MEMORANDUM OF LAW

DATE: February 19, 1988

TO: James Sills, Chief of Staff, Councilmember J. Bruce Henderson

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Arising from Ownership of Stock in Public Utility Company

This is in response to your letter of January 21, 1988, requesting advice on Councilman Henderson's potential conflict of interest arising from his ownership of stock in San Diego Gas & Electric Company. You inquire, specifically, whether Mr. Henderson should abstain on matters which come before the Council relating to the proposed Belmont Park shopping center located in the Mission Beach community of District 6, so long as Phase One Development Company remains the lessee.

FACTUAL BACKGROUND

Councilman Henderson is the Councilmember of the Sixth District which includes the community of Mission Beach. Under the terms of an existing City lease, the Phase One Development Company ("Phase One") is redeveloping a portion of Belmont Park located in Mission Beach into a shopping center.

It is your understanding that Phase One is a wholly-owned subsidiary of San Diego Gas & Electric Company ("SDG&E"). Councilman Henderson owns several hundred shares of stock in SDG&E, amounting to more than $1,000, according to the attachment to your letter.

LEGAL ANALYSIS

The Political Reform Act found in Government Code Sections 81000 et seq. prohibits a public official from making, or participating in making, a governmental decision in which he or she knows, or has reason to believe, he or she has a financial interest within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial

effect, distinguishable from the effect on the public generally, on "any business entity in which the public official has a direct or indirect investment worth one thousand dollars ($1,000) or more.. . ." Government Code Section 87103.

The question presented by your letter is whether Mr. Henderson has a direct or indirect investment in Phase One by virtue of his ownership of SDG&E stock.

The term "investment" is defined as:

╒Aσny financial interest in a security issued by a business entity, including but not limited to common stock, preferred stock, . . . or other ownership interest owned directly, indirectly or beneficially by the public official, . . . if the business entity or any parent, subsidiary or otherwise related business entity has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title. No asset shall be deemed an investment unless its fair market value equals or exceeds one thousand dollars ($1,000).. . . The term "parent, subsidiary, or otherwise related business entity" shall be specifically defined by regulations of the ╒Fair Political Practicesσ ╒Cσommission.

Government Code Section 82034. ╒Emphasis added.σ

The Fair Political Practices Commission (FPPC) has defined the term "parent, subsidiary, or otherwise related business entity" in pertinent part as follows:

(a) Parent-subsidiary. A parent-subsidiary relationship exists when one corporation directly or indirectly owns shares possessing more than 50 percent of the voting power of another corporation.

(b) Otherwise related business entity. Business entities, including corporations, partnerships, joint ventures and any other organizations and enterprises operated for profit, which do not have a parent-subsidiary relationship are otherwise related if any one of the following three tests is met:

(1) One business entity has a controlling ownership interest in the other business entity.

(2) There is shared management and control between the entities. In determining whether there is shared management and control, consideration should be given to the following factors:

(A) The same person or substantially the same person owns and manages the two entities;

(B) There are common or commingled funds or assets;

(C) The business entities share the use of the same offices or employees, or otherwise share activities, resources or personnel on a

regular basis;

(D) There is otherwise a regular and close working relationship between the entities; or

(3) A controlling owner (50% or greater interest as a shareholder or as a general partner) in one entity also is a controlling owner in the other entity.

. . .

2 California Administrative Code Section 18236.

Although the facts do not indicate whether Phase One is a corporation or some other type of entity, they indicate that Phase One is a wholly-owned subsidiary of SDG&E, and thus it falls within the definition of "parent, subsidiary or otherwise related business entity" as defined by the FPPC under Government Code Section 82034. Therefore, Mr. Henderson has a potential conflict of interest in dealing with matters pertaining to Belmont Park's development.

It is, however, critical to point out that on the facts given, it is not possible to determine whether Mr. Henderson should abstain from all matters pertaining to the park. Rather, whether Mr. Henderson must abstain from participation will depend on whether the particular facts satisfy the four-part test established by the FPPC to determine disqualification: 1) It must be reasonably foreseeable that there will be some financial effect resulting from the decision; 2) the financial effect must be on one of the interests described in Government Code Section 87103; 3) the financial effect must be material; and 4) the effect must be one that differs from the effect on the public generally. In the Matter of Opinion Requested by Tom Thorner, 1 FPPC Ops. 198, 202 (1975).

In conclusion, Mr. Henderson may have a conflict of interest in matters pertaining to Belmont Park because of his ownership of more than $1,000 of SDG&E stock. Because of the breadth of the question, however, this memorandum can provide only guidelines, not absolute rules, to govern Mr. Henderson's future actions when he is faced with a matter concerning Belmont Park. Whether he must abstain from participating in or voting on a Belmont Park matter will depend on the particular facts of the given situation and whether those facts meet the elements of the four-part test set forth in the Thorner opinion. If Mr. Henderson desires further guidance for a particular vote regarding Belmont Park, we will be happy to provide it expeditiously.

JOHN W. WITT, City Attorney
By
Cristie C. McGuire
Deputy City Attorney

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