

MEMORANDUM OF LAW

DATE: May 24, 1994

TO: Harry Mathis, Councilmember, District No. 1

FROM: City Attorney

SUBJECT: Potential Conflicts of Interest Arising from Two
Transportation Projects

This is in response to your opinion request of February 22, 1994, to City Attorney John W. Witt. You originally asked whether you have a potential conflict of interest that would prevent your participation in governmental decisions pertaining to three (3) separate projects: (1) Regents Road Bridge; (2) Airport at Miramar; and, (3) "Texas" U-Turn project for Ardath Road/SR-52 at Regents Road exit. Since that original request, your Chief of Staff Scott Tillson has asked the City Attorney to focus this response on the proposed Regents Road Bridge and Texas U-Turn projects, and to wait for further direction on the potential Miramar Airport. Your questions arose because of the location of your residence in relation to these projects.

Since the response to potential conflict of interest questions is fact-specific, I will set forth the pertinent facts for each question, then will analyze those facts separately.

BACKGROUND FACTS

I have obtained the background facts on these matters from several sources: Scott Tillson, your Chief of Staff; Allen Holden, Jr., Deputy Director, Transportation Planning Division of the Engineering Department ("E&D"); Ron D'Argento, Associate Engineer (Civil), and Brad Jacobsen, Associate Engineer (Traffic), both of the Transportation Planning Division of E&D; and Michael R. Steffen, Deputy Director, Real Estate Acquisition and Valuation Division, Real Estate Assets Department. I have also reviewed several documents provided by the Engineering and Development and Real Estate Assets Departments.

Proposed Regents Road Bridge

According to Mr. Ron D'Argento of E&D, proposed construction of Regents Road Bridge actually consists of three (3) separate transportation projects, as shown in the draft North

University City ("NUC") Public Facilities Plan and Facilities Benefit Assessment for Fiscal Year 1995: (1) "Regents Road - AT&SF Bridge to 100 Feet North of Lahitte Court" (Project NUC-12); (2) "Regents Road - 100 Feet North of Lahitte Court to Governor Drive" (Project: NUC-14); and, (3) "Regents Road Bridge" (Project NUC-18).

Essentially, the proposed project consists of constructing a bridge over existing railroad tracks and building a new 4-lane road or widening existing portions of Regents Road to 4-lanes, with Class II bike lanes. According to information provided, preliminary design work is underway and the Council will be asked to review and approve environmental impact reports on the project in the coming fiscal year. The Council is also scheduled to award the design contract for the bridge itself during fiscal year 1995, which starts July 1, 1994.

For purposes of this opinion request you provided us with the address of your personal residence.F

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

Based on an assessor's

tax lot map provided by Mike Steffen of the City's Real Estate Assets Department, Ron D'Argento of E&D determined that your residence is approximately 2,720 feet from the nearest point of the three-part bridge project.

Proposed Texas U-Turn on SR-52 at Regents Road

The proposed Texas U-Turn on SR-52 at Regents Road is one of several proposed alternatives to constructing two "missing ramps" on Interstate-5 ("I-5"): (1) one ramp southbound I-5 onto westbound Ardath Road, (2) the other ramp westbound on Ardath to northbound I-5. (See City Manager Report No. 89-465 to the Council's Transportation and Land Use Committee, September 25, 1989.) Volume 4 of the City Manager's Proposed Fiscal Year 95 Budget, C.I.P. Project No. 52-442.0, page 144, provides \$80,000 in the coming year to further study the Texas U-Turn and related alternatives. If the City Manager's proposal is adopted, there will be approximately \$1 million remaining in the budget to continue further studies of the Texas U-Turn and related proposals in future fiscal years.

Again, based on the Tax Assessor's map provided by Mike Steffen, Ron D'Argento of E&D determined that your residence is approximately 1,600 feet from the nearest point of the proposed Texas U-Turn on SR-52 at Regents Road.

APPLICABLE LAW

The applicable law necessary to analyze the legal issues

presented by your questions is the Political Reform Act of 1974 (Government Code section 81999 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 himself 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, thereby creating a disqualifying financial conflict of interest?
- (4) If so, will that financial effect be distinguishable from the financial effect on the public generally, thereby permitting participation in the government decisionmaking despite the conflict?

I. Is there an Economic Interest?

City Councilmembers 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 City Council decision on the two projects described above. 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 both the proposed Regents Bridge and Texas U-Turn projects, and your ownership interest exceeds \$1,000. We conclude that you have an economic interest because you own real property near the project sites, 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 his 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 docket. However, the law provides clues which should put you as a 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 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. Rules governing materiality of financial effects in property within 2,500 feet are set forth in Regulation 18702.3(a)(3).

