

State of California



Fair Political Practices Commission

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Technical Assistance • • Administration • • Executive/Legal • • Enforcement
(916) 322-5662 322-5660 322-5901 322-6441

March 30, 1984

Honorable Dianne Feinstein, Mayor
City and County of San Francisco
City Hall
San Francisco, CA 94102

Re: Your Request for Advice
Our No. A-84-057

Dear Mayor Feinstein:

You have written requesting additional advice following our letter of March 5, 1984, to City Attorney George Agnost (No. A-84-014). Your letter has focused on the question of which activities, relative to Candlestick Park and the new downtown stadium, you may undertake without making, participating in making or using your official position to influence a governmental decision. Mr. Agnost's previous letter had outlined a broad range of actions which you desired to undertake. In our letter of March 5, we advised that you should disqualify yourself as to certain of those actions. You have now determined to refrain from any such actions, but contemplate taking certain preliminary actions leading up to the ultimate decisions or recommendations; the latter you would postpone until the period of your disqualification has expired, on or about July 31, 1984.

CONCLUSION

Prior to August 1, 1984, you may not engage in any preliminary negotiations, discussions, reasoning, compromises, planning, drawing of plans and specifications or give and take which is leading up to any decision which will have a reasonably foreseeable material financial effect upon the San Francisco Forty Niners. The aforementioned activities all constitute participating in making or using your official position to influence a governmental decision. Any of those activities is subject to the requirement of disqualification during the existence of the conflict of interest stemming from receipt of the Forty Niners tickets. Once again, the requirement of disqualification does not prohibit you from fully delegating these activities to other City officials who have no conflict of interest.

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FACTS

You have received a gift of \$250 or more from the San Francisco Forty Niners within the last 12 months (it was transmitted to you by letter dated July 20, 1983, and received by you on or about August 1, 1983).^{1/} (See, advice letter A-84-014 to George Agnost.) Consequently, the Forty Niners are a source of income to you pursuant to Government Code Section 87103(c), requiring you to disqualify yourself from making, participating in making or using your official position to influence any governmental decision which will have a material financial effect upon the Forty Niners prior to August 1, 1984. (See Agnost letter supra.)

You have agreed that you will not participate in any decisions meeting the above criteria prior to August 1; however, you wish to know whether or not certain "preliminary" actions are also covered by the prohibition. You have asked specifically about the application of the Commission's regulation, 2 Cal. Adm. Code Section 18700^{2/} to the following actions which you desire to undertake prior to August 1, 1984.

With regard to the downtown stadium, the actions that I contemplate taking between now and July 31, 1984, as outlined below, will not involve voting on matters, appointing persons to any offices, obligating or committing myself or my office to any course of action, or entering into any contractual agreement on behalf of my agency.

* * *

I will not plan to negotiate with the Giants and the Forty-Niners, but I would like to ascertain what

^{1/} You received a similar gift from the San Francisco Giants; however, that gift is now more than 12 months old and is no longer a basis for disqualification.

^{2/} Regulation 18700 defines the terms "make," "participate in making," and "use of one's official position to influence" a governmental decision, terms which are used in Government Code Section 87100, which is the basic disqualification provision of the Political Reform Act (Government Code Sections 81000-91014). All statutory references are to the Government Code., unless otherwise stated.

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type of commitment they are willing to make. With that information, I can decide for myself whether this project is feasible and whether I should make a recommendation to those who will make the final decisions and exercise their substantive powers of review. Without action by the Recreation and Park Commission, the Board of Supervisors and the voters, I have no authority to enter into any binding negotiations on behalf of the City and County of San Francisco with regard to any aspect of the downtown stadium.

* * *

My purpose in gathering information and opinions at this time is not to influence the decisions of others with regards to the stadium, but to inform myself as to the available options. No policy or position based upon my inquiries will be presented to any decision-maker until after July 31, 1984.

