

MEMORANDUM OF LAW

DATE: January 13, 1987

TO: Councilwoman Gloria D. McColl
FROM: City Attorney
SUBJECT: Conflict of Interest Problems

By memoranda of November 20 and 24, 1986, you posed two (2) factual situations in which you seek guidance on potential conflicts of interest. The first situation flows from the rehabilitation of a residential complex known as Harbor Vista. You note that you have property interests "within a block of this development" and receive fixed rate rents from same. The later inquiry focuses on whether you should participate in the formation of a business improvement district on University Avenue in which you own property.

As the principles of law involved are the same, we are answering your requests with one memorandum but segmenting our discussion for your guidance.

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.

In the first instance involving your land near but not involving the Harbor Vista complex, you obviously have financial interests within 87103(b) (real property) and 87103(c) (source of income). The focus must be then whether any decision of yours "will have a material financial effect . . .," on your financial interests. California Government Code section 87103. Note that the focus is the effect on your interests and not the effect on Harbor Vista since you have no interest in that property.

In a similar but distinguishable situation, the Fair Political Practices Commission ruled that the Mayor of Santa Clara should not vote on a rezoning to provide 176 senior citizen units because it would foreseeably financially benefit an adjacent shopping mall in which the Mayor had a financial interest. In re Gillmor, 3 FPPC Ops. 38 (1977) holds:

In the present case, we think it is "reasonably foreseeable" that these types of positive financial consequences will occur if the property in question is rezoned and the senior citizens' housing complex constructed. Moreover, we think it is clear that Mayor Gillmor's interests will be affected. The decision to rezone and to construct the new housing complex foreseeably will bring additional renters, visitors, shoppers and foot traffic, in general, into the area. Accordingly, more potential customers will be available for Mayor Gillmor's sources of income (the beauty shop, the florist shop and the combination watch, hearing aid and repair shop). In addition, Mayor Gillmor's restaurant, which is both a source of income and an investment, undoubtedly will benefit

from the increased number of persons in the area. Finally, if these various businesses do enjoy an increase in business, their locations will become more desirable and real property values, including those of Mayor Gillmor's property, foreseeably will be enhanced.

In re Gillmor, supra at 41-42.

Whether governmental action will have a material financial effect has been further quantified by regulations promulgated by the Fair Political Practices Commission:

18702. Material Financial Effect.

(a) The financial effect of a governmental decision on a financial interest of a public official is material if the decision will have a significant effect on the business entity, real property or source of income in question.

(b) In determining whether it is reasonably foreseeable that the effects of a governmental decision will be significant within the meaning of the general standard set forth in paragraph (a), consideration should be given to the following factors:

(1) Whether, in the case of a business entity in which the public official holds a direct or indirect investment of one thousand dollars (\$1,000) or more or in the case of a business entity in which the public official is a director, officer, partner, employee, trustee or holds any position of management, the effect of the decision will be to increase or decrease:

(A) The annualized gross revenues by the lesser of:

1. One hundred thousand dollars (\$100,000); or
2. One percent if the effect is one thousand dollars (\$1,000) or more; or

(B) Annual net income by the lesser of:

1. Fifty thousand dollars (\$50,000); or
2. One half of one percent if the effect is one thousand dollars (\$1,000) or more; or

(C) Current assets or liabilities by the lesser of:

1. One hundred thousand dollars (\$100,000); or
2. One half of one percent if the effect is one thousand dollars (\$1,000) or more.

Current assets are deemed to be decreased by the amount of any expenses incurred as a result of a governmental decision.

(2) Whether, in the case of a direct or indirect interest in real property of one thousand dollars (\$1,000) or more held by a public official, the effect of the decision

will be to increase or decrease:

(A) The income producing potential of the property by the lesser of:

1. One thousand dollars (\$1,000) per month; or

2. Five percent per month if the effect is fifty dollars (\$50) or more per month; or

(B) The fair market value of the property by the lessor of:

1. Ten thousand dollars (\$10,000); or

2. One half of one percent if the effect is one thousand dollars (\$1,000) or more.

(3) Whether, in the case of a source of income, as defined in Government Code Section 87103(c), of two hundred fifty dollars (\$250) or more received by or promised to a public official within 12 months prior to the time the decision is made:

(A) The effect of the decision will be to directly increase or decrease the amount of income (other than rents) to be received by the official, or to confer a financial benefit or detriment upon the official or a member of the official's immediate family, in an amount of one hundred dollars (\$100) or more; or

(B) There is a nexus between the governmental decision and the purpose for which the official receives income; or

(C) In the case of a source of income which is a business entity, the business entity will be affected in a manner described in subsection (b)(1) above; or

(D) If the source of income is not a business entity, the decision will have a significant effect on the source

2 Cal. Admin. Code Section 18702.

As you can see before the legal conclusion on conflict of interest can be drawn, certain preliminary financial facts have to be known. 2 Cal. Admin. Code 18702 (b)(2)(B) specifically focuses on whether the fair market value of the property will be increased or decreased by (1) \$10,000 or more or (2) by one half of one percent where the effect is \$1,000 or more. Whether this threshold amount is involved in the situation you pose can only be ascertained by an appraisal that analyzes what effect, if any, the rehabilitation of the Harbor Vista project would have on your

properties which we understand are all leased to commercial businesses. Hence pending such an appraisal you should not participate in any future votes involving Harbor Vista.

As to the second question involving a business improvement district in which you own land, we believe disqualification is required. Since your question was abstract, we will assume that the improvement district is to be formed under the Municipal Parking and Business Improvement Area Law of 1979, California Streets and Highways Code sections 36500 et seq. and hence all improvements will be financed by assessments on the business licenses within the district. But the size and nature of improvements are discretionary.

Again it is clear that you have a financial interest within the definition of Government Code 87103 since you own real property within the contemplated district. While disqualification by reason of ownership does not result from every improvement district, we are persuaded that this situation is analogous to the decision rendered in *In re Opinion* requested by F. Mackenzie Brown, 4 FPPC 19, 21 (1978) which ruled:

In this case, it is reasonably foreseeable that the improvement district decisions will have financial effects upon the property of the two council members. The decision to form the district will determine whether or not the two council members' properties will be assessed to pay for the improvements. Decisions concerning the district's boundaries, the size of the district and the amount of money which will be spent for improvements will affect the size of the assessment that is levied against the properties.

Furthermore, it is reasonably foreseeable that the street beautification and increased

parking brought about through the improvement district will have a financial effect on the council members' properties. The street beautification and parking project is intended to improve the business climate of the downtown area. It is foreseeable that the project will increase the business in the area and as a result increase the income potential and value of downtown commercial properties, including the council members' properties.

While you did not specify the type of property you owned

within the district, if it is of the type (commercial) that is reasonably foreseeably benefited by such districts, then the disqualification conclusion in Brown should be heeded and you should not participate in either pre-Council discussions or Committee/Council actions considering such a district.

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By

Ted Bromfield

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