

MEMORANDUM OF LAW

DATE: June 13, 1997 (Revised)

TO: Jack McGrory, City Manager

FROM: City Attorney

SUBJECT: Potential Conflict of Interest/City Treasurer Sitting on Board of Neighborhood Development Bank

QUESTION PRESENTED

You have asked the City Attorney to advise you whether the City Treasurer, Conny Jamison, has a conflict of interest in serving on the Board of Directors of the Neighborhood Development Bank.

SHORT ANSWER

Although the facts presented show there is no incompatibility of offices that would preclude Ms. Jamison from sitting on the Neighborhood Development Bank's Board, she will be disqualified in her City Treasurer roles from making or influencing decisions that will foreseeably have a material financial effect on either the Bank or its holding company Neighborhood Bancorp.

BACKGROUND

I. City Treasurer's Roles

Conny Jamison has four roles by virtue of being the City Treasurer:

- (1) She serves as City Treasurer, whose duties are prescribed under San Diego City Charter ("Charter") section 45.
- (2) She serves as an ex-officio member of the City's Funds Commission under Charter section 41(a).
- (3) She serves on the Board of Administration for the City Employees' Retirement

System (“CERS”) under Charter section 144.

(4) She serves as one of the trustees of the Master Trust Agreement for the City of San Diego Defined Contribution Plans, which includes the City’s Supplemental Pension and Savings Plan (“SPSP”) and 401(k) Plan.

In her capacity as City Treasurer, Ms. Jamison has responsibility for managing investments of City funds, among many other duties. In her other three capacities, the City Treasurer has no day-to-day responsibility for investing public funds, but participates in setting guidelines for investing them.

II. Member of Neighborhood Development Bank’s Board of Directors

Separate and distinct from her job as City Treasurer, Ms. Jamison serves on the Board of Directors of a new bank, Neighborhood Development Bank (“Bank”), which will open its doors for business on June 27, 1997. In approximately May 1995, Ms. Jamison was appointed to the Bank’s Board of Directors (“Board”). Before taking the position on the Board, Ms. Jamison received the City Manager’s approval. At the time of her appointment to the Board, existing law required that the Bank demonstrate through composition of its Board that it had the support not only of affected primary beneficiaries but also of representatives of local government. 12 C.F.R. 24.4 (1993) (amended 1996), 12 C.F.R. 24.2(j) (1993) (amended 1996). These regulations have since been amended and no longer require the presence of a public official on the Board.

Interpreting the regulations that were in place in 1993, the federal Comptroller of the Currency (“Comptroller”) required that the Bank’s Board contain at least one public official who served as a non-voting advisory director. Letter Ruling from the Comptroller of the Currency dated August 19, 1994, to Robert M. McGill, President of Neighborhood Bancorp, Appendix B, Item 5, interpreting 12 U.S.C. 24 (Eleventh) and 12 C.F.R. pt. 24. Although the law was amended in September 1996, to substantially modify the community participation requirements, the Comptroller has not issued an updated letter ruling that removes or modifies the requirement to have a public official serve on the Bank’s Board as a non-voting advisory member. 61 Fed. Reg. 185, 49654, 185, 49656 (1996). Under current regulations, community support may be demonstrated in a variety of ways, not necessarily by composition of the Bank’s Board. 12 C.F.R. 24.3 (1996).

Ms. Jamison receives no compensation for serving on the Bank’s Board. She informs me that she is contemplating investing \$5000 of her own money in the Bank.

The Bank’s purpose is to provide flexible loans to economic development and affordable housing projects directly from its portfolio and through participation with other financial institutions. The Bank’s tools are to be loans, deposits, money transfer instruments, and other traditional Bank services. The Bank is not currently eligible to receive City funds, but if certain formalities are met, it would be eligible to receive up to \$100,000 in City monies. The Bank’s Executive Director, Bob McGill, also informed me that the Bank’s holding company, Neighborhood Bancorp, will also be seeking investments of other public monies, for example, the City’s retirement funds. A sister corporation of the Bank, Neighborhood Capital Advisors, currently has a requirements contract with the Retirement Board to administer and monitor the

Retirement System's existing mortgage portfolio. The contract was executed in June 1995, and continues indefinitely until terminated by one of the parties. In its first year, the amount the Retirement Board paid to Neighborhood Capital Advisors under this contract was \$5000. Since then they have received \$2000 per year from the Retirement Board.

