BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of: Opinion requested by: William P. Hopkins, City Attorney, City of Anaheim	No. 77-022 Dec. 8, 1977

BY THE COMMISSION: Many types of complimentary tickets and free passes are sent customarily to members of the Anaheim City Council, heads of city departments and members of various city boards and commissions. Such tickets and passes include:

(1) Golden West Baseball Co. tickets for each "Angels" game for seats in a special box reserved for City officials and their guests at the City's stadium. There are 81 "Angels" baseball games played at the City's Anaheim Stadium during the baseball season. Six tickets to each game are available to each city councilmember, although not always used by them personally. In most cases they are given to other persons who are guests of the city councilmembers concerned and sometimes they are not used. These box seats are not available to the general public and have no printed price on the tickets. The highest priced ticket sold to the public is $4.50.

(2) A Disneyland annual pass which is good for four persons. Regular admission price is now $5.50 per person, and Disneyland is open approximately 300 days per year.

(3) Tickets for free parking at the City's Anaheim Stadium and Convention Center parking lots for events attended there. The regular parking fee is $1.50 per event.

(4) Passes to events and exhibitions at the Anaheim Convention Center. Prices for tickets to such events vary from $2.00 to $8.00 on the average, with discounts available to the general public in some cases.

(5) Mann Theater pass for admission of two persons to local theaters. Such tickets can be used for admission to the theaters for a regular show but are not valid for special shows. The highest regular admission price is $3.50 per person. Passes require a minimum charge of at least $.50 per person.

(6) Movieland Wax Museum annual pass is good for two persons. Regular admission price is $4.50 per person. The museum is open approximately 350 days per year.

Based on these facts, William P. Hopkins, City Attorney of Anaheim, has asked the following questions concerning reporting and valuation of such free passes and disqualification requirements that may arise by virtue of accepting the tickets:

(1) Must the recipients of complimentary tickets and free annual passes report such items as gifts on their Statements of Economic Interests if such items are retained but not used?

(2) Must the recipients of complimentary tickets and free annual passes report such items as gifts on their Statements of Economic Interests if such items are retained but only used occasionally?

(3) Must the recipients of complimentary tickets and free passes report such items as gifts on their Statements of Economic Interests if they do not use the items but they give them to other persons?

(4) If complimentary tickets and free passes are required to be reported as gifts, how should the value of such gifts be determined for reporting purposes?

(5) In the event that the recipient of complimentary tickets or passes does not desire to retain said items, is it necessary that they be returned to the donor with a letter of transmittal or other evidence of rejection of the gift?

(6) If the value of a complimentary ticket or free pass equals or exceeds $250, is the donor a "source of income" within the meaning of Government Code Section 87103?

(7) If most or all members of the city council have received free passes worth $250 or more from the same

donor, does the "rule of necessity" provided in Government Code Section 87101 allow the official to disclose fully the conflict involved and to participate in the making of governmental decisions so as to prevent a failure of action?

CONCLUSION

(1), (2) and (3) Recipients of complimentary tickets and free passes must disclose such items on their Statements of Economic Interests if the ticket or pass is worth $25 or more. Government Code Sections 82030(a), 87207(a). The tickets or passes must be disclosed even if they are never used, used only occasionally, or given to some other person. The only exception to this rule arises when such tickets are not used at all and are, within 30 days after receipt, returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes. Government Code Section 82030(b)(4).

(4) The value of complimentary tickets and free passes is the fair market value. Government Code Section 81011. The value can be determined by considering the following factors:

1. Can such a pass be purchased on the open market?

2. If not:

(a) what is the maximum use a person might reasonably make of such a pass in a year, taking into account the nature of the event and whether the pass is transferable; and

(b) what is a reasonable percentage that a vendor might discount the price of a pass from the price of multiple individual tickets in order to induce the general public to buy a pass?

