



California Fair Political Practices Commission

March 4, 1986

David Benjamin
City Attorney
City of Walnut Creek
P.O. Box 8039
Walnut Creek, CA 94586

Re: Your Request for Advice on
behalf of Merle Hall
Our File No. A-86-061-1

Dear Mr. Benjamin:

This is in response to your letter, dated February 19, 1986, requesting formal written advice on behalf of Merle Hall, Councilmember of the City of Walnut Grove. You have stated the material facts as follows.

FACTS

On November 5, 1985, the voters of Walnut Creek approved an initiative ordinance entitled "Traffic Control Initiative," Measure H on the November ballot. The fundamental provision of Measure H is Section 2(a), which states in part as follows:

No buildings or structures shall be built in the City of Walnut Creek unless (1) the A.M. and P.M. peak hour volume-to-capacity ratio of all intersections on Ygnacio Valley Road and all intersections within the Core Area along Main Street, Broadway, California Boulevard, Mt. Diablo Boulevard, Civic Drive and Parkside Drive is .85 or less....

Because some of the intersections specified by Measure H do not, at this time, meet a volume-to-capacity ratio of .85 or less at the A.M. and P.M. peak hours, the prohibition imposed by Section 2(a) took effect on November 29, 1985, the date Measure H itself took effect.

Although Section 2(a) prohibits the construction of any building or structure within the City, Section 2(b) sets forth seven categories of exemptions from this building prohibition. Buildings or structures which qualify under any of these

exemptions may be built even if the traffic service level established by the Measure is not reached. The exemptions pertinent to this request are those stated in subsections (1) and (2), which provide as follows:

(1) Commercial buildings up to 10,000 square feet on a single parcel....

(2) Housing projects up to 30 units on a single parcel in the Core Area and 10 units on a single parcel outside the Core Area, provided that housing built in an existing residential district does not exceed the density allowed by the zoning ordinance for that district as of April 26, 1985....

Measure H defines the word "parcel" to mean "... a single parcel of record on the date of enactment of this ordinance" (Measure H, Section 2(3)(1)). As used in Section 2(b)(2), the term "Core Area" refers generally to the downtown area of Walnut Creek as defined in the City's General Plan.

Soon after the passage of Measure H, a number of questions were presented which required definition or interpretation of its key provisions. One such question concerns the proper interpretation of Section 2(b)(1) and (2), regarding the construction of commercial buildings or housing projects on a single parcel. In some cases, one person may own two or more contiguous parcels. Under Measure H, that property owner would be allowed to construct a commercial building up to 10,000 square feet on each parcel; alternatively, the owner would be allowed to construct a housing project of up to 30 units on each parcel if the property is located in the Core Area, or up to ten units on each parcel if the property is located outside the Core Area.

Because Measure H allows a certain amount of development on each separate parcel, several developers asked the City whether the allowable development potential of two or more contiguous parcels could be aggregated and distributed across the parcels without regard to parcel boundaries. It was argued that shifting development across parcel lines would permit projects of superior design with fewer impacts on traffic circulation.

For example: Under Measure H, the owner of three contiguous parcels would be allowed to construct three separate commercial buildings, one on each parcel, not to exceed 10,000 square feet each. One commercial building of 30,000 square feet, however, could allow for a more pleasing design and a more efficient use of the property by consolidating such common requirements as parking, stairs and hallways, elevators and

heating, ventilation and air conditioning equipment. Similarly, the owner of five contiguous parcels in the Core Area would be allowed, under Measure H, to construct 30 dwelling units on each parcel. A consolidated project of 150 units, however, could improve traffic circulation by decreasing driveway cuts and allowing more land to be used for open space and common recreational facilities.

This issue of the aggregation and distribution of development rights and other questions of interpretation were transmitted to the City Council on December 17, 1985. Upon the advice of the City Attorney the question of the aggregation of development rights, and other land use issues, was referred to the Planning Commission for a report and recommendation.

Following a public hearing, the Planning Commission concluded that the aggregation and distribution of development rights on contiguous parcels would have a beneficial effect on traffic circulation and urban design. It therefore recommended to the City Council that Measure H be interpreted to allow the aggregation of development rights for contiguous parcels under the same ownership, provided that the ultimate density of development for all parcels does not exceed the development that would have been permitted for each parcel individually.

In the absence of Councilmember Hall's participation, the City Council is equally divided on the question of adopting the Planning Commission's recommendation. The City Council has agreed to continue its discussion on this item to allow Councilmember Hall to seek advice from the Commission.

Councilmember Hall has the following financial interests which may be affected by the City Council's decision on the aggregation of development rights under Measure H:

1. Councilmember Hall is the President and sole shareholder of Dynamic Agents, Inc., a real estate brokerage and management company doing business as "Merle Hall Investments." Councilmember Hall's interest in his company exceeds \$100,000 and his income from the company exceeds \$10,000 per year.

2. Councilmember Hall has a direct investment in the following real property in Walnut Creek which is composed of two or more contiguous parcels:

- a. Councilmember Hall owns interests in real property located at 1815, 1821 and 1825 Mt. Diablo Boulevard (.89 acre). He is the sole owner in fee of the property at 1821 and 1825 Mt. Diablo; he has an undivided 1/3 interest, as tenant in

common, of the property at 1815 Mt Diablo Boulevard. This property is composed of separate but contiguous parcels and is improved with three single-story buildings, totalling approximately 12,500 square feet, that are leased for office use. The value of this property exceeds \$100,000.

b. Councilmember Hall also owns interests in real property located on California Boulevard in Walnut Creek and commonly known as "Petticoat Lane." This property is approximately 2.39 acres in size, and is composed of four separate but contiguous parcels. It is improved with six one or two-story buildings totalling approximately 43,500 square feet that are leased to various tenants for commercial use. The value of this property exceeds \$100,000.

3. Councilmember Hall's company, Merle Hall Investments, manages other property located at 1535, 1540 and 1544 Third Avenue. This property consists of three parcels zoned M-2 (Multiple Family Residential). It is improved with 3 fourplex residential structures. For the management of this property Merle Hall Investments receives income in excess of \$1,001 but less than \$10,000 per year.

QUESTIONS

Councilmember Hall wishes to know whether he can:
(1) participate in the City Council's decision to allow aggregation and distribution of development rights among contiguous parcels under Measure H, or (2) participate in the City Council's decision to place an amendment to Measure H on the June ballot.

CONCLUSIONS

(1) Councilmember Hall should not participate in the City Council's decision regarding the interpretation of Measure H if it is determined that there would be a material financial effect as to any of his economic interests. (2) Likewise he should not participate in the Council's decision regarding placing the measure on the ballot.

ANALYSIS

The Political Reform Act^{1/} prohibits a public official from making, participating in making or in any way attempting to use

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

his or her official position to influence a governmental decision in which he or she has a financial interest. Section 87100.

An 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 or on:

(a) Any business entity in which the public official has a direct or indirect investment 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.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts 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.

* * *

Section 87103(a)-(e).

1. Merle Hall Investments

Councilmember Hall has a direct investment (Section 87103(a)) of more than \$1,000 in Merle Hall Investments, the company is a source of income (Section 87103(c)) of more than \$250 per year to Councilmember Hall and he is an officer (Section 87103(d)) of that business entity. Consequently, Councilmember Hall will be required to disqualify himself if the City Council's decision will have a reasonably foreseeable

material financial effect, distinguishable from its effect on the public generally,^{2/} on Merle Hall Investments.

The effect of a decision, in the case of Merle Hall Investments, will be material if the decision will result in an increase or decrease in the gross revenues of the company of \$10,000 or more in a fiscal year or a similar affect upon its assets. (See, 2 Cal. Adm. Code Section 18702.2(g).)

Arguably, it may be reasonably foreseeable that the City Council's decision will result in an increase or decrease in the gross revenues of Merle Hall Investments of \$10,000 or more during a fiscal year. However, without additional facts regarding the company's past annual revenues, its share of the real estate market and the possible impact of the decision on the real estate market, we are unable to conclude that Councilmember Hall's interests in Merle Hall Investments would require him to disqualify himself from participating in the aggregation decision.

If, however, it can be shown that Councilmember Hall's income from Merle Hall Associates could be increased or decreased by \$250 or more as a result of this decision, then disqualification would be required pursuant to 2 Cal. Adm. Code Section 18702.1.

2. Councilmember Hall's Real Property Interests

You have stated that in your view "it is reasonably foreseeable that the market value of contiguous parcels under the same ownership would increase if the limited development rights afforded by Measure H could be aggregated and distributed across those parcels without regard to parcel boundaries." Councilmember Hall agrees that this interpretation of Measure H "may improve the value of development rights allowed under Measure H."

While both of you agree that there could be an increase in the fair market value of Councilmember Hall's real property interests should the City Council decide to interpret Measure H to allow aggregation of contiguous parcels, there are two issues that must be addressed. First, Councilmember Hall emphatically believes it is either not feasible, or in some

^{2/} Generally, an industry, trade or profession does not constitute a significant segment of the general public; therefore, the "public generally" exception is not applicable to Merle Hall Investments. See, 2 Cal. Adm. Code Section 18703.

cases not practical, for him to take advantage of any additional development rights that would be available to him under the aggregation interpretation of Measure H. Secondly, we have not been provided with any data concerning the probable magnitude of financial effect of this decision on the fair market value of Councilmember Hall's real property holdings.

With respect to the issue of whether Councilmember Hall would, in fact, utilize any additional development rights afforded by the aggregation interpretation, the Commission held in the Legan Opinion:^{3/}

The intended or probable use for property potentially benefited or harmed by a decision is not considered in the analysis of the reasonably foreseeable effects of a decision. The decision's effect upon the property's current fair market value is the appropriate test.

9 FPPC Opinions at 15.

In Legan, County Supervisor Legan's employer (Kaiser) insisted that it would not utilize the increased permissible housing density that would be available for its Hillside property but rather intended to keep this property as an undeveloped buffer zone for its quarry and cement plant operations. In refusing to adopt Supervisor Legan's approach as to what was the reasonably foreseeable effect of the governmental decision on Kaiser's real property holdings, the Commission stated:

There are several problems with considering such an approach. First, we must look at the objective effect upon the value, not whether the owner will act to realize the increased value by selling or developing the property. The second problem is that there is no guarantee that Kaiser won't change its use of the property once the decision has been made and the benefit conferred.

9 FPPC Opinions at 9.

Consequently, Councilmember Hall's intentions with respect to the future use of his property cannot be taken into consideration in determining the reasonably foreseeable financial effect of the decision on his real property

^{3/} Opinion requested by Thomas L. Legan, 9 FPPC Opinions 1, No. 85-001, August 20, 1985.

holdings. For example, a developer might pay more for the Mt. Diablo Boulevard property because he or she could add improvements to the 12,500 square feet of single-story buildings thereby increasing the office space to as much as 30,000 square feet, if the interpretation is adopted by the Council to permit aggregation of parcels. On the other hand, this might not be feasible and there might be no significant effect upon the fair market value of these parcels.

Even though the City Council's decision could have a reasonably foreseeable financial effect on Councilmember Hall's real property holdings, disqualification would not be required unless the financial effect would be material. Under 2 Cal. Adm. Code Section 18702(b)(2)(B), the effect of this decision will be material if it will increase or decrease the total fair market value of all of Councilmember Hall's real property holdings by at least \$1,000 and will also be at least \$10,000 or one-half of 1 percent, whichever is less.

