

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

SHANNON M. THOMAS
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Jan I. Goldsmith
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: December 16, 2009

TO: Stacey LoMedico, Director, Park & Recreation Department

FROM: City Attorney

SUBJECT: Conflict of Interest for Mission Bay Park Committee Members

INTRODUCTION

The Mission Bay Park Committee [Committee] is responsible for serving in an advisory capacity to the Park and Recreation Board, Mayor, City Council, and City Manager on policy issues relating to the acquisition, development, maintenance, and operation of Mission Bay Park. In addition, the Mission Bay Park Committee also fulfills the role of the Mission Bay Park Improvement Fund Oversight Committee as those duties are set forth in San Diego Charter section 55.2; essentially to recommend future capital improvement projects and to meet at least quarterly to audit and review the implementation of that Charter section.

Various Mission Bay Park lessees have offered the use of meeting space to the Committee, with food and beverages available to the Committee members and the public. Also, members of the public have offered to take the Committee members on a boat tour of Mission Bay Park for the purpose of showing the Committee members Mission Bay from the perspective of the water.

QUESTIONS PRESENTED

1. Does the City of San Diego Ethics Ordinance prohibit the Committee members from accepting the use of a meeting room, food and beverages and from accepting a boat tour?
2. Does the California Political Reform Act prohibit the Committee members from accepting the use of a meeting room, food and beverages and from accepting a boat tour?

SHORT ANSWERS

1. No. As long as the value of the food and beverages remain below a statutorily set amount, the Committee members are not prohibited by the City's Ethics Ordinance from accepting the food and beverages. The use of the room is not for the personal benefit of the Committee members, and is therefore not within the definition of a gift. The boat tour is for informational purposes, and is therefore exempt from the definition of a gift.

2. No. The reasons are the same as set forth above, however, if food and beverages were accepted in excess of the statutorily set amount, specific analysis would need to be conducted regarding the reasonably foreseeable material effect the specific decision in front of the Committee would have on the source of the gift.

BACKGROUND

The Mission Bay Park Committee is established in the San Diego Municipal Code for the purpose of advising the Park and Recreation Department, the Mayor, City Council, and City Manager on policy issues relating to acquisition, development, maintenance, and operation of Mission Bay Park.

In addition, Proposition C, approved by the voters in 2008, amended the Charter by adding section 55.2, Mission Bay Park and Regional Parks Improvement Funds. This Charter section requires that certain revenue collected from within Mission Bay Park be expended in Mission Bay Park. The Mission Bay Park Committee has been designated the oversight committee for the purposes of identifying capital projects, prioritizing those projects, and ensuring the funds are spent in accordance with the Charter section. In conjunction with the new duties associated with being designated the Mission Bay Park Improvement Fund Oversight Committee, the Mission Bay Park Committee is required to file Statements of Economic Interest, and abide by a Council-adopted Conflict of Interest Code.

ANALYSIS

The City of San Diego Ethics Ordinance and the California Political Reform Act govern the acceptance of gifts by certain government officials. The applicability of each is discussed below.

I. City's Ethics Ordinance.

Members of the Committee are City Officials, as defined in the City's Ethics Ordinance. The Ethics Ordinance defines City Officials thus: "*City Official* includes: . . . (b) any *City Board* member . . ." SDMC § 27.3503. A City Board is defined to include any board, commission, committee, or task force whose members are required to file statements of economic interest. *Id.* As of July 7, 2009, the Committee members are required to file statements of economic interest.

The Ethics Ordinance prohibits the acceptance by City Officials of various enumerated benefits; of relevance to this inquiry is the prohibition on the acceptance of gifts. It is unlawful to accept gifts from any single source in any calendar year that exceed a specified value, if the member would be required to report the gift from that source on the member's statement of economic interest. SDMC § 27.3520(g).

A gift is defined in part as "any *payment* that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public." SDMC § 27.3503. A payment is defined to include "anything else of value, whether tangible or intangible." SDMC § 27.3503.

