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**MEMORANDUM OF LAW**

**DATE:** July 30, 2009

**TO:** Honorable Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** Conflicts of Interest in Making or Confirming Appointments to Boards and Commissions

**INTRODUCTION**

This Office has been asked to provide guidance regarding when Councilmembers must recuse themselves from voting to confirm appointments to a board or commission.

**QUESTION PRESENTED**

When must Councilmembers recuse themselves from voting on the appointment of an individual to a board or commission?

**SHORT ANSWER**

Generally, Councilmembers must not participate in a decision to appoint an individual to a board or commission when it is *reasonably foreseeable* that the appointment will have a material financial effect on the Councilmember's economic interests. Councilmembers must not only avoid actual conflicts of interest, they must avoid the appearance of conflicts of interest. Such avoidance of conflicts is necessary to reinforce public trust in governmental institutions.

With respect to appointments to boards and commissions, the Fair Political Practices Commission [FPPC] has provided guidance. The FPPC has concluded that an appointment decision will not create a conflict for an official if:

- The official has no financial interest in the appointment decision;
- There is no understanding between the official and the appointee as to how the appointee will vote; and

- The potential appointee has not taken a position on the issue or otherwise expressed intentions as to how he or she might vote on particular issues.

The above guidelines are premised on the assumption that an appointee will act independently, exercising his or her own judgment to decide issues, rather than merely carry out the will of the appointing power. However, to determine whether a potential conflict exists, one would need to know all the facts in a given situation.<sup>1</sup>

### ANALYSIS

The laws governing conflict of interest include provisions of the Political Reform Act, case law and other statutory laws, the San Diego City Charter, the San Diego Municipal Code, and Council Policy 000-04. These laws are designed to protect against the appearance of conflict and self-benefit by public officials, and may be violated if elected officials participate in certain decisions before the Council. These potential financial interests include investments in business entities, interests in real property, income, positions in business entities, and gifts. In addition to those interests, there are other general common law and California Government Code section 1090 requirements precluding self-dealing and conflicts of interest.<sup>2</sup>

To determine whether a potential conflict exists, one would need to know all the facts in a given situation. Absent specific facts, our Office cannot provide a “blanket” opinion as to whether an elected official would be unable to participate in making an appointment to a given board or commission.

This memorandum sets forth the applicable laws to consider when evaluating whether a conflict exists when making or confirming an appointment to a board or commission.

#### **I. Charter Section 15: Councilmember’s Duty to Vote**

San Diego Charter section 15 reads in relevant part: “No member shall be excused from voting except on matters involving the consideration of his own official conduct or in which his own personal interests are involved.” This Charter section creates a councilmember’s duty to vote, unless the matter being voted upon involves the councilmember’s personal conduct or his or her personal interests. Personal interests include financial interests.

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<sup>1</sup> This analysis is equally applicable to the Mayor’s appointment of an individual to a board or commission.

<sup>2</sup> This memorandum does not address conflicts under California Government Code section 1090. Those conflicts generally apply to situations involving decisions relating to a contract.

## II. The Political Reform Act

The purpose of the conflict of interest provisions of the Political Reform Act [Act] is to ensure public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their financial interests or those of persons who have supported them. By disclosing relevant financial interests, public officials can determine whether a conflict of interest exists and avoid participating in a matter. “Public officials” include elected officers and other high-ranking public employees.

### A. Determination of Disqualifying Financial Interest

A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. Whether disqualification from governmental decision making is required due to conflicting financial interests is determined under the Act, which describes contractual conflicts of interest. (Cal. Gov't Code §§ 87100-87500). Under the Act, a public official is required to disqualify himself or herself from making governmental decisions if the official has a direct economic interest as defined in California Government Code Section 87103. Economic or financial interests that can be potential sources of disqualification include investments in business entities, interests in real property, positions in business entities, gifts received in the previous twelve months, and sources of income. Cal. Gov't Code § 87103.

An analysis under the Act must determine whether the economic interest is directly or indirectly involved in the governmental decision before the public official. Cal. Code Regs. title 2, § 18704. For example, a person's financial interest, including sources of income, business entities and sources of gifts, is directly involved in a governmental decision when that person, whether directly or by an agent: initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request; or is a named party in, or is the subject of, the proceeding before the official. Cal. Code Regs., title 2, § 18704.1. Real property in which an official has an economic interest is considered directly involved in a governmental decision if it is within 500 feet of the boundaries of the property which is the subject of the decision. Cal. Code Regs., title 2, § 18704.2.

