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February 11, 1985

Honorable Leon L. Williams
Chairman, Board of Supervisors
County of San Diego
355 County Administration Center
San Diego, California 92101

Dear Supervisor Williams:

Re: Conflicts of Interest and Political Activities

This letter is designed to provide you with a general overview of several areas of law relating to conflicts of interest and political activities which pertain to your position as a Supervisor. We believe it is important that you and your staff be familiar with these laws. If you have any questions regarding the applicability of the following discussion to any specific factual situation, please contact County Counsel as soon as possible.

I

CONFLICTS OF INTEREST

The California courts have traditionally predicted conflict of interest decisions on the dual basis of: (1) the statutory restrictions and (2) the prohibition of sound public policy evolved from common law principles. The conflict of interest laws are:

a. Government Code Section 1090 et seq., prohibiting conflicts of interest in contractual matters.

b. The conflict of interest provisions of the Political Reform Act of 1974 (Gov. Code § 87100 et seq.), as implemented by the regulations of the Fair Political

Practices Commission (FPPC) (2 Cal.Admin.Code, § 18700 et seq.).

c. The Conflict of Interest Code adopted pursuant to and as required by the Political Reform Act of 1974 (see Gov. Code § 87300 et seq.).

d. Government Code Section 1126 relating to acts which are in conflict with or inimical to the duties of an officer or employee or those of his agency.

e. The common law rule prohibiting conflicts of interest.

A. PROHIBITED INTERESTS IN CONTRACTS (Gov. Code § 1090 et seq.).

1. Government Code Section 1090[1] provides in relevant part:

"[C]ounty . . . officers or employes shall not be <u>financially interested in any contract made by them in their official capacity</u>, or by any body or board of which they are members. Nor shall . . . county . . . officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity." (Emphasis added.)

2. Section 1090 is not only applicable to contracts made by the officer, it is also applicable to those contracts made by the board of which the officer is a member. Thus, if the transaction comes within the restrictions of Section 1090, the board itself is not permitted to act, even if the interested member refrains from participating in the transaction (City of Imperial Beach v. Bailey [1980] 103 Cal.App.3d 191).

3. The object of Section 1090 is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear on an official's decision.

4. Violation of Section 1090 is a <u>felony</u> and the violator is barred forever from holding any office in the State (§ 1097).

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[1] Unless otherwise indicated, all section references hereinafter are to the Government Code.

5. A contract made in violation of Section 1090 may be avoided at the instance of any person except the person interested in the contract (§ 1092).

6. 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. (Millbrae Assoc. for Residential Survival v. City of Millbrae [1968] 262 Cal.App.2d 222, 237.) Thus, an officer or employee "makes" a contract if he or she participates in any of the listed activities.

7. Section 1090 applies to independent contractors such as consultants, attorneys or architects who participate in the making of a contract (Schaefer v. Bernstein [1956] 140 Cal.App.2d 278).

8. Sections 1091 and 1091.5 provide exceptions for certain officers and employees where the interest in the contract is considered either remote or nonexistent. With respect to remote interests, the board is authorized to make the contract if the interested member discloses such remote interest and his vote is not counted in making the contract (Fraser-Yamor Agency, Inc. v. County of Del Norte [1977] 68 Cal.App.3d 201).

B. POLITICAL REFORM ACT OF 1974 (Gov. Code § 81000 et seq.)[2].

Prohibited Conflicts of Interest

1. Section 87100 provides:

"No public official at any level of state or local government shall make, participate in making or in any

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[2] Enclosed is a letter dated March 28, 1984, addressed to the Board of Supervisors, which discusses in more detail disqualification due to conflict of interest under the Political Reform Act of 1974 (Attachment "A"). Because of the amendment of Government Code Section 84308, effective September 30, 1984, we also enclose a supplemental letter as part of Attachment "A" to explain the 1984 amendment.

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."

2. The term "public official" means every member, officer, employee and, in some circumstances, consultant of a state or local government agency.

3. An 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:

"(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars ($1,000).

"(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars ($1,000).

"(c) Any source of income, other than 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.

"For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater." (Sec. 87103.)

4. The Political Reform Act applies both to contractual and non-contractual decisions.

5. Section 87100 does not prevent a public official from making or participating in the making of a governmental decision

to the extent his participation is legally required for action or to break a tie. This is the so-called rule of necessity and is construed very narrowly. The fact that a public official's vote is needed to break a tie does not per se make his participation legally required.

Financial Disclosure

6. In addition to prohibitions against conflicts of interest, the Political Reform Act also requires "designated employees" to file financial disclosure statements upon commencing County employment, upon leaving County employment and annually while employed by the County (§ 87200 et seq.). Contents of these statements are specified by statute and regulation and detailed instructions are available to each designated employee.

Penalties and Remedies

7. A knowing or wilful violation of the Political Reform Act is a misdemeanor. In addition to other penalties provided by law, a fine of up to "the greater of ten thousand dollars ($10,000) or three times the amount the person failed to report properly . . . may be imposed upon conviction for each violation." (Sec. 91000.)