I am now in the process of preparing a policy for the Office of the Mayor that would be embodied in recommendations to the governmental decision-makers. As I have informed you, I will be meeting with the Southern Pacific Corporation on Friday, March 9, to discuss their Mission Bay project and, I hope, to receive a stadium site offer from them. You have advised me that this meeting does not violate the law, so long as I limit my discussions with the Southern Pacific officials on the stadium site to Southern Pacific's contribution of the site to the City. May I meet, thereafter, with representatives of the Forty-Niners to discuss the possibility of their financial participation in the development of the stadium, including long-term leasing of executive boxes? May I also meet with representatives of various corporations to explore the possibility of their purchase of the rights to advertising within the structure and possible participation in the financing of the scoreboard?

In sum, I am investigating various financing options and sounding out potential investors and participants on the nature and extent of their participation. This information is necessary to enable me to determine whether the idea of a downtown stadium is workable. However, I will not, until after July 31,

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1984, set down my position in any formal proposal that will be transmitted to the appropriate public agencies.

Mindful of the restrictions I must observe under the Act, it is important for me to know whether my investigations of the feasibility of proceeding with development of the stadium constitute making, or participating in making, a governmental decision under the Act. It appears to me that, so long as I am only gathering information and so long as no commitments are made or policy issued from my office until after the relevant deadlines, the actions I have outlined do not fall within the definition of participation in the making of a governmental decision as set forth in the Act.

I do not intend to obligate or commit the City and County to any course of action, nor may I legally do so. I will not directly or indirectly advise any decision-maker, such as the Recreation and Park Commission or the Board of Supervisors, on a recommended course of action until after July 31, 1984. Negotiations with teams, advertisers or developers would result, at most, in a proposal to be made to the Recreation and Park Commission or Board of Supervisors at that time. Furthermore, the results of such negotiations will be subject to "significant substantive review" by the Recreation and Park Commission, the Board of Supervisors who must exercise their independent charter-conferred powers of judgment on the merits and demerits of any proposal. Finally, the disposition of Candlestick Park and issuance of revenue bonds must be decided at a general or special election by the voters of the City and County of San Francisco.

What follows below is our understanding of other factual matters which must be considered by us in rendering advice to you. If our understanding is incorrect, please advise us at once.

The construction of a downtown stadium and the disposition of Candlestick Park are being contemplated for a variety of reasons; however, the primary purpose of either facility is to house the City's major-league sports franchises and, therefore, the relative esthetic and economic desirability of the two

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alternatives to the teams is of great importance in the overall equation; each has come out in support of the new stadium alternative.

You are endeavoring to pull together a financing package for the proposed downtown stadium which will limit the need for taxpayer support. Among other things, this includes: securing the downtown stadium site at no cost; obtaining commitments from the teams to lease luxury boxes in the new stadium; selling the Candlestick Park site; obtaining commitments to purchase advertising rights in the new stadium, including the scoreboard; efforts to locate a generous benefactor after whom the stadium would be named; and efforts to obtain other sources of private funding to construct the downtown stadium. In short, you have stated that the downtown stadium proposal is the most complex project that you have worked on in your many years of public service.

All of these various endeavors are aimed at the ultimate goal of achieving a stadium proposal which requires little or no public financing by the City or its taxpayers. As a result, if an additional level of commitment is forthcoming from one source (the scoreboard advertiser), a lesser commitment may be necessary from another source (the team), etc.

Lastly, you have asked two additional questions regarding specific activities. One is whether you can meet with (and seek commitments from) a brewing company regarding purchase of advertising for the scoreboard; the second is whether you can meet with a group of developers who have a proposal for the purchase of Candlestick Park.

ANALYSIS

The basic question posed by your letter is whether the activities described above fall within the purview of Section 87100 which prohibits an official from making, participating in making or in any way attempting to use his or her official position to influence a governmental decision in which he or she has a financial interest. You have made reference to the Commission's regulation, 2 Cal. Adm. Code Section 18700, and have urged that it be read to permit you to engage in the "preliminary" activities described above, so long as "decisions" or "recommendations" are not made until after July 31, 1984.

