

DATE: January 20, 1988

TO: Councilmember Ron Roberts  
FROM: City Attorney  
SUBJECT: Conflict of Interest/Disqualification  
Requirements Under Political Reform Act  
(Government Code Sections 87100 et seq.),  
Charter Section 94 and Government Code Sections  
1090 et seq.

This is in response to a letter of December 1, 1987, from Richard Wagner, attorney, to Ted Bromfield of this office. In that letter Mr. Wagner requests an opinion regarding whether you should disqualify yourself from influencing governmental decisions affecting or involving (1) SGPA Planning & Architecture San Diego, a California corporation, ("SGPA") (2) SGPA Partnership I, a California limited partnership, ("Partnership") and (3) the clients of SGPA and Partnership.

#### FACTS

In the letter Mr. Wagner sets forth certain assumed facts, which are outlined only briefly here: You currently hold equity interests in both SGPA and Partnership. SGPA and Partnership plan to purchase these interests by means of promissory notes made payable to you. Each of the promissory notes will be secured by irrevocable letters of credit issued by an unnamed financial institution. There are no facts contained in the letter regarding the amounts of your equity interests in SGPA or Partnership nor the anticipated purchase price of each entity or amount of periodic payments to be made under the notes. The letter also contains no facts regarding current or potential clients of SGPA or Partnership.

Because of the breadth of the questions presented and the complexity of the law governing them, it is not possible to issue a single ruling that determines in each and every instance whether you must disqualify yourself from participating in governmental decisions involving SGPA and Partnership.

Rather, this memorandum will focus on the major issues presented by Mr. Wagner's letter and will attempt to provide you with guidelines. Whether you should disqualify yourself from participating in governmental decisions will turn on the particular facts and circumstances surrounding a given decision.

#### LEGAL ANALYSIS

The law governing the issues raised by the letter is in part contained in California's Political Reform Act (the "Act"), codified in Government Code Sections 81000 et seq. and

regulations adopted by the Fair Political Practices Commission (FPPC) under that Act, codified at 2 California Administrative Code Division 6. In addition, certain common law principles may apply to the questions presented. See 59 Ops. Cal. Atty.Gen. 604, 614 (1976). Also, San Diego Charter Section 94 and Government Code Sections 1090 et seq. apply to the questions as they relate to City contracts.

A. Political Reform Act ("Act").

The Act 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. Government Code Section 87100.

FPPC regulation 18702.1 further clarifies the disqualification requirements in pertinent part as follows:

18702.1 Disqualification

(a) Except as provided in subsection (c), a public official shall not make, participate in making, or use his or her official position to influence a governmental decision if:

(1) Any person (including a business entity) which has been a source of income (including gifts) to the official of \$250 or more in the preceding 12 months appears before the official in connection with the decision;

(2) Any business entity in which the official has a direct or indirect investment of \$1,000 or more, or in which the official is an officer, director, partner, trustee, employee, or holds any position of management, appears before the official in connection with the decision;

(3) . . . ;

(4) It is reasonably foreseeable that the personal expenses, income, assets, or liabilities of the official or his or her immediate family will be increased or decreased by at least \$250 by the decision; or

(5) Disqualification is required pursuant to any other section in this chapter.

(b) A person or business entity appears before an official in connection with a decision when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request;

(2) Is a named party in the proceeding

concerning the decision before the official or the body on which the official serves.

(c) Notwithstanding subsection (a) an official does not have to disqualify himself or herself from a governmental decision if:

(1) The effect of the decision on the official or his or her immediate family, on the source of income (including gifts) to the official, or on the business entity in which the official has an investment . . . will not be distinguishable from its effects on the public generally;

(2) . . .;

(3) Although disqualification would otherwise be required under subsection (a)(1), (a)(2), or (a)(3) the decision will have no financial effect on the person or business entity who appears before the official, or on the real property.

2 Cal.Admin.Code Sec. 187021 (emphasis added).

The question presented by Mr. Wagner's letter, in essence, is whether you will hold a financial interest in either SGPA or Partnership because of the promissory notes.

