DATE: April 28, 1987

TO: Angeles Leira, Planning Department
FROM: City Attorney
SUBJECT: Potential Conflict of Interest for Two Members of the Historical Site Board

This is in response to your query whether Wayne Donaldson and Dorothy Hom have potential conflicts of interest when sitting as members of the Historical Site Board (the "Board") in upcoming hearings on the proposed Chinese-Asian District. Specifically, you asked: 1) whether there is a conflict of interest; 2) whether Wayne Donaldson/Dorothy Hom can participate in the discussion and abstain; 3) whether Dorothy Hom can participate in the community presentation but not the Board deliberation; and 4) whether Wayne Donaldson/Dorothy Hom should leave the hearing room.

I will analyze each individual's situation separately.

DOROTHY HOM

You indicated that Dorothy Hom and her husband are in the process of purchasing property within the new proposed Chinese-Asian District. The Homs also own a parcel on Sixth Avenue within the Gaslamp Quarter. This site may be incorporated in the new Chinese-Asian District.

The pertinent provisions related to and governing conflict of interest are contained in the Political Reform Act of 1974, as amended. The applicable sections provide as follows:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.
>
> California Government Code Section 87100.

> An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, . . . on: ┌Emphasis added.σ
>
> . . .
>
> (b) Any real property in which the public official has direct or indirect interest worth one thousand dollars ($1,000) or more.
>
> California Government Code Section 87103.

Members of the Board, as persons involved with governmental

decision-making, are public officials within the meaning of California Government Code Section 87100.

Quoting from an early Fair Political Practice Commission opinion, as the foregoing sections specify, ". . . several elements must be present before a public official is required to disqualify himself or herself 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 Section 87103 of the California Government Code. Third, the anticipated financial effect must be material. And fourth, the governmental decision's anticipated financial effect must be distinguishable from its effect on the public generally." ╒In re Opinion requested by Tom Thorner, 1 FPPC Op. 198, 202 (1975).σ

The terms "material financial effect" and "effect on the public generally" are defined in Title 2, Sections 18702 and 18703 of the California Administrative Code. Those sections state, in pertinent part:

> (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:
>
> . . .
>
> (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 lesser 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.

California Administrative Code Section 18702.

A material financial effect of a governmental decision on an official's interests, as described in Government Code Section 87103, is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public . . ..

California Administrative Code Section 18703.

The Fair Political Practice Commission interpreted the phrase "public generally" as it is used in California Administrative Code Section 18703 as comprising those persons within the jurisdiction of the respective officials. ╒2 FPPC Op. 77 (1976).σ Here, the public generally would be comprised of San Diego commercial property owners or all property owners in San Diego. Since a relatively small percentage of San Diego property owners or San Diego commercial property owners own property within the proposed Chinese-Asian District, any financial effect on Dorothy Hom's property resulting from a decision by the Board would be distinguishable from the effect of such action on the general public.

The issue then is whether it is reasonably foreseeable that the decision by the Board will have a financial effect on Dorothy Hom's property and whether that financial effect is material.

It is unclear what the financial impact will be of a decision to designate the proposed area an historical district. However, it is reasonable to conclude that the designation could affect property values and that some financial impact on Dorothy Hom's property is likely.

A material financial effect is reasonably foreseeable if the proposed designation affects Dorothy Hom's property by the amounts set out in California Administrative Code Section 18702(b)2. above.

Even if the financial effect of the proposed designation is not material under California Administrative Code Section 18702, Dorothy Hom should disqualify herself from voting in the upcoming Board hearing on the Chinese-Asian District under the Conflict of Interest Code of the Board.

Section 100B of that Code states that the provisions of the Board Code are additional to the Public Reform Act and other laws pertaining to conflicts of interest.

Section 200 of the Board Conflict of Interest Code states:

SECTION 200 PROSCRIBED ACTIONS

A. A member shall avoid any action, whether or not

specifically prohibited by law, which may tend to affect his or her position performance creating the appearance of:

1. Using public office for private gain.
2. Giving preferential treatment to any person.
3. Losing complete independence or impartiality.

The fact that Dorothy Hom owns property within the proposed district the Board will vote on creates the appearance that Dorothy Hom cannot be completely independent or impartial. Therefore, Dorothy Hom should not vote on the designation of a proposed Chinese-Asian District.

