



# California Fair Political Practices Commission

February 11, 1987

Donald L. Clark  
County Counsel  
County Government Center, East Wing  
70 West Hedding Street  
San Jose, CA 95110

Re: Your Request for Advice  
Our File No. A-87-028

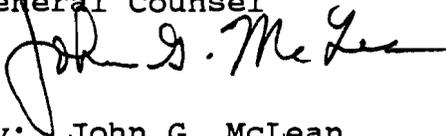
Dear Mr. Clark:

We have received a copy of your letter to Santa Clara County Traffic Authority member Brian O'Toole regarding his duties under the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1/</sup> This is to confirm that the portions of that letter involving application of the Act are consistent with telephone advice I provided to you on December 29, 1986.

If you should have any questions, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths  
General Counsel

  
By: John G. McLean  
Counsel, Legal Division

DMG:JGM:plh

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<sup>1/</sup> Government Code Sections 81000-91015.

County of Santa Clara

California

**COPY**

F P F C  
JAN 20 11 16 AM '87

Donald L. Clark, County Counsel  
No. 87-1

January 14, 1987

Mr. Brian O'Toole  
Santa Clara County Traffic Authority  
19925 Stevens Creek Boulevard, Suite 139  
Cupertino, CA 95014

Dear Mr. O'Toole:

You have asked if you have a conflict of interest as a member of the Santa Clara County Traffic Authority by reason of your employment with ABAG Plan.

#### Conclusion

You do not have a financial interest by reason of your employment with ABAG Plan in decisions of the Traffic Authority to allocate revenues and to contract with the California Department of Transportation for construction of highway projects under the Authority's capital improvement plan and its expenditure plan. You should disqualify yourself from participating in any decisions awarding contracts or granting funds to cities who are members of the ABAG Plan.

#### Discussion

You are a member of the Santa Clara County Traffic Authority. The Traffic Authority was created in 1984 pursuant to the Santa Clara County Commuter Relief Act. (Pub. Util. C., sec. 140,000 and following. Stats. 1984, Chapter 446.) The voters of Santa Clara County approved the creation of the Authority at the November 6, 1984, general election. According to the ballot measure, the purpose of the Authority is to improve, expand and construct the highway transportation system in the County. The Traffic Authority is authorized to impose a 1/2% transactions and use tax for up to 10 years for highway transportation purposes in the county. (Pub. Util. C., sec. 140260.) Highest priority goes to improvement of State Highway Routes 85, 101 and 237. (Section 140256.5.)

The governing board of the Authority consists of five members: One member of the Board of Supervisors, appointed by the Board; two members representing the City of San Jose, consisting of the Mayor and a member of the City Council, appointed by the Council; two members representing the other cities in the county divided into two zones, appointed by the Mayor from those cities and who should be Mayors or City Council members. (Section 140051.) You serve on the Traffic Authority Board as Council member of the City



Mr. Brian O'Toole

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of Sunnyvale and represent the north zone, which includes the Cities of Los Altos, Los Altos Hills, Milpitas, Mountain View, Palo Alto, Santa Clara, and Sunnyvale.

The Traffic Authority performs acts necessary to carry out the purposes of the Santa Clara County Commuter Relief Act. (Section 140105.) Revenues from taxes imposed pursuant to the statute are allocated by the Authority for the administration of the highway capital improvement program. (Section 140255.) The Authority has an expenditure plan which was initially prepared by the County Board of Supervisors. (Section 140256.) The Authority gives highest priority to projects in the initial expenditure plan. The Authority may amend the plan by votes of four members, as provided in the statute. (Section 140257.) The Traffic Authority approves projects and authorizes expenditure of Traffic Authority funds within the scope of the highway improvement program and the Authority's expenditure plan.

Your employer is ABAG Plan. This is a self-insured pool for liability coverage. The owners of ABAG Plan are 25 cities within the Bay Area, including Milpitas, Los Altos, Los Altos Hills, Saratoga, Cupertino, Los Gatos, Campbell, Morgan Hill, and Gilroy, all in Santa Clara County. ABAG Plan will contract to provide risk management services with the Bay Cities Joint Powers Insurance Authority, another self-insurance pool that includes Monte Sereno.

Political Reform Act

No public official shall make, participate in making or in any way attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a financial interest. (Gov. C., sec. 87100.) The Political Reform Act applies to the Traffic Authority, and the Authority has on May 6, 1985, adopted its Conflict of Interest Code pursuant to the Act. (Gov. C., secs. 87300-87302.)

An official has a financial interest within the meaning of the statute if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or on:

- (a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

. . . . .

- (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

Mr. Brian O'Toole

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to, received by or promised to the public official within 12 months prior to the time when the decision is made.

- (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

The question arises, do you as a member of the Traffic Authority participate in governmental decisions which will have a material financial effect, distinguishable from their effect on the public generally, on a business entity in which you have an interest, on a source of income to you, or a business entity in which you are an employee or hold a position of management, over the threshold amounts. (Gov. C., secs. 87100, 87103.)

