needs to influence nor reward action. We conclude that no violation of the Council Policy has thus occurred.

CONCLUSION

Mr. Henderson's and Mr. Strohlein's complaints have no legal merit. The use of the Directors' Areas at the Stadium was long ago ruled to be neither income nor gift for reporting purposes, and that result has specifically been codified into state regulations. The use of those areas is thus also not a gift for purposes of the gift limitation and disqualification provisions in state law. Access to the tangible and intangible benefits of the Directors' Areas, including food and beverage, is neither reportable nor subject to the limitations and prohibitions in state law.

Furthermore, no conflict of interest with regard to Service America or the Convention Center referendum is created by the use of the Directors' Areas, the purchase of Super Bowl tickets at face value, or by access to an owner's box at the Stadium. Finally, no violations of Council Policy have occurred with regard to these matters, and no violation of the Brown Act occurred at the December 16, 1997, closed session of the City Council as no final action was taken by the Council at that time concerning lease negotiations with the Padres.

A copy of this Report will be provided to the District Attorney, the FPPC, the County Grand Jury, Mr. Henderson and Mr. Strohlein.

Respectfully submitted,

CASEY GWINN
City Attorney

LJG:ljg:js(043.1)
Attachments 1-8
cc: City Manager
City Auditor
City Clerk
District Attorney
FPPC
Grand Jury
J. Bruce Henderson
Alfred C. Strohlein
RC-98-5
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