

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement
(916) 322-5662 322-5660 322-5901 322-6441

May 13, 1985

Steven Woodside
Chief Assistant County Counsel
County of Santa Clara
County Government Center, East Wing
70 West Hedding Street
San Jose, CA 95110

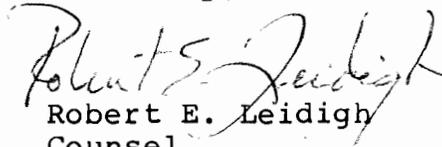
Re: Your Request for Advice
Our File No. A-85-106

Dear Mr. Woodside:

You have written requesting advice as to whether the South County Joint Planning Advisory Committee should be subject to the conflict of interest provisions of the Political Reform Act. From your letter and its attachments and from our two telephone conversations on the subject, I have learned that this precise question is currently in litigation between your office and private parties seeking injunctive relief.

It is this agency's policy not to render advice on questions currently pending in the trial courts. We will on occasion intervene in an action and also on occasion will appear amicus in cases pending in the appellate courts. However, this does not appear to be an appropriate case for our involvement at this time. Please keep us apprised of the progress of the case in court; you have advised it is currently set for hearing in June.

Sincerely,


Robert E. Leidigh
Counsel
Legal Division

REL:plh

cc: Bruce Tichinin, Attorney for Plaintiff

County of Santa Clara

California

Office of the County Counsel
County Government Center, East Wing
70 West Hedding Street
San Jose, California 95110
299-2111 Area Code 408

Donald L. Clark, *County Counsel*

April 9, 1985

Mr. Robert Leidigh
Counsel
Fair Political Practices Commission
P. O. Box 807
Sacramento, CA 95804

Dear Mr. Leidigh:

We request, on behalf of the Santa Clara County Board of Supervisors, advice on the following issue:

Are the members of the South County Joint Planning Advisory Committee subject to the disclosure requirements of the Political Reform Act?

We enclose our April 8, 1985 opinion that this Advisory Committee is not subject to the Act because it does not possess decision-making authority.

We enclose two November 29, 1984, memos, and a February 8, 1985 "information sheet" relating to this subject. We also enclose the schedule of meetings which illustrates the limited charge and term for the Committee. Finally, we enclose a letter dated March 26, 1985, from Attorney Bruce Tichinin, who takes issue with our opinion.

We look forward to your advice.

Very truly yours,

DONALD L. CLARK
County Counsel



STEVEN WOODSIDE
Chief Assistant County Counsel

SW:jf

Encls.



California

Donald L. Clark, County Counsel

M E M O R A N D U M

TO: ERIC CARRUTHERS
County Planning Department

DATE: April 8, 1985

FROM: STEVEN WOODSIDE *SW*
Chief Assistant County Counsel

RE: SOUTH COUNTY JOINT PLANNING ADVISORY COMMITTEE

You have requested, on behalf of the South County Joint Planning Advisory Committee, advice as to whether the members of this committee are subject to the disclosure requirements of the Political Reform Act (Gov. C., sec. 81000 et seq.), and whether they are prohibited by the Act from participating in the committee's work on issues in which they have a financial interest.

CONCLUSION

The members of the Advisory Committee are not subject to the disclosure requirements because they do not have "decision making authority." The Act as interpreted by the Fair Political Practices Commission does not apply to persons who have no decision-making authority. However, because we rely in part upon FPPC regulations, and because counsel for the Commission is empowered to give written advice upon which we may rely (Gov. C., sec. 83114(b)), we have asked for an advice letter on this issue.

FACTS

The South County Joint Planning Advisory Committee (hereinafter "Advisory Committee") was created in late 1984 by actions of the Santa Clara County Board of Supervisors, and the Cities of Gilroy and Morgan Hill. The County Planning Office recommended creation of an "Advisory Committee." (See your November 29, 1984, memo to the Board of Supervisors.) The role of the Advisory Committee was described by the Planning Director in his November 29, 1984, memo as follows:

" . . . to prepare a joint agencies plan for the South County.

The Committee has twenty members and includes nine (9) officials of the three jurisdictions and eleven (11) public, or citizen members, from the area. [Three Council members or Planning Commissioners from the Cities of Morgan Hill and Gilroy. One Supervisor and two Planning Commissioners from the County. Two representatives from the unincorporated area of San Martin. Nine at large citizen members.]

Committee Charge

1. Study the issues and options relevant to the South County's future, with study reports to be prepared jointly by the staffs of the County and the Cities with consultant services as may be needed.
2. Guide the preparation of a draft joint agencies plan by staff and consultants for submittal to the Board of Supervisors, County Planning Commission and the City Councils and Planning Commissions of Morgan Hill and Gilroy by August 1985.
3. Include in the planning process consideration of the area's infrastructure needs and appropriate roles of the Cities, the County, other agencies and the private sector in meeting those needs, with proposals regarding them to be submitted following the draft plan.
4. Draw upon the resources of the community through such meetings, workshops, hearings and other methods as needed to secure public participation and professional expertise vital to the success of the project.
5. Act as liaison between the South County Plan project and the City Councils, Board of Supervisors, and the Planning Commissions in order to inform the three jurisdictions of progress in the project, to make referrals of issues requiring special attention by one or all of the participating agencies, and to bring feedback to the project.
6. Adopt rules and procedures necessary for the conduct of the Committee's activities." (Emphasis added.)

The Advisory Committee "may provide a basis for agreements between the jurisdictions regarding service provisions, public facilities or revenues." (February 29, 1985, "information sheet," quoting from recommendations made in November.)

DISCUSSION

Government Code section 87100 provides that:

"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."

Section 87300 et seq. requires each local agency to adopt a conflict of interest code and to enumerate those public official decision-makers who must disclose their financial interests.

Initially, it must be determined whether the members are "public officials" within the meaning of the Political Reform Act. Section 82048 defines "public official" as "every member, officer, employee or consultant of a state or local government agency." Local government agency, in turn, means:

". . . a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of these, but does not include any court or any agency in the judicial branch of government."

(Section 82041; emphasis added.)

Individuals who serve on the Advisory Committee could be "public officials" only by reason of their status as "members," since it is clear that they do not serve as officers¹, employees or consultants of the Advisory Committee within the meaning of the Political Reform Act. In determining whether such individuals are "members", we must look to 2 California Administrative Code, section 18700(a)(1), a regulation of the California Fair Political Practices Commission:

(1) "Member" shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decision-making authority. A board or commission possesses decision-making authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

¹ Some Advisory Committee members are public officials of Gilroy, Morgan Hill or the County. These officials must file disclosures by virtue of their status with these local agencies.

