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MEMORANDUM OF LAW

DATE: September 15, 2006

TO: Councilmember Kevin Faulconer

FROM: Carol Leone, Deputy City Attorney

SUBJECT: Conflict of Interest Inquiry

INTRODUCTION

Councilmember Faulconer has asked the City Attorney's Office to inform him about interpretation and application of the Political Reform Act and other applicable conflict of interest procedures and guidelines.

QUESTION PRESENTED

Is Councilmember Faulconer required to disclose his personal financial interests in a project area each time there is a potential conflict of interest, or is a one time only disclosure sufficient?

SHORT ANSWER

The disclosure should be provided in written form for inclusion into the minutes each time an item is heard on the agenda for which a potential conflict exists.

BACKGROUND

San Diego City Official Kevin Faulconer is the councilmember for District Two, located predominantly in downtown. Councilmember Faulconer's wife, Katherine Faulconer, solely owns and operates Restaurant Events ("Events"), a corporation. Events opened in 1996 and has functioned as an Outside Sales Firm for the Restaurants of the Gaslamp Quarter and La Jolla. Employees of the corporation are paid by contracted restaurants on a commission-only basis to solicit, book and plan convention events for designated venues. The clientele primarily consists of Meeting Planners who coordinate events for incoming convention attendees. Events is fully compensated by the venue where the event takes place. The Meeting Planners are not charged a fee for services received.

In addition to meal functions inside of the venues, Events sells Gaslamp Quarter Gift Certificates, and coordinates and sells the Gaslamp Quarter Corporate Block Party. The Corporate Block Party was developed by Events in 1998 to create a single venue in the Gaslamp, large enough to host a convention group of considerable size. The events are private and paid for by a single entity as a means to entertain clients and/or employees visiting San Diego. Events sells the event to the meeting planner and coordinates all of the food and beverage on behalf of the venues. Events also partners with Planners production company to help mitigate the impact on the community and ensure that the best interests of all the businesses of the Gaslamp are the top priority. Events' gross sales in 2005 just topped two million dollars. Events is located at 614 5th Avenue, Suite J, San Diego, California. It is located directly within the heart of downtown San Diego.

Katherine Faulconer is also a limited partner with a 1.25% interest in Spa Tiki, a Limited Partnership. Island Spa, Incorporated, is the General Partner of Spa Tiki, L.P. The General Partner owns 75% of the business and the remaining 25% is owned by the limited partners. Spa Tiki opened in 2003 and is located in the Harbor Club and is located in the Harbor Club at 200 Harbor Drive, Suite 200, San Diego, California. Clients come from downtown hotels, downtown residences, and throughout broader San Diego. Spa Tiki offers massages, facials, wraps, scrubs, and nail services, and also operates a retail store. Gross sales in 2005 just topped 1.5 million dollars. It is located near downtown's southeast boundary defined by waterfront San Diego Bay.

ANALYSIS

I. Councilmember's Duty to Vote

San Diego Charter Section 15 reads in relevant part: "No member shall be excused from voting except on matters involving the consideration of his own official conduct or in which his own personal interests are involved." This charter section creates a councilmember's duty to vote, unless the matter being voted upon involves the councilmember's personal conduct or his or her personal interests. Personal interests include financial interests.

II. Council Policy 000-04

San Diego City Council Policy 000-04 [Policy] states in pertinent part:

"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 or her official duties or would tend to impair his or her independence or judgment or action in the performance of such duties."

In the application of this Council Policy to this situation, the crucial question involves an analysis of what type of financial or personal interest would create an incompatibility between the

financial or personal interest and the discharge of the official's duties. That analysis can be aided by the Government Code sections dealing with such conflict questions.

III. Determination of Disqualifying Financial Interest

Whether disqualification from governmental decision making is required due to conflicting financial interests is determined under the California Political Reform Act (California Government Code Sections 1090-1097; 87100-87500) which describes contractual conflicts of interest. Under the Political Reform Act, a public official is required to disqualify himself or herself from making governmental decisions if the official has a direct economic interest as defined in California Government Code Section 87103. Economic or financial interests that can be potential sources of disqualification include investments in business entities, interests in real property, positions in business entities, gifts received in the previous twelve months, and sources of income. Cal. Gov't Code § 87103.

An analysis under the Act must determine whether the economic interest is directly or indirectly involved in the governmental decision before the public official. Cal. Code Regs. Title 2, § 18704. For example, a person's financial interest, including sources of income, business entities and sources of gifts, is directly involved in a governmental decision when that person, whether directly or by an agent: initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request; or is a named party in, or is the subject of, the proceeding before the official. Cal. Code Regs., Title 2, § 18704.1. Real property in which an official has an economic interest is considered directly involved in a governmental decision if it is within 500 feet of the boundaries of the property which is the subject of the decision. Cal. Code Regs., Title 2, § 18704.2.

IV. California Health and Safety Code Section 33130(a)

California Health and Safety Code Section 33130(a) states in relevant part as follows:

“No agency or community officer or employee who in the course of his or her duties is required to participate in the formulation of, or to approve plans or policies for, the redevelopment of a project area shall acquire any interest in any property included within a project area within the community. If any such officer or employee owns or has any direct or indirect financial interest in property included within a project area, that officer or employee shall immediately make a written disclosure of that financial interest to the agency and the legislative body and the disclosure shall be entered on the minutes of the agency and the legislative body. Failure to make the disclosure required by this subdivision constitutes misconduct in office.” [Emphasis added.]

Under the terms of Charter Section 15, a councilmember is required to participate in voting on matters unless the decision relates to their personal conduct or interests. Since Councilmember Faulconer has an indirect financial interest in property in the Centre City Redevelopment project area, Health & Safety Code § 33130(a) is applicable. Though Councilmember Faulconer is required to

participate in decisions, so long as the decision does not relate to his personal conduct or personal interests, he should disclose his financial interest in businesses within the Centre City Redevelopment Project Area when an agenda item deals with approval of plans or policies for projects within that project area. It should be noted, however, that as described above, a project or its effects upon these or other properties in which Councilmember Faulconer has an indirect financial interest could elevate the Councilmember's personal interest to such a degree that it would be necessary for the Councilmember to recuse himself from participation in a decision on that project. Such a determination is made on a case-by-case basis.

CONCLUSION

The provisions of Charter Section 15 mandate that a councilmember participate and vote on an agenda item, so long as there are no personal interests of the councilmember involved in the decision. For matters in which a councilmember has an indirect financial interest relating to an agenda item, due to the Charter's mandate to participate, the councilmember may participate; however, Health & Safety Code § 33130(a) requires that a written disclosure of the direct or indirect financial interest be entered on the minutes of the agency and legislative body. In light of the mandatory and explicit language in Health & Safety Code § 33130(a) it is concluded that a written disclosure be made and entered into the minutes of each meeting in which an agenda item would create a potential conflict of interest.

MICHAEL J. AGUIRRE, City Attorney

By
Carol Leone, Deputy City Attorney