

DATE: February 15, 1994

TO: Councilmember Christine Kehoe

FROM: City Attorney

SUBJECT: Potential Conflict of Interest in Development of
Housing Commission Property at 4545 Arizona Street

This is in response to your memorandum of January 3, 1994, to City Attorney John W. Witt. You ask whether you have a potential conflict of interest in the development of a property at 4545 Arizona Street, because your residence is located nearby. The Housing Commission has recently purchased this property and the site will be reconfigured and developed. Although you do not sit on the Housing Commission, by virtue of your position on the City Council you are also a member of the Housing Authority, which has the power to review certain decisions of the Housing Commission. Upon review, the Housing Authority may uphold, reverse, or modify a decision of the Housing Commission.

BACKGROUND FACTS

We have obtained the background facts on this matter from Hossein Ruhi, Deputy Director of the City's Engineering Department, Robert J. Norris, Jr., Deputy Executive Director of the Housing Commission, and David Schuh, Project Manager of the Housing Commission. We have also studied the following Housing Commission reports on this matter: (1) Report to the Housing Authority for the Agenda of November 24, 1992, regarding Acquisition of Greentree Plaza, Skyline Park, and 4545 Arizona Street; (2) Report No. 93-157 dated May 28, 1993, regarding FDIC Acquisitions in Districts 3 and 4; (3) Report No. 93-176 dated June 4, 1993, regarding FDIC and RTC Acquisitions (Citywide); (4) Report No. 93-172 for the Agenda of June 14, 1993, regarding Acquisition of three (3) FDIC Properties Located at 4545 Arizona Street, 4720-70 Logan Avenue and the Intersection of Skyline and Woodman; and, (5) Report No. 93-231 for the Agenda of August 16, 1993, regarding Development Plans for Properties Being Acquired from the Federal Deposit Insurance Corporation: Skyline Park, Greentree Plaza and 4545 Arizona Street. We also reviewed the "Pricing and Absorption Strategy for a 38 Unit Attached For-Sale Project Located in San Diego, California" prepared for the San Diego Housing Commission in January 1994 by the Meyers Group. We have also received an expert opinion and analysis from Kenneth A. Keagy, MAI, of Lee C. Johnson Company on the potential impact on

the market value and market rental value of your property resulting from the proposed Housing Commission action on the Arizona Property.

From the above, we have learned the following relevant facts: The Housing Commission authorized purchase of the property at 4545 Arizona Street in November 1992, from the Federal Deposit Insurance Corporation. The purchase price was \$1,450,000. Escrow closed in January 1994.

The property is a 50 unit complex consisting of 2 one-bedroom and 48 two-bedroom apartments. Building permits were issued in 1985 and the structures are approximately 95 percent complete. Since issuance of the building permits, the Mid-City Planned District Ordinance ("PDO") was enacted in January 1986. Pursuant to the Mid-City PDO, this site is currently zoned MR-1750. This zoning would permit development of a maximum of 29 units at the Arizona site if the project were to be built now (rather than the 50 units that were allowed and built under the zoning laws existing in 1985).

According to the August 1993 report, Housing Commission staff is exploring ways to reconfigure the project to decrease density in a manner consistent with maintaining economic feasibility. Also, the staff is trying to develop some space within the project to create community services normally not found in a typical apartment project, services such as day care, on-site office space, and meeting or counseling rooms. These services would primarily serve residents of the building, but they could serve neighborhood residents as well. According to the August report, the estimated cost of reconfiguring and completing the complex at 4545 Arizona Street is \$2.4 million, including the purchase price. According to Dave Schuh, the final development plans are scheduled to go before the Housing Commission for discussion and approval at its meeting in February 1994. The Housing Commission's decision on the development plans is final unless at least one Housing Authority memberF Effective March 2, 1994, it will take three (3) members of the City Council to refer a Housing Commission decision to the Housing Authority for review. Ordinance No. O-18030, adopted January 31, 1994, amending SDMC ' 98.0301.

requests

review of the decision or, as a policy matter, the Executive Director of the Housing Commission decides to ask the Housing Authority to review the decision. For purposes of this memorandum, it is assumed that the Housing Authority will be reviewing the Housing Commission's decision. If the question does not come before the Housing Authority for review, the question of potential conflict of interest becomes moot.

From Mr. Ruhi of the Engineering Department, we have learned that your residence is 1,014 feet from the 4545 Arizona site.F

You provided us with the address of your residence in your inquiry. You are not required under the law, however, to disclose publicly the address of your personal residence. Gov't Code ' 87206(f). Therefore, we decline to place it in this memorandum, which will become a public record as soon as it is issued.

You own your home.

LEGAL ANALYSIS

The applicable law necessary to analyze the legal issues presented by your question is the Political Reform Act of 1974 (Government Code section 81000 et seq.). 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 herself from participating in a governmental decision depends on examination of four factors:

- (1) Does the public official have an economic interest that may be affected by that governmental decision?
- (2) If so, will the decision have a reasonably foreseeable, financial effect on that economic interest?
- (3) If so, will the reasonably foreseeable effect be material?
- (4) If so, will that financial effect be distinguishable from the financial effect on the public generally?

I. Is there an Economic Interest?

City Councilmembers sitting as Housing Authority members are clearly public officials for purposes of analysis under Government Code section 87100. Therefore, we examine the first question, namely, whether you have a economic interest that could

be affected by any Housing Authority decision on the Arizona property. You have no conflict if you have no economic interest (as defined by the statute) that could be affected by the governmental decision.