Since we have not been provided with any facts concerning the magnitude of the probable effect of this decision on Councilmember Hall's real property holdings we cannot conclude whether or not the financial effect of this decision will be material. If, however, you believe that the materiality criteria have been satisfied, you should advise Councilmember Hall that he may not participate in or attempt to use his official position to influence the City Council's decision on the interpretation of Measure H.

3. The Property Managed by Merle Hall Investments

The owners of the property managed by Merle Hall Investments are sources of income in excess of \$250 (Section 87103(c)) to Councilmember Hall as he is the sole shareholder of Merle Hall Investments. (See, Section 82030(a).) Therefore, disqualification will be required if the City Council's decision could have a reasonably foreseeable material financial effect, distinguishable from its effect on the public generally, on the owners of these properties by way of an effect upon the fair market value of their parcels.

Again, as we have no facts concerning these persons or entities we can offer no conclusion as to whether the financial effect on these sources of income to Councilmember Hall would be material.

4. The Towne Centre Shopping Complex

You have, subsequent to your written request (on February 26), orally sought our advice on behalf of Councilmember Hall regarding a related matter.

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By its terms, Measure H would prevent the construction of the Towne Centre Shopping Complex. Based upon our previous advice to you related to this project (Advice Letter No. A-83-266), Councilmember Hall has disqualified himself in the past with respect to decisions on this project. The project is a large commercial complex covering several blocks in downtown Walnut Creek and would involve a hotel, Macy's store and numerous other retail outlets, as well as an adjacent parking structure. Councilmember Hall's Mt. Diablo Boulevard and "Petticoat Lane" properties are situated nearby to the proposed Towne Centre Shopping Complex.

You have been informed that the developers of the proposed complex intend to ask the Council on Tuesday, March 4th, to place a measure on the June 1986 ballot which would exempt the Towne Centre Shopping Complex from the restrictions imposed by Measure H, thereby allowing the project to go forward. If the measure is not approved by the Council or if placed upon the ballot and defeated, the project cannot proceed unless the developers succeed in a court challenge to Measure H's applicability to the project. (In your legal analysis of Measure H for the ballot pamphlet, you pointed out that case law has held that local land-use ordinances may not affect redevelopment projects; the Towne Centre project is a redevelopment project.)

You have asked whether, in light of our advice in the Thorson letter, No. A-85-221, Councilmember Hall, despite what you and he have determined to be a disqualifying financial interest in the proposed project, may participate in the Council's decision regarding placing the question on the June ballot. Because of the time frame in which such a decision must be made by the Council, we have not had sufficient time in which to consider the matter in great depth. However, it is our belief that the unique factual content present in the Thorson situation is not present here. Consequently, we conclude that if Councilmember Hall is disqualified with respect to major "go or no go" decisions relating to the Towne Centre Shopping Complex, he is also disqualified from participating in the decision to place the matter on the ballot.

In this instance, the project's developers seek the ballot measure as a way to allow the project, which is otherwise blocked, to go forward. If Councilmember Hall were a consultant hired by the developers to represent them before the Council to seek the ballot measure, he would be disqualified under the "nexus" provisions of 2 Cal. Adm. Code Section 18702(b)(3). He could not accomplish in his role as a councilmember what he is being paid to do as a private consultant. Clearly, it would be inappropriate to permit him

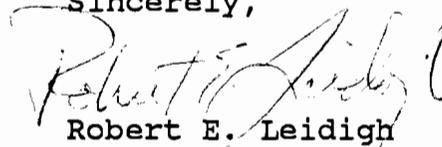
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to participate in the Council's deliberations simply because the matter would be placed before the voters for ultimate determination. Although Councilmember Hall's disqualifying interest here is his ownership of nearby property, not a "nexus" relating to income, the Act does not distinguish between degrees or types of disqualifying financial interests. Therefore, we conclude that participation would be inappropriate in this circumstance if disqualification is required.

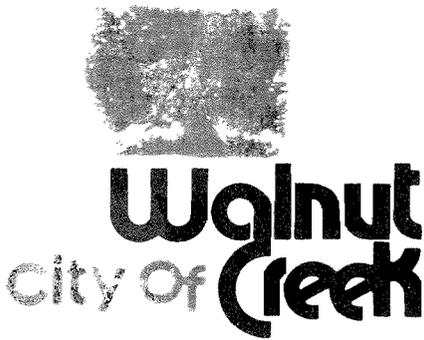
You have also asked the related questions of whether Councilmember Hall could participate in a Council decision to urge a position of support or opposition to the measure if it were to be placed on the ballot (either by the Council or by initiative measure). We advised you that he may not. However, he may, as an individual councilmember, take a public position on the measure, may urge the citizens of Walnut Creek to vote in a particular way and may contribute to the campaign for the position of his choice; subject, of course, to the restriction that he not use public funds in this regard.

If we can be of further assistance to you or Councilmember Hall concerning this matter please to not hesitate to contact us again.

Sincerely,


Robert E. Leidigh
Counsel
Legal Division

REL:JG:plh



FEB 20 9 02 AM '86

February 19, 1986

Mr. Robert Leidigh
Chief of Legal Division
Fair Political Practices Commission
428 J Street, Suite 800
P. O. Box 807
Sacramento, California 95804

Re: Request for Advice

Dear Mr. Leidigh:

I have been authorized by Merle Hall, Council Member of the City of Walnut Creek, to submit on his behalf this request for formal written advice pursuant to Government Code §83114(b). Council Member Hall's mailing address is 1111 Civic Drive, Walnut Creek, California 94596. This request seeks guidance on Council Member Hall's obligation under the conflict of interest provisions of the Political Reform Act of 1974.

The facts material to the consideration of the questions presented below are as follows:

I. STATEMENT OF FACTS.

On November 5, 1985, the voters of Walnut Creek approved an initiative ordinance entitled "Traffic Control Initiative", Measure H on the November ballot. (A copy of Measure H, marked Exhibit A, is included with this request.) The fundamental provision of Measure H is Section 2(a), which states in part as follows:

No buildings or structures shall be built in the City of Walnut Creek unless (1) the A.M. and P.M. peak hour volume-to-capacity ratio of all intersections on Ygnacio Valley Road and all intersections within the Core Area along Main Street, Broadway, California Boulevard, Mt. Diablo Boulevard, Civic Drive and Parkside Drive is .85 or less....

Because some of the intersections specified by Measure H do not, at this time, meet a volume-to-capacity ratio of .85 or less at the A.M. and P.M. peak hours, the prohibition imposed by Section 2(a) took effect on November 29, 1985, the date Measure H itself took effect.

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Although Section 2(a) prohibits the construction of any building or structure within the City, Section 2(b) sets forth seven categories of exemptions from this building prohibition. Buildings or structures which qualify under any of these exemptions may be built even if the traffic service level established by the Measure is not reached. The exemptions pertinent to this request are those stated in subsections (1) and (2), which provide as follows:

(1) Commercial buildings up to 10,000 square feet on a single parcel;....

(2) Housing projects up to 30 units on a single parcel in the Core Area and 10 units on a single parcel outside the Core Area, provided that housing built in an existing residential district does not exceed the density allowed by the zoning ordinance for that district as of April 26, 1985;

Measure H defines the word "parcel" to mean "...a single parcel of record on the date of enactment of this ordinance" (Measure H, Section 2(e)(1)). As used in Section 2(b)(2), the term "Core Area" refers generally to the downtown area of Walnut Creek as defined in the City's General Plan. (The nature and characteristics of the Core Area were described in more detail in Council Member Hall's request for advice dated November 28, 1983, your advice number A-83-266).

Soon after the passage of Measure H, a number of questions were presented which required definition or interpretation of its key provisions. One such question is central to this request: it concerns the proper interpretation of Section 2(b)(1) and (2), regarding the construction of commercial buildings or housing projects on a single parcel. In some cases, one person may own two or more contiguous parcels. Under Measure H, that property owner would be allowed to construct a commercial building up to 10,000 square feet on each parcel; alternatively, the owner would be allowed to construct a housing project of up to 30 units on each parcel if the property is located in the Core Area, or up to ten units on each parcel if the property is located outside the Core Area.

Because Measure H allows a certain amount of development on each separate parcel, several developers asked the City whether the allowable development potential of two or more contiguous parcels could be aggregated and distributed across the parcels without regard to parcel boundaries. It was argued that shifting development across parcel lines would permit projects of superior design with fewer impacts on traffic circulation.

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For example: Under Measure H, the owner of three contiguous parcels would be allowed to construct three separate commercial buildings, one on each parcel, not to exceed 10,000 square feet each. One commercial building of 30,000 square feet, however, could allow for a more pleasing design and a more efficient use of the property by consolidating such common requirements as parking, stairs and hallways, elevators and heating, ventilation and air conditioning equipment. Similarly, the owner of five contiguous parcels in the Core Area would be allowed, under Measure H, to construct 30 dwelling units on each parcel. A consolidated project of 150 units, however, could improve traffic circulation by decreasing driveway cuts and allowing more land to be used for open space and common recreational facilities.

This issue of the aggregation and distribution of development rights and other questions of interpretation were transmitted to the City Council on December 17, 1985 (See Council Agenda Summary, December 17, 1985, attached to this request as Exhibit B. The aggregation issue is discussed in that memorandum under "Issue No. 5."). Upon the advice of this office, the question of the aggregation of development rights, and other land use issues, was referred to the Planning Commission for a report and recommendation.

Following a public hearing, the Planning Commission concluded that the aggregation and distribution of development rights on contiguous parcels would have a beneficial effect on traffic circulation and urban design. It therefore recommended to the City Council that Measure H be interpreted to allow the aggregation of development rights for contiguous parcels under the same ownership, provided that the ultimate density of development for all parcels does not exceed the development that would have been permitted for each parcel individually. The Planning Commission's recommendation on this issue, and others, was then scheduled for a public hearing before the City Council on January 21, 1986. (See City Council Agenda Summary, dated January 21, 1986, attached to this request as Exhibit C; the aggregation issue is discussed in that memorandum as "Issue No. 3.")

Prior to the City Council meeting, I met with Council Member Hall to discuss the effect that his financial interests might have on his ability to participate in the decision on the aggregation of development rights, and other issues that would be presented to the City Council at the same time. Based upon my review of Council Member Hall's financial interests, the applicable provisions of the Political Reform Act and the Commission's regulations and opinions, I advised Council Member Hall to abstain from the discussion and decision on the aggregation of development rights, and he did so.

Following the public hearing before the City Council, however, the Council was unable to reach a decision on whether to permit the aggregation of development rights on contiguous parcels. Two Council Members believed that the aggregation of development rights should be permitted; two others believed that the language of Measure H should be strictly adhered to and that development should only be allowed on individual parcels. I advised the City Council that, under the Political Reform Act, the need to resolve a tie-vote does not justify Council Member Hall's participation. Council Member Hall, however, seeks definitive advice on whether the conflict of interest provisions of the Act require him to abstain from participation on this issue. The Council agreed to continue its discussion on this item to allow Council Member Hall to seek advice from the Fair Political Practices Commission.

II. COUNCILMEMBER HALL'S FINANCIAL INTERESTS.

Council Member Hall has the following financial interests which may be affected by the City Council's decision on the aggregation of development rights under Measure H; financial interests which are not affected by this particular issue are omitted.