The Political Reform Act excludes salary received from a local governmental agency in the definition of "income". (Gov. C., sec. 82030(b)(2).) ABAG Plan is a private nonprofit corporation, not a local governmental agency. Therefore, we cannot exclude your salary from ABAG Plan as income under the Act. Moreover, you work under a pay-for-performance agreement with ABAG Plan, and that is not straight salary which would be excluded from the definition of income if ABAG Plan were a governmental agency.

The decisions made by the Traffic Authority to allocate revenues for specific highway projects under the Authority's capital improvement program and its expenditure plan do not have a material financial effect, distinguishable from their effect on the public generally, on cities in the county. (The Traffic Authority includes all the incorporated and unincorporated territory of the county. Section 140251.) The Authority contracts with the California Department of Transportation for construction and improvements of the highway projects. The Traffic Authority does not contract with the cities for these projects. It would be difficult to say the Traffic Authority's decisions to allocate funds and make contracts with the State Department of Transportation affect the various cities in the county to a greater extent than the public generally as defined by the Political Reform Act.

In our opinion, you do not have a financial interest in the governmental decisions of the Traffic Authority which we describe here, within the meaning of the Political Reform Act.

You are employed by ABAG Plan, not by the cities who are members of the Plan. A cautious approach would require that we consider the cities who are members of the Plan to be sources of income to you. You have pointed out that your salary is based on your performance and the success of the Plan. Thus, if the Traffic Authority were to consider agreements with any of the cities who are members of the Plan, you should disqualify yourself from participating in those decisions.

Mr. Brian O'Toole

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January 14, 1987

We have discussed these questions with a staff member of the Fair Political Practices Commission, and under the facts given to him, he concurs with our conclusions covered by the Political Reform Act.

Financial Interest In Contract - Government Code section 1090

Government Code section 1090 and following prohibit county, city, and district officers from being financially interested in any contract made by them in their official capacity.

Like section 87100 in the Political Reform Act, section 1090 applies to transactions in which the official is financially interested. Section 1090, however, is not only applicable to contracts made by the official, it is also applicable to those contracts made by the body or board of which the official is a member. Thus, if the transaction was within the restrictions of section 1090, the Board itself is not permitted to act even if the interested Board member refrains from participating in the transaction. (65 Ops.Cal.Atty.Gen. 41, 54.)

In a recent case on section 1090, our Supreme Court reviews the law and emphasizes, ". . . the significant public policy goals which mandate strict enforcement of conflict-of-interest statutes, such as section 1090 . . . ." (Thompson v. Call (1985) 38 Cal.3d 633.)

In the Thompson case, a private developer, as part of a complex land development project, obtained from the City of Albany approval of a use permit, rezone, and tentative map. The conditions of approval included dedication of land to the city for parks and open space. The developer purchased part of the property to be dedicated from a member of the city council. The Supreme Court held the transaction produced a "single contract" in which the council member had a financial interest in violation of section 1090. The appropriate remedy, the court held, consisted of retention by the city of the parcel of land sold by the council member and "forfeiture" by the council member of the purchase price plus interest to the city. (Thompson, supra, p. 643.) The law is strict. Civil liability under section 1090 is not affected by the presence or absence of fraud, by the official's good faith or disclosure of interest, or by his nonparticipation in voting. (Thompson, supra, p. 652.)

We do not see a financial interest here covered by section 1090, where the actions of the Traffic Authority are allocation of funds and contracts for highway construction projects with the State of California Department of Transportation. Again, on the basis that the cities who are members of the ABAG Plan may be sources of income to you, you should not participate in agreements between the Authority and these cities or with the ABAG Plan.

Mr. Brian O'Toole

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January 14, 1987

Section 1090 is qualified by other related code sections. (65 Ops. Cal. Atty. Gen. 41.) While these sections do not apply to our issue here, they may be relevant to other factual cases.

Section 1091 describes "remote interests." In the cases specified in section 1091, an officer shall not be deemed to be interested in a contract entered into by the Board of which the officer is a member if the officer has only a remote interest in the contract and if the fact of the interest is disclosed to the Board and noted in its official records, and the Board authorizes the contract in good faith by a vote sufficient without counting the vote of the member with the remote interest. For example, a remote interest includes that of an employee or agent of a firm which renders service to the contracting party in the capacity of an insurance agent or broker, if the individual does not receive remuneration or a commission as a result of the contract. (Section 1091, subdivisions (a) and (b)(5).)

Section 1091.5 describes interests deemed not to constitute an interest under section 1090. These include interests of a nonsalaried member of a nonprofit corporation, and a noncompensated officer of a nonprofit, tax-exempt corporation which, as one of its primary purposes, supports the functions of the public body or board, provided the interest is noted in the official records. To the extent the interest comes within these provisions, section 1090 does not prohibit the interested member from participating in making the contract. (Section 1091.5, paragraphs (7) and (8) of subdivision (a).) Although ABAG Plan is a nonprofit tax-exempt corporation, a contract made by the Traffic Authority with ABAG Plan would not come under the exemption of section 1091.5 because you receive compensation from the Plan.

Nevertheless, in our opinion, actions by the Traffic Authority allocating funds and entering into contracts with the California Department of Transportation for highway construction projects do not involve contracts in which you have a financial interest within the meaning of section 1090. If, however, the Traffic Authority should contemplate contracts with any of the cities that are members of the ABAG Plan, you should refrain from participating in such decisions, and we should consider the effect on the contracts of a possible financial interest where it could be argued that the cities are a source of income to you.

