

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: October 4, 2006
TO: Mayor and City Councilmembers
FROM: City Attorney
SUBJECT: Approval of SEC Order; Conflicts of Interest; Rule of Necessity

INTRODUCTION

On October 5, 2006, the City Council will consider the approval of an Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 [Order]. The Order provides that the City's consent to the Order is: "Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted . . ."

In connection with this matter, the question has arisen whether some Councilmembers have a conflict of interest in participating in a decision to approve or reject the Order. While we do not have enough facts to make a determination on this issue, some Councilmembers may determine that such a conflict exists and choose to recuse themselves from this matter. There are eight members of the City Council and five members are necessary for a quorum. If more than three members recuse themselves, the "rule of necessity" may allow for members to vote.

DISCUSSION

I. General Principles on Conflict of Interest.

In general, public officials are guided by the following governing rule:

§ 18700. Basic Rule; Guide to Conflict of Interest Regulations.

- (a) No public official at any level of state or local government may make, participate in making or in any way use or attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a disqualifying conflict of interest. A public official has a conflict of interest if the decision

will have **a reasonably foreseeable material financial effect on one or more of his/her economic interests**, unless the public official can establish either: (1) that the effect is indistinguishable from the effect on the public generally, or (2) a public official's participation is legally required.

(FPPC Regulation, Tit. 2, Div. 6, § 18700(a) [emphasis added].)

Government Code § 1090 similarly precludes a public officer or employee from participating in the making of a contract in which he or she is financially interested. A settlement agreement between the City of San Diego and the SEC may be interpreted to be such a "contract," if it affects an individual Councilmember's "financial interest." Although the term "financial interest" is not specifically defined, case law and statutory exceptions to the basic prohibition indicate the term is to be liberally construed. *Thomson v. Call*, 38 Cal. 3d 633, 645 (1985).

Similarly, the City's Ethics Ordinance states it is unlawful for a City official to knowingly influence a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on 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.

II. The "Rule of Necessity."

The Fair Political Practices Commission [FPPC] regulations provide that an official is "legally required to make or to participate" only if there is no reasonable alternative manner of decisionmaking. (Cal. Code Regs., tit.2, § 18708(a)).

FPPC Regulation, Tit. 2, Div. 6, § 18708 states in relevant part:

18708. Legally Required Participation.

(a) A public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision within the meaning of Government Code section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

...

(c) This regulation shall be construed narrowly, and shall:

...

(3) Require participation by the smallest number of officials with a conflict that are "legally required" in order for the decision to be made. A random means of selection may be used to select only the number of officials needed. When an official is selected, he or she is selected for the duration of the proceedings in all related matters until his or her participation is no longer legally required, or the need for invoking the exception no longer exists.

(d) For purposes of this section, a “quorum” shall constitute the minimum number of members required to conduct business and when the vote of a supermajority is required to adopt an item, the “quorum” shall be that minimum number of members needed for that adoption.” (FPPC Regulation, Tit. 2, Div. 6, § 18708 [emphasis added].)

In the present situation, we have not identified an alternative manner that would permit the City to enter into the Order, absent a vote of the Council. Accordingly, if the City wishes to exercise the “rule of necessity” the FPPC has outlined the steps to be taken. First, the official must disclose the existence and nature of the conflicting personal financial interest in the outcome of the particular action and make it a matter of public records. Second, the official is prohibited from using his or her official position to influence any other public official with regard to the matter. Third, the official must state exactly why there is no alternative route by which action can be taken. Finally, the official must limit his or her participation to action that is legally required. (Cal. Code Regs, tit. 2, § 18708(b) and (c)).

If an insufficient number of Councilmembers remains to participate in the decision, the “legally required participation” exception is triggered. (FPPC Reg., Tit. 6, Div. 2, § 18708(c)(3).) Under this process, the City would randomly select a sufficient number of Councilmembers to bring the panel to a quorum.¹

For example, if five Councilmembers are recused from the eight-member Council, two of the “recused” members would be randomly selected to join the three remaining members for the purpose of handling all action related to this matter. These same two members also should be assigned to work on all action related to the City’s defense and not just the one vote on the Order. They would continue doing so unless and until circumstances change for the others recused from the panel. (For example, if a recused member settles his or her case with the SEC, he or she may then be free of conflicts and can rejoin the panel.)

CONCLUSION

To summarize, the Council is required to seat a quorum of its members to handle this matter, and, if too many Councilmembers are disqualified, it can invoke the “legally required participation” law to seat them.

MICHAEL J. AGUIRRE, City Attorney

By
City Attorney

MJA:CB:jb

¹ The regulation merely refers to a random selection process, without suggesting how to accomplish this. One possibility is to have the City Clerk put the names of the “recused” Councilmembers into a hat and choose the number needed.