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. The rules for determining materiality of financial effect on properties outside the 2,500 foot radius differ. See Regulation 18702(b).

In the present case, you were aware that your residence was located fairly close to both the proposed Regents Bridge and Texas U-Turn projects. Therefore, you properly asked the City Attorney about potential conflicts arising from the proximity of your residence to the project sites. The Department of Engineering and Development subsequently determined that your residence is approximately 2,720 feet from the proposed Regents Bridge project and approximately 1,600 feet from the proposed Texas U-Turn project. The City Council's action on each of these projects, for example, approval of any environmental impact reports pertaining to the projects or authorization for the City Manager to proceed with consultant contracts for design of the projects, could affect your home's fair market value or its rental value.

Given the proximity of your residence to the Texas U-Turn project (1,600 feet), we conclude that it is reasonably foreseeable that there could be some financial effect on your

property resulting from the Council's decisions pertaining to these projects. Therefore, it is necessary to determine whether that financial effect will be material as to the value of your real property interest.

Although less likely to pose a conflict of interest, it is also necessary to determine whether future City Council decisions pertaining to the Regents Road Bridge project will have a material financial effect on your residence approximately 2,720 feet away.

B. Meaning of "material financial affect" generally.

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 Cal Trans to construct the Texas U-Turn, 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 either the Texas U-Turn or Regents Road Bride projects, 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.

1. 300 Foot Rule

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)).

2. 300-2,500 Foot Rule

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)).

3. Over 2,500 Foot Rule

Lastly, if your property is 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).

III. Determination of Materiality of Effect on your Property Resulting from Council Actions on the Two Projects.

A. Determining Materiality of Financial Effect on Your Residence as Pertaining to the Regents Road Bridge Project

Since your residence is approximately 2,720 feet from the boundaries of the proposed Regents Road Bridge project, it will be necessary to apply the rules in 2 Cal. Code of Regs. section 18702.3(b) to determine whether a particular governmental

decision will have a material financial effect on your property. That is, it is necessary to determine whether there are special circumstances triggering disqualification. Special circumstances do not exist if either: (1) there are more than 10 properties under separate ownership within 2,500 feet of the public official's property; or, (2) the effect of the governmental decision on the public official's property is the same as the effect on 25% of all other properties within 2,500 feet of the public official's property. Determination of special circumstances is a fact question, for which we asked assistance from Mr. Holden of Engineering and Development.

The particular City Council decisions pertaining to the Regents Road Bridge project coming up in FY 95 will be the review and potential approval of some environmental documents. Mr. Holden pointed out that adding a bridge on Regents Road will merely make another North-South connector parallel both to Genesee Avenue and I-5. This new connector will serve equally all residents of University community, of which you are a resident, as well as many people in surrounding communities. After studying maps of your residential area and the project site, Mr. Holden determined that there are well over ten (10) properties within 2,500 feet of your property. Additionally, although not necessary to do so in light of this previous finding, he found that decisions pertaining to the proposed bridge project will affect well over 25% of other properties within 2,500 feet of your property. Under either finding we conclude that no special circumstances affecting your property will result from City decisions pertaining to the Regents Road Bridge.

Therefore, we conclude you have no conflict of interest arising from the proximity of your residence to the Regents Road Bridge project that would prevent you from participating in City decisions pertaining to the project.

B. Determining Materiality of Financial Effect On Your Residence as Pertaining to the Texas U-Turn Project:

Since your residence is approximately 1,600 feet from the boundaries of the proposed Texas U-Turn project, it will be necessary to apply the rules in 2 Cal. Code of Regs. section 18702.3(a)(3) to determine whether a particular City Council decision will have a material financial effect on your property.

The particular governmental decision pertaining to the Texas U-Turn project coming up on the Council docket will be whether or not to approve the City Manager's proposed FY 95 budget. Determining materiality is a factual question. Therefore, we again asked Allen Holden, Jr., of the Engineering and Development Department for assistance in making this determination.

Mr. Holden first pointed out that the Texas U-Turn, if constructed, will affect only those persons entering or leaving La Jolla, not the residents of University community where you live. The U-Turn would be built where a freeway with on and off ramps currently exists at SR-52/Regents Road. As the crow flies, your property is approximately 1,600 feet from one edge of the proposed U-Turn. However, if one travels the normal streets and highways between your residence and the proposed U-Turn, your residence is a substantial distance further away from the project. Mr. Holden found that, if the Texas U-Turn were built, the traffic levels and patterns in your area will not change substantially; neither will the level of privacy, intensity of use, noise, or emissions.