#### Incompatible Activities

A local agency officer or employee shall not engage in any activity for compensation which is inconsistent, incompatible, in conflict with, or inimical to his/her duties as a local agency officer or employee. (Gov. C., sec. 1126.) The appointing power of the local agency may determine those activities which for employees under its jurisdiction are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or

Mr. Brian O'Toole

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January 14, 1987

employees. The local agency may adopt rules governing the application of this section. (Section 1126.)

Your employment with ABAG Plan is not inconsistent with, incompatible to, or in conflict with your office as member of the Santa Clara County Traffic Authority.

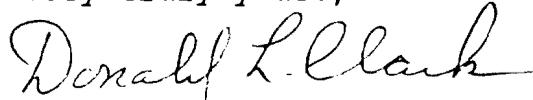
Common Law Doctrine of Conflict of Interest

This doctrine is based on court decisions. Public officers should not exploit their official position for their private benefits. The interest need not be financial. When there is such an interest, one should withdraw from participation. (See 42 Ops.Cal.Atty.Gen. 151 at 155 (1963); 58 Ops.Cal.Atty.Gen. 345 at 355 (1975); Noble v. City of Palo Alto (1928) 89 Cal.App. 47, 51-52.)

We do not see private benefits here which are incompatible to or in conflict with your serving on the Traffic Authority. In our opinion, such a conflict does not exist.

As stated above, you should withdraw from participation in any decisions by the Traffic Authority with ABAG Plan or with cities who are members of ABAG Plan.

Very truly yours,



Donald L. Clark  
County Counsel

DLC:mo

cc: John McLean, FPPC

Louis B. Green, Sunnyvale City Attorney

5DLC154

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# California Fair Political Practices Commission

February 20, 1987

Wes Bannister  
Huntington Beach  
City Councilmember  
15562 Chemical Lane  
Huntington Beach, CA 92649

Re: Your Requests for Advice  
Our File Nos. A-87-029 and  
A-87-050

Dear Mr. Bannister:

This is in response to your requests for advice dated January 16, 1987 and February 3, 1987 concerning your duties under the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1/</sup>

## QUESTIONS

1. Are you prohibited from participating in discussions with the city attorney or with various department heads for the purpose of attempting to resolve a lawsuit filed against the City of Huntington Beach by a client of your insurance agency?
2. Are you prohibited from participating in a decision regarding rezoning land owned by a client of your insurance agency?

## CONCLUSION

1. You may not participate in discussions with the city attorney or with city department heads for the purpose of attempting to resolve the lawsuit if the client has been a

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

source of income to you of \$250 or more in the preceding 12 months.

2. You may not participate in a decision regarding rezoning land owned by a client of your insurance agency if the client has been a source of income to you of \$250 or more in the preceding 12 months.

#### FACTS

In the first situation, a lawsuit has been filed against the City of Huntington Beach by John J. Stanko in his capacity as trustee of the Stanko Trust. The lawsuit involves the Davenport Marina, which is owned and operated by the Stanko Trust. You own a 100 percent interest in an insurance agency which insures the Davenport Marina.

In the second situation, a client of your insurance agency is coming before the city council to request that certain property be rezoned from commercial to residential property.

#### ANALYSIS

Section 87100 prohibits a public official from making, participating in, or attempting to influence a 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 will have a material financial effect, distinguishable from its effect on the public generally, on, among other things, a source of income aggregating two hundred fifty dollars (\$250) or more 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).) Since you own 100 percent of your insurance agency, all commission income to the insurance agency is attributed to you.<sup>2/</sup> (Section 82030.) Accordingly,

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<sup>2/</sup> "Commission income" means gross payments received as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. (Regulation 18704.3(b).) However, any portion of the commission which is paid to a solicitor is not included as commission income to your insurance agency. (See, Carey Opinion, 3 FPPC Ops. 99 (No. 76-087, Nov. 3, 1977); copy enclosed.) Thus, if for example the sale of an insurance policy by a solicitor results in a \$400 commission which is split 50/50 between the solicitor and your insurance agency, your insurance agency has earned \$200 in commission income.

if the Stanko Trust or the client seeking the rezoning has provided \$250 or more in commission income to your insurance agency in the preceding 12 months, you may not participate in any decision which will have a reasonably foreseeable material financial effect on that client.

As we have previously advised you, it is usually necessary to estimate the dollar value of the effect of a decision on an official's economic interest to determine whether the effect is material. (Advice Letter to Wes Bannister, No. I-86-327 (Jan. 8, 1987).) However, Regulation 18702.1 sets out certain special situations in which an effect is considered material regardless of its dollar value. In particular, Regulation 18702.1(a)(1) provides that a public official shall not participate in a decision if:

(1) Any person (including a business entity) which has been a source of income (including gifts) to the official of \$250 or more in the preceding 12 months appears before the official in connection with the decision;

A person or business entity "appears before an official in connection with a decision" when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request;

(2) Is a named party in the proceeding concerning the decision before the official or the body on which the official serves.

Regulation 18702.1(b)(1) and (2).

