California
Fair Political
Practices Commission

November 26, 1986

Allen E. Sprague
City Attorney
City of Fremont
City Government Building
39700 Civic Center Drive
Fremont, CA 94537

Re: Your Request for Advice on Behalf of Fremont City Councilmember John Dutra
Our File No. A-86-260

Dear Mr. Sprague:

You have written for follow-up advice to our previous letter to you (A-86-260). That letter is incorporated herein by reference and a copy is attached for your convenience. You have asked that we expedite this letter because of a pending decision on November 25, 1986; telephone advice was provided on that date.

QUESTIONS

1.) May Councilmember Dutra "pay back" the commission income received from a mobile home sale last April, thereby eliminating the sales client as a source of income for purposes of disqualification?

2.) If the answer to question 1 is in the negative, may Councilmember Dutra participate in decisions regarding a proposed mobile home rent control ordinance.

3.) May Councilmember Dutra avoid future disqualification by restructuring his fee splitting arrangements?

CONCLUSION

1.) There is no provision in the law for "pay back" of earned income in order to eliminate what would otherwise constitute a source of income.

2.) Councilmember Dutra may participate in a mobile home rent control decision because it is not reasonably foreseeable that his sales client's rent will be affected by $250 or more in a year, or that the value of the client's mobile home will

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916) 322-5660

be affected by $1,000 or more, as a result of adoption of the rent control ordinance. It also is not reasonably foreseeable that Councilmember Dutra's real estate business will be materially affected by the rent control proposal.

3.) Councilmember Dutra may avoid future disqualification by restructuring his agency's fee arrangements.

FACTS

The facts contained in the previous advice letter (No. A-86-260) are incorporated herein without restatement. Since the writing of that letter, the following additional material facts have been ascertained and provided in your letter and subsequent telephone conversations.

Only one of the purchasers of a mobile home through Councilmember Dutra's firm remains as a possible basis for disqualification. The purchase was in April 1986 and resulted in commission income in excess of $250 attributed to Councilmember Dutra. The purchaser continues to reside in one of Fremont's mobile home parks (Besaro). The other five purchasers discussed in the previous letter either purchased more than 12 months ago or do not currently reside in any of Fremont's mobile home parks.

The proposed ordinance has now taken shape. A copy of the proposed ordinance is attached and incorporated herein. It provides for a roll back of rent increases made after January 1, 1986, and does not provide for vacancy decontrol. It has alternative provisions for regulating rent increases.

Lastly, an issue has been raised regarding the possible effects of the mobile home rent control ordinance on Councilmember Dutra's real estate business. You and Councilmember Dutra have determined that the maximum reasonably foreseeable effect on his business would be less than $5,000 in annualized gross revenues (commission income). You have asked whether the standard of $10,000 set forth in the Commission's materiality regulation is the appropriate standard to apply in this situation.

ANALYSIS

The Political Reform Act (the "Act")[1] provides that no public official shall make, participate in making, or use his

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[1] Government Code Section 81000-91015. All statutory references are to the Government Code unless otherwise noted. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

official position to influence the making of a governmental decision in which he knows or has reason to know he has a financial interest. (Section 87100.) An official has a financial interest requiring disqualification if the effect of the decision on any one of several economic interests is both material and reasonably foreseeable. (Section 87103.) The decision's effect upon the official's economic interest must also be distinguishable from the effect upon the public generally before disqualification will be required. (Section 87103; Regulation 18703.)

The economic interests which are relevant to this inquiry are:

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

Section 87103

Councilmember Dutra's Real Estate Business

As to Councilmember Dutra's real estate business ("Dutra Realty"), an effect will be considered material if it is reasonably foreseeable that Dutra Realty's gross commission income (not including fees contractually split with his sales agents or with other brokers) will be increased or decreased by $10,000 or more in a year. (See, Regulation 18702.2(g); Carey Opinion, 3 FPPC Opinions 99 (No. 76-087, Nov. 3, 1977); copies previously provided.) In the "P.S." to your letter, you have stated that Councilmember Dutra's best estimate is that the proposed ordinance would not increase his 70% share of his agency's gross commission income revenues more than $3,258. (This figure assumed that his sales of mobile homes might conceivably double.) However, for purposes of measuring the effect upon his business entity, the 70% ownership factor should not be applied.[2] Even so, the anticipated maximum

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[2] The percentage of ownership factor is applicable when determining his pro rata share of the gross income received from a client. It is not applicable when determining a decision's effect on his business.

effect upon his business entity would be less than $5,000, or less than one-half of the standard adopted by the Fair Political Practices Commission for businesses the size of Dutra Realty. (See, Regulation 18702.2(g).)

Commission income of $1,850.00 was generated from the purchase of the mobile home by the resident of Besaro Mobilehome Park, based upon a sale price of $37,000. The fee allocation arrangement with the other broker and Dutra Realty's sales agent resulted in only 41.992% of the $1,850 commission accruing to Dutra Realty. As a 70% owner, 70% of that amount, or $543.00, is attributable to Councilmember Dutra. This makes the purchaser a source of income of $250 or more to Councilmember Dutra within the past 12 months. (Section 87103(c).)

You have asked whether "the bell can be unrung." You wish to know whether Councilmember Dutra may now refund a portion of the commission to reduce his pro rata share to less than $250. While there is a provision in the Act permitting the return or "pay down" of a gift within 30 days of receipt and a provision for return or "pay down" of certain campaign contributions within a 30-day period, there is no similar provision for return or "pay down" of income. (See, Sections 82028 and 84308.) Even if a parallel provision did exist, much more than 30 days has now passed. We see no basis for allowing a retroactive "pay down" or return under these circumstances.

Councilmember Dutra's Source of Income

We turn then to the issue of whether Councilmember Dutra's source of income (the purchaser) will be affected in a reasonably foreseeable manner which will be both material and distinguishable from the public generally. In our previous letter, we considered and disposed of the "public generally" issue. The number of mobile home units in Fremont is simply too small to constitute a significant segment of the general public. (Regulation 18703.)

The guidelines for assessing materiality were set forth in detail in our previous advice letter. Effects on rent will be considered material on the purchaser if they equal or exceed $250 for the year. Effects on the purchaser's personal property (the mobile home) will be considered material if they will equal or exceed a $1,000 effect on the fair market price for the mobile home unit. As previously noted, the sales price on April 21, 1986, was $37,000. Thus, the rent control ordinance would have to change the price of the unit by almost 3% before it would be considered material.

The Effect Upon Rents Paid By The Source Of Income

The particular mobile home park in which Councilmember Dutra's source of income resides has had rent increases as follows:

a. July 1, 1985 $10 per month per space (4.7%)
b. July 1, 1986 $12 to $13 per month per space (5.0%)

During the year July 1, 1985 to June 30, 1986, the Bay Area Consumer Prize Index ("CPI") rose 4.2%. During the current year (July 1, 1986 to the present), the annual rate of increase in the CPI is 2.9%. The proposed rent control ordinance provides that if rents have been raised during 1986, they will be "rolled back" and the maximum rent increase allowed pursuant to the ordinance will be applied instead. The difference, if any, will be refunded. The maximum allowable annual rent increase under the proposed ordinance is the greater of:

a. 3 percent;
b. $10 per month; or
c. 60 % of the increase in the CPI, with a cap of 6%.

Rents at the Besaro park on January 1, 1986, ranged from $210/month to $250/month. Applying the rent "roll back" provision to the Besaro rent structure, you have stated the following:

a. The maximum allowable increase at Besaro would be $10 per month, as that sum is greater than either 3% or 60% of 2.9%.

b. The increase since January 1, 1986, ranged from $12 to $13 per month.

c. The "roll back" would be to the July 1, 1986, effective date of the rent increase in Besaro.

d. The net benefit to the tenants of Besaro from the "roll back" for the period from December 1, 1986, to July 1, 1986, would be five months at $3 (maximum), or $15 total.

