

MEMORANDUM OF LAW

DATE: October 1, 2001

TO: Councilmember Ralph Inzunza

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Related to Proposed San Diego Air Commerce Center Project at Brown Field Airport

INTRODUCTION

A question has arisen with regard to your ownership of a residence in Otay Mesa, near the Brown Field Airport, and whether that economic interest disqualifies you from participating in decisions regarding the proposed development of Brown Field. Because of the distance of your residence from Brown Field, and because your residence will not be subject to significant noise impacts from the airport, according to the environmental review of the project, you are not legally disqualified from participating in decisions regarding Brown Field. Additionally, even if the noise impact of the airport to your residence was considered significant for environmental review purposes, because thousands of other homes in the area will be subject to similar impacts as those to your residence, you would not be disqualified from participating in decisions about Brown Field.

FACTUAL BACKGROUND

In 1996, the City entered into an exclusive negotiating agreement with Brown Field Aviation Park, LLC (BFAP) for the development at Brown Field Airport of a cargo airport, and other non-aviation uses such as office and retail space to be built adjacent to the airport. The name of the proposed project is the San Diego Air Commerce Center Project (SDACC). On October 1, 2001, the City Council will be considering various options related to the SDACC Project, including the possible negotiation of a new agreement with BFAP, or the issuance of a new request for proposals. As a result of the City Council's decision on October 1, future City Council action may be required with regard to the SDACC Project, including approval of a development agreement, and various land use decisions. (For more information about the Project and the pending City Council action, see City Manager's Report No. 01-200, which is attached as Exhibit 1).

You own a residence in the Ocean View Hills development in Otay Mesa. The distance between your residence and the boundary of the Brown Field Airport area is approximately two miles. The Ocean View Hills development is in Census Tract 100.14, which has a population over the age of 18 of 7,808 persons according to the 2,000 Census. Ocean View Hills is

surrounded by a number of other census tracts containing dense population. The seven Census Tracts just west of Brown Field and the Ocean View Hills development, between Interstate 805 and Interstate 5, (Census Tracts 100.01, 100.03, 100.04, 100.06, 100.07, 100.10, and 100.11) contain population over 18 of at least 25,000 persons, according to the 2000 Census.

According to John Kovac, the City's environmental analyst for the SDACC Project, the environmental review for the Project identified noise as the only potential impact of the Project on the Ocean View Hills development area. State regulations governing airport noise identify a Community Noise Equivalent Level (CNEL) of 65dB as the threshold level of noise which is significant to a reasonable person residing in the vicinity of an airport. Cal. Admin. Code tit. 21, 5006. The noise study that was conducted for the Project identified the noise levels for the area to the west of Brown Field, in the direction of the flight path from the airport. (See Exhibit 2, showing the noise study area, and indicating the location of your residence with an arrow). The 65 CNEL noise contour boundary ends approximately one mile east of the Ocean View Hills development. Your residence is outside both the 65 CNEL noise contour and the 60 CNEL noise contour, and therefore outside the area of significant noise impacts, according to state noise regulations.

ANALYSIS

The conflict of interest authority relevant to this situation is the Political Reform Act of 1974.

Political Reform Act of 1974

The Political Reform Act of 1974 [Act], codified at California Government Code sections 81000-91015, was adopted to ensure that public officials perform their duties in an impartial manner, free from bias caused by their financial interests. Cal. Gov't Code 81001.

A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the economic interests delineated in California Government Code section 87103. Those interests are investments in business entities; interests in real property, income received in the previous twelve months, positions in business entities, and gifts received in the previous twelve months. Investments, income, and gifts must meet threshold dollar values set by the Act before they become potential sources of disqualification. Cal. Gov't Code 87103.

As a Council member, you are considered a public official within the meaning of the Act. Cal. Code Regs. tit. 2, 18701(a). The Act prohibits an official with a disqualifying conflict of interest from making, participating in making, or using his or her official position to attempt to influence, a governmental decision. This standard prohibits participation in discussions regarding the decision, in addition to voting on the decision, if an official has a disqualifying financial interest. Therefore, whenever you vote on issues related to the development of Brown Field requiring Council approval, or participate in any discussions about these matters, your actions will be covered by the Act.

____ A. Effect of SDACC Project on your Residence is Presumed Not to be Material, Because Your Residence is Over 500 Feet From Brown Field

For purposes of this analysis it is necessary to determine if a material financial effect on your real property interest is reasonably foreseeable as a result of the governmental decision in question. The first step in this analysis is determining whether the economic interest in question is directly or indirectly involved in the governmental decision. Cal. Code Regs. tit. 2, 18704(a). Because your residence is not the “subject of the governmental decision” in this case, as that term is defined by the Act, and because your residence is not within 500 feet of the boundaries of Brown Field, your residence is indirectly involved in decisions regarding Brown Field. Cal. Code Regs. tit. 2, 18704.2(a). The financial effects of a governmental decision on indirectly involved real property are presumed not to be material. Cal. Code Reg. tit. 2, 18705.2(b)(1). Therefore, you are not disqualified from participating in decisions about Brown Field unless other circumstances can be shown which overcome this presumption. Cal. Code Reg. tit. 2, 18705.2(b)(1).

