

MEMORANDUM OF LAW

DATE: November 15, 1994

TO: Councilmember Christine Kehoe

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Arising from Location of
Personal Residence/Participation in the Adoption of the
North Park Redevelopment Survey Area

By memorandum dated November 1, 1994, you have asked the City Attorney for advice regarding a potential conflict of interest in the adoption of the revised boundary of the North Park Redevelopment Survey Area. The potential conflict arises from the location of your residence in the Survey Area. This memorandum is in response to that opinion request.

BACKGROUND

I have obtained the following facts from your original memorandum dated November 1, 1994, a draft of the North Park Redevelopment Project report prepared by Patricia K. Hightman, Deputy Executive Director of the Redevelopment Agency dated October 28, 1994, copies of the recommended project area boundaries, and a parcel map which shows the actual location of your residence. I have also discussed these matters briefly over the telephone with Ples Felix, Project Manager for the North Park Redevelopment Project.

You own and live in a single family residence which is located within the North Park Redevelopment Survey Area.

Although you have provided your exact street address, I decline to place it in this memorandum since it will become a public record as so as it is issued. You are not required to disclose your personal residence. Gov't Code ' 87206(f).

On November 15,

1994, the City Council, sitting as the Redevelopment Agency, will decide whether to adopt the revised boundary of the North Park Redevelopment Survey Area. Your residence will still be included in the revised boundary of the Survey Area.

A brief history of the North Park Redevelopment Project follows. These fact were obtained from the draft North Park Redevelopment Project report dated October 28, 1994.

The Redevelopment Agency conceptually approved the preparation of the North Park and Mid-City Redevelopment Plans in March of 1988 based

on the "Mid-City Redevelopment Feasibility Study." The City Council established the North Park Redevelopment Survey Area in May of 1989. The survey area was expanded on May 14, 1990, by Resolution No. R-275708. The Planning Commission selected the Project Area and approved the preliminary plan in October of 1990.

The need for the reexamination of both the Survey and the Project Areas became necessary due to the passage of the 1993 Redevelopment Law Reform Act, which became effective on January 1, 1994. After reexamining the Survey and Project Areas, staff will recommend on November 15, 1994, that the City Council expand the Survey Area to include two parcels on the southwest corner of University Avenue and Alabama Street, one parcel on the southwest corner of Boundary Street and the alley north of Adams Avenue, and the entire block on Georgia Street, Florida Street, Meade Avenue and El Cajon Boulevard.

Ples Felix, Project Manager for the North Park Redevelopment Project, has indicated that none of the improvements contemplated by the redevelopment agency are expected to create a greater impact or benefit to your property than would apply with respect to any other persons in the redevelopment area.

You have requested an opinion as to whether you have a conflict of interest that would preclude you from participating in the decision to adopt the revised Survey Area due to the fact that your residence is located within the current, as well as the recommended Survey Area. Our analysis and conclusion follow.

ANALYSIS

The issue presented involves the conflict-of-interest provisions of the Political Reform Act of 1974 (the "Act") which are set forth beginning with Government Code section 81000. The Act specifies when economic conflicts of interest prohibit a public official from participating in or making a governmental decision.

Government Code section 87100 states 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 87103 states that an official has a financial interest within the meaning of Government Code 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 interest worth one thousand dollars (\$1,000)

or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$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.

Gov't Code Sections 87103(a)-(d).

In the present case, you own a home in the North Park Redevelopment Survey Area. Although we have not been given any information regarding the value of your home, it is clear that your ownership interest exceeds \$1,000 as set forth in Government Code section 87103(b). Based on this economic interest, you are prohibited from making, participating in making or using your official position to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on your economic interest, distinguishable from its effect on the public generally.

Since your residence is located within the North Park Redevelopment Survey Area, and as such, you will presumably benefit from the proposed improvements to the area, it is reasonably foreseeable that the passage of the revised boundary for the Survey Area will have some financial effect on your residence. The critical question, however, is whether the City Council's decision on the revised boundary for the Survey Area will have a material financial effect on your economic interest in your residence.

Materiality

The Fair Political Practices Commission ("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 these rules are attached for your convenience (Exhibit A). These rules set forth a step-by-step approach to determine "materiality" 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.

Your real property interest is directly involved in the governmental decision at hand because your property is located within the Survey Area which is the subject of the upcoming decision. For this reason, Regulation 18702.1 is applicable when determining whether there will be a foreseeable and material financial effect on your economic interest.

Regulation 18702.1(a)(3)(D) applies specifically to real property interests in the redevelopment process. It states that the effect of a decision on an official's real property interest is material if:

The decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area (emphasis added).

The adoption of the revised boundary of the North Park Redevelopment Survey Area adds territory to the redevelopment area. I have attached two maps that show the expansion area that is being proposed. (Exhibit B). Since the decision before the agency is to add territory to the redevelopment area and your residence is located within the boundaries of the redevelopment area, the financial effect of the decision is deemed material pursuant to Regulation 18702.1 (a)(3)(D). For this reason, you must disqualify yourself unless the public generally exception applies.

