MEMORANDUM OF LAW

yymmdd

DATE: September 8, 1989

TO: The Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Arising from Ownership of Real Property Near Proposed Chinese Mission

This memorandum supplements the memorandum of law issued on August 8, 1989, on the same topic (copy attached as Exhibit A). At the August 8th meeting, this item was continued to September 11, 1989, until further information could be obtained that would assist the Councilmembers in determining whether disqualifying conflicts exist which would preclude one or more members from voting on this matter.

The proposed actions are described in the attached copy of the excerpt from the agenda of the joint meeting of the City Council and Redevelopment Agency of August 1, 1989 (Item No. 601) (Exhibit B). Since the August 8th memo, which was written to address Councilmember Henderson's question, Councilmember Wolfsheimer has indicated that she owns property near the proposed site of the Chinese Mission. She asks that this office examine her potential conflict of interest vis a vis the Chinese Mission actions in addition to that of Councilmember Henderson.

BACKGROUND FACTS

Councilmember Henderson

Councilmember Henderson has a limited partnership interest of between $1,000 and $10,000 each in the Horton Grand and Grand Saddlery Hotels (adjacent structures) (hereafter "hotels"). This information was disclosed on his Statement of Economic Interest (S.E.I.) filed on April 3, 1989 for the period covering January 1 through December 31, 1988. Councilmember Henderson confirmed on August 22, 1989 that his investment interests in the hotels has not changed since filing his S.E.I. Councilmember Henderson also states on his S.E.I. that he receives no income from these two (2) real properties.

According to Pam Hamilton, Executive Vice President of the Centre City Development Corporation (CCDC), the southernmost edge of the hotels is located less than 300 feet from the northernmost edge of the proposed site of the Chinese Mission. The hotels touch on the southeast corner of Third and Island Street, while the proposed Chinese Museum site is located on the northwest

corner of Third and "J" Street. A copy of a block map showing the relationship of the hotels to the proposed Chinese Mission site is available in the City Attorney's office for review.

Councilmember Wolfsheimer

According to her S.E.I. filed on March 31, 1989 covering calendar year 1988, Councilmember Wolfsheimer owns a condominium valued at over $100,000, located at 750 State Street, No. 406. The condominium is leased and earns income of between $1,000 and $10,000 annually. Ms. Wolfsheimer still has this real property and earns income from it according to her administrative Executive Assistant, Joann Johnson. According to the block map prepared by CCDC Staff, this condominium is approximately 1950 feet from the proposed site of the Chinese Mission. The boundaries of the common area are a few feet closer to the Chinese Mission site, but not significantly closer for purposes of this analysis.

Proposed Action: There were two votes pertaining to the Chinese Mission on the agenda for August 1, 1989 and continued to September 11, 1989 meeting.

According to Ms. Hamilton, if these actions are approved, essentially the Redevelopment Agency would acquire the proposed site at Third and "J" Street. The site is a 5,000 square foot parcel currently in private ownership and used as a commercial warehouse. The site would then be leased to the Chinese Historical Society for approximately 55 years for placement of a historically designated structure known as the Chinese Mission. The structure was used by members of the Chinese community in turn of the century San Diego. The structure is currently temporarily stored elsewhere on Redevelopment Agency property (on First Avenue), but is not designed for permanent placement at that site. Currently existing on one side of the proposed site is a new residential development; on the other side is another historic Chinese structure scheduled for retention. The Chinese Mission, the hotels and Ms. Wolfsheimer's condominium are all in the Marina Park District Zone, which is scheduled to become 80% residential over time. Because of its location and small size, the 5,000 square foot parcel will be difficult to develop into residential use according to Ms. Hamilton. The zone permits cultural uses, such as the Chinese Mission, by issuance of a CUP.

In the analysis below, the applicable law will be set forth first. Then the law will be applied to the facts presented by Mr. Henderson's and Ms. Wolfsheimer's fact situations to reach a conclusion.

Applicable Law - Political Reform Act

The Political Reform Act (the "Act") was adopted by the people in 1974. The Act specifies when economic conflicts of interest prohibit a public official from participating in or making a governmental decision 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 (Government Code section 87100).

To determine whether a public official will be required to disqualify him or herself from participating in a governmental decision depends on examination of four factors:

1) Will the decision have a reasonably foreseeable,
2) material financial effect,
3) on the official's economic interest,
4) that is distinguishable from the effect on the public generally?

