

# SALT LAKE CITY CORPORATION

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LAW DEPARTMENT

RALPH BECKER  
MAYOR

## MEMORANDUM

**TO:** Kyle LaMalfa, Chair  
Jill Remington Love, Vice Chair  
Carlton Christensen  
Stan Penfold  
Luke Garrott  
Charlie Luke  
Søren Simonsen

**CC:** Cindy Gust-Jenson, Council Executive Director

**FROM:** Margaret Plane, City Attorney *MP*  
Boyd Ferguson, Senior City Attorney

**RE:** Conflict of Interest in Voting to Appropriate Retirement Funds

**DATE:** November 18, 2013

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We have been asked whether City Council members have a disqualifying conflict of interest in participating in a vote to appropriate funds, retroactively funding the retirement of past and current Council Members. Specifically, on Friday, November 15, 2013, Carlton Christensen, Jill Remington Love, and Stan Penfold requested that the Council consider a budget amendment to fund the retirement of approximately 25 Council Members (five current and 20 past) who may have received incorrect information about their eligibility to participate in the Utah Retirement System. The Council Members recognize that this is only a vote to appropriate funds, and that the vote would not legally require the City to make back payments for retirement.

Salt Lake City Code Section 2.44.030 states:

A. If the performance of a public servant . . . constitutes any governmental action on any matter involving the public servant's . . . financial or professional interest and it is reasonably foreseeable that the decision will have an individualized material effect on such interest, distinguishable from its effect on the public generally, the public servant or volunteer public servant shall publicly disclose such matter: . . . [t]o the mayor and the city council, in the case of the city council member's disclosure.

...

C. The public servant . . . who has a financial interest shall disqualify himself or herself from participating in any deliberation as well as from voting on such matter.<sup>1</sup>

We believe the City ordinance requires recusal by the current Council Members who may receive a retroactive retirement payment as a result of the Council's action. Nonetheless, we recognize that the definition of "financial interest" in the City Code applies where a "business entity" is involved. An argument can be made that official action not involving a business entity cannot violate City Code Section 2.44.030. However, in past opinions the City Attorney's Office has interpreted "financial interest" according to its common sense meaning, which includes anything affecting a person's money or finances. It does not make sense to say, for example, that a Council member could not vote to grant money to a business entity in which the Council member has a position or interest, but that the Council member could vote to grant money directly to the Council member in his or her individual capacity.

Any other interpretation of the City ordinance could create a trap for Council members, possibly leading them to violate state law. Specifically, if a Council member focused solely on the City Code provision and concluded that he or she could vote as long as a business entity were not involved, that vote might result in prosecution under state law. Utah Code Section 10-3-1304 of the Municipal Officers' and Employees' Ethics Act makes it an offense for an elected officer to: "use or attempt to use the officer's or employee's official position to: (i) further substantially the officer's or employee's personal economic interest." The Utah Code clearly uses the common sense meaning of "personal economic interest," which is not limited to the involvement of a business entity.

Although we recommend recusal, we recognize that this recommendation needs to be reconciled with the fact that, in general, Council may make budget appropriations for their own salaries and benefits without violating ethics rules. If Council Members were prohibited from acting on their own salaries, no other person or entity could make the required appropriation, making Council action permissible out of necessity.<sup>2</sup>

In this case, five current Council Members may receive an individualized financial benefit from the Council's proposed action.<sup>3</sup> A complicating factor is that three of the five Council Members (Christensen, Love and Penfold) previously requested that "Salt Lake City allow our participation in the Utah State Retirement System, as of the date that each of us first began to serve on the City Council based upon the system in place at that time." (Letter to City

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<sup>1</sup> See also City Code Section 2.44.040A: "A public servant . . . may not: . . . 2. Corruptly use or attempt to use the public servant's . . . official position to: a) further substantially the public servant's . . . financial or professional interest or the financial or professional interest of others; or b) secure special privileges for the public servant . . . or others.

<sup>2</sup> Under state statute, a council has the power to appropriate funds. See Utah Code § 10-3b-203(1)(a)(ii) (stating that council in a council-mayor form of government shall appropriate funds). Because this is a decision that only the council has the authority to make, the common law "rule of necessity" says that if a conflict of interest situation would require the recusal of all (or more than a quorum) of an elected body, rendering it unable to do the public's business where there is a legal duty to act, the elected body may act despite the conflict of interest. There may be other historical and legal reasons why such action does not violate ethics rules, but given the timing of the request we did not have the opportunity to do further research.

<sup>3</sup> Two Council Members' interests are not implicated because they are Tier II employees under the Utah Retirement System. The appropriation would only apply to Tier I eligible employees.

Attorney Ed Rutan, dated May 13, 2013.) The request was denied and they are pursuing administrative remedies through URS.

Although resolving claims against the City is an executive function, Council often requests and receives briefings on the status of claims. This is in part because once a settlement is reached or a judgment is entered, Council may be asked to appropriate funds to meet the City's obligation if funds are not available. It is unusual for Council to make a fund appropriation where an administrative adjudication is underway and before a settlement or judgment requires an appropriation. Making an early appropriation may be perceived as Council Members using their elected positions to further their "personal economic interest" in violation of Utah Code Section 10-3-1304.

Also complicating the analysis is the fact that two other Council Members would receive the same benefit, although they are not currently pursuing the administrative adjudication. Because five current Council Members stand to benefit from the Council's action, we recommend that none of them participate in the deliberation or vote. We recognize that this means there is not a quorum. However, because there is no legal duty to act at this time, the rule of necessity does not apply. This issue could be deliberated and voted on by a future council, set to take office in a few weeks, with fewer disqualifying conflicts.

Finally, the retroactive nature of the retirement contributions is troubling. If approved and actually allocated, 20 past Council Members would stand to benefit from a legislative action that they, as a legislative body, did not take. When a council passes a salary increase for a coming fiscal year, a future council can change that decision. In this case, the current legislative body would be appropriating funds to potentially change decisions past councils might have made, but did not.

The consequences of violating either the City Code or the Utah Code are significant. For example, City Code Section 2.44.270 provides: "In addition to any penalty provided herein, any person who knowingly and intentionally violates any provision of this chapter is guilty of a misdemeanor and may be dismissed from employment or removed from office as provided by law." Utah Code Section 10-3-1310 is even more punitive:

In addition to any penalty contained in any other provision of law, any person who knowingly and intentionally violates this part . . . shall be dismissed from employment or removed from office and is guilty of: (1) a felony of the second degree if the total value of the compensation, conflict of interest, or assistance exceeds \$1,000.

After considering City Code and state statute, together with the pending administrative adjudication and the retroactive nature of the potential allocation, we recommend disclosure and recusal. We recognize that there will not be a quorum for the short term. However, there is no current necessity to act and a future council can consider the issues without the current conflict concerns.