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DATE: April 7, 2003
TO: Deputy Mayor Ralph Inzunza
FROM: City Attorney
SUBJECT: Compensation and Benefits for City Councilmember Appointed to San Diego County Regional Airport Authority Board

MEMORANDUM OF LAW

INTRODUCTION

In light of your recent appointment to the San Diego County Regional Airport Authority Board [Board], you asked this Office two questions related to the compensation and benefits package [Benefits] that has been designed for appointees to the Board. This memorandum memorializes advice previously given you by our Office regarding this matter.

QUESTIONS PRESENTED

1. May you accept the Benefits?
2. Are Board members disqualified from participating in the vote to approve the Benefits package?

SHORT ANSWERS

1. Yes. The benefits are specifically authorized by the legislation which created the Board, and you are thus not precluded from accepting the benefits.
2. No. The Board is the only entity which can approve the Benefits, and all Board members have the same financial interest in the decision regarding approval of the Benefits, a "rule of necessity" applies which allows you and the other Board members to participate in the decision.

FACTUAL BACKGROUND

The San Diego County Regional Airport Authority [SDCRAA] was created by the state legislature on October 14, 2001, with the passage of AB 93. That legislation was subsequently amended by SB 1896, and is currently codified at California Public Utilities Code sections 170000 through 170084. The permanent governing body for the SDCRAA took over on January 1, 2003, and consists of a nine-member board. Three of the board members make up the Executive Committee, which is a full-time, salaried position. The other six board members are General Board members, who are part time and do not receive a salary. In addition to the salary received by the Executive Committee members, the code authorizes the following compensation for all Board members:

- (a) (1) Members shall be paid \$100 per regular, special, or committee meetings, for not more than four meetings per month.
- (2) Any member may waive the payment or payments described in paragraph (1).
- (b) Members of the board may be paid for direct out-of-pocket expenses.
- (c) The board shall adopt a compensation, benefits, and reimbursement policy within three months of being constituted.
- (d) Employees of the authority are eligible for retirement benefits under the California Public Employees' Retirement System [CalPERS]

Cal. Pub. Util. Code § 170024.

On October 24, 2002, Mayor Dick Murphy appointed you as the San Diego City Councilmember representative to the Board. As such, you are an unsalaried General Board member, entitled to receive the items listed above pursuant to California Public Utilities Code section 170024. A package of benefits has been designed for board members as required by California Public Utilities Code section 170024(c) which includes benefits such as expense reimbursement, health benefits, prescription plan benefit, dental benefits, vision benefits, and life insurance. In the case of some of the offered benefits, such as the health benefits, the coverage is worth more than the coverage available through the City of San Diego's benefits program.

ANALYSIS

I. A City Councilmember May Accept the Benefits as Part of Serving as a General Board Member for SDCRAA.

Our Office has long interpreted the language in San Diego Charter section 12.1 regarding Councilmember salaries as representing full and complete compensation for the performance

of the duties of City office. 1968 Op. City Att'y 45; 1970 Op. City Att'y 139; 1973 Op. City Att'y 255. However, an exception exists when compensation for sitting on a board in an *ex officio* capacity is authorized by state legislation. This exception is illustrated best by the case of *Jarvis v. City of Los Angeles*, 67 Cal. App. 3d 834 (1977). In the *Jarvis* case, a Los Angeles City Councilmember served on the board of directors of a county sanitation district for which he received compensation in addition to his council salary. The *Jarvis* court determined that the compensation could be lawfully accepted because the sanitation district was created by state law and was a matter of statewide concern, and the state law allowing compensation controlled over contrary provisions of the Los Angeles Charter. *Id.* at 838.

Our Office issued a City Attorney Opinion shortly after *Jarvis* was published, concluding that “where Council members are mandated by state law to serve on state created boards or commissions and where that law provides for compensation of members of those board or commissions, Council members are not precluded by the San Diego Charter from accepting such compensation since they serve on those boards or commissions not as a member of the Council, but as an officer and appointee of the State.” 1977 Op. City Att'y 20, 22.