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency."

(Emphasis added.)

The Advisory Committee does not make final governmental decisions; nor does it compel governmental decisions. Decisions concerning any plans proposed by the committee must be approved by the local government agencies who have jurisdiction over the subject of the plans. Thus, the members are not public officials under Regulation 18700(a)(1) (A) or (B).

Whether Regulation 18700(a)(1) (C) applies, i.e., whether the members make "substantive recommendations which are, and over an extended period of time have been regularly approved" is problematic. Because the Advisory Committee is so new, it cannot be said that its recommendations are approved with such regularity as to make the Advisory Committee a decision-maker.

In a matter similar to ours, the Fair Political Practices Commission issued a formal opinion that redevelopment agency Policy advisory committees are not subject to the Political Reform Act.

The Commission found that these advisory committees,, although officially established by state law, did not have "decision making authority." (Bonfa opinion, FPPC opinion 76-033, 2 FPPC Ops. 146.) The Commission noted:

Whether the PAC "makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment," and hence has decision-making authority, depends on the facts of each particular case. We have been provided with no facts which suggest that this occurs in the present case. (Footnote 2, 2 FPPC at 150.)

Similarly, in the instant matter, we have no facts to suggest that the Advisory Committee has decision-making authority by virtue of having recommendations regularly approved by the affected City Councils or by the County Board of Supervisors.

Moreover, because the Advisory Committee has no established term (and will presumably disband when its report is issued some time this summer), it does not appear that the Advisory Committee will even make recommendations over an extended period of time.

The instant matter is in contrast to the case of Commission on Cal. State Gov. Org. & Econ. v. Fair Political Practices Comm. (1977) 75 Cal.App.3d 716. In that case, the Court of Appeal affirmed a decision of the FPPC to order that disclosure statements be filed by the State Commission on Government and Economy (Little Hoover Commission). The court found that the Commission was not a solely advisory body. Rather, it possessed power to investigate, to subpoena evidence, to contract, and to issue reports which, taken together, "transforms the commission into an active manager and originator of decisions." (Ibid, at p. 721.)

Moreover, the Little Hoover Commission caused changes in public policy, "resulting in tangible effects which far outdistance the soft inducements of good counsel." (Ibid, at 722.)

Here, we have a non-permanent advisory committee which does not possess subpoena or contracting powers. We do not have a body like the Little Hoover Commission which has for many years operated to directly influence governmental decision-making activities.

In concluding that the Advisory Committee is not subject to the disclosure requirements of the Political Reform Act, we treat this committee the same as other advisory bodies which from time-to-time have been convened to advise the Board of Supervisors or other bodies on planning issues. For example, the 1978 General Plan Advisory Committee, the Transportation 2000 Advisory Committee, and the City of San Jose Horizon 2000 Advisory Planning Committee have not been required to file disclosure statements.

We note also that if the Advisory Committee did have "decision making authority," it would appear in other respects to possess attributes which the FPPC will regard as falling within the definition of a local government agency (i.e., it is formed and funded by a local government). See Seigel opinion, FPPC Opinion No. 76-054; see also Anaheim Stadium Advice Letter (July 20, 1981).

Because we have concluded that the Advisory Committee is not subject to the Act, it is not necessary to address the second question as to whether anyone with a disclosable financial interest would be disqualified from participating on the Committee. We wish to point out, however, that the holding of a financial interest would not disqualify one from participation in all activities of the Committee. Rather, one would be precluded from participating in a decision which would have a material effect upon one's financial interest which is distinguishable from its effect upon the public generally. (See 2 Cal. Admin. C., secs. 18702, 18703.) Whether such an effect is present would depend upon the facts of each case.

memorandum



TO	Board of Supervisors, City Councils of Gilroy and Morgan Hill	FROM	E. Jack Schoop, Director Department of Planning & Development
SUBJECT	SOUTH COUNTY JOINT PLANNING PROJECT		DATE November 29, 1984

PROPOSAL

Establish, jointly with the Cities of Gilroy and Morgan Hill, the South County Joint Planning Committee with the charge to prepare a joint agencies plan for the South County.

The South County Planning Committee would have twenty members and would include nine (9) officials of the three jurisdictions and (11) public members from the area. The citizens would be selected to represent the various communities of interest. The Committee members would be appointed as follows:

- City of Morgan Hill
 - o 3 Officials (Council members and Planning Commissioners)
 - o 3 citizen members
- City of Gilroy
 - o 3 officials (Council members and Planning Commissioners)
 - o 3 citizen members
- County of Santa Clara
 - o 3 officials (1 Supervisor, and 2 Planning Commissioners)
 - o 3 citizen members
- San Martin
 - o 2 members, one each from the San Martin Planning Committee and the San Martin Homeowners Association

Committee Charge

1. Study the issues and options relevant to the South County's future, with study reports to be prepared jointly by the staffs of the County and the Cities with consultant services as may be needed.
2. Guide the preparation of a draft joint agencies plan by staff and consultants for submittal to the Board of Supervisors, County Planning Commission and the City Councils and Planning Commissions of Morgan Hill and Gilroy by August 1985.
3. Include in the planning process consideration of the area's infrastructure needs and appropriate roles of the Cities, the County, other agencies and the private sector in meeting those needs, with proposals regarding them to be submitted following the draft plan.
4. Draw upon the resources of the community through such meetings, workshops, hearings and other methods as needed to secure public participation and professional expertise vital to the success of the project.

memorandum



TO	Board of Supervisors	FROM	W. Eric Carruthers, Principal Planner Office of Planning
SUBJECT	SOUTH COUNTY JOINT PLANNING PROGRAM		DATE November 29, 1984

Prepared by: W. Eric Carruthers

Reviewed by: Robert L. Sturdivant

Submitted by: E. Jack Schoop

A. RECOMMENDED ACTION

Create, jointly with the Cities of Morgan Hill and Gilroy, the South County Joint Planning Advisory Committee with the membership and charge presented in the attached memo to the Board and the two cities.

B. Fiscal Implications

This action will not result in expenditures beyond the adopted County budget and work program for the Office of Planning.

C. REASONS FOR THE RECOMMENDATION

This action implements the Board's directive that the Planning Office initiate a joint-cities-county planning program for the South County. The program will provide a framework for review of County policy, concurrent with the cities policies, so as to jointly meet expected growth in population and employment.

It may provide a basis for agreements between the jurisdictions regarding service provision, public facilities or revenues.

The proposed Committee and charge have been prepared in cooperation with officials and staffs of the two cities and with Supervisor Wilson's staff. The two city councils are expected to act on the proposal early in December.

