

MEMORANDUM OF LAW

DATE: January 8, 1999

TO: Laura McDonald, Chief of Staff, Council District No. 5

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Arising from Councilmember's Ownership of Personal Residence/Item No. 330, Council Docket of January 11, 1999

You have asked whether Councilmember Warden has a potential conflict of interest that disqualifies her from participating in discussions in and voting on matters pertaining to the Saddle Club Estates project, which is on the Council's docket of January 11, 1999, as Item No. 330. The question arises because Councilmember Warden and her husband own a residence in the Trails' development, which is located adjacent to the Saddle Club Estates property. This supersedes the informal memorandum dated January 8, 1999, on the same topic. The conclusion has not changed.

QUESTION PRESENTED

Does Councilmember Warden, because of her residence in the Trails' development, have a financial interest in the Saddle Club Estates proposal that would potentially disqualify her from participating in discussions and voting on Item 330 on the January 11, 1999, Council docket?

SHORT ANSWER

Yes. Her economic interests both in her residence and in the common areas held by all property owners in the Trails' development are a source of potential financial conflict of interest for the Councilmember that disqualify her from participating in or voting on decisions pertaining to the Saddle Club Estates proposal.

BACKGROUND FACTS

The facts relied on to prepare this Memorandum of Law are based primarily on materials on file with the City Clerk pertaining to Item No. 330. The Saddle Club Estates project proposes a Progress Guide and General Plan Amendment, a Community Plan Amendment, a Rezone, a

Vesting Tentative Map, a Planned Residential Development permit, and a Resource Protection Ordinance permit. If approved, the project will rezone land uses on a 34.46 acre site from A-1-1 and A-1-10 to R-1-10 zones, develop forty single family residences with private streets, gated entry, and landscaping, and dedicate 19.36 acres for open space. On January 11, the Council will be asked to take several actions on the proposal: to adopt a resolution certifying an environmental mitigated negative declaration, to introduce an ordinance rezoning 19.36 acres, to adopt a resolution granting or denying a vesting tentative map, to adopt a resolution granting or denying a planned residential permit, and to adopt a resolution amending both the Rancho Bernardo Community Plan and the Progress Guide and General Plan.

Councilmember Warden's residence¹ is located in a developed area of Rancho Bernardo known as the "Trails." The Trails contains property owned in common by all the property owners in the Trails' development. The Trails' development is immediately adjacent to the Saddle Club Estates property and in fact shares an extensive common boundary with the subject property. With the help of the maps on file with the Clerk and a Thomas Brothers map, City Attorney Investigator Francine Howell has determined that the Councilmember's residence is approximately 2250 feet² from the nearest edge of the subject property.

ANALYSIS

This matter is governed by the Political Reform Act of 1974 [Act] adopted by vote of the people of the State of California (codified at California Government Code sections 81000–91015). The Act was adopted in part to ensure that public officials perform their duties in an impartial manner, free from bias caused by their financial interests (Cal. Gov't Code 81001). To further this goal, section 87100 states:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his [or her] official position to influence a governmental decision in which he [or she] knows or has reason to know he [or she] has a financial interest.

A public official has a financial interest in a decision 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, a member of his or her immediate family, or on any of six economic interests delineated in section 87103.

The Councilmember is a public official within the meaning of the Act by virtue of her serving as a City Councilmember. The action items under Item 330 on the January 11 docket are all governmental decisions within the meaning of the Act.

I. Councilmember's Relevant Economic Interests

The Councilmember has an economic interest in the residence she and her spouse own in the Trails' development. Presumably, this interest is worth \$1,000 or more. The Councilmember also has an economic interest in the common property held by all the property owners in the Trails' development. It is assumed for purposes of this Memorandum of Law that the

Councilmember's interest in the commonly held property is worth \$1,000 or more. Therefore, the Councilmember has two separate economic interests, both involving real property that may be affected by the Council's decisions on the Saddle Club Estates proposal. She may not participate in the governmental decisions involving the Saddle Club Estates proposal if those decisions will have a material financial effect on her real property interests.