Here, the legislation creating the SDCRAA requires that a San Diego City Councilmember sit as a General Board member. Cal. Pub. Util. Code § 170016. Additionally, the legislation clearly authorizes a \$100 per meeting stipend and reimbursement for direct out-of-pocket expenses, and therefore, based on the *Jarvis* analysis, a City of San Diego Councilmember may lawfully accept these entitlements. Additionally, although California Public Utilities Code section 170024 does not explicitly identify the benefits a board member may receive, it authorizes the Board itself to determine what benefits will be provided.

According to the *Jarvis* case, however, the legislation need not be specific regarding the exact compensation or benefits to be provided. In that case, the legislation creating the sanitation district did not explicitly establish the per-meeting compensation, but instead established an upper limit and left it to the board to determine the appropriate amount. “The district board shall have power to fix the amount of compensation per meeting to be paid each member of the board for his services for each meeting attended by him; provided that said compensation shall not exceed fifty dollars (\$50) for each meeting of the district board attended by him, not to exceed one hundred dollars (\$100) in any one month . . .” *Jarvis*, 67 Cal. App. 3d at 838. Therefore, as long as the legislation creating the SDCRAA provides a framework for a form of compensation, the acceptance of that compensation and benefits by a councilmember is lawful in spite of San Diego Charter section 12.1.

Based on the ruling in *Jarvis*, and the language contained in California Public Utilities Code section 170024, a Councilmember serving in an *ex officio* position on the Airport Authority may lawfully accept a benefits package notwithstanding any language in the San Diego Charter to the contrary. Additionally, there is nothing that requires a Councilmember serving on the SDCRAA Board to forego accepting these authorized benefits because they may duplicate or exceed benefits available to the Councilmember through the City's own benefits program. Because the Benefits are authorized by statute, the Councilmember may accept them in addition to or in lieu of the City benefits.

II. Are Members of the SDCRAA Board Disqualified From Participation in the Approval of the Board Benefits Package?

A. Political Reform Act

The Political Reform Act of 1974 [Act], codified at California Government Code sections 81000–91015, was adopted to ensure that public officials perform their duties in an impartial manner, free from bias caused by their financial interests. Cal. Gov't Code § 81001. For purposes of the Act, a public official has a financial interest in a decision 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, a member of his or her immediate family, or on any of the economic interests delineated in California Government Code section 87103. One of those interests is a source of income of \$500 or more in the previous twelve months, which includes both income received by the official, and income promised to the official during that time period. Cal. Gov't Code § 87103.

Income is defined in California Government Code section 82030(a) to include “any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse.” California Government Code section 82030(b)(2) provides, however, that income “does not include . . . [salary and reimbursement for expenses or per diem received from a state, local, or federal government agency.” The Fair Political Practices Commission [FPPC] has further defined this exception for government income in the California Code of Regulations:

For purposes of California Government Code section 82030(b)(2), the following definitions apply:

- (a) “Salary” from a state, local, or federal government agency means any and all payments made by a government agency to a public official, or accrued to the benefit of a public official, as consideration for the public official's services to the government agency. Such payments include wages, fees paid to public officials as “consultants” as defined in California Code of Regulations, Title 2, section 18701(a)(2), pension benefits, *health and other insurance coverage*, rights to compensated vacation and leave time, free or discounted transportation, payment or indemnification of legal defense costs, and similar benefits.

Cal. Code Regs. tit. 2, § 18232 (emphasis added).

The FPPC has also discussed income from a government agency in an advice letter regarding whether certain councilmembers were required to disclose income they received from Oxnard government agencies and commissions, including their airport authority. Based on an

analysis similar to the one discussed above, the FPPC concluded that “[s]alary, reimbursement for expenses and per diem from local governmental agencies are not reportable on an official's Statement of Economic Interests” *In re Lockwood*, FPPC Priv. Adv. Ltr. A-88-030. In this case, because the Airport Authority is a government agency, the monies and benefits received by a Councilmember serving on that agency are specifically excluded from the disclosure requirements contained in the Political Reform Act.

