

MEMORANDUM OF LAW

DATE: January 29, 1991

TO: Honorable Mayor and City Councilmembers
FROM: City Attorney
SUBJECT: POTENTIAL CONFLICT OF INTEREST/PAYMENT BY CITY
OF BILLS FOR ATTORNEY SERVICES RENDERED TO
INDIVIDUAL COUNCILMEMBERS

During the discussion regarding Item 207 on Council Docket of December 10, 1990, and subsequently, a question has arisen as to whether certain Councilmembers have a conflict of interest in voting on whether the City should pay bills from attorneys for legal services rendered to those same Councilmembers in the case of Perez, et al., v. City of San Diego, et al., U.S. Dist. Ct. No. 88-0103-R-(M), filed January 2, 1988. The City Attorney was asked to provide an opinion in writing before the matter is to be heard by the City Council in closed session.

BACKGROUND

During the recent redistricting process, the City Council on a five to four vote, voted to adopt a redistricting map. Since the redistricting matter was under litigation at the time in the Perez case, the question arose as to whether the City Attorney could ethically represent both the Council majority and minority in that case. In a letter dated July 18, 1990, copy attached, the City Attorney informed the Mayor that a potential conflict of interest might exist in representing both the legislative body and the voting minority. A similar letter with identical text was sent to Councilmembers Henderson, McCarty and Roberts on July 18, 1990. In that July 18th letter, the City Attorney offered to assist the four individuals in the minority in finding suitable legal counsel. Both by direct oral expression and implication in the letter, the City Attorney expressed no conflict in representing the remaining five (5) Councilmembers.

Three (3) individual Councilmembers who were among the majority felt they could not receive fair and adequate representation by the City Attorney in the Perez case. They

subsequently on their own elected to seek private counsel to represent them. One firm has represented all three in the Perez lawsuit since shortly after our July 18th letter. The City has not been privy to the financial arrangements between these three (3) Councilmembers and their attorney for legal services in the Perez case. Absent facts to the contrary, however, it is assumed for purposes of this analysis that some agreement has been made

between these three (3) Councilmembers and their attorney in which those three (3) Councilmembers have agreed to pay the law firm for services rendered and that these legal services were not provided pro bono.

Because of letters received from the attorney representing these three (3) individuals, the City confronts claims demanding payment for all or part of that law firm's fees for services rendered on the Perez case. To the extent that these demands present potential claims that could ripen into litigation, the Council will be briefed on claims for attorneys' fees in the Perez case in closed session.

QUESTION PRESENTED

In light of the above facts, may a Councilmember who is financially obligated to pay fees for legal services participate in the consideration of whether the City should pay those fees?

ANALYSIS

At the outset, we note that the City Attorney's position was and is that the City has no duty to pay the legal fees incurred by Councilmembers to whom the City Attorney offered representation in those instances where no disqualifying conflict was found. Whether payment of those fees by the City would be a proper expenditure of public funds is being treated separately. This memorandum focuses solely on the issue of whether the three (3) Councilmembers are prohibited from voting on the matter because of conflicts of interest.

There are two conflict of interest laws that must be examined to answer the question presented. The first is found in Government Code section 1090 et seq.; the second is found at Government Code section 87100 et seq. (The Political Reform Act). These are treated separately below.

1. Government Code section 1090

Government Code section 1090 provides in relevant part that "city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members" The statute essentially prohibits public officials from being directly or indirectly interested in contracts made by the public entity of which the officer is a member.

The statute was designed to reflect the common law doctrine, as set forth in the case of *Spence v. Harvey*, 22 Cal. 336, 340 (1863): "For every public officer is bound to be disinterested in the consideration of all public questions, and any contract which interferes with the free and unbiased exercise of his judgment in relation to a question of trust or confidence reposed in him, is against public policy and good morals." The

California courts have strictly enforced Government Code section 1090.

The question here is: Would the City's agreement to pay the attorney's fees for financially committed Councilmembers constitute a contract for purposes of section 1090? We think it does.