According to the Committee's Conflict of Interest Code, Appendix B, Disclosure Categories, the Committee members are required to report gifts from, among others, "any person, firm or entity that supplies goods or services to the Park and Recreation Department of the City of San Diego, including businesses with leaseholds in City parks" The limitation of \$320 is subject to adjustment to ensure consistency with the limits set by the California Fair Political Practices Commission [FPPC], and shall be the same as set forth in title 2 section 18940.2 of the California Code of Regulations. SDMC §27.3521. The gift limitation set by the FPPC for calendar years 2009 and 2010 is \$420. Cal. Code Regs. tit. 2, § 18940.2(a). Therefore, for the calendar years 2009 and 2010, the Committee members may not accept gifts from a lessee of Mission Bay Park that exceed \$420 in a calendar year.

The provision of a meeting room does not appear to confer a personal benefit upon the Committee member attending the Committee meeting. Acceptance of food or beverages, however, would be a personal benefit to the recipient. The Committee members may not accept food and beverages from a Mission Bay lessee that exceed \$420 in a single calendar year. Excluded from the definition of gifts are informational items, including tours and inspections designed specifically for public officials SDMC § 27.3525(l)(2). Therefore, a boat tour for informational purposes would not be considered a gift.

II. California's Political Reform Act.

The Political Reform Act of 1974 [Act] is codified in California Government Code sections 81000-91014. The Act was adopted to ensure that public officials perform their duties in an impartial manner, free from bias caused by their financial interests. Cal. Gov't Code § 81001.

A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of the official's economic interests, unless that effect is indistinguishable from the effect on the public generally. Cal. Gov't Code § 87103. There are six disqualifying types of economic interests: investments in business entities, interests in real property, sources of income, sources of gifts, positions in business entities, and personal finances. Cal. Gov't Code § 87103(a)-(e).

The analysis to determine whether the Committee members have a conflict of interest prohibiting the use of the room and acceptance of the food, beverages, and boat tour consists of an eight step test. The analysis must determine whether: 1) the members are public officials; 2) the officials are making or participating in making a governmental decision; 3) the public officials have one of six disqualifying interests; 4) the economic interest is directly or indirectly involved in the governmental decision; 5) the governmental decision will have a material financial effect on the public officials' economic interest; 6) it is reasonably foreseeable that the economic interest will be materially affected; 7) the effect of the governmental decision on the public officials' economic interests is distinguishable from its effect on the general public; and 8) the public officials' participation is legally required.

- 1) The Committee members are public officials.

The Act defines "public official" to include every member, officer, employee or consultant of a state or local government agency. Cal. Gov't Code § 82048. "Members" includes unsalaried members of committees, boards or commissions with decision-making authority; meaning the body has the authority to make a final governmental decision, to compel or prevent the making of a governmental decision through use of an exclusive power to initiate or veto that may not be overridden, or it makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency. Cal. Code Regs. tit.2, § 18701(a).

This office has concluded that the Committee members are public officials. City Att'y Report 2009-16 (June 23, 2009)

- 2) The Committee members make or participate in making a governmental decision.

Numerous acts are considered part of making a governmental decision. These include voting, making appointments; obligating the public agency to any course of action; entering into a contract on behalf of the agency; or refraining from acting on any of these matters (unless the abstention is based on a conflict of interest). Cal. Code Regs. tit. 2, § 18702.1(a).

The participation in making a governmental decision includes negotiating, without significant substantive review, regarding a governmental decision relating to approval of a rate, rule, or regulation; the adoption or enforcement of a law; the issuance, suspension, or revocation of a permit, license, application, certificate, approval, order, or similar entitlement;

authorizing the entering into, modification, or renewal of a contract- provided it is the type that requires agency approval; granting agency approval when the contract requires it and the agency is a party; granting approval of plans, designs, or similar items; and adopting or granting approval of policies, standards, or guidelines for the agency, or any of its divisions. Cal. Code Regs. tit. 2, § 18702.2(a). The participation in the making of a governmental decision also includes advising or making recommendations to the decision maker, either directly or without significant intervening substantive review by: 1) conducting research or making any investigation which requires the exercise of judgment by the official and the purpose of which is to influence any of the governmental decisions referenced in the previous sentence, or 2) preparing or presenting any report, analysis, or opinion, orally or in writing, which requires the exercise of judgment on the part of the government official and the purpose of which is to influence a governmental decision referenced above. Cal. Code Regs. tit. 2, § 18702.2(b).