Given the current CPI rate of increase and the existing rent structure in the Besaro park, the likely maximum allowable increase if the ordinance is adopted is $10 per month. Given the rent history in the Besaro park, the anticipated rent increase for the next year would be 5% ($13 to $14). Therefore, the reasonably foreseeable difference resulting from the ordinance would be no more than approximately $5 per month. Consequently, the annualized effect of the ordinance would be approximately $60 in savings to the tenant in question. This combined with a maximum "roll back" benefit of $15 would total $75 at the most, which is substantially below the $250 threshold for a material financial effect upon the

tenant who is a source of income to Councilmember Dutra.[3] Therefore, the ordinance's effect on rents does not present a reason for requiring disqualification.

The Effect Upon the Value of the Mobile Home of the Source of Income

We turn to consideration of the reasonably foreseeable effects of the proposed rent control ordinance on the fair market value of the tenant's mobile home unit. As indicated earlier, for an increase or decrease to be considered material, it would need to equal or exceed $1,000 in current fair market value. (See, Legan Opinion, 9 FPPC 1 (No. 85-001, Aug. 20, 1985); copy previously provided.)

With regard to mobile home park rent control, the theory often postulated is this: The fact that rent is controlled on a particular space will result in an enhancement of the value of that space. The value of the mobile home space is enhanced because, over time, actual rent will lag behind fair market rent, thereby reducing the total cost of the mobile home plus rent of the space for the home. In theory, this will increase demand and increase the fair market value of the mobile home unit situated on the rent-controlled space.

Because there is no "vacancy decontrol" provision in the proposed ordinance, there is at least the possibility that its adoption could result in some increase in the fair market value of the tenant's unit.[4] However, the relevant factor is current fair market value. (See, Legan Opinion, supra.) In the foreseeable future, it is not likely that any significant reduction in rent will accrue to the tenant's space in the park. Furthermore, unlike the situation in Hall v. City of Santa Barbara, 797 F.2d 1493 (9th Cir. 1986), cited by the attorney for the park owners, there is no "perpetual lease" provision in the proposed ordinance. There are numerous tenant protections provided in the California Civil Code, but the proposed ordinance does not expand upon those to create a "perpetual lease". Even more important, the proposed ordinance contains a "sunset" provision at the end of five years. Thus, the maximum savings which would be anticpated by a future purchaser is limited to a five-year span.

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[3] If Councilmember Dutra's source of income resided in a different park, with a different history of rent increases, the calculations could conceivably result in a more substantial effect.

[4] If, at some point in the deliberations, vacancy decontrol is inserted into the proposed ordinance, the issue of any effect upon the value of the tenant's unit would become moot. With vacancy decontrol, the rent would rise at the time of any sale, thereby eliminating the potential for any "premium".

Taking all of these factors into consideration, we conclude that, absent specific evidence to the contrary,[5] it is not reasonably foreseeable that the current fair market value of the tenant's mobile home in the Besaro park will increase or decrease by $1,000 or more as a result of adoption of the proposed ordinance. You and Councilmember Dutra have reached the same conclusion, drawing upon his extensive experience in the real estate industry in Fremont.

Lastly, you have asked whether Councilmember Dutra may restructure his fee arrangements with his sales agents so as to assure that in the future his pro rata share of gross commission income to Dutra Realty would be less than $250 from any mobile home transaction. Councilmember Dutra is free to restructure his fee arrangements so long as there is no offsetting adjustment in other fees. Under the Carey Opinion, supra, it is only the gross amount of commission income (after deducting the contractually obligated share to the sales agent) which is attributable to Dutra Realty. The amount of the sales agent's contractual share is a private business decision which is up to Councilmember Dutra.

Should you have questions regarding this letter, the undersigned may be reached at (916) 322-5901.

Sincerely,

DIANE M. GRIFFITHS
General Counsel

By: Robert E. Leidigh
ROBERT E. LEIDIGH
Counsel, Legal Division

Attachments

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[5] We have discussed on the telephone the possibility that the park owners could possibly produce credible data which would be pursuasive that this conclusion is erroneous. If such data is presented at the Council meeting, you should advise Councilmember Dutra that he may not continue to participate in the discussion and deliberations over this ordinance until the Commission has had an opportunity to review and analyze the data.

F P P C
NOV 3 11 49 AM '86

City of Fremont

October 30, 1986

Fair Political Practices Commission
428 "J" Street, Suite 800
P. O. Box 807
Sacramento, CA 95804-0807

ATTN: Legal Division

RE: Fremont City Councilmember John Dutra - Your File No. A-86-260

Gentlemen:

This follows up your letter advice of September 19, 1986.

Since our correspondence, a definite draft proposed ordinance on mobile home rental limits has been prepared (copy enclosed). It will be assumed here by me that it is reasonably foreseeable at this point to determine that if adopted the ordinance will have some financial affect on mobile home tenants. The ordinance will be considered by the City Council on November 18, 1986, and thus some urgency in the questions posed herein is apparent.

Your advice is sought concerning any remaining questions concerning Councilmember Dutra's continuing participation in the consideration of the mobile home rent stabilization ordinance.

As reflected in my memo of October 1, 1986 to Dutra and his memo of October 24, 1986 (copies enclosed), there remains only one sales transaction to be considered from the transactions we had previously submitted for consideration (Item A in Dutra memo). That transaction occurred in April, 1986, and the purchaser (and still tenant) was a source of income to Dutra in a sum exceeding $250 ($543). According to the information presently available to Dutra, however, his analysis concludes that the likely affect of the ordinance as presently drafted would not, as a result of rent control, reach the $250 limit in order to be considered a "material financial effect" on the source of income. In regard to the $1,000 limit and the affect of rent control on the value of the mobile home unit itself, it is Dutra's (see bottom of page 2 of his memo) and my conclusion that based on the information available it is too speculative and thus not reasonably foreseeable to determine that the ordinance will have a material financial effect of $1,000 or more on the mobile home park tenant involved. This includes consideration of the particular park (Besaro) that the tenant is located at and the rent

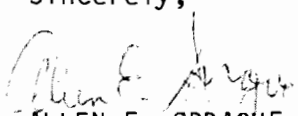
structure history of that park. Do you find anything wrong with this reasoning or conclusion?

We have a new question which may be significant in regard to the above discussed transaction, as well as other transactions that may be involved in the future. As mentioned in Dutra's memo (top of page 2), he has increased the sales agent commission on that transaction so that his financial interest would not exceed $250. Does this retroactive action of Dutra eliminate the source of income question (assuming our conclusions on the $250 and $1,000 questions did not resolve)? The answer is important not only in our conclusions reached in that transaction discussed as to material financial effect, but also as to other transactions that might come to light despite the exhaustive research Dutra has undertaken (and could have considerable importance in connection with other conflict questions arising in other matters other than the subject ordinance). In other words, can the bell be unrung? In my opinion, I cannot see how the purpose of the Political Reform Act would not be served by such retroactive actions, but your advice is requested on this question.

Next, as distinguished from retroactive actions, you will note from Dutra's memo that he has instructed (next to last paragraph on page 3) that in connection with any future mobile home transactions that his commission income not exceed $245 from any single transaction. Is there any reason such action does not conform to the letter and spirit of the Political Reform Act? (I might mention that if the rent control ordinance is adopted, it would appear Dutra would no longer have any potential conflict questions in regard to the ordinance unless the Council again considered the matter); for the period of time the Council is considering this matter, Dutra's instruction would appear to eliminate any problem of a new conflict arising. Dutra considered not being involved in any way with mobile home transactions, but feels he cannot give such instructions to the sales agents who are independent contractors.

Thank you for your consideration. Although Councilmember Dutra and myself feel confident that he does not have a conflict of interest problem in this matter at this point in time, your advice is sought to eliminate any doubt. A reply orally and/or in writing before November 18 would be much appreciated.