### Lawsuit

In the first situation you have presented, the lawsuit filed by Stanko Trust constitutes a "claim or similar request." Furthermore, Stanko Trust, through its agent John Stanko, is a named party in proceedings concerning the lawsuit. Therefore, you may not make, participate in making, or use your official position to influence a decision regarding the lawsuit if John Stanko or the Stanko Trust has been a source of income to you of \$250 or more in the preceding 12 months.

By participating in discussions with the city attorney and various department heads for the purpose of resolving the

Wes Bannister  
February 20, 1987  
Page 4

Stanko Trust lawsuit, you would be considered to be "using your official position to influence" a governmental decision regarding the lawsuit. (Regulation 18700.1(a), copy enclosed.)

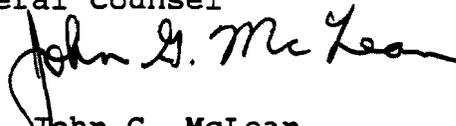
Rezoning

In the second situation you have presented, the request for rezoning constitutes an "application, ... appeal, or similar request." In addition, your client is undoubtedly a named party in the proceeding. Accordingly, you may not participate in the rezoning decision if the client has been a source of income to you of \$250 or more in the 12 months preceding the decision.

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

Sincerely,

Diane M. Griffiths  
General Counsel



By: John G. McLean  
Counsel, Legal Division

DMG:JGM:plh  
Enclosure



BANNISTER & ASSOCIATES  
INSURANCE

JAN 16 10 04 AM '87  
January 16, 1987

Attorney John G. McLean  
Counsel, Legal Division  
California Fair Political Practices Commission  
P.O. Box 807  
Sacramento, California 95804-0807

Re: Lawsuit  
John J. Stanko, as Trustee of the  
Stanko Trust, UDT 9/24/80,  
Petitioner,  
vs.  
City of Huntington Beach, City  
Council of the City of Huntington Beach  
and Does 1 through X, inclusive

Dear Mr. McLean:

Attached to this letter please find a copy of a lawsuit which is being filed by one John J. Stanko against the City of Huntington Beach. The lawsuit clearly defines the reasons for action, and specifically, addresses the prior handling by the City Council of an action that the claimant feels was illegal.

In this particular case, I happen to know the parties who were involved in the action, and know that it was politically motivated, which is fully indicated by the lawsuit filed by Mr. Stanko.

My concern is that I insure Mr. Stanko and therefore, have a potential conflict of interest if I become involved. This lawsuit was delivered to me by Mr. Stanko with a request that I become involved in the hopes that I could help to resolve the situation without actually having to go to court, thus saving both the City and the claimant the time and expense of a trial.

Again, following your January 8th letter, if Mr. Stanko is allowed to maintain the end ties that he is indicating that he would lose, there would be no change in the gross receipts of my client, however, if he loses those gross receipts, there would be a reduction. The reduction in gross receipts, however, would be less than \$10,000 per year.

The premiums that are established on the marina are based on value of the docks, and gross receipts, however, the total premium is less than the \$10,000 stipulated in your letter to Bannister & Associates, therefore, any change in gross receipts, either upward or downward would reflect an amount substantially under the \$10,000 level, but in excess of the \$1,000 level.

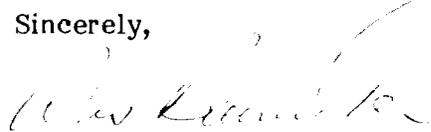
A decision made by the Council that the action taken previously was invalid would in no way improve the use of the "land or other" since it is currently in use in the same manner as requested by the lawsuit. The loss of the end ties in the marina, would subject my client to a reduction in his ability to use land, but again, reflecting gross receipts as a factor, would not effect the gross receipts beyond the limits specified.

I would like to use the lawsuit document, and have the permission of the claimant, to discuss this action with the City Attorney and with the department heads that were previously involved in the program, however, am afraid that in so doing I could influence "legislation", which could conceivably be a conflict of interest according to your letter of January 8th.

Am I precluded from assisting this resident of Huntington Beach from resolving this problem and hopefully, reducing expenses to the City, and possible court action, by the conflict of interest laws in your judgement? Please advise as quickly as possible since this is a very serious situation and could be very expensive to all parties involved. It is my hope that I could use the knowledge I have of the risk, and the insured's desire to avoid legal action, to resolve this case in a way that would be equitable and fair to all.

Please advise.

Sincerely,



Wes Bannister

WB/bu

Encl.

COMMERCIAL INSURANCE POLICY

\*\*\*\*\*  
\* COMMON POLICY DECLARATIONS \*  
\*\*\*\*\*

POLICY NUMBER: 01-CC-043R  
RENEWAL OF: NEW

NAMED DAVENPORT MARINA, ETAL  
INSURED (SEE NAMED INSURED END'T)  
MAILING P.O. BOX 2705  
ADDRESS: HUNTINGTON BEACH, CA 92649

AGENT: BANNISTER & ASSOC INSURANCE  
15562 CHEMICAL LANE  
HUNTINGTON BEACH, CA 92649  
04-03599 (364)  
(714) 891-2351

POLICY PERIOD: FROM 06-20-86 TO 06-20-87  
12001 AM STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE

\*\*\*\*\*  
\* THIS POLICY IS SUBJECT TO FINAL AUDIT.  
\* TOTAL ESTIMATED ANNUAL PREMIUM  
\* DUE ON EFFECTIVE DATE: 3,198.00  
\*\*\*\*\*

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

COMMERCIAL LIABILITY COVERAGE PART ..... 3.