8. A person convicted of a misdemeanor violation of the Political Reform Act may not be a candidate for any elective office or act as a lobbyist for a period of four years following the date of conviction unless the court at the date of sentencing specifically determines that this provision shall not be applicable (§ 91002).

9. Any person residing in the jurisdiction may sue for injunctive relief to enjoin violations or to compel compliance with the provisions of the Political Reform Act (§ 91003). If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void (§ 91003).

Conflict of Interest Code[3]

10. The Political Reform Act requires each local governmental agency to adopt a Conflict of Interest Code which must contain the following required provisions:

"(a) Specific enumeration of the positions within the agency which involve the making or participation in the making of decisions which may foreseeably have a material efect on any financial interest and for each such enumerated position, the specific types of investments, interests in real property, and sources of income which are reportable. An investment, interest in real property, or source of income shall be made reportable by the Conflict of Interest Code if the business entity in which the investment is held, the interest in real property, or the income or source of income may foreseeably be affected materially by any decision made or participated in by the designated employee by virtue of his or her position.

"(b) Requirements that each designated employee . . . file statements at times and under circumstances described herein, disclosing reportable investments, interests in real property and income. The information disclosed with respect to reportable investments, interests in real property, and income shall be the same as the information required by Sections 87206, 8720.5 and 87207. The first statement filed under a Confict of Interest Code by a designated employee shall disclose any reportable investments and interests in real property. An initial statement shall be filed by each designated employee within 30 days after the effective date of the Conflict of Interest Code, disclosing interests held on the effective date of the Conflict of Interest Code. Thereafter, each new designated employee shall file a statement within 30 days after assuming office, or if subject to State Senate confirmation, 30 days after being appointed or nominated, disclosing

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[3] A copy of the Conflict of Interest Code applicable to members of the Board of Supervisors is attached (Attachment "C"). This Code was adopted by the Board of Supervisors on June 15, 1976 (No. 104).

interests held on the date of assuming office or the date of being appointed or nominated, respectively. Each designated employee shall file an annual statement, at the time specified in the Conflict of Interest Code, disclosing investments, interest in real property and income held or received at any time during the previous calendar year or since the date the designated employee took office if during the calendar year. Every designated employee who leaves office shall file, within 30 days of leaving office, a statement disclosing reportable investments, interests in real peropty, and income held at any time during the period between the closing date of the last statement required to be filed and the date of leaving office.

"(c) Specific provisions setting forth any circumstances under which designated employees or categories of designated employees must disqualify themselves from making, participating in the making or using their official position to influence the making of any decision. Disqualification shall be required by the Conflict of Interest Code when the designated employee has a financial interest as defined in Section 87103, which it is reasonably foreseeable may be affected materially by the decision. No designated employee shall be required to disqualify himself or herself with respect to any matter which could not legally be acted upon or decided without his or her participation."

C. INCOMPATIBLE ACTIVITIES (Gov. Code § 1126)

1. A County officer or employee may not engage in any employment, activity or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties of his or her appointing authority or with the duties of the agency by which he or she is employed (§ 1126).

2. Unless otherwise approved by the County, an officer or employee shall not perform any work, service or counsel for compensation outside of his or her County employment where any part of his or her efforts will be subject to approval by any other officer, employee, board or commission of the County.

3. Each "appointing power" may determine, subject to approval by the Board of Supervisors, those activities which for employees under its jurisdiction are to be prohibited (§ 1126).

4. Pursuant to Resolution Number 41 of the Board of Supervisors adopted February 29, 1972[4], each appointing authority has adopted rules prohibiting specified incompatible activities. These rules may vary slightly from department to department, but generally they prohibit an outside activity if:

> "(a) it involves the use for private gain or advantage of his county time, facilities, equipment or supplies; or the badge, uniform, prestige or influence of his county office or employment, or
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> "(b) it involves the receipt by the officer or employee of any money or other consideration from anyone other than the County for the performance of an act which the officer or employee, if not performing such act, would be required or expected to render in the regular course or hours of his county employment or as a part of his duties as a county officer or employee, or
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> "(c) it involves the performance of an act in other than his capacity as a county officer or employee which act may later be subject directly or indirectly to control, inspection, review, audit, or enforcement of any other officer or employee of the County, or
>
> "d) it involves such time demands as would interfere with the efficient performance of his county duties."

5. The rules also call for disclosure by officers and employees of their outside activities for compensation which relate to their County duties or which may be subject to review by any other officer, employee, board or commission of the County.

6. The rules must state that disciplinary action may be taken against any employee engaging in a prohibited outside activity.

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[4] A copy of this Resolution is attached (Attachment "B"). We are unaware of any Resolution applying solely to employees of the Board of Supervisors.