Sincerely,



ALLEN E. SPRAGUE
City Attorney
(415) 790-6620

AES:vs / cao-7559

Enc.

cc: Paul Jensen
City Council
Councilmember Dutra

P.S. I have enclosed correspondence just initiated with Paul Jensen, attorney for two of the major mobile home park owners. The January, 1986, sale he mentions is one of the transactions Dutra has decided does not constitute a source of income problem (Item C of his memo). More significantly he states that the resale value of mobile home units will increase and result in increased commissions. By implication, this raises a question whether it is reasonably foreseeable that rent control will have a direct material financial effect on Dutra Realty (and the 70% ownership interest of John and Bernadine Dutra), as distinguished from the source of income questions we have been addressing. As stated in my initial letter to the FPPC, neither Dutra nor I have felt there is a serious question concerning a reasonably foreseeable direct material financial effect given the historical insignificance of mobile home unit transactions in his business. For example, assuming six transactions in the next year with a net commission income of $543 each (as in Item A of his memo) and not adjusting to the $245 maximum as Dutra has instructed, the resulting $3,258 would be less than the $10,000 limit of 2 Cal. Adm. Code Section 18702(b)(1) or 18702.2(g)(1), in view of the $75-100 million gross revenue of the Dutra firm. If this reasoning is not correct your advice is sought. If there is in fact any problem in this regard, Dutra will take action to reject any income from mobile home transactions in the next year. Again, thanks for your consideration.

Alan S

P.S. #2 ---See Supplemental Memo of 10-31 to me from Dutra attached.

AES

City of Fremont
CALIFORNIA

memorandum

October 31, 1986

DIRECTOR OF HUMAN SERVICES SHENFIL

MOBILE HOME RENT STABILIZATION ORDINANCE

1. In reference to your October 24, 1986 memo and following discussion with you and Dutra, the only revision necessary to the October 15, 1986 draft is in connection with security deposits. In order to strengthen the existing prohibition against security deposits by eliminating the words "or increasing" in Section 3-13112(a) at the bottom of page 17, and to add a new next-to-last sentence in Section 2 on page 17, which in effect requires park owners to return security deposits imposed prior to the ordinance. This change is reflected in the October 31, 1986 draft ordinance attached.

2. I am transmitting copies of the October 31, 1986 draft to City Council, even though there may be further revisions prior to the November 18 Council hearing. I've done this because the Western Mobilehome Association letter of October 30 to you is copied to Council as well, and Councilmembers may want to review the draft ordinance now.

3. Regarding the Association's comments, I suggest we meet to consider. Some of them may make useful clarifications which we can agree to be incorporated. Other comments are more substantive and I would need clarification from you or Dutra if we are to incorporate in the final draft version to go to Council (in packets November 13 for November 18, 1986 meeting).

ALLEN E. SPRAGUE
City Attorney

AES:db
cao-7579

cc: Councilman Dutra
City Council
Western Mobilehome Association

NOV 13 8 52 AM 86

City of Fremont
39700 Civic Center Drive
Fremont, California 94538

(415) 790-6620

November 12, 1986

Diane M. Griffiths
General Counsel
CALIFORNIA FAIR POLITICAL PRACTICES
COMMISSION
428 J Street, Suite 800
P. O. Box 807
Sacramento, CA 95804-0807

RE: John Dutra
86-260

Dear Ms. Griffiths:

Pursuant to your instructions of November 6, 1986, this supplemental letter is forwarded to you to advise you that I have been authorized by Fremont City Councilman John Dutra to write the letter requesting advice which was received by you on November 3, 1986.

Mr. Dutra's home address is 45499 Concho Court, Fremont, CA 94539. His work telephone number is (415) 657-8222; his home telephone number is (415) 658-6871.

Sincerely,

ALLEN E. SPRAGUE
City Attorney

AES/aj

cc: John Dutra

LAW OFFICE
PAUL T. JENSEN
A PROFESSIONAL CORPORATION
111 WEST ST. JOHN STREET, SUITE 800
SAN JOSE, CALIFORNIA 95113
TELEPHONE (408) 280-5600

OCT 1986
RECEIVED
CITY ATTORNEY'S OFFICE
CITY OF FREMONT

October 27, 1986

Alan Sprague
Fremont City Attorney
39700 Civic Center Drive
Fremont, CA 94538

Re: Proposed Mobilehome Rent Control Ordinance

Dear Mr. Sprague:

Please allow this letter to confirm our phone conversation of October 27, 1986 wherein I advised you that I represent the ownership of Southlake Mobilehome Park and Niles Canyon Mobilehome Park. As I indicated to you, my client is concerned over the proposed rent control Ordinance for the City of Fremont, and there appear to be indications of a possible conflict of interest involving Councilman Dutra as to the enactment of such an ordinance.

Specifically, my client's concern stems from Government Code § 87103 which prohibits a financial interest by a governmental official in cases where it is reasonably foreseeable that that official's decision will have a material financial affect on him or his immediate family. My client advises me that Mr. Dutra's Red Carpet Realty office has been involved in mobilehome resales at Southlake Mobilehome Park as late as January, 1986.

Along those lines, enclosed herewith please find a copy of a flyer which was distributed in Southlake Mobilehome Park by Mr. Dutra's agent, Steve Findlay, regarding activities of Dutra Red Carpet Realty at the park. Also enclosed herewith, please find a copy of my letter of October 24, 1985 in response to the dissemination of that flyer.

I indicated to you that my client is concerned that enactment of any rent control ordinance will have the immediate effect of artificially increasing resale prices of mobilehomes situated in mobilehome parks in the City of Fremont. Since mobilehome resale agents typically earn commissions based upon the resale

LAW OFFICE
PAUL T. JENSEN
A PROFESSIONAL CORPORATION

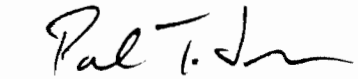
price of such homes, increases in resale prices will result in increases in commissions earned. It would, therefore, appear that enactment of a rent control ordinance in the City of Fremont would directly and substantially financially benefit Mr. Dutra.

The concept of rent control ordinances increasing mobilehome resale prices is not new. As I mentioned to you, the opinion of the U.S. Ninth Circuit Court of Appeals in the Hall v. City of Santa Barbara case, 86 Daily Journal D.A.R. 3022, clearly establishes that a cause of action for an unconstitutional taking of property from a mobilehome park owner is adequately stated by allegations of transfer of a possessory interest in land to mobilehome park tenants through a rent control ordinance which substantially increases resale values of individual mobilehomes while lowering the value of the mobilehome park as a whole. Needless to say, my client is extremely concerned that a member of the Fremont City Council with a monetary interest in mobilehome park resale prices will be playing a key role in deliberations on the enactment of such an ordinance.

You indicated to me that Mr. Dutra has adequately documented to your office that he has no material financial interest in the passes of a rent control ordinance in the City of Fremont. At this time, I would request that you forward to me all data submitted by Mr. Dutra in support of his position. It is imperative that the issue of rent control in the City of Fremont be considered by impartial Council Members acting in a legislatively responsible manner. Therefore, your assistance in this area will be greatly appreciated.

If I can provide you with any further information supporting my client's deep concern over this issue, please don't hesitate to contact me. I look forward to hearing from you in the near future.

Very truly yours



PAUL T. JENSEN

PTJ:ft

Enclosure

cc: Western Mobilehome Association
Hal Marcus

PAUL T. JENSEN
ATTORNEY AT LAW
111 WEST ST. JOHN STREET, SUITE 800
SAN JOSE, CALIFORNIA 95113
TELEPHONE (408) 280-5600

October 24, 1985

Dutra Realty Enterprises, Inc.
43505 Mission Blvd.
Fremont, CA 94539

Re: Southlake Mobilehome Park
4343 Durham Road
Fremont, California

Dear Sir/Madam:

Please be advised that the undersigned represents Southlake Mobilehome Park. Enclosed herewith, please find a copy of a flyer recently distributed door-to-door by your agent Steve Findlay at Southlake.