During the project, work materials of the Committee will be sent to County Board members and Planning Commissioners. Progress reports will be presented and study sessions will be scheduled to inform the Board and Planning Commission of South County issues and options of the future and to seek Board and Planning Commission input to the process.

E. CONSEQUENCES OF NEGATIVE ACTION

Some other mutually agreeable planning process for the project would be needed. The program would be considerably delayed as a result.

F. STEPS FOLLOWING APPROVAL

Designate the County members to the Advisory Committee and direct staff to convene the Committee in January to begin the program.

WEC:ad

Attachments
ad#Gen/Info#2;wec/memo

County of Santa Clara

California

INFORMATION SHEET

February 8, 1985

SOUTH COUNTY JOINT PLANNING PROJECT

The South County Joint Planning Committee was established jointly by the Cities of Gilroy and Morgan Hill and the County of Santa Clara with the charge to prepare a joint agencies plan for the South County.

The Committee has twenty members and includes nine (9) officials of the three jurisdictions and eleven (11) public, or citizen members, from the area. The public members were selected to represent the various communities of interest. The Committee members were appointed as follows (see attached roster):

- City of Morgan Hill
 - o 3 Officials (Council members and Planning Commissioners)
 - o 3 citizen members
- City of Gilroy
 - o 3 officials (Council members and Planning Commissioners)
 - o 3 citizen members
- County of Santa Clara ✓
 - o 3 officials (1 Supervisor, and 2 Planning Commissioners)
 - o 3 citizen members
- San Martin
 - o 2 members, one each from the San Martin Planning Committee and the San Martin Homeowners Association

Committee Charge

1. Study the issues and options relevant to the South County's future, with study reports to be prepared jointly by the staffs of the County and the Cities with consultant services as may be needed.
2. Guide the preparation of a draft joint agencies plan by staff and consultants for submittal to the Board of Supervisors, County Planning Commission and the City Councils and Planning Commissions of Morgan Hill and Gilroy by August 1985.
3. Include in the planning process consideration of the area's infrastructure needs and appropriate roles of the Cities, the County, other agencies and the private sector in meeting those needs, with proposals regarding them to be submitted following the draft plan.

SOUTH COUNTY JOINT PLANNING

ADVISORY COMMITTEE

City of Morgan Hill

Bob Foster - Mayor
30 Keystone Avenue
Morgan Hill, CA 95037
(408) 779-2106 (Bus.)

Bill Brown - Councilmember
16465 Jackson Oaks Dr.
Morgan Hill, CA 95037
(408) 779-3232 (Bus.)
(408) 778-2021 (Res.)

Alternate: Neil Heiman
2975 Thomas Grade
Morgan Hill, CA 95037
947-7722 (Bus.)

Jim Reilly - Planning Commissioner
18765 Glen Ayre Dr.
Morgan Hill, CA 95037
(408) 779-7767 (Res.)

Alternate: Clarence Kludt
545 Diana Ave.
Morgan Hill, CA 95037
(408) 779-4541

Beth Wyman - Citizen
1095 Llagas Rd.
Morgan Hill, CA 95037
(408) 779-4525

Ed Lazzarini - Citizen
15585 S. Monterey Rd.
Morgan Hill, CA 95037
(408) 779-9168

Linda Keilers - Citizen
2220 Rolling Hills Dr.
Morgan Hill, CA 95037
(408) 365-8888

City of Gilroy

Pete Valdez - Councilmember
7565 Santa Theresa
Gilroy, CA 95020
(408) 842-6484 (Bus.)
(408) 0374 (Res.)

Jack Pate - Councilmember
7581 Carmel St.
Gilroy, CA 95020
(408) 847-1001 (Bus.)
(408) 842-4158 (Res.)

Edith Edde - Planning Commissioner
7700 Rea St.
Gilroy, CA 95020
(408) 842-6945 (Res.)

Sig Sanchez - Citizen
286 5th St.
Gilroy, CA 95020
(408) 842-4839 (Res.)

Connie Rogers - Citizen
7690 Santa Theresa Dr.
Gilroy, CA 95020
(408) 842-8494 (Res.)

Kenneth Noonan - Citizen
7663 Church St.
Gilroy, CA 95020
(408) 847-2700 (Res.)

San Martin

George W. Robinson
14025 Harding Ave.
San Martin Homeowners
and Residents' Assn.
San Martin, CA 95046
(408) 683-4787 (Res.)

Larry Morgan
San Martin Advisory Committee
1700 E. Middle Ave.
San Martin, CA 95046
(408) 463-4554 (Bus.)
(408) 683-2007 (Res.)

SOUTH COUNTY WORK AND MEETING SCHEDULE

Revised 3/ 2

	TYPE DRAFT TEXT	INITIAL IN-HOUSE STAFF REVIEW		SEND DRAFT TO OTHER REVIEWERS	REVIEW PROPOSED CHANGE	TYPE FINAL DRAFT		COPY FINAL DRAFT	MAIL FINAL DRAFT TO ADV COM	ADVISOR COMMITTEE MEETING
		4	3	4	3	3	3	3	3	
Working days to complete task:		4	3	4	3	3	3	3	3	
TOPIC	STAFF	MONTH DATE	MONTH DATE	MONTH DATE	MONTH DATE	MONTH DATE	MONTH DATE	MONTH DATE	MONTH DATE	MONTH DATE
POP/EMPL FORECASTS	CM,SS,OF	2 / 13	2 / 19	2 / 22	3 / 5	3 / 8	3 / 12	3 / 15	3 / 21	
PUBLIC SERVICE	STAFF	2 / 27	3 / 5	3 / 8	3 / 19	3 / 22	3 / 26	3 / 29	4 / 11	
EDUCATION	STAFF	2 / 27	3 / 5	3 / 8	3 / 19	3 / 22	3 / 26	3 / 29	4 / 11	
DRAINAGE / FLOOD CONTROL	L.POGGIORE	3 / 13	3 / 19	3 / 22	4 / 2	4 / 5	4 / 9	4 / 12	4 / 25	
NATURAL ENVIRONMENT	STAFF	3 / 27	4 / 2	4 / 5	4 / 16	4 / 19	4 / 23	4 / 26	5 / 9	
SAFETY	J.WALDO	3 / 27	4 / 2	4 / 5	4 / 16	4 / 19	4 / 23	4 / 26	5 / 9	
WATER	L.POGGIORE	4 / 10	4 / 16	4 / 19	4 / 30	5 / 3	5 / 7	5 / 10	5 / 23	
AGRICULTURE	C.REID	4 / 17	4 / 23	4 / 26	5 / 7	5 / 10	5 / 14	5 / 17	5 / 30	
COMMUNITY CHARACTER	C.MING	4 / 17	4 / 23	4 / 26	5 / 7	5 / 10	5 / 14	5 / 17	5 / 30	
HOUSING	B.STOCHL	5 / 1	5 / 7	5 / 10	5 / 21	5 / 24	5 / 28	5 / 31	6 / 13	
SEWAGE	M.CWENS	5 / 1	5 / 7	5 / 10	5 / 21	5 / 24	5 / 28	5 / 31	6 / 13	
TRANSPORTATION	B.EISERT	5 / 22	5 / 28	5 / 31	6 / 11	6 / 14	6 / 18	6 / 21	6 / 27	
ECONOMIC DEVELOPMENT	B.STOCHL	5 / 22	5 / 28	5 / 31	6 / 11	6 / 14	6 / 18	6 / 21	6 / 27	
OPEN SPACE	B.SAXON	5 / 29	6 / 4	6 / 7	6 / 18	6 / 21	6 / 25	6 / 28	7 / 11	
DRY MARTIN	R.EDDOW	5 / 29	6 / 4	6 / 7	6 / 18	6 / 21	6 / 25	6 / 28	7 / 11	
INFRASTRUCTURE	STAFF	6 / 12	6 / 18	6 / 21	7 / 2	7 / 5	7 / 9	7 / 12	7 / 25	
LOCAL GOVERNMENT	K.PETROTTA	6 / 26	7 / 2	7 / 5	7 / 16	7 / 19	7 / 23	7 / 26	8 / 8	
INTER-MOUNTAIN VALLEYS	STAFF	7 / 10	7 / 16	7 / 19	7 / 30	8 / 2	8 / 6	8 / 9	8 / 22	