(5) If one returns a gift to the donor or donates it to a charitable organization, it would seem prudent, although not expressly required by the Act, for the official to retain a copy of a transmittal letter or similar evidence to document the transaction. Government Code Section 82030(b)(4).

(6) The donor of a complimentary ticket which has a fair market value of $250 or more is a source of income to the recipient within the meaning of Government Code Section 87103(c). Accordingly, the recipient must disqualify himself from making or participating in the making of any governmental decision which would foreseeably and materially affect the donor in a manner distinguishable from its effect on the public generally.

(7) The rule of "legally required participation" set forth in Government Code Section 87101 does not apply to a conflict of interest that arises because of gifts an official has accepted if it was reasonably foreseeable at the time the gift was received that the official would be asked to make or participate in making a governmental decision affecting the donor. The need for disqualification in these situations, therefore, should be assessed under the standards set forth in Government Code Sections 87100 and 87103 without regard to the provisions of Section 87101.

ANALYSIS

(1) and (2) Questions (1) and (2) ask whether the recipients of complimentary tickets and free annual passes must report such items as gifts on their Statements of Economic Interests if the items are retained and not used, or used only occasionally. Government Code Section 87207[1/] requires the disclosure of gifts from a single source aggregating $25 or more in value. The recipient is required to disclose the value of and date on which the gift was received, the name and address of the donor, and the business activity, if any, of each donor. Section 87207(a)(1), (a)(4). Section 82028 defines "gift" to mean "any payment to the extent that consideration of equal or greater value is not received...." "Payment," in turn, is defined in Section 82044 to mean "a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or <u>anything else of value</u>, whether tangible or intangible." (Emphasis added.) Since the complimentary tickets and free passes entitle the holder to attend specified events without paying the admission price charged to other members of the public, such tickets constitute items of value. Thus, the tickets are "payments" within the meaning of Section 82044. Since

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1/ All statutory references are to the Government Code unless otherwise noted.

they are complimentary, we assume that members of the council have not provided equal or greater consideration in return for them. Accordingly, a complimentary ticket is a gift which must be reported by the recipient on his or her Statement of Economic Interests if the ticket is worth $25 or more. Moreover, since the value of such tickets is the entitlement to attend specified events free of charge, the fact that the holder has not or will not attend the events in question does not affect the value of the tickets.

Our conclusion is bolstered by Section 82030 which specifically provides that income includes any "discount in the price of anything of value unless the discount is available to members of the public without regard to official status."[2/] In the instant case, the free passes and complimentary tickets provide a discount of the entire purchase price and are made available specifically because of the recipient's official status.

(3) The third question asks whether complimentary tickets must be reported as gifts if the recipient does not return them to the donor, but instead passes them along as gifts to other persons. In these circumstances the complimentary ticket must be reported by the official. His reporting obligations remain unchanged whether he retains the gift or gives it to someone else.

The only exception to this conclusion arises if the tickets are not used and "within 30 days after receipt, are returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes." Section 82030(b)(4). If this procedure is followed, the gifts are not reportable.

(4) Mr. Hopkins' fourth question asks how complimentary tickets and passes should be valued. Section 81011 provides:

> Whenever in this title the amount of goods, services, facilities or anything of value other than money is required to be reported, the amount shall be the estimated fair market value at the time received

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2/ See Opinion requested by Blanche Russell, Holiday Inns, 1 FPPC Opinions 191 (No. 75-135, Dec. 3, 1975).

> or expended, and a description of the goods, services, or facilities shall be appended to the report or statement.

In an opinion issued to Controller Kenneth Cory, 1 FPPC Opinions 153 (No. 75-094-B, Oct. 23, 1975), the Commission emphasized that the filer's own good faith estimate of the value of a gift would meet the requirements of the Act. The filer need not employ an appraiser or resort to similar means for determining a gift's value. Thus, a filer is entitled to exercise a measure of discretion when he or she attempts to value a gift for reporting purposes and it is not necessary to consult the Commission or city attorneys for official approval of some particular dollar value prior to filing a statement.