7. The statute proscribing incompatible activities is not applicable to elective officers since they have no "appointing power" other than the electorate (64 Ops.Cal.Atty.Gen. 796 [1981])[5].

II

POLITICAL ACTIVITES

A. RULES APPLICABLE TO ALL COUNTY OFFICERS AND EMPLOYEES

1. Chapter 9.5 (commencing with Section 3201) of Division 4 of Title 1 of the Government Code provides the rules applicable to political activities of County officers or employees. Except as provided in Chapter 9.5, or as necessary to meet requirements of federal law (Hatch Act), no restriction may be placed on the political activities of any officer or employee of the County (§ 3203).

2. No County officer or employee or an individual seeking County office or employment, may "directly or indirectly, use, promise, threaten or attempt to use, any office, authority or influence, whether then possessed or merely anticipated" to confer upon or secure for any person, or to aid or obstruct any person in securing, any position, nomination, confirmation, promotion, or change in compensation or position, within the County upon consideration or condition that the vote or political influence or action of such person or another shall be given or used in behalf of, or withheld from, any candidate, officer, or party, or upon any other corrupt condition or consideration (§ 3204). The prohibition contained in Section 3204 applies to urging or discouraging the individual employee's action.

3. A County officer or employee may not knowingly solicit political contributions from other County officers or employees or from persons on County employment lists (§ 3207). This does not prevent an officer or employee from soliciting contributions through the mails or otherwise from a significant segment of the

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[5] The doctrine of incompatible activities should not be confused with the doctrine of incompatibility of offices. The doctrine of incompatibility of offices arises when the same person holds two separate public offices at the same time.

public which may include officers and employees of the County (see 59 Ops.Cal.Atty.Gen. 623 [1967]).

4. A County officer or employee may not participate in political activities of any kind while in uniform (§ 3206).

5. A County officer or employee may not engage in political activities during hours in which he or she has been directed to perform assigned duties (§ 3207; San Diego County Charter, § 914).

6. Nothing mentioned above prevents a County officer or employee from soliciting or receiving political funds or contributions to promote the passage or defeat of a ballot measure which would affect the rate of pay, hours of work, retirement, civil service, or other working conditions of officers or employees of the County, except that such activity may be (and is) prohibited during working hours and the County may limit entry into governmental offices for such purposes during working hours (§ 3209).

B. RULES APPLICABLE UNDER THE HATCH ACT

1. A portion of the Hatch Act (5 U.S.C. § 1501, et seq.) applies to County officers or employees whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the federal government (5 U.S.C, § 1501(4)).

2. In such cases, a County officer or employee may not:

(a) use his or her official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(b) directly or indirectly coerce, attempt to coerce, command, or advise a state or local officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(c) be a candidate for a partisan elective office (5 U.S.C., §§ 1502, 1503).

The prohibition against candidacy does not apply to elected officials.

3. Both an employee accused of violating the Hatch Act and the County are entitled to a hearing before the Federal Merit Systems Protection Board (Board). The Board must decide:

(a) whether a violation has occurred,

(b) determine whether the violation warrants the removal of the officer or employee and

(c) notify the officer or employee and the County of the determination by registered or certified mail.

4. When the Board finds:

(a) that a County officer or employee has not been removed from office or employment when so ordered by the Board, or

(b) that the officer or employee has been removed and has been appointed within 18 months after his or her removal to an office or employment in the State of California in a state or local agency which does not receive loans or grants from the federal government; the Board must order the appropriate federal agency to withhold from its loans or grants to the County an amount equal to two years' pay at the rate the officer or employee was receiving at the time of the violation. When the state or local agency to which appointment within 18 months after removal has been made is one that receives loans or grants from a federal agency, the Board must direct that the withholding be made for that state or local agency.

(c) The Board may not require an amount to be withheld from a loan or grant pledged by a state or local agency pledged as security for its bonds or votes if the withholding of that amount would jeopardize the payment of the principal or interest on the bonds or votes.

C. RULE OF STANSON v. MOTT

In Stanson v. Mott (1976) 17 Cal.3d 206, the California Supreme Court held that public funds could not be used to campaign for or against (i.e., promotional purposes) a ballot proposition. Violation of this rule may result in <u>personal</u> liability and criminal prosecution. However, public funds may be used for informational activities. The rule of Stanson v. Mott is that a

public official must use due care in authorizing the expenditure of public funds and may be subject to personal liability for improper expenditures made in the absence of due care. Factors which may be considered in determining if a public official has exercised due care are whether the impropriety of the expenditure was obvious or not, whether the official was alerted to the possible impropriety, or whether the official relied upon legal advice or the presumed validity of an existing legislative enactment or judicial decision in making the expenditure.[5]

CONCLUSION

If you have any specific questions regarding the above discussion, please contact this office.

Very truly yours,

LLOYD M. HARMON, JR., County Counsel

LMH:dl

Enc.

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[5] Also see Board of Supervisors Policy A-73, a copy of which is attached (Attachment "D").