

MEMORANDUM OF LAW

DATE: March 27, 1987

TO: John W. Witt, City Attorney  
FROM: Ted Bromfield, Chief Deputy City Attorney  
SUBJECT: Councilmember Wolfsheimer: Alleged Failure to  
Disclose Property

FACTUAL BACKGROUND

Mr. Wesley Stark has filed a complaint with this office that Councilmember Wolfsheimer has failed to disclose a property interest in real property located at 5322-24 El Cajon Boulevard and, in so doing, improperly voted on the Mid-City Planned District Ordinance on January 21, 1986 which affected the property.

While Mr. Stark filed this complaint in November of 1986, the over fifteen (15) exhibits attached to the Litigation Investigator's report (attached hereto) readily reveal the reason for the time required in analyzing and evaluating the complaint. The report in short discloses that 5322-24 El Cajon Boulevard is owned by the Feldman and Helfand Partnership but that through a series of leases, subleases, sales and assignments, Councilmember Wolfsheimer does have a one-half interest in a) the building on the land and in b) the sublease to portions of the property. Hence she does possess a financial interest within the meaning of the Political Reform Act, California Government Code sections 81000 et seq. The legal effect of this interest and the remedy for non-disclosure follow.

LEGAL EFFECT OF NON-DISCLOSURE

As the two (2) disclosure statements filed by Ms. Wolfsheimer detail (Exhibits 12 and 13), the Councilmember has consistently listed "Denny's Restaurant, 665 No. Mollison, El Cajon" when in fact she has absolutely no interest in this property. (See p. 4 of Investigator's Report.) Similarly she has failed to list the "Denny's Restaurant" (now a Nappy's) which was the original construction on 5322-24 El Cajon Boulevard (Exhibit 3).

The confusion then appears over the sameness of the names (Denny's) and the similarity over the locations (The City of El Cajon vs. El Cajon Boulevard). Nevertheless the nondisclosure is present and thus its effect must be determined.

Both as a candidate and a councilmember, Ms. Wolfsheimer was required to list all her interests in real property. California Government Code sections 87201; 87202. Failure to do so has criminal and civil sanctions which are phrased as follows:

. 91000. Violations; misdemeanor; fines; limitations

(a) Any person who knowingly or willfully violates any provision of this title is guilty of a misdemeanor.

(b) In addition to other penalties provided by law, a fine of up to the greater of ten thousand dollars (\$10,000) or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received may be imposed upon conviction for each violation.

(c) Prosecution for violation of this title must be commenced within four years after the date on which the violation occurred.

. 91004. Reporting requirements; violations, civil liability

Any person who intentionally or negligently violates any of the reporting requirements of this act shall be liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount not more than the amount or value not properly reported.

. 91005. Contribution, gift or expenditure; making or receiving as violation; economic benefit of designated employee; civil liability

(a) Any person who makes or receives a contribution, gift or expenditure in violation of Section 84300, 84304, 86202, 86203 or 86204 is liable in a civil action brought by the civil prosecutor or by a person residing

within the jurisdiction for an amount up to five hundred dollars (\$500) or three times the amount of the unlawful contribution, gift or expenditure, which ever is greater.

(b) Any designated employee or public official specified in Section 87200, other than an elected state officer, who realizes an economic benefit as a result of a violation of Section 87100 or of a disqualification provision of a Conflict of Interest Code is liable in a civil action brought by the civil prosecutor or by a person residing within the

jurisdiction for an amount up to three times the value of the benefit.

California Government Code sections 91000; 91004 and 91005

While it is confirmed that Ms. Wolfsheimer failed to report her property interest as required on her Statement of Economic Interests, criminal sanctions are not recommended. First, Section 91000(a) requires a showing of "knowingly or willfully" which does not appear present from these facts. While these terms generally do not require specific intent (Penal Code section 7), the convoluted course of ownership (from owner to lessee to trust to assignee) would certainly mitigate against purposeful omission. Secondly, the disclosure of property not actually owned on Form 721 certainly shows a concern to list everything the person thought she owned.

The civil sanction of Section 91004 provides liability for negligent disclosure in an amount not more than the value of the property not reported. In the instant case, no monetary figure has been placed on Ms. Wolfsheimer's one-half interest in the sublease and building but it appears to be substantial. (See Exhibit 14.) But to seek a substantial civil penalty over an apparent reporting error rather than a purposeful omission does not appear fair.

Two (2) sections of the Political Reform Act would appear to counsel against a severe monetary penalty for this type of non-reporting.

. 91001. Criminal and civil penalties and remedies;

....

(c) Whether or not a violation is inadvertent, negligent or deliberate, and the presence or absence of good faith shall be considered in applying the remedies and sanctions of this title.

. 91009. Amount of liability; seriousness of violation and degree of culpability; disposition of recovery

In determining the amount of liability under Sections 91004 or 91005, the court may take into account the seriousness of the violation and the degree of culpability of the defendant. If a judgment is entered against the defendant or defendants in an action brought under Section 91004 or 91005, the plaintiff shall receive fifty percent of the

amount recovered. The remaining fifty percent shall be deposited in the General Fund of the state. In an action brought by the civil prosecutor, the entire amount recovered shall be paid to the general fund or treasury of the jurisdiction.

California Government Code sections 91001(c) and 91009. Emphasis added.

The presence of good faith and lack of a serious violation appear obvious in the face of the confused reporting of the Councilmember's Denny's restaurant interest where the actual owned interest is not reported but a non-owned interest with the same name is disclosed.

Rather than seeking a civil penalty in the amount of the interest, I believe Ms. Wolfsheimer should be warned to do a detailed review of her Trust B interests and file amended Statements of Economic Interest (Form 721) accordingly. This would require an amended filing and fulfill the purpose of the act which is to obtain a detailed disclosure. California Government Code section 81002. A letter to accomplish this is also attached.

The above-referenced penalties likewise apply to the vote of January 21, 1986. Obviously, Ms. Wolfsheimer may not participate in a governmental decision in which she knows she has a financial interest. California Government Code section 87100. However, under Section 87103 that decision must have a "material financial effect" on the asset which in this case is a one-half interest in the sublease and building at 5322-24 El Cajon Boulevard. As the investigator's report details, the investigator found the effect of the rezoning to be "negligible." (See p. 6 of Investigator's Report.)

Even if the investigator's conclusion is understated, the remedy provisions still would require a willful or knowing violation for criminal sanctions which, as detailed above, do not

appear to be present. Further the civil sanction of injunctive relief which is available for alleged conflict of interest problems (California Government Code section 91003) would still be tempered by the Section 91001(c) standard of "presence or absence of good faith." Clearly having erroneously listed her property interest, the Councilmember saw no reason to refrain from participation in the vote.

#### CONCLUSION

The complaint of Mr. Stark is found to be true in that Councilmember Wolfsheimer failed to list a one-half interest in a sublease and building at 5322-24 El Cajon Boulevard. However,

from a review of the origin, nature and apparent confusion over the interest in the property as reflected in her Statements of Economic Interest, no criminal or civil penalty should be pursued. Rather Councilmember Wolfsheimer should be advised to review all her Trust B holdings and file amended Statements of Economic Interest as soon as possible and in no event later than ten (10) working days from the receipt of these findings.

Should Mr. Stark find this recommendation unsatisfactory, he may file his own civil action (California Government Code sections 91003; 91004) for relief or seek the assistance of the Fair Political Practices Commission to which I am forwarding my analysis.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:js:011(x043.2)

Attachments

cc Fair Political Practices Commission

Attn. Enforcement Division

ML-87-31