

January 6, 2005

SDEC Formal Advice Letter No. FA05-01

Advice Provided to:
Mayor Dick Murphy
202 "C" Street, 11th floor
San Diego, CA 92101

Re: Request for Conflict of Interest Advice on Calling a Special Session of the
City Council to Hold a Mayoral Election Contest Proceeding

Dear Mayor Murphy:

This advice letter has been prepared in response to your memorandum to the San Diego Ethics Commission dated January 2, 2005. You are seeking advice from the Ethics Commission concerning a request you have received to call a special session of the San Diego City Council to hold a Mayoral Election Contest Proceeding.

QUESTION

As the Mayor whose election is being contested, are you disqualified because of a conflict of interest from acting on a request to call a special session of the City Council to hold a Mayoral Election Contest Proceeding?

SHORT ANSWER

No, you do not have conflict of interest under the City of San Diego Ethics Ordinance that would disqualify you from calling a special session of the City Council to hold a Mayoral Election Contest Proceeding.

BACKGROUND AND ANALYSIS

You received a letter on December 30, 2004, from Fredric Woocher, in which he asks you to call a special session of the San Diego City Council during the week of January 3, 2005, to hold a Mayoral Election Contest Proceeding. You state that, under the Permanent Rules of Council, the Mayor has discretion to call, or not to call, a special session of the City Council.

The City's conflict of interest rules are codified in the City of San Diego's Ethics Ordinance, which is set forth in Chapter 2, article 7, division 35 of the San Diego Municipal Code [SDMC]. The rules disqualify a City Official from influencing a municipal decision in which the official has a financial interest. SDMC section 27.3561 provides in relevant part:

It is unlawful for any City Official to knowingly influence a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on

(a) the City Official or a member of his or her immediate family, if the material financial effect is distinguishable from its effect on the public generally; or

(b) any of the following economic interests:

....

(4) any person from whom a City Official or a member of the City Official's immediate family has received (or by whom you have been promised) \$500 or more in income within twelve months prior to the municipal decision); and

...

(6) the personal expenses, income, assets, or liabilities of a City Official or a member of the City Official's immediate family.

For purposes of this analysis, we note that this disqualification rule was modeled after two provisions of the state's Political Reform Act [PRA] (Cal. Gov't. Code §§ 87100 and 87103) and associated regulations adopted by the Fair Political Practices Commission [FPPC]. Additionally, the Municipal Code expressly incorporates the FPPC's rules concerning the materiality of governmental decisions on various economic interests. (SDMC § 27.3561(c)). Therefore, the ensuing analysis refers directly to applicable FPPC regulations and California Government Code sections. Also, where appropriate in this analysis, we look to FPPC interpretations of comparable statutes and regulations for guidance in interpreting the Municipal Code's disqualification rules.

A. City Official and Municipal Decision

By virtue of being seated as Mayor, you are a City Official within the meaning of the City's disqualification rules. If by calling a special session of the City Council you would be "influencing a municipal decision", the disqualification rules come into play.

With regard to whether you would be "influencing a municipal decision," the Ethics Ordinance defines this term as follows:

Influencing a municipal decision means affecting or attempting to affect any action by a City Official on one or more municipal decisions by any method, including promoting, supporting, opposing, participating in, or seeking to modify or delay such action. Influencing a municipal decision also includes providing information, statistics, analysis or studies to a City Official.

SDMC § 27.3503.

By exercising your discretion to call, or not to call, a special session of the City Council, you are clearly “participating in” a municipal decision. This conclusion is consistent with the regulations promulgated by the FPPC establishing that discretionary decision making by public officials constitutes governmental decision making for purposes of the PRA's disqualification requirements (Cal. Code of Regs. tit. 2. §§ 18702.3 and 18702.4).

B. Economic Interests

As a City Official you will be disqualified from calling a special meeting of the Council if it is reasonably foreseeable that calling the meeting will have a material financial effect, distinguishable from its effect the public generally, on one or more of your economic interests. To make this determination, two relevant economic interests must be examined: (1) sources of income to you in the amount of \$500 in the previous twelve months (SDMC § 27.3561(b)(4)), and (2) your personal expenses, income, assets, or liabilities (SDMC § 27.3561(b)(6)).

