MEMORANDUM OF LAW

DATE: September 11, 1989

TO: Mayor Maureen O'Connor
FROM: City Attorney
SUBJECT: Potential Conflict of Interest Arising from Ownership of Property in the Peninsula Area

This memorandum supplements the memorandum of August 8, 1989, on the same topic (copy attached as Exhibit A). At the August 8 Council meeting, the items pertaining to the Peninsula area were continued until September 11, 1989. Although the items were continued for other reasons, you have asked for further information from this office that would assist you in determining whether disqualifying conflicts exist which would preclude you from participating in or voting on the planning matters in the Peninsula area.

BACKGROUND FACTS

I. Proposed Actions

The three proposed actions scheduled for September 11 are as follows:

1) Adopt a resolution adopting maps classifying Protected Single Family Neighborhoods in the Peninsula area and releasing other Peninsula areas from the provisions of the Interim Single Family Neighborhood Protection Ordinance (Ordinance No. O-17250 New Series, adopted on February 21, 1989).
2) Introduce an ordinance rezoning two (2) properties in the Peninsula to R1-5000.
3) Adopt a resolution approving a community plan amendment for the Peninsula.

Attached is Planning Report No. 89-393, dated August 1, 1989, which gives the background information on these three (3) actions

(Exhibit B). See pp. 6-8 for text regarding the Peninsula area. Attached to that report are maps showing the areas to be designated Protected Single Family Neighborhoods, to be rezoned and to become subject to the Community Plan Amendments. See Attachments 7A, 7B and 7C to Exhibit B. The location and extent of the impact on properties in the Peninsula area resulting from these three (3) proposed actions are discussed more fully below.

A. Numbers of properties affected by designation as, and being released from designation as, Protected Single Family Neighborhoods.

In February, 1989 the City Council adopted an interim ordinance which imposed the Protected Single Family Neighborhood designation on existing multi-family zoned as well as existing single-family zoned neighborhoods in many communities of San Diego until planning staff could finish mapping single-family areas in those communities. Mapping is now complete. According to Attachment 13 of this Planning Report (Exhibit B), approximately 10,000 actual and potential single-family dwelling units in the Peninsula area will come within the area to be classified on the maps as Protected Single Family Neighborhoods. Areas which were previously zoned multi-family and developed as multi-family or commercial uses are not proposed to be included in the areas designated as Protected Single-Family Neighborhoods. These properties are therefore proposed for "release" from the interim ordinance Protected Single-Family Neighborhood designation. See p. 3 of Planning Report (Exhibit B).

According to Bill Levin, Senior Planner, the properties proposed for "release" also affect many hundreds of units (over 90% of similarly situated properties) in the Peninsula area. The two (2) areas which were previously zoned multi-family, but which are not already developed as multi-family units, are proposed for rezoning on the September 11 docket and are discussed more fully below.

B. Location of Rezonings

One of the two areas proposed for rezoning to R1-5000 in the Peninsula area is located in the 3600 and 3700 blocks north of Voltaire Street (currently zoned R-1500 and R-3000). The second is a 0.89 acre portion of a vacant parcel south of Curtis Street, west of Poinsettia, east of Warden and north of Browning. This area is proposed to be rezoned from R-1000 to R1-5000. In the two areas proposed for rezoning, there will be five (5) units downzoned in the Peninsula area and another sixty-one (61) units potentially "lost" due to downzoning.

C. Extent of Impact of Community Plan Amendment.

The community plan amendment is textual. The precise language of the amendment appears on p. 2. of Attachment 7C to Exhibit B and will not be repeated here. The amendment refers to map 7A which shows that hundreds to thousands of parcels in the Peninsula area will be subject to this plan amendment.

II. Property Owned in Peninsula Area.

You own two (2) residential properties in the Peninsula area. One is located at 567 Gage Lane, the other at 3011 Hugo Street. According to information provided by Sandra Teasley of Zoning and Alexandra Hart of the Mayor's Office, the property on Gage Lane

has been zoned single-family residential (R-10,000) since 1952 and is developed as a single-family residence. The property on Hugo Street has been zoned multi-family residential (R-1000) since 1974 and is developed as a multi-family residence (triplex).

According to Frank Belock, Deputy Director, Engineering and Development Department, the property on Gage Lane is more than one mile away from the nearest proposed rezoning in the Peninsula area; the property on Hugo Street is approximately 3,700 feet from the nearest proposed rezoning. The Hugo Street property is among those proposed for release from Protected Single-Family Neighborhood designation under the proposed resolution discussed above. The Gage Street property is zoned for single-family use and developed as single-family. Therefore, it will continue to be classified as a Protected Single-Family Neighborhood property.

In the analysis below, the applicable law will be set forth first. Then the law will be applied to the facts presented.

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 the site of a proposed Council action involving real property. Although properties outside of a 2,500 foot radius of the site of a proposed action are not necessarily 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 your property were to be acquired by one of the proposed actions, then the regulation would apply. But if the councilmembers' real property is only indirectly involved in the decision, then regulation 18702.3 would 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
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> profession does not constitute a significant segment of the general public (emphasis added).

IV. Is there a Residential Property Exception?

A question regarding residential real property arose during the August hearing on these matters. Specifically, you queried whether residential properties, especially those used as personal residences, were to be considered in determining whether conflicts of interest would preclude participation in planning and zoning matters.

