

MEMORANDUM OF LAW

DATE: October 30, 1989

TO: Councilmember Bruce Henderson
FROM: City Attorney
SUBJECT: Potential Conflict of Interest Arising from
Ownership of Real Property Near Proposed Soledad Hills
Subdivision in Pacific Beach

This memorandum is in response to a conflict of interest question that arose during the October 16, 1989, Council meeting regarding Item No. 106 pertaining to the proposed Soledad Hills subdivision in Pacific Beach. The matter was continued to October 30th to obtain more information from the developer and to obtain the City Attorney's opinion about your potential conflict of interest arising from your ownership of property near the proposed subdivision site.

BACKGROUND FACTS

The facts outlined below were obtained in large part from the Request for Council Action (1472) dated September 18, 1989, with attached background materials; from James Sills, your Chief of Staff; from Ted Shaw, the Associate Planner in the City's Planning Department; and from your Statement of Economic Interest (SEI) for calendar year 1988.

You have a 50% undivided fee interest in a lot at 5334 Westknoll. The lot is currently developed as a single family residence and is rented. The value of that undivided interest as shown on your SEI is over \$100,000.

The Westknoll lot is located approximately 1500 feet from the boundaries of the proposed Soledad Hills subdivision ("Soledad Hills"). The Soledad Hills site is located on the south side of Yost Drive between Yost Circle and Alta Vista Street in Pacific Beach. The site comprises 3.36 acres or 146,362 square feet. The site is currently zoned R1-10,000, that is, zoned for residential use with a minimum lot size of 10,000 square feet. The property already has a Planned Infill Residential Development

Permit and Tentative Subdivision Map to subdivide the 3.36 acre site into 11 lots to construct 10 single family detached homes. All utilities required for the development are available from the street.

The proposed subdivision is a 10-unit residential project designed to appeal to upper middle class professionals with older children. One of the 11 lots has already been sold subject to the final subdivision map and will not be constructed with the

other ten lots. Formerly, the proposed subdivision site was a wholesale nursery.

The surrounding neighborhood is single-family residential. The area is currently in transition from older bungalow type housing to larger single family residences.

The proposed Council actions on Monday, October 30th regarding Soledad Hills consists of two actions: 1) to approve the final subdivision map of Soledad Hills; and 2) to authorize the City Manager to enter into an agreement with Cirrus Development Group, Inc. ("Cirrus") for the work to be done. We understand that as part of the approval of the final map the Council will be accepting Cirrus's offer to dedicate a public street. Dedication of the public street was one condition established when the Tentative Subdivision Map was approved earlier.

APPLICABLE LAW - POLITICAL REFORM ACT

The applicable law governing conflict of interest arising from ownership of real property was set forth in a Memorandum of Law dated September 8, 1989 to the Honorable Mayor and City Councilmembers regarding ownership of real property near a proposed Chinese Mission. In lieu of repeating the applicable law here, we attach a copy of the Memorandum.

ANALYSIS

As a preliminary matter, it is necessary to determine whether the proposed Council actions relating to Soledad Hills are the types of governmental decisions that trigger a complete analysis of the potential conflict of economic interest contemplated by the Political Reform Act ("Act"). The determination will depend on whether the actions are ministerial or discretionary. In a memorandum dated October 5th to the Mayor's Chief of Staff, Benjamin Dillingham, copy attached, we discussed the distinction between "discretionary" and "ministerial" governmental acts. The Fair Political Practice Commission (FPPC) Regulations recognize

that ministerial, as opposed to discretionary, acts are not the type of acts that constitute making, or participating in making, a governmental decision within the meaning of Government Code section 87100. (2 California Code of Regulations 18700(d)(1).

In the present case the Subdivision Map Act requires the Council to approve a final subdivision map if all of the legal requirements and conditions of the applicable Tentative Map are met. Government Code section 66458. If the Council does not approve the final map and the map conforms to all of the requirements, then the final map is deemed approved even without Council action. Government Code section 66458(b).

By statute, then, there is no discretion in the Council at

the final map adoption stage in subdivision proceedings. Therefore, approving the final subdivision map is not a governmental decision within the meaning of Government Code section 87100. If that were the only decision before the Council regarding Soledad Hills on October 30th, there would be no need to analyze the conflict question further because of this conclusion.

However, also before the Council on October 30th is the question whether to authorize the City Manager to enter an agreement with Cirrus for installation and development of improvements for the subdivision. This type of agreement is authorized under Government Code section 66462(a)(1). Although some aspects of the process of approval of the improvement agreement are ministerial in nature, the Council is not obligated to proceed with the improvement agreement per se. The Council could require the developer to enter into another type of agreement. Government Code section 66462(a)(2). Because of the element of discretion involved in the type of agreement which the Council may require we conclude that participating in the decision to authorize (or not) the City Manager to enter into an agreement with Cirrus to install and develop the improvements for the subdivision is in the nature of a governmental decision governed by Government Code section 87100. Therefore, it is necessary to analyze whether you have an economic interest that will be materially financially affected by that decision and if so, whether it will be affected differently from the effect on the public generally.

In the present case, you clearly have an economic interest within the meaning of the Act because of your partial ownership of the lot at 5334 Westknoll.

The real question presented by the current facts is whether that economic interest will be materially financially affected by the decision.

Since the Westknoll property is 1500 feet from Soledad Hills, FPPC regulation 18702.3 will apply to determine materiality. Under that regulation, it is necessary to determine whether there will be a \$10,000 change in fair market value to the Westknoll property as a result of the decision, or a change in rental value of \$1,000 or more per twelve month period. The determination is to be made in light of the following factors set forth in FPPC regulation 18702.3(d).

1. The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which

- the official has an interest;
2. Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;
 3. In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, effect on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood. Regulation 18702.3(d)

Since the determination of materiality is factual, we turned to City Manager John Lockwood for assistance on October 27th. Mr. Lockwood analyzed the facts under these guidelines and determined that there would not be a \$10,000 change in fair market value of the Westknoll property, nor would there be a change in rental value exceeding \$1,000 per 12 month period as a result of the vote to approve the subdivision improvement agreement with Cirrus. Mr. Lockwood found that, although the change in use from wholesale nursery to high-end single family residential use was significant, the small size of the development (10-11 residential units) will minimize the effect on the Westknoll property some five (5) blocks away. Further, although the subdivision will tend to increase the property value of the surrounding neighborhood, the amount of change in fair

market value of the Westknoll property will not reach \$10,000, nor will the rental value change by \$1,000 or more per year. Lastly, although the traffic, noise levels, air emission and intensity of use in the area will increase because of the subdivision, the increase will be only slight because only 10 or 11 housing units will be constructed. Therefore, although there may be a slight increase in value to the Westknoll property, it will not reach the \$10,000 fair market value threshold or the \$1,000 rental value threshold necessary to require disqualification.

Since there will not be a material financial effect on the Westknoll property resulting from the decision to approve the improvement agreement, there is no need to discuss whether the "public generally" exception applies.

In conclusion, we find that you are not disqualified from voting on either the final subdivision map or the subdivision improvement agreement pertaining to Soledad Hills because of your

economic interest in the Westknoll property.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

CCM:skc:048:011:(x043.2)

Attachment

cc Ted Shaw, Associate Planner (w/attach.)

ML-89-103