II. Identifying the Applicable Materiality Threshold

To determine whether decisions under Item 330 will have a material financial effect on the Councilmember's real property interests, the applicable materiality threshold must be determined. The threshold depends on the type of economic interest involved in the decisions and whether the economic interest is directly or indirectly involved in the decisions. In the present case, the Councilmember's real property interests are only indirectly involved. Cal. Code Regs. tit. 2, 18704.2. Therefore, we apply the standards set forth in title 2, section 18705.2(b) of the California Code of Regulations to determine materiality.

A. Effect of Decisions on Commonly Held Property

The Councilmember has an economic interest, assumed to be valued at \$1,000 or more, in commonly held property that is located immediately adjacent to the subject property. Therefore, the applicable materiality regulation is title 2, section 18705.2(b)(1)(A) of the California Code of Regulations. This standard is a "one-penny" rule. *In re Walsh*, FPPC Priv. Adv. Ltr. A-98-234. Under this standard, *any* reasonably foreseeable financial effect on her property interest that results from the decisions will be material. For this reason alone, she would be precluded from participating in or voting on Item 330 decisions, unless the "public-generally" exception applies.

B. Effect of Decisions on Personal Residence

The Councilmember's residence is approximately 2250 feet from the nearest boundary of the subject property. Therefore, the applicable materiality regulation is title 2, section 18705.2(b)(1)(C) of the California Code of Regulations. The Councilmember may not participate in the decisions if: (1) the decisions will result in a financial effect of \$10,000 or more on the fair market value of either of her real property interests, or (2) the decisions will affect the rental value of either of her real property interests by \$1,000 or more per twelve month period. These are factual determinations the City Attorney is unable to make. Under this regulation, the public official is required to make a good faith determination, which will be satisfied if a person qualified to determine the value of real property applies the factors outlined in the FPPC's materiality regulations to make the determination. *In re Mandeville*, FPPC Priv. Adv. Ltr. A-93-403. A real property appraiser or equivalent would be qualified to make this determination, as long as that person applies the factors in title 2, section 18705.2(b)(4)(A)–(C) of the California Code of Regulations. Absent such determination, we recommend that the Councilmember refrain from participating in or voting on decisions pertaining to the Saddle Club Estates proposal.

III. The Public-Generally Exception

Assuming a public official is determined to have one or more economic interests materially affected by a governmental decision, that public official may still be entitled to participate in and vote on the decision if the circumstances fit within the public-generally exception. Under the public-generally exception, even if a public official has an economic interest that will be materially affected by a governmental decision, the public official will be treated as not having a disqualifying financial interest if the public official's economic interest is affected in the same manner as the public generally. Cal. Code Regs. tit. 2, 18707. Even though we do not have sufficient facts to fully explore this possibility, it is doubtful, given the relatively small size of the Trails' development, that the public generally exception would apply in these circumstances to permit the Councilmember to participate in or vote on Item 330 decisions.

CONCLUSION

The City Attorney was asked to determine whether Councilmember Warden has a potential conflict of interest that would prevent her from participating in or voting on the Saddle Club Estates proposal, which is on the Council docket of January 11, 1999, as Item 330. The Councilmember and her husband have an economic interest in their residence, which is located in the Trails' development approximately 2250 feet from the Saddle Club Estates property. The Councilmember also has an economic interest in real property held in common with other property owners in the Trails' development, which shares an extensive common boundary with the subject property. We found that both of the Councilmember's economic interests may be materially affected by the governmental decisions on the Saddle Club Estates proposal. Therefore, she has a potential conflict of interest in the governmental decisions pertaining to the Saddle Club Estates proposal that are on the Council docket of January 11, 1999, as Item No. 330, and she should refrain from participating in or voting on all matters under that item. We have insufficient facts to determine whether there is an actual conflict or whether the public-generally exception would apply to allow her to participate and vote. When the matter comes up on the Council docket, she should describe the nature of her economic interests that may be involved in the Saddle Club Estates proposal and state that she has a potential conflict of interest that prevents her participation in Item 330 decisions.

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By

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cc: Rick Duvernay, Deputy City Attorney
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