

MEMORANDUM OF LAW

DATE: April 25, 1991

TO: Ron Buckley, Secretary to the Historical Site Board

FROM: City Attorney

SUBJECT: Conflict of Interest/Historical Site Board

This is in partial response to your memorandum of December 13, 1990, to Deputy City Attorney Allisyn Thomas asking about potential conflicts of interest faced by members of the Historical Site Board. Ms. Thomas is responding by separate memorandum to the second paragraph, whereas this memorandum will answer the questions raised by the first paragraph. The question in paragraph one (1) essentially is whether those Historical Site Board members who own historical property in this City can participate in discussions on the development of appropriate incentives for historical site owners.

BACKGROUND FACTS

Allisyn Thomas and I met with you on January 9, 1991, to obtain more background facts to answer the questions raised by your memorandum. These facts are summarized as follows: There are approximately 260 separate historical properties in this City. There are also four (4) historical districts which contain a total of approximately 600 historical sites. The total number of historical sites, including those separate properties described above and those contained within historical districts, comprise approximately 2-4% of all properties in the City.

The Historical Site Board ("Board") was created many years ago by the City Council by ordinance (codified at San Diego Municipal Code section 22.0201 et seq.). Its members are experts in the field of historic preservation. The Board has final decisionmaking power over historical site designations. It also makes recommendations in other areas that are regularly adopted by the City Council without major modification or amendment.

The Board has recently been considering various types of financial and other types of incentives to encourage historical site owners to preserve their historical property. Among the incentives being considered are rehabilitation loans, a tax increment program which addresses "medium" or "moderate" income property owners, fee waivers, and possible rebates of increased property taxes resulting from increased assessments due to

rehabilitation. Direct tax incentives are already provided under state and federal laws and will not be considered by the Board. Whatever recommendations for incentives the Board develops will eventually be presented to the City Council for adoption.

The conflict of interest question arises because a few Board members themselves own historical sites in this City that will be potentially eligible for any incentive program adopted by the City Council.

QUESTION PRESENTED

May those Board members who own historical sites in this City participate in the development of financial and other types of incentives for historical sites without violating applicable conflict of interest laws?

LEGAL ANALYSIS

The applicable conflict of interest law is located in the Political Reform Act of 1974 (the "Act"), codified at Government Code section 81000 et seq. Disqualification from participation in certain governmental decisions is governed by Government Code section 87100, which reads as follows:

Section 87100. Public Officials; State and Local.

No public official at any level of

state or

local government shall make, participate in

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or in any way attempt to use his official

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to influence a governmental decision in

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knows or has reason to know he has a

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The term "financial interest" as used in Government Code section 87100 is defined in Government Code section 87103, as follows:

Section 87103. Financial Interest.

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 the official or a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

official has (b) Any real property in which the public (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, 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.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

for (e) Any donor of, or any intermediary or agent a donor of, a gift or gifts aggregating two hundred fifty (\$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.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agent, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

In order to answer the question presented it is necessary to examine the issues described briefly below:

- I. Are Board members "public officials" for purposes of disqualification under the Act.
- II. Is consideration and development of an incentive program a governmental decision within the meaning of the Act?
- III. Is it reasonably foreseeable that either Board members themselves or their economic interests will be affected materially by whatever incentive program will be developed and proposed to Council?
- IV. Will the public generally be affected in the same way as the affected Board members?

These questions will be addressed separately below.

I. Are Board members "public officials" for purposes of disqualification under the Act?

The first issue to be decided is whether Board members are "public officials" within the meaning of the Political Reform Act ("Act") and therefore are obliged to determine whether they are disqualified from participating in certain deliberations undertaken by the Board. For purposes of disqualification, the term "public official" is defined in Government Code section 82048 and refined in Fair Political Practices Commission (FPPC) Regulation 18700 in relevant part as follows:

(a) "Public official at any level of state or local government" means every natural person who is a member, officer, employee or consultant of a state or local government agency.