When determining the value of a gift it is important to remember that the Act requires the reporting of fair market value even if an official derives little or no benefit from the gift. For example, a bottle of fine wine may be unappreciated by a recipient who does not drink alcoholic beverages. Nevertheless, the reportable value of the wine is its fair market value, without regard to the utilization of the gift by its recipient. Similarly, a complimentary ticket or free pass has a market value that is independent of the frequency with which the official attends the event in question.[3/] To help officials determine the fair market value of complimentary tickets, we set forth below some standards for determining the value of such passes. Then we apply these standards to a few of the examples posed by Mr. Hopkins.

In general, the fair market value of a gift is the value that the gift would command in the open market. Kaiser Co. v. Reid, 30 Cal. 2d 610, 623 (1947). Thus, the recipient's initial determination should be whether the ticket or a similar ticket is sold on the open market to the general public. If so, the fair market value is that sales price.

3/ However, the value of a free pass still is measured by the number of admissions to which the pass entitles the official. So for example, if a pass to Angels games only entitled the official to attend half the Angels home games, or if the official was given the pass after half the Angels home games had been played, the value of the pass would be based upon an entitlement to attend half the Angels games, not all of them.

For example, Mr. Hopkins indicated that each member of the city council receives six season box seats to the California Angels baseball games. Since season tickets for seats similar to those made available to city councilmembers are sold to the public, the complimentary season tickets have a readily ascertainable market value. We have been informed that a season ticket for a box seat costs $340. Therefore, six season tickets have a fair market value of $2,040.

If the complimentary ticket or free pass cannot be purchased by the general public, we think that the following factors should be taken into account when valuing a complimentary pass:

> 1. What is the maximum use a person might reasonably make of such a pass in a year, taking into account the nature of the event and whether the pass is transferable; and
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> 2. What is a reasonable percentage that a vendor might discount the price of a pass from the price of multiple individual tickets in order to induce the general public to buy a pass?

With these factors in mind, we turn to a representative example posed by Mr. Hopkins.

He indicated that each member of the city council receives a season pass to Disneyland. We have been advised by officials at Disneyland that such a pass entitles the holder to four free admissions per use (five admissions if the holder has three or more children). Each admission is worth $9.25 ($5.50 admission plus five rides worth $3.75). An official's children may use the pass only when accompanied by a parent, although an official may bring as his guests persons other than his children. The pass is not transferable.

Disneyland does not sell season passes. In addition, they advise us that they have never had an occasion to value a season pass and they have no idea what one is worth. Therefore, we must look to the two standards we have posited to estimate the fair market value of a Disneyland season pass. First we must determine what is the maximum use that might reasonably be made of such a pass. Disneyland advises us that during the first eight months of 1977, some city officials did not use the pass at all, others used it as often as once a month, and a few used it at a rate of twice a month. Based on these figures, the maximum reasonable use

is twice a month or 24 times a year and the total value of the pass would be $888 (4 admissions multiplied by $9.25 per admission multiplied by 24 uses.)[4] In accordance with our second standard, this amount may then be discounted to determine a fair market value. If 30% were used as a reasonable discount figure, the value of the pass would be approximately $620.

We wish to stress once again that the reasonable maximum use and discount figures we used in this example are by no means the only ones that could be applied to determine the fair market value of these tickets. We use them only to illustrate the general approach and standards we think are appropriate to valuing a complimentary ticket or free pass.

If a councilmember believes that reporting a gift of this size might mislead the public because he has never or only rarely used the gift, he may, of course, include an explanation on his form. For example, an entry might read: "Season pass to Disneyland; difficult to value, but value estimated at $620; never used."

(5) In answer to the fifth question, if one returns a gift to the donor or donates it to a charitable organization, it would seem prudent, although not expressly required by the Act, for the official to retain a copy of a transmittal letter or similar evidence to document the transaction.

