California
Fair Political
Practices Commission

July 8, 1986

Thomas J. Harron
City Attorney
City of Chula Vista
267 Fourth Avenue
Chula Vista, CA 92010

Re: Your Request for Advice
Our File No. A-86-189

Dear Mr. Harron:

Thank you for your letter requesting advice concerning the Political Reform Act (the Act.)[1/]

QUESTIONS

You have asked three questions:

1. May a public official who owns real property or is on a waiting list to purchase real property in a residential development participate in a decision to assess each home in the development approximately $415 per year to pay for public improvements? There are approximately 11,000 homes planned in the development, all of which would be subject to the assessment.

2. Does Section 84308 prevent a member of the Coastal Commission, an appointed commission, from permitting another candidate to include the commission member's name in a list of "friends" on an invitation to a political fundraising event?

3. May a city councilmember participate in a decision affecting a person who has sold him real property, when the sales agreement provides that should the councilmember subsequently sell the property and make more than a 10-percent return on his investment, the councilmember would be required to pay 25 percent of the profits to the seller?

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

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CONCLUSIONS

1. A public official who owns real property, or is on a waiting list to purchase real property, in a residential development may participate in a decision to assess each of the 11,000 proposed homes in the development approximately $415 to pay for public improvements, because the decision will affect a significant segment of the public.

2. Section 84308 does not prevent a member of an appointed commission from permitting another candidate to include the commission member's name in a list of "friends" on an invitation to a political fundraising event, so long as the commission member does not personally request contributions of $250 or more from persons he knows are parties or participants in proceedings pending before his commission.

3. A city councilmember may participate in a decision affecting a person who has sold him real property when the sales agreement provides that, should the councilmember subsequently sell the property and make more than a 10-percent return on his investment, the councilmember would be required to pay 25 percent of the profits to the seller.

ANALYSIS

Your first question concerns the conflict of interest provisions of the Act. Section 87100 prohibits a public official from participating in any governmental decision in which he knows or has reason to know he has a financial interest. A public official has a financial interest in a decision if it is reasonably foreseeable that the decision would have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his immediate family, or on, among other interests, any real property in which the official has a direct or indirect interest worth $1,000 or more. Section 87103.

You stated in your letter and subsequent telephone conversation that Councilman Dave Malcolm and another member of the City of Chula Vista City Council are on a waiting list to purchase residential property in a new development known as East Lake. Although neither councilmember currently owns property in East Lake, you have stated that there is a substantial likelihood that both councilmembers will become property owners in East Lake.

The decision pending before the City Council is whether to levy an assessment on parcels located in East Lake in order to pay for public improvements in that development. The assessment would be $415 per residential parcel per year. There are approximately 11,000 residential parcels planned in the East Lake development, all of which would be subject to the proposed assessment. If this decision would have a material financial effect on the councilmembers or on any real property in which they have an interest worth $1,000 or more, and the effect would be distinguishable from the effect on the public generally, then the councilmembers must disqualify themselves from participating in that decision.

The Commission has adopted regulations for determining whether the effect of a decision will be considered material. Regulation 2 Cal. Adm. Code Section 18702.1, in particular, requires a public official to disqualify himself from participating in a governmental decision if:

> (3) The decision concerns the zoning or rezoning, annexation or deannexation, sale, purchase or lease, actual or permitted use, or inclusion in or exclusion from any city, county, district or other local government subdivision of, or taxes or fees assessed or imposed on, or any similar decision as to real property in which the official has a direct or indirect interest (other than a leasehold interest) of $1,000 or more;
>
> (4) It is reasonably foreseeable that the personal expenses, income, assets, or liabilities of the official or his or her immediate family will be increased or decreased by at least $250 by the decision; or
>
> 2 Cal. Adm. Code Section 18702.1(a)(3) and (4).

Applying the above standards to the facts you have presented, we conclude that the two councilmembers have a financial interest in the decision to levy an assessment of $415 per year on East Lake properties because that decision would foreseeably affect their personal expenses by $250 or more. Accordingly, it is not necessary for us to determine whether the two councilmembers have interests in real property worth $1,000 or more as a result of being on the waiting list to purchase homes in East Lake. We note that our decision is consistent with the Commission's decision in the Opinion requested by F. Mackenzie Brown, 4 FPPC Opinions 19 (No. 77-024, Feb. 7, 1978).

