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MEMORANDUM OF LAW

DATE: December 2, 2004
TO: Mayor Dick Murphy
FROM: City Attorney
SUBJECT: Conflict of Interest Analysis re: Declaration of Election Results by Public Officials Who Are Candidates in the Election

QUESTION PRESENTED

In an e-mail dated November 29, 2004, you asked the City Attorney for his opinion on the question of whether candidates in the November 2, 2004, Mayoral election who sit on the City Council may lawfully participate in the municipal decision to declare the results of that election.

SHORT ANSWER

The financial interest a candidate has in the outcome of the mayoral election is the salary he or she would receive as Mayor. Governmental salaries, however, are not considered reportable "income" for purposes of the Political Reform Act [PRA] or the City's Ethics Ordinance. Therefore, candidates for Mayor who sit on the City Council do not have a disqualifying conflict of interest in the municipal decision to declare the results of the Mayoral election.

DISCUSSION

You are a candidate for a second term of office as Mayor of the City of San Diego. Councilmember Donna Frye is also a candidate for this office. Both of you sit on the City Council, whose duty it is to declare the results of the Mayoral election. You are seeking advice regarding whether these candidacies create a conflict of interest that would lawfully preclude the two of you from participating in the decision to declare the results of an election in which you were candidates.

Both the PRA and the City's Ethics Ordinance prohibit public officials from making, participating, or influencing governmental decisions in which they have a financial interest. Cal. Gov't Code § 87100, San Diego Municipal Code [SDMC] § 27.3561. A disqualifying conflict of

interest will generally be found if it is reasonably foreseeable that the decision will have a material financial effect on a source of income in the amount of \$500 or more over the past twelve months (Cal. Code Regs. tit. 2, § 18703.3(a), SDMC § 27.3561(b)(4)) or affects the official's personal finances in an amount of \$250 or more in a 12 month period (Cal. Code Regs. tit. 2, § 18705.5(a), SDMC § 27.3561(b)(6)). Because the Mayor draws a salary in excess of the above amounts, an official who is a candidate for that office would have a conflict of interest with regard to a municipal decision relating to his or her candidacy in the election unless an applicable exception exists.

There is such an exception, as codified in the definition of "income." Income does not include "salary and reimbursement for expenses or per diem received from a state, local, or federal government agency." Cal. Gov't Code § 82030(b)(2). For this reason, the City is not a source of "income" to members of the City Council within the meaning of the PRA or the Ethics Ordinance, and accordingly the City is not an economic interest to such persons. Additionally, the Mayoral salary would not affect the official's reportable personal finances. A decision that could affect a Councilmember's candidacy for elective office (i.e., an entitlement to receive a governmental salary), therefore, does not have any actual impact on his or her "income." See e.g., *In re Gutierrez*, Fair Political Practices Commission [FPPC] Advice Ltr. A-00-015. As such, no disqualifying conflict of interest exists on the basis of an official's governmental salary in the context of a municipal decision to declare the results of an election in which that official is a candidate.

Note that the conclusion reached above would not be affected by any involvement that the candidates may have in litigation regarding the results of the Mayoral election. In the *Gutierrez* advice letter cited above, candidate Contreras won the election for a seat on the City of Coachella City Council by one vote. The election was contested. The FPPC determined that Contreras could vote in matters concerning the litigation because her interest was limited to her salary and benefits as an elected official. In *Wynder*, FPPC Advice Ltr. A-04-116, two councilmembers were named as defendants in an election contest. Noting that "the only potential loss they may suffer would be the loss of their respective offices," the FPPC determined that the two councilmembers could lawfully participate in a decision relating to the city's settlement of the election contest. Although the municipal decision before the San Diego City Council involves a declaration of the election results, and not anything directly relating to litigation surrounding the election, the *Gutierrez* and *Wynder* advice letters illustrate that a public official's involvement in an election-related litigation does not, in and of itself, create a disqualifying economic interest that must be considered in a conflict of interest analysis. For the reasons set forth above, it appears settled that Mayoral candidates sitting on the City Council may participate in the decision to declare the results of the November 2, 2004, Mayoral election notwithstanding any involvement in litigation regarding that election.

CONCLUSION

Although the decision to declare the results of the Mayoral election may financially impact you and Councilmember Frye, the fact that governmental salaries are not considered reportable "income" for purposes of the Political Reform Act or the City's Ethics Ordinance leads to the

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conclusion that you and Councilmember Frye may lawfully vote to declare the results of the Mayoral election. Neither of you have a disqualifying conflict of interest in that municipal decision on the basis of your status as candidates in the Mayoral election.

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