1. Council Member Hall is the President and sole shareholder of Dynamic Agents, Inc., a real estate brokerage and management company doing business as "Merle Hall Investments." Council Member Hall's interest in Merle Hall Investments exceeds \$100,000.00, and his income from the company exceeds \$10,000 per year.

2. Council Member Hall has a direct investment in the following real property in Walnut Creek which is composed of two or more contiguous parcels:

a. Council Member Hall owns interests in real property located at 1815, 1821 and 1825 Mt. Diablo Boulevard (.89 acre). He is the sole owner in fee of the property at 1821 and 1825 Mt. Diablo; he has an undivided 1/3 interest, as tenant in common, of the property at 1815 Mt. Diablo Boulevard. This property is composed of separate but contiguous parcels and is improved with three single-story buildings, totalling approximately 12,500 square feet, that are leased for office use. A site plan of this property, showing the boundaries of the individual parcels and the location of the existing improvements, is attached as Exhibit D. The value of this property exceeds \$100,000.00.

b. Council Member Hall also owns interests in real property located on California Boulevard in Walnut Creek and commonly known as "Petticoat Lane." This property is approximately 2.39 acres in size, and is composed of four separate but contiguous parcels. It is improved with six one- or two-story buildings totalling approximately 43,500 square feet that are leased to

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various tenants for commercial use. A site plan of this property showing the individual parcels and the location of the existing improvements is attached as Exhibit E. The value of this property exceeds \$100,000.00.

3. Merle Hall Investments manages the property located at 1534, 1540 and 1544 Third Avenue. This property consists of three parcels zoned M-2 (Multiple Family Residential). It is improved with 3 fourplex residential structures. For the management of this property, Merle Hall Investments receives income in excess of \$1,001 but less than \$10,000 per year. A parcel map of this property, showing the boundaries of the individual parcels, is attached as Exhibit F.

III. QUESTIONS PRESENTED.

A. May Council Member Hall participate in the City Council's deliberations and decision on whether Measure H allows the aggregation and distribution of development rights among contiguous parcels?

1. Is it "reasonably foreseeable" that Council Member Hall's participation on this issue would affect his financial interests?

IV. DISCUSSION.

To assist the Commission in the formulation of its advice, it may be helpful to state the basis for my earlier advice to Council Member Hall and, in addition, the arguments which Council Member Hall has advanced in favor of his participation.

Briefly stated, it was my view that it is reasonably foreseeable that the market value of contiguous parcels under the same ownership would increase if the limited development rights afforded by Measure H could be aggregated and distributed across those parcels without regard to parcel boundaries. Such an interpretation would allow, in at least some cases, the construction of a project of superior design, and would permit efficiencies with regard to the construction and use of common facilities such as parking, stairs and hallways, elevators, HVAC systems and public areas. Although Council Member Hall has no plans to redevelop or sell his interests on Mt. Diablo Boulevard or Petticoat Lane, the Council's decision on the aggregation issue may increase the market value of these properties in the future. Further, it was my view that Council Member Hall's participation on this issue could not be justified under the "public generally" exception.

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Council Member Hall submits the following arguments in favor of this participation:

I agree that an interpretation of Measure "H" that allows aggregation of parcels may improve the value of development rights allowed under Measure "H". However, the nature of my contiguous real property interests is that of assets held for the long term production of income as opposed to land held for development. It is impractical or not feasible to develop my interests any further under the limited development rights allowed under Measure "H", or they are already fully developed to the extent allowed by Measure "H". Therefore, as to my interests, any financial benefit which may result from the decision would be purely speculative and not clear, direct, immediate or measurable and thus not "reasonably foreseeable" within the meaning of the Act.

A. The Mt. Diablo Boulevard Property.

Although Measure "H" would theoretically allow up to 40,000 square feet of building area on these four parcels, it is not practical or feasible to do so because:

1. Separate ownership of 1815 - I am the sole owner of parcels 1-3 on Exhibit "E". I own a 1/3 undivided interest, as Tenant in Common, in parcel 4. That parcel cannot be developed in conjunction with parcels 1-3 unless I acquire the remaining 2/3 interest in it, or enter into a formal development partnership with the other owners. So far I have been unable to do either. My ability to accomplish this in the future is purely speculative as opposed to direct or immediate and therefore not "reasonably foreseeable" under the meaning of the Act.

2. Long term lease of 1821-1825 - Effective January 1, 1986, I entered into a five-year lease of these premises including both buildings and the land. In order to develop the property further the tenant would have to give up the lease.

3. Redevelopment of 1821-1825 not feasible - Even if the lease could be terminated, it would not make economic sense to do so. The present capitalized value of the rent is much greater than the value of the land for a 30,000 sq.ft. project, whether or not it is aggregated. Therefore the "highest and best use" is to retain the property for the production of income.

I concede that some day the buildings may wear out and that a new 30,000 sq. ft. building with a parking structure may attract so much more rent that it would then be economically viable for me to demolish the present buildings and build a new larger one. But, because one of the buildings was remodeled four years ago and the other is only 13 years old the eventuality of this occurring

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could be very remote. In any event it is impossible, at this time, to predict when it could occur or what financial trade-offs would result if aggregation were allowed.

In summary, any potential benefit resulting from aggregation of my property if it is ever re-developed is speculative, long term, undefineable, not immediate or direct and certainly has no bearing on the present capitalized value of the property which is much greater than its value as land for development. Therefore no material financial effect is "reasonably foreseeable" within the meaning of the Act. In the interest of making this presentation as concise as possible, I have omitted the calculations which support my financial arguments. Upon request of the Commission, however, I would be pleased to provide that information.

4. Additional development of 1821-1825 is not feasible. Theoretically, the size of the existing buildings on the three parcels at this location could be increased by approximately 17,000 sq. ft. under Measure H. I concede that if there were no existing lease and if it were feasible to do this that the possibility of siting the expansion in one location by aggregating the parcels may have a financial effect.

However, because of the overall limited size of all the parcels combined, no additional building space can presently be added due to the lack of required parking area. In order to comply with the city's parking requirements, an underground parking structure large enough to handle both the existing and additional spaces would be required.

The cost of building a parking structure to serve 30,000 sq. ft. of building area is too much to justify adding only 17,000 sq. ft. of potential building. Therefore, the capitalized value of the current rent remains greater than the addition allowed under Measure H. This makes it impractical and not feasible to change the current use. Any financial effect of this decision on my interest in this property is not direct or immediate and therefore not "reasonably foreseeable" under the meaning of the Act. Again, I would be pleased to submit financial calculations which support these points upon the Commission's request.

B. Petticoat Lane Property.

This property is currently developed with more building space than would be allowed under Measure H. It is a viable retail center 90% occupied with a capitalized value many times greater than the value of land for a comparable sized project.

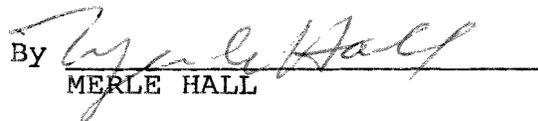
The only possible benefit of allowing aggregation of these

Mr. Robert Leidigh
February 19, 1986
Page 8

parcels would be to rebuild with a totally different site plan. However, this would not be feasible unless the entire project burned to the ground and was rebuilt with insurance proceeds. This would not be a direct or immediate result of this decision and is therefore not "reasonably foreseeable" under the meaning of the Act.

C. 1534, 1540 and 1544 Third Avenue.

This property, managed by Merle Hall Investments, is zoned M-2 (Multiple Family Residential) which allows up to four residential units per parcel. Although Measure "H" would allow up to 10 units per parcel it does not allow more than the existing zoning density. Accordingly, I believe that this property is also developed to the maximum extent possible under Measure H. Therefore it is not "reasonably foreseeable" that this decision would result in any financial effect on Merle Hall Investments.

By 
MERLE HALL

V. CONCLUSION.

Thank you for your advice on this matter. If you have any questions, please feel free to call me or to call Council Member Hall directly. His number is (415) 933-4000.

Very truly yours,


DAVID BENJAMIN
City Attorney

DB:ct

TRAFFIC CONTROL INITIATIVE

City of Walnut Creek, Contra Costa County

The People of the City of Walnut Creek find, declare and ordain as follows:

1. Walnut Creek's Traffic Crisis: Facts and Findings.

(a) The Final Environmental Impact Report for the 1985 Core Area Plan (FEIR) states that, "If no improvements are made to the street system, the traffic volumes added only by those projects which are now under construction will exceed the capacity of the existing streets. This does not include those projects which are approved but not yet under construction." (FEIR, Vol. II, Response to E. Johnston)

(b) The report further states that the lowest acceptable level of service at intersections is "D". (FEIR, Vol. III, Technical Appendix A-6, p.2) At level "D", drivers may have to wait through more than one red light at an intersection. Level "D" has a Volume to Capacity Ratio range of .80-.89. (Ibid., p.7)

(c) Traffic levels of a Volume to Capacity Ratio higher than .85 pose an immediate threat to the public health, safety and welfare. Traffic volumes at or near road capacity increase the risk of traffic accidents; hinder or block the passage of police cars and emergency vehicles; increase air pollution; discourage people from shopping or doing business in Walnut Creek; and lower the quality of life for Walnut Creek residents.

(d) Both commercial and residential developments have contributed to the dangerously high traffic levels in Walnut Creek.

2. Building Moratorium to Limit Traffic Congestion.

(a) No buildings or structures shall be built in the City of Walnut Creek unless (1) the AM and PM Peak Hour Volume to Capacity Ratio of all intersections on Ygnacio Valley Road and all intersections within the Core Area along Main Street, Broadway, California Blvd., Mt. Diablo Blvd., Civic Drive and Parkside Drive is .85 or less, and (2) the traffic generated by the proposed building or structure, when such traffic is added to existing and expected traffic volumes, will not increase the AM or PM Peak Hour Volume to Capacity Ratio at any of those intersections above .85. Estimations of expected traffic volumes shall not be reduced on the assumption that there will be more ride-sharing or use of public transit in the future, or on the assumption that some kind of Transportation System Management program or Flex-time program will be followed in future developments.

(b) Notwithstanding the provisions of Section 2(a) above, buildings or structures which qualify under any of the following categories may be built:

(1) Commercial buildings up to 10,000 square feet on a single parcel; or increases in the size of existing commercial buildings to a total size of 10,000 square feet or less; or rebuilding of existing commercial buildings which have been damaged or destroyed;

(2) Housing projects up to 30 units on a single parcel in the Core Area and 10 units on a single parcel outside the Core Area, provided that housing built in an existing residential district does not exceed the density allowed by the Zoning Ordinance for that district as of April 26, 1985;

(3) Parking structures;

(4) Senior citizen housing, including housing in the Rossmoor Leisure World Planned Development;

(5) Facilities serving the health, safety or welfare of the public, such as hospitals, medical clinics, police or fire stations, and schools;

(6) Cultural, recreational or religious facilities;

(7) Any residential construction that does not increase the number of permanent housing units on the parcel where the construction takes place, such as remodeling or rebuilding existing housing, or adding or rebuilding accessory structures.

(c) This ordinance shall apply to all buildings or structures approved but not yet under construction, as well as to all buildings or structures not yet approved as of the date of enactment of this ordinance.

(d) Nothing in this ordinance shall prevent the City of Walnut Creek from rezoning any land use district.