The full text of regulation 18700 is set forth in the attached Exhibit "A"; however, subdivisions (c) and (e) are set forth below for ease of reference:

(c) A public official or designated employee "participates in the making of a governmental decision" when, acting within the authority of his or her position, he or she:

(1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

* * *

(e) "In any way attempting to use his or her official position to influence a governmental decision" shall include furthering or attempting to affect in any manner any decision:

(1) Within or before his or her agency; or

(2) Before any agency which is appointed by or subject to the budgetary control of his or her agency.

* * *

2 Cal. Adm. Code Section
18700.

You have stated that you desire to gather information and to ascertain commitments in order to formulate a policy so that ultimately you may make recommendations to the Recreation and Park Department ("Department") and to the Board of Supervisors ("Board") among others. In so doing you will be advising or

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making recommendations to the decision-makers directly and without intervening substantive review.

You are preparing to make such recommendations by conducting research or making an investigation which requires the exercise of judgment on your part and the purpose of which is to influence the decision. You will also be preparing and presenting an analysis or opinion, orally or in writing, which requires the exercise of judgment on your part and the purpose of which is to influence the Department's and the Board's decisions. You would be undertaking these activities in your capacity as Mayor of San Francisco. Thus, you will be participating in the making of a governmental decision by engaging in those activities. 2 Cal. Adm. Code Section 18700(c). With respect to the Department, which is subject to your appointment powers, you would also be using your official position to influence its decision. 2 Cal. Adm. Code Section 18700(e).

A violation occurs not only when the official participates in the decision, but when he influences it, directly or indirectly. (Section 87100, fn. 2 ante; Stigall v. City of Taft, supra, 58 Cal. 2d at p. 560.) Thus, a public official outside the immediate hierarchy of the decision-making agency may violate the conflict of interest law if he uses his official authority to influence the agency's decision.

Comm'n. on Cal. State Gov.
Org. & Econ. v. FPPC (1977) 75
Cal. App. 3d 716, 723.

The various activities you desire to undertake may not be bifurcated according to timing. The process is a continuum, and it may not be commenced during the period of your disqualification. The above-cited reference to Stigall v. City of Taft, is significant in this regard. In Stigall, the court was considering an alleged violation of a different conflict of interest statute, Section 1090. However, as noted by the Court in Comm. on Cal. State Gov. Org. & Econ. v. FPPC, supra, the reasoning is applicable to the Political Reform Act's conflict of interest provisions as well. In Stigall, a contractor who was a member of the Taft City Council resigned just before the final decision to award a city contract to his company, after having participated in its preliminary stages. Generally, Section 1090 prohibits the "making" of any contract between an agency and a company when the owner of the company is involved

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in the agency. In reviewing the actions covered by Section 1090's prohibition on "making," the Stigall court said:

In the first place we are not here concerned with the technical terms and rules applicable to the making of contracts. The Legislature instead seeks to establish rules governing the conduct of governmental officials. In this sense, is an act done or an agreement "made" only when the final, objective affirmation is communicated? It is true that no rights and duties accrue and no contract is technically made until such time, but the negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of the decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense.

Stigall v. City of Taft (1962)
58 Cal. 2d 565, 569.

Similar language appears in Millbrae Assn. for Residential Survival v. City of Millbrae (1968) 262 Cal. App. 2d 222, 237, where the court also considered Section 1090 in light of Stigall.

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. (Stigall v. City of Taft, supra, at pp. 569, 571.) Such construction is predicated upon the rationale that government officers and employees are expected to exercise absolute loyalty and undivided allegiance to the best interests of the governmental body or agency of which they are officers or employees, and upon the basis that the object of such a statute is to remove or limit the possibility of any personal influence, either directly or indirectly which may bear on an officer's or employee's decision. (Stigall v. City of Taft, supra, at p. 569.)

* * *

Millbrae Assn et al v. City of Millbrae, supra.