Government Code Section 87103 explains the meaning of having a "financial interest" under Section 87100.

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 from its effect on the public generally, on:

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

(b) . . .;

(c) Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; . . .

(Emphasis added.)

The question next presented by Mr. Wagner's letter is whether the promissory notes will constitute either "investments" or "source of income."

The terms "investment" and "income" as used in Section 87103 are defined in the Act. Investments include debt instruments

under Government Code Section 82034. Therefore, the promissory notes issued by SGPA and Partnership constitute "investments" within the meaning of the Act.

Under the Act, "income" includes interest payments and proceeds from sales. Government Code Section 82030(a). Therefore, the proposed relationship between yourself and SGPA and Partnership establishes those two entities as potential "sources of income" under Government Code Section 87103(c).

In the letter Mr. Wagner asserts that because the letters of credit securing the two promissory notes will ensure that you will ultimately be paid what is due under the notes, regardless of the financial condition of either SGPA or Partnership, then you have "no direct or indirect financial or economic" interest under applicable provisions of the Act. Mr. Wagner further argues that your true financial interest lies with the financial institution issuing the letter of credit.

Since the promissory notes constitute investments or sources of income, the question presented by Mr. Wagner's argument is whether the letters of credit negate your potential financial interest under the Act.

To address the argument, it is necessary to understand the meaning and operation of "letter of credit." Under the Uniform Commercial Code adopted in California, letter of credit "means an engagement by a bank or other person made at the request of a customer and of a kind within the scope of this division (Section 5702) that the issuer will honor drafts or other demands for payment in compliance with the conditions specified in the credit . . ." Cal.U.C.C. Sec. 5103 (emphasis added).

Under this definition, the letters of credit only become operable when certain conditions are met as set forth in the letters themselves. The proposed letters of credit in this instance are not provided to us for review.

In any event, Mr. Wagner's argument ignores the fact that there continues to be a direct financial relationship between yourself and SGPA and Partnership, as embodied in the promissory notes. By themselves the letters of credit do not negate the fact that the promissory notes constitute "investments" and "sources of income" under the Act.

From a careful reading of the foregoing Government Code sections it is apparent that a public official does not have to disqualify himself from participating in a governmental decision unless several elements are present: 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 re Thorner, 1 FFPC Ops. 198, 202 (1975).

Under the third part of the Thorner test, the focus of inquiry under the statute and FPPC regulations is not only whether your pocketbook may be directly affected by participation in governmental decisions but also whether SGPA's or Partnership's pocketbook may be affected by particular decisions. The Political Reform Act will require you to disqualify yourself from participating in certain governmental decisions involving SGPA or Partnership only when the Thorner criteria outlined above are met.

#### B. San Diego City Charter Section and Government Code Sections 1090 et seq.

The above analysis under the Political Reform Act assumes that the governmental decisions in which you may participate do not involve contracts between the City and SGPA or Partnership or clients of either entity. Under San Diego City Charter Section 94 or Government Code Sections 1090 et seq. you may not have a direct or indirect interest in, or in the performance of, any contract with or for the City. If you do, the contract may be void.

An analysis of that Charter section and Government Code section was prepared by former Assistant City Attorney Robert S. Teaze in a memorandum of law dated January 7, 1981. That memorandum was prepared in response to a query by a former councilmember who had recently been elected to the City Council and who had been, until installed in office, a partner in a law firm. A copy of the memorandum and its attachments are enclosed for your reference.

#### CONCLUSIONS

You may have to disqualify yourself from participating in or voting on governmental decisions involving SGPA or Partnership under the Political Reform Act, despite the letters of credit issued by a financial institution. Whether you must abstain from participating in or voting on a particular decision will depend on the particular facts and circumstances surrounding each decision. Additionally, you may have to disqualify yourself under San Diego City Charter Section 94 and Government Code Sections 1090 et seq. in matters involving City contracts.

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By

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Deputy City Attorney

CCM:ps:048.7.1(x043.2)

Attachments  
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