



California Fair Political Practices Commission

September 19, 1986

Evelyn Munn
Ed Skoog
Councilmembers
City of Walnut Creek
P.O. Box 8039
Walnut Creek, CA 94596

Re: Your Request for Advice/Appeal
Our File No. I-86-175

Dear Councilmembers:

Pursuant to your request to "appeal" the staff's advice letter, No. A-86-148, to your fellow councilmember, Merle Hall, your materials were forwarded to the Commissioners together with the staff's advice letter.

The Commission did not meet in July; at its August meeting, the Commission approved the staff's advice letter as sent.

Sincerely,

A handwritten signature in cursive script that reads "Robert E. Leidigh".

Robert E. Leidigh
Counsel
Legal Division

REL:km



California Fair Political Practices Commission

June 19, 1986

Evelyn Munn
Ed Skoog
Councilmembers
City of Walnut Creek
P.O. Box 8039
Walnut Creek, CA 94596

Re: Your Request for Advice/Appeal
Our File No. I-86-175

Dear Councilmembers:

You have written requesting advice regarding the ability of one of your colleagues on the City Council (Merle Hall) to participate in the selection of his replacement on the Walnut Creek Redevelopment Agency. As Councilwoman Munn has been previously advised by telephone, the Commission does not provide advice to third parties. Government Code Section 83114 and the Commission's regulations provide for the rendering of advice only to the person whose duties under the Political Reform Act are in question or to that person's authorized representative. Neither of you meet those criteria.

You have been provided with a copy of the Commission's letter No. A-86-148, to Walnut Creek City Attorney David Benjamin, who sought advice on behalf of your colleague Merle Hall on this subject. You have written anew (June 16, 1986) requesting to "appeal" that advice to the full Commission. While there is no formal "appeal" process for third parties, the Commissioners routinely review all staff advice letters on a monthly basis. Inasmuch as the letter in question (A-86-148) is about to be transmitted to the Commissioners for their review, your letters of May 16 and June 16 will be forwarded with it to the Commissioners for their review together. They will advise the staff if they are dissatisfied with the staff's advice rendered in the letter.

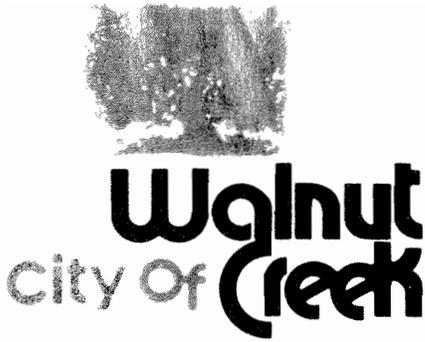
If you have any questions regarding this letter, I may be reached at (916) 322-5901.

Sincerely,

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

Robert E. Leidigh
Counsel
Legal Division

REL:plh



F P P C
MAY 21 8 04 AM '86

May 16, 1986

Robert E. Leidigh
Counsel, Legal Division
F.P.P.C.
P. O. Box 807
Sacramento, CA 95804-0807

Re: Request for Advice on Behalf of
City of Walnut Creek Council Members
Evelyn Munn and Ed Skoog in
Re: Walnut Creek Council Member
Merle Hall's participation in an
appointment to the Walnut Creek
Redevelopment Agency (Your File No. A-86-061)

Dear Mr. Leidigh:

Council Members Evelyn Munn and Ed Skoog of the City of Walnut Creek, seek written guidance from the Fair Political Practices Commission (F.P.P.C.) with regard to certain facts relating to Council Member Merle Hall's appointing his successor to the Walnut Creek Redevelopment Agency.

Please refer to Inter-Office Memo attached, dated April 11, 1986 from David Benjamin, Walnut Creek City Attorney, and to your communication dated March 4, 1986 upon which Council Members Munn and Skoog base their assertions that Council Member Hall be denied entitlement to place a surrogate to act on his behalf on the Walnut Creek Redevelopment Agency.