B. The Noise Impacts on Your Residence Are Not Significant Enough to Overcome the “500 Foot” Presumption of No Disqualification

The Act provides that the “500 foot” presumption may be rebutted as follows:

This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision affects:

- (A) The development potential or income producing potential of the real property in which the official has an economic interest;
- (B) The use of the real property in which the official has an economic interest;
- (C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

Cal. Code Regs. tit. 2, 18705.2(b)(1).

Based on the information in the attached Manager’s Report regarding the SDCAA Project, the proposal does not appear to involve any impacts on the ability of residential property owners in Ocean View Hills to develop their property or to use their property. In the category of impacts to neighborhood character, the environmental study for the Project identified noise as the only potential impact of the Project on the Ocean View Hills development. However, your residence is outside of the 65 CNEL noise contour, and therefore outside the area considered to be impacted significantly by noise from the airport, according to state noise regulations.

In a similar factual situation involving an official who owned a home near an airport, the Fair Political Practices Commission followed the state noise guideline of 65 CNEL in determining whether an official’s home would be materially financially affected by the airport. *In re Holland*, FPPC Priv. Adv. Ltr. A-86-092. Therefore, because your residence is outside the 65 CNEL noise contour identified for the Project, it is reasonable to conclude as a result of that study, the Project will not have a significant noise impact on the character of your neighborhood. Therefore, there do not appear to be any circumstances related to the proposed Project which

would overcome the presumption that you are not disqualified from participating in decisions related to the Project, based on your residence being more than 500 feet from Brown Field.

C. Any Effects on Your Property From the Project Would Be Indistinguishable From Effects On the "Public Generally"

Even assuming a material financial effect on your property could be shown based on noise impacts or other impacts from the proposed Project, you will not be disqualified from participating in decisions related to the Project if the effects of those decisions on your property would be indistinguishable from the effects of such decisions on the "public generally," Cal. Code Regs. tit. 2, 18707(a). For purposes of effects on real property, the effects are considered indistinguishable from the "public generally" in a situation where the decision also affects 5,000 property owners or homeowners in the jurisdiction of the official's agency. Cal. Code Regs. tit. 2, 18707.1(B)(ii).

In this situation, based on the dense population surrounding both Brown Field and Ocean View Hills, it is reasonable to assume that impacts of the proposed Project on your residence would be indistinguishable from impacts on at least 5,000 other property owners in the area. Census Tract 100.14, which contains Brown Field and Ocean View Hills, has a population of 7,808 adults over the age of 18. Most of that population consists of the Ocean View Hills development itself. Further, if the area immediately to the west is considered, rather than the entire geographical area, because of the flight path of Brown Field being in a western direction, the seven Census Tracts immediately west of Brown Field area have a population of approximately 25,000 adults over the age of 18, according to the 2000 Census. Together, these eight Census Tracts west of Brown Field contain approximately 33,000 adults over the age of 18. All of this population is outside of the 65 CNEL noise contour, and most of the population, like your residence, is also outside of the 60 CNEL noise contour. Therefore, all of the residents in this area appear to be similarly situated with respect to noise impacts.

The Fair Political Practices Commission has ruled in a similar case involving an official who lived near an airport, that the "public generally" exception applied to that official. *In re Holland*, FPPC Priv. Adv. Ltr. A-86-092. In that case, the official's home was located in the 65 CNEL noise contour, along with approximately 3,000 other households, and approximately 8,000 residents. The Commission presumed based on their location in the same noise contour that all of those residents would be impacted in roughly the same manner by airport operations. Conversely, all of the residences located outside of the identified noise contours of Brown Field should be presumed to have roughly the same impacts from airport operations. Therefore, even if it can be shown that airport operations will result in noise or other impacts which would have a material financial effect on your residence, those impacts would probably be indistinguishable from the effect on at least 5,000 other residents in this densely populated area to the west of Brown Field, and therefore would not disqualify you from participating in decisions regarding the proposed Project.

CONCLUSION

Based on the facts presented to this office, we find no basis to legally disqualify you from voting on all matters related to the future of Brown Field.

CASEY GWINN, City Attorney

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By

Lisa A. Foster

Deputy City Attorney

LAF:cdk:jrl
Attachments
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