This office has concluded that the Committee members participate in the making of a governmental decision when exercising their duties as the Mission Bay Park Improvement Fund Oversight Committee. City Att'y Report 2009-16 (June 23, 2009).

3) The Committee members have one of the six disqualifying interests if they receive a gift of food or drink within 12 months of their participation in a governmental decision which is valued at more than \$420.

The six disqualifying types of economic interest are 1) investments in business entities; 2) interests in real property; 3) source of income; 4) source of gifts; 5) business position; and 6) personal financial effect. Cal. Gov't Code § 87103(a)-(e). The facts provided for this analysis indicate that the possible disqualifying economic interest is a source of gifts.

Gifts are defined as any payment that confers a personal benefit on the recipient, to the extent consideration of at least equal value is not received by the donor. Cal. Gov't Code § 82028(a). Payment includes anything of value, whether tangible or intangible. Cal. Gov't Code § 82044.

The use of the room for the Committee meetings would not confer a personal benefit on the Committee members and is therefore not a gift. *In Re Brennan*, FPPC Inf. Adv. Ltr. A-08-44

(use of a meeting room by the New Motor Vehicle Board that was provided by a party to the pending action did not confer a personal benefit to the board members).

A gift also does not include informational items. Cal. Gov't Code § 82028; Cal. Code Regs. tit. 2, §18942. Informational items include any item which "serves primarily to convey information and which is provided for the purpose of assisting the recipient in the performance of his or her official duties . . ." Cal. Code Regs. tit. 2, § 18942.1. Tours designed specifically for the purpose of assisting the recipient public officials in the performance of their official duties are informational items, and therefore are not a gift. *Id.* It appears that the boat tour was offered for the purpose of assisting the Committee members in the performance of their official duties and as such it would not be considered a gift.

A gift to a public official is a disqualifying interest if it provided to, received by, or promised to the public official within 12 months of the decision in question, and is valued at more than a biennially adjusted amount: between January 1, 2009 to December 31, 2010 that value is \$420. Cal. Gov't Code § 87103(e). Therefore, assuming the other factors of this analysis are met, the acceptance by the Committee members of the gift of food and drink in excess of \$420 would be a disqualifying interest. Gifts are valued at their fair market value as of the date they are received or promised to the recipient. Cal. Code Regs. tit. 2, § 18946(a). A gift is considered received or accepted when the recipient has actual possession or exercises control over the gift. Cal. Code Regs. tit. 2, § 18941(a). The provision of food and beverages is considered a gift because of the "obviously personal benefit to the recipient." *In Re Girard*, FPPC Inf. Adv. Ltr. A-98-170a.

An additional factor for consideration is whether the offer of a gift is made to the City of San Diego, or to the members. Cal. Code Regs. tit. 2, § 18944.2. If the gift is made to the City, the gifts are not considered to have been made to the Committee members. To determine whether the gifts were made to the City, four factors must be met: 1) the City must receive and control the gift, 2) the gift must be used for official City business, 3) the donor may specify the recipient, but the City must determine who will actually use the gift, and 4) the City must memorialize the receipt of the gift as a public record, which includes documentation that the first three conditions were satisfied, and must identify the recipients of the gift. *Id.* The report must be filed within 30 days

with the City Clerk. *Id.* There is no information at this time to support a conclusion that these gifts were made to the City.

A thorough analysis of the next factors cannot be completed without more information about the business organization of the donors and the specific decision the Committee may be asked to make. However, the following is provided for general guidance.

4) Is the source of the economic interest directly or indirectly involved in the governmental decision?

