

MEMORANDUM OF LAW

DATE: April 9, 1991

TO: Gonzalo Lopez, Assistant Deputy Director,
Park and Recreation Coastal Division

FROM: City Attorney

SUBJECT: Potential Conflict of Interest -- Eligibility of Dr.
Joy Zedler for Appointment to Advisory Committee

You sent a memorandum to this office requesting an opinion as to Dr. Joy Zedler's eligibility as a consultant for the Famosa Slough Enhancement Plan. According to your memo, Dr. Zedler has resigned from the Famosa Slough Guidance Committee and would like to bid as a proponent for the enhancement plan to be financed by a grant from the State of California.

BACKGROUND

According to your February 21, 1991 memo, the Famosa Slough Guidance Committee ("Committee") is a citizen's group organized by the Park and Recreation Department, Coastal Division, as an "ad hoc" advisory committee for the Famosa Slough Enhancement Plan. San Diego City Charter section 43(b), which authorized such committees, reads as follows:

The Mayor, City Council or City Manager may create and establish citizens' committees. Such committees shall be created and established only for the purpose of advising on questions with clearly defined objectives, and shall be temporary in nature, and shall be dissolved upon the completion of the objectives for which they were created. Committee members shall serve without compensation.

Even though the Committee may be purely advisory, it is necessary to analyze this situation in depth for potential conflicts of interest, since even "a person merely in an advisory position to a city is affected by the conflicts of interest rule." *Schaefer v. Berinstein*, 140 Cal.App.2d 278, 291 (1956).

Your memo referred to, and you included a copy of, Dr. Zedler's resignation letter from the Committee, dated February 14, 1991. In that letter Dr. Zedler requested assurance of her eligibility to propose biological studies as part of the Enhancement Plan for Famosa Slough. She was very clear that the role of the Committee at the time of her service was to review scopes of work for a project to be carried out by Phil Williams Associates. She stated that she worked on revising a specific document, that

she did not write a new scope of work for open bidding, and that she worked with the Committee in providing advice on management needs for Famosa Slough.

Dr. Zedler also said that the Committee was asked to work on a new scope of work after the agreement with Phil Williams Associates was no longer in effect. Prior to any discussion of the new scope of work, she wanted to know what involvement she could have in the discussion without losing eligibility to propose biological studies of Famosa Slough. While awaiting the requested information, she elected not to be involved in the preparation of the scope of work for the new project. Your response to her regarding what involvement she could have was that she would not be allowed to propose biological studies as part of the Famosa Slough Enhancement Plan if she participated in the Guidance Committee; hence, her resignation from the Committee.

ANALYSIS

No discussion of the law of conflict of interest would be complete without reference to the Political Reform Act of 1974, California Government Code section 81000 et seq. ("Act"). The basic provision prohibiting official action in a conflict of interest situation is section 87100, which states that "no public official at any level of 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." The thrust of this section is to prohibit participation in the governmental decisionmaking process by public officials who have a financial interest which will be affected by a decision when it is ultimately made.

The term "public official" is defined in section 82048 of the Act as "every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government." A consultant is "one who consults another." Webster's Ninth New Collegiate Dictionary, 1987. To consult means "to ask the advice or opinion of another." Ibid. Therefore, Dr. Zedler is, in fact, a public official, as that term is defined in the Act.

The next point to be addressed, acting under the assumption that Dr. Zedler, while a member of the Committee, was in fact a public official, was whether she participated in the governmental decisionmaking process in respect to the potential conflict of interest question. According to your description of the work done by the Committee while Dr. Zedler was a member, and according to her letter, she did not participate in any governmental decisionmaking process for either the first or second scope of

work. The Committee merely responded to the Park and Recreation Department's request for advice on the Famosa Slough Enhancement Plan and was not involved in any decisionmaking per se about the Plan, Requests for Proposals, or award of contract.

The third question we need to answer according to the terms of the Act is whether or not Dr. Zedler has a financial interest in the governmental project under discussion here. Section 87103 of the Act provides in pertinent part:

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 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.

A public official, then, has the proscribed financial interest if he or she is a partner in a firm which seeks to enter the contract in question, if he or she will receive more than \$250 in income from the contract, or if his or her interest in the contracting firm is worth more than \$1,000.

Applying the foregoing conclusion to Dr. Zedler's situation under the facts set forth at the beginning of this memo of law, it is concluded that:

1. Dr. Zedler, as a consultant of a local government agency, was a public official within the meaning of the Political Reform

Act of 1974.