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As can be seen, even the narrow language of Section 1090, which refers only to "making" a contract, has been broadly interpreted by the courts to carry out the statute's purposes. Obviously, the much more inclusive language of Section 87100, which prohibits making, participating in making, and using one's official position to influence, could not receive a narrower interpretation than Section 1090. To the contrary, given the Act's specific directive that it "should be liberally construed to accomplish its purposes," the interpretation of Section 87100 should be even broader than that of Section 1090. The Commission has consistently advised that the Act's prohibition precludes participation in even the formative stages and precludes debating or discussing the issue and even chairing a meeting when the issue is being discussed.^{3/}

Consequently, on those issues for which it is reasonably foreseeable that the ultimate decisions will have a material financial effect upon the Forty Niners, you may not participate in any preliminary activities which involve your exercise of judgment prior to July 31, 1984. At the minimum, these activities include: preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, solicitation of bids and the give and take which goes beforehand in the making of the decision to commit. However, as we previously advised, you may receive a written proposal from the developers since there is no give and take in the mere receipt of the letter. Any follow up in the form of negotiations or questions would have to be delegated to someone else prior to August 1.

For those ultimate decisions which will not have a reasonably foreseeable material financial effect on the Forty Niners you are, of course, able to proceed in any and all preliminary activities.^{4/} However, given our understanding of

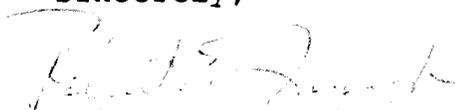
^{3/} On this latter point, see Biondo Opinion, 1 FPPC Opinions 54, 58, No. 75-036, July 2, 1975. More generally, see Advice Letter to David Kaplan, No. A-82-108, which, while dealing with the issue in the context of consultants, discusses the nature of what constitutes "participation" in a governmental decision. (Copies enclosed.)

^{4/} One of these activities is seeking a no cost site for the downtown stadium. The selection of one no cost site versus another will probably not result in a material financial effect on the teams, since it will not alter the economic aspects of their participation. However, a no cost site versus a costly site would foreseeably have such an effect.

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the interrelationship between many aspects of the proposal, these activities will be limited. Should you have questions as to which stadium decisions fall into which category, we will continue to provide assistance to you as requested. However, it seems clear that negotiating with the teams, developers and advertisers to determine their "commitments" will involve judgments on your part and would be inappropriate prior to July 31, 1984. Should you require further elaboration on this letter, I may be reached at (916) 322-5901.

Sincerely,



Robert E. Leidigh
Counsel
Legal Division

REL:plh
Enclosure

OFFICE OF THE MAYOR
SAN FRANCISCO



DIANNE FEINSTEIN

March 9, 1984

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Mr. Robert E. Leidigh
Counsel, Legal Division
State Fair Political Practices Commission
P. O. Box 807
Sacramento, California 95804

Dear Mr. Leidigh:

I appreciate your taking the time to talk on the telephone with City Attorney George Agnost and me the other day regarding my participation in matters relating to the development of a downtown stadium for San Francisco. Pursuant to your suggestion, I am sending this letter to request your written advice as to which aspects of the stadium planning process I may take part in between now and August 1, 1984.

As set forth in your advice letter, I understand that the Political Reform Act (hereinafter the "Act") forbids me to make, or to participate in making, or to influence a governmental decision that will have a significant financial impact upon the Giants (prior to March 21, 1984) or the Forty-Niners (prior to July 31, 1984). Our questions during the telephone conference focused on what constitutes "making a governmental decision" within the meaning of the Act.

In that regard, my staff informs me that FPPC Regulation No. 18700 provides in subsection (b) that a public official makes a governmental decision when

. . . he or she, acting within the authority of his or her office:

- (1) Votes on a matter;
- (2) Appoints a person;
- (3) Obligates or commits his or her agency to any course of action;
- (4) Enters into any contractual agreement on behalf of his or her agency;
- (5) Determines not to act, within the meaning of sub-paragraphs (1), (2), (3) or (4), unless such determination is made because of his or her financial interest. When the determination not to act occurs because of his or

her financial interest, the official's determination must be accompanied by disclosure of the financial interest, made part of the agency's official record or made in writing to the official's supervisor, appointing power or any other person specified in a conflict of interest code adopted pursuant to Government Code Section 87300.

