

DATE: November 24, 1986

TO: Mayor Maureen O'Connor

FROM: City Attorney

SUBJECT: Potential Conflict of Interest

By memorandum of November 20, 1986, you outlined Item 33 on the docket of November 24, 1986 which is an appeal from the decision of the Planning Commission granting Planned Commercial Development Permit and Tentative Map 85-0500 affecting a 23.8 acre site on the north side of Mira Mesa Boulevard between I-15 and Black Mountain Road. Not connected to, but adjacent to the property in issue is 9225 Mira Mesa Boulevard in which you have a trust deed interest that pays a fixed income of \$707.75 per month. In view of these facts, you ask whether or not you should abstain from voting on the item.

The Political Reform Act (California Government Code section 81000 et seq.) prohibits a public official from making or participating in making a governmental decision in which he or she knows or has reason to believe he or she has a financial interest. California Government Code section 87100. A person has a financial interest within the meaning of Section 87100, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally on

....

- (a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.
- (c) Any source of income, other than gifts and other than loans by a commercial lending

institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

....

California Government Code section 87103.

Your trust deed interest clearly qualifies as a financial interest under the quoted definitions of Government Code sections

87103(b) and (c). We must turn then to whether it is "reasonably foreseeable that (your) decision will have a material financial effect" California Government Code section 87103.

The Fair Political Practices Commission has formulated a four (4) part test for disqualification:

Under the foregoing sections, several elements must be present before a public official is required to disqualify himself from participation in a governmental decision. First, it must be reasonably foreseeable that the governmental decision will have a financial effect. Second, the anticipated financial effect must be on a financial interest of the official, as defined in Sections 87103(a) through (d). Third, the anticipated financial effect must be material. And fourth, the governmental decision's anticipated financial effect on the official's financial interest must be distinguishable from its effect on the public generally.

In re Opinion requested by Tom Thorner, 1 FPPC Opinions 198, 202 (December 4, 1975).

Where a financial interest of the governmental official is indirect as opposed to direct, the issues of foreseeability and materialness always arise. The test for foreseeability is not what might happen to property but rather whether there is a substantial probability that a financial impact will occur. As a fixed trust deed on a fast food operation (Taco Factory) the effect is speculative at best. Hence we cannot say that approval or denial of this appeal will have any "foreseeable" effect.

Further the financial effect must be "material." The Fair Political Practices Commission has devised explicit tests for materiality at 2 Cal. Admin. Code 18702 and each test requires that some financial increase or decrease flow from the governmental decision. Here we have a fixed trust deed in both amount and monthly income. Whatever speculative effect there is on the business of the Taco Factory, the trust deed remains fixed.

The only analogous ruling of the Fair Political Practices Commission is found at 3 FPPC Ops. 38 (1977) where a mayor was disqualified from voting on a 176 senior citizen unit development that adjoined the Franklin Mall in the City of Santa Clara in which the mayor owned several businesses, including a restaurant, which could foreseeably benefit from increased foot traffic. The

present facts are clearly distinguishable since whether foot traffic and activity are increased or not, the Mayor's financial interest remains fixed and will neither benefit nor suffer from increased activity.

Finding both no foreseeable effect on the trust deed and no increase or decrease in the asset thus no material financial effect, we find no necessity for disqualification on Item 33. Accordingly, the Mayor may participate on all aspects of the appeal.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

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