

MEMORANDUM OF LAW

DATE: July 10, 1995

TO: Councilmember Scott Harvey

FROM: City Attorney

SUBJECT: Determination Regarding Potential Conflict of Interest
Arising Out of Ownership of Property in Assessment District

This is in response to your request of June 15, 1995, for a determination as to whether you have a financial conflict of interest in matters pertaining to the Washington Street Landscape Maintenance District under the Political Reform Act (the "Act").

The Act is codified at Government Code sections 81000-91015. All statutory references in this memorandum are to the Government Code unless otherwise indicated. The Fair Political Practices Commission (the "FPPC") has adopted regulations interpreting the Act, which regulations appear at 2 California Code of Regulations, sections 18000-18954. All references to regulations in this memorandum are to Title 2, Division 6 of the California Code of Regulations.

We note that we

had cautioned you previously not to participate in matters pertaining to this maintenance district pending completion of our research and analysis of the issues presented. The results of our research and analysis are contained in this memorandum.

QUESTION

May you participate in and vote on decisions involving or affecting the Washington Street Landscape Maintenance District, since you own real property exceeding \$1,000 in value in the district?

CONCLUSION

It is reasonably foreseeable that your economic interest in real property, which is located within the Maintenance District, will be affected materially by Council's decisions on the annual assessments for the District. Therefore, unless the "public generally" exception applies, you may not participate or vote on matters pertaining to the Maintenance District. We find that the "public generally" exception applies in this instance, and that you may fully participate and vote on Maintenance District matters.

FACTS

On June 13, 1995, a preliminary hearing was held to allow public testimony relating to establishing the annual assessments for the

Washington Street Landscape Maintenance District (the "Maintenance District"). The City Council is scheduled to take action on the proposed assessments on July 18, 1995. The Maintenance District lies in the Mission Hills Community Area and lies entirely within Council District 2, which is the district you represent. The Maintenance District was established in July 1993, for the purpose of maintaining the landscaping improvements on the Washington Street center islands approximately 380 feet west of the University Avenue overpass to Hawk Street. The landscaping improvements will consist of various types of trees, shrubs and ground cover.

According to Paul Toomey of the Engineering Department, approximately 3,500 "equivalent dwelling units" ("EDU's"), which comprise single family residences, condominiums and apartment houses, are scheduled to be assessed. As proposed, the assessment will be approximately \$10.00 per EDU.

You have a financial interest exceeding \$1,000 in your residence,^F Although you have provided your exact street address, we decline to place it in this memorandum since it will become a public record as soon as it is issued. You are not required to disclose your personal residence. Gov't Code ' 87206(f), which is located entirely within the boundaries of the Maintenance District. As an owner of a single family residence within the Maintenance District, you will be assessed at the rate of all other EDU's.

ANALYSIS

Among other things, the Act contains provisions that require a public official to disqualify him or herself from making or participating in governmental decisions. A "public official" is defined in Section 82048 and Regulation 18700 and includes every natural person who is a member, officer, employee, or consultant of a state or local government agency. A city councilmember is a "public official" within this definition.

The test for determining whether a public official is disqualified from decisionmaking is located in Section 87100. This section prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

For purposes of Section 87100, the term "financial interest" provides in relevant part:

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:

....

Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.
Section 87103(b) (emphasis added).

You have an interest in real property worth more than \$1,000. Therefore, under Section 87103(c), you may not make, participate in making, or in any way attempt to use your official position to influence a governmental decision which will have a reasonably foreseeable material financial effect, distinguishable from its effect on the public generally, on your real property interest. Restated, Section 87103(c) demands resolution of three questions: (1) will there be a reasonably foreseeable financial effect on your property resulting from the Council's decision on the assessment fees; (2) assuming there is some reasonably foreseeable financial effect on your property, will that financial effect be material; and, (3) assuming the financial effect is material, thereby creating a disqualifying financial conflict of interest for you, will the "public generally" exception apply, nonetheless, to allow you to participate and vote on the Maintenance District's annual assessment fees.