(e) Definitions. As used herein,

(1) the term "parcel" means a single parcel of record on the date of enactment of this ordinance;

(2) the term "commercial buildings" includes hotels and motels.

(f) Should any part of this ordinance be held invalid, it shall be severable and shall not affect the validity of the remaining parts.

CITY OF WALNUT CREEK
COUNCIL AGENDA SUMMARY
December 17, 1985

ORIGINATED BY: City Attorney and
Community Development Dept. -
Planning

AGENDA ITEM NO. 5d

SUBJECT: ISSUES ARISING UNDER MEASURE H ("TRAFFIC CONTROL
INITIATIVE")

BACKGROUND AND FINDINGS:

I. Introduction.

Since its passage on November 5, many issues have been presented to staff which require an interpretation of the provisions of Measure H. This report identifies the issues presented thus far; explains the significance of each issue; and recommends procedures for the City Council to follow to resolve the issues. Before discussing those issues, however, a brief overview of the structure of Measure H may be helpful as background information.

II. Overview of Measure H.

The central provision of Measure H is Section 2(a), which states (in part) as follows:

No buildings or structures shall be built in the City of Walnut Creek unless (1) the AM and PM Peak Hour Volume to Capacity Ratio of all intersections on Ygnacio Valley Road and all intersections within the Core Area along Main Street, Broadway, California Boulevard, Mt. Diablo Boulevard, Civic Drive and Parkside Drive is .85 or less....

Because some of the intersections specified by Measure H do not, at this time, meet a volume-to-capacity ratio of .85 or less at the A.M. and P.M. peak hours, the prohibition imposed by Section 2(a) took effect on November 29, 1985, the date Measure H itself took effect. Section 2(c) describes the application of this prohibition to current development projects:

This ordinance shall apply to all buildings or structures approved but not yet under construction, as well as to all buildings or structures not yet approved as of the date of enactment of this ordinance.

COUNCIL AGENDA SUMMARY

December 17, 1985

Subj: ISSUES ARISING UNDER MEASURE H ("TRAFFIC CONTROL INITIATIVE")

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Note that Section 2(a) is a prohibition against constructing any building or structure. Measure H expressly provides that it does not prohibit the rezoning of property (Section 2(d)), and nothing in Measure H prohibits the subdivision of property.¹ Even if property is rezoned and subdivided for a particular type and intensity of development, however, no building or structure may be built unless it falls within one of the exemptions established by Section 2(b).

Section 2(b) sets forth seven categories of exemptions from the prohibition set forth in Section 2(a). Buildings or structures which qualify under any one of these categories may be built even though a volume-to-capacity ratio of .85 at the A.M. and P.M. peak hours is not met at the intersections specified in Section 2(a). The exemptions are as follows:

- (1) Commercial buildings up to 10,000 square feet on a single parcel; or increases in the size of existing commercial buildings to a total size of 10,000 square feet or less; or rebuilding of existing commercial buildings which have been damaged or destroyed;
- (2) Housing projects up to 30 units on a single parcel in the Core Area and 10 units on a single parcel outside the Core Area, provided that housing built in an existing residential district does not exceed the density allowed by the Zoning Ordinance for that district as of April 26, 1985;
- (3) Parking structures;
- (4) Senior citizen housing, including housing in the Rossmoor Leisure World Planned Development;
- (5) Facilities serving the health, safety or welfare of the public, such as hospitals, medical clinics, police or fire stations and schools;

¹Although Measure H does not prohibit the subdivision of property, only parcels created on or before November 29, 1985, the date of enactment of Measure H, may be considered for the purpose of development under the exemptions set forth in Sections (b)(1) and (2); Section 2(e)(1) defines the word "parcel" to mean "...a single parcel of record on the date of enactment of this ordinance."

COUNCIL AGENDA SUMMARY

December 17, 1985

Subj: ISSUES ARISING UNDER MEASURE H ("TRAFFIC CONTROL INITIATIVE")

Page 3

(6) Cultural, recreational or religious facilities;

(7) Any residential construction that does not increase the number of permanent housing units on the parcel where the construction takes place, such as remodeling, or rebuilding existing housing, or adding or rebuilding accessory structures.

The term "commercial buildings" is defined to include hotels and motels (Section 2(e)(2)).

III. Issues Presented.

Issue No. 1: What procedure should be used to determine whether a particular project falls within an exemption, and at what point in the development process should a determination of exemption be made?

Significance of Issue No. 1: This issue relates only to the method used to administer the exemptions, not to the interpretation or scope of any particular exemption.

Issue No. 2: As to projects which involve the construction of more than one building:

a. Should all buildings in the project be deemed to be "under construction" if a building permit has been obtained for all buildings and at least one building is under construction on the date of enactment?

b. Should all buildings be deemed to be "under construction" if a building permit has been issued for only one building, and that building is "under construction" on the date of enactment of Measure H?

Significance of Issue No. 2: There are several current development projects that involve the construction of more than one building. In some cases, a building permit was obtained for all buildings, and at least one building was "under construction" on or before the date of enactment of Measure H. In other cases, a building permit was obtained for only one building, or portion of a building, and only that building was "under construction" on the date of enactment.

Issue No. 3: Does the exemption stated in Section 2(b)(1) allow commercial buildings up to 10,000 gross square feet or 10,000

COUNCIL AGENDA SUMMARY

December 17, 1985

Subj: ISSUES ARISING UNDER MEASURE H ("TRAFFIC CONTROL INITIATIVE")

Page 4

net square feet?

Significance of Issue No. 3: A distinction is often drawn between a building's gross and net square feet. The City's Zoning Ordinance, for example, defines "gross floor area" generally as the total area of all floors in a building as measured to the outside surfaces of exterior walls, exclusive of parking structures; "rentable floor area," on the other hand, is defined generally as the total area on all floors as measured to the inside surfaces of interior walls and excluding hallways, stairs, restrooms and other common areas. It is also a common practice in real property development and leasing to distinguish between the gross and net square feet of a building using similar criteria.

Issue No. 4: Are the exemptions set forth in Section 2(b) cumulative? For example, can a particular project in the Core Area have 10,000 square feet of commercial building and 30 dwelling units on the same parcel? Similarly, can a particular development outside the Core Area have 10 conventional housing units and additional senior citizen housing on the same parcel?

Significance of Issue No. 4: The current Core Area Plan encourages mixed-use development. Several mixed residential/commercial projects have been proposed, and one has been approved but not constructed.

Issue No. 5: If a residential project includes more than one parcel, can the total number of housing units allowed for all parcels under Section 2(b)(2) be distributed on the site without regard to parcel boundaries, or must the permitted number of housing units for each parcel actually be constructed on each parcel?

Significance of Issue No. 5: Section 2(b)(2) allows housing projects up to 30 units on a single parcel in the Core Area and 10 units on a single parcel outside the Core Area. In some developments that comprise more than one parcel it may be desirable for design reasons to distribute the permitted housing units across the site, rather than to adhere strictly to parcel boundaries.

Issue No. 6: On property that was not within the City's corporate limits on April 26, 1985 and was not rezoned on that date, how should the density of development be determined for that property under Section 2(b)(2)? Similarly, how should the density of development be determined for property that was within the City's boundaries on April 26, but was not classified by the Zoning Ordinance on that date, or was not classified as residential on that date?

Significance of Issue No. 6: Section 2(b)(2) allows housing projects up to 30 units on a single parcel in the Core Area

COUNCIL AGENDA SUMMARY

December 17, 1985

Subj: ISSUES ARISING UNDER MEASURE H ("TRAFFIC CONTROL INITIATIVE")

Page 5

and 10 units on a single parcel outside the Core Area, provided that housing built in an existing residential district does not exceed the density allowed by the Zoning Ordinance for that district as of April 26, 1985. This issue recognizes that some property was not within an existing residential district on April 26, 1985 because it was not within the City and was not rezoned, or was not classified under the Zoning Ordinance, or was not classified as residential.

Issue No. 7: Does the exemption for housing projects in the "Core Area" refer to the Core Area boundaries set forth in the 1975 Core Area Plan, or the boundaries suggested in the proposed revisions to the Core Area Plan?

Significance of Issue No. 7: The proposed revisions to the Core Area Plan, not yet adopted by the City Council, propose an expansion of the Core Area to include the Newell Hill Shopping Center at the northeast corner of Newell and South Broadway and the Kaiser site on the south side of that intersection.

Issue No. 8: How are the density restrictions in Section 2(b)(2) affected by state law provisions which requires cities to grant a 25% density bonus for low- and moderate-income housing?

Significance of Issue No. 8: State law requires that a density bonus, or other incentive of equivalent financial value, be granted to a developer of housing who agrees to construct at least 25% of the total units of a housing development for persons of low- or moderate-income, or 10% of the total number of units for lower income households, or 50% of the total dwelling units of the housing development for senior citizens (Government Code §65915). Under §65915, the term "density bonus" means a density increase of at least 25% over the otherwise maximum allowable residential density under the applicable zoning ordinance and land use element of the General Plan.

Issue No. 9: What is the definition of "senior citizen housing"?

Significance of Issue No. 9: There are various definitions of senior citizen housing set forth in state law and City ordinances. These definitions may differ on the age at which one becomes a senior, the right of senior citizens to share dwelling units with non-seniors, and the designation of income levels.

Issue No. 10: Are convalescent homes, resthomes, medical offices and congregate care facilities exempt from Measure H?

Significance of Issue No. 10: Section 2(b)(5) exempts "[f]acilities serving the health, safety or welfare of the public, such as hospitals, medical clinics," This issue asks whether

COUNCIL AGENDA SUMMARY

December 17, 1985

Subj: ISSUES ARISING UNDER MEASURE H ("TRAFFIC CONTROL INITIATIVE")

Page 6

convalescent homes, resthomes, congregate care facilities, medical offices and similar uses fall within this exemption.

Issue No. 11: Are second dwelling units exempt from the provisions of Measure H?

Significance of Issue No. 11: An argument has been made that second dwelling units are prohibited under Measure H because they do not fall with an exemption. Section 2(b)(2) appears to allow second dwelling units, because it permits the construction of more than one housing unit on a single parcel, provided that it does not exceed the specified density standard.² Section 2(b)(7), however, allows residential construction provided that it does not increase the number of permanent housing units on the parcel where the construction takes place.

Issue No. 12: Does the word "parcel" refer only to a parcel of land, or does it include also the creation of air space parcels in a condominium development?

Significance of Issue No. 12: Under Section 2(b)(2), housing projects up to 30 units on a single parcel are allowed in the Core Area and up to 10 units on a single parcel outside the Core Area. In both cases, the parcel must have been a "parcel of record" on the date of enactment of Measure H. Condominium developments involve the division of air space into particular units and the creation of common areas for the benefit of condominium owners. This issue asks whether each condominium unit, shown as a parcel of record on the date of enactment of Measure H, should be treated as a single parcel and therefore exempt under Section 2(b)(2).

Issue No. 13: If a parcel is improved with a commercial building or buildings with a floor area greater than 10,000 square feet, can the structure be rebuilt or redesigned provided that the total square footage is not increased?

Significance of Issue No. 13: There are many older commercial structures in the City which are in need of renovation. Some owners have expressed a desire to demolish the existing structure and reconstruct a new building of the same size, or to relocate a portion of an existing building without increasing its square footage.

Issue No. 14: Are commercial education facilities, such as business and trade schools, exempt from the building prohibition?