I. Is there an Economic Interest?

Generally, it is best to analyze the third factor before turning to the other three factors, because there is no conflict if no economic interest (as defined by the statute) is affected by the governmental decision.

The relevant type of economic interest at issue here concerns real property in which the public official has a direct or indirect interest worth one thousand dollars ($1,000) or more (Government Code section 87103(b)).

II. Will there be a reasonably foreseeable material financial effect on an identified economic interest?

A. Reason to Know and the Duty of Inquiry.

If a public official knows or has reason to know that one of his or her economic interests as defined above may be affected by the governmental decision, then the official should go on to examine the other factors. The law does not impose strict liability on a public official to know under all circumstances whether one of his or her economic interests will be affected by the decision, nor does the law require the official to inquire about every detail of every item on the Council docket. However, the law provides clues which should put the Councilmember on alert to inquire further about potential conflicts.

In the area of potential conflicts arising from real property interests, it behooves the official to be familiar with certain criteria in the new Fair Political Practices Commission's (FPPC)

rules governing "material financial affect." In particular, the Councilmember should know whether he or she has an interest in or outright owns properties within 2,500 feet of site of a proposed Council action involving real property. Although properties outside of a 2,500 feet radius of the site of a proposed action are not necessary precluded from creating disqualifying conflicts, there is less likelihood of required disqualification. Although the FPPC rules do not state that a councilmember is free to ignore potential conflicts if he or she owns property outside the 2,500 foot radius, the duty of inquiry is raised only if there are "special circumstances" involved in the decision which would trigger further inquiry. Although the term "special circumstances" is not defined by the FPPC, presumably placing a 100,000 square foot shopping center with four major department stores and 100 smaller retail stores on a previously vacant lot would probably affect property values in an area greater than the 2,500 foot radius. Hence, the "special circumstances" should invite further analysis.

Even absent "special circumstances," however, the FPPC rules indicate that if a councilmember has property within the 2,500 foot radius, the councilmember will have "reason to know" or suspect he or she may have a disqualifying interest. That is, property within that 2,500 foot distance should put the councilmember on notice to inquire further.

Only after it is determined that an official knows, or has reason to know that his or her economic interest may be affected by a decision does one determine whether there will be a

reasonably foreseeable material financial effect on that economic interest. That issue is discussed below.

B. Meaning of "material financial affect."

The FPPC last year adopted revised rules that clarify the meaning of the term "material financial effect." 2 California Code Regulations 18702 through 18702.6. A copy of those rules is attached for your convenience (Exhibit C). Although complex and lengthy, these new rules set forth in a step-by-step process how "materiality" should be determined for each type of economic interest (income, investment or real property interest). Material financial effects on real property interests are covered in Regulations 18702.1 and 18702.3.

If a councilmember's real property is directly involved in the governmental decision at hand, then regulation 18702.1 would be applicable. For example, if either of the Councilmembers' properties were to be acquired by CCDC for use as a Chinese Museum, then the regulation would apply. But if the

councilmembers' real property is only indirectly involved in the decision, then regulation 18702.3 would apply.

In the present case, since neither Councilmember Henderson's nor Wolfsheimer's real property is the proposed site for placement of the Chinese Mission, then regulation 18702.3 will apply.

For decisions involving indirect impacts on real property, the determination of materiality depends in large part on the number of feet the councilmember's property is from the property that is the subject of decision. If the councilmember's property is within 300 feet of the subject property, then the councilmember must show that the decision will have no financial affect on the councilmember's property. In other words, with properties that close to the subject property, the FPPC creates a presumption that there will be a material financial effect on the councilmember's property resulting from the decision (Regulation 18702.3(a)(1)).

If a councilmember's property is between 300 and 2,500 feet from the subject property, then the result will be material if there is a reasonably foreseeable change (increase or decrease) in the fair market value of $10,000 or more, or change (increase or decrease) in rental value of $1,000 or more per twelve month period (Regulation 18702.3(a)(3)).

Lastly, if the councilmember's property is more than 2,500 feet from the subject property then the decision will not be material unless special circumstances will make the fair market value or rental value change by the amounts stated above and there will not be a similar effect on at least 25% of all properties within 2,500 feet of the councilmember's property or there are not at least ten other properties within 2,500 feet of the councilmember's property. (Regulation 18702.3(b)(1) and (2).)