My client strongly objects to references in the enclosed flyer to the fact that Mr. Findlay is "our park's personal representative from Dutra Red Carpet Realty". Clearly, this reference connotes some sort of approval or authorization by the ownership and Management of Southlake for Mr. Findlay's activities in the park, and implys that Mr. Findlay is somehow connected with or approved by my client. Be advised that this is not the case and under no circumstances does my client in any way endorse or approve any particular resale agent or brokerage. Therefore, the representations of Mr. Findlay are misleading and pose the threat of potential exposure to my client should litigation or other complications arise from any of Mr. Findlay's resales at Southlake.

Accordingly, demand is hereby made that within 7 days from date of this letter that your office distribute to all households at Southlake a retraction and clarification of the fact that the ownership and Management of Southlake Mobilehome Park in no way endorses or are connected with the activities of Mr. Finlay or your office. Such a retraction is important, not only to my

PAUL T. JENSEN
ATTORNEY AT LAW

client but to your firm as well, in order to avoid any appearance of an illegal trust arrangement between your office and my client which may constitute a violation of the California Cartwright Act. I trust that you will promptly disseminate such a retraction and provide me with a copy.

Further, as mentioned above, Mr. Findlay has been soliciting listings by going door-to-door within the mobilehome park. As a resident of Southlake, Mr. Findlay is well aware that no solicitation is permitted at any time within the park. A sign is posted prominently on display at the front of the park advising all residents and guests of this fact. Accordingly, it is necessary that you advise Mr. Findlay and your other agents that no door-to-door solicitation is permitted within the park, and that such activities cease immediately. Should it appear that Mr. Findlay or any other person from your office is continuing to solicit business within the park, my client has instructed me to commence legal proceedings to put a stop to such activities.

If you have any questions regarding the foregoing, please contact me directly. I look forward to receiving a copy of your written retraction which is to be disseminated within the park within 7 days.

Very truly yours,

PAUL T. JENSEN

PTJ:ft

Enclosure

cc: Client

RED CARPET PROUDLY PRESENTS

Dutra Realty Enterprises, Inc.

RED CARPET®

MLS

STEVE FINDLAY
REALTOR-ASSOCIATE

43505 Mission Blvd.
Fremont, CA 94539

Bus: (415) 657-6300
Res: (415) 651-5626

Each Red Carpet Office is Independently Owned and Operated

Hello neighbor,

Once again I would like to take a moment of your time to help keep us aquainted. As you may know my name is Steve Findlay and I am our park's personal represenative from Dutra Red Carpet Realty. I live at 48 Eagle Green and I am available to answer your questions concerning Real Estate at any time.

I will be dropping by about once a month to leave you with an informative newsletter that will contain pertinamt market information concerning our park in general. Also included in this letter will be a classified section---so if you have anything you want to sell and you want some free advertising please call me at either of my numbers.

To keep us informed on market values of our park I will continue to provide a short list of mobiles that have recently sold,

251	MANITOBA GREE	4	$21,000	Br-	3	1.5	- Bth
#16	EAGLE TERRACE	4	$23,000		2	1.5	
294	WINNIPEG TERR	4	$25,000		2	1	
229	MANITOBA TERR	4	$36,500		3	2	
141	COLERIDGE TER	4	$37,000		2	2	
192	COLERIDGE GRE	4	$37,000	Br-	3	2	- Bth

I am glad to continue to be of service to you and if I could help you in any further way please contact me at bus.-657-6300
home-651-5626

Thank you so much,

Steve Findlay

classified: Adorable! Cute! Cuddly!
Cairne Terrior Puppies
Asking $250 call: 651-5626

Red Carpet® is the federally registered service mark of Red Carpet Corporation of America

City of Fremont

City Government Building
39700 Civic Center Drive
Fremont, California 94537

October 30, 1986

Paul Jensen
111 West St. John, Suite 800
San Jose, CA 95113

RE: Fremont Mobile Home Rent Control

Dear Mr. Jensen:

Enclosed is correspondence concerning conflict of interest question as to Councilmember Dutra.

As you represent the Southlake and Niles Canyon Mobile Home Park owner, you may have access to factual information as to the impact of rent control on annual rental (the $250 question) and upon the value of the mobile home unit (the $1,000 question). If you do, please let me know.

Sincerely,

ALLEN E. SPRAGUE
City Attorney
(415) 790-6630

AES:vs
cao-7561

Enc.

cc: FPPC
City Council
Councilmember Dutra

P.S. I just received your letter. As you can see from the P.S. in my letter to the FPPC, I have already begun to consider your points. Despite the position of your clients concerning rent control, I appreciate your informing me of your concerns and that we will mutually cooperate to exchange information on the conflict question so as to not have to deal with last minute surprises and delays.

COPY

October 31, 1986

Allen Sprague, Esq.
City of Fremont
39700 Civic Center Drive
Fremont, CA 94538

Dear Allen,

As per your request, an analysis was conducted to access the financial significance of the sale of mobile home units located within the City of Fremont relative to overall sales in Dutra Realty Enterprises, Inc. The study covered the two (2) year period from 11/18/84 to 11/18/86, the date when the proposed Mobile Home Rent Stabilization Ordinance is scheduled to come before the city council. The results are as follows:

I) Dutra Realty Enterprises, Inc. was involved in the sale of six mobile homes located within the city limits of Fremont from 11/18/84 to date with none currently in escrow or anticipated to close before 11/18/86. The six units are as follows:

ITEM	ADDRESS	PARK	CLIENT	CLOSE OF ESCROW	GROSS COMM INCOME
A	4141 Deep Creek #43 Fremont Agent - W. Dorsett S. Kroschel	Besaro	Buyer	4/21/86	$37,000
B	4141 Deep Creek #214 Fremont Agent - D. Morris	Besaro	Seller	1/ 6/86	67,950
C	310 Winnepeg Green Fremont Agent - P. Cheshire	Southlake	Seller	2/13/86	22,000
D	32 Eagle Green Fremont Agent - I. Jeangerard	Southlake	Buyer	9/24/85	27,000
E	251 Manitoba Green Fremont Agent - M. Sturdevant - I. Jeangerard	Southlake	Buyer Seller	6/ 7/85	21,000

F	156 Coleridge Terrace Fremont Agent - W. Barnes	Southlake	Buyer Seller	1/15/85	38,000

II) The total volume of mobile house sales of the subject units computed per the normal real estate industry practice of totaling the sales price both for the sales and the listing sides of the transaction is as follows:

A	$37,000
B	67,950
C	22,000
D	27,000
E ...sale	21,000
...listing	21,000
F ...sale	38,000
...listing	38,000
Total sales volume	$271,950

III) The average sales price per (non-mobile home) residential unit in Fremont for the two (2) year period averaged approximately $120,000. Therefore, by dividing the $271,950 by 2 to arrive at the average mobile home volume of sales in Fremont per year, the result, i.e., $271,950/2 = $135,950 per year, is roughly equivalent to one (non-mobile home) residential unit sale per year. Dutra Realty Enterprises, Inc. is currently averaging fifty four closed escrows for non-mobile home residential units per month or approximately six hundred forty eight per year.

(IV) The sales volume for Dutra Realty Enterprises, Inc. for the two (2) year period is estimated to total approximately $160,000,000. Therefore, by dividing the total two (2) year mobile home volume of sales in Fremont ($271,950) by the total estimated corporate two (2) year sales volume ($160,000,000), the result is $271,950/$160,000,000 = 0.0017 or less than two tenths of one percent of overall sales.

The conclusion is that mobile home sales in Fremont represents the approximate equivilent of one non-mobile home residential unit sale per year, is less than two tenths of one percent (0.002) of overall sales and, therefore, have nil, if any, financial effect on Dutra Realty Enterprises, Inc.

Your assistance in this matter is appreciated.