With regard to the downtown stadium, the actions that I contemplate taking between now and July 31, 1984, as outlined below, will not involve voting on matters, appointing persons to any offices, obligating or committing myself or my office to any course of action, or entering into any contractual agreement on behalf of my agency.

In subsection (c), Regulation No. 18700 further elucidates under what circumstances a public official or a designated employee participates in making a governmental decision. The Regulation provides that he or she does so, inter alia, when he or she:

. . . Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; . . .

I will not plan to negotiate with the Giants and the Forty-Niners, but I would like to ascertain what type of commitment they are willing to make. With that information, I can decide for myself whether this project is feasible and whether I should make a recommendation to those who will make the final decisions and exercise their substantive powers of review. Without action by the Recreation and Park Commission, the Board of Supervisors and the voters, I have no authority to enter into any binding negotiations on behalf of the City and County of San Francisco with regard to any aspect of the downtown stadium.

I have also been told that Subsection (c)(2) of Regulation 18700 further provides that an official participates in making a governmental decision when he or she:

Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision . . .

My purpose in gathering information and opinions at this time is not to influence the decisions of others with regards to the stadium, but to inform myself as to the available options. No policy or position based upon my inquiries will be presented to any decision-maker until after July 31, 1984.

I am now in the process of preparing a policy for the Office of the Mayor that would be embodied in recommendations to the governmental decision-makers. As I have informed you, I will be meeting with the Southern Pacific Corporation on Friday, March 9, to discuss their Mission Bay project and, I hope, to receive a stadium site offer from them. You have advised me that this meeting does not violate the law, so long as I limit my discussions with the Southern Pacific officials on the stadium site to Southern Pacific's contribution of the site to the City. May I meet, thereafter, with representatives of the Forty-Niners to discuss the possibility of their financial participation in the development of the stadium, including long-term leasing of executive boxes? May I also meet with representatives of various corporations to explore the possibility of their purchase of the rights to advertising within the structure and possible participation in the financing of the scoreboard?

In sum, I am investigating various financing options and sounding out potential investors and participants on the nature and extent of their participation. This information is necessary to enable me to determine whether the idea of a downtown stadium is workable. However, I will not, until after July 31, 1984, set down my position in any formal proposal that will be transmitted to the appropriate public agencies.

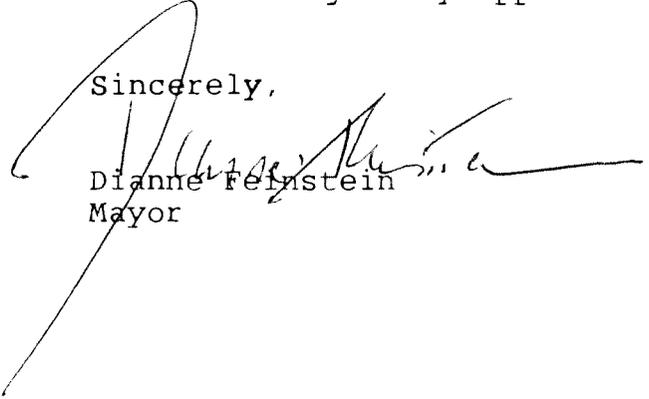
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I do not intend to obligate or commit the City and County to any course of action, nor may I legally do so. I will not directly or indirectly advise any decision-maker, such as the Recreation and Park Commission or the Board of Supervisors, on a recommended course of action until after July 31, 1984. Negotiations with teams, advertisers or developers would result,

at most, in a proposal to be made to the Recreation and Park Commission or Board of Supervisors at that time. Furthermore, the results of such negotiations will be subject to "significant substantive review" by the Recreation and Park Commission, the Board of Supervisors who must exercise their independent charter-conferred powers of judgment on the merits and demerits of any proposal. Finally, the disposition of Candlestick Park and issuance of revenue bonds must be decided at a general or special election by the voters of the City and County of San Francisco.

Your prompt attention to this matter is greatly appreciated.

Sincerely,



Dianne Feinstein
Mayor