Turning to the issue of whether the decision would affect the two councilmembers in a manner distinguishable from the effect on the public generally, the Commission has stated that a material financial effect of a governmental decision on an official's interests is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the jurisdiction or a significant segment of the jurisdiction. 2 Cal. Adm. Code Section 18703. In the facts you have presented, there are approximately 114,000 residents in the City of Chula Vista; the decision regarding the assessment for East Lake properties would ultimately affect approximately 11,000 homes in substantially the same manner, assuming that all homes planned are constructed. We think that 11,000 residential property owners is a significant segment of the public in Chula Vista. See Owen Opinion, 2 FPPC Opinions 77 (No. 76-005, June 2, 1976).

Accordingly, we conclude that the two councilmembers may participate in the decision concerning the assessment for East Lake properties.

Your second question on behalf of Councilman Malcolm relates to Section 84308, a statute which imposes campaign contribution limits and related disqualification requirements on members of appointed boards and commissions. We have agreed that a companion question will be answered in a separate letter.

Section 84308 imposes three duties on members of appointed boards and commissions. First, the law prohibits those officials from accepting, soliciting or directing campaign contributions of $250 or more from parties, participants or their agents in any proceeding involving a license, permit, or other entitlement for use while the proceeding is pending and for three months after the final decision in the proceeding. Second, the law requires the officials to disqualify themselves from participating in those proceedings if the officials have received campaign contributions of $250 or more from a party or participant within the 12 months prior to the decision. Finally, Section 84308 requires the officials to disclose all campaign contributions totaling $250 or more received from parties or participants within the 12 months prior to the decision.

Your questions relate specifically to the prohibition on accepting, soliciting or directing contributions of $250 or more from any party, participant, or agent of a party or participant, while a proceeding involving a license, permit, or other entitlement for use is pending before the official's agency and for three months following the date a final decision is rendered in the proceeding. Section 84308(b) specifies that

this prohibition applies whether the official accepts, solicits or directs the contribution for himself, on behalf of any other official, or on behalf of any candidate for office or on behalf of any committee. The answer to your questions depends on whether Councilman Malcolm is considered to be "soliciting," "accepting" or "directing" a contribution when he either permits his name to be listed on a fundraising letter for another candidate, or authorizes the use of his home for a fundraiser for another candidate.

In regulation 2 Cal. Adm. Code Section 18438.6, the Commission has defined the terms "solicit," and "accept" and "direct" a contribution for purposes of Section 84308. Regulation 2 Cal. Adm. Code Section 18438.6 provides:

> (a) A person "accepts" or "receives" a contribution only if the contribution is for that person's own candidacy or own controlled committee.
>
> (b) A person "makes a contribution" to an officer or candidate only if the contribution is made for that officer's or candidate's own candidacy or controlled committee.
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> (c) An officer "solicits" a contribution only if he or she knows or has reason to know that the person being solicited for a contribution is a party or agent of a party, or is a participant or agent of a participant and either:
>
> > (1) The officer or candidate personally requests a contribution for his or her own campaign or controlled committee, or for any other candidate, public official or committee, either orally or in writing; or
> >
> > (2) The agent of the officer or candidate with the officer or candidate's knowledge, requests a contribution for the officer or candidate's own campaign or controlled committee.
>
> (d) Notwithstanding subsection (c), a solicitation does not include a request made in a mass mailing sent to members of the public, to a public gathering, or published in a newspaper, on radio or TV, or in any other mass media. A person does not "solicit" solely because his or her name is printed with other names on stationery or a letterhead used to request contributions.

> (e) A person "directs" a contribution if he or she acts as the agent of another person or of a committee other than his or her own controlled committee in accepting a contribution on behalf of, or transmitting a contribution to, such other person or committee.

As your question concerns the actions of an official with regard to contributions for another candidate, we must focus on the definitions of "soliciting" and "directing" contributions. The official's actions would not be "accepting" or "receiving" a contribution because, in the facts you presented, the contribution is for another person's candidacy. 2 Cal. Adm. Code Section 18438.6(a).

Regarding the propriety of an official permitting the inclusion of his or her name in a list of "friends" on an invitation to a political fundraising event for another candidate, regulation 2 Cal. Adm. Code Section 18438.6(d) specifically provides that an official does not "solicit" a contribution solely because his or her name is printed with other names on stationery or a letterhead used to request contributions. Accordingly, the mere listing of the official's name with other "friends" in a fundraising invitation is not prohibited by Section 84308, even if the invitation is sent to parties or participants in proceedings pending before the official's agency; however, the official must not <u>personally request</u> campaign contributions of $250 or more from the parties or participants. 2 Cal. Adm. Code Section 18438.6(c).