In the present case, you own a home near the Arizona Street property, and your ownership interest exceeds \$1,000. We conclude that you have an economic interest because you own real property near the project site, and the value of that property equals 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 her economic interests 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 you as a public official to know under all circumstances whether one of your economic interests will be affected by the decision, nor does the law require you to inquire about every detail of every item on the Council or Housing Authority docket. However, the law provides clues which should put you as a Councilmember^F For purposes of this memorandum, the term "Councilmember" is used to connote Housing Authority members.

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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 Fair Political Practices Commission's ("FPPC") rules governing "material financial effect." 2 Cal. Code of Regs. sections 18702 through 18702.6. In particular, a public official should know, or inquire to determine, whether he or she has an interest in or outright owns properties within 2,500 feet (that is, within approximately one-half mile) of the site of a proposed governmental 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 public official 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 create special circumstances that invite further analysis.

Even absent "special circumstances," however, the FPPC rules indicate that if a public official has property within the 2,500-foot radius, the public official 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 public official on notice to inquire further.

In the present case, you were aware that your residence was located within approximately one-half mile of the Arizona Street property. Therefore, you properly asked the City Attorney about potential conflicts arising from the proximity of your residence to the project site. The Department of Engineering and Development subsequently determined that your residence is approximately 1,000 feet from the Arizona property. The Housing Authority's decision on whether to reconfigure and develop the site to reduce its density to conform to current zoning laws could affect your home's fair market value or its rental value. Therefore, given the proximity of your residence to the Arizona Street property, we conclude that it is reasonably foreseeable that there could be some financial effect on your property resulting from a Housing Authority's decision pertaining to the Arizona property.

Since we have determined that there is reason to know that your economic interest in your residence may be affected by a Housing Authority decision, it is necessary now to 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 has adopted extensive rules that clarify the meaning of the phrase "material financial effect," as used in Government Code section 87103 and 2 Cal. Code of Regs. sections 18702 through 18702.6. A copy of those rules is attached for your convenience (Exhibit A). Although complex and lengthy, these 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 your real property interest were directly involved in the governmental decision at hand, then Regulation 18702.1 would be applicable. For example, if your residential property were itself to be acquired by the Housing Commission for development, then the regulation would apply. But when real property is only indirectly involved in the decision, then Regulation 18702.3

applies.

In the present case, since your residence is not the proposed site for development by the Housing Commission, 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 your property is from the property that is the subject of decision. If your property is within 300 feet of the subject property, then you must show that the decision will have no financial effect on your 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 public official's property resulting from the decision (Regulation 18702.3(a)(1)).

If your 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 your property were more than 2,500 feet from the subject property then the decision will not be material unless special circumstances would 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 your property or there are not at least ten other properties within 2,500 feet of your property. (Regulation 18702.3(b)(1) and (2).)

In short the FPPC regulations shift the presumptions on materiality depending on how close a public official'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.

2 Cal. Code of Regs. section 18702.3(d).

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.

Determining whether a particular governmental decision will have a material financial effect on one or more economic interests of a public official is a factual determination requiring, especially in close calls, an expert opinion. Therefore, we turned to the City Manager for assistance on this issue.

The City Manager engaged the services of Kenneth Keagy, an independent professional appraiser, to obtain an expert opinion on the materiality of any financial effect the Housing Authority's decision would have on your residence. Mr. Keagy's report is attached for your reference as Exhibit B. Mr. Keagy analyzed the question using the criteria set forth in FPPC Regulation 18702.3 and he concluded that the proposed reconfiguration and development of the 4545 Arizona Street property will have little impact on the market or rental value of your home and that impact would be much less than the \$10,000 change in fair market value or \$1,000 change in rental value required by 2 Cal. Code of Regs. 18702.3 to trigger a disqualifying conflict of interest.

Therefore, under the facts given and based on Mr. Keagy's expert opinion, we conclude you do not have a disqualifying financial interest resulting from the proposed reconfiguration and development of the 4545 Arizona Street property. Since we find no disqualifying conflict of interest, there is no need to determine whether the "public generally" exception applies here.

CONCLUSION

The question you presented is whether you would be able to participate as a Housing Authority member in any decision pertaining to the reconfiguration and development of property at 4545 Arizona Street. Since escrow has closed on the Housing Commission's purchase of the property, the question of whether to purchase it or not will not come before the Housing Authority again. In the present case, you clearly have an economic interest in any development decision about the Arizona property by virtue of your residence, which you own and which is

approximately 1,000 feet away from the Arizona property.

Since your residence is located between 300 and 2,500 feet of the Arizona property, it was necessary to determine whether the result of any Housing Authority decision pertaining to the reconfiguration or development of that property will foreseeably change the fair market value of your residence by \$10,000 or more or change its rental value by \$1,000 or more per year. 2 Cal. Code of Regs. 18702.3. Independent real property appraiser Kenneth Keagy was asked to give his professional opinion on that issue. In his opinion, any impact the Housing Authority decision will have on the market value or rental value of your property is minimal and well within the regulatory limits. Therefore, we conclude that you have no disqualifying conflict of interest prohibiting you from participating in or voting on any Housing Authority decision pertaining to the reconfiguration or development of the Arizona Street property.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

CCM:jrl:011(x043.2)

cc Hossein Ruhi, Deputy Director,

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