Sincerely,

John Dutra

John Dutra

Western Mobilehome Association

Suzanne Schenfil
Human Services
City of Fremont
39700 Civic Center Drive
Fremont, CA 94538

October 30, 1986

Dear Suzanne,

Enclosed are comments on the draft rent control ordinance for mobilehome parks as you requested. In general we find the proposed ordinance to be restrictive and counter productive to a cooperative working relationship between residents and management. Further, the language in the ordinance is confusing and vague. The inability of those governed by the ordinance to clearly understand its provisions will only bring about more disputes. Although parkowners strongly urge the Fremont City Council not to adopt this ordinance, following is a list of recommended changes.

One of the major objections to the proposed ordinance is the amount of paperwork required by the parkowner. These requirements are abusive. The documentation demanded will take up an inordinate amount of city staff time for processing. An overall process simplification is called for.

If you have any questions regarding the suggestions inclosed please do not hesitate to contact me.

Sincerely,

Meg Miranda

Meg Miranda
Regional Director for Local Government
and Community Relations

Enclosure

cc: Councilmembers Morrison, Baker, Ball, Dutra, Mello
Fremont Parkowners

777 North 1st St., Suite 600 • San Jose, CA 95112 • (408) 998-0530

Western Mobilehome Association

COMMENTS AND SUGGESTED CHANGES

FREMONT PROPOSED RENT CONTROL ORDINANCE

October 30, 1986

Sec. 3-13102 Definitions

(a) Affected Tenant - It should be noted that residents who have signed long-term leases are not affected by rent control under state law. Also, reference should change from "tenant" to "space". Often there is more than one resident per space.

(c) Capital improvements: Substitute the following language:

Capital Expenditures: Capital expenditures are of two kinds: Capital Replacements and Capital Improvements, which are defined below.

"Capital Replacement" refers to replacement of and EXISTING thing or item in the park. "Capital Improvement" refers to any thing or item which is NEW and NOT BEFORE EXISTING in the park. Capital Improvements and Capital Replacements must be estimated as useful for at least one year. Expenditures deductible as ordinary expenses under Internal Revenue Code and Amendments are not included under any circumstances as capital expenditures.

EXAMPLES OF CAPITAL REPLACEMENT: A roof to replace the old roof on the existing clubhouse; not to be construed as upgrading, but to be of comparable quality, workmanship, and materials, or upgraded as necessary to comply with law.

EXAMPLES OF CAPITAL IMPROVEMENT: Construction of a new swimming pool where none existed before; addition of new landscape where none existed before; installation of air conditioning in the clubhouse where none existed before.

(c-3) Reference is made to "the rental unit" but no definition is provided. Does this refer to the rental space or to the

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park in general? Normally, the work "unit" refers to the mobilehome itself. However, the mobilehomes are owned individually by the residents and would not be subject to repair by the parkowner.

Sec. 3-13103 Residential rent increase limitations

(a) Set effective date to coincide with the date that the ordinance is adopted. The parkowners have shown good faith and have not raised rents in excess of their normal annual rent increases. The Council cannot arbitrarily set rents, it is an unjust use of police power.

(a-1) Allow 100% of CPI and pass through of expenses over which the parkowner has no control, such as taxes, government fees and assessments, insurance, unmetered utilities (including sewers, garbage, etc.). The formula would be:

Rent - Pass Throughs = Base Rent
Base Rent X 100% CPI = Increase
Base Rent + Increase + Pass Throughs = Rent

(a, last paragraph) What is the purpose of the owner notifying City staff anytime a rent increase follows the allowable rate set by the formula? If the residents disagree with the increase they have the right to petition for a rent review.

(b) Unnecessary documentation is required by parkowners to simply pass through the residents' portion of the rent stabilization administration fee. The procedure may be simplified if the city sent an annual bill to the parkowner indicating the residents' share. This amount would be divided by the number of affected spaces (excluding those residents who have signed long-term leases). The result would be added to the resident's rent bill. The bill from the city and a list of affected spaces would be made available at the manager's office.

The smallest park in Fremont is 165 spaces. The ordinance, as written, requires the parkowner to give <u>each</u> resident the names and space numbers of all the other affected residents. Even if only half of the residents are married and the park had one anniversary date (a common practice), this list would include the names of 246 people. If fifty names fit on one page the list would be five pages long. It would require 1,230 pieces of paper to mail to each resident! Not to mention the rent bill itself and the required information concerning the rent review process. Failure to provide all of this documentation would mean that the parkowner could not collect the rent increase or evict a resident <u>for any reason</u>.

(b-4) Simplify by stating that the space fee for the rent control program is separate from the rent and is not to be included in future calculations for the rent increase.

(d) Change to: The rent increase limitations and procedures set forth in this section shall not apply if doing so would violate the terms of a written long-term lease (long-term being more than 12 months).

Sec. 3-13104 Information to be supplied tenant

(a) Change to: Within thirty (30) days after the effective date of this ordinance and upon rerenting of each mobilehome space thereafter, the owner shall make available to each resident a current copy of this ordinance if requested by the resident. The City shall provide the parkowner with an updated version of the ordinance.

If the above changes are not made the parkowners shall be required to send out close to 1,000 copies of a 21 page document.

(b-1-ii) The owner should only be required to provide a <u>brief</u> summary supporting the reason for the requested rent increase. Again, the amount of paperwork proposed in this section is prohibitive. It is also redundant to request material that will be reviewed in arbitration.

(b-2) See comments regarding Sec. 3-13103 (b). The list of affected tenants would be made available at the manager's office.

(b-4) Providing a petition form to each resident will result in multiple hearing petitions. Forms should be available from the rent review officer. This would insure coordination of hearing requests. Further, a single distribution point of petitions would insure that the most up-to-date form was circulated.

(c) Since there are strict penalties for owners in the event they not provide the correct information to residents, in all fairness, residents should be penalized if they refuse to sign the document acknowledging receipt of the rent increase and other materials as the ordinance requires.

Better yet, eliminate this section. Penalties are already included in the ordinance and in the Civil Code that ensure proper notification will be given to the resident. This requirement is more unnecessary documentation.

Sec. 3-13105 The rent dispute resolution process

(b) The meeting described herein between the parkowner and residents is technically not a mediation. A mediation requires the presence of a neutral third party to conduct the meeting. A mediator makes no decision in the matter, but assists the parties to reach a mutually agreeable solution. We recommend the use of mediators at this stage of the process. A written agreement signed by all present should be required if compromise is reached. Any signator would be exempt from further petitions and appeals under this ordinance.

(c) Change "...signed by at least fifty one percent (51%) of all affected tenants" to "...affected spaces".

(d) The rent review officer should notify both parties if a petition is not valid.

There may also be uncontrollable circumstances under which a representative of either side cannot attend the scheduled hearing. No allowances are made in the ordinance for rescheduling hearing dates. Of course, an appropriate amount of time prior to the hearing should be set for notification.

(g) If the maximum time limitation is taken for each step of the process, the arbitrator's decision will be made after the effective date of the 60 day rent increase notice. The ordinance should note that the arbitrator's ruling will be retroactive to the date set by the original rent increase.

Sec. 3-13108 Standards of review

(b) Add: Financing charges may also be included in the sum to be passed through to the residents.

(b-5) Amortization period not to be greater than the useful life of the rehabilitation or improvement or ten years, which ever is greater.

(d) Requests under this section must be of a reasonable and relevant time period. Also, rent increases which took effect before the effective date of the ordinance may not be considered as excessive and compensation given by means of a lesser rent increase than can be supported by the landlord's evidence.

Sec. 3-13109 Net operating income

Renumbering, on page 16 change (b) and (c) to (d) and (e) respectively.

(b page 16 - 2) If the ordinance is not to allow depreciation to be included as an operating expense then previous references to reserves for replacement (Sec. 3-13109 c - 9 and 10) must be eliminated. Allowance for depreciation is a reserve for replacement.

Sec. 3-13111 Tenants' right of refusal

Add: No resident shall be allowed to refuse payment of the rent increase if the rent review officer has determined that the residents' petition is invalid.

Sec. 3-13114 Nonwaiverability

By state law any signator of a long-term lease is exempt from this ordinance.