ANALYSIS

Your question raises two separate issues: (1) Are the positions of City Treasurer and unpaid board members of the Neighborhood Development Bank incompatible offices? (2) Assuming there is no incompatibility of office that would preclude the Treasurer from sitting on the Bank's Board of Directors, must she disqualify herself from making or participating in making decisions that affect the Bank or its holding company?

I. Incompatibility of Offices

The common law doctrine of incompatibility of offices prohibits a single public official from simultaneously holding two incompatible public offices. The doctrine "springs out of considerations of public policy." People ex rel. Chapman v. Rapsey, 16 Cal. 2d 636, 641 (1940), citing People v. Garrett, 72 Cal. App. 452 (1925). If the offices are determined to be incompatible, the consequences to the public official are significant: by virtue of taking the second position, the official automatically forfeits the first position. 68 Cal. Op. Att'y Gen. 337, 338-39 (1985). To determine whether the doctrine applies to the present facts requires resolving two issues: Are the offices truly public offices? Assuming they are, are their duties incompatible?

The doctrine of incompatibility of offices applies only when both positions are public offices as opposed to public or private employment. 68 Cal. Op. Att'y Gen. 337, 339 (1985). Interpreting the landmark case of People ex rel. Chapman v. Rapsey, 16 Cal. 2d 636 (1940), the California Attorney General states that the definition of "public office" has three parts: (1) the position is created or authorized by a constitution or some law; (2) the tenure of the position is continuing and permanent, not occasional or temporary; and, (3) the position is one in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state. 68 Cal. Op. Att'y Gen. 337, 342. All three parts of the definition must be met in order for a position to qualify as a public office.

We now apply this three-pronged definition to the present facts. Clearly, the Office of City Treasurer and its related offices are public offices. But in serving as one of the Bank's Directors, is Ms. Jamison holding a second public office? No. We will consider each of the three prongs in turn.

First, the mere fact that the former federal regulations as interpreted by the Comptroller required a public official to serve on the Bank's Board does not mean that, within the meaning of the first prong, the Board position was created or authorized by a "constitution or some law." To find otherwise would mean that simply stating that a public official must serve on a board creates a second public official position.

Second, assuming for purposes of argument only that the first prong had been met, the

second prong is met. Specifically, the tenure of the position on the Bank's Board is not occasional or temporary. Although not permanent, the position is continuing.

Third, we examine whether the Bank's Board performs a public function for the public benefit and exercises some of the sovereign powers of the state. It does not. Although the Bank's purpose is to provide flexible loans for affordable housing, the Bank is still a private bank. It is not an arm of the federal, state or local government. It will not exercise any sovereign power of a government.

We conclude that serving on the Bank's Board does not constitute holding a public office, because two parts of the definition of "public office" are not met. Because we have concluded that a position on the Bank's Board is not a public office within the meaning of the doctrine, it is not necessary to reach the issue of whether the offices are incompatible. The doctrine of incompatible offices does not apply to the present facts and would not require Ms. Jamison to forfeit her City Treasurer position.

II. Disqualification Under the Political Reform Act

If Ms. Jamison maintains both City Treasurer and Bank Board member positions, under the Political Reform Act ("Act") the question is whether Ms. Jamison will be disqualified from making or participating in decisions that will materially affect the Bank or its holding company, Neighborhood Bancorp. Under the Act, a public official is disqualified from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which he or she knows, or has reason to know, he or she has a financial interest. Cal. Gov't Code 87100.

For purposes of Government Code section 87100, a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on the official, on the official's immediate family, or on one of the economic interests listed in Government Code section 87103.

A. Effect of Holding Position of Management in a Business Entity

One of the economic interests that triggers potential disqualification includes "[a]ny business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management." Cal. Gov't Code 87103 (d). Since Ms. Jamison serves on the board of directors of a bank, even as an advisory director without voting powers, she is deemed to hold a management position within the meaning of this provision. Holding a position of management in a company constitutes an economic interest if the company is a "business entity" as defined by the Act. The term "business entity" includes any organization or enterprise organized for profit. Cal. Gov't Code 82005. Since the Bank is being organized for profit, it qualifies as a "business entity" for purposes of determining whether Ms. Jamison will be disqualified from voting or participating in governmental decisions that foreseeably could

materially financially affect the Bank.