(6) In his sixth question, Mr. Hopkins asked whether the donor of a complimentary ticket which has a fair market value of $250 or more is a source of income to the recipient within the meaning of Section 87103(c). Because,

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[4] If statistics are not available to aid in determining maximum reasonable use, it may be necessary simply to make an estimate based on one's knowledge of the nature of the event involved. A movie theater pass, for example, could reasonably be used as often as once a week for admission to a single theater, assuming a weekly turnover of movies, or more if the pass entitles the holder to admission to more than one theater. The maximum projected use would be even higher if the pass were transferable. A pass to the Movieland Wax Museum, on the other hand, would not be used nearly as often since the experience from visit to visit would be relatively constant. It would not be unreasonable for one to conclude, therefore, assuming the pass is not transferable, that the maximum reasonable use of such a pass would be five or six times a year.

as stated in our response to questions (1) and (2), a complimentary ticket or free pass is "income" to the official, the donor is a "source of income" to the official if the value of the complimentary tickets is $250 or more. Consequently, the recipient must disqualify himself from making or participating in the making of any governmental decision which could foreseeably and materially affect the donor in a manner distinguishable from the effect on the public generally. Sections 87100, 87103.

(7) The last question asks whether the "rule of necessity" contained in Section 87101 permits the recipient of a gift worth more than $250 to disclose fully the conflict involved and then to participate in the decision in order to prevent a failure of action by the city council.

Section 87101 provides, in part, that:

> Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made....

Section 87101 is similar to the "rule of necessity" which has been established by case law. Under that rule, even if an official is otherwise disqualified, the official may still act if there is no alternative source of decision and if his failure to act would necessarily result in a failure of justice. Caminetti v. Pacific Mutual Life Ins. Co., 22 Cal. 2d 344, 366 (1943); Brenkwite v. City Santa Cruz, 272 Cal. App. 2d 812, 818 (1969). In Gonsalves v. City of Dairy Valley, 265 Cal. App. 2d 400, 402 (1968), plaintiffs challenged a use permit that the city council had granted to a fertilizer company because all five councilmen owned stock in the company. Upholding the permit, the court held that:

> The rule is well settled that where an administrative body has a duty to act upon a matter which is before it and is the only entity capable to act in the matter, the fact that the members may have a personal interest in the result of the action taken does not disqualify them to perform their duties. It is a rule of necessity that has been followed consistently.
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> 265 Cal. App. 2d at 402.

Section 87101 was intended to apply to conflicts that arise because officials receive income from or have investments in the same entity. In these situations, the importance of allowing government to function while permitting officials to earn a living or make investments outweighs the potential for biased decision making. However, we do not believe that the "rule of necessity" encompasses conflicts that arise because public officials have accepted gratuities from donors who will be affected by the officials' actions. Such an interpretation would permit a donor to make gifts to every member of the city council and would allow interested councilmembers to participate in decisions affecting the donor. Interpreting Section 87101 to include conflicts arising because officials have accepted gifts would condone or even encourage circumvention of the Act's conflict of interest provisions. We decline to reach a result that is so clearly inconsistent with the policy objectives underlying Section 87101.[5]

Therefore, we conclude that Section 87101 does not apply to a conflict that arises because of gifts an official has accepted if it was reasonably foreseeable at the time the gift was received that the official would be asked to make or participate in the making of a governmental decision affecting the donor. The requirement of disqualification in such situations should be assessed under the standards set forth in Sections 87100 and 87103, without regard to the provisions of Section 87101.[6]

We understand that our interpretation of "legally required participation" is not one which has heretofore been applied. We also understand that members of the city council may have received gifts that would subject them to disqualification and that applying this interpretation of "legally

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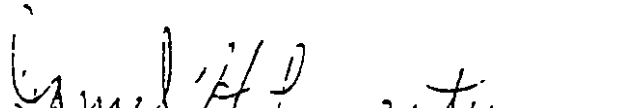
[5] See e.g. Section 81001(b) which declares that "public officials ... should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them."