Sec. 3-13117 Review by the City Council

Add: All parkowners shall be notified by mail. A notice shall also be sent to each mobilehome park and shall be posted in a public place within the park facilities.

AUG 15 10 15 AM 86

August 14, 1986

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

ATTN: Legal Division

RE: John Dutra, Councilman, City of Fremont - Mobile Home Park Rent Control

This follows up a telephone conversation I had with John McLean of your staff on July 9, 1986.

Councilman Dutra, who assumed office in April of 1986, has a large real estate brokerage firm, with approximately 125 agents, which transacts approximately 600 residential sales per year. He has initiated a proposal before the City Council to consider a mobile home park rent stabilization ordinance. The City Council has appointed him as a one-person committee to work with City staff, mobile home park owners, and tenants in considering what the possible needs for mobile home rent control are in this area. (By way of background: The City of Fremont just two years ago had a comprehensive rent control initiative voted on by the City electorate after the City Council declined to adopt the proposed ordinance. The initiative was resoundingly defeated. However, the City Council, responding to continued concerns of citizens, sponsored a voluntary rent mediation program conducted by the Apartment Owners Association. As a result of Council elections in November, 1985, and April, 1986, there are only two incumbent Councilmen from the previous Council. The present Council is monitoring the progress of the comprehensive rent mediation program of the Apartment Owners Association. So, there is a possibility that a comprehensive rent control proposal will come again before the City Council. There is no question in Councilman Dutra's mind or mine that if a comprehensive rent control ordinance again comes before the Council, he will need to abstain from all participation in any decisions concerning such, inasmuch as one of his firms is a small property management company managing some rental units in the city. But the focus of this letter is on the much more narrowly framed mobile home park rent control proposal.) It should be noted that Dutra's firm, of which he and his wife are 70% owners, have no connection with the rental of mobile homes or ownership of any mobile home park.

The City of Fremont has a population of approximately 153,000 persons. There are approximately 800 mobile home park units distributed among three principal parks and other smaller parks. Mr. Dutra has researched all recent company transactions and has discovered that within the past year there have been six

transactions in which his firm has participated in the sale of mobile home park units in Fremont (see attached list). At this point it is significant to distinguish an important difference between a comprehensive rent control ordinance of apartments and condo units, and a mobile home park rent control ordinance. In a mobile home park, the real estate or land is owned by the owner of the mobile home park, and this is separate from the ownership of the mobile home park units which are personally owned by the residents of the park. Thus a real estate broker who may be involved in the sale of a unit is not involved in the sale or rental of the space rented by the park.

Of the six transactions, Mr. Dutra has, after some effort, discovered that two of those sales were on behalf of sellers/tenants who have relocated, one moving out of state and one moved to a single family detached Fremont home. Mr. Dutra's firm did receive its commission from these sellers and therefore they would be sources of income. From my analysis, there clearly would be no conflict of interest involved in these transactions, insofar as the mobile home rent control proposal is concerned, since they no longer reside in a Fremont mobile home park. In the four other transactions, Mr. Dutra refers to his firm's role as representing the buyers, as distinguished from sellers, while recognizing that in accodance with real estate law his reconized client is the seller. These transactions derive from transactions which could be described as follows. Another real estate firm had a listing for a sale of a mobile home park unit (the same capacity as Dutra's firm did on the two sales previously discussed herein); and then Dutra's firm, in representing a buyer citizen who perhaps has sought to purchase a single family detached dwelling through his firm, finds out that the buyer cannot qualify for a standard residential home, but the Dutra firm assists by linking the buyer up with the mobile home listing. In the escrow one-half of the brokerage fee is paid by the seller to the listing firm which was involved and one-half to Dutra as the cooperating broker. Both are regarded by real estate law to be representing the seller. In that sense, the source of income is technically and actually still from the seller, but there is a lessor relationship that was developed between Dutra's firm and the buyer. There is no easy way to trace the history of the actual seller and source of income since such transactions are not recorded and the movement of the actual seller could only be obtained from the other listing firm which has no obligation to inform (and Mr. Dutra says probably would not disclose the whereabouts of that seller). So, the question here is whether through the regulations or other interpretation of the Act, these buyers constitute sources of income although they in no way were involved in the payment of the fee. This is important since these buyers are still residents of the mobile home parks where they bought their unit. And they would appear likely to be affected to some extent by any such rent control regulations. In short, are these buyers sources of income for purposes of the Act? I might just mention again that these few transactions constitute a small portion of the approximately 600 total residential unit sales handled by Dutra's firm in the past year.

I have not myself attempted to make a thorough analysis of the statute or regulations in this matter, but it seems to me pretty clear that at least in the initial stages of considering a proposed ordinance, there is no reasonable foreseeability that there would be a material financial effect upon either Mr. Dutra's own business or any source of income that he's had in the past

year. And I say this even though Mr. Dutra is taking a leadership role in the proposed rent control ordinance consideration by actively participating in the development of any regulation that may be proposed to Council.

The analysis of the regulations that I have done is not conclusive but may assist in your determination. Section 18704.3(c)(2)(A) identifies as a source of income "the person the broker represents in the transaction". In the real estate profession it is assumed the broker represents the seller; Dutra actually received the commission from the seller who was the client and not the buyer. Under 18704.3(c)(2)(D), the other broker would be deemed a source of income as well as the seller, so the regulations contemplate a broader scope of representation that the traditional broker/seller relationship. The question remains whether the buyers are deemed to be sources of income under 18704.3(c)(2)(A).

Assuming that these buyers are sources of income, we still need to determine if Dutra's participation in the rent control matter (either in the preliminary stage or in the later and more specific stages leading to a decision) leads to a conclusion that there is a reasonably foreseeable material financial effect on the sources of income, namely the buyers who are now owners of the four mobile home units. (Note: my analysis assumes there is no reasonable foreseeable material financial effect upon Dutra's business.) Assuming that it is "reasonably foreseeable" that <u>some</u> financial effect would result from adoption of a rent control ordinance (that might be argued but is assumed here), the focus turns to whether a rent control measure will have a "material financial effect" on the sources of income. That's hard to do without a concrete and specific proposal (such as what % rent increase is allowed, is there a rollback, etc.), but I'm looking for the existing regulations that would aid in that determination.

Section 18702 is the general regulation on material financial effect, and subsection (b)(3) deals with whether a decision will be "significant" on a $250 or more source of income. (The standard 6% broker's commission, and even half of that as in the case of the four transactions involved here, exceeds by many times $250, as can be seen in the attached list which includes sales prices). Subparagraph (A) does not in my opinion apply since rent control will not "directly" affect Dutra. Subparagraph (B) does not apply because there is no "nexus". Subparagraph (C) does not apply because the sources are not business entities. But subparagraph (D) does seem to apply but begs the question of whether the decision is "significant". Section 18702.2 assists in determining "significant" in regard to business entities but there is apparently no specific regulation for non-business sources of income. However, the provisions of subsection (g) of 18702.2 relates to "small fry" business entities and may be helpful. I think we can ignore paragraphs (1) and (3) because it seems clear that rent control would not have a $10,000 effect on gross revenue or on volume of the assets (mobile home unit). But paragraph (2) states that there is a material financial effect on a business entity if: "The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of $2,500 or more". Will rent control of mobile home parks result in reducing rent for a mobile home park tenant, $2500 or more? In response, it should be noted that the final content of the ordinance

is not set (see questions to be considered in enclosed City staff memo of July 18 to Dutra). However, the enclosed tabulation of recent rent increases shows that the typical range of rent increases per year, with or without rent control, are well under $2500 (the range on the tabulation has a low of $132 per year to a high of $396 per year). So if the "small fry" business entity $2500 standard in 18702.2(g)(2) is used, there would not be a "material" financial effect on Dutra's source of income. However, because the business entity regulation is not applicable, your own analysis and opinion is requested.