LAW OFFICES OF
TICHININ & MITCHELL

BRUCE TICHININ
ROBERT B. MITCHELL
ATTORNEYS AT LAW

17575 MONTEREY STREET
MORGAN HILL, CA 95037
TELEPHONE (408) 779-9194

March 26, 1985

Mr. Donald L. Clark
County Counsel
ATTN: Mr. Steven Woodside
Deputy County Counsel
County Government Center
Ninth Floor, East Wing
70 West Hedding Street
San Jose, CA 95110

Re: South County Joint Planning Advisory Committee
Compliance with Political Reform Act of 1974

Dear Mr. Woodside:

Please be advised by this letter that I represent David C. Heninger, a resident of the territory affected by the work of the South County Joint Planning Advisory Committee. Acting as a Private Attorney General, Mr. Heninger requests that you advise the Committee and the Board of Supervisors that:

(a) the Committee is subject to the requirement of Gov. Code Sec. 87300,¹ and should adopt the Conflict of Interest Code required by Sec. 87302 before proceeding further with its work; and

(b) the members of the Committee are subject to the prohibition of Gov. Code Sec. 1091.1 and that therefore any members of the Committee who own lands within the territory affected by the

¹ Unless otherwise indicated, all statutory references are to the Government Code.

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work of the Committee, or an interest in such lands, will be unable to vote on the Committee and therefore should resign.

The reasoning upon which it is proposed that such action is required is set forth hereafter.

I

COMMITTEE IS AN AGENCY UNDER SEC. 87300

Section 87300 applies to every "agency." "Agency" means a "local government agency" (Sec. 82003), which means "a[ny]... agency" of a county or city (Sec. 82041). The Committee, having been created by the County of Santa Clara ("County"), City of Gilroy and City of Morgan Hill ("Cities") represents the County and the Cities in dealing with third persons² and thus is an

² The transactions in which this representation is to be exercised, as set forth in the Charge of the Committee are to study "the issues and options relevant to South County's future," to guide the preparation of "a draft joint agency's plan" for the County and the Cities, and to submit proposals "regarding...[the] appropriate roles of...other agencies and the private sector" to the County and the Cities in a "meeting...the area's infrastructure needs." This latter submission is apparently intended as a potential basis for agreements regarding such infrastructure needs and revenues related thereto ("it may provide a basis for agreements between the jurisdictions regarding service provision, public facilities or revenues.")

The third persons with whom the Committee will deal in these transactions appear to be consultant (Charge No. 1.) other agencies of government (Charge No. 3.), the public (Charge No. 4.), professionals with expertise (Charge No. 4.) and the other principals of the three governmental subdivisions who have created the agency (Charge No.5., the Committee is charged to "act as a liason" between the project and the governing and advisory bodies of the County and the Cities).

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agency of those governmental entities (Civ. Code Sec. 2295).³

Thus, because the Committee is an agency and Sec. 87300 requires every agency to "adopt and promulgate a Conflict of Interest Code," the Committee must adopt and promulgate such a code.

II

THE DECISIONS OF THE COMMITTEE MAY MATERIALLY AFFECT FINANCIAL INTERESTS

Section 87302 requires that the positions with the Committee which involve the making or participation in the making of decisions which "may foreseeably have a material effect on any financial interest" shall be specifically enumerated. For the reasons described below, the Committee will be making decisions which foreseeably have a material effect on financial interests, and the Conflict of Interest Code for the Committee must

3

"An agent is one who represents another, called the principal, in dealing with third persons. Such representation is called agency." Civ. Code Sec. 2295.

"Agency is that relation that results from the act of one person, called a principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in affecting the purpose of the principal." Workman v. City of San Diego (1968) 267 CA 2d 36, ___, 72 CR 509, 511. There appears to be no limitation upon the discretion of the Committee in carrying out its charge.

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therefore specifically enumerate the positions within the Committee involved in the making or participation in the making of such decisions.

A. Growth Affects The Financial Interest Of Business Generally.

It is axiomatic that population growth financially affects any business serving the area in which the growth occurs. Thus, since the Committee is charged with making decisions which will result in a draft plan for the County and Cities which will be the "framework for review of...policies" of these agencies "so as to jointly meet expected growth in population and employment," the decisions of the Committee may foreseeably have a material financial effect on the financial interest of all businesses serving the South County area.

B. Allocation Of Infrastructure Cost Responsibility Will Affect Development-Related Financial Interests.

Meeting the infrastructure needs of an area experiencing population growth requires financing the increased need for infrastructure created by the growth. Since it is also a charge of the Committee to make proposals regarding the "appropriate roles of the...private sector in meeting those [infrastructure] needs" of the South County area arising from

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the anticipated population growth, the decisions of the Committee may foreseeably have a material financial effect on the financial interest of the affected private sector entities by influencing the allocation of financial responsibility for these infrastructure costs between the private sector and the taxpayers. The private sector entities which foreseeably will be most materially affected are the business interests directly involved in the development that will be necessary to accommodate the anticipated population growth. Specifically, the interests of persons holding title to undeveloped real property, or title to financial obligations secured by such title in undeveloped real property, or ownership interests in business entities involved in development or ownership in business entities interested in locating in the territory to be developed will most foreseeably be materially financially affected.

