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Board of Supervisors
County of San Diego
335 County Administration Center
San Diego, CA 92101

Honorable Board:

Re: Disqualification Due to Conflict of Interest

As you are probably aware, this office has issued recently several opinions relating to the above-referenced subject. The law on this matter is somewhat complex. We hope the following information is of some assistance to you. When particular matters arise where you believe you might have to disqualify yourself, we urge you to contact this office before the matter comes before your Board.

1. Political Reform Act

The Political Reform Act (Gov. Code § 87100 et seq.) contains two provisions which require disqualification in particular matters. First, disqualification is required where the decision may affect a financial interest of the decision maker. Second, disqualification may be required when the decision may affect a financial interest of a person who has made a political contribution to a decision maker.

A. Disqualification Due to Financial Interest

"No public official at any level of state or local government shall 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." (Gov. Code § 87100).

Government Code Section 87103 sets forth what constitutes a financial interest for purposes of Section 87100. A person 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 four types of interests.

These four interests are:

1. Investments in any business entity in which the public official has a direct or indirect investment worth more than $1,000. A business entity is one operated for profit. Disqualification is required if the effect on the business entity is material. It is not necessary that the effect on the official be material. Thus, if a person owns more than $1,000 worth of stock in a widely held corporation the officer must disqualify himself if the decision will have a material effect on the corporation, even though due to the diversity of stock ownership the effect of the decision on the officer's stock will be minimal. An investment for purposes of these provisions does not include bank accounts, interest in mutual funds, money market funds, insurance policies, government bonds, or securities.

The officer need not own the stock himself since the section covers "indirect investments." An indirect investment means an investment 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 or dependent children own directly, indirectly, or beneficially a 10 percent interest or greater. Thus, an official who owns a 10 percent interest in Business A which has an investment worth more than $10,000 in Business B cannot participate in a decision which will have a material effect on Business B.

As noted above, the effect on an investment must be material. Regulations of the Fair Political Practices Commission (FPPC) attempt to establish standards for determining if an effect is material. An effect on an investment or business entity is deemed material if the decision will increase or decrease (1) annual gross revenues of the entity by the lesser of $100,000 or 1% if the effect is at least $1,000; (2) annual net income of the entity by the lesser of $50,000 or 1/2 of 1% if the effect is at least $1,000; or (3) current assets or liabilities of the entity by the lesser of $100,000 or 1/2 of 1% if the effect is at least $1,000. (18 Cal.Admin.Code § 18702.)

2. Any real property in which the public official has a direct or indirect interest worth more than $1,000. A person holds an indirect interest in real property if it is owned by the official's spouse or dependent child, by an agent on behalf of the official, or by a business entity or trust which the official, or the official's agent, spouse, or dependent children own directly, indirectly, or beneficially a 10% interest or greater. An interest in real property includes real property located in the county or within two miles of the county. It includes leases which have an unexpired term of at least 10 years, and options to purchase. A principal residence is included, even though it may not have to be disclosed on a financial disclosure statement.

The effect of a decision on an interest in real property is deemed to be material if the effect of the decision will be to increase or decrease (1) the income producing potential of the property by the lesser of $1,000 per month, or 5% per month if the effect is $50 or more per month, or (2) the fair market value of the property by the lesser of $10,000 or 1/2 of 1% if the effect is $1,000 or more.

3. Any source of income aggregating $250 or more in value provided to, received by, or promised to the official within 12 months prior to the time when the decision is made. A source of income does not include loans by a commercial lending institution if made on terms available to the public without regard to the official's official status.

As interpreted by the Fair Political Practices Commission, a source of income includes income of a business entity in which an official has a 10% interest or more. Thus, if an official has a 10% interest in Business A and Client B has paid Business A $2,500 within the past 12 months, a decision which would have a material effect on Client B cannot be participated in by that official. This is true even though the decision may not have an effect on either the income of Business A or the income of the official. Disqualification will have to take place even though Client B may not have to be disclosed on the financial disclosure statement filed by the official.

Income includes, among other things, gifts, loans,outstanding loans, the official's community property interest in the income of a spouse, and a pro rata share of income in a business entity or trust in which the official or official's spouse owns at least a 10% interest. Income does not include, among other items,

government salary, an inheritance, interest in savings accounts, dividends on publicly traded stock, loans from close relatives, or pensions.