WITNESSED \_\_\_\_\_ (DATE)

BY \_\_\_\_\_ (AUTHORIZED REPRESENTATIVE)

~~BOAT DEALERS/MARINA OPERATORS~~

POLICY NUMBER: 01-BD-0435  
RENEWAL OF: NEW

DECLARATIONS

INSURED: JOHN J. STANKO, ET AL  
NAME: ~~17121 EDGEWATER LANE~~  
AND: HUNTINGTON BEACH, CA 92649  
ADDRESS:

AGENT: BANNISTER & ASSOC INSURANC  
15562 CHEMICAL LANE  
HUNTINGTON BEACH, CA 92649  
04-03999 (384)  
(714) 891-2351

LEGAL ENTITY: INDIVIDUAL

POLICY TERM: FROM 04-13-86 TO 04-13-87  
12:01 AM STANDARD TIME AT ADDRESS OF INSURED

TOTAL ANNUAL PREMIUM  
DUE ON EFFECTIVE DATE: \$ 1,000.00

LOCATION  
1. 4032 DAVENPORT  
HUNTINGTON BEACH, CA 92649

OCCUPANCY  
MARINA

COVERAGE(S)	SCH	LOC	LIMIT OF INSURANCE (\$)	RATE	DEDUCT -TYPE (1)	PREM (1)
MARINA OPERATORS COVERAGE	IND	1	1,000,000		200	1

TOTAL ..... \$ 1,000.00

ENDORSEMENTS ATTACHED: 9-CIM(0181) CIM001(0982) 98DA(1281) CIM151(1281)

IN CONSIDERATION OF THE PREMIUM, INSURANCE IS PROVIDED THE NAMED INSURED TO AN AMOUNT NOT EXCEEDING THE AMOUNT(S) SPECIFIED, SUBJECT TO ALL THE PROVISIONS OF THIS POLICY INCLUDING FORMS AND ENDORSEMENTS MADE A PART HEREOF.

COUNTERSIGNATURE DATE \_\_\_\_\_

LATHAM & WATKINS  
Robert K. Break  
Virginia P. Croudace  
660 Newport Center Drive  
Suite 1400, P.O.Box 2780  
Newport Beach, CA 92660

(714) 752-9100

Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF ORANGE

JOHN J. STANKO, as Trustee of The	)	Case No. 46-75-77
Stanko Trust, UDT 9/24/80,	)	
	)	NOTICE OF MOTION AND MOTION
Petitioner,	)	FOR PEREMPTORY WRIT OF
	)	MANDAMUS AND FOR ORDER
vs.	)	ENFORING JUDGMENT, WITH
	)	POINTS AND AUTHORITIES
CITY OF HUNTINGTON BEACH, CITY	)	
COUNCIL OF THE CITY OF	)	
HUNTINGTON BEACH and DOES 1	)	Date:
through X, inclusive,	)	Time:
	)	Dept:
Respondents,	)	
_____	)	

TO RESPONDENTS CITY OF HUNTINGTON BEACH and CITY COUNCIL OF THE  
CITY OF HUNTINGTON BEACH:

PLEASE TAKE NOTICE that on \_\_\_\_\_, 1986,  
at \_\_\_\_\_ a.m., or as soon thereafter as counsel can be heard, at  
Department \_\_\_ of the Superior Court of Orange County, 700 Civic  
Center Drive West, City of Santa Ana, California, petitioner  
will and hereby does move the Court for a peremptory writ of  
mandamus commanding respondents to set aside Resolution No. 5523  
dated June 23, 1985, in the proceedings entitled "A Resolution  
of the City Council of the City of Huntington Beach establishing

a pier head line in the Davenport Marina." Petitioner will and hereby does further move the Court for an order enforcing its Judgment Granting a Peremptory Writ of Mandamus entered in Book No. 78, Page 373 on July 17, 1974 in Orange County Superior Court Case No. 211820. This motion is based on this notice, the verified petition filed in this action, all other papers and records on file in this action, the attached memorandum of points and authorities and any evidence that may be produced at the hearing.

Dated: \_\_\_\_\_, 1986

LATHAM & WATKINS  
Robert K. Break  
Virginia P. Croudace

By \_\_\_\_\_  
Attorneys for Petitioner

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I

INTRODUCTION

Either the Stanko Trust, petitioner, or Dr. John Stanko, the Trust's founder, has owned and operated the Davenport Marina in Huntington Harbour since 1975. Since 1975, boats lawfully have been moored at the ends, or "side-ties," of the four ~~piers~~ <sup>slips?</sup> included in the Davenport Marina. On June 3, 1985, however, without affording petitioner a public hearing, without making any findings to explain or justify its actions, without any evidentiary showing of the need for its action, and contrary to the terms of the deed by which the channel adjoining the Marina was dedicated to the City of Huntington Beach, the Huntington Beach City Council voted to establish a "pierhead line" for the Marina that would eliminate side-tie moorings at the ends of two of the ~~piers~~, and the revenues they yield to petitioner. Moreover, the pierhead line approved by the Council would, again without a hearing, findings, or evidentiary justification, eliminate what has been judicially adjudged to be the Marina owner's vested right to expand the Marina in accordance with an approved, valid, and vested permit previously issued by the City. In so doing, the City acted in violation of the due process rights of petitioner, in prejudicial abuse of its discretion, and in contempt of the prior judgment of this Court. The writ, and an order enforcing the Court's prior judgment, must be issued.