C. The Rate, Mix And Pattern Of Growth Will Affect Development-Related Financial Interests.

Also, decisions of the Committee regarding the recommended rate of growth, mix of growth and pattern of growth set out in the draft plan which the Committee is charged to prepare may foreseeably have a material financial effect on the enumerated development-related financial interests, since the rate, mix and pattern of growth vitally affect these interests.

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III

THE MEMBERS AND STAFF OF THE COMMITTEE ARE
"DESIGNATED EMPLOYEES" WITHIN THE MEANING OF SECTION 87302

As shown immediately above, the decisions of the Committee may foreseeably have a material effect on financial interests. Under Sec. 87302, the positions within the Committee which "involve the making or participation in the making of [these] decisions" must be specified in the Conflict of Interest Code for the Committee.

Clearly, the Members of the Committee occupy positions within the Committee involving the making of these decisions. Equally clearly, the staff members of the Committee (other than the secretary who records the proceedings) participate in the making of the decisions by the Committee through the reports, recommendations and proposed findings they prepare for the Committee. Thus, Committee members and Committee staff personnel should be specifically enumerated as "designated employee[s]" holding such positions.

Such designated employees are also required to disqualify themselves from making or participating in the making of any decision which it is reasonably foreseeable may materially affect a financial interest of the designated employee (Sec.

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87302(c)). Thus, the Committee members and the Committee staff persons would be required under the Conflict of Interest Code to disqualify themselves from making or participating in the making of a decision of the Committee when it is reasonably foreseeable that a financial interest of that Committee member or staff person may be materially affected by the decision of the Committee.

IV

THE COMMITTEE IS NOT "ADVISORY ONLY"

Some members of the Committee have suggested that the disclosure and disqualification provisions do not apply to them because the Committee serves a solely advisory function. Gov. Code Sec. 87019 does specifically exempt a member of any board or commission which "serves a solely advisory function." However, the Committee does not fall within this exemption.

To be sure, one of the functions of the Committee is to advise the Cities and the County. However, that is not the sole function of the Committee. An additional charge of the Committee is "to secure public participation and professional expertise" in preparing its draft plan. In securing public participation and professional expertise, the Committee is empowered to hold meetings, workshops, hearings and to use

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"other methods" as needed.

It has been expressly held that a state commission which served an advisory function but had additional powers was not exempt from the definition of designated employee under the "advisory only" exemption, for the following reason:

"A violation occurs not only when the official participates in the decision, but when he influences it, directly or indirectly. (citations) Thus, a public official outside the immediate hierarchy of the decision-making agency may violate the conflict of interest law if he uses his official authority to influence the agency's decision."

Commission on California State
Government Organization and Economy
v. Fair Political Practices
Commission (1977) 75 CA 3d 716,
724, 142 CR 468, 472, emphasis
added.

Under the foregoing authority, the "advisory only" exemption does not appear to apply to the members of the Committee.

V

SECTION 1091.1 PROHIBITS PERSONS WITH SUBDIVISION INTERESTS
OR AN INTENTION TO SUBDIVIDE FROM SERVING ON THE COMMITTEE

Gov. Code Sec. 1090 prohibits governmental officials from being "financially interested in any contract made by...any body or board of which they are members."

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This Section has been construed to prohibit such officials from serving at all on governmental bodies which contract with the officials in a private capacity. The choice for a person with such a conflict is to give up the contract or give up the official position (City of Imperial Beach v. Bailey (1980) 103 CA 191, 197-8, 162 CR 663, 666, City Council of City of San Diego v. McKinley (1978) 80 CA 3d 204, 145 CR 461, Fraser-Yamor Agency v. City of Del Norte (1977) 68 CA 3d 201, 137 CR 118, Stigall v. City of Taft (1962) 58 CA 2d 565, 25 CR 441, Terry v. Bender (1956) 143 CA 2d 198, 300 P 2d 119, Schaefer v. Berinstein (1956) 140 CA 2d 278, 295 P 2d 113).

A special exception from the foregoing prohibition is carved out for the subdivision of lands of public officials in Sec. 1091.1. However, the exception, in order to avoid unconstitutionality as a special law or denial of equal protection imposes (as a condition to permitting public officials to subdivide their land) the requirement that the official "shall not cast his vote upon any matter or contract concerning said subdivision in any manner whatever."

Although the work of City Councils and the Board of Supervisors and of other boards or commissions of local government often involves matter or contracts not concerning subdivisions, all the work of this particular Committee concerns subdivisions. Subdivision is the principal tool by which

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government accommodates growth, and dealing with the pressures for the anticipated population growth in the area is the raison d'etre of this Committee.

Therefore, in order to avoid a violation of this Section, any member of the Committee who has an interest in an existing subdivision within a territory under study by the Committee, or who intends to subdivide any such land, should not serve on the Committee at all. In addition, in order to avoid the appearance of a conflict of interest, any owner of such land which is capable of being subdivided should also not serve on the Committee.

VI

THE "ADVISORY ONLY" EXEMPTION IS INVALID

A. The "Advisory Only" Exemption Conflicts With The Definition Of "Designated Employee" As One Whose Decisions May Affect Financial Interests.

There is a clear-cut internal conflict in the language of Gov. Code Sec. 82019 (defining "designated employee" for purposes of applying Sec. 87302). The logically unavoidable conflict exists between the generic definition of designated employee in subsection (c) as one making decisions "which may

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foreseeably have a material effect on any financial interest" and the exception (also in subsection (c)) from that definition of a "member of any board or commission which serves a solely advisory function." The conflict exists in that the purpose, the intent of advice is to create specific effects. Thus, wherever the decision of a board or commission serving a solely advisory function is intended to materially affect a financial interest the language exempting members of such boards or commissions is inconsistent with the definition of designated employee as one whose decisions may foreseeably have a material effect on financial interests. In such instances, the inconsistency is logically irreconcilable. It appears that the entire subject matter of the Committee's charge is to make decisions which may foreseeably have a material effect on financial interests because the purpose of the draft plan which the Committee's decisions will formulate is to create the framework for the County's and Cities' joint plan for future growth. For all the reasons outlined in section II, above, this plan will have a material effect on financial interests, and it is thus foreseeable that the Committee's advisory decisions may affect these same financial interests.

