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FAIR POLITICAL PRACTICES COMMISSION

April 30, 1996

Cristina L. Talley
Acting City Attorney
City of Pasadena
100 North Garfield Ave.
P.O. Box 7115
Pasadena, CA 91109-7215

Re: Your Request for Advice
Our File No. A-96-065

Dear Ms. Talley:

This is in response to your letter requesting advice on behalf of James Stivers, Robert Monk and John Kobara, members of the Board of Directors of the Rose Bowl Operating Company, regarding their responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Nothing in this letter should be construed to evaluate any conduct which may have already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.) Please note that our advice does not address issues raised in your letter concerning Section 1090 which prohibits a public official from having a financial interest in a contract. You should consult the Attorney General's office about Section 1090.

QUESTIONS

1. May members of the board of directors of the Rose Bowl Operating Company participate in decisions pertaining to the Rose

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000 - 18995. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

Bowl Improvement Project in affiliation with the Tournament of Roses Association or the University of California if these two entities have been a source of income or gifts to the officials?

2. May James Stivers and Robert Monk return income or gifts received from the Tournament of Roses Association so they may participate in all decisions concerning the association?

3. Does the exception in 18703.3 apply to James Stivers because he was nominated by the Tournament of Roses Association to serve on the board of directors of the Rose Bowl Operating Company?

CONCLUSIONS

1. Salary from the University of California is not disqualifying "income." Therefore, John Kobara may participate in all the decisions of the board. Income and gifts from the Tournament of Roses Association are potentially disqualifying interests for James Stivers and Robert Monk. Therefore, unless an exception applies, these officials may not participate in decisions that will have a reasonably foreseeable and material financial effect on the Association.

2. Section 82028 expressly excludes gifts which are returned, donated to a charitable organization, or reimbursed within 30 days of receipt, from the definition of "gift." Therefore, a payment resulting in a gift may be reimbursed within 30 days of receipt of the gift, and no gift will result. However, no such statutory exception exists for the reimbursement of income.

3. Regulation 18703.3 does not apply, because James Stivers does not have an economic interest which he is required by law to represent. For example, employment with the Tournament of Roses Association is not a requirement to serve on the Board of Directors. Therefore, this regulation will not apply to Mr. Stivers if the Tournament of Roses Association is materially affected by the governmental decisions.

FACTS

The Rose Bowl Operating Company (the "RBOC") is a not-for-profit public benefit corporation established as an instrumentality of the City of Pasadena by Pasadena Municipal Code Chapter 2.175. Pursuant to the ordinance, the corporation is organized exclusively to exercise an essential governmental function, namely management of a world class stadium and a professional quality golf course complex. The corporation is established for charitable purposes within the meaning of Internal Revenue Code Section 501(c)(3), and its governing body is a board of the city. Members of the board of directors of the RBOC are required to file statements of economic interests pursuant to the city's conflict of interest code.

The Rose Bowl Improvement Project ("the Project") is a proposed improvement program to the Rose Bowl stadium. It is intended to enhance the stadium for the benefit of its current tenants, including University of California, Los Angeles (UCLA) and the Tournament of Roses Association ("the Association"). The improvements are also considered necessary to retain the UCLA football team, to meet deferred maintenance needs, and to comply with the requirements of the Americans with Disabilities Act of 1991 ("the ADA").

There are a number of decisions concerning the project which will have an economic impact on the tenants, which include the Association and UCLA. These include a proposed ADA related seating plan which will result in the removal of approximately 3,000 stadium seats; a proposed reconfiguration of seating for program purposes which could result in the loss of up to 15,000 stadium seats; and the addition of concession stands, which is anticipated to increase the amount of revenue generated at Rose Bowl events. Other components of the project include replacement of existing seating with thin-profile, a new sound system, 10 new rest room buildings and renovation of the existing 17 rest rooms, eight new concession stands and renovation of the existing stands, renovation of the dressing rooms, renovation of the media rooms, accessibility improvements, and maintenance of the north end of the stadium. These project improvements are estimated to cost \$20 million.