(1) "Member" shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decision-making authority. A board or commission possesses decision-making authority whenever:

governmental (A) It may make a final decision;

recommendations (C) It makes substantive

which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or government agency.

According to the facts you provided, not only does the Board have final decisionmaking powers over historical site designations, but also for many years it has made substantive recommendations in other areas to the City Council that have been regularly approved without significant modification or amendment. Therefore, Board members are "public officials" for purposes of determining whether they must disqualify themselves under the Act.

II. Is consideration and development of the incentive program a "governmental decision" within the meaning of the Act?

The second issue presented is whether the Board's consideration of the incentive program is in the nature of a

"governmental decision" within the meaning of the Act. The term "governmental decision" is defined in a regulation adopted by the FPPC (2 Cal. Code of Regs. section 18700). This regulation reads in relevant part:

(c) A public official or designated employee "participates in the making of a governmental decision" when, acting within the authority of his or her position, he or she:

.....

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

The Board has many duties too numerous to describe here. They are set forth in San Diego Municipal Code section 26.0204, a copy of which is attached. Clearly, however, among the Board's functions is to advise the City Council directly by making oral and written reports, analyses and opinions, which require the expertise of the Board and the purpose of which is to influence the Council's decisionmaking.

According to the facts provided, the Board is developing potential financial and other types of incentives to encourage historical site owners to rehabilitate their properties. The Board is made up of experts in the field of historic preservation who will exercise their judgment in developing recommendations on the types of incentives they believe will be most effective to accomplish the goal of historic preservation. Their recommendations will be presented to Council directly (or

indirectly via the City's Planning Commission). The deliberation and action of the Board pertaining to development of the incentive program clearly qualifies it as governmental decisionmaking within the meaning of the FPPC regulation and therefore of the Act.

III. Is it reasonably foreseeable that either Board members themselves or their economic interests will be affected materially by whatever incentive program will be developed and presented to Council?

Under the present facts, depending on the type of incentives eventually recommended by the Board, the Board members who own historical property may well be directly affected by their recommendations, because of the financial impact of the incentives on either themselves directly or on one or more of their economic interests.

One of the FPPC regulations clarifies when a decision will have a material financial effect on an official directly, as opposed to the effect on one of the official's financial interests, thus requiring disqualification. 2 Cal. Admin. Code section 18702.1. This regulation reads in relevant part:

18702.1. Material Financial Effect: Official's

Economic I

in the Decision

(a) The effect of a decision is material if any of the following applies:

....

(4) The official or immediate Family - The decision will result in the personal expenses, income, assets (other than interests in real property), or liabilities of the official or his or her immediate family increasing or decreasing by at least \$250.

Thus, assuming the Board eventually approves an incentive program that results in, for example, decreasing a Board member's expenses on his or her historic property by only \$250, the Board member would be directly and materially financially affected according to this FPPC regulation.

Even assuming the Board members would not be directly affected by the incentive program, one or more of their economic interests may well be affected. The two types of economic interests that would be most likely affected are real property interests (Government Code section 87103(b)) and income interests (Government Code section 87103(c)), especially if the historical sites owned by the Board members are rental property. Without more specific facts, however, it is impossible to determine

whether or what kind of economic interests may be involved.

A. Meaning of "reasonably foreseeable."

Even if a particular governmental decision results in a financial effect on one or more economic interests, that alone is not a violation of the Act unless it is reasonably foreseeable before the governmental decision is taken that a material financial effect on the interest would result.

The term "reasonably foreseeable" is not defined in the statute or in FPPC regulations, but it was discussed at length by the FPPC in one of its early advisory opinions, In the Matter of Tom Thorne, 1 FPPC Opinions at 198 (1975). After reviewing both federal and California cases that discuss the meaning of "reasonable foreseeability" in the conflict of interest area, the FPPC stated: "The question of whether financial consequences upon a business entity are reasonably foreseeable at the time a governmental decision is made must always depend on the facts of each particular case." 1 FPPC Opinions at 205. Although "the statute requires foreseeability, not certainty, . . . the ultimate test is whether the element of foreseeability, together with the other elements . . . is present to the point that the official's 'unqualified devotion to his public duty' might be impaired." citation omitted. 1 FPPC Opinions at 206.

