MEMORANDUM OF LAW

DATE: July 1, 1991

TO: Councilmember Bruce Henderson

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Arising from Listing Councilmember on Law Firm's Letterhead/Council Docket Items S-409 and S-416 of July 1, 1991

This is in response to your memorandum of June 25, 1991, to City Attorney John Witt, in which you ask whether you have a potential conflict of interest pertaining to the La Jolla Business Improvement District ("B.I.D.") vote on July 1, 1991 on Docket Items S-409 and S-416. The question arises because you are "of counsel" to your brother's law firm (Henderson & Henderson), which is located in the La Jolla B.I.D.

BACKGROUND FACTS

In lieu of reciting the proposed Council actions of July 1, we attach copies of relevant excerpts of the agenda of that day (Exhibit A). Among other things, however, the Council will be asked to vote on a resolution of intention to disestablish the La Jolla B.I.D. (Item S-416(B)).

According to Walt Hauschildt, Community Development Coordinator in the Property Department who supervises the B.I.D. Administrator, the firm of Henderson & Henderson has a current business license and is classified as a Type C, Zone 2 business. The business is assessed $35.00 per year for B.I.D. purposes. That assessment would no longer be made if the B.I.D. is disestablished.

You state in your memorandum that you have received no compensation from the firm of Henderson & Henderson. We received confirmation from your Chief of Staff James Sills that you received no income from that firm in the past 12 months, that you have no investment interest in the firm, and that you do not hold real property with the firm.F
We note, however, from your Statement of Economic Interest for calendar year 1990 (filed with City Clerk on April 1, 1991), that you hold a 50% undivided fee ownership of property elsewhere in San Diego with your brother. You also receive some income from that property. However, those interests are not relevant here.
In short,
you have no financial relationship with your brother's law firm. You do, however, hope to practice law with your brother once you leave the City Council, but have no current promise to receive income from the firm.

Mr. Sills also confirmed that you are listed "of counsel" on the law firm's letterhead, but the City and Council office which you hold are not mentioned.

LEGAL ANALYSIS

To answer the questions raised in your memorandum, we need to examine the conflict of interest law embodied in the Political Reform Act of 1974, codified in Government Code section 81000 et seq., and the Council's Code of Ethics (Council Policy 000-4), copy attached as Exhibit B. These are treated separately below.

Political Reform Act

Government Code section 87100 states when a public official must disqualify him or herself from participating in or making a governmental decision, as follows:

> 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.

Under this statute, a public official is disqualified from participating in or making a governmental decision only if he or she has a "financial interest" that may be affected by the decision. Government Code section 87103 defines the term "financial interest" as follows:

> Section 87103. Financial Interest.
>
> An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:
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> (a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars ($1,000) or more.
>
> (b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars ($1,000) or more.
>
> (c) Any source of income, other than gifts and 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.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts 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.

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.

To determine whether a public official has a disqualifying financial interest under the above-quoted Government Code section, it is necessary to determine the effect of a governmental decision on 1) the official him or herself; 2) the immediate family of the public official; or, 3) on one of the public official's economic interests defined in Government Code section 87103(a)-(e) above.

Under Government Code section 82029, the term "immediate family" includes only the spouse or dependent children of a public official. A brother is not included in that definition.

From the facts given, we find that you have no disqualifying financial interest that will prevent you from participating in or voting on the matters pertaining to the La Jolla B.I.D., for the reasons set forth below:

First, we find that you personally have no financial interest within the meaning of Government Code sections 87100 and 87103: 1) you have received no income and have no current promise to receive income from your brother's law firm; 2) you have no investment interest in the firm; and, 3) you hold no property interest with the firm. Second, a brother does not constitute "immediate family" for purposes of the Political Reform Act. Therefore, the fact that the Henderson & Henderson law firm or your brother personally will no longer have to pay the $35.00 per year B.I.D. assessment if the Council decides to disestablish the B.I.D., does not constitute a financial effect on your "immediate family" within the meaning of Government Code sections 87103 and 82029.

Since we decide that there will be no financial effect on you or on one of your economic interests resulting from any Council action pertaining to the La Jolla B.I.D., we do not need to reach the issue of materiality.

We conclude that, under the Political Reform Act, you are not disqualified from participating in or voting on the matters pertaining to any of the items concerning the La Jolla B.I.D. (Items S-409 and S-416 on

the Council Docket of July 1, 1991).

Council Policy 000-4

Council Policy 000-4 was adopted on December 26, 1967 and was corrected on January 18, 1968 (copy attached as Exhibit B). Two sections are relevant here. These sections are quoted below:

> First: 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 official duties or would tend to impair his independence or judgment or action in the performance of such duties.
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> Second: No elected official, officer, appointee or employee shall engage in any enterprise or activity which shall result in any of the following:
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> (a) Using the prestige or influence of The ┌sicσ City office or employment for private gain or advantage of himself or another.

The facts presented raise two issues under this Council Policy. First, unlike the Political Reform Act, under this policy both personal as well as financial interests are potentially disqualifying interests. Whether an official's judgment is so impaired by a personal or financial interest that he or she could not discharge the duties of the job properly is within the official's conscience to decide. There is no legal penalty for violating the policy. Therefore, you need to determine from examination of your own conscience whether you may participate in and vote on the La Jolla B.I.D. matters in light of your relationship with your brother. If you feel your official judgment would be impaired, then you should refrain from participating and voting. If, on the other hand, you can remain fair and impartial, you have a duty under Charter section 15 to participate and vote on those matters.

The second issue raised under the Council Policy is whether the City's name or Council office is being used for the private gain of the law firm in violation of the policy. We understand that the City's name and Council office are not used on the firm's letterhead. Your name and "of counsel" merely appear. Therefore, we find that the City's name is not being used for the private gain of the law firm in violation of the policy.

CONCLUSION

We find that there is no financial conflict of interest disqualifying you from participating in or voting on the La Jolla B.I.D. issues (Items S-409 and S-416, July 1, 1991, Council Docket), arising from the fact that you are "of counsel" to your brother's law firm (Government Code sections 87100 and 87103). Under Council Policy 000-4, you would be disqualified from voting only if your personal relationship with your

brother has impaired your consideration of the B.I.D. issue. We find that the use of your name without mention of the City or Council office on the law firm's letterhead is not a violation of Council Policy 000-4.

JOHN W. WITT, City Attorney
By
Cristie C. McGuire
Deputy City Attorney

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Attachments
ML-91-48