The impact of the major decisions is described below.

Seat Removal and Reconfiguration: The loss of seating capacity will have a quantifiable, financial impact on the Association. Assuming that all of the gross ticket revenue is paid to the Association itself, at the 1996 ticket price of \$75, the ADA removal of 3,000 seats would have a direct impact of \$225,000 on the gross annual receipts of the Association. The removal of 15,000 seats caused by a reconfiguration of all the seating in the Rose Bowl stadium would have a direct impact of \$1,125,000. The total foreseeable impact on the Association would be \$1,350,000 per year.

Concession Stands: Revenue generated by new concession stands will accrue, by preexisting contracts, to the concessionaire, the City of Pasadena, and to the tenants. According to the city's Department of Finance, approximately 16% of the city's annual, gross concession revenues are attributable to the Rose Bowl game. Therefore, 16% of the projected \$40,000 in gross revenues which each new concession stand is projected to generate, or \$6,400 gross revenues would be generated by each new stand, every year at the Rose Bowl game.

The Association's share of this revenue would be \$1,132.80 (50% of the city's 35.4% of the gross sales), per stand, for each year of its contract, which equals \$9,062.40 for all eight

concession stands per year (\$40,000 per year gross per concession stand x 16% attributable to the Rose Bowl game x 32.4% of the gross sales which is the city's share x 50% of the city's share which accrues to the Association x eight new concession stands = \$9,062.40).

James Stivers, Robert Monk, and John Kobara are members of the Board of Directors of the RBOC. The board of directors consists of nine members. Seven of the members are nominated by each councilmember of the City of Pasadena. The Chancellor of UCLA and the board directors of the Association each nominate one member. James Stivers was nominated by the Association, one of the major tenants of the Rose Bowl. He is also an "Honorary Life Director" of the Association, a volunteer, non-paid position. Robert Monk is Vice Chair of the Football Committee of the Association, also a volunteer. However, he is not an Association nominee. John Kobara is employed as the Associate Vice Chancellor of University Relations under the Regents of the University of California. He was nominated by UCLA.

The Association is known to provide amenities to its volunteers. The most visible amenity is the exclusive use of an official tournament vehicle during the busiest period of tournament activity. The vehicle may be used for personal purposes. James Stivers has received payments within the previous twelve months in the form of the use of an Association vehicle. In addition, members of the Association receive from zero to two complimentary tickets to the Rose Bowl game, each, depending upon their status. Two tickets have a total face value of \$150.

APPLICABLE LAW

Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

1. Economic Interests

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 (among others) any source of gifts of \$280 or more, or any source of income of \$250 or more to the public official within 12 months prior to the time when the decision is made. (Section 87103(c) and (e).) Moreover, public officials are subject to a \$280 gift limit from any single source in a calendar year. (Section 89503.)

Receipt of either income or gifts by the public officials may subject them to the disqualification provisions of the Act.

a. Income and Gifts

"Income" includes any payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer. (Section 82030.) A payment is considered income when consideration of equal or greater value is provided to the source of the payment.

While we have no exact formula to determine whether consideration of equal or greater value has been provided by an official, the following general guidelines may be of assistance. The value of services rendered may be proven by evidence as to the customary rate of compensation for such services, irrespective of official status. (Tassi v. Tassi (1958) 160 Cal.App.2d 680, 690-691.) Also relevant in the determination might be the length of time spent rendering the services, or whether the services are of the type not readily available from others.

If consideration of equal or greater value is not provided, payments made to a public official would be a gift. "Gift" means any payment to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. (Section 82028.) Gifts which are returned, donated to a charitable organization, or reimbursed within 30 days of receipt, are not gifts. (Section 82028(b)(2); Regulation 18943.)

Ultimately, the determination of whether equal consideration has been provided is necessarily a factual one. However, if an official claims that a payment is income and not a gift, the official has the burden of proving that the consideration provided was of equal or greater value than the payment received. (Section 82028.)