²Under state law, a second dwelling unit cannot be counted when determining residential density (Government Code §65852.2(b)).

COUNCIL AGENDA SUMMARY

December 17, 1985

Subj: ISSUES ARISING UNDER MEASURE H ("TRAFFIC CONTROL INITIATIVE")

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Significance of Issue No. 14: Section 2(b)(5) exempts "schools" from the building prohibitions, but does not specify public or private schools.

Issue No. 15: Can existing parking structures be converted to commercial space on parcels which contain more than 10,000 of existing commercial space?

Significance of Issue No. 15: One office development of more than 10,000 square feet has a surplus of parking, and has asked whether a portion of the parking structure can be converted to retail use.

Issue No. 16: Are commercial health clubs, athletic facilities and spas exempt from the building prohibition?

Significance of Issue No. 16: The Racquetball Club has asked whether it may expand its present facility, raising the question whether commercial athletic facilities of this type are exempt under Section 2(b)(6) as "recreational facilities."

IV. Recommended Procedures.

To insure a permanent record of the Council's interpretations that will provide guidance to the staff and to the public, we recommend that the City Council's interpretations of these issues be adopted in ordinance form. Under the State planning law, however, any ordinance that regulates the use of buildings or land must be referred first to the Planning Commission for public hearing, report and recommendation (Government Code §§65850 and 65853). To insure the validity of any ordinance ultimately adopted, every proposed interpretation of Measure H should be reviewed to determine whether it must be adopted in accordance with these procedures.

The resolution of many of the issues presented above will not regulate the use of land or buildings to any greater or lesser degree than does Measure H itself. On these issues the voters' intent is reasonably clear, or the issue itself is a matter of administration rather than regulation. On other issues, however, the voters' intent is not readily apparent, and the ultimate interpretation of such issues will affect the use of land or buildings. These issues are:

Issue No. 3 (10,000 gross square feet vs. 10,000 net square feet)

Issue No. 5 (distribution of exempt housing units without regard to parcel boundaries)

COUNCIL AGENDA SUMMARY

December 17, 1985

Subj: ISSUES ARISING UNDER MEASURE H ("TRAFFIC CONTROL INITIATIVE")

Page 8

- Issue No. 6 (establishing density of development for property that was not within the City or not zoned on April 26, 1985)
- Issue No. 9 (definition of "senior citizen housing")
- Issue No. 10 (whether convalescent homes, rest homes, medical offices and congregate care facilities are "facilities serving the health, safety or welfare of the public....")
- Issue No. 14 (whether commercial education facilities are "schools")
- Issue No. 16 (whether commercial athletic clubs are "recreational" facilities)

The City Attorney's office recommends that these issues, and similar issues that may be presented to the City Council, be presented first to the Planning Commission for a public hearing and a report and recommendation to the City Council. Upon receipt of the Commission's recommendations, the Council must also hold a public hearing on these issues.

We also recommend that the City Council hold a public hearing on those issues that need not be referred to the Planning Commission. All persons affected by Measure H would be given an opportunity to express their views on the proper resolution of each issue; prior to the hearing, staff would also present its analysis and recommendations to the Council.

If the City Council agrees that a hearing should be held, the Council should consider whether to await the Planning Commission's recommendations and treat all issues at once, or whether to decide some issues in advance of others. Accordingly, we present two alternative procedures which the Council may wish to follow:

(1) Take no further action on the interpretation of Measure H until the Planning Commission forwards its recommendations on those issues that were referred to the Commission. (Under State law, the City Council may require the Planning Commission to render its report within 40 days; failure to report to the City Council within that time period is deemed to be approval of the proposed ordinance (Government Code §65853)). Upon receipt of the Planning Commission's recommendations, the City Council would then schedule a public hearing for the purpose of taking testimony and resolving all of the issues presented at one time; alternatively,

(2) Schedule a public hearing as soon as possible on the issues the City Council has reserved to itself, and resolve those issues

COUNCIL AGENDA SUMMARY

December 17, 1985

Subj: ISSUES ARISING UNDER MEASURE H ("TRAFFIC CONTROL INITIATIVE")

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without waiting for the Planning Commission's recommendations on the remaining issues. Upon receipt of the Planning Commission's recommendations, the City Council would then hold a second public hearing and resolve the remaining issues at that time.

ATTACHMENTS:

1. Correspondence dated November 29, 1985 to the City Manager from UNICOM Answering Service.

2. Correspondence dated December 3, 1985 to the City Manager from Ed Dimmick.

3. Text of Measure H.

COUNCIL ACTION REQUIRED:

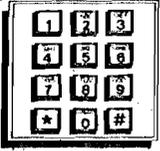
Identify any additional issues involving the interpretation of Measure H; consider the recommended procedures for resolving these issues of interpretation; and direct staff to proceed accordingly;

OR

Take such other action as the Council deems appropriate.

DB:ct

cc: Elaine Johnston, Planning Commission Chairman



UNI-COM

ANSWERING SERVICE

1252 CIVIC DR • WALNUT CREEK, CA 94596

(415) 945-6100

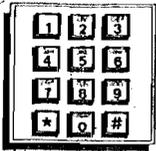
November 29, 1985

TOM DUNNE
CITY MANAGER
P.O. Box 8039
1666 North Main Street
Walnut Creek, Ca. 94596

Dear Tom:

At the City Council meeting on November 26, 1985, I asked about Kirby Plaza which was planned as a two (2) phase project. At that meeting, you advised me to write a letter.

On November 27, 1985, I talked to Randy Jerome and Christy Miller in the Community Development Department. During the discussion, I received a copy of Resolution #1208 and a copy of Building Permit #2784 (copies enclosed). I asked Randy Jerome and Christy Miller if a second building or foundation permit were issued for Phase II of Kirby Plaza. They stated that this is the only permit on record for Kirby Plaza. It is my understanding that the Permit #2784 is only for Phase I of Kirby Plaza. It is also my understanding that the City of Walnut Creek will not issue new building permits for



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office buildings over 10,000 square feet because of Proposition H.

Since I am presently a tenant at 1252 Civic Drive which is the planned site for Kirby Plaza Phase II, it is important for me to know if the City plans to permit the construction of this project. I would appreciate a response as soon as possible since the two (2) phase projects are a discussion item at the City Council meeting on December 3, 1985.

Sincerely,



Sanford Weintraub
Managing General Partner
Uni-Com Answering Service

SLW:jmc
Enclosures

December 3

Tom -

Following is my concern about what has been called "phantom".

Pleasure H states that buildings or structures which are under construction will be allowed to continue, last week the council decided what was ^{meant by} under construction. What about those projects which have more than 1 building? Are there any ^{projects} which, for example, have a foundation for one building, thus allowing it to go ahead, but don't have a foundation yet begun for other buildings? As I understand Pleasure H, such other buildings would not be allowed to be built. Are there any such projects in the city? I don't know, but would like to know.

Thank you,
Ed Jimmick

TRAFFIC CONTROL INITIATIVE

City of Walnut Creek, Contra Costa County

The People of the City of Walnut Creek find, declare and ordain as follows:

1. Walnut Creek's Traffic Crisis: Facts and Findings.

(a) The Final Environmental Impact Report for the 1985 Core Area Plan (FEIR) states that, "If no improvements are made to the street system, the traffic volumes added only by those projects which are now under construction will exceed the capacity of the existing streets. This does not include those projects which are approved but not yet under construction." (FEIR, Vol. II, Response to E. Johnston)

(b) The report further states that the lowest acceptable level of service at intersections is "D". (FEIR, Vol. III, Technical Appendix A-6, p.2) At level "D", drivers may have to wait through more than one red light at an intersection. Level "D" has a Volume to Capacity Ratio range of .80-.89. (Ibid., p.7)

(c) Traffic levels of a Volume to Capacity Ratio higher than .85 pose an immediate threat to the public health, safety and welfare. Traffic volumes at or near road capacity increase the risk of traffic accidents; hinder or block the passage of police cars and emergency vehicles; increase air pollution; discourage people from shopping or doing business in Walnut Creek; and lower the quality of life for Walnut Creek residents.

(d) Both commercial and residential developments have contributed to the dangerously high traffic levels in Walnut Creek.

2. Building Moratorium to Limit Traffic Congestion.

(a) No buildings or structures shall be built in the City of Walnut Creek unless (1) the AM and PM Peak Hour Volume to Capacity Ratio of all intersections on Ygnacio Valley Road and all intersections within the Core Area along Main Street, Broadway, California Blvd., Mt. Diablo Blvd., Civic Drive and Parkside Drive is .85 or less, and (2) the traffic generated by the proposed building or structure, when such traffic is added to existing and expected traffic volumes, will not increase the AM or PM Peak Hour Volume to Capacity Ratio at any of those intersections above .85. Estimations of expected traffic volumes shall not be reduced on the assumption that there will be more ride-sharing or use of public transit in the future, or on the assumption that some kind of Transportation System Management program or Flex-time program will be followed in future developments.

(b) Notwithstanding the provisions of Section 2(a) above, buildings or structures which qualify under any of the following categories may be built:

(1) Commercial buildings up to 10,000 square feet on a single parcel; or increases in the size of existing commercial buildings to a total size of 10,000 square feet or less; or rebuilding of existing commercial buildings which have been damaged or destroyed;

(2) Housing projects up to 30 units on a single parcel in the Core Area and 10 units on a single parcel outside the Core Area, provided that housing built in an existing residential district does not exceed the density allowed by the Zoning Ordinance for that district as of April 26, 1985;

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(7) Any residential construction that does not increase the number of permanent housing units on the parcel where the construction takes place, such as remodeling or rebuilding existing housing, or adding or rebuilding accessory structures.

(c) This ordinance shall apply to all buildings or structures approved but not yet under construction, as well as to all buildings or structures not yet approved as of the date of enactment of this ordinance.

(d) Nothing in this ordinance shall prevent the City of Walnut Creek from rezoning any land use district.

(e) Definitions. As used herein,

(1) the term "parcel" means a single parcel of record on the date of enactment of this ordinance;

(2) the term "commercial buildings" includes hotels and motels.

(f) Should any part of this ordinance be held invalid, it shall be severable and shall not affect the validity of the remaining parts.

CITY OF WALNUT CREEK
COUNCIL AGENDA SUMMARY
JANUARY 21, 1986

ORIGINATED BY: CDD - PLANNING
CITY ATTORNEY

AGENDA ITEM NO.

SUBJECT: PUBLIC HEARING ON THE INTERPRETATION OF VARIOUS ISSUES
RELATING TO THE IMPLEMENTATION OF MEASURE H, TRAFFIC
CONTROL INITIATIVE

BACKGROUND: The traffic Control initiative, Measure H, was adopted by the voters of Walnut Creek on November 5, 1985, and took effect on November 29, 1985. A number of issues have been presented which require interpretation before Measure H can be applied in specific situations. Those issues which relate to the regulation of land use were the subject of a public hearing by the Planning Commission on January 9. The City Council has requested a report from the Planning Commission by January 26, 1986. That report, and staff recommendations on the issues, are the subject of this agenda summary. Planning Commission recommendations are contained in a letter to the City Council appended to this report.

FINDINGS, ANALYSIS AND RECOMMENDATIONS:

ISSUE NO. 1.: Shall all buildings in a development be deemed to be "under construction" if a building permit has been issued for only one building, and that building is "under construction" on the date of enactment of Measure H?