A person or business entity is directly involved in a decision before a public official's agency if that person or entity is named as a party to a proceeding conducted by the official's agency or initiates the proceeding by the filing of an application, claim, appeal, or similar request or proceeding. Cal. Code Regs. tit. 2, § 18704.1(a). If the source of the gifts in excess of \$420 appears before the Commission for a governmental decision, any Committee members who accepted these gifts would have a direct economic interest in the governmental decision.¹

There are numerous types of indirectly involved interests which may be prohibited, however there is no presumption of materiality for these types of interests; the materiality of each interest must be examined in relationship to the particular governmental decision. Cal. Code Regs. tit. 2, §§ 18705-18705.5. Therefore, indirectly involved interests are discussed below in conjunction with their materiality.

5) Will the governmental decision have a material financial effect on the Committee members' economic interest?

Materiality is presumed if there is a direct economic interest.² Cal. Code Regs. tit. 2, §§ 18704.1(b); 18705.4(a). If the interest in the source of the gifts is indirectly involved, however, the applicable thresholds must be applied to determine whether the economic interest is material. Cal. Code Regs. tit. 2, § 18705. The applicable threshold to determine the materiality of an indirect economic interest in a gift will depend on the source of the gift. Cal. Code Regs. tit. 2, § 18705.4(b).

¹ One exception to this rule however, is if the official can show that the governmental decision will have *no* financial effect on his or her economic interest. Cal. Code Regs. tit. 2, § 18705(b)(1).

² The exception in footnote 1 continues to apply.

The meeting location rotates among different Mission Bay Park lessees and insufficient information is known about the sources of the food and beverages. Therefore, the following is a summary of materiality of an economic interest in a business entity:

- a. Listed in Fortune 500, or if not listed, has revenues not less than those of the entity that ranks 500th in the Fortune 500 list and the decision will increase or decrease the entity's gross revenue for a fiscal year by \$10 million or more, will result in the entity incurring or avoiding additional expenses for a fiscal year in the amount of \$2,500,000 or more, or will result in an increase or decrease in the value of the entity's assets or liabilities of \$10 million or more;
- b. Listed on the New York Stock Exchange, or if not listed, in its most recent fiscal year has net income of no less than \$2.5 million and the decision will result in an increase or decrease to the business entity's gross revenue for a fiscal year in the amount of \$500,000 or more, will result in the entity incurring or avoiding additional expenses or reducing or eliminating expenses for a fiscal year in the amount of \$200,000 or more, or the will result in an increase or decrease in the value of assets or liabilities of \$500,000 or more;
- c. Listed on the NASDAQ or American Stock Exchange, or if not listed, for its most recent fiscal year had net income of no less than \$500,000, and the decision will result in an increase or decrease to the entity's gross revenue for a fiscal year in the amount of \$300,000 or more, will result in the entity incurring or avoiding additional expenses or reducing existing expenses for a fiscal year in the amount of \$100,000 or more, or will result in an increase or decrease in the value of assets or liabilities of \$300,000 or more; or
- d. If the business entity does not fall within a description in (a)-(c), then the decision is material if it will result in an increase or decrease in the entity's gross revenues for a fiscal year of \$20,000

or more, will result in the entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more, or will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.

When a Committee member encounters a decision that involves the economic interests discussed herein, i.e., the source of gifts of food and beverages exceeding the statutory limit, the member must determine which of the above categories the business providing the gift falls within, then determine the financial effect the decision will have on that business.

6) It is reasonably foreseeable that the economic interest will be materially affected?

The effects of the decision by a public official with a direct or indirect affect on a disqualifying economic interest must be reasonably foreseeable at the time the decision is made. Cal. Gov't Code § 87100; Cal. Code Regs. tit. 2, §§ 18700; 18706. The standard applied at this step is whether there is a substantial likelihood, based on all of the facts available to the public official at the time of the decision that the effect creating the conflict of interest will occur. Cal. Code Regs. tit. 2, § 18706(b). For example, looking at the materiality standards in section 5(d) above, a Committee member must decide whether there is a substantial likelihood, based on all available facts that the governmental decision will result in an increase or decrease of \$20,000 or more in the business entity's gross revenues for the fiscal year.