Furthermore, including the official in a list of "friends" of another candidate does not, of itself, make the official an agent of the other candidate; therefore, the official would not be "directing" contributions. 2 Cal. Adm. Code Section 18438.6(e).

Therefore, with regard to your second question, we conclude that Section 84308 does not prohibit a member of an appointed commission or board from being included in a list of "friends" on an invitation to a fundraiser for another candidate, or from donating the use of his home for a fundraiser for another candidate, so long as the official does not personally request or accept contributions of $250 or more from parties or participants in proceedings pending before the official's agency.

Your last question concerns the conflict of interest provisions of the Act. You stated that Councilman Malcolm has purchased real property from an individual, and the sales agreement provides that, should Councilman Malcolm subsequently sell the property and make more than a 10 percent return on his

investment, the councilmember would be required to pay 25 percent of the profits to the individual from whom he purchased the property. Your question is whether this sales agreement would cause the councilmember to disqualify himself from participating in decisions which would have a reasonably foreseeable material financial effect on the individual who sold the real property to the councilmember. The answer to this question depends on whether the sales agreement between the councilmember and the seller makes the seller a "source of income" of $250 or more to the councilmember.

"Income," for purposes of the Act, includes the proceeds of any sale or any gift or loan received by a public official. Section 82030(a). An agreement that a public official will purchase real property from another person does not, of itself, make the seller a source of income to the official. However, if the sales agreement also provides for a loan from the seller to the official, then the seller becomes a source of income to the official. Additionally, to the extent that the official did not provide consideration equal to or greater than the fair market value of the real property, the official would have received a gift (Section 82028), and therefore income, from the seller.

When we discussed the specific facts of the sales agreement on the telephone, you indicated that the councilmember owned a piece of real property that controlled access to an adjacent parcel. The owners of the adjacent parcel had been unsuccessful in their attempts to develop that parcel or to sell it for development due to the lack of access, and therefore agreed to sell the parcel to the councilmember at a relatively low price. However, the sales agreement included the provision requiring Councilman Malcolm to share future profits from the sale of that property with the seller should those profits exceed 10 percent. Under these facts, we conclude that the sales agreement does not create either a loan or a gift to the councilmember. The councilmember's obligation to pay a percentage of his profits to the seller is unlike a loan in that it is contingent on future events occurring, and, at this time, we have no ability to foresee whether those events will occur.

As to the question of a gift to Councilman Malcolm, it appears that the price the councilmember paid for the property was the result of an arm's length agreement; accordingly, without additional facts, we do not question that the councilmember provided consideration equal to or greater than the fair market value of the property.

Consequently, we conclude that the seller of the property is not a source of income to Councilman Malcolm under the facts provided. The councilmember may, therefore, participate in decisions which would have a material financial effect on the seller of the property.

If you have any further questions regarding these matters, please contact me at (916) 322-5901.

Very truly yours,

Kathryn E. Donovan By RES

Kathryn E. Donovan
Counsel
Legal Division

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CITY OF
CHULA VISTA
OFFICE OF THE CITY ATTORNEY

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June 4, 1986

Kathy Donovan
Fair Political Practices Commission
P.O. Box 807
Sacramento, CA 95814

Dear Ms. Donovan:

This letter is a follow-up to our conversation on June 4, 1986 in which I discussed a number of questions dealing with the conflict of interest provisions of the Political Reform Act. Specifically, I had four questions which I raised with you.

The first question involved the EastLake development in the eastern portion of Chula Vista. This is a large development that will result in approximately 11,000 homes with a business park and will be phased over a period of approximately ten years. Our mayor and one of our councilmen are on a list to buy property in the EastLake area. It is our expectation that both of them will, in fact, become homeowners in EastLake. We have a matter coming before Council which will deal with an assessment district for EastLake. The assessment would result in a charge of approximately $415 on each home in the development to pay for public improvements. I had some question as to whether this would have any effect on fair market value, but you informed me that the test under the recently changed Government Code §87103 and regulation 18702.1 would disqualify a member from participation if the issue would have a $250 out of pocket effect on him so that it was unnecessary to go into the fair market value analysis. This being the case, it is my intention to inform the councilmembers that they should abstain in this matter.

The second question deals with a fairly common practice these days in raising campaign funds for candidates. The candidate will send out an invitation to a $250-$500-$1,000 a plate dinner or function and the invitation will say please join Candidate X and his or her friends, after which a list of friends appears on the invitation. I was concerned about the Government Code

section which prohibits a councilmember who serves on another board, for example, MTDB or the Coastal Commission, from soliciting money from people who may have a matter before them, and whether by allowing their name to be on this list, that constitutes a solicitation. You told me that there is a specific regulation, §18438.6, which states that "solicit" does not apply where a person merely allows his or her name to be printed with other names on a letterhead or stationery used to request contributions.