Regulation 18706 provides that: “[a] material financial effect on an economic interest is reasonably foreseeable, within the meaning of Government Code section 87103, if it is substantially likely that one or more of the materiality standards [citations omitted] applicable to that economic interest will be met as a result of the governmental decision.” If an effect is just a mere possibility, it is not reasonably foreseeable. *Downey Cares v. Downey Development Com.*, 196 Cal. App. 3d 983, 989-991 (1987); *Witt v. Morrow*, 70 Cal. App. 3d 817, 822 (1977); and *In re Thorner*, 1 FPPC Ops. 198. (1975).

B. FPPC Advice Letters on Appointments to Boards and Commissions

Appointing an individual is considered “making a governmental decision” under the Act. Therefore, an official's appointment decision, like any other governmental decision, should be examined independently to determine whether it is *reasonably foreseeable* that the appointment will have a material financial effect on the official's economic interests. *In re McAndrews* Advice Letter, No. A-99-213.

In *McAndrews*, the FPPC considered whether Los Angeles Mayor Richard Riordan may appoint three new members to the Board of Information Technology Commissioners. The Board members would comprise a majority of the Board and might be asked to render decisions and provide advice relating to access by Internet companies to cable systems owned by the franchises of the City. The Mayor's spouse had financial interests in an Internet company. Reviewing past advice letters on similar issues, the FPPC stated:

In the *Benjamin* Advice Letter, No. A-86-148, we stated that participation in the appointment process was permissible so long as the “disqualified public official does not seek in any way to influence the decision of [the appointee] as to the specific decision as to which disqualification is required.”

The *Lofgren* Advice Letter, No. A-86-307, involved a county Supervisor who had appointed an individual to sit on the board of a nonprofit as her proxy, and the nonprofit was deciding whether to hire the law firm of the supervisor's spouse. The letter concluded that the supervisor's appointing of the individual to act as her proxy on the nonprofit board was a governmental decision. “However, so long as you do not utilize your appointment power over Mr. Head to dictate his actions on the private entities' boards . . . then no ‘governmental decision’ is involved in the decision as to whether to hire your husband's law firm.”

In an unrelated *Lofgren* Advice Letter, No. A-96-042 we advised that the Mayor of Folsom was not precluded from making appointments to the City of Folsom Redevelopment Agency Citizens Advisory Committee and the Historical Area Committee based on his ownership of property within the redevelopment area and historic district area. Absent a specific agreement with the appointees, it was not foreseeable that the appointments would have a material financial effect on the Mayor's economic interests. (*See also*, *Ungar* Advice Letter, No. A-93-277; *McHugh* Advice Letter, No. A-93-142.)

*In re McAndrews* Advice Letter, No. A-99-213.

The FPPC concluded that an appointment decision will not create a conflict for an official in circumstances where:

- The official has no financial interest in the appointment decision;
- There is no understanding between the official and the appointee as to how the appointee will vote; and
- The potential appointee has not taken a position on the issue or otherwise expressed intentions as to how he or she might vote on particular issues.<sup>3</sup>

The FPPC's advice was premised "on the assumption that an appointee will act independently, exercising his or her own judgment to decide issues rather than merely carrying out the will of the appointing power." *In re McAndrews* Advice Letter, No. A-99-213.

#### C. Recusal Procedure

California Code of Regulations, title 2, section 18702.5(b) sets forth the procedures to follow when a Councilmember is disqualified from participating in a decision because of a conflict of interest:

(b) Content & Timing of Identification: The public official shall, following the announcement of the agenda item to be discussed or voted upon but before either the discussion or vote commences, do all of the following:

(1) The public official shall publicly identify: (A) Each type of economic interest held by the public official which is involved in the decision and gives rise to the conflict of interest (i.e. investment, business position, interest in real property, personal financial effect, or the receipt or promise of income or gifts), and (B) The following details identifying the economic interest(s): (i) if an investment, the name of the business entity in which each investment is held; (ii) if a business position, a general description of the business activity in which the business entity is engaged as well as the name of the business entity; (iii) if real property, the address or another indication of the location of the property, unless the property is the public official's principal or personal residence, in which case, identification that the property is a residence; (iv) if income or gifts, then

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<sup>3</sup> We note that a reappointment may be considered differently than a new appointment. One already serving on a board or commission may have taken actions that show a position on an issue or expressed intentions. This may provide some factual insight into whether the appointee has taken a position on a particular matter affecting the financial interests of a Councilmember.

identification of the source; and (v) if personal financial effect, then identification of the expense, liability, asset or income affected.

(2) Form of Identification: If the governmental decision is to be made during an open session of a public meeting, the public identification shall be made orally and shall be made part of the official public record.