[6] In order to prevent a situation from arising in the future where all or nearly all of the members of the Anaheim City Council are disqualified from acting on a particular matter, the members of the city council may wish to refrain from accepting gifts worth $250 or more from any donor which may foreseeably be affected by future city council votes.

required participation" to past gifts, which could not possibly be returned unused and within 30 days of receipt in accordance with Section 82030(b)(4), would be unfair and would unduly hamper the operations of the city council. We conclude, therefore, that the interpretation of "legally required participation" contained in this opinion shall not apply to any gift which a city councilmember returns to its donor promptly following issuance of this opinion. With respect to gifts which are returned immediately, it is permissible to apply the standards governing "legally required participation" that are applicable to other forms of income.

Gifts which have been received in the past and which are not returned promptly to their donors following issuance of this opinion may still trigger disqualification and the rule of necessity may not be invoked to avoid such a result. The same applies, of course, to gifts worth $250 or more which are received and retained in the future.

Approved by the Commission on December 8, 1977. Concurring: Lowenstein, McAndrews and Remcho. Commissioners Lapan and Quinn dissented.



Daniel H. Lowenstein

Commissioners Quinn and Lapan dissenting:

We dissent from the majority holding that gifts in the form of free passes to entertainment made available to members of the Anaheim City Council must be valued according to their "maximum reasonable" use, rather than their actual use.

The majority in this opinion has made the judgment that complimentary passes received by city councilmembers are gratuities serving no public purpose, and that they should be reported on the members' disclosure statements at outrageously inflated values which extend beyond all common sense. The majority's sole advice to the councilman who may receive Disneyland passes or baseball passes from the California Angels, but does not wish to report a $2,000 plus gift from the baseball team, or a $600 gift from Disneyland, is to return all the passes.

Indeed there may well be public purpose in receipt of these passes by councilmembers, which the majority blithely overlooks. The Angels play in a city-owned facility, Anaheim Stadium, and Disneyland provides much of the revenue for area businesses, in this city in which entertainment is a major industry. Surely there may be some public purpose served by councilmembers attending games at Anaheim Stadium or visiting Disneyland, yet under the majority's reading of the questions posed, the councilmember, because passes to these facilities are free, has received gifts worth thousands of dollars.

A far better conclusion would be that the councilman may value the pass according to its actual use, by himself, his family, or as a gift to others. This more sensible conclusion is permitted us in Section 81011 which permits valuation of goods "at the time received or expended." Certainly "expended" can be read to mean, in the case of a pass, when it is used, and each time it is used. This valuation of the gift also conforms with advice given the Anaheim City Council on taxation of these passes by the Internal Revenue Service.[1/]

This interpretation is also buttressed by the opinion requested by Controller Kenneth Cory, 1 FPPC Opinions 153 (No. 75-094-B, Oct. 23, 1975), that "a reasonable estimate based on a good faith effort to ascertain the value of gifts will suffice." Under the Cory opinion it is not, for example, necessary to appraise wall plaques, framed pictures, etc., to establish an exact value; and "neighborly services," such as help building a fence, need not be reported at all. In point of fact, these involve tangible gifts and services which have intrinsic value, and could be valued to the exact dollar. But the Commission has decided that such extreme actions are unnecessary; that gift valuation can be informal and based on a good faith, common sense estimate of worth.

However, this reasonable and liberal valuation of gifts stops when free passes are concerned. Mr. Cory, on the basis of his "best judgment or experience, may make a reasonable approximation" of the value of a wall plaque; but the Anaheim City Councilman may not make a similarly "reasonable approximation" of the value of a pass he receives but may never use. Instead the pass is to be valued as though he has satiated himself with baseball by attending all 81 Angels' home games, or glutted himself with visits to Disneyland, when in fact he may have placed the tickets and passes in his desk and never used them at all.