As a separate but related inquiry, your advice is sought concerning a most troublesome matter. This letter indicates that Dutra had to research all previous records for the past year to discover the six mobile home units in Fremont the firm had been involved with in the prior year. He also had to go to some considerable effort to follow up to determine what had transpired after the close of escrow in the six transactions, by interviewing each of the involved sales associates, in order to find out which, if any, of the four of the six still resided in Fremont mobile home parks. Just how far does Dutra have to go to identify questionable sources of income? It is hoped that some specific advice more helpful than merely warning officials to make a "reasonable effort", can be provided. A real estate executive, in particular and especially one in a large a large brokerage with annual sales in the range of $75,000,000 or more, has so many minor sources of income which are potentially affected by governmental decisions that detailed advice from you would be highly desirable. Thank you for your consideration.

If any clarification of the facts presented are needed, please do not hesitate to either call me at my number listed below or Councilman Dutra, whose business number is (415) 657-8222 and home number is (415) 657-6871.

ALLEN E. SPRAGUE
City Attorney
(415) 790-6623

AES:sm/vs
cao-6486

cc: Councilman Dutra

California
Fair Political
Practices Commission

September 19, 1986

Allen Sprague
City Attorney
City of Fremont
City Government Building
39700 Civic Center Drive
Fremont, CA 94537

Re: Your Request for Advice on Behalf of Fremont City Councilmember John Dutra
Our File No. A-86-260

Dear Mr. Sprague:

You have written requesting formal written advice on behalf of Fremont City Councilmember John Dutra. Pursuant to my telephone conversation of September 16, 1986, with Lyle Lopus of your staff, the time for response has been extended to this date. Councilmember Dutra and his wife own 70 percent of a large real estate brokerage firm, which engages in some sales of mobile home units.

QUESTION

Councilmember Dutra wishes to know whether, and if so to what extent, he must disqualify himself from participation in governmental decisions involving a possible mobile home rent stabilization ordinance for Fremont.

CONCLUSION

Councilmember Dutra need not disqualify himself until the proposal for a mobile home rent stabilization ordinance becomes definitive enough to determine that it will have a reasonably foreseeable material financial effect upon one or more of his firm's clients.

FACTS

Councilmember Dutra has asked the City Council to consider adopting a mobile home rent stabilization ordinance. The City Council has made him a one-person committee to work with city staff, mobile home park owners, and tenants to consider whether the city needs mobile home rent control.

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916) 322-5660

The City of Fremont has a population of approximately 153,000 persons. There are approximately 800 mobile home park units distributed among three principal parks and other smaller parks.

Councilmember Dutra and his wife own 70 percent of a large real estate brokerage firm. The firm transacts approximately 600 residential sales per year, with property sales in the range of $75,000,000 annually.

Councilmember Dutra has determined that his firm has engaged in six sales transactions within the past 12 months involving mobile homes in Fremont. In each instance, his pro rata share of the sales commission exceeds $250. His firm is not involved in rental of mobile homes nor in mobile home park ownership.

Two of the mobile home sales in which the firm was involved were on behalf of sellers who have relocated. The firm did receive its commission from these sellers. These clients no longer reside in Fremont mobile home parks.

In the four other transactions, the firm characterizes itself as representing the buyer, as distinguished from the seller, while recognizing that real estate law treats the seller as the client. In these cases, the firm simply assisted the buyer by lining up the buyer with a mobile home park unit listed by another firm. In escrow, one-half of the brokerage fee was paid by the seller to the listing firm and one-half to Councilmember Dutra's firm. The buyers are still residents of the mobile home parks in Fremont.

ANALYSIS

Councilmember Dutra is a public official. Government Code Section 82048. As such, the Political Reform Act (the "Act")[1/] requires that he not participate in any governmental decision in which he has a financial interest. Section 87100. Councilmember Dutra has a financial interest in a decision if it will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on:

> (c) Any source of income, other than gifts and other than loans by a commercial lending institution

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

> 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.
>
> Section 87103(c).

You have stated that Councilmember Dutra has received $250 or more within the last 12 months from six persons as a result of mobile home sales transactions. Two were sellers who have since moved out of the parks. However, four were buyers who still reside in mobile home parks in Fremont. Even though real estate law may treat the seller as the payer of commission income, the party represented by Mr. Dutra's firm is treated as the source of his commission income under the Act. 2 Cal. Adm. Code Section 18704.3(c)(2)(A)[2/] (copy enclosed).

Councilmember Dutra's share of the commission income is his 70 percent share of the firm's gross revenues, excluding the sales agent's contractual share. Section 82030(a). See Carey Opinion, 3 FPPC Opinions 99 (No. 76-087, Nov. 3, 1977) (copy enclosed). Based on your letter, we will assume that Mr. Dutra's share is equal to or greater than $250 in each instance.

Based upon the information provided, it appears that any effect upon the mobile home park tenants will be distinguishable from the effect upon the "public generally" (Section 87103) or any "significant segment of the public." Regulation 18703. Fremont has approximately 45,000 households. Eight hundred mobile home households represents a very small percentage of the total. See Legan Opinion, 9 FPPC Opinions 1 (No. 85-001, Aug. 20, 1985) (copy enclosed).

Consequently, if a governmental decision will have a reasonably foreseeable material financial effect upon any of the four mobile home purchasers, Councilmember Dutra will be required to disqualify himself from participation in that decision. Regulation 18702(b)(3)(D) provides that the effect of a decision upon a nonbusiness source of income will be material if it is "significant." Using Regulation 18702.1(a)(4) as a guide, we believe that a decision which will

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2/ Commission regulations appear at 2 Cal. Adm. Code Sections 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

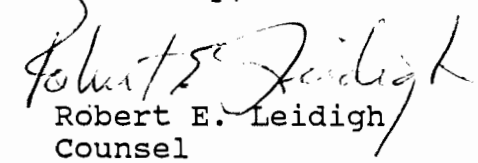
affect annual rents of these mobile home park tenants by $250 or more will be "significant."[3] From another perspective, if the value of their mobile home units will be significantly affected as a result of the imposition of rent controls, this would also constitute a material financial effect. As a guideline in this regard, we believe a $1,000 effect would be significant.[4]

Consequently, if the mobile home ordinance proposal progresses to the point that one can determine that any of the four clients will be affected in such a manner, disqualification would be required. At this preliminary stage, such a determination cannot be made. By the time it can be made, the 12-month period for considering these clients as sources of income under Section 87103 may have expired.

If and when you believe such a determination can be made, please do not hesitate to contact this office for further assistance. I enclose a copy of our Advice Letter to Douglas McAvoy (No. A-82-071) for your information on the question of how much effort Councilmember Dutra must expend in determining who are his firm's clients.

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

Sincerely,



Robert E. Leidigh
Counsel
Legal Division

REL:plh
Enclosures

3/ This is based upon an analogy to the effects upon the official under Regulation 18702.1(a)(4). We do not believe that an analogy to the small business entity standard in Regulation 18702.2(g) is appropriate. The Commission chose to differentiate between effects upon business entity sources of income and effects upon nonbusiness sources of income when it adopted Regulation 18702(b)(3)(C) and (D).

4/ This is based upon an analogy to the effects upon interests in real property governed by Regulation 18702(b)(2).

F P P C
AUG 15 10 15 AM '86

August 14, 1986

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

ATTN: Legal Division

RE: John Dutra, Councilman, City of Fremont - Mobile Home Park Rent Control

This follows up a telephone conversation I had with John McLean of your staff on July 9, 1986.

