

MEMORANDUM OF LAW

DATE: April 28, 1989

TO: Deputy Mayor Judy McCarty
FROM: City Attorney
SUBJECT: Potential Conflict of Interest/Councilmember
as Member of Mission Trails Regional Park Foundation,
Inc., and as Officer of Friends of Mission Trails
Regional Park

This is in response to your memorandum of March 22, 1989, and confirms oral advice given to you via your assistant, Lou Ann Holmes, on March 29, 1989.

BACKGROUND FACTS

As background, you state that the Mission Trails Regional Park Foundation, Inc. ("Foundation") was established in January, 1988, as a nonprofit public benefit corporation organized for the purpose of preserving, improving and maintaining Mission Trails Regional Park ("Park"). The Foundation was organized under the State's nonprofit public benefit corporation law for the public and charitable purposes outlined above. "Friends of Mission Trails Regional Park" ("Friends") is a separate organization of individuals. Its purpose is to promote sustaining memberships in the Foundation and to promote public education about park sensitivities. The chair of the Friends association has recently resigned. The Foundation has expressed interest in your becoming chair of the Friends association.

We obtained further background information from your assistant, Lou Ann Holmes, by telephone on April 5, 1989, from Mike Pent, Chair of the Foundation, by telephone on April 6, 1989, and from Jack McGrory, Assistant City Manager, on April 11, 1989. The following summarizes the facts they provided:

Under its bylaws, the Foundation has three (3) to fifteen (15) directors. There are no "members" of the Foundation. The previous chair of the Friends association sat on the Foundation's Board of Directors and it is contemplated that the next chair would also. Neither the position on the Foundation's Board nor the chairmanship of the Friends association is a paid position.

The Foundation has no contract currently with the City. Also, the Foundation to date has received no grant money or other funding from the City. It is contemplated, however, that the Foundation will administer on behalf of the City \$1.2 million in facilities benefit monies to develop the park. These funds result from a recently entered development agreement for

Tierrasanta (Development Agreement adopted by the City Council by Ordinance No. O-17153 on October 6, 1988).

According to Jack McGrory, those benefit monies will be paid directly to the City and transferred to the Foundation to make future improvements at the park. The precise mechanism for transfer of the money is not yet known, but presumably it will be some form of contract.

ISSUES

You ask whether you will have any possible conflict of interest if: 1) You were to take over as chairperson of the Friends association; and 2) You were to become a "member" of the Foundation.

LEGAL ANALYSIS

Substantially similar questions have been asked of this office many times in the past. Enclosed for your reference are several Memoranda of Law dated April 11, 1975; May 18, June 21, and September 28, 1976; January 9, 1979; February 20, 1981, and May 27, 1986.

Political Reform Act

The law as to the Political Reform Act of 1974 ("Act") set forth in the Memorandum of Law of May 18, 1976, is essentially the same today as in 1976. Government Code section 81000 et seq. prohibits a public official who has a financial interest as defined by the Act from making, participating in making, or in attempting "to use his official position to influence a governmental decision . . ." when that decision will have a material effect on the financial interest. Government Code sections 87100 and 87103.

Under Government Code section 87103, an official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on "any business entity in which the public official is an . . . officer . . ." Government Code section 87103(d).

Government Code section 82005 defines "business entity" to exclude nonprofit corporations. Therefore, City officials who are also unpaid officers and members of nonprofit corporations or groups are not considered to have prohibited financial interests within the meaning of the Act. Thus, your taking the unpaid positions of chair of the Friends association and member of the Board of Directors of the Foundation would not create a prohibited financial interest in those entities within the meaning of the Political Reform Act.

Charter Section 94 and Government Code Section 1090 et seq.

Charter section 94 provides that no officer of the City may be directly or indirectly interested in a contract with the City.

This Charter section has long been interpreted along the lines of Government Code section 1090 et seq., which also prohibits City officials from having financial interests in contracts to which the City is a party.

In 1980, Government Code section 1091.5 was amended to clarify the law. The law prior to 1980 had been interpreted to require City officials to approve a contract with a nonprofit corporation without counting the vote of a Councilmember who also happened to be a member or officer of that corporation, even though the City officer had announced the potential conflict publicly and the announcement appeared in official Council minutes. See, for example, the Memorandum of Law dated May 18, 1976. The 1980 amendment clarifies that no prohibited contractual conflict exists so long as the Councilmember discloses that he or she is a member or officer of the nonprofit corporation with whom the City is contracting, and that disclosure appears in the Council minutes. Government Code sections 1091(a) and (b)(1) and 1091.5(a)(8). See also the Memorandum of Law dated January 9, 1979, and February 29, 1981, for a full quote. Therefore, your sitting on the Board of Directors of the Foundation would not create a prohibited contractual conflict of interest in the event the Foundation takes a contract with the City.

Since the Friends association is not one of the types of entities with which section 1090 is concerned, it is apparent that chairmanship of that association also does not require a finding of a conflict of interest under Government Code section 1090. However, you should disclose your relationship to the Foundation and to the Friends association anytime there is a discussion of a potential contract between the City and Foundation, and make sure that disclosure is placed in the minutes of that meeting.

Council Policy 000-4

Although we have determined there is no financial conflict of interest under Government Code section 87100 and 87103 and no contractual conflict of interest under Charter section 94 or Government Code section 1090 et seq., we would be remiss if we did not caution you about Council Policy 000-4, which prohibits an "elected official . . . from engaging in any . . . transaction or . . . from having . . . a personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgement or action in the performance of such duties."

This policy would also prohibit the use of City time,

equipment or supplies for the "private gain" of either the Foundation or Friends association.

This is a policy, not a law, and may be waived by vote of the Council. Also, this policy does not necessarily require that you disqualify yourself from participating in decisions involving the Foundation if you were to serve as chair of the Friends association and also sit on the Board of the Foundation. Rather, it is a matter of individual conscience whether holding those positions would tend to impair your independence in making decisions in your capacity as Councilmember. If so, you should refrain from participating in or voting on those decisions.

CONCLUSION

If you choose to accept the invitation to chair the Friends association and sit on the Board of the Foundation, there would be no resulting financial conflict of interest under the Political Reform Act (Government Code sections 87100 and 87103) or contractual conflict of interest under Charter section 94 or Government Code section 1090 et seq.

Council Policy 000-4 would, however, require that you examine your own conscience to determine whether holding such positions would impair your judgment in handling matters involving the Foundation, for example, deciding on whether to award a future contract between the City and Foundation.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

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Enclosures

ML-89-41