In short the FPPC regulations shift the presumptions on materiality depending on how close the councilmember's property is to the subject property.

C. Factors to determine change in fair market or rental value.

To assist in determining whether a decision will materially affect fair market or rental value or create the special circumstances which trigger operation of Regulation 18702.3(b), the FPPC has set forth the following guidelines:

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).

For purposes of decisions in redevelopment areas, the FPPC regulations specifically state that certification of an environmental document and selection of a project area are both in the nature of decisions that trigger operation of Regulation 18702.3. Regulation 18702.3(e).

Please note that there is also a special regulation governing decisions to construct or improve streets, sewers, etc. This special regulation is not discussed at length here because it is not relevant to the issues presented, but it is noted only to alert you to its existence for possible future reference.

III. Is the public generally affected the same way?

Assuming that a public official's economic interest will be affected by the decision and that it is reasonably foreseeable that there will be a material financial effect on that economic interest, an official may still not be disqualified from participating in the decision if it can be shown that the public generally will be affected in substantially the same way.

The relevant portion of FPPC regulation 18703 defining the phrase "public generally" is set forth below. Whether the "public generally" exception applies will generally turn on the particular facts of a given situation.

> 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. Except as provided herein, an industry, trade or profession does not constitute a significant

segment of the general public (emphasis added).

Councilmember Henderson

In Mr. Henderson's case, the type of economic interest at issue is exclusively real property.

In the present instance, Mr. Henderson's property is within 300 feet of the proposed Chinese Mission site. Therefore, there is a presumption that the proposed action will materially financially affect the councilmember's property. Regulation 18702.3(a)(1). To determine whether there will be some or no financial effect resulting from the Chinese Mission votes we consulted City Manager John Lockwood in a meeting on August 30, 1989. Mr. Lockwood analyzed the facts under the guidelines set forth in Regulation 18703(d) to make this determination. He determined that there may indeed be some financial effect on Mr. Henderson's property as a result of the changed use from commercial warehouse to cultural museum. Therefore, we conclude there will be a reasonably foreseeable material financial effect resulting from the Chinese Mission votes on Mr. Henderson's property.

The last question presented relative to Mr. Henderson's properties is whether the "public generally" exception will apply to permit Mr. Henderson to vote on the Chinese Mission matters. Since hotels are the types of properties whose patronage is affected by location and views, we can say with assurance that the effect of changing the use from commercial warehouse to Chinese Museum on the hotels will be different from the effect on a significant segment of the public. Therefore, the "public generally" exception will not apply here.

Therefore, Mr. Henderson should abstain from participating in or voting on the two Chinese Mission matters on the Council's agenda for September 11, 1989.

Councilmember Wolfsheimer

Ms. Wolfsheimer not only has a real property interest but also rental income arising from that interest that will potentially be affected by the Chinese Mission votes.

In Councilmember Wolfsheimer's case, the condominium is located within 2,500 feet of the proposed Chinese Mission site. Therefore, it is necessary to determine whether the result of the Council's vote on the Chinese Mission matters will change the fair market value of Ms. Wolfsheimer's condo by $10,000 or more, or change its rental value by $1,000 or more per year. Regulation 18702.3(a)(3).

Again we consulted Mr. Lockwood on August 30, 1989 to make

the determination. He analyzed the facts under the guidelines set forth in Regulation 18702.3(d) and determined that the votes will not result in a change in fair market or rental value of the condominium in the above amounts. Although the change in use from commercial warehouse to cultural museum may benefit the surrounding area, the effect on the condominium complex almost 2,000 feet away will be slight. The change in use will not affect or will only slightly affect the income potential of the condominium. Last, since the condominium is a residential property, the effect on traffic, view, privacy, intensity of use, noise levels and air emissions were considered. In Mr. Lockwood's opinion, the effect of the changed use on the condominium will be slightly ameliorated but not enough to reach the values required under Regulation 18702.3(a)(3) to require disqualification. Therefore we conclude that the result of the Chinese Mission votes will not have a reasonably foreseeable

material financial effect on Councilmember Wolfsheimer's condominium. Therefore, she is not precluded from participating in or voting on the Chinese Mission matters on September 11, 1989.

JOHN W. WITT, City Attorney
By
Cristie C. McGuire
Deputy City Attorney

CCM:jrl:skc:011(x043.2)
Attachments
cc Pam Hamilton
Executive Vice President, CCDC
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