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## II

### FACTUAL BACKGROUND

The Huntington Harbour adjoining the Davenport Marina (the "Marina") came into being in October 1962, when the Huntington Harbour Corporation (the "Corporation"), petitioner's predecessor in interest, dedicated the fee interest in the Harbour to the City. The deed also reserved to the Corporation and its successors in interest an easement to construct and operate a marina on a portion of the dedicated harbor, including the area on which improvements for the Marina have been constructed. (See Administrative Record ("A.R."), Exhibit 4, attachment 2.) In May 1964, the City issued Conditional Exception (Use Variance) No. 707 (the "Conditional Exception") allowing construction of 91 slips at the Marina, along with an adjacent parking lot. (See id., Exhibit 1.) The Corporation obtained the necessary permits and constructed the marina bulkhead and parking lot, gangways, and 26 boat slips. (Id., Exhibit 11, App. C, page 5.) In 1971, the Corporation decided to construct, and the City approved, 48 additional boat slips previously authorized by the Department of the Army, Los Angeles District Corps of Engineers. (See id., Exhibit 2.) By November 1972, the Corporation had constructed a total of 29 boat slips in the Marina. (Id., Exhibit 11, App. C, page 6.)

Before the slips could be completed, however, on or about November 14, 1972, the City ordered the Corporation to cease development of the Marina. (Id., pages 5-6.) Despite the City Attorney's opinion to the contrary, the City Council decided that an environmental impact report had to be certified

before the development could proceed. (See id., Exhibit 4, page 2.) Ultimately, on February 19, 1974, the Council revoked the Conditional Exception and the Corporation sued. (Id., and Exhibit 11, App. C, pages 5-7.)

The Corporation's petition for writ of mandate was tried before Judge Soden in Orange County Superior Court on July 16, 1974. Judge Soden entered his judgment (the "Judgment") commanding the Council to set aside its revocation of the Conditional Exception. Judge Soden found that the Corporation had a vested right to complete development of the Marina:

"Huntington Harbour Corporation having made substantial [sic] expenditures, performed substantial [sic] construction, and incurred substantial liabilities in good faith reliance upon Conditional Exception (Use Variance) No. 707 and Harbor Permit No. 518 has a vested right to complete the Davenport Marina."

(Id., Exhibit 11, App. C, page 12, and App. D, page 2; id., Exhibit 5, pages 478-479.) The Council elected not to appeal and the Judgment became final.

In response to Judge Soden's Judgment, in 1975 the Council considered establishing a pierhead line in the Marina to circumvent the Judgment. It declined to do so, however, presumably in light of the City Attorney's opinion that any pierhead line requiring removal of existing docking opportunities as originally approved by the City would constitute inverse condemnation and would require the City to compensate the owner of the Marina. (A.R., Exhibit 7.)

In 1975, with the Judgment declaring that the right to expand the Marina as planned in 1964 was vested, John Stanko and Ken Thompson purchased the Marina from the Corporation. <sup>for assembly to end 1972 plan</sup>  
(Petition for Writ of Mandate (CCP §1094.5), filed August 30, 1985 ("Petition"), ¶ 19.) In December 1982, Mr. Stanko purchased Mr. Thompson's interest in the Marina and, in 1984, transferred title thereto to petitioner. (Id.) From and after 1975, the owners of the Marina have continued to moor boats at the side-ties of the ~~four~~ piers in the Marina. (See A.R., Exhibit 8, page 1, and Exhibit 9, page 1.)

In 1985, however, the City's staff, based upon complaints from a neighbor, again decided to recommend that the Council consider establishing a pierhead line in the Marina. The staff set forth three alternatives, <sup>?</sup> identical to those proposed in 1975. (Compare A.R., Exhibit 8 (the "Staff Report"), Ex. "A", "B", and "C", with A.R., Exhibit 9, Ex. "A" and "C", and Exhibit 15, Ex. "B".) Despite the City Attorney's 1975 opinion regarding inverse condemnation, the City recommended adoption of proposal "B," which would eliminate two existing side-tie moorings at the Marina. (See A.R., Exhibit 7, page 2.)

Upon learning of the City's renewed interest in establishing a pierhead line in the Marina, on or about May 17, 1985, petitioner's attorney, Robert K. Break, telephoned the City Attorney to discuss the matter. (Declaration of Robert K. Break ("Break Decl."), ¶ \_\_\_\_.) Mr. Break was referred to Deputy City Attorney Robert Sangster. (Id.) On or about May 21, 1985, Mr. Break spoke with Mr. Sangster, apprising him of the

existence of the Judgment, identifying several material misrepresentations in and omissions from the Staff Report, and requesting an opportunity to meet with the City's staff to determine why the proposal was being made and whether a compromise pierhead line could be proposed instead. (Id., ¶ \_\_\_\_; see A.R., Exhibit 10.) Mr. Break subsequently reduced such concerns to writing in a May 23, 1985, letter to Mr. Sangster. (See A.R., Exhibit 10.)