Analysis of Issue No. 1.: In cases where a building permit was issued for one building of a multi-building project, and that building was deemed to be under construction on November 29, 1985, can the entire project be deemed to be under construction? Several "phased" projects are in this situation: Kirby Plaza Offices, Shell Ridge Professional Park, and Dow Chemical Greenhouses. The issue of vested rights hinges upon substantial progress toward completion of construction pursuant to a valid building permit.

Staff Recommendation on Issue No. 1.: Staff suggests that buildings without valid building permits cannot be deemed to be under construction, regardless of developer/owner intent in project planning.

Planning Commission Recommendation on Issue No. 1: Support staff recommendation.

ISSUE NO. 2.: Does the exemption stated in Section 2(b)(1) allow commercial buildings up to 10,000 gross or net square feet?

EXHIBIT C

Analysis of Issue No. 2.: Gross building area means the total area occupied by a building, exclusive of garages, patios, decks, etc. Net area is synonymous with rentable floor area, and is described in detail in the zoning ordinance (attachments 3 and 4). The City uses net rentable floor area for determining parking, and gross building area for Core Area In-lieu Development Fees. There is typically a 10-20% difference between the gross and net area of a building, depending on efficiency. Industry standard trip generation data are presented in terms of gross building area.

Staff Recommendation on Issue No. 2.: Staff recommends that gross building area be used to determine project exemption status. Net area may change based on the nature of tenancy in a building, and the City currently bases traffic mitigation fees on gross building area.

Planning Commission Recommendation on Issue No. 2.: Net rentable building area, as defined in the zoning ordinance.

ISSUE NO. 3.: If a residential project includes more than one parcel, can the total number of housing units allowed for all parcels under Section 2(b)(2) be distributed on the site without regard to parcel boundaries, or must the permitted number of housing units for each parcel actually be constructed on each parcel?

Analysis of Issue No. 3.: In many cases, two or more parcels are assembled in order to develop a project. The exemptions in 2(b)(2) would allow, for example, ten units to be built on each parcel of a three-parcel assembly. If the zoning specified no side-yard setbacks, the structures on adjacent parcels could be connected to create a single building of 30 units. Since this amount of development is allowed by Measure H on assemblages of separate parcels, should the allowable amount of development be allowed to be shifted around to enable better project design? The advantages of allowing this shifting include more efficient use of property, potentially better design, more useable open spaces, and fewer driveway cuts into public streets. The advantages of requiring multi-parcel projects to be dispersed over the separate parcels relate directly to the purpose of Measure H; namely it is probable that design and site constraints would result in fewer units under the more restrictive interpretation, and this would translate to fewer automobile trips.

Staff Recommendation on Issue No. 3.: Staff could find either option acceptable, but supports the Planning Commission's recommendation of allowing the permitted development, either residential or commercial, to be located on multi-parcel assemblages without regard for parcel lines, as long as the project density does not exceed that which could be developed by adhering to strict per-parcel limits on each.

Planning Commission Recommendation on Issue No. 3.: See staff recommendation above.

ISSUE NO. 4.: On property that was not within the City's corporate limits on April 26, 1985 and was not rezoned on that date, how should the density of development be determined for that property under Section 2(b)(2)? Similarly, how should the density of development be determined for property that was within the City's boundaries on April 26, but was not classified by the Zoning Ordinance on that date, or was not classified as residential on that date? OK

Analysis of Issue No. 4.: Section 2(b)(2) allows housing projects up to 10 or 30 units per parcel, depending on location, provided the density allowed by the zoning ordinance on April 26, 1985 is not exceeded. Properties not in the City on April 26, 1985, properties zoned other than residential, or unclassified parcels have no established benchmark.

Staff Recommendation on Issue No. 4.: Staff recommends that the benchmark density be established by the City Council at the time of rezoning, rezoning or establishment of an initial residential zoning classification on a parcel in accordance with regular City procedures.

Planning Commission Recommendation on Issue No. 4.: Support staff recommendation.

ISSUE NO. 5.: What is the definition of "senior citizen housing?" OK

Analysis of Issue No. 5.: There are various definitions of senior citizen housing set forth in State law and City ordinances. These definitions may differ on the age at which one becomes a senior, the right of senior citizens to share dwelling units with non-seniors, and the designation of income levels. The City zoning ordinance definition, attached to this report, sets 60 years as the age limit, but further requires that the units be affordable. U.S. Department of Housing and Urban Development (HUD) regulations as used for the Casa Montego senior project stipulate 62 years as the limit. The California Civil Code (attached) defines senior citizen housing as housing for those over 55 years of age in large developments (over 150 units) and 62 years of age in all other situations.

Staff Recommendation on Issue No. 5.: The definition of "senior citizen" in a "senior citizen housing development" contained in State law is the controlling factor. Therefore, the City may use 55 years of age as the minimum for the purpose of determining eligibility. Households in which one of the members meets the applicable age limit would be accepted as "senior citizen" households. For small developments under 150 units, 62 may be used.

Planning Commission Recommendation on Issue No. 5.: The Commission recommends age 60 be used in all cases as the minimum limit. Presumably only one household member would have to exceed 60 years to qualify.

ISSUE NO. 6.: Are convalescent homes, resthomes, medical offices and congregate care facilities exempt from Measure H? 2-

Analysis of Issue No. 6.: Facilities "serving the health, safety or welfare of the public, such as hospitals, medical clinics..." are exempted from the building moratorium. The listed uses in many ways could be determined to fit this exemption.

Staff Recommendation for Issue No. 6.: Staff recommends that the listed uses be determined to fall within the exemption in Section 2(b)(5).

Planning Commission Recommendation on Issue No. 6.: Support staff recommendation. OK

ISSUE NO. 7.: Are commercial education facilities, such as business and trade schools, exempt from the building prohibition?

Analysis of Issue No. 7.: The exemption listed in Section 2(b)(5) is for "schools," but does not specify public or private schools, or commercial education facilities.

Staff Recommendation on Issue No. 7.: Staff suggests that, because the exemption is not limited to public or non-profit schools, all types of educational activities be included in the exemption.

Planning Commission Recommendation on Issue No. 7.: Support staff's recommendation.

ISSUE NO. 8.: Are commercial health clubs, athletic facilities and spas exempt from the building prohibition? OK

Analysis on Issue No. 8.: There are a variety of private, for-profit health clubs, athletic facilities, spas and related uses. In some ways, they do serve the health and welfare of the public. OK

Staff Recommendation on Issue No. 8.: Staff recommends that commercial spas, health clubs, exercise facilities and similar uses be determined to fall under the exemption stated in Section 2(b)(6).

Planning Commission Recommendation on Issue No. 8.: Support staff's recommendation.

ISSUE NO. 9.: Are lot line adjustments permitted, for the purpose of establishing a "parcel" under Measure H, after the effective date of the initiative? dk

Analysis of Issue No. 9.: Subdivision law permits and may require minor adjustments to lot lines in established subdivisions and parcel maps. These changes could result in greater development potential pursuant to per-parcel limitations of Measure H. There is no authority to prohibit lot line adjustments; the issue is merely whether the parcel boundaries in effect on November 29, 1985 must be used to determine developability under the initiative.

Staff Recommendation on Issue No. 9.: Staff believes that parcel boundaries in effect on November 29 should be used to determine developability under Measure H, regardless of subsequent lot line adjustments.

Planning Commission Recommendation on Issue No. 9.: Support staff's recommendation.

ISSUE NO. 10.: Can residential and commercial uses be mixed on a parcel if the total square footage limits of Measure H are not exceeded? ok

Analysis of Issue No. 10.: Measure H is silent regarding projects which contain both residential and commercial components. At issue is how to determine the allowable exemption for each use in mixed residential/commercial projects. Assuming that the exemptions are not additive, then some method for determining trade-offs between residential and commercial uses must be established. It should be noted that mixed use projects are normally expected in the Core Area. Therefore, a parcel which is allowed 10,000 square feet of commercial space would alternately be allowed 30 residential units. 7.

Staff Recommendation on Issue No. 10.: Staff suggests a simple arithmetic equivalency formula be used, which relates 10,000 square feet of commercial space to 30 dwelling units. Each 1,000 feet of commercial space would equal three units; each unit would equate to 333 square feet of commercial space. Any project would be exempt which did not exceed the equivalent of 10,000 square feet of commercial space or thirty units.

Planning Commission Recommendation on Issue No. 10.: Support staff's recommendation.

ISSUE NO. 11.: Can a building permit be issued for a project which includes some development which is exempt under Measure H plus the permitted amount of residential or commercial development? 2,

Analysis of Issue No. 11.: This issue relates to a situation where a mixture of exempt uses is proposed on a single parcel, including size-limited exemptions (dwellings and commercial space) and unlimited exemptions (health and welfare uses, for example). The most immediate situation is the Shell Ridge Office Professional Park, where the developer proposes a mix of medical offices, out-patient clinics and general offices. He wishes to know if up to 10,000 square feet of general office space can be built in addition to the clinic and medical office space.

Staff Recommendation on Issue No. 11.: Staff believes that the language of Measure H allows buildings to be built which qualify under any, and not only one, of the listed exemptions. The exception to this is where size-limited (residential and commercial) uses which were not intended to be added together, as is discussed in Issue No. 10.

Planning Commission Recommendation on Issue No. 11.: Support staff's recommendation. (Note: This concludes the list of issues referred to the Planning Commission for review and report.)

ISSUE NO. 12.: Does the exemption for housing projects in the "Core Area" refer to the Core Area boundaries set forth in the 1975 Core Area Plan, or the boundaries suggested in the proposed revisions to the Core Area Plan? OK

Analysis of Issue No. 12.: The 1975 Core Area Plan boundaries differ from those proposed in the draft Core Area Plan revisions currently under review. Although the revisions have not been adopted, Council did approve the boundary changes affecting several properties, including the Newell Hill Center and Kaiser parking lot, which relate in access more to the Core Area than to the neighborhood to the east. These properties currently carry R-0 zoning, a classification found only in the Core Area.

Staff Recommendation on Issue No. 12.: Staff suggests that the subject area be determined to be in the Core Area for purposes of Measure H.

ISSUE NO. 13.: How are the density restrictions in Section 2(b)(2) affected by state law provisions which requires cities to grant a 25% density bonus for low- and moderate-income housing? OK

Analysis of Issue No. 8.: State law requires that a density bonus, or other incentive of equivalent financial value, be granted to a developer of housing who agrees to construct at least 25% of the total units of a housing development for persons of low- or moderate-income, or 10% of the total number of units for lower income households, or 50% of the total dwelling units of the housing A

development for senior citizens (Government Code Section 65915). Under Section 65915, the term "density bonus" means a density increase of at least 25% over the otherwise maximum allowable residential density under the applicable zoning ordinance and land use element of the General Plan.

Staff Recommendation on Issue No. 13.: State law takes precedence over local ordinance; the City must grant a density bonus if requested, or grant "equivalent financial value" incentives to the developer. Staff suggests the choice of bonus or financial incentive be decided on a case-by-case basis. The draft Housing Element proposes guidelines for the state mandated density bonus program. These guidelines should be in place before an assessment can be made of the value of the density bonus.

ISSUE NO. 14.: Are second dwelling units exempt from the provisions of Measure H? OK

Analysis of Issue No. 14.: Section 2(b)(2) permits the construction of more than one housing unit on a single parcel, provided that it would not exceed the density standard. State law (Government Code Section 65852(b)) stipulates that a second dwelling unit cannot be counted when determining residential density.