Therefore, there is no hard and fast rule to guide the Board members in determining whether there are "reasonably foreseeable" material financial effects flowing from certain governmental decisions. Each determination will turn on the facts of a particular case.

Under the present facts, however, certainly it is reasonably foreseeable that there will be some financial impact on those Board members' economic interests because of their ownership of historic properties, since the whole concept underlying development of an incentive program is to create financial and other inducements to undertake rehabilitation of historic properties.

B. Meaning of "material financial effect" if economic interests are indirectly affected.

Once it has been decided that Board members are "public officials" for purposes of disqualification under the Act, that development of an incentive program for rehabilitation of historic properties in the City is in the nature of governmental decisionmaking, and that those Board members who own historic properties will reasonably foreseeably be either directly or indirectly affected by the incentives, it is necessary to determine whether the Board members will be affected directly and materially or whether one or more of their economic interests will be materially affected by the incentive program.

Whether a public official is affected directly and materially by a governmental decision is discussed at page 7, above, and will not be repeated here. The following discusses only those situations in which a public official's economic interests are indirectly affected by a governmental decision. Until such time as the types of economic interests held by the Board, if any, are known precisely, it is impossible to determine whether the incentive program would have a material financial effect on those interests. To assist the affected Board members, however, we attach excerpts from relevant FPPC regulations which define "material financial effect" on each type of economic interest. (2 Cal. Code of Regs. sections 18702 through 18702.6.) For purposes of completing this analysis, however, this memorandum will assume that the Board members' economic interests will be affected financially and materially by the incentive program.

IV. Will the public generally be affected in the same way as the Board members?

Assuming that the Board members themselves or their economic interests will be affected by the incentive program and that it is reasonably foreseeable that there will be a material financial effect on these individuals or their economic interests, the Board members may still not be disqualified from participating in developing the incentive program if it can be shown that the public generally will be affected in substantially the same way.

The relevant portion of FPPC regulation section 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).

2 Cal. Code of Regs. section 18703.

Although the FPPC has never adopted a strict arithmetic test for determining what constitutes a significant segment of the public, the FPPC has stated that the population affected be large in number and heterogeneous in nature.

A recent private advice letter issued by the FPPC summarizes how the FPPC has interpreted the public generally exception, as follows:

I-90-151 . . .) We have advised in the past that 36 percent of the housing units and population of a county constituted a significant segment of the public. (Marsh Advice Letter, No. A-89-422) We have also advised that two percent of the similarly situated homeowners and one percent of the population of a city's population are not a significant segment of the public. (Remelmeyer Advice Letter, No. 87-210; Zamboni Advice Letter, No. A-89-021) The residential units in a development zone constituting five percent of the residences in a city are not a significant segment of the population. (Cosgrove Advice Letter, No. A-89-120) We have also said that 15 land owners out of the entire city of Carlsbad was not a significant segment of the population of Carlsbad. (Biondo Advice Letter, No. I-90-241)

According to the facts presented, the number of historical properties within this City constitutes only about 2-4% of the properties throughout the City. The Board members who own historical properties are among those 2-4% of the City's property owners. Following the guidelines established in the several private advice letters outlined above, historical property owners in this City do not constitute a significant segment of the population. Therefore, we conclude that the public generally exception would not apply to permit those Board members who own historical properties in this City to participate in developing the incentive programs for historical sites in this City.

CONCLUSION

The Historical Site Board is considering various types of financial and other types of incentives to encourage historical site owners to preserve their historical property. Some of the Board members themselves own historical properties in this City. The question is posed whether those Board members may participate in developing the incentive program without violating the conflict of interest laws. For the reasons set forth in this memorandum,

the City Attorney finds that these Board members indeed may be prohibited from participating in developing the incentive program by virtue of their ownership of historical properties in this City.

Attorney

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