B. Resolution Of The Conflict In Statutory Language.

The conflict in the statutory must be resolved in favor of either the rule or its exception. Board or commission

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members serving a solely advisory function which may foreseeably have a material financial affect on a financial interest, as is the case with the Committee members here, are either designated employees under the rule despite the invalid exemption, or are exempt from the definition of designated employee under the valid exception.

1. Political Reform Act Rule Of Construction.

The most logical first-reference for resolution of this conflict is the rule of construction set out in the Political Reform Act itself, which states that:

"This title should be liberally construed to accomplish its purposes."

Sec. 87003

"Assets and income of public officials⁴ which may be materially affected by their official action should be disclosed and in appropriate circumstances the official should be disqualified from acting in order that conflicts of interest may be avoided."

Sec. 87002(d)

Designated employees must disclose their assets and are disqualified from participating in decisions which

⁴ Because they are members of a local government "agency," the Committee members are "public officials" (Sec. 82048)

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involve conflicts of interest (Sec. 87302(b) and (c)). A liberal construction of the term "designated employee" which expands the term to include those involved in advisory functions despite the contrary exception is a construction which straightforwardly follows the rule of Sec. 81003. On the other hand, a restrictive construction of the term "designated employee" which recognizes the exception as valid would prevent accomplishment of the Act's purpose to require disclosure and disqualification of officials whose actions may affect their financial interests. Such a construction would breach the rule of Sec. 81003.

2. The Exemption Violates Article IV, Sec. 16 Of The California Constitution.

Not surprisingly, an exemption so hopelessly in conflict with the purpose of the statute of which it is a part violates a fundamental, constitutional precept. Article IV, Sec. 16(a) of the California Constitution provides:

"All laws of a general nature shall have a uniform operation."

Thus, the Political Reform Act must operate uniformly to accomplish its purpose of disclosing "assets and income of public officials which may be materially affected by their official actions" by requiring that all public officials

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whose actions may affect their assets and income (whether those actions be to advise or to decide) to influence the decision or to make it, to participate in such disclosure. The "advisory only" exemption creates a classification within the definition of "designated employee" which excludes advisory employees. This classification violates Article IV, Sec. 16(a) under the following rule of case law:

"A classification is reasonable...only if (the)...differences between the classes... are reasonably related to the purposes of the statute." (Coffee-Rich, Inc. v. Fielder, 27 CA 3d 792, 809, 104 CR 252, 263, citing Werner v. Southern California Associated Newspapers, 35 C 2d 121, 131, 216 P 2d 825, 831, emphasis added. See also Southern Cal. of Seventh-Day Adventists v. The Franchise Tax Board, 47 CA 3d 207, 214, 120 CR 622, 625; "a classification 'must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.'" (emphasis added); and see In Re David G., 93 CA 3d 247, 254, 155 CR 500, 503: "Legislation affecting only a particular class is constitutional if it is based upon some difference or distinction having a substantial relation to the purpose of the statute." (emphasis added).

The purpose of the Political Reform Act is to prevent the misuse of public office to bring about decisions which create a financial benefit for the holders of the public office. Government decisions made without a basis in fact or reason are legally invalid as violations of the substantive due process requirement that governmental decisions have some rational basis to support them. Thus, the advisory functions of

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providing facts or policy-reasoning to decision makers is as essential to any official decision as is the decision itself. All valid governmental actions consist of two parts, i.e. facts/reasoning and decision. Advisors provide the former and decision makers the latter. Both are essential and there is no rational basis upon which the advisory function can be said to be less important, and thus rationally less related to the effect of the action, than the decision making function.

Stated differently, the purpose of the Act is that "conflicts of interest may be avoided" (Sec. 81002(d)). Whether he acts in an advisory role or a decision-making role, a public official experiences conflict of interest when the advice or the decision may have a material effect on a financial interest. When such an effect may be had, his interest as a public official to be free from the appearance of influence of personal considerations conflicts with his private financial interest in the subject matter of his official conduct no less when he gives advice on the subject matter than when he decides on the subject matter. The classification which the exemption creates between advisors and decision makers thus cannot stand on some ground of difference having a fair and substantial relation to the Act's object of avoiding conflicts of interest for no such difference regarding the goal of avoiding conflicts of interest can be established between the two functions.

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3. The Exemption Violates The U.S. Amendment Equal Protection Clause.

Because it violates Article IV, Sec. 16 of the Constitution, the exemption also violates the U.S. Amendment Equal Protection Clause:

"[Article IV] Sec. 16 [of the California Constitution is]...considered as substantially the equivalent of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution."

McGlothen v. Department of Motor Vehicles, 71 CA 3d 1005, 1026, 140 CR 168, 181-2.

That is, the exemption operates to deny the same (or equal) protection to the public from the harm created by conflicts of interest where the government official with a conflict is an advisor that it gives to the public where the government official with a conflict is a decision maker.

"The constitutional bedrock upon which all equal protection analysis rests is composed of the insistence upon a rational relationship between selected legislative ends and the means chosen to further or achieve them. This precept, and the reasons for its existence, have never found clearer expression than in the words of Justice Robert Jackson, uttered 30 years ago. 'I regard it as a salutary doctrine,' Justice Jackson stated, 'that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of the regulation. This equality is not merely abstract justice. The framers of the Constitution knew,

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and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonably government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just and to require that laws be equal in operation."

Hayes v. Wood, 25 C 3d 772, 787-8, 160 CR 102, 109, invalidating markedly lower income source-reporting threshold in Political Reform Act for public officials who are attorneys and brokers as denial of equal protection.

"Th[e] purpose...[of] insur[ing] that income of a public official which may be 'materially affected' by his official actions be disclosed...is not advanced in a manner consistent with equal protection when one profession is singled out for special treatment on the basis of an availability to him of a method of payment which is no more subject to abuse than any other which might be used to further illicit ends."

(795, 114)

Similarly, such purpose of assets or income disclosure is not advanced in a manner consistent with equal protection when one form of participation in the government action which may materially affect the interest of public officials (i.e. the giving of advice) is singled out for special

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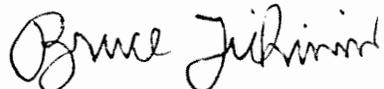
treatment from other forms of participation in such action, such as decision making. Both advising and deciding are equally subject to corrupt abuse.

The remedy for an unconstitutional exemption under both the state and federal constitutions is to invalidate the exemption:

"A legal classification which arbitrarily excludes some but not all of those [public officials] similarly situated in relation to the legitimate purposes of the statute...may [be] correct[ed]...by invalidating the invidious exemption."

