

MEMORANDUM OF LAW

DATE: June 23, 1994

TO: The Honorable Susan Golding

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Pertaining to  
Consultant Agreement for Design of Street  
Improvements to Genesee Avenue and Nobel Drive

By memorandum dated June 3, 1994, you have asked the City Attorney to determine whether you have a conflict of interest in participating in or voting on Item No. 123 on the City Council docket of June 6, 1994, pertaining to a consultant agreement for certain street improvements in the Genesee Avenue and Nobel Drive area. The item has been continued to June 27, 1994.

On docket item No. 123, the City Manager essentially asks the City Council to adopt a resolution authorizing execution of an agreement with a design consultant for street improvements ("Proposed Project") and to authorize expenditure of money from a Facilities Benefit Assessment ("FBA") Fund for the Proposed Project. Your questions arise because your personal residence is located near the Proposed Project.

BACKGROUND FACTS

As described on the June 6th docket, if the resolution is adopted, this project will widen Genesee Avenue from its present four lanes to six lanes from Nobel Drive to State Route 52 and add a right-turn-only lane from Nobel Drive to southbound Genesee Avenue. The project will also reconstruct southbound Genesee Avenue to the westbound State Route 52 intersection and will add a traffic signal. The Class II Bicycle Lanes will be retained and all curb parking will be eliminated along Genesee.

From prior communications with you and your staff we have learned that you have an ownership interest exceeding \$1,000 in a residence and a common area near Nobel Drive.

The exact location of your residence was provided to the City Attorney for purposes of researching and analyzing the legal issues presented. The location of your personal residence is not required to be disclosed under the Political Reform Act (Government Code section 87206(f)) and will not be disclosed here.

We have obtained the assistance of Jim Prescott, Associate

Engineer, Engineering Design Division, City of San Diego  
Department of Engineering and Development to determine the  
distance between your residence and the Proposed Project and to  
provide other assistance in making factual determinations  
required by this Memorandum of Law. Mr. Prescott has determined  
that, as the crow flies,F

For purposes of determining whether there are potential  
disqualifying conflicts of interest arising from economic interests  
in real estate, the proximity of a public official's real property  
interest is measured from the nearest boundary of the proposed  
project site to the nearest boundary of the official's property.  
Fair Political Practices Commission ("FPPC") Private Advice Letter  
A-93-403 (Jan. 27, 1994).

- (1) the distance from the edge of your  
residential property line to the nearest point of the Proposed  
Project is approximately 2,700 feet; and, (2) the distance from  
the edge of the common area surrounding your residence to the  
nearest point of the Proposed Project is 2,300 feet.

#### APPLICABLE LAW

In lieu of reciting the applicable law pertaining to  
conflicts of interest arising out of ownership of a residence  
near a proposed project site, attached is a copy of a Memorandum  
of Law dated May 24, 1994, to Councilmember Mathis which recites  
the relevant law in detail.

#### ANALYSIS

Your economic interest of \$1,000 or more in your personal  
residence and its common area trigger examination of whether the  
Council's decision pertaining to the Proposed Project will have a  
material financial effect on that economic interest, thereby  
disqualifying you from participating in the decision.

Since your residence is only about one-half mile from the  
Proposed Project, it is reasonably foreseeable that the street  
improvements in the Nobel-Genesee area will have some financial  
effect on your residence and its common area. The central issue  
posed by your inquiry is whether the Council's decision on the  
Proposed Project will have a material effect on your financial  
interest in your residence and its common area.

#### MATERIALITY OF FINANCIAL EFFECT ON YOUR RESIDENCE

Since your residence, not counting the common area, is  
approximately 2,700 feet from the Proposed Project, it is  
necessary to apply the rules in 2 California Code of Regulations  
section 18703.2(b) to determine whether the Council's decision  
will have a material financial effect on your residence. Under  
that regulation, it is necessary to determine whether special  
circumstances exist to trigger disqualification. Special  
circumstances do not exist if either: (1) there are more than ten

(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. Since these are fact questions, we turned to Mr. Prescott for assistance.

Mr. Prescott is very familiar with the Proposed Project and, at our request, he studied several specific maps and documents pertaining to the area in question. Mr. Prescott states that the project, if approved, will increase traffic generally in the neighborhood. Indeed, it is designed to do so, because it is designed to relieve current bottlenecked traffic. He also determined that the project, if approved, will affect well over 25% of the properties within 2,500 feet of your property in the same way. We conclude, therefore, that no special circumstances exist arising from the location of your residence. We also conclude that you are not required to disqualify yourself from participating in, or voting on, the Proposed Project by virtue of the location of your residence.