This same rule excluding government income from disclosure requirements under the Act also applies to the issue of disqualification. California Government Code section 87100 provides that public officials shall 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.” California Government Code section 87103 provides that public officials have “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: . . . (c) Any source on income.” As discussed above, California Government Code section 82030(b)(2) and title 2, section 18232 of the California Code of Regulations exclude government income, including benefits, from what is considered to be income for purposes of the Act. Therefore, section 87100 is not violated by a SDCRAA Board member's participation in decisions regarding the Board compensation and benefits.

An identical analysis was made in 68 Op. Cal. Atty Gen. 337 (1985), involving a conflict of interest question for a member of a board of directors for a community services district who also served as a fire captain. The \$100 monthly stipend the board member received for fire captain services was not considered “income” and the opinion concluded that his “compensation does not provide the kind of financial interest which would make California Government Code section 87100 applicable.” *Id.* Similarly, the Airport Authority's compensation for board members does not constitute the kind of financial interest that would create a potential conflict of interest under California Government Code section 87100.

B. California Government Code section 1090

California Government Code section 1090 precludes public officials from being financially interested in any contract made by them in their official capacity. Members of the Airport Authority, each of them a “public official,” have a financial interest in the benefits they will receive, and the procurement of these benefits will involve contracts. This raises the issue of whether it is appropriate for the members of the Board to vote on those benefits pursuant to California Government Code section 1090.

California Government Code section 1091.5(a)(9) provides an exception for “compensation for employment with a governmental agency, other than the governmental agency that employs the officer or employee. . . .” However, the legislative history and interpretation of this section reveals that it is not applicable to the instant situation. An Attorney General opinion analyzing this section concluded that it was intended to apply to the situation that arises when a governmental employee who serves on the board of another public agency

votes on a contract between his governmental employer and the agency. 78 Op. Cal. Att'y Gen. 362 (1995).

Although it appears that there are no statutory exceptions to California Government Code section 1090 that apply to this situation, a common law "rule of necessity" applies to section 1090 to allow governmental agencies to conduct business in spite of conflicts of interest in instances where no other viable alternatives exist. "The common law developed the rule of necessity to prevent the vital processes of government from being halted or impeded by officials who have conflicts of interest in the matters before them." *Kunee v. Brea Redevelopment Agency*, 55 Cal. App. 4th 511, 520 (1997). "According to the common law rule of necessity, where an administrative body has a duty to act upon a matter which is before it and is the only entity capable to act in the matter, the fact that the members may have a personal interest in the result of the action taken does not disqualify them to perform their duty." *Affordable Housing Alliance v. Feinstein*, 179 Cal. App. 3d 484, 489 (1986).

The California Attorney General has specifically ruled that with respect to contractual conflicts of interest, the rule of necessity applies to allow a public officer to carry out the essential duties of his office, despite a conflict of interest where he is the only one who may legally act. 69 Op. Cal. Att'y Gen. 102, 109. Here, because the Board is the only entity which can lawfully approve the Board benefits package pursuant to California Public Utilities Code section 170024, the rule of necessity applies and the Board members are not disqualified by section 1090 from voting on the benefits package.

CONCLUSION

Because the state legislature specifically authorized that the members of the Airport Authority Board receive compensation and benefits, there is no legal reason why you and the other members of the Board cannot receive the Benefits, in addition to any compensation and benefits that you are entitled to receive from the City. Additionally, because the compensation

and benefits are exempt from the definition of "income" for purposes of the Political Reform Act, and because the Board is the only entity which can legally approve the Benefits, there is no legal reason why you and the other Board members cannot approve the Benefits.

Please feel free to call me at 533-5850 if you have any questions

CASEY GWINN,
City Attorney

By

Lisa

A. Foster

Deputy City Attorney

Deputy Mayor Ralph Inzunza
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