Councilman Dutra, who assumed office in April of 1986, has a large real estate brokerage firm, with approximately 125 agents, which transacts approximately 600 residential sales per year. He has initiated a proposal before the City Council to consider a mobile home park rent stabilization ordinance. The City Council has appointed him as a one-person committee to work with City staff, mobile home park owners, and tenants in considering what the possible needs for mobile home rent control are in this area. (By way of background: The City of Fremont just two years ago had a comprehensive rent control initiative voted on by the City electorate after the City Council declined to adopt the proposed ordinance. The initiative was resoundingly defeated. However, the City Council, responding to continued concerns of citizens, sponsored a voluntary rent mediation program conducted by the Apartment Owners Association. As a result of Council elections in November, 1985, and April, 1986, there are only two incumbent Councilmen from the previous Council. The present Council is monitoring the progress of the comprehensive rent mediation program of the Apartment Owners Association. So, there is a possibility that a comprehensive rent control proposal will come again before the City Council. There is no question in Councilman Dutra's mind or mine that if a comprehensive rent control ordinance again comes before the Council, he will need to abstain from all participation in any decisions concerning such, inasmuch as one of his firms is a small property management company managing some rental units in the city. But the focus of this letter is on the much more narrowly framed mobile home park rent control proposal.) It should be noted that Dutra's firm, of which he and his wife are 70% owners, have no connection with the rental of mobile homes or ownership of any mobile home park.

The City of Fremont has a population of approximately 153,000 persons. There are approximately 800 mobile home park units distributed among three principal parks and other smaller parks. Mr. Dutra has researched all recent company transactions and has discovered that within the past year there have been six

transactions in which his firm has participated in the sale of mobile home park units in Fremont (see attached list). At this point it is significant to distinguish an important difference between a comprehensive rent control ordinance of apartments and condo units, and a mobile home park rent control ordinance. In a mobile home park, the real estate or land is owned by the owner of the mobile home park, and this is separate from the ownership of the mobile home park units which are personally owned by the residents of the park. Thus a real estate broker who may be involved in the sale of a unit is not involved in the sale or rental of the space rented by the park.

Of the six transactions, Mr. Dutra has, after some effort, discovered that two of those sales were on behalf of sellers/tenants who have relocated, one moving out of state and one moved to a single family detached Fremont home. Mr. Dutra's firm did receive its commission from these sellers and therefore they would be sources of income. From my analysis, there clearly would be no conflict of interest involved in these transactions, insofar as the mobile home rent control proposal is concerned, since they no longer reside in a Fremont mobile home park. In the four other transactions, Mr. Dutra refers to his firm's role as representing the buyers, as distinguished from sellers, while recognizing that in accodance with real estate law his reconized client is the seller. These transactions derive from transactions which could be described as follows. Another real estate firm had a listing for a sale of a mobile home park unit (the same capacity as Dutra's firm did on the two sales previously discussed herein); and then Dutra's firm, in representing a buyer citizen who perhaps has sought to purchase a single family detached dwelling through his firm, finds out that the buyer cannot qualify for a standard residential home, but the Dutra firm assists by linking the buyer up with the mobile home listing. In the escrow one-half of the brokerage fee is paid by the seller to the listing firm which was involved and one-half to Dutra as the cooperating broker. Both are regarded by real estate law to be representing the seller. In that sense, the source of income is technically and actually still from the seller, but there is a lessor relationship that was developed between Dutra's firm and the buyer. There is no easy way to trace the history of the actual seller and source of income since such transactions are not recorded and the movement of the actual seller could only be obtained from the other listing firm which has no obligation to inform (and Mr. Dutra says probably would not disclose the whereabouts of that seller). So, the question here is whether through the regulations or other interpretation of the Act, these buyers constitute sources of income although they in no way were involved in the payment of the fee. This is important since these buyers are still residents of the mobile home parks where they bought their unit. And they would appear likely to be affected to some extent by any such rent control regulations. In short, are these buyers sources of income for purposes of the Act? I might just mention again that these few transactions constitute a small portion of the approximately 600 total residential unit sales handled by Dutra's firm in the past year.

I have not myself attempted to make a thorough analysis of the statute or regulations in this matter, but it seems to me pretty clear that at least in the initial stages of considering a proposed ordinance, there is no reasonable foreseeability that there would be a material financial effect upon either Mr. Dutra's own business or any source of income that he's had in the past

year. And I say this even though Mr. Dutra is taking a leadership role in the proposed rent control ordinance consideration by actively participating in the development of any regulation that may be proposed to Council.

The analysis of the regulations that I have done is not conclusive but may assist in your determination. Section 18704.3(c)(2)(A) identifies as a source of income "the person the broker represents in the transaction". In the real estate profession it is assumed the broker represents the seller; Dutra actually received the commission from the seller who was the client and not the buyer. Under 18704.3(c)(2)(D), the other broker would be deemed a source of income as well as the seller, so the regulations contemplate a broader scope of representation that the traditional broker/seller relationship. The question remains whether the buyers are deemed to be sources of income under 18704.3(c)(2)(A).

Assuming that these buyers are sources of income, we still need to determine if Dutra's participation in the rent control matter (either in the preliminary stage or in the later and more specific stages leading to a decision) leads to a conclusion that there is a reasonably foreseeable material financial effect on the sources of income, namely the buyers who are now owners of the four mobile home units. (Note: my analysis assumes there is no reasonable foreseeable material financial effect upon Dutra's business.) Assuming that it is "reasonably foreseeable" that <u>some</u> financial effect would result from adoption of a rent control ordinance (that might be argued but is assumed here), the focus turns to whether a rent control measure will have a "material financial effect" on the sources of income. That's hard to do without a concrete and specific proposal (such as what % rent increase is allowed, is there a rollback, etc.), but I'm looking for the existing regulations that would aid in that determination.

Section 18702 is the general regulation on material financial effect, and subsection (b)(3) deals with whether a decision will be "significant" on a $250 or more source of income. (The standard 6% broker's commission, and even half of that as in the case of the four transactions involved here, exceeds by many times $250, as can be seen in the attached list which includes sales prices). Subparagraph (A) does not in my opinion apply since rent control will not "directly" affect Dutra. Subparagraph (B) does not apply because there is no "nexus". Subparagraph (C) does not apply because the sources are not business entities. But subparagraph (D) does seem to apply but begs the question of whether the decision is "significant". Section 18702.2 assists in determining "significant" in regard to business entities but there is apparently no specific regulation for non-business sources of income. However, the provisions of subsection (g) of 18702.2 relates to "small fry" business entities and may be helpful. I think we can ignore paragraphs (1) and (3) because it seems clear that rent control would not have a $10,000 effect on gross revenue or on volume of the assets (mobile home unit). But paragraph (2) states that there is a material financial effect on a business entity if: "The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of $2,500 or more". Will rent control of mobile home parks result in reducing rent for a mobile home park tenant, $2500 or more? In response, it should be noted that the final content of the ordinance

is not set (see questions to be considered in enclosed City staff memo of July 18 to Dutra). However, the enclosed tabulation of recent rent increases shows that the typical range of rent increases per year, with or without rent control, are well under $2500 (the range on the tabulation has a low of $132 per year to a high of $396 per year). So if the "small fry" business entity $2500 standard in 18702.2(g)(2) is used, there would not be a "material" financial effect on Dutra's source of income. However, because the business entity regulation is not applicable, your own analysis and opinion is requested.

As a separate but related inquiry, your advice is sought concerning a most troublesome matter. This letter indicates that Dutra had to research all previous records for the past year to discover the six mobile home units in Fremont the firm had been involved with in the prior year. He also had to go to some considerable effort to follow up to determine what had transpired after the close of escrow in the six transactions, by interviewing each of the involved sales associates, in order to find out which, if any, of the four of the six still resided in Fremont mobile home parks. Just how far does Dutra have to go to identify questionable sources of income? It is hoped that some specific advice more helpful than merely warning officials to make a "reasonable effort", can be provided. A real estate executive, in particular and especially one in a large a large brokerage with annual sales in the range of $75,000,000 or more, has so many minor sources of income which are potentially affected by governmental decisions that detailed advice from you would be highly desirable. Thank you for your consideration.

If any clarification of the facts presented are needed, please do not hesitate to either call me at my number listed below or Councilman Dutra, whose business number is (415) 657-8222 and home number is (415) 657-6871.

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cc: Councilman Dutra