B. Effect of Investment Interest of \$1000 or More

If Ms. Jamison invests \$5000 in the Bank, another economic interest listed in Government Code section 87103 will become relevant. Namely, it would be a direct or indirect investment interest in a business entity worth one thousand dollars (\$1000) or more. Cal. Gov't Code 87103(a). Because the Bank is a "business entity," her investment interest will require a determination whether she will be disqualified from voting or participating in governmental decisions that foreseeably could materially financially affect the Bank.

C. Disqualification Required If Governmental Decision Will Result in Foreseeable Material Financial Effect

Because Ms. Jamison has one or more financial interests in the Bank, she may be disqualified from making or participating in making governmental decisions in her official capacities as City Treasurer, as a member of the Retirement Board, as a member of the Funds Commission, and as a trustee for the City's defined benefit plans. However, she is not disqualified from making all decisions that may affect the Bank or its related entities, but only those decisions that may foreseeably result in a material financial effect on the Bank or its related holding and sister companies. Cal. Gov't Code 87100 and 87103. Whether Ms. Jamison will in fact be disqualified from participating in a particular decision will depend on the particular facts and circumstances surrounding that decision. However, we take this opportunity to outline some of the potential areas of concern based on the few facts we currently have at hand.

For example, Bob McGill, President of Neighborhood Bancorp, which is the holding company of the Bank, informs us that in the future Bancorp will likely seek to have various city monies, for example, retirement funds, invested in that corporation. According to both the Retirement Board Administrator Larry Grissom and Ms. Jamison, in order for that to occur, the Retirement Board's investment guidelines would have to be changed to allow socially targeted investments. If a proposed change in investment guidelines were to come before the Retirement Board, you or Ms. Jamison should seek our advice at that time to analyze whether she would in fact be disqualified from participating in those discussions or voting on the matter.

A sister corporation of the Bank, Neighborhood Capital Advisors, currently has a small requirements contract with the Retirement Board to administer a small mortgage portfolio. If the Bank, its holding company, or its sister corporation ever seek to enter into a contract with the Retirement Board (or with the City, defined benefit plans trustees, or Funds Commission), you or Ms. Jamison should seek the City Attorney's advice to determine whether she would in fact be disqualified from participating in or making decisions on the contract.

Finally, if the Bank completes its paper work and seeks to serve as a depository of up to \$100,000 of City funds, you or Ms. Jamison should ask the City Attorney to advise you on whether as City Treasurer she is disqualified from making the decision whether to deposit up to \$100,000 of the City's money in the Bank.

III. Council Policy 000-4: City's Code of Ethics

Council Policy 000-4 sets forth a code of ethics governing all City officers and employees, including Ms. Jamison. Among other things, this policy prohibits an officer or employee from having a "financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his [or her] official duties or would tend to impair his [or her] independence or judgment or action in the performance of such duties." The City Attorney has concluded in similar instances that it is a matter of personal conscience whether one's judgment is so impaired by a direct or indirect personal or financial interest that one cannot fulfill one's public duties. San Diego City Attorney Memoranda of Law: ML-90-37, Mar. 14, 1990; ML-89-41, April 28, 1989; and ML-88-55, June 7, 1988.

This City Council policy has been implemented by the City Manager by means of Administrative Regulation 95.60, entitled "Conflict of Interest and Employee Conduct." Under this regulation Ms. Jamison was required to disclose her involvement on the Bank's Board, which she did in November 1994, before she took her position on the Bank's Board. San Diego Admin. Reg. 95.60 3.15. She has met her obligations under the Council Policy as implemented by the City Manager.

CONCLUSION

This memorandum analyzes the common law doctrine of incompatibility of offices and concludes that the City Treasurer Conny Jamison is not, by virtue of being a non-voting advisory member of the Board of Directors of Neighborhood Development Bank, simultaneously holding two incompatible offices. The City Treasurer does, however, have one or more financial interests in the Bank within the meaning of the Political Reform Act and its disqualification provisions. Cal. Gov't Code 87100 and 87103. If she is asked in one of her official capacities to make or participate in making a decision that will result in a foreseeable material financial effect on the Bank or its sister or holding companies, then the Treasurer should disqualify herself from making or participating in making that decision.

CASEY GWINN, City Attorney

By

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