It is true that for purposes of disclosure under the Act, elected officials do not have to list their principal residence or real property used exclusively for the elected official's personal residence on their annual Statement of Economic Interests (S.E.I.). Government Code section 87206(f). For purposes of determining whether disqualifying conflicts of interest exist, however, all residential real property, including an elected official's private residence, must be considered. Government Code section 87103. There is no exception for residential property. This information was confirmed by telephone with FPPC staff attorney, John McLean on August 29, 1989.

THE LAW APPLIED TO GAGE LANE AND HUGO STREET PROPERTIES

There is no doubt that you have economic interests within the meaning of the Act arising from your ownership of the Gage Lane and Hugo Street properties.

The questions presented by the facts are: 1) whether there will be a reasonably foreseeable material financial effect on either of these two (2) properties resulting from any one or all three actions scheduled to be taken on September 11; and, 2) if so, whether the "public generally" exception will apply to permit you to participate in and vote on one or all of these three matters.

Because there are different facts regarding each property, each will be treated separately below:

I. Gage Lane

The Gage Lane property is zoned for single-family residential and is in fact developed as a single-family residence. Although this property will be classified and mapped as part of a

Protected Single-Family Neighborhood (see Attachment 7A to Exhibit B), it is not one of the multi-family zoned properties that would receive special treatment under the Protected Single-Family Neighborhood Ordinance. Neither is it one of the properties scheduled for "release" for the Protected Single Family Residence designation because it is zoned and developed for single-family use, not zoned and developed for multi-family use.

Also, although the Gage Lane property will be affected by the proposed Community Plan text amendment (see p. 2 of Attachment 7C to Exhibit B, and maps attached thereto), the effect on the property will be the same as that on virtually every other single-family residential property in the Peninsula area, which number in the thousands.

Lastly, the Gage Lane property is more than a mile away from the nearest proposed rezoning. There are no special circumstances which lead us to believe that the rezonings will especially affect the Gage Lane property differently from the rest of the Peninsula community.

Because the Gage Lane property is within areas proposed for classification on maps as Protected Single-Family Neighborhoods and because it is within the area to be affected by the Community Plan Amendment, by definition these two (2) proposed council actions will have a material financial effect on the Gage Lane property. FPPC Regulation 18702.1(a)(3).

As to the rezoning action, however, the Gage Lane Property is more than 2,500 feet from the nearest rezone and there are no special circumstances affecting materiality. Therefore, we conclude there will be no material financial effect resulting from the proposed rezonings. FPPC Regulation 18702.3(b).

Even though the proposed actions to classify many Peninsula areas as Protected Single-Family Neighborhoods and to adopt the Community Plan Amendment will result in reasonably foreseeable material financial effects on the Gage Lane property within the terms of the FPPC regulations, the "public generally" exception applies to permit you to participate and vote on these matters. Both the proposed classification of Peninsula properties as Protected Single-Family Neighborhoods and the proposed Community

Plan Amendment will affect hundreds to thousands of properties in the Peninsula in the same way that the Gage Lane property will be affected. Therefore, we conclude that the "public generally" exception applies. FPPC Regulation 18703.

Therefore, you are not precluded for voting or participating on the three planning and zoning matters scheduled for September 11 by virtue of your economic interest in the Gage Lane property.

II. Hugo Street

The Hugo Street property requires a slightly different analysis as to materiality from that of Gage Lane, because it is zoned and developed for multi-family use.

Again, since the Hugo Street property will come within areas subject to the Community Plan Amendment, by definition the amendment will yield a material financial effect on the property. FPPC Regulation 18702.1(3).

Instead of the Hugo Street property being classified for Protected Single-Family Neighborhood status, this property is among those proposed for "release" from this classification, because it is zoned and developed for multi-family use. Hence, the Hugo Street property is directly affected by the proposed "release" action and, therefore, will be materially financially affected with the meaning of FPPC Regulation 18702.1(a)(3).

Lastly, Hugo Street is approximately 3,700 feet from the nearest property proposed for rezoning. Again, there are no special circumstances to trigger application of special rules on materiality. We consulted City Manager John Lockwood on August 30, 1989, for a factual determination of materiality. Using the guidelines in FPPC Regulation 18702.3(b) and (d), he determined that there will be no material financial effect on the Hugo Street property resulting from the proposed rezoning.

Since we have determined that the proposed release of the Hugo Street property from the Protected Single-Family Neighborhood designation and its inclusion in the area to be subject to the proposed Community Plan Amendment will result in a material financial effect on the property, the next and final question is whether the "public generally" exception will apply to permit you to participate and vote on these two actions.

Again, the Community Plan Amendment will affect hundreds to thousands of properties in the Peninsula area. Hugo Street is only one among many multi-family zoned properties sharing the same characteristics. It will be affected in the same manner as all other multi-family zoned developed properties in the Peninsula area.

The proposed "release" of the Hugo Street property from the

classification from the Protected Single-Family Neighborhood will also receive the same treatment as more than 90% of other multi-family zoned and developed areas of the Peninsula will receive. Therefore, we conclude that the "public generally" exception applies to these two proposed actions.

Therefore, you are not precluded from participating or voting on any of the three proposed actions pertaining to the Peninsula area as a result of your economic interest in the Hugo Street property.

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Attachments
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