Based on the above factual findings, we find that most likely your property values will probably not change by the amounts required to trigger disqualification as a result of any City Council decision pertaining to the U-Turn. Short of obtaining a professional property appraisal, however, there is no sure way to make that determination. Even if the property value changes sufficiently to trigger disqualification, we think the "public generally" exception, discussed below, will allow you to participate fully in any discussion or decisionmaking pertaining to the U-Turn.

IV. Is the Public Generally Affected in this Same Way?

If and only if a public official's economic interest is affected materially thereby triggering a potential conflict of interest, is it necessary to determine whether the "public generally" is affected in the same way. If "yes," the public official is permitted to participate fully and vote on the governmental decision that created the conflict. The "public generally" exception arises out of statutory language (Government Code section 87103), and has been elaborated upon by the Fair Political Practices Commission ("FPPC") in regulations. The FPPC has recently amended the "public generally" regulation, to read in relevant part as follows:

18703. Effect on the Public Generally.

(a) General Rule: Except as provided in Government Code Sections 87102.6 and 87103.5 and California Code of Regulations, Title 2, Sections 18703.1, 18703.3 and 18703.5, the material financial effect of a governmental decisions on a public official's financial effect of a governmental decision on a public official's economic interests

is indistinguishable from its effect on the public generally if both subdivisions (a)(1) and (a)(2) of this regulation apply:

(1) Significant Segment:

The governmental decision will affect a "significant segment" of the public generally as set forth below:

(A) The decision will affect:

(i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents, or

(ii) Ten percent or more of all property owners, all home owners, or all households in the jurisdiction of the official's agency or the district the official represents, or

(iii) Fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession; or,

(B) The decision will affect 5,000 individuals who are residents of the jurisdiction; or,

(C) The decision will affect the segment of persons identified in California Code of Regulations, Title 2, Sections 18703.2; or,

(D) The decision will affect a segment of the population which does not meet any of the standards in subdivisions (a)(1)(A) through (a)(1)(C), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.

(2) Substantially the Same

Manner: The governmental decision will affect the official's economic

interest in substantially the same manner as it will affect the economic interests of the segment identified in subdivision (a)(1) of this regulation.

In the present case, neither Government Code sections 87102.6 or 87103.5, nor California Code of Regulations, Title 2, Sections 18703.1, 18703.3 or 18307.5 apply here. Therefore, the general rule articulated in Regulation 18703(a) applies; and, it is necessary to determine whether both Sections 18703(a)(1) and (a)(2) apply. Again, that is a factual determination, and we turned to Mr. Holden of Engineering and Development for assistance to determine the facts under the criteria of these parts of the regulation.

As Mr. Holden pointed out above, the Texas U-Turn, if built, will serve persons entering and leaving La Jolla. The University community where you live will be largely unaffected by the creation of the U-Turn. The University community comprises at least 10% of the population of District No. 1, the District from which you are elected. Using the terminology of FPPC Regulation 18703(a)(2), your residence will be affected in the same way as a "significant segment" of the other properties in the District. Therefore, you qualify under FPPC Regulation 18703 for the "public generally" exception, and you may fully participate in any decisions pertaining to the Regents Road Bridge project.

V. SUMMARY.

A. Regents Road Bridge

Your residence is approximately 2,720 feet from the nearest point of the Regents Road Bridge project. After extensive analysis of the law and facts, we conclude that you do not have a conflict of interest disqualifying you from participating in discussions or decisions pertaining to the bridge.

B. Texas U-Turn

Your residence is approximately 1,600 feet as the crow flies from the proposed "Texas U-Turn" project for Ardath Road/SR-52 at Regents Road. After extensive analysis of the law and the facts, we have determined that you most likely have no disqualifying conflict of interest in participating in discussions or decisions on the proposed project. Assuming for purpose of argument only that you will have a conflict, we analyzed whether the "public generally" exception applied to permit you to fully participate and vote on Texas U-Turn matters. We determined that the exception applied. Therefore, you may fully participate and vote

on the matters pertaining to the Texas U-Turn.
JOHN W. WITT, City Attorney

By
Cristie C. McGuire
Deputy City Attorney

CCM:jrl:011:3.2)

Attachment

cc Allen Holden, Jr., Engineering and Development

ML-94-46

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