We stress our understanding that some fee agreement exists between the law firm and the respective Councilmembers, that services have been rendered pursuant to this agreement, and that Councilmembers who were recipients of this service are now responsible for the payment. Further, we understand that some claim for payment has been asserted against the City.

For the City to agree to pay claims for services rendered to such Councilmembers and for which such Councilmembers are personally liable would create a form of contract between the law firm and the City. To create such a contract would obviously be financially beneficial to the individual Councilmember involved.

To be involved in such a decision presents the classic dichotomy that section 1090 was meant to avoid. Should the officer consider the collective good of the City or his or her individual alleviation of a personal debt? Section 1090 prohibits placing a public official in such a position; it mandates "exercising absolute loyalty" and "unbiased allegiance" to the best interests of the City. *Stigall v. City of Taft*, 58 Cal. 2d 565, 569 (1962). Since consideration of an agreement would alleviate a financial burden, we find the Councilmember cannot exercise such "absolute loyalty" and hence may not participate.

Based upon our understanding that such fee arrangements do require personal payment, we find that Councilmembers cannot participate in alleviating their own financial burdens under Government Code section 1090 et seq. Payment of these legal fees by the City would not constitute reimbursement for "necessary expenses," because the expenses were not incurred on behalf of or on the behest of the City, but only on behalf of and at the behest of the three (3) Councilmembers acting alone. Government Code section 1091.5(a)(2). Therefore, no exception to the prohibition would apply.

We also note that any contract made in violation of Government Code section 1090 is void, not merely voidable. *Thomson v. Call*, 38 Cal. 3d 633 (1985).

2. Government Code section 87100

Under Government Code section 87100, a public official, including a City Councilmember, may not "make, participate in making or in any way attempt to use his official position to

influence a governmental decision in which he knows or has reason to know he has a financial interest." Emphasis added.

Government Code section 87103 defines a "financial interest" for purposes of Government Code section 87100. It reads in relevant part:

87103. Financial 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 from its effect on the public generally, on the official or a member of his or her immediate family or on:

- (a) Any business entity in which the public official has a direct or indirect investment 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

Emphasis added.

As stated above, absent facts to the contrary, we assume for purposes of this analysis that the attorney services were provided in exchange for a fee or a promise of a fee by the Councilmembers and that some fee arrangement

had been made. If there has been no fee arrangement, and the attorney services were provided pro bono, a separate attorney opinion addresses how that situation should be handled. See Memorandum of Law dated July 27, 1990, copy attached.

Under this statute a public official may be disqualified from participating or voting on governmental decisions, if to do so would have a material financial effect on the public official personally or on one of the public official's financial interests.

One of the Fair Political Practices Commission's (FPPC) rules clarifies when a decision will have a material financial effect on the official directly, as opposed to the effect on one of the official's financial interests, thus requiring disqualification. 2 Cal. Admin. Code Section 18702.1. This regulation reads in relevant part:

18702.1 Disqualification

(a) A public official shall not make, participate in making, or use his or her official position to influence a governmental decision if:

. . . .

(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 Emphasis added.

We assume for purposes of this analysis that the claim for attorneys fees in the present instance exceeds \$250 for each indebted Councilmember. If the City were to pay these fees, the individual Councilmember's liability (debt to the law firm) would clearly be reduced by the amount of the City's payment, thus triggering the disqualification provisions of Regulation 18702.1(a)(4) and Government Code section 87103.

Therefore, we conclude that the Councilmembers who incurred the debt to the law firm are disqualified from participating in or voting on the decision to have the City pay those legal fees, because those Councilmembers would be directly and materially affected by the decision.

Because the Councilmembers would be directly affected by the decision, it is unnecessary to analyze whether the decision would have a material financial effect on the Councilmembers' economic interests as outlined in Government Code section 87103.

CONCLUSION

For the reasons set forth above, we conclude that under Government Code sections 1090 and 87100, the three (3) Councilmembers are prohibited from participating in or voting on the issue of whether the City should pay the three (3) Councilmembers' legal fees.

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By

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Attachments

ML-91-06