You asked the extent to which a Board member who is disqualified from voting may participate in the proceedings before the Board. When a Board member is disqualified, he or she must refrain not only from making the decision but also from participating in the making of the decision or using his or her official position to influence the decision. California Government Code Section 87100.

However, the regulations specifically exclude from the definition of participating in the making of a governmental decision and attempting to influence agency decisions the situation in which the official appears in the same manner as any other member of the general public solely to represent herself on a matter related to her personal interest. California Administrative Code Sections 18700(d)(2) and 18700.1(b)(1)(A). Accordingly, a disqualified Board member may address the Board from the audience as a member of the general public on a matter if her participation relates solely to her own financial interests. The provision does not permit the official to represent interests other than her own. Therefore, Dorothy Hom may not represent clients or even a group of neighbors before the Board. A Board member may not expressly or impliedly coerce the other Board members during a public appearance representing her own financial interest. In addition, a Board member who appears as a member of the public in this manner must be subject to the same limitations as any other member of the public would be appearing before the Board.

Obviously, Dorothy Hom may be present in the hearing room if she is going to appear before the Board on personal matters. However, if she is not going to appear, Dorothy Hom should leave the hearing room if her presence could in any way influence the decision of the Board.

WAYNE DONALDSON

You indicated that Wayne Donaldson was hired by the Centre

City Development Corporation, Inc., ("CCDC") to analyze building rehabilitation issues for nine Chinese buildings within the proposed Chinese-Asian District. Wayne Donaldson was paid $2,700 by CCDC.

The definition of a financial interest within California Government Code Section 87100 applicable to Wayne Donaldson is found in Government Code Section 87103(c) which states, in pertinent part:

> An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material
>
> financial effect, distinguishable from its effect on the public generally, . . . on: ┌Emphasis added.σ
>
> . . .
>
> (c) Any source of income . . . 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.

Assuming Wayne Donaldson received the payment from CCDC within 12 months of the Board hearings, it must be established that it is reasonably foreseeable that the governmental decision will have a financial effect on CCDC, that the effect is material, and that the effect is distinguishable from the affect on the public generally. If all these elements are satisfied, Wayne Donaldson will have to disqualify himself from voting or participation in the proposed Chinese-Asian District hearings.

As discussed above, the test to determine whether it is reasonably foreseeable that the governmental decision will have a financial effect and whether that effect is material is found in California Administrative Code Section 18702 which states, in pertinent part:

> (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:
>
> . . .
>
> (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:

. . .

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

Wayne Donaldson was hired by CCDC to analyze building rehabilitation issues of Chinese buildings within the proposed Chinese-Asian District. Clearly there is a nexus between the purpose of that contract and the decision whether or not to designate the area that contains these buildings an historical district.

You indicated in a telephone conversation to this office that the proposal for a Chinese-Asian District was originated by CCDC and that CCDC submitted the proposal to the Planning Department. Therefore, the decision by the Board on the designation of this proposed Chinese-Asian District will affect CCDC differently than it affects all members of the public or a significant segment of the public.

Even if all the elements of California Government Code Sections 87100 and 87103 are not met, the Conflict of Interest Code of the Board proscribes any action creating the appearance of losing complete independence or impartiality. The fact that Wayne Donaldson received money from the agency that originated the proposal for a Chinese-Asian District creates the appearance that Wayne Donaldson is not totally impartial.

In addition, California Administrative Code Section 18702.1 provides, in pertinent part:

(a) . . . a public official shall not make, participate in making, or use his or her official position to influence a governmental decision if:

(1) Any person (including a business entity) which has been a source of income . . . to the official of $250 or more in the preceding 12 months appears before the official in connection with the decision; . . ..

As you indicated on the telephone, CCDC might appear before the Board in connection with the proposed Chinese-Asian District. In this situation, Wayne Donaldson would have to disqualify himself.

As with Dorothy Hom, Wayne Donaldson should leave the hearing room if his presence could in any way influence the decision of the Board.

Since the analysis regarding potential conflicts of interest must be made on the special facts of each case, this opinion applies only to the facts set out in the opinion.

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By
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ML-87-42