2. The duties of the Committee are to give scientific advice on a specific project, the Famosa Slough Enhancement Plan, not to advise on governmental decisions relative to the award of the project or contract in question.
3. Dr. Zedler apparently would have a financial interest in the new scope of work on which the Committee is advising the City; however, she elected not to be involved in the preparation of the scope of work, and resigned from the Committee when told she would not be allowed to propose biological studies for the Plan if she participated in the work of the Committee.

In respect to the project in question, therefore, Dr. Zedler, as a member of the Famosa Slough Guidance Committee, did not participate to the extent of creating a conflict of interest within the meaning of the Political Reform Act of 1974.

Our analysis may not stop here, however. Section 91014 of the Act provides that nothing in the Act "shall exempt any person from applicable provisions of any other laws of this state." Those other laws would be section 94 of the San Diego City Charter and section 1090 et seq. of the California Government Code dealing with conflicts of interest in contracts.

The pertinent part of section 94 of the San Diego City Charter provides as follows:

No officer, whether elected or appointed, of The City of San Diego shall be or become directly or indirectly interested in, or in the performance of, any contract with or for The City of San Diego Any person wilfully violating this section of the Charter shall be guilty of a misdemeanor and shall immediately forfeit his office and be there-after forever barred and disqualified from holding any elective or appointive office in the service of the City. No officer, whether elected or appointed, shall be construed to have an interest within the meaning of this section unless the contract . . . shall be with or for the benefit of the office, board, department, bureau or division with which said officer is directly connected in the performance of his duties and in which he

or the office, board, department, bureau or division he represents exercises legislative, administrative or quasi-judicial authority in the letting of or performance under said contract

All contracts entered into in violation of this Section shall be void and shall not be enforceable against said City

It has been the consistent position of this office that members of the City's committees, boards and commissions are "officers" of the City within the meaning of section 94. Therefore Dr. Zedler, when she held a position as a member of the Committee was, we believe, an officer within the meaning of this section.

Interestingly enough, however, California courts have defined city "officer" differently. The most recent conclusion is found in *City Council v. McKinley*, 80 Cal.App.3d 204, 210 (1978), where the court held:

It is apparent now there are two require-ments for a public office; first, a tenure of office which is not transient, occasional, or incidental but is of such nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency and, second, the delegation to the officer of some portion of the sovereign functions of government either legislative, executive, or judicial. (Citations omitted.)

Under this description of a public officer, Dr. Zedler would not qualify as an officer and any further discussion would be moot. But as mentioned above, all relevant laws must be analyzed and a reasonable conclusion must be reached as the result of such analysis.

California Government Code section 1090 regarding conflicts of interest provides in pertinent part that "members of the Legislature, state, county, district, judicial district, and 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." A contract is defined as "An agreement between two or more persons which creates an obligation to do or not to do a particular thing." *Black's Law Dictionary*, Fifth Edition, 1979. Since there has not been a contract entered into in this situation, it may at first appear that our discussion need proceed no further. However, the courts have also analyzed this issue and, in a diligent effort to

pro-hibit any fraud or impropriety or any appearance of impropriety, have opined that:

Although section 1090 refers to a contract "made" by the officer or employee, the word "made" is not used in the statute in its narrower and technical contract sense but is used in the broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. (Stigall v. City of Taft 58 Cal. 2d 565 (1962) at pages 569, 571.) Such construction is predicated upon the rationale that government officers and employees are expected to exercise absolute loyalty and undivided allegiance to the best interests of the governmental body or agency of which they are officers or employees, and upon the basis that the object of such a statute is to remove or limit the possibility of any personal influence, either directly or indirectly which may bear on an officer's or employee's decision. (Stigall v. City of Taft, supra, at p. 569.)

Millbrae Assn. For Residential Survival v. City of Millbrae, 262 Cal.App.2d 222, 237 (1968).

The case cited by the Millbrae court, Stigall v. City of Taft, 58 Cal.2d 565 (1962), concerns an official who had resigned his position prior to the technical "making" of a contract, but after he had served as a member of the City Council and the Council's building committee that supervised the drawing of plans and specifications and the call for bids for the construction of a civic center. At least part of that time, he was owner of a plumbing business that was low bidder for plumbing work. The councilmember resigned, but the contract was still found to be void. In contrast, although Dr. Zedler did participate in prior discussions about a different scope of work, she chose not to participate at all in discussions regarding the new scope of work and resigned from the Committee immediately upon hearing that she would not be allowed to bid if she remained on the Committee.

CONCLUSION

It is our opinion, based upon the statutes and cases discussed above and as applied to the facts of this situation, that Dr. Zedler does not have a conflict of interest and may be

allowed to respond to a proposal to develop Enhancement Plans
for Famosa Slough.

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Attorney

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