A. Foreseeability

The first question to be resolved under the above-cited test is whether a reasonably foreseeable financial effect on your real property will result from the Council's decisions on the annual assessment fees for the Maintenance District. Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. The statute requires more than a possibility, but less than a certainty. See, e.g., *In re Thorner*, 1 FFPC Ops. 198 (1975).

In this case, the decision involves setting the annual fees for an already existing landscape maintenance district. Since your property is located within the Maintenance District, it is reasonably foreseeable that there may be some benefit to your real property resulting from the ongoing maintenance of the landscaping, which is paid for by these annual assessment fees. Since it is reasonably foreseeable that there may be some financial effect on your real property interest, the next question to be resolved is whether that financial effect will be material.

B. Materiality

Regulation 18702 sets forth the guidelines for determining whether

an official's economic interest in a decision is "materially" affected as required by Section 87103. If an official's financial interest is directly involved in the decision, Regulation 18702.1 applies to determine materiality.

In the present case, your property is located within the Maintenance District's boundaries, therefore, your property will be directly affected by the decision. Regulation 18702.1 states in relevant part that the effect of a decision is material if "the decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on such property"

Since the decision would involve the imposition of assessments on all property within the district, including your property, the effect of the decision is deemed material.

C. Public Generally

Even though the effect of the decision on your real property interest is material, you are not disqualified from participating in the assessment rate setting decision if the decision will affect a significant segment of the public in substantially the same manner as it will affect your economic interest. Regulation 18703.

There is a special rule for determining whether the public generally exception applies to assessment decisions. Regulation 18703(b). This regulation states in relevant part:

The financial effect of a governmental decision on an . . . official's economic interest is indistinguishable from the decision's effect on the public generally if any of the following apply:

(1) The decision is to establish or adjust assessments . . . which are applied on a proportional basis on the official's economic interest and on a significant segment of the jurisdiction as defined in subdivision (a)(1) above (emphasis added).

The first subissue to be determined under this regulation is whether the proposed assessment is to be applied on a proportional basis on your property. We conclude that it is. The assessments are being applied to all EDU's within the Maintenance District. EDU's include single family residences, condominiums and apartment houses within the Maintenance District. As an owner of single family residence, you are being assessed as a single EDU: no more, no less. Therefore, the assessment is being made on a proportional basis on your property.

The second subissue to be determined under Regulation 18703(a)(1) is whether the effect of the Council's decision will be the same as that on a "significant segment" of the public, as that term is defined in the regulation. Defining the term "significant segment," Regulation 18703(a)(1) reads in relevant part as follows:

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

....

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

....

For purposes of Regulation 18703(a)(1)(B) the term jurisdiction means District 2, the electoral district you represent. See FPPC Priv. Adv. Ltr. A-94-351 (Nov. 30, 1994). The question is whether 5,000 other individuals who are residents of District 2 will be affected in the same way. We think the answer is "yes," for the following reasons: First, the entire Maintenance District is located within Council District 2. Second, the proposed assessment is to be made on over 3500 EDU's, including your residence. According to the 1990 Census, the average population per San Diego household is 2.61 persons.F

The information from the 1990 Census was obtained from Joey Perry of the City's Planning Department.

Therefore, the

number of individuals occupying the 3500 EDU's in the Maintenance District would be approximately 9,135. Thus, we find that more than 5,000 individuals who are residents of Council District 2 will be affected in the same way that you will be. That is, you will be affected in the same way as a "significant segment" of the public within the meaning of Regulation 18703(a)(1)(D).

Because the assessments are to be imposed on a proportional basis on your property and because you will be affected by the Council's decision in the same way as a significant segment of the public, we find that the public generally exception will apply. Therefore, you may fully participate and vote on decisions affecting the Maintenance District.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

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

cc Joey Perry, Planning Department

Paul Toomey, Engineering Department

ML-95-44