1/ In a letter to Mr. Hopkins' office the IRS Coordinator in Southern California wrote: "My further opinion is that income could be measured only by the value of actual use; I can think of no other reasonable method."

The majority's maximum possible valuation standard not only affronts good sense, but it impairs the goal of the Act, which is, after all, reporting of the existence of gifts. One councilmember may attend several dozen Angels' games on his pass, and should therefore report this fact and be disqualified if a matter affecting the Angels comes before the council. Another member may attend no games -- and the public should not be led to believe he had received a $2,000 gift from the Angels -- and he should not be disqualified from acting. The majority solution, that he report receipt and the maximum potential value, but indicate non-use, seems rather purposeless.

There is no end of mischief inherent in the majority's answer to Question (7). In the first place, the majority states case law holdings as to the "rule of necessity" and then rather pointedly refuses to follow applicable case law. It is well established in administrative law that administrative agencies must respect existing statutes and case law in rule making. The majority has chosen to flaunt this principle by adopting a new standard for the "rule of necessity" which is clearly contrary to existing law.

Not only that, but the majority does so by deciding that the "rule of necessity," as expressed in Section 87101 is different for gifts than it is for investments and income -- although Section 82030(a) clearly includes gifts as part of income. There is no justification whatsoever for setting a different standard for gifts than exists for other forms of income.

Finally, the majority opens a huge loophole for those interests which may want to disqualify a governmental body from acting to inhibit them. All such interests need do is to send each member of the governing body a "pass" to the interest's events, and if the members do not return that pass within 30 days, and if its full potential value exceeds $250, the members of the governing body are automatically disqualified from taking any action involving that interest. It is clear this can mean governmental actions taken to protect the public at the expense of the interest. Thus the interest has a way of assuring itself carte blanche to void the oversight responsibilities of a public body simply by sending free passes to all the members. The public welfare may suffer because of an oversight on the part of the members of the public body, albeit an innocent one.

Indeed, the majority would not need to reach the tortured conclusion that it does with Question (7) were actual-use valuation permitted. The majority mandates massive disqualification, since receipt of any pass virtually assures disqualification, and this often means the entire council is disqualified. Realizing that this could well put a council in an entertainment capital like Anaheim out of business, the majority tries to create a "reasonable forseeability" standard so that some members may still participate in decisions. There is nothing in the statute nor case law which permits such an interpretation. "Reasonable foreseeability" has not been previously applied to the "rule of necessity." Nor does the majority tell us how it is to be applied here.

Much is made in this opinion of comparisons between passes and items of intrinsic value, such as a bottle of wine, which may likewise be received and not be used. We do not suggest that because we feel a pass may be valued according to its actual use that a bottle of wine which is not drunk, or an automobile which is not driven -- or a hundred dollars which is not spent for that matter -- should be valued only at the time it is actually enjoyed. Each of these items has a tangible value, intrinsic within its own nature. A pass is different; it has no value except when it is exercised. A pass may be sold, and this it takes on a value; it may be used, and of course has value then; it may be given away, and take on a particular value then. But a pass which is never exercised is, after a certain passage of time, of no more value than the cardboard it is printed upon.

We agree that valuing a pass is difficult; but our objective here should be to avoid assigning potential and speculative values to gifts which may be out of all proportion to their worth to the recipient. It is an unfortunate trait of contemporary government that increasingly administrative agencies engage in decision making which takes leave of all sound judgment and common sense. With this opinion the Commission charges into a maze of pettifoggery. Violation of the reporting sections of this Act may result in fines equal to the unreported amount. By this opinion we invite massive law suits against public officials who may be guilty of no more than placing a free pass in their desk and forgetting its existence. It stretches the imagination beyond the breaking point to conclude that the public ever intended such a stern result in the passage of the Political Reform Act.

T. Anthony Quinn
Commissioner