It should be noted that the issue of whether a Councilmember may participate in the decision to amend a redevelopment plan when the Councilmember's personal residence is located within the plan area has been addressed in several private advice letters issued by the FPPC. The FPPC has consistently advised that a Councilmember who owns a home in a redevelopment area is deemed to have a foreseeable and material financial effect on their economic interests, and as such, may not participate in the decision to amend a redevelopment plan unless the public generally exception applies to the Councilmember's real property interest.

"The Public Generally" Exception

Since your economic interest is affected materially thereby triggering a conflict of interest, it is necessary to determine whether the "public generally" is affected in the same way. If they are, you

are permitted to participate fully and vote on the governmental decision that created the conflict. For the "public generally" exception to apply, a decision must affect the official's economic interests in substantially the same manner as it would affect a significant segment of the public generally.

The FPPC has 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 decision 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 the criteria set forth in Sections 18703(a)(1) and (a)(2) are met.

Whether the criteria set forth in Regulation 18703 are met in this case requires a factual determination. For this determination, we turned to Mike Jenkins, Special Projects Coordinator for Economic Development Services, Office of the City Manager. Mr. Jenkins has extensive training and experience in the field of redevelopment law and project management.

Mr. Jenkins indicated that the total population of the Survey Area is approximately 16,000 and the total number of housing units is 9,000. Under FPPC Regulation 18703(a)(1)(ii), a significant segment of the "public generally" can be determined by ten percent of all households in the Survey Area. For the "public generally" exception to apply, ten percent of all households in the Survey Area need to be affected in substantially the same manner as your household by the adoption of the Survey Area.

In Mr. Jenkins's professional opinion, at least ten percent of the 9,000 households in the Survey Area will benefit from the redevelopment of this area and, as such, will be affected in substantially the same manner as your household. In making this factual determination, Mr. Jenkins is relying on the fact that there are no specific projects planned for the Survey Area at this time. Once specific projects are proposed and brought before the Council for approval, a new factual determination will need to be made.

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 Survey Area. Therefore, you qualify under FPPC Regulation 18703 for the "public generally" exception, and you may

fully participate in the upcoming decision to adopt the revised boundary of the North Park Redevelopment Survey Area.

Council Policy 000-4 -- The City Council's Code of Ethics

In 1967, the City Council adopted a "Code of Ethics" governing elected and appointed officials and employees of the City. Under this policy, "No elected official . . . shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his or her official duties or would tend to impair his or her independence or judgment or action in the performance of such duties."

Even though you are not prevented by the Political Reform Act from participating in the decision to adopt the North Park Redevelopment Survey Area, you should consider whether you are able to participate in those decisions under the terms of this policy by reason of the ownership of your residence within the Redevelopment Area. If, after examining your own conscience, you determine that you can render impartial decisions despite ownership of property within the Redevelopment area, you may vote. If not able to stay impartial, you should refrain from participation in the decisions.

California Health and Safety Code section 33130(a)

California Health and Safety Code section 33130 (a) states in relevant part as follows:

33130. (a) No agency or community officer or employee who in the course of his or her duties is required to participate in the formulation of, or to approve plans or policies for, the redevelopment of a project area shall acquire any interest in any property included within a project area within the community. If any such officer or employee owns or has any direct or indirect financial interest in property included within a project area, that officer or employee shall immediately make a written disclosure of that financial interest to the agency and the legislative body and the disclosure shall be entered on the minutes of the agency and the legislative body. Failure to make the disclosure required by this subdivision constitutes misconduct in office.

Even though you are not prevented by the Political Reform Act from participating in the upcoming decision involving the revised boundary of the North Park Redevelopment Survey Area, you shall immediately make a written disclosure of your financial interest to the agency and the legislative body and the disclosure shall be entered in the minutes.

CONCLUSION

This memorandum examines whether you are disqualified from participating in and voting on the revised boundary of the North Park Redevelopment Survey Area because of potential conflicts of interest

arising from the location of your residence in the Survey Area.

We conclude that you are deemed to have an economic interest in your residence that will be materially financially affected by the City's decision on the Survey Area and, as such, you will be disqualified from participating and voting on the revised boundary of the North Park Redevelopment Survey Area unless the "public generally exception" applies. We have concluded, after consulting with Mike Jenkins, that the factual determination necessary to satisfy the criteria for this exception has been made. Therefore, the exception applies and you may fully participate in the upcoming decision regarding the Survey Area.

However, you may only participate after considering Council Policy 000-4 and after making a written disclosure of your financial interest to the agency and the legislative body. Such a disclosure must be entered in the minutes.

It should be noted that this opinion is limited to your participation in the decision to adopt the revised boundary of the North Park Redevelopment Survey Area. As specific projects are proposed, a new factual determination will be necessary to determine if the exception applies.

JOHN W. WITT, City Attorney

By

Jennifer K. Hooper

Deputy City Attorney

JKH:jrl:011(x043.2)

Attachments

ML-94-92