Hayes v. Superior Court of San Bernardino County, 6 C 3d 216, 224-5, 98 CR 449, 453.

Very truly yours,



BRUCE TICHININ

BT/cs

cc: D. Heninger

Memorandum

To : Barbara

Date : September 26, 1985

From : FAIR POLITICAL PRACTICES COMMISSION
Jack

Subject : Request for Amicus in the Case of Heninger v. South County Planning Advisory Committee, et al.

Bruce Tichinin, attorney for appellant David Heninger, has requested that the Commission enter the case as amicus curiae on behalf of appellant. Prior to Mr. Tichinin's request, Steven Woodside, Chief Assistant County Counsel for the County of Santa Clara, wrote the Commission requesting advice as to whether the South County Joint Planning Advisory Committee should be subject to the conflict of interest provisions of the Political Reform Act. Bob Leidigh replied stating: "It is this agency's policy not to render advice on questions currently pending in the trial courts." (See A-85-106.) Bob left open the possibility of the Commission appearing as an amicus but concluded that "this does not appear to be an appropriate case for our involvement at this time." A copy of Bob's letter was sent to Mr. Tichinin which, in turn, prompted his request.

1. Nature of the Dispute

The South County Joint Planning Advisory Committee (Committee) was created by the Santa Clara County Board of Supervisors and the City Councils of Gilroy and Morgan Hill. The Committee has 20 members: nine officials of the three jurisdictions and 11 public, or citizen members, from the area. The Committee's charge is as follows:

- A. Study the issues and options relevant to the South County's future, with study reports to be prepared jointly by the staffs of the County and Cities with consultant services as may be needed.
- B. Guide the preparation of a draft joint agencies plan by staff and consultants for submittal to the Board of Supervisors, County Planning Commission and the City Councils and Planning Commissions of Morgan Hill and Gilroy by August 1985.

- C. Include in the planning process consideration of the area's infrastructure needs and appropriate roles of the Cities, the county, other agencies and the private sector in meeting those needs, with proposals regarding them to be submitted following the draft plan.
- D. Draw upon the resources of the community through such meetings, workshops, hearings and other methods as needed to secure public participation and professional expertise vital to the success of the project.
- E. Act as liason between the South County Plan project and the City Councils, Board of Supervisors, and the Planning Commissions in order to inform the three jurisdictions of progress in the project, to make referrals to issues requiring special attention by one or all of the participating agencies, and to bring feedback to the project.
- F. Adopt rules and procedures necessary for the conduct of the Committee's activities.

David Heninger, a member of the Planning Commission of the City of Morgan Hill, requested that the Committee adopt a conflict of interest code pursuant to Section 87300. The Committee declined Heninger's request and Heninger filed an action seeking a preliminary injunction enjoining the Committee from meeting and drafting a plan until the Committee adopted a conflict of interest code.

2. Current Status of the Case

On June 13, 1985 the Superior Court issued a Minute Order denying the preliminary injunction. Heninger then petitioned the Court of Appeal for writ of supersedeas, which was denied. Bruce Tichinin has advised me that he plans to file his appellate brief in October and that briefing by the parties should be complete sometime in December.

3. Issues Presented

Whether the Committee is required to adopt a conflict of interest code pursuant to Section 87300. In deciding this issue the court will have to determine whether the Committee has a "solely advisory function." (Section 82019.)

4. Appellant Heninger's Arguments

A. The Committee is an "Agency" Under Section 87300

The Committee represents the County and Cities in dealings with third persons and is thus an agency of those government entities. Heninger cites Section 2295 of the Civil Code which defines an agent as one who represents another, called the principal, in dealing with third persons.

B. The Decisions of the Committee may Materially Affect Financial Interests

1. Growth affects the financial interest of business generally.
2. Allocation of infrastructure cost responsibility civil affect development - related financial interests.
3. The rate, mix and pattern of growth will affect development-related interests.

C. The Members and Staff of the Committee are "Designated Employees" Within the Meaning of Section 87302

The members and staff of the committee participate in the making of decisions by the Committee through the reports, recommendations and proposed findings they prepare for the Committee.

D. The Committee is not "Advisory Only"

The exemption under Section 87019 should not apply to the Committee because advising the County and the Cities is not its sole function. An additional charge of the Committee is "to serve public participating and professional expertise" in preparing its draft plan.

Heninger relies on Commission on Calif. State Government Organization and Economy v. FPPC (1977), 75 Cal. App. 3d 716, which held that a state commission which served an advisory function but had additional powers was not exempt from the definition of designated employee under the "advisory only" exemption. Heninger specifically quotes the portion of the opinion which states:

A violation occurs not only when the official participates n the decision, but when he influences it, directly or indirectly. Thus, a public official

outside the immediate hierarchy of the decision-making agency may violate the conflict of interest law if he uses his official authority to influence the agency's decision.

75 Cal. App. 3d at 724.

E. The "Advisory Only" Exemption is Invalid

Heninger alternatively argues that there is an internal conflict in the language in Section 82019. Heninger reasons that the purpose of giving advice is to create specific effects and that exempting members of a commission which serves a solely advisory function is inconsistent with the definition of "designated employee" as one making decisions which may foreseeably have a material effect on any financial interest.

Heninger concludes that the exemption is in conflict with the purpose of the statute and therefore violated Article IV, Sec. 16 of the California Constitution as well as the Equal Protection Clause of the U.S. Constitution.

5. Respondent County of Santa Clara's Arguments

A. The Committee is not a Decision-making Body

Respondent argues that members of the Committee are not "public officials" because under 2 Cal. Adm. Code Section 18700(a)(1) only members of boards or commissions "with decision-making authority" are considered public officials. Because the Committee does not make final governmental decisions; does not compel governmental decisions; and does not make substantive recommendations which are, and over an extended period of time have been, regularly approved, the members of the Committee are not public officials under the regulation.

In arriving at this conclusion respondent relies on the fact that any decisions concerning plans proposed by the Committee must be approved by the local government agencies who have jurisdiction over the subject of the plans. Additionally, respondent points out that since the Committee is new it cannot be said that its recommendations are approved with such regularity as to make it a decision-maker.

Respondent distinguishes Commission on Calif. State Gov. Org. and Economy v. FPPC, supra, by noting that the Little Hoover Commission had the power to subpoena and contract while the Committee does not possess subpoena and contracting powers. Additionally, respondent states: "We do not have a body like the Little Hoover Commission which has for many years operated to directly influence governmental decision-making activities."