On May 31, 1985, the Friday immediately before the June 3 Council meeting, at Mr. Break's request, petitioner and its representatives met with Mr. Sangster, Charles Thompson, the City Administrator, James Palin, Director of the City's Department of Development Services, and Paul Cook, the Director of the City's Department of Public Works. (Break Decl., ¶ \_\_\_\_.) At this meeting, Mr. Break specifically inquired of these City representatives whether any public health, safety, or welfare justification supported establishment of any pierhead line. (Id., ¶ \_\_\_\_.) All responded that no such justification existed. (Id.) At this meeting, Mr. Break also delivered to Mr. Sangster a position paper (A.R., Exhibit 11) outlining petitioner's major factual and legal arguments regarding its right to continue the existing operation of the Marina, including the utilization of all side-tie moorings. (Id., ¶ \_\_\_\_.) Finally, petitioner proposed a compromise pierhead line that the City representatives agreed to consider supporting. (Id., ¶ \_\_\_\_.) Immediately following this meeting, petitioner's representatives arranged for delivery of copies of the position paper to Council members prior to the June 3 meeting, and were assured by the Council's

clerk that the position paper would be delivered to the Council members for their consideration over the weekend prior to the June 3 meeting. (Id., ¶ \_\_\_\_.)

At the Council meeting on June 3, 1985, the proposal to establish a pierhead line at the Marina ("Resolution No. 5523") was calendared as an administrative item. It was not set for a public hearing. (See A.R., Exhibit 12, page 9, Exhibit 13, pages 116-117, Exhibit 14, page 1.) Petitioner's sole opportunity to address the proposal was during the "public comments" portion of the Council meeting. (Id., Exhibit 14, page 2.) Indeed, when Mr. Break addressed the Council during this portion of the meeting, the City mayor emphasized that Resolution No. 5523 was not set for public hearing, and therefore cut short Mr. Break's attempts to respond to a Council member's questions. (A.R., Exhibit 14, page 15.) To further complicate matters, the City Attorney, Gail Hutton, misrepresented to the Council that the City had received petitioner's position paper at 4 p.m. on June 3, the hearing date. (See id., pages 22-23, 26-28.)

Ultimately, no evidence was taken. The Council simply adopted Resolution No. 5523 as an administrative item, without a hearing, and without making any findings of public purpose or necessity. (See A.R., Exhibit 14, pages 19-31.)

On August 30, 1985 petitioner petitioned this Court for a peremptory writ of mandate commanding the City and the Council to set aside Resolution No. 5523. (See Petition.) Also on August 30, 1985, petitioner requested the City to prepare a record of the City's proceedings in adopting Resolution No.

5523. (See Request for Preparation of Administrative Record, filed in this action on August 20, 1985, and Proof of Service, filed on October 25, 1985.) Although the City was required to prepare and deliver the record to petitioner by November 28, 1985 (see Cal. Code of Civ. Proc., § 1094.6(b)), the City delayed for almost a full year before delivering to petitioner's attorneys an uncertified copy of the record on or about August 6, 1986. On August 20, 1986, petitioner returned the record to the City for certification. On August 21, 1986, the City certified part of the record and, as discovered in or about October 1986, returned an incomplete copy of the record to petitioner's attorneys. Petitioner's attorneys contacted the City in or about October 1986 and on or about each of November 19, 20 and 21, 1986 regarding omissions from the record, and finally received the missing documents from the City on or about December 4, 1986.

### III

The City's Actions Denied Petitioner Due Process In

Refusing To Allow Petitioner A Fair Trial

It has long been the law in California, and nationally, that a city cannot require a landowner to discontinue a prior lawful use of his property without first affording the landowner the constitutional protections of due process. (City of San Marino v. Roman Catholic Archbishop, 180 Cal.App.2d 657, 669-670 (1960); McCaslin v. City of Monterey Park, 163 Cal.App.2d 339, 347 (1958); Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 795-96 (1948).) Central to the protections of the due process clause of the Fifth Amendment

is the right, as codified in California Code of Civil Procedure Section 1094.5 (all further statutory references are to the Code of Civil Procedure unless otherwise specified), to a "fair trial," which is the right not only to be heard in a meaningful manner, but also to know beforehand the alleged bases for the contemplated action and be able to contest them. (Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976); Morgan v. U.S., 304 U.S. 1, 18-19 (1938).) In administrative hearings, due process specifically includes the right to representation by counsel and the right to cross-examine witnesses. (See Borror v. Department of Investment, 15 Cal.App.3d 531, 540-41 (1971); Olive Proration Committee for Olive Proration Zone No. 1 v. Agricultural Prorate Comm'n, 17 Cal.2d 204, 210 (1941).) Here, not only was petitioner denied an administrative trial, but the City acted in a manner that only can be characterized as being fundamentally unfair.