#### MATERIALITY OF FINANCIAL EFFECT ON THE COMMON AREA SURROUNDING YOUR RESIDENCE

Since the boundary of the common area surrounding your residence is approximately 2,300 feet from the Proposed Project's boundary, it is necessary to apply the rules in 2 California Code of Regulations section 18702.3(a)(3) and (d) to determine whether the Council's decision on the Proposed Project will have a material financial effect on your economic interest in the common area, thereby requiring your disqualification from the Council's decisionmaking. Again we turned to Mr. Prescott for help. Specifically addressing the factors set forth in Section 18702.3(d)(3), Mr. Prescott found that the project, if approved, will clearly increase traffic in the neighborhood. He also found, however, that the project will not affect the view from or privacy of your residence. The level of intensity of use will increase generally in the area, but not specifically in your development, in his opinion. Although not certain, Mr. Prescott states that the City's Engineering Department anticipates that adverse air emission in the area will decrease because traffic will not be stalled at the Genesee-Nobel intersection. Given these findings, it is highly unlikely that the Proposed Project will have the major financial effect required by 2 California Code of Regulations section 18702.3(a)(3) or (d) to trigger disqualification.

#### APPLICABILITY OF PUBLIC GENERALLY EXCEPTION

Since we cannot make the determination of "materiality of

financial effect" on the common area with absolute certainty without an opinion of a professional real estate appraiser or the equivalent,F

According to a private advice letter recently issued by the FPPC, a "public official does not need to retain an appraiser to assess the financial effect of a decision on his or her property." A public official will be considered to have made a "good faith" effort to determine materiality of financial effect, if the public official had a person "qualified" to determine the value of real property apply the factors outlined in the FPPC's materiality regulations to reach a determination. Private Advice Letter A-93-403 (January 27, 1994).

it is necessary to take the next analytical step.

That is, assuming for purposes of argument only that you have a conflict of interest in the Proposed Project because of the proximity of your residence's common area to the Project, are you nonetheless eligible to participate and vote because you fit within the "public generally" exception?

The applicable law pertaining to the "public generally" exception was set out in the previously mentioned and attached Memorandum to Councilmember Mathis. 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 18703.5 apply here. Therefore, the general rule established in Regulation section 18703(a) applies and it is necessary to determine whether both Sections 18703(a)(1) and (a)(2) apply. Again, these are factual determinations and we turned to Mr. Prescott for help.

As Mr.Prescott pointed out above, the Proposed Project is designed to increase traffic circulation in the area. It will widen one existing major road (Genesee) and create a right-turn-only lane at a major intersection in the area. According to Mr. Prescott, as of today's date, the average daily traffic circulation along Genesee Avenue between Nobel and Governor Drives is 31,000 vehicle trips. The Proposed Project when complete will therefore affect many more than 5,000 individuals in this City who use these streets daily. Mr. Prescott also finds that the Proposed Project, if approved, will affect the common area surrounding your property in the same way that it affects a "significant segment" of the rest of San Diego.

In light of these determinations, we find that the "public generally" exception applies in this case, and that you will not be prohibited from participating or voting on the Proposed Project by virtue of the proximity of the common area surrounding your property to the boundary of the Proposed Project.

EXPENDITURES OF FACILITIES BENEFIT ASSESSMENT MONIES

As a final matter, you asked whether you could participate and vote on expenditures of Facilities Benefit Assessment monies in your area.F

FBA monies have already been assessed and paid on your property. The fees were assessed against the developer, who as is customary, most likely passed those fees on to individual property buyers such as yourself. The Council will not be asked whether to levy FBA's in this area or in what amounts; that decision has already been made by a previous Council.

The answer will depend on what specific projects are proposed. (For example, we understand that the proposed connection of Nobel Drive to the 805 freeway may be coming before the Council in this next fiscal year. That connector would likely be financed by FBA monies.) There can be no blanket determination. We invite you to ask the City Attorney for an opinion if and when a specific proposed expenditure arises.

#### CONCLUSION

Your residence is approximately 2,700 feet from the nearest boundary of the proposed Nobel Drive-Genesee Avenue street improvement project. After extensive analysis of the law and facts, we conclude that, by virtue of the location of your residence, not counting the common area, you do not have a conflict of interest disqualifying you from participating in discussions or decisions pertaining to the Nobel Drive-Genesee Avenue street improvement project.

The boundary of the common area surrounding your residence is approximately 2,300 feet as the crow flies from the proposed Nobel-Genesee street improvement project. We have determined that most likely you have no disqualifying conflict of interest in participating in discussions or decisions on the Proposed Project. However, assuming for purpose of argument only that you will have a conflict arising from your economic interest in the common area, we analyzed whether the "public generally" exception applied to permit you to fully participate and vote on this Proposed Project. We determined that the exception applied. Therefore, you may fully participate and vote on matters pertaining to the Nobel-Genesee street improvements.

As a final matter you asked whether, as a general rule, you may participate and vote on expenditures of Facilities Benefit Assessment monies. The answer will vary depending on the specific facts pertaining to a proposed expenditure.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire  
Deputy City Attorney

CCM:jrl:pev:011(x043.2)

Attachment

cc: Jim Prescott, Associate Engineer, Department of  
Engineering and Development

ML-94-55

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