MEMORANDUM OF LAW

DATE: December 17, 1985

TO: Councilmember Abbe Wolfsheimer

FROM: City Attorney

SUBJECT: Potential Disqualification in the Matter of

Buena Vista Apartments

FACTUAL BACKGROUND

Before the City Council on December 17, 1985 is a proposal to adopt eleven (11) pages of policies and objectives correcting a defect in the City's housing element as required by California Government Code section 65583(c)(4) and found lacking in Buena Vista Gardens Apartment Association v. City of San Diego Plan-
ning Department, No. D001376, Court of Appeal, Fourth Appellate District (November 26, 1985). Since a comprehensive revision of the City's housing element of the General Plan is scheduled before the Transportation and Land Use Committee in January of

1986, the pending resolution is designed to enable the sale of industrial development bonds on the Buena Vista Gardens Project.

The law firm representing Buena Vista Gardens is Milch, Wolfsheimer and Wagner in which your spouse, from whom you are separated, is a partner. We have been informed by Mr. Wolfsheimer that the fee to be paid for this representation at the meeting of December 17, 1985 is a fixed hourly rate. Hence whether the resolution is passed or rejected, the economic impact on the firm is exactly the same.

You candidly outline your interest in the law firm to be an unvalued interest in the business entity which you represent to be worth more than one thousand dollars ($1,000) yet an interest that is frozen and would be valued per your representation as of the date of your separation from Mr. Wolfsheimer in May of 1982. Since May of 1982, you represent that you have received no economic benefit, interest, salary or client fees from this business entity. Indeed we note that all earnings and accumulations of a separated spouse are the separate property of the spouse,

California Civil Code section 5118. You and Mr. Wolfsheimer have so treated your respective earnings.

Against this fabric of facts, you ask if you must disqualify yourself from participating in the resolution affecting the Buena

Vista Gardens Apartments.

LEGAL RESTRICTIONS

The Political Reform Act (California Government Code section 81000 et seq.) prohibits any participation in governmental decisions in which the public official has a financial interest. Government Code section 87100. Section 87103 defines financial interest as one in which a material financial effect, apart from its effect on the general public, is reasonably foreseeable at designated threshold levels.

We need not be concerned with whether this resolution affects the public at large since it is conceded that this resolution is designed to permit the sale of bonds for a specific project: Buena Vista Apartments. Hence we must address the issue of financial interest and whether the Councilmember's decision will have a material financial effect on the statutorily defined interests.

> SEC. 87103. Financial interest; material effect; indirect investment or interest
>
> An 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 financial effect,

distinguishable form its effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect interest worth one thousand dollars ($1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars ($1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred 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.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred 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.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

California Government Code section 87103.

A law partnership is clearly a business entity as defined in Government Code section 82005 as any partnership operated for profit. From the facts presented, Councilmember Wolfsheimer has a financial interest in a business entity of her separated spouse's law partnership which she indicates, although unvalued, is worth more than one thousand dollars ($1,000).

However, the Councilmember must disqualify herself only when her decision has a material effect on her financial interest in this business entity. In re Opinion requested by MacKenzie Brown, 4 FPPC Opinions 19 (1978). As well can be anticipated, the term "material" in an evolving economy has been subject to review and revision by the Fair Political Practices Commission. Their latest regulation on the definition of materiality provides:

SEC. 18702.2. Material Financial Effect on a Business Entity

(a) This section shall be used to measure whether the reasonably foreseeable effect (whether direct or indirect) of a governmental decision will be material as to a business entity in which an official has an economic interest.

b) An official has an economic interest in a business entity if one or more of the following criteria are met:

(1) The business entity is a source of income (including gifts) aggregating $250 or more provided to, received by or promised

to the official within the preceding 12 months.

(2) The official has a direct or indirect investment worth $1,000 or more in the business entity.

(3) The official is a director, partner, employee, trustee of, or holds any position of management in, the business entity.

. . . .

(g) For business entities which are not covered by (c), (d), (e) or (f) (listed and traded corporations) the effect of a decision will be material if:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of $10,000 or more: or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of $2,5000 or more; or

(3) The decision will result in an

increase or decrease in the value of assets or liabilities of $10,000 or more.

(h) The provisions of this section shall supersede the provisions of subdivision (b)(1) of Section 18702 until Section 18702 is amended or repealed.

2 California Administrative Code section 18702.2 (effective August 24, 1985) (emphasis added).

Material effect, therefore, is measured by what impact the participation or decision will have on the business entity. As the facts reveal, a decision on the resolution will have an economically neutral effect since the fee paid will be at a fixed hourly rate and thus be the same whether the resolution is approved or rejected. Since the effect of the Councilmember's decision will not increase or decrease gross revenues of the business entity, as provided by 2 California Administrative Code 18702.2(g)(1)(2) or (3), no material financial effect can be said to result from her participation in a governmental decision.

We have previously used the test for materiality in passing upon whether then - Councilmember Richard M. Murphy could participate in a zoning change where the Councilmember's former law

firm represented the client. There, as here, no income was being received from the law firm and the effect of the client's fee on the gross income of the firm was reviewed under 2 California Administrative Code 18702(3) since modified by 2 California Administrative Code 18702.2. There, as here, we found no reason for disqualification. 1981 Opinions of the City Attorney 101. There is no indication that the fee would be a source of income, since no income has been received since your separation and since fees earned subsequent to separation would be and are treated as separate property. Civil Code section 5118.

CONCLUSION

The facts disclosed to us show that neither you directly nor you through the law firm would be materially affected as defined in 2 California Administrative Code section 18702.2 since you have not received any income from the firm and your interest in the firm would not increase economically.

We continue to caution, however, that all disqualification issues are strictly limited to their facts and that any facts differing from those recited herein would significantly change our conclusion.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

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