2. Foreseeability and Materiality

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

The Commission has adopted differing guidelines to determine whether an effect is material, depending on the specific circumstances of each decision. Regulation 18702.1(a) provides that the effect of the decision is material and disqualification is required where the source of income or a donor of gifts is

directly² before an official. Where a person is indirectly affected by a decision Regulations 18702.2 through 18702.6 apply. If the indirect effect of a decision is on a nonprofit entity, Regulation 18702.5 applies.

What constitutes a "material" financial effect on a nonprofit source of income or gifts depends on the financial size of the entity. For example, Regulation 18702.5(d) provides for an entity whose gross annual receipts are more than \$1,000,000, but less than or equal to \$10,000,000 the effect of the decision is material if:

(1) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$100,000 or more.

(2) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$25,000 or more.

(3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$100,000 or more.

3. "Public Generally" Exception

Regulation 18703 provides an exception to the conflict-of-interest provisions if the effect on the official's interest is not distinguishable from the effect on the public generally. For the exception to apply, a decision must affect the official's interests in substantially the same manner as it would affect a significant segment of the public. (Regulation 18703.)

However, Regulation 18703.3 states, in relevant part, that for the purposes of Section 87103, the "public generally" exception applies to appointed members of boards and commissions

² A person or business entity is directly before a public official's agency when that person or entity initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in the proceeding, or the proceeding involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the donor. (Regulation 18702.1(b).)

who are appointed to represent a specific economic interest if all of the following apply:

(1) The statute, ordinance, or other provision of law which creates or authorizes the creation of the board or commission contains a finding and declaration that the persons appointed to the board or commission are appointed to represent and further the interests of the specific economic interest.

(2) The member is required to have the economic interest the member represents.

(3) The board's or commission's decision does not have a material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.

(4) The decision of the board or commission will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment of the persons the member was appointed to represent.

ANALYSIS

1. Economic Interests

As members of the board of directors of the Project, a local government agency,³ James Stivers, Robert Monk, and John Kobara are public officials. (Section 82048.) Consequently, if they have received income of \$250 or more, or gifts from a single source totaling \$280, they may be required to disqualify themselves from any decision which would have a foreseeable and material financial effect on the source of income or gifts.

Use of Tournament of Roses Vehicles:

James Stivers has received payments within the previous twelve months in the form of the use of an Association vehicle. Absent an exception, the payments received by James Stivers would be a gift from the Association unless consideration of equal or greater value was provided in exchange for the payments. If James Stivers provided consideration of equal or greater value to the

³ "Local government agency" means a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing. (Section 82041.)

Association for the use of the vehicle, then the payments would be considered income.⁴

You stated in our telephone conversation of March 19, 1996, that James Stivers made reimbursements to the Association to reduce the amount he received to be under \$250 so that he may participate in all the Project decisions. Unlike the gift statute, which expressly excludes gifts which are returned, donated to a charitable organization, or reimbursed within 30 days of receipt, no such statutory authority exists for reimbursement of income. (Section 82030(b); Albano Advice Letter, No. A-92-191.) Therefore, if James Stivers has received income for his services in the amount of \$250 in the 12 months prior to a Project decision, he may not participate in the decision if it will have a reasonably foreseeable material financial effect on the Association.

Rose Bowl Tickets:

You indicated that members of the Association receive tickets to the Rose Bowl. During our telephone conversation of March 19, 1996, you also indicated that James Stivers and Robert Monk reimbursed the Association within 30 days of receipt for any gifts received from the Association aggregating \$280 or more. (Regulation 18943.) If this is the case, these public officials would not be deemed to have a disqualifying interest by virtue of the receipt of the tickets.⁵

Governmental Salary:

As noted above, sources of income are potentially disqualifying economic interests to the officials. (Section 87103(c).) However, salary and reimbursement for expenses or per diem received from a state, local, or federal government agency, are not regarded as income for purposes of the Act. (Section

⁴ Section 82030(b)(2) exempts "reimbursement for travel expenses and per diem received from a bona fide educational, academic, or charitable organization." Consistent with the Internal Revenue Code, we have interpreted "bona fide educational, academic, or charitable organization" as those organizations formed under Internal Revenue Code Section 501(c)(3). As noted in your letter, this would not apply to your facts since the vehicle may be used for personal purposes unrelated to Association activities.