1. Source of Income

As Mayor, you draw a salary and receive related benefits in excess of \$500 per year from the City. Therefore, unless an exception applies, the City is a source of income to you for purposes of applying the disqualification rules. As a matter of policy the state has decided to simply exclude some forms of income from the definition of that term as used in the PRA. Significantly, for purposes of this analysis, the term “income” expressly excludes salaries and per diem payments received from a local government. Cal. Gov’t Code § 82030(b)(2); Cal. Code of Regs. 18705(c)(1). It also excludes other employment related benefits. See, e.g., *In Re Cosgrove*, FPPC Adv. Ltr. A-98-145. This is known as the “government salary exception” (*In re Gutierrez*, FPPC Adv. Ltr A-00-015). Therefore, we find that an exception applies here and that the City is not a source of income that disqualifies you from calling a special meeting of the City Council for the purpose requested. Absent facts showing that you have another source of income that would be affected by calling this meeting, we conclude that you are not disqualified from calling this meeting by virtue of an impact on any source of income.

2. Personal Finances

Under SDMC section 27.3561(b)(6), the effect of the decision on your personal finances must also be examined. Unless an exception applies, if calling the special meeting, or not calling the meeting, will affect your personal income, assets, expenses or liabilities by \$250 or more in a

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twelve month period, the financial effect will be considered material. SDMC § 27.3561(b)(6); Cal. Code of Regs. tit. 2, § 18705.5(a)

For purposes of this analysis we examine only your salary and benefits from the City. You have not provided any facts indicating that you have other assets, expenses, liabilities, or income that will be affected by the decision. The crux of the question is whether calling the special meeting, which could result in the loss of your official position as Mayor of the City of San Diego, would create a disqualifying personal financial effect. The question turns on whether the "government salary exception" applies under the "personal financial effects" rule. We think it does.

As stated in the above analysis, the term "income" expressly excludes government salaries and related benefits. This "government salary exception" has been examined and discussed thoroughly in several FPPC opinions pertaining to the personal financial effects rule. In one of its most recent advice letters, the FPPC refused to allow the "personal financial effects" rule to "swallow up the government salary exception." This advice was rendered in the context of an election contest where an official's position was at stake and the governmental decision pertained to use of City funds to provide a defense to the election contest. *See, In re Gutierrez*, FPPC Adv. Ltr. A-00-015, in which the FPPC found that a seated city councilmember could participate in a decision to fund the defense costs of an election contest challenging her election. The FPPC stated:

We understand that the loss of an official position may well cause a large change in an official's economic well-being, which may in turn affect the official's assets, expenses, or liabilities. But these effects, where they are secondary to an effect on "government salary," are not potentially disqualifying "personal financial effects."

In re Gutierrez, FPPC Adv. Ltr. A-00-015, p. 3.

Even more recently, the FPPC found that two city council members did not have personal financial interests by virtue of their city salaries that would disqualify them from participating in settlement discussions pertaining to election contests brought to challenge the validity of their elections. *In re Wynder*, FPPC Adv. Ltr. A-04-116. In that matter, the FPPC noted particularly that "the only potential loss they may sustain is the loss of their elected positions." *In re Wynder*, at p. 4.

There is nothing in the Municipal Code to cause us to think that the City's personal financial effects rule should be interpreted differently from that in the state law or regulations. Therefore, based on the above-cited applications of the "government salary exception" to the "personal financial effects" rule, we conclude that you are not disqualified from calling a special session of the City Council to hold an election contest proceeding, even though your position as Mayor may be at stake.

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CONCLUSION

The City's conflict of interest rules would prohibit you from calling a special session of the City Council to hold a Mayoral Election Contest proceeding if a source of income to you or your personal finances would be materially affected by calling the special session. You receive a salary and related benefits from the City as Mayor. Because these income and benefits are subject to the "government salary exception," you do not have a disqualifying financial interest that would prohibit you from calling a special session of the City Council to hold a Mayoral Contest Election Proceeding.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

Cristie C. McGuire
General Counsel