Staff Recommendation on Issue No. 14.: Staff recommends that second dwelling units be determined to be exempt from the building moratorium.

ISSUE NO. 15.: Does the word "parcel" refer only to a parcel of land, or does it include also the creation of air space parcels in a condominium development? OK

Analysis of Issue No. 15.: Under Section 2(b)(2), housing projects up to 30 units on a single parcel are allowed in the Core Area and up to 10 units on a single parcel outside the Core Area. In both cases, the parcel must have been a "parcel of record" on the date of enactment of Measure H. Condominium developments involve the division of air space into particular units and the creation of common areas for the benefit of condominium owners. This issue asks whether each condominium unit, shown as a parcel of record on the date of enactment of Measure H, should be treated as a single parcel and therefore exempt under Section 2(b)(2). The Jones Road Villas Development is one affected project.

Staff Recommendation on Issue No. 15.: Air space parcels are created in the same fashion as ground parcels, are similarly saleable and taxable, and carry development rights. They appear on the Assessor's records as parcels. The Subdivision Map Act provides for their creation, and embodies them with certain rights, including the right

to develop according to the subdivision and zoning requirements. It is staff's opinion that air space parcels should be counted as "parcels" under Measure H.

ISSUE NO. 16.: If a parcel is improved with a commercial building or buildings with a floor area greater than 10,000 square feet, can the structure be rebuilt or redesigned provided that the total square footage is not increased? ?

Analysis of Issue No. 16.: There are many older commercial structures in the City which are in need of renovation. Some owners have expressed a desire to demolish the existing structure and reconstruct a new building of the same size, or to relocate a portion of an existing building without increasing its square footage. In one instance, a structure was demolished prior to the effective date of Measure H, in anticipation of future renovation. This is the case with Siemens Medical Laboratories.

Staff Recommendation on Issue No. 16.: Staff suggests that commercial buildings which are over 10,000 square feet as of November 29, 1985, can be rebuilt or redesigned, as long as the total square footage is not increased. Council could determine that buildings destroyed prior to November 29, 1985 may also be replaced.

ISSUE NO. 17.: Can existing parking structures be converted to commercial space on parcels which contain more than 10,000 square feet of existing commercial space? OK

Analysis of Issuance No. 17.: One office development, Two Walnut Creek Center, of more than 10,000 square feet, has a surplus of parking, and has asked whether a portion of the parking structure can be converted to retail use.

Staff Recommendation on Issue No. 17.: Staff does not believe that the language of Measure H would permit conversion of a parking structure to commercial space if the total would exceed 10,000 square feet.

RECOMMENDED PROCEDURE:

Following the public hearing and Council deliberations on the various issues, staff will prepare an ordinance for adoption by the Council setting forth the determinations. Staff will bring this ordinance back at a subsequent meeting.

ATTACHMENTS:

1. Traffic Control Initiative
2. Response to Council Agenda Summary, proponents of Measure H

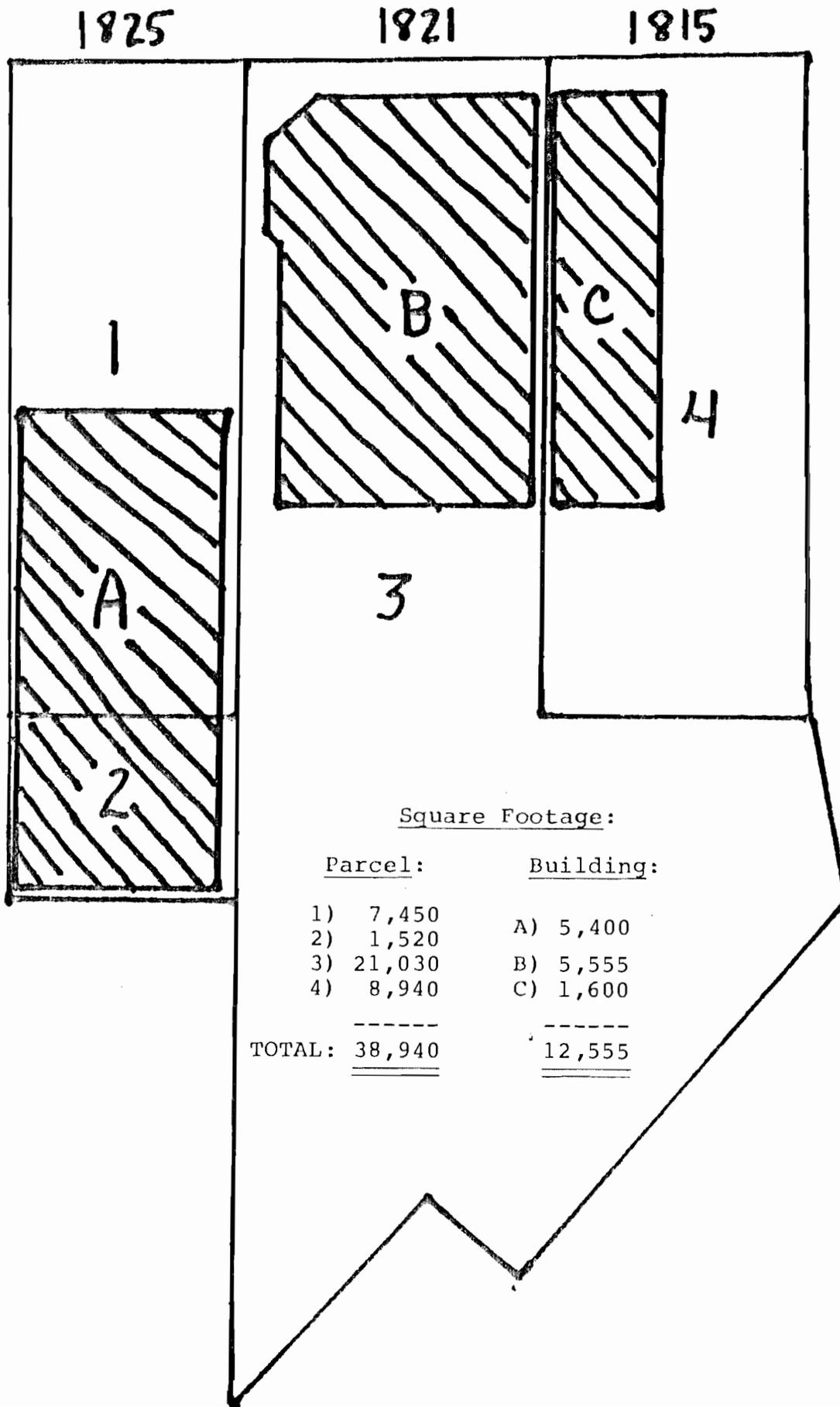
3. W.C.M.C. Sec. 10-2.101(aa and ab), Definition of "Floor Area, Gross, and Rentable"
4. W.C.M.C. Sec. 10-2.101(bs), Definition of "Senior Citizen Housing"
5. Cal. Civil Code [1], Sec. 51.3
6. Letter dated 12/20/85 from Frank Bryant
7. Letter dated 1/8/86 from Mark Armstrong
8. Draft Planning Commission Minutes from 1/9/86
9. Letter from Planning Commission dated 1/15/86

COUNCIL ACTION REQUIRED:

Conduct the public hearing, then direct staff to prepare an ordinance reflecting Council decisions on the above issues.

Prepared by Jerry Swanson/mes/jj
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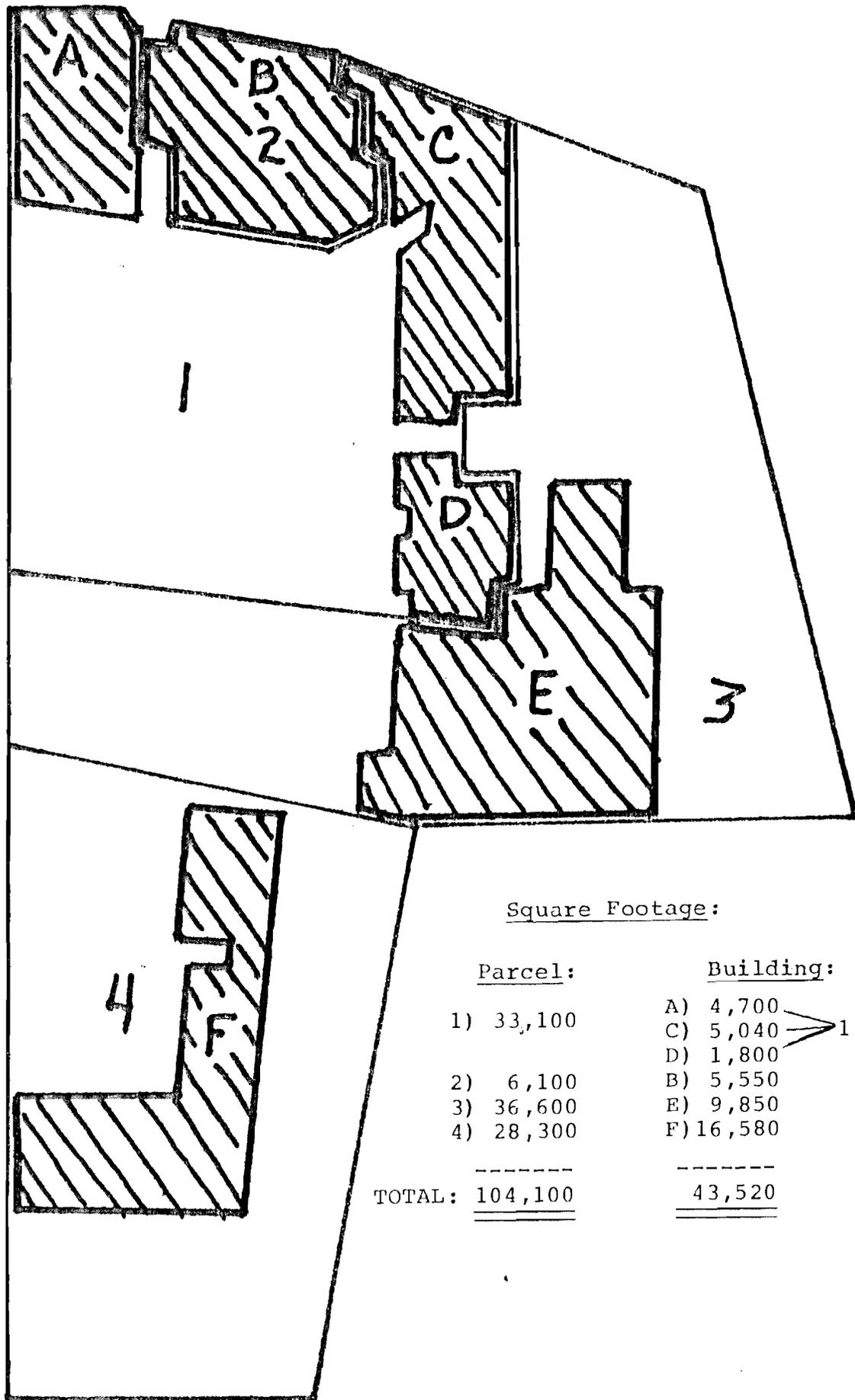
Mt. Diablo Blvd.