⁵ Also please note that to the extent that the automobile use by James Stivers would be a gift and not income, the gifts must be aggregated and the total received from the Association cannot exceed \$280.

82030(b)(2).) Therefore, the salary John Kobara receives as an employee of the University of California will not constitute a disqualifying source of income within the meaning of Section 87103(c), and he may participate in all the governmental decisions regarding the Project.

2. Foreseeability

You ask whether the various improvement decisions and the overall improvement project will foreseeably affect the Association, a tenant of the Rose Bowl game. You state that while it is arguable that the overall improvement project may have an impact on the gross annual receipts of the Association, it can also be argued that an improvement project will have no effect upon revenue because patronage is ultimately dictated by factors such as team success and weather.

According to your facts, the overall improvement project will cost \$20 million. Certainly, the magnitude of the project will result in some financial effect on the Association. For example, the decisions concerning the seat removal and reconfiguration alone will foreseeably affect the Association by over \$1 million. We conclude that it is reasonably foreseeable that the overall project, and decisions leading up to completion of the project, will financially affect the Association.

3. Materiality

Under your facts, Regulation 18702.5, concerning nonprofit entities, applies. If a decision will affect the Association to the extent set forth in the applicable provision of Regulation 18702.5, James Stivers would be prohibited from participating in the decision because he has received income from the Association exceeding \$250 during the previous 12 months.

You state in your letter that the gross revenues resulting from two of the major decisions, that affecting concession stands and seat removal and reconfiguration, will not reach the applicable materiality threshold under Regulation 18702.5. If the materiality thresholds are not met with respect to each decision, James Stivers may participate in the separate decisions, including a new sound system, 10 new rest room buildings and renovation of the existing 17 rest rooms, renovation of the dressing rooms, renovation of the media rooms, accessibility improvements, and maintenance of the north end of the stadium. If a decision concerning the overall project is necessary at the conclusion of the project work, you must consider the aggregate financial effect upon the Association in order to determine whether Mr. Stivers may participate in approval of the final project.

4. Public Generally

You have also analyzed in your letter the potential application of Regulation 18703.3 with respect to James Stivers.

He was nominated to serve on the board of the RBOC by the Association, a major tenant of the Rose Bowl. You state that you believe the regulation applies since this official represents a tenant and the decisions will affect all tenants.

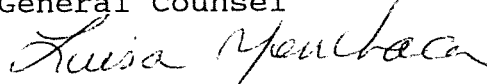
The Rose Bowl Operating Company's ordinance (Chapter 2.175) provides that the Association shall nominate one member to the Rose Bowl Operating Company board. The ordinance does not provide, expressly or impliedly, that the Association nominee represents the interests of tenants of the stadium.⁶ Moreover, there is no economic interest that a member is required to have within meaning of Regulation 18703.3(a)(2).

Therefore, the exception provided by the regulation does not apply to Mr. Stivers. Although Mr. Stivers received income in excess of \$250 from the Association, the ordinance does not provide that the Association must be a source of income to him.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Luisa Menchaca
Counsel, Legal Division

⁶ For example, a municipal code provided that persons appointed to a rent review board were appointed to represent and further the interests of tenants and mobilehome park owners. Therefore, Regulation 18703.3 applied to a commissioner of the board with respect to decisions affecting mobilehome park owners and operators, but not with respect to decisions affecting the mobilehome association that employed the commissioner. (Galliano Advice Letter, No. I-94-088.) Similarly, Mr. Stivers was not appointed to represent the interests of tenants within meaning of Regulation 18703.3.