The City did not afford petitioner any procedure that remotely resembled a hearing prior to imposing a pierhead line which revoked petitioner's rights to use side-ties at the Marina, and to expand the Marina west from the parking area located north of the existing docks. Despite its impact on petitioner's vested rights, Resolution No. 5523 was simply listed as an "administrative item" and enacted as such. (See A.R., Exhibit 10, page 9, and Exhibit 14, page 31.) This is not due process.

First, petitioner was never apprised beforehand of the basis for the Council's proposed action. (Break Decl., ¶ \_\_\_\_.) The Staff Report failed to set forth any justification for

creating the pierhead line. (See A.R., Exhibit 7, pages 1-2.) Mr. Break had specifically attempted to determine the basis for the City's action in his May 31 meeting with City representatives, and was unequivocally informed that there was no public health, safety, or welfare justification for the proposal. (Break Decl., § \_\_\_\_.) Petitioner was therefore unable to prepare adequately to respond to the Council's concerns regarding placement of the pierhead line at the June 3 meeting.

Second, petitioner was not given any opportunity to confront issues regarding the proposed pierhead line in any meaningful way. For example, at the outset, petitioner was not afforded a hearing, but was merely given the right to speak for a limited time during the public comments portion of the Council meeting. (Id., Exhibit 12, page 9, Exhibit 14, pages 1-2.) This opportunity to speak was woefully inadequate, especially in view of the fact that the Council does not even consider in its decision on administrative items (such as Resolution No. 5523) any comments adduced during the public comments portion of a Council meeting. (Id., Exhibit 12, attachment 1.) Furthermore, petitioner's inability to present evidence regarding the Staff Report's errors as to the nature of petitioner's proposed compromise and the existing width of the channel at the Marina (see A.R., Exhibit 10, pages 1-2) was severely prejudicial in light of Ms. Houseal's and Council person's Green's subsequent testimony regarding the alleged necessary channel width, and Ms. Houseal's comments with respect to pierhead line placement. (Id., Exhibit 14, pages 16-19, 26.) Mr. Cook's failure to

augment the Staff Report to state that there was no public health, safety, or welfare problem when given the opportunity to do so (see id., Exhibit 14, pages 19-20) was equally prejudicial and inexcusable. Finally, the City's sloth in presenting petitioner's position paper (id., Exhibit 11) to the Council and the misrepresentations of City staff (see Break Decl., ¶     ) prevented the arguments petitioner had previously submitted from being considered by the decisionmakers.

The City likewise denied petitioner the opportunity to rebut comments made during the public comments portion of the meeting. The mayor aborted petitioner's attempts to rebut the claim in the Staff Report attributing to Dr. Stanko the pierhead line proposal indicated on Exhibit C thereto: "Councilman Kelly, I am sorry[. T]his is not a public hearing . . . [I]ts public comments." (A. R., Exhibit 14, page 15.) In addition, petitioner had no chance to rebut the City Attorney's incredible representations to the Council that the City had no prior notice of petitioner's claims. (Id., Exhibit 14, at 20, 22-23, 26-27.) These misrepresentations severely prejudiced the Council against petitioner, as is evidenced by the following statement by a Council person:

"Well, I have a problem with the tactic of going along and studying this issue for how long? The gentleman has been involved and all of a sudden his attorney throws paperwork at us. I've done it in the past and I call it the big smoke screen, and I have no problem with going with recommended action and which is item B, I believe, and let the man do what he has to do. I

make a recommended action; move the staff recommendation."

(Id., at 22-23.) Another Council person echoed the concern with what was perceived to be an attorney's attempt to sandbag the Council:

". . . I too am concerned from what I heard the legal person come down and indicate on this item was that the City does not have a right to change anything that has happened in the past and I just wanted our City Attorney to reaffirm that laws and things can change. We can zone, rezone, down-grade, up-grade and we have done it many times. And, I just, lawyers trying to scare us into doing something bother me greatly."

(Id., at 23.) Nothing could be further from due, fair process.

In short, the Fifth Amendment's requirement that no person be deprived of property without due process of law is intended to ensure fair play and stand as a shield against unfair or deceptive treatment by government. (See Hannah v. Larche, 363 U.S. 420, 442 (1960); see also U. S. v. Romano, 585 F.2d 1, 7 (1st Cir. 1978).) In this case, petitioner was not only denied the basic protection of a fair hearing with an opportunity to fairly understand and rebut evidence supporting any pierhead line that would adversely impact his vested and long established property rights, but petitioner was subjected to grossly unfair and deceptive treatment by the City. For this reason alone, the writ must be issued.

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#### IV

The City Abused Its Discretion In Approving Resolution No. 5523

In addition to inviting inquiry whether there was a fair trial underlying any quasi-adjudicatory decision such as this, Section 1094.5(c) also provides that the writ shall issue if the decision constitutes a "prejudicial abuse of discretion," which ". . . is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." The City clearly did not proceed as required by law, as discussed above. It denied petitioner a fair hearing.

Equally fatal to the City's action is the fact that the City failed absolutely to make any findings supporting its actions. "[I]mplicit in Section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (Topanga Ass'n For a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 515 (1974).) The Topanga decision advanced a number of important policy reasons for this stark and unequivocal holding: "to