Some factors to be considered when making this decision are the extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction; the market share held by the public official or the official's source of income in the jurisdiction; the extent to which the official or the official's source of income has competition for business in the jurisdiction, and the extent to which the occurrence of the material financial effect is contingent on intervening events. Cal. Code Regs. tit. 2, § 18706(b). These factors are general guidelines, and are non-exclusive. *Id.*

7) Is the effect of the governmental decision on the Committee members' economic interest distinguishable from its effect on the public generally?

Even if the public official has an economic interest and the public official is participating in a governmental decision that will foreseeably have a material effect on that interest, the public official will not be prohibited from participating in the decision if the decision will affect the official's economic interest in the same manner as it affects the general public's. Cal. Gov't Code § 87103. "Public generally" means the economic interests of a "significant segment" of the public, as further defined, is affected in "substantially the same manner" as the economic interest of the public official. Cal. Code Regs. tit. 2, § 18707.1.

8) Are the Committee members legally required to participate?

An exception to the prohibition against participating in the making of a governmental decision in which the official has financial interests exists for those situations when the public official is legally required to act. Cal. Gov't Code § 87101.³ Public officials are legally required to participate in the making of a governmental decision when there is no other alternative source of decision that is consistent with the purposes and terms of the statute that authorized the decision, such as when a quorum of members does not exist without the disqualifying member.⁴ Cal. Code Regs. tit. 2, § 18708. A public official participating in the making of a decision in these circumstances must disclose the existence of the conflict, identify the type of economic interest, and provide particulars about the source of the economic interest. *Id.* The disqualified member may not participate if a quorum can be convened without that member's participation, and if several or all of the members have disqualifying interests, only the smallest number of disqualified members legally necessary may participate. *Id.* The selection of the necessary number of disqualified members may be at random. *Id.* This rule cannot be used to allow an entire body or quorum of disqualified members to participate in a decision, however. *In Re Hopkins*, 3 FPPC Ops. 116 (1997). Such a result would allow a donor to make gifts to all of the public

³ This exception does not include the need to break a tie vote. *Id.*

⁴ If a quorum can be convened without the disqualifying member, even if the non-disqualified members are not actively present, the mere absence of a quorum at the time of the disqualification does not create a legal necessity for the participation of the disqualified member. Cal. Code Regs. tit. 2, § 18708(c)(2).

officials, and thus ensure a decision by a body of economically interested decisionmakers. *Id.*

In this case, the Committee members may easily avoid the potentially disqualifying interests in the gift of food and beverages by refusing to accept gifts that exceed the statutory limit.

CONCLUSION

The Mission Bay Park Committee members are public officials subject to the City's Ethics Ordinance. As such, they may not accept gifts from Mission Bay lessees that exceed the value stated in their conflict of interest code. At present, that gift limitation is \$420. The food and beverages are considered gifts, because they inure to the personal benefit of the recipient. The use of the room is not considered a personal benefit to the Committee member and is therefore not considered a gift. Informational items such as tours designed for public officials are specifically exempt from the City's gift limitations.

In addition, the Mission Bay Park Committee members are public officials subject to the California Political Reform Act. They participate in the making of a governmental decision when acting in their capacity as the Mission Bay Park Improvement Fund Oversight Committee. The facts presented for analysis indicate that the source of a potentially disqualifying economic interest is gifts. The question regarding a potential conflict of interest was presented in the absence of any particular decision facing the Committee, so a complete analysis of the issue cannot be conducted: in particular, it cannot be determined whether acceptance of a gift in excess of the statutory amount constitutes a direct or indirect material, reasonably foreseeable, financial effect. Such analysis is fact specific, and would need to be addressed at the time a Committee member is faced with a specific decision.

JAN I. GOLDSMITH, City Attorney

By Shannon M. Thomas

Shannon M. Thomas
Deputy City Attorney