Statement of Facts

In Inter-Office Memorandum, April 11, 1986, David Benjamin, Walnut Creek City Attorney, advised the members of the Walnut Creek City Council re the new provision to Sec. 33200:

If a member of the legislative body of a city or county does not wish to serve on the agency, the member may so notify the legislative body of the city or county and the legislative body of the city or county shall appoint a replacement who is an elector of the city or county to serve out the term of the replaced member.

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Attorney Benjamin points out further in his memorandum that "nothing prohibits the resigning Councilmember from participating in the vote to appoint his replacement."

Council Members Munn and Skoog contend that the correct interpretation of this Section 33200 is that nothing in the new Section legally permits Council Member Hall participating in the selection of a surrogate. Further, a request by Council Members Munn and Skoog for an outside counsel's legal opinion on this issue was denied by the three remaining Council Members.

Council Members Munn and Skoog maintain that Council Member Hall has notified the legislative body and that these questions pertinent to Section 33200 need clarification:

1. The City Council sitting as the Redevelopment Agency has been notified of Merle Hall's resignation and that the four remaining Council Members are the only elected officials who can vote upon a replacement due to said notification, since they are the legislative body and the legal quorum which remains after such notification;
2. that the clause "member of the legislative body who does not wish to serve" is not applicable. This is not the case. Council Member Merle Hall is precluded from serving on the Redevelopment Agency due to a "conflict of interest;"
3. that Council Member Merle Hall has had to disqualify himself on other occasions from a vote upon decisions coming before the Walnut Creek City Council due to "conflict of interest;"
4. that the same "conflict of interest" exists whether Council Member Merle Hall sits as a member of the Redevelopment Agency or City Council; and
5. that the term "shall appoint" a replacement is hardly a mandate to the four remaining members of the legislative body. Legally and semantically the term "shall" creates an "uncertainty" and is less binding than the word "must" and thus, does not constitute a binding obligation.

The questions Council Members Munn and Skoog propose are thus:

1. What is the legal basis under California law which permits elected officials to appoint their own successor; specifically, other legal precedents, decisions, cases relating to the specific area dealing with "conflict of interest." The "conflict of interest" proviso in this case applies to Council Member Merle Hall's ownership of property adjacent to the Town Centre Project

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and hardly seems legally and morally of "no particular interest" according to Munn and Skoog. Therefore, what is the legal precedent for an elected official with a "conflict of interest" to appoint a successor whose decision will have in turn, a "foreseeable affect" on Mr. Hall's financial interests: namely, properties Council Member Merle Hall owns on Mt. Diablo Boulevard, and the property acquired in 1985 on Petticoat Lane, adjacent to the Town Centre Project. This property consists of a nightclub and proposed restaurant that would benefit financially from the Town Centre's proposed offices, retail and hotel within walking distance from the project.

This case must be determined by the facts of this case. To say that "no particular reason" is necessary to support the resignation from the Agency does not address the fact that Mr. Hall's resignation is solely due not to "no particular reason" but on the face of it, a very particular reason "conflict of interest." This case merits a review of legal precedents and possibly a review of legal opinions from the Attorney General.

Further, Council Member Margaret Kovar resigned from the Walnut Creek City Council in 1985. Council Member Kovar refused to participate in the appointment of her successor and deemed it highly "inappropriate." There is no precedent in Walnut Creek to permit Hall from appointing his successor either. Such an appointment of a successor by him would be on the face of it biased. It would also send a message to the voters in this City that a specific case decision was not properly given due consideration by the F.P.P.C. and an attendant "appearance of corruption" would remain in the minds of the voters by Mr. Hall's attempt to circumvent "fair political practices."

Item 2. Please refer to your communication dated March 4, 1986, p. 4, Section heading, Conclusions. You state: (1) Likewise he (Council Member Merle Hall) should not participate in the Council's decision reagrding placing the measure on the ballot." The analogy that somehow allows Council Member Hall, in your telephone conversation to David Benjamin, to participate in appointing a Redevelopment Agency successor because "no one can forsee what is in the mind of the one who votes" must apply equally as well as the same decision to disallow Council Member Hall to participate in a Council decision to place an exemption to Measure H on the ballot. Thus, quid pro quo no one can determine what is in the mind of the voter individually or voters collectively either. However, in your communication the decision was stated that Council Member Merle Hall must disqualify himself from the Council's decision to place the measure on the ballot

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(2) p. 4. Your analysis of Prop. 9 of the P.R.A. "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."

Argument:

1. Council Members wear "two hats" but the "conflict of interest" provision still applies even if the Redevelopment Agency "hat" is removed due to resignation from that particular body. As a Council Member, Merle Hall has exactly the same "conflict of interest" he has as ex-officio member of the Redevelopment Agency. As a Council Member, he is prohibited "in any way to attempt to use his official position to influence a government decision in which he knows, or has reason to know, he has a financial interest and must abstain from participating in such a matter which will have a material effect on his financial interest." Thus, as a Council Member, he is prohibited to influence the Council in a decision. A vote for his own successor is the highest form of influence there is.

2. It further appears that while Council Member Merle Hall sat on the Redevelopment Agency he violated "conflict of interest" Re: the common law applicable to "conflict of interest." The common law provision prohibits members from "engaging in activities in which their private interests conflict with their public duty." Mr. Hall purchased property on Petticoat Lane in 1985 which is almost adjacent to the Town Centre Project. There was no indication before the passage of Measure H, that Council Member Merle Hall, who stated at that time that he was philosophically and economically opposed to Redevelopment, that he would resign from the Redevelopment Agency. Yet, after the passage of Measure "H" in 1985, which is law, and after the purchase of property on Petticoat Lane in 1985, he now seeks a successor. This clearly is an attempt by Council Member Merle Hall to use his official position to "influence a governmental decision in which he has a financial interest."

Along with the fact that a vote to appoint a surrogate by Merle Hall is the "highest form of influence" that can be utilized by a local official to influence a government decision" two facts will be discussed herein that clearly implicate recent actions by Council Member Merle Hall which undercut the Court's decision that "a public officer is impliedly bound to exercise the powers conferred upon him with "disinterested skill, zeal and diligence and primarily for the benefit of the public." Noble v. City of Palo Alto, 89 Cal.App. 47, 51 (1928).

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FACTS

1. Council Member Merle Hall states in his letter of resignation from the Redevelopment Agency that he feels "the agency would benefit by replacing me with a member better able to contribute." Therefore, he clearly implies that only the Agency can replace him. However, he is seeking to participate as a Council Member to replace himself with a "stand-in."

2. Council Member Merle Hall has personally contacted Elaine Johnston in an effort to replace him on the Redevelopment Agency. Elaine Johnston is the Chair of the Walnut Creek Planning Commission. Chairman Johnston has communicated this fact to City Attorney, David Benjamin. The City Attorney has had to advise Mrs. Johnston on the legalities as to holding a concurrent seat on the Redevelopment Agency and Planning Commission. Further, Mrs. Johnston has advised Council Member Skoog on two separate occasions that she is Pro-Town Centre. This clearly implies that Mrs. Johnston, an advocate of Town Centre would vote on amendments to the Disposition and Development Agreement (DDA) that would make the currently circulated petition by the Town Centre developer more palatable to the voters. This in effect would create a "go or no go" decision relating to the Town Centre shopping complex in which Mr. Hall was disqualified from participating in the decision to place the matter on the ballot to exempt the Town Centre project from the provisions of Measure H.

3. Walnut Creek Planning Commissioner Tom Conrad has relayed to Council Members Munn and Skoog that he has personal knowledge and will testify to same that Council Member Merle Hall has approached others in the Walnut Creek community in an effort to solicit them to replace him on the Redevelopment Agency and has queried them as to their positions on the Town Centre Project. Prop. 9 is clear on this matter. Yet Council Member Merle Hall has been unilaterally approaching members of the Walnut Creek community, even though he is "prohibited in any way attempting to use his or her official position to influence a governmental decision in which he or she has a financial interest." Section 87100.

Council Members Munn and Skoog maintain that the evidence is a fair, factual, and unbiased statement of the facts.

1. A quorum exists in four members of the Redevelopment Agency and that the notification of resignation is to the four legislators remaining and permit only those four legislators to render a decision on replacement.

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Moreover, Council Members Munn and Skoog are unequivocally opposed to sitting with an appointee: a) there is no legal precedent permitting such to occur in this particular case; b) the voters had a perception when they voted on Walnut Creek Council Members they were voting on these same elected officials as members of the Redevelopment Agency; c) that the elected officials' commitment to their constituency is unlike that of an appointee who has no such constituency and is thus not a duly elected representative of the community at large, with the political significance, duties and ramifications attached to the office.

2. No legal precedent exists for Merle Hall as an elected official with a "conflict of interest" to participate in selecting an apprentice successor.

a) The identical "conflict of interest" which applies as a member of the Redevelopment Agency precludes such participation by Council Member Hall to choose a surrogate.

3. Council Member Merle Hall has been actively soliciting a "stand-in" which will in turn create a "go or no go" with the Town Centre Project and that this will have a "favorable effect on his financial interests."

4. Council Member Merle Hall has violated common law and moral law by abrogating his responsibility to act with "disinterested zeal for the benefit of the public."

Council Members Munn and Skoog respectfully request that this entire matter be brought to the full commission for a ruling. Because Munn and Skoog are strict adherents to the Provisions of Prop. 9 and its intent of "fair political practices", Council Member Munn and Skoog will avail themselves of every opportunity to discuss this with you further at your convenience.

In any event, Council Members Munn and Skoog reserve the right to appeal Counsel Leidigh's decision. However, we will abide by the final decision of the entire commission.

Thank you for your consideration and patience in this matter.

Respectfully,



Evelyn Munn
Walnut Creek Council Member
35 Sandra Court
Walnut Creek, CA 94595



Ed Skoog
Walnut Creek Council Member
258 Shady Lane
Walnut Creek, CA 94596

Attachments



INTER-OFFICE MEMORANDUM

April 11, 1986

TO: MAYOR AND CITY COUNCILMEMBERS
CITY MANAGER

FROM: DAVID BENJAMIN, CITY ATTORNEY *DB*

SUBJ: COUNCILMEMBER HALL'S PROPOSED RESIGNATION FROM THE REDEVELOPMENT AGENCY

Councilmember Hall has informed me that he intends to resign from the Redevelopment Agency of the City of Walnut Creek. This memorandum sets forth the basis for his proposed resignation, and the legal consequences which that resignation will have for the City Council, the Redevelopment Agency and the Town Centre Redevelopment Project.

The Community Redevelopment Law presents two alternative methods for the creation of a redevelopment agency. The legislative body may create a separate agency by appointing five or seven members of the community to act as the Redevelopment Agency (Health & Safety Code §33110). Alternatively, the City Council may declare itself to be the Agency (Health & Safety Code §33200). This is the approach chosen by the City of Walnut Creek and most other cities in the state. Where the legislative body declares itself to be the agency, City Council members serve ex officio as members of the agency. Prior to 1984, therefore, a member could not resign from the redevelopment agency without automatically resigning from the city council.

In 1984, the state legislature amended that section of the Health & Safety Code to allow a member of the legislative body to resign from the agency without also resigning from the city council. A new provision was added to §33200 which reads as follows:

If a member of the legislative body of a city or county does not wish to serve on the agency, the member may so notify the legislative body of the city or county and the legislative body of the city or county shall appoint a replacement who is an elector of the city or county to serve out the term of the replaced member

There are four significant points to note about this section:

(1) A city councilmember may resign from the redevelopment agency simply because he or she does not wish to serve on the

MAYOR AND CITY COUNCILMEMBERS

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agency; that is, no particular reason is needed to support the resignation;

(2) The legislative body, not the redevelopment agency, selects the resigning councilmember's replacement;

(3) The replacement must be an elector of the City of Walnut Creek; and

(4) The appointee serves out the term of the resigning councilmember. The law does not authorize the city council to remove the appointee prior to the expiration of that term.

Under §33200, Councilmember Hall may resign his seat on the Redevelopment Agency, but maintain his seat on the City Council. It is then the responsibility of the City Council to appoint a replacement to serve on the agency. Nothing in §33200 prohibits the resigning Councilmember from participating in the vote to appoint his replacement. Therefore, unless another law prohibits Councilmember Hall's participation, he may vote with the remainder of the City Council to select a new member of the Agency. The only legal basis on which Councilmember Hall's participation might be prohibited is the Political Reform Act. I have discussed this issue by telephone with the staff of the Fair Political Practices Commission, however, and have been advised informally that the Act does not prohibit Councilmember Hall from voting on his successor.

Section 33200 does not impose a particular procedure that the Council must follow to select a replacement. The "Maddy Local Appointive List Act of 1975" (Government Code §§54970 et seq.) requires that vacancies in local "boards, commissions, and committees" be posted before a final appointment is made. Under a recent Attorney General's Opinion, however, it appears that this Act does not apply to filling unscheduled vacancies on the Redevelopment Agency (68 Ops.Cal.Atty.Gen. 122 (1985)). The Council, therefore, may choose to follow the procedures set forth in this Act, but is not required to do so. The Act states that a notice of unscheduled vacancies shall be posted in the Office of the City Clerk for at least 20 days, and that final appointment cannot be made for at least ten working days after the notice is posted. If an emergency exists, the Act allows an unscheduled vacancy to be filled immediately on an acting basis.

Recent discussions of an amendment to the Disposition and Development Agreement have focused attention on the Redevelopment Agency. Under the Community Redevelopment Law, however, cities have a cooperative role with redevelopment agencies. In that role, the City Council will be called upon to act on

MAYOR AND CITY COUNCILMEMBERS

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various matters relating to the Town Centre project specifically, and redevelopment activities generally. In the area of project financing, the City Council may be asked to approve bond issues; to act as the parking authority to issue bonds; to act as the master lessee in leaseback financing; and to approve the use of tax increment for infrastructure improvements. In non-financing areas, the City Council will be asked to make decisions regarding planning and zoning of the project area; the proposed vacation of Locust Street; the acceptance of land from the Redevelopment Agency; and the disposition of City-owned property. The City Council must also approve the terms of the sale or lease of all property acquired with tax increment. Finally, the Council retains authority over the appropriation of money for the Redevelopment Agency, the adoption and amendment of redevelopment plans, the existence or dissolution of the Agency, and review of the Agency's budget.

The City Council should also be aware that one form of financing for the Town Centre project will be unavailable if Councilmember Hall resigns from the Agency. Under §7200.1 of the Revenue & Taxation Code, sales tax increment financing is available only if the Redevelopment Agency is composed "...solely of the entirety of the membership of the city council." At this time, the Town Centre project does not rely upon sales tax increment as a method of financing the project. Councilmember Hall's resignation from the Agency would preclude the use of this financing technique for the duration of his term on the City Council.

DB:ct



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

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.

David Benjamin
March 4, 1986
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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.

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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

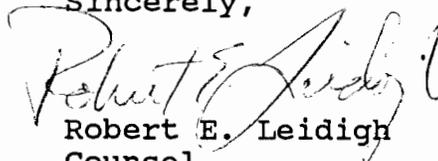
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to participate in the Council's deliberations simply because the matter would be placed before the voters for ultimate determination. Although Councilmember Hall's disqualifying interest here is his ownership of nearby property, not a "nexus" relating 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



California Fair Political Practices Commission

May 23, 1986

Evelyn Munn
Ed Skoog
Walnut Creek Councilmembers
P.O. Box 803
Walnut Creek, CA 94596

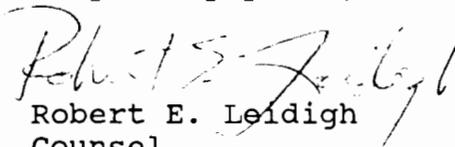
Re: 86-175

Dear Ms. Munn and Mr. Skoog:

Your letter requesting advice under the Political Reform Act has been received on May 21, 1986 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,


Robert E. Leidigh
Counsel
Legal Division

REL:plh