Respondent also cites City Council v. McKinley (1980), 80 Cal. App. 3d 204, which defines a public decision-maker as one who has tenure of office and has been delegated some portion of the sovereign functions of government. Respondent argues that members of the Committee are not public decision-makers because of the transient nature of the Committee and because the Committee has not been delegated any governmental decision-making power.

B. Exempting Advisors from the Political Reform Act is Consistent with the Purposes of the Conflict of Interest Rules

The Act merely prohibits public decision-makers from making decisions which affect their private interests. The Act does not prohibit financially interested private persons or advisors from participation short of actual decision-making. the "advisory only" exception is consistent with the purposes of the Act because solely advisory officials are not decision-makers; they only recommend.

Respondent also argues that because Section 87303 gives agencies six months in which to adopt a conflict of interest code, temporary advisory bodies were not intended to be covered by the Political Reform Act.

6. Recommendation

I believe that the Commission should not enter this case as amicus curiae on either side for the following reasons:

A. The Facts Regarding the Function of the Committee have not Been Settled

- The superior court did not issue an accompanying statement with its order.

Barbara
September 26, 1985
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- Respondent states that the Committee does not have contracting power while Heninger's attorney told me in a phone conversation that it did. (The court in the Little Hoover Commission case viewed the power to contract as an important element in deciding whether the commission had a solely advisory function.)

B. The Question Could Become Moot if the Committee Completes its Draft Prior to the Appellate Court's Decision

- Respondent stated that the Committee is expected to disband by the end of this year.

LAW OFFICES OF

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FFFC

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MORGAN HILL, CA 95037
TELEPHONE (408) 779-9194

AUG 19 7 50 AM '85

BRUCE TICHININ
ROBERT B. MITCHELL
ATTORNEYS AT LAW

August 15, 1985

Mr. Robert E. Leidigh
Legal Division
Fair Political Practices Commission
P.O. Box 807
Sacramento, CA 95804

Re: Yr. File No. A-85-106
David C. Heninger v. South County Joint Planning Advisory
Committee, et al., 6 Civil No. H000999
Santa Clara County Superior Court No. 572602

Dear Mr. Leidigh:

Pursuant to the interest expressed in your May 13, 1985 letter to Steven Woodside, Chief Assistant County Counsel for the County of Santa Clara, I am enclosing herewith a copy of Appellant's Petition for Writ of Supersedeas in the case referred to above, in connection with his appeal from an order denying a preliminary injunction to enjoin the defendant from proceeding until it adopts a conflict of interest code under Gov. Code Sec. 87300.

I request that the Fair Political Practices Commission enter the case as amicus curiae on behalf of appellant, at least as to those issues consistent with the past and present position of the Commission, i.e. that under Commission, etc. v. F.P.P.C. (1977) 75 CA 3d 716, and under Regulation 18700(c)(2), the defendant Committee is required to promulgate and adopt a conflict of interest code.

Thank you for your consideration of this matter.

Very truly yours,



BRUCE TICHININ

BT/cs

Enclosure

cc: D. Heninger
S. Woodside

TICHININ & MITCHELL

BRUCE TICHININ
ROBERT B. MITCHELL
ATTORNEYS AT LAW

SEP 12 9 02 AM '85

17575 MONTEREY STREET
MORGAN HILL, CA 95037
TELEPHONE (408) 779-9194

September 9, 1985

Mr. Jack Gould
Legal Division
Fair Political Practices Commission
P.O. Box 807
Sacramento, CA 95804

Re: Yr. File No. A-85-106
David C. Heninger v. South County Joint Planning Advisory
Committee, et al., 6 Civil No. H000999
Santa Clara County Superior Court No. 572602

Dear Mr. Gould:

Pursuant to our telephone conference of September 6, 1985, I am enclosing herewith a copy of the Appellant's Appendix filed with the Sixth District Court of Appeal in the case referred to above. This document contains the entire record in Superior Court (the preliminary injunction hearing was not reported) and will undoubtedly remain the entire record on appeal. The questions you have regarding the work of the Committee are answered in it (see the specific citations contained in the Petition for Writ of Supersedeas forwarded with my letter to Mr. Leidigh).

We will argue that it was an abuse of discretion to deny the preliminary injunction because the facts show a violation of the Sec. 87300, et seq. requirements that a government agency which makes decisions or participates in the making of decisions which it is reasonably foreseeable will affect financial interests must promulgate and adopt a conflict of interest code and the members of the agency must file disclosure statements under it prior to participating in or making decisions. Paul v. Watler (1962) 209 C 2d 615 holds that where (as under the PRA) injunctive relief is authorized for a violation of statute great or irreparable injury attends violation of that statute. Such violation was shown here, and the failure to issue a preliminary injunction upon a showing of great or irreparable injury is an abuse of discretion. For authority which supports this contention without discussing it, see Save El Toro Association v. Days (1977) 74 CA 3d 64, 141 CR 282 (denial of preliminary injunction reversed without comment where substantive provisions of Planning and Zoning Law were violated).

Finally, I enclose page four of the Petition before the Supreme Court which states the social importance of this case as precedent.

Mr. Gould
September 6, 1985
Page Two

If I may be of further assistance, please do not hesitate to call.

Very truly yours,

A handwritten signature in cursive script that reads "Bruce Tichinin".

BRUCE TICHININ

BT/cs

Enclosures

cc: D. Heninger

1 urgent. Current policies are in place on all topics of its
2 inquiry and can serve adequately during the appeal period.

3
4 II

5 A HEARING IS NECESSARY TO SETTLE THE IMPORTANT
6 QUESTION OF LAW THAT THE ACT PROTECTS THE PUBLIC FROM
7 THE FINANCIAL BIAS OF ADVISORY GOVERNMENTAL OFFICIALS
8

9 Governmental agencies such as the Committee, created ad hoc
10 to conduct investigations and make recommendations, are an
11 established and important part of American government. In fact,
12 such agencies usually, as here, deal with issues of critical
13 importance whose very inability to be handled by the ordinary
14 organs of government necessitates the creation of the special
15 agency. Thus, the great importance of such agencies, the
16 far-reaching consequences of their recommendations (if adopted),
17 as well as the irregular and relatively unregulated status
18 which, by nature, they occupy, all underscore the importance of
19 enforcing laws requiring their activities to be conducted with
20 integrity.

21 This case presents the opportunity to assure that such
22 enforcement will occur statewide for the many, important such
23 committees of the future.

24
25 III

26 THE INTENT OF THE ACT IS TO AVOID CONFLICTS OF INTEREST
27

28 "Public officials, whether elected or