(3) Recusal/Leaving the Room: The public official must recuse himself or herself and leave the room after the identification required by subdivisions (b)(1) and (b)(2) of this regulation is made. He or she shall not be counted toward achieving a quorum while the item is discussed.<sup>4</sup>

### III. City of San Diego Ethics Ordinance

The Ethics Ordinance was adopted by the City for the following reasons:

#### § 27.3501 Purpose and Intent

It is the purpose and intent of the *City* Council of the City of San Diego in enacting this Division to assure that individuals and interest groups in our society have a fair and equal opportunity to participate in government; to embrace clear and unequivocal standards of disclosure and transparency in government so as to avoid conflicts of interest and the appearance of conflicts of interest; to increase understanding of the *City* Charter, ordinances, and the roles of *City Officials*; to help reinforce public trust in governmental institutions; and to assure that this Division is vigorously enforced. (emphasis added.)

The Ethics Ordinance applies to elected officials, including Councilmembers. (*See*, definition of *City Official*, SDMC § 27.3503). In addition to avoiding the appearance of conflicts of interest, and to act in a manner that reinforces the public's trust in governmental institutions, Councilmembers must avoid participating in decisions that affect his or her economic interests:

#### § 27.3561 Disqualification of City Officials in Municipal Decisions Affecting

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<sup>4</sup> There are special procedures for closed session and exceptions to the general rules that are not addressed in this memorandum.

### **Economic Interests**

It is unlawful for any *City Official* to knowingly *influence a municipal Decision* if it is reasonably foreseeable that the *municipal decision* will have a material financial effect on:

(a) the *City Official* or a member of his or her *immediate family*, if the material financial effect is distinguishable from its effect on the public generally; or

(b) any of the following economic interests:

(1) any business entity in which the *City Official* or a member of the *City Official's immediate family* has invested \$2,000 or more; and

(2) any business entity for which the *City Official* or a member of the *City Official's immediate family* is a director, officer, partner, trustee, employee, or hold any position of management; and

(3) any real property in which the *City Official* or a member of the *City Official's immediate family* has invested \$2,000 or more; and

(4) any *person* from whom a *City Official* or a member of the *City Official's immediate family* has received (or by whom you have been promised) \$500 or more in income within twelve months prior to the *municipal decision*; and

(5) any *person* from whom a *City Official* or a member of the *City Official's immediate family* has received *gifts* which total \$320 or more within twelve months prior to the *municipal decision*. This *gift* threshold is subject to adjustment in accordance with the provisions of section 27.3521; and

(6) the personal expenses, income, assets, or liabilities of a *City Official* or a member of the *City Official's immediate family*.

(c) For purposes of this section, "material financial effect" has the same meaning as that term is used in title 2, sections 18705 through 18705.5 of the California Code of Regulations.

#### **IV. Common Law Principles**

Even where no conflict is found based on statutory provisions, certain circumstances could be a conflict based on common law. 53 Op. Cal.Att’y Gen. 163 (1970). In *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928), the court stated: “A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.” Councilmembers must discharge their responsibilities with integrity and fidelity and avoid participating in any decision where he or she has a personal or pecuniary interest. See, *Terry v. Bender*, 143 Cal. App. 2d 198 (1956); *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (1996).

#### **V. Council Policy 000-04**

San Diego City Council Policy 000-04 states in pertinent part: “No elected official, officer, appointee or employee of The City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his or her official duties or would tend to impair his or her independence or judgment or action in the performance of such duties.”

For example, in a 2004 memorandum to Councilmember Scott Peters we advised:

Under this Policy [000-04], when a Councilmember has an interest in a matter, whether that interest is financial or personal, it is within a Councilmember’s own discretion to determine if that interest in a matter makes participation in a decision on that matter “incompatible with the proper discharge of his or her official duties.” If you determine that your participation in a decision regarding Evans School or Francis Parker Middle/Upper School would be inappropriate under this Policy, you may choose to abstain from participating in the item. It should be emphasized, however, that this result is not required under the law, and is a matter for your own discretion.

City Att’y MOL No. 04-3 (Feb. 12, 2004).

### **CONCLUSION**

Councilmembers must avoid conflicts of interest and the appearance of conflicts of interest when participating in or making decisions, including voting on an individual’s appointment to a board or commission. Whether a conflict exists will depend on the specific circumstances of the appointment and the potential interests of the Councilmember.

Councilmembers are therefore advised to consider the ethics rules outlined here and to consult



Honorable Mayor and City  
Council

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our Office for guidance on the specific circumstances they face in making a given appointment to a board or commission.

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