A decision is deemed to have a material effect on a source of income if the decision will increase or decrease the amount of income (other than rents) of the official or his immediate family by $100 or more. If the source of income is a business entity, the effect of the decision will be material if the business entity is affected in the manner set forth for investments as described above; i.e., the gross revenues, net revenues, or assets or liabilities of the business entity would be increased or decreased by the amounts set forth above under the discussion of investments. If the source of income is not a business entity, then the decision will be material if it "will have a significant effect on the source." (2 Cal.Admin. Code § 18702.)

4. Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. As noted above, a business entity is one operated for profit. The decision will have a material effect on the business entity if the standards set forth for investment above are met.

If a decision will have a material effect upon a financial interest, the official must refrain from making or participating in making, or using his or her position to influence the making of the decision. The exitence of the disqualifying interest must be made a part of the board's or commission's official records. The official may appear as a member of the general public to represent himself or herself on matters related to his or her personal interest if done in public, and the officer indicates he or she is acting in a private capacity.

It may, of course, be difficult to determine with precision whether or not the effect of a decision will be material as discussed above. A FPPC pamphlet states "Sometimes it is difficult to give a dollar value to the effect of a governmental decision. In such cases, the effect may be material if the decision significantly affects the use or enjoyment of land or other interests, or if the official's receipt of income from a private source is directly related to the decision."

B. Disqualification Due to Political Contributions

A person who serves on a quasi-judicial board or commission may not vote on an application before the board or commission if the member has within the past 12 months received from the applicant, his agent, or a person with a financial interest supporting or opposing the application, a contribution or contributions totaling $250 or more for the official's candidacy in state, local, or federal elections. (Gov. Code § 84308).[1/] The official must disclose the receipt of the contribution at the public hearing on the application. The disclosure "shall be in the public record." The officer may nevertheless vote if he returns the contribution within 30 days from the time he knows or should know of the contribution. Receipt of a contribution by one's own controlled committee is deemed receipt of a contribution by the official.

A person who supports or opposes an application has a "financial interest" as that term is used in Government Code Sections 87100 and 87103 which are discussed in part A of this memorandum.

A person actively supports or opposes an application if he or his agent communicates with a board member for the purpose of influencing a vote, testifies in person to influence a decision, or communicates with an employee of the board to influence a vote. It should be noted that FPPC regulations appear to require disqualification of Commissioner A who has received a contribution from B when B or his agent contacts Commissioner C or Staff Member D if the decision will affect B's financial interest. We suggest you contact our office for assistance if it is unclear if the contributor who is a proponent or opponent has a financial interest.

The disqualification herein discussed applies to members of any quasi-judicial board or commission. It does not apply to the Board of Supervisors when acting as the Board or as an ex officio board of a district. It does not apply to members of the board when serving on LAFCO since that is a legislative not a quasi-judicial body. It does apply to board members when acting on the Coastal Commission.

The foregoing relates to disqualification. You should also be aware once an application has been filed, and for 3 months

1/ The statute applies only to contributions made after December 31, 1982. (2 Cal.Admin.Code § 18438.)

after a decision is made, the member cannot accept or solicit or direct a contribution of $250 or more. Also, the prohibition does not just apply to the candidacy of the board or commission member. Once an application is filed, the member cannot accept direct or solicit a contribution for any other candidate for office. A person, or his agent with his knowledge, solicits a contribution if he requests a contribution orally or in writing, and the request is not made in a mass mailing, to a public gathering, or published in a newspaper, or broadcast on radio or TV. A person does not solicit solely because his or her name is printed with other names on stationery or a letterhead used to request contributions. A person directs a contribution if he acts as an agent for another person, or for a committee other than his own controlled committee, in accepting a contribution on behalf of or transmitting a contribution to such other person or committee. (2 Cal.Admin.Code § 18438.6.)

2. Interest in Contracts

In addition to the provisions of the Political Reform Act of 1974 discussed above, Government Code Section 1090 prohibits county officers or employees from being financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. It must be emphasized that this is a flat prohibition, not merely a basis for disqualification, and applies to contracts as opposed to matters such as rezoning, or the issuance of permits. Although beyond the scope of this memorandum, despite the prohibitions of Government Code Section 1090, Government Code Section 1091 classifies certain interests as remote where a contract may be entered into if it is approved without the vote of the interested member. Again, particular questions involving interests in contract should be directed to this office.

Very truly yours,

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County Counsel

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