Square Footage:

<u>Parcel:</u>	<u>Building:</u>
1) 7,450	A) 5,400
2) 1,520	B) 5,555
3) 21,030	C) 1,600
4) 8,940	
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TOTAL: <u>38,940</u>	<u>12,555</u>

S. California Blvd.



Square Footage:

Parcel:

Building:

- 1) 33,100
- 2) 6,100
- 3) 36,600
- 4) 28,300

- A) 4,700
- C) 5,040
- D) 1,800
- B) 5,550
- E) 9,850
- F) 16,580

11,540

TOTAL: 104,100

43,520

LARKEY RANCH SUB'N NO. 2

1969-1-5 P.M. 8 6-21-68

A-1976 ROLL - TRACT 4568 MB179-42

1-87 P.M. 40 7-14-80

9

HALL LN.

CELA CT.

VARTAN CT.

1808

SECOND

AVE.

18

33

MONTIN CT.

BALDWIN LANE

22

THIRD

AVE.

PIKEWOOD CT.

191

ASSESSOR'S MAP
BOOK 171 PAGE 19

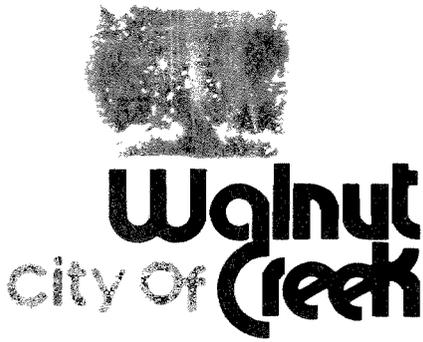
CONTRA COSTA COUNTY, CALIF.
2/10/86 C.M.

A - LARKEY RANCH SUB'N NO. 1 M.B. 4-79

B - WHITTON SUB'N. M.B. 34-8

COURT E





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June 25, 1986

Robert E. Leidigh, Esq.
Legal Division
California Fair Political Practices Commission
P. O. Box 807
Sacramento, CA 95804-0807

From: Council Members Evelyn Munn and Ed Skoog

Re: Merle Hall, your file No. A-86-061

Dear Mr. Leidigh:

We wish to take this opportunity to support your advice to Merle Hall, May 15, 1986. We understand your advice to mean Mr. Hall may not vote on the issue of parcel aggregation.

Following are our thoughts on this matter for your information.

I. Statement of Facts

1. Walnut Creek City Attorney, David Benjamin, in his letter to you, dated February 19, 1984 IV: Discussion, page 3, related the facts thus: Briefly stated, it was my view that it is reasonably foreseeable that the market value of contiguous parcels under the same ownership would increase if the limited development rights afforded by Measure "H" could be aggregated and distributed across those parcels without regard to parcel boundaries. Although Council Member Hall has no plans to redevelop or sell his interests on Mt. Diablo Boulevard on Petticoat Lane, the Council's decision as to the aggregation issue may increase the market value of these properties in the future."

Further, in that same communication Council Member Merle Hall stated: "I agree that an interpretation of Measure "H" that allows aggregation of parcels may improve the value of development rights allowed under Measure "H" (page 6). Further, Council Member Merle Hall stated: I concede that some day the buildings may wear out and that a new 30,000 square foot building with a parking structure may attract so much more rent that it

Robert E. Leidigh, Esq.
June 25, 1986
Page Two

would thus be economically viable for me to demolish the present buildings and build a new larger one (page 4). Further, "I concede that if there were no existing lease and if it were feasible to do this that the possibility of siting the expansion in one location by aggregating the parcels may have a financial effect." (Additional development of 1821-1825 Mt. Diablo Blvd., Walnut Creek).

You received from Council Member Merle Hall a six-page letter with attachments dated April 18, 1986 in which he attempts to analyze "fair market value" as a "function of income." You responded to Council Member Merle Hall's communication of May 15, 1986, that "there would be no requirement for you to disqualify yourself from participation in the aggregation decision. However, the citation you referenced was Legan Opinion, 9 FPPC Opinions, No. 85-001, August 20, 1985.

We understand that the same case which deals with guarantees of the future effect upon real property in Legan is the same case as Council Member Hall's real property holdings in Walnut Creek on Mt. Diablo Boulevard, South California Boulevard and Third Avenue. "There is no guarantee that Kaiser won't change the use of the property once the decision has been made and the benefit conferred." Thus, Council Member Hall's argument that the "best and highest use" of his property is "income" is no guarantee that once the decision is made (to aggregate) the use of the property will not change.

The use of the property under the aggregation interpretation of Measure "H" will have a foreseeable financial effect on Council Member Hall's contiguous parcels on South California Boulevard and Mt. Diablo Boulevard as he has conceded to and agreed to in the above dated communication. His future intentions notwithstanding, you clearly point out "a developer might pay more for the Mt. Diablo property . . . if the interpretation is adopted by the Council to permit aggregation of parcels."

Thus the test of fair market value as applied to "income" is flawed because the real test applies to real property.

References:

1. Council Agenda Summary: January 21, 1986: Implementation of Measure "H": Analysis: "The advantages of requiring multi-parcels to be dispersed over the separate parcels relate directly to the purposes of Measure H; namely, that it is probable that design and site constraints would result in fewer units under the more restrictive interpretation and this would translate to fewer automobile trips."

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2. In the real estate and land infill market of urban areas today in California, fewer units translates into lower densities and less profits. As another developer, Dale Frost, so aptly put it before the passage of Measure "H", "In my opinion, this (Measure "H") effectively eliminates the feasibility of doing any high density projects anywhere near what the current, (prior to November 29, 1986) zoning allows" and Measure H "enactment would cut property values in half."

3. The developer of five contiguous parcels on Riviera Avenue wishes to aggregate these parcels and then sell the property as one parcel because he can negotiate a higher "price" and sell the aggregated parcel to another land developer at a higher profit margin.

4. Seventeen property owners applied for parcel map waivers before enactment of "H". This divided one parcel into several parcels in order to build 10,000 square feet, or 30 units on each new parcel. Certainly these developers, and Merle Hall is such a developer, realized the "price" for one parcel would be less than one parcel divided X number of times:

1 parcel - 10,000 sq. ft. commercial
Parcel map waivers 4 parcels = 40,000 sq. ft. commercial

After Measure "H" they currently feel entitled to develop by aggregation all that property aggregation will permit. Clearly, the development community recognized this fact as they hurried to beat the Measure H deadline of November 5, 1985.

Conflict of Interest

Proposition 9 of the Political Reform Act "Prohibits a public official from making, participating in making or in any way attempting to use his official position to influence a governmental decision in which he or she has a financial interest."

If Council Member Merle Hall votes yes on aggregation, which he intends to do, he will do so as an "official influencing a government decision in which he has a financial interest." This applies not only on real property but on his "income" from said property.

You will recall Council Member Hall's "conflict of interest" over the Town Centre Redevelopment project which surfaced in 1983. At that time and thereafter, until the passage of Measure "H", Council Member Hall opposed the Town Centre and abstained from participating in a government decision because he termed the response from the FPPC "ambiguous." Therefore, the course he took not to vote, in his opinion, was a "discretionary" one.

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Page Four

This is Mr. Hall's public statement to the Contra Costa Times, dated February 9, 1984:

Hall said he decided to abstain on further discussion of the project 'because of the fact that there has not been clear, absolute opinion given. If for example, I should not abstain and the City should go ahead with the project and some disgruntled person were to use my participation as legal grounds for challenging the project, then a disservice to the City would occur which otherwise might not be the case', he said. 'If there is a gray area here, regardless of which way the gray area should go, it's incumbent upon me to step out', he added. (Contra Costa Times 2/9/84)

A. The parcel owned by Council Member Hall at 1815 Mt. Diablo Blvd. The assertion that Council Member Hall should exclude this property because he holds a "minority interest" does not appear to be relevant. What is relevant is that he holds a financial interest. Thus, parcel aggregation would have a "reasonably foreseeable" effect on his financial interests.

B. The Traffic Control Initiative states:

- 2. (1) Commercial buildings up to 10,000 square feet on a single parcel.
- (2) Housing projects up to 30 units on a single parcel in the Core Area and 10 units on a single parcel outside the Core Area. . . .

"This restriction has been emphasized in the ballot argument in favor of Measure H and the Ballot Measures Fact Sheet distributed to voters by Citizens for a Better Walnut Creek." Further "If developers were not restricted to one project on a single parcel of record when Measure H was enacted, developers could subdivide parcels and, instead of building one 30 unit project, for example, could build two 30 unit projects--creating a substantial traffic impact." (Response to Council by CBWC: Issue No. 5)

This is exactly the case in the parcel map waiver scenario described above in which 17 developers subdivided before the enactment of "H". Aggregation now will allow them increased financial benefit and substantial profit vis-a-vis larger projects. Aggregation of parcels is unabashedly and undeniably a breach of the law, Measure H.

C. We agree with you in the Conclusion, May 15, 1986. You state: "With respect to your parcels which you have analyzed, we

Robert E. Leidigh, Esq.
June 25, 1986
Page Five

are in no position to validate or to refute your analysis." We contend that your analysis of the case of Legan applies, as stated on page 4, communication March 4, 1986: and that "the decision's effect upon the property's fair market value is the appropriate test. Further, there is no guarantee that Council Member Merle Hall, a developer, will not change its use of the property "once the decision has been made and the benefit conferred." 9 FPPC Opinions at 9.

D. Council Member Hall's intention to vote relates to a "gray area" based on the above advice from you. As stated previously, Hall was adamantly opposed to the Town Centre for two years before Measure "H." Now, he is the champion of the Redevelopment project. He changed his mind. He can change his mind again. He may, in the future, after the benefit conferred, and after using his influence in a government decision, decide, as other developers desire to do, to aggregate his parcels, which will in turn, have a "foreseeable effect on his financial interests."

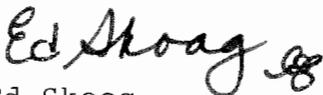
Finally, we agree with Mr. Hall, Contra Costa Times, 2/9/84 that if there is a gray area here "it's incumbent upon me to step out." As to "disgruntled persons" there are 60,000 residents who are increasingly disgruntled over Council Member Hall's "conflicts of interest" which are a true "disservice to the City."

While it is ultimately in your province to render legal decisions on "conflict of interest" pertaining to Proposition 9, we believe that an integral part of these decisions affect moral and ethical conduct by elected officials who are sworn to uphold public trust.

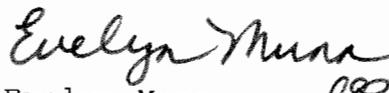
We commend you for your diligence, time and effort on behalf of the people of Walnut Creek and California who deserve the best from elected officials who are "bound to exercise the powers conferred on him with disinterested skill, zeal and diligence and primarily for the benefit of the public."

Thank you for your consideration of this matter.

Respectfully,



Ed Skoog
Council Member of Walnut Creek



Evelyn Munn
Council Member of Walnut Creek



California Fair Political Practices Commission

February 26, 1986

David Benjamin
Walnut Creek City Attorney
P.O. Box 8039
Walnut Creek, CA 94596

Re: A-86-061

Dear Mr. Benjamin:

Your letter requesting advice under the Political Reform Act has been received by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Robert E. Leidigh".

Robert E. Leidigh
Counsel
Legal Division

REL:plh
cc: Merle Hall, Councilmember