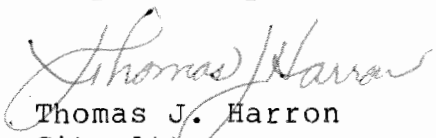
My next question was whether the fact that a councilmember allowed the fund raising dinner or other special event to take place in his house would change the opinion in No. 2 above. You informed me that it would not, as long as the councilmember was not actually making the solicitation or request by either sending out the invitation or orally requesting the money. The mere permission to use a councilperson's property would not change your opinion in No. 2.

Finally, I described a property transaction whereby a councilmember bought a fee interest in property from a landowner with the provision that should the councilmember later sell the property and make more than a 10% return on his investment, he would be required to turn over 25% of the profits to the seller. The seller of the property would have no control over the use of the land or its development. His sole connection with the property would be this right to 25% of the profits, should a certain eventuality occur, i.e., the sale of the property at a price ensuring more than 10% return to the councilmember. The councilmember wanted to know if he would be able to participate in decisions involving the seller. It was your opinion that he could and that there was no relationship between the seller and the councilmember that would require him to abstain.

I would very much appreciate it if you would confirm your advise in the form of an advice letter. The EastLake matter will be coming before Council very shortly for a decision. The election questions will start to take on a great importance as we enter the campaign season prior to the November elections. The property transaction probably will not take place until the parties can get some assurance that the councilman will not be disqualified from future participation in decisions affecting the owner.

Thank you for your courtesy and cooperation in this matter.

Very truly yours,



Thomas J. Harron
City Attorney

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California
Fair Political
Practices Commission

June 12, 1986

Thomas J. Harron
City Attorney
276 Fourth Avenue
Chula Vista, CA 92010

Re: 86-189

Dear Mr. Harron:

Your letter requesting advice under the Political Reform Act has been received on June 9, 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,

Kathryn E. Donovan

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Counsel
Legal Division

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Assessment district OK'd for EastLake

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By Dee Anne Traitel
Tribune Staff Writer

The Chula Vista City Council has approved formation of the final assessment district to pay for $5.3 million in public improvements for EastLake, a massive planned community situated in the hills east of the city.

The council voted unanimously Tuesday night to approve an improvement package that will tax homeowners annually for 20 years and gives developers the green light to begin selling homes to 2,000 prospective buyers.

EastLake, a phased-in community, is expected to add 30,000 new residents to the city by the turn of the century. Demand to buy homes in the project has been high, yielding long lines of prospective buyers eager to live in the Hills and Shores neighborhood, which is the first phase of the community.

According to figures provided by the developer, the owner of a 1,400-square-foot home in the $100,000 price range will pay a total of $895 a year for street, water and storm-drainage improvements.

Coupled with property-tax fees, the owner of a $100,000 home will pay $2,094 per year. Taxes vary depending on the size of the home.

Responding to council concerns over disclosure, EastLake Vice President Robert Santos said that prospective buyers of new homes in the EastLake community are provided with a notice listing the special taxes and assesments, and are required to sign a statement acknowledging that they have read the material before the sale can close escrow.

"If anything, we've overdisclosed (the assesment information), if that's possible," Santos said, adding that prospective buyers receive the information when they are looking at the homes, sign a form when they reserve a lot and before they can close escrow.

Santos said the assessment is a maximum rate, and "can only go down; it can't go up," and that lenders will be making the decision to qualify prospective buyers on the basis of the maximum assessment.

Santos said the assessment fees include $410 to build new schools, $25 for open space, $105 for an industrial park and a lake and $355 for the improvements voted on last night.

Because Chula Vista Mayor Greg Cox and Councilman David Malcolm are purchasing homes in EastLake, they were unable to vote on prior assessment matters. But, Chula Vista City Attorney Thomas Harron told the council the Fair Political Practices Commission had ruled it would not be a conflict for Cox and Malcolm to vote on the issue.

Harron told the two officials that "because a substantial number of the public would be affected by the assessment district," they could vote on the matter.

Prior to the vote, Malcolm asked Santos why EastLake varied from the majority of planned communities in the state to create the assessment district.

Santos said it was less expensive to tax the homeowners annually rather than having the developer pay for the improvements in a lump sum that would be factored into the price of the home.