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**MEMORANDUM OF LAW**

**DATE:** February 23, 2006

**TO:** Honorable Mayor and City Councilmembers

**FROM:** City Attorney

**SUBJECT:** Appointments of Mayor and Councilmembers to Outside Agencies

**INTRODUCTION**

Each year the City Council makes appointments of its members to various outside boards, commissions, and agencies. These appointments have historically been handled in a single resolution with all members of the City Council participating in the vote. Recently it was brought to the attention of Councilmember Madaffer that the Fair Political Practices Commission [FPPC] had written an informal advice letter recommending that councilmembers not participate in a vote to appoint themselves to a board or commission that would increase that member's salary, per diem, or reimbursement. At Councilmember Madaffer's request, this memorandum discusses the informal advice letter and makes recommendations on how to comply with such advice. In addition, the memorandum addresses the Mayor's role in approving a resolution that appoints him to a board or agency that may increase his compensation or provide reimbursement.

**QUESTIONS PRESENTED**

1. Must councilmembers recuse themselves from participating in a decision to appoint themselves to a board or commission where such appointment would increase only that member's salary, per diem, or reimbursements?
2. May the Mayor approve or veto a resolution that appoints him to a board or commission where such appointment would increase only his salary, per diem, or reimbursements?

### SHORT ANSWERS

1. Yes. Councilmembers should recuse themselves from any decision to appoint themselves to a board or commission where that member's salary, per diem, or reimbursements would be uniquely increased through such appointment.

2. No. The Mayor may not approve or veto a resolution that appoints him to a board or commission where his salary, per diem, or reimbursements would be increased through such appointment.

### ANALYSIS

On December 31, 2003, the FPPC issued an informal advice letter that advised the city council for the City of Mission Viejo that a councilmember may not participate in a decision to appoint him or herself to a board or commission where such appointment would increase only his or her salary, per diem, or reimbursements. *In re Thorson*, FPPC Inf. Adv. Ltr. I-03-287. (Copy attached.) The letter discusses the six kinds of economic interests from which conflicts of interest may arise and defines the standard for materiality of those interests as set forth in California Government Code section 87103 and title 2, sections 18703-18703.5 of the California Code of Regulations. Relying on the "personal effects rule," one of the six kinds of interests found in California Government Code section 87103 and further defined in title 2, section 18705.5(b) of the California Code of Regulations, the FPPC concluded that a councilmember must recuse him or herself if the result of the action would be that the councilmember receives a salary, per diem, or reimbursement in excess of \$250 per year that is different from that paid to the other members of the City Council. The key factor cited by the FPPC is that the additional compensation afforded by the outside organization appointment is above and beyond the regular compensation every other councilmember receives. This factor triggers an exception to title 2, section 18705.5(b) of the California Code of Regulations, which generally exempts compensation paid by a local government agency from consideration in conflicts of interest analysis, and makes the personal effects rule applicable to the outside organization compensation.

The San Diego City Council is presented with a similar situation when councilmembers are appointed to outside organizations and agencies. Councilmembers are annually appointed to a number of outside organizations, ranging from SANDAG and the League of California Cities to various joint powers agencies and park task forces. Many of these organizations have the potential to provide compensation in an amount that exceeds \$250 per year to board members. In the case of each of these organizations, once a councilmember is appointed to the board he or she is eligible to receive the designated compensation. This compensation is above and beyond the regular compensation that is available to each of the other councilmembers as remuneration for their customary activities as a councilmember. Because of this, the situation falls within the parameters of the situation analyzed by the FPPC and the same advice applies. Accordingly, councilmembers should recuse themselves from any vote to appoint them to outside

organizations or agencies where they would receive additional compensation in an amount exceeding \$250 per year, whether it comes from salary, per diem, or reimbursements.

In past years, the appointment of councilmembers to outside organizations has been handled with one resolution that lists each outside organization and the respective councilmember or members being appointed to that organization. *See, e.g.*, San Diego Resolution R-300015 (Dec. 7, 2004). Compliance with the FPPC advice necessitates separate resolutions for appointments to those outside organizations that offer any additional compensation to their members to allow councilmembers to recuse themselves from voting on their own appointment. Councilmembers are currently appointed to over thirty outside organizations, many of which clearly provide compensation in the form of per diem or reimbursements to members. Many more outside organizations are authorized by controlling law or governing documents to provide compensation, but the actual level or type of compensation may change depending on the wishes of each successive board. Several other outside organizations do not currently have guidelines for providing compensation to members, but are not prevented by controlling law or governing documents from authorizing compensation in the future. The confluence of different compensation policies makes it difficult to separate out those outside organizations that will clearly offer compensation in any given year. Given this difficulty, we recommend that the appointments to outside organizations be reflected in separate resolutions for each councilmember. This will allow each respective councilmember to recuse him or herself from deliberation and voting on the resolution appointing him or her to outside organizations.

Likewise, the Mayor should not participate in the process of appointing himself to outside organizations. While the Mayor is not part of the legislative body, and therefore does not participate in deliberation and voting on appointments, the Mayor does have the ability to approve or veto resolutions making appointments. San Diego Charter § 280. Affirmatively approving a resolution is a form of involvement in the appointment process. The Mayor should avoid participating in his own appointment to outside organizations by not affirmatively approving the resolution appointing him to those organizations. Instead, the Mayor should allow the resolution containing his own appointments to go into effect by operation of law rather than by signature. San Diego Charter § 280(c)(4). This will avoid any involvement by the Mayor in the process of appointing himself to outside organizations.

### **CONCLUSION**

This Office concurs with the FPPC advice that councilmembers should recuse themselves from deliberating and voting on any resolution that will appoint them to an outside organization where they will receive additional compensation that totals \$250 or more per year. Because it is difficult to tell with certainty which outside organizations will offer compensation that meets the threshold amount in any given year, we recommend that the appointment of councilmembers to outside organizations be reflected in separate resolutions for each councilmember. This process will allow each councilmember to recuse him or herself from the deliberation and voting on his or her own appointment, thereby eliminating any actual and potential conflicts in the outside

organizations appointment process. Similarly, we recommend that the Mayor not participate in any decisions affecting his appointment to outside boards or agencies where he may be entitled to any additional compensation. In that regard, the Mayor should not approve the resolution but merely allow the resolution to take effect by operation of law.

MICHAEL J. AGUIRRE, City Attorney

By  
Michael J. Aguirre  
City Attorney

MJA:SR:jb  
Attachment  
ML-2006-3