

## MEMORANDUM OF LAW

DATE: December 4, 1991  
TO: Diane Takvorian, Member, Quality of Life Board  
FROM: City Attorney  
SUBJECT: Potential Conflict of Interest Regarding Vote on Proposed  
City Ordinance

By memorandum dated October 3, 1991, from your staff person Laura Alexander to Deputy City Attorney Cristie McGuire, you have asked whether you have a disqualifying conflict of interest on the Toxic-Free Neighborhoods Ordinance.

### BACKGROUND

The conflict of interest question arises because you are employed full-time and receive a salary as the Executive Director of Environmental Health Coalition ("EHC"). EHC drafted the proposed Toxic-Free Neighborhoods Ordinance and introduced it to the Public Services and Safety ("PS&S") Committee of the San Diego City Council on July 3, 1991. The PS&S Committee referred the proposal to the Quality of Life Board for review and recommendations.

In brief, the ordinance would establish buffer zones between businesses that use hazardous materials and homes, parks, day care centers, and schools. The ordinance defines categories of hazardous materials and the quantities which may be maintained within the established buffer zones. If the ordinance is passed, businesses would be notified and asked to determine whether they are affected by the ordinance - i.e., determine if they have materials in amounts greater than the specified thresholds and if they are within the specified buffer zones. Should a business determine it falls within both of these specifications then it has three options: 1) exempt its facility by changing to nonhazardous materials or reduce its on-site quantities; 2) discontinue use of hazardous materials within the buffer zone; or 3) apply for a Hazardous Materials Conditional Use Permit.

### QUESTION PRESENTED

Do you have a financial conflict of interest which disqualifies you from participation in any decision regarding the adoption of the Toxic-Free Neighborhoods Ordinance?

### LEGAL ANALYSIS

To answer the question raised, we need to examine the conflict of interest law embodied in the Political Reform Act of 1974, codified in California Government Code sections 81000 et seq., and the City Council Code of Ethics (Council Policy 000-4), copy attached. These are treated separately below.

#### I. Political Reform Act

The relevant provisions of the Political Reform Act under the circumstances presented here are Sections 87100 and 87103(c). Section 87100 provides:

Section 87100. Public Officials; State and Local.

No public official at any level or state or local government shall 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.

Section 87103 defines when a public official has a "financial interest" within the meaning of Section 87100:

Section 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:

....

(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. (Emphasis added.)

As noted above, you are employed full-time by EHC. As the Executive Director of EHC, you have received a salary in excess of two hundred fifty dollars (\$250) within the last twelve (12) months. Therefore, you have a financial interest within the meaning of the Act.

To determine whether you will be required to disqualify yourself from participating in a governmental decision regarding the proposed ordinance due to this financial interest, four factors are relevant:

1. Will the decision have a reasonably foreseeable financial effect?
2. Will the effect be on one or more of the economic interests defined by the statute?
3. Will the financial effect be material?
4. Will the effect be distinguishable from the effect on the public generally.

These factors must be applied to determine whether you have a financial interest that disqualifies you. The fourth factor only applies if you answer "yes" to the first three questions.

Taking the second factor out of order, we must first examine whether there will be a reasonably foreseeable financial effect on your economic interest resulting from the Quality of Life Board decision on the

ordinance. The law does not impose strict liability on a public official to know under all circumstances whether one of his or her economic interests will be affected by the decision. Only after it is determined that an official knows, or has reason to know, that his or her economic interest may be affected by a decision does one determine whether there will be a reasonably foreseeable material financial effect on that economic interest. In the instant case, as the ordinance is presently drafted, we find that EHC (your source of income) will not reasonably foreseeably be directly or indirectly financially affected by or involved in the governmental decision for the reasons set forth below.

The key phrase in the analysis is the term "reasonably foreseeable." The term "reasonably foreseeable" is not defined in the statute or Fair Political Practices Commission ("FPPC") regulations, but it was discussed at length by the FPPC in one of its early advisory opinions, In the Matter of Tom Thorner, 1 FPPC Op. 198 (1975). After reviewing both Federal and California cases that discuss the meaning of "reasonable foreseeability" in the conflict of interest area, the FPPC stated: "The question of whether financial consequences upon a business entity are reasonably foreseeable at the time a governmental decision is made must always depend on the facts of each particular case." *Id.* at 200. Although "the statute requires foreseeability, not certainty, . . . the ultimate test is whether the element of foreseeability, together with the other elements . . . is present to the point that the official's 'unqualified devotion to his public duty' might be impaired." *Id.* at 206.

Applying the facts of this case, the proposed ordinance does not provide for the creation of an enforcement agency or for the City to contract with a private entity to provide enforcement services. Moreover, EHC has never provided such services in the past which would suggest it could take on such a contract. Thus, it would appear that it is not reasonably foreseeable at this time that the governmental decision will have an effect on your financial interest.

Since it is not reasonably foreseeable there will be a financial effect, it is not necessary to examine the remaining factors. From the above analysis, we conclude that you do not have a financial interest which disqualifies you from participating in the governmental decision pursuant to Sections 87100 and 87103.

## II. Council Policy 000-4

Council Policy 000-4 was adopted on December 26, 1967, and was corrected on January 18, 1968. The relevant portion of this policy provides:

No elected official, officer, appointee or employee of The City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend

to impair his independence or judgment or action in the performance of such duties.

Although you do not have any disqualifying financial interests, your participating in or making a governmental decision on the proposed ordinance may be contrary to the tenets of this Council Policy. As the Executive Director of EHC, the entity which drafted and proposed the ordinance, you have a direct personal interest in this matter. You must examine whether this personal interest will impair your judgment to such a degree that you believe you cannot render an impartial decision. While the Council Policy contains no sanctions, it is the policy and direction of the Council. Using your "conscience as your guide," if your prior participation in the formulation of this ordinance clouds your objectivity as a reviewer, you should disqualify yourself from such review.

#### CONCLUSION

As the Executive Director of EHC, you have received an income in excess of \$250 within the last twelve (12) months. EHC drafted the proposed ordinance which now appears before the Quality of Life Board of which you are a member. Your employment with EHC does not create an economic conflict of interest which disqualifies you from participating in or making a governmental decision regarding the ordinance. However, pursuant to Council Policy 000-4, your direct personal interest in this matter may create a conflict; you will have to decide whether your personal interest may impair your ability to render an impartial judgment.

JOHN W. WITT, City Attorney

By

Kelly J. Salt

Deputy City Attorney

KJS:jrl:(x043.2)

Attachment

cc Mike Stepner, City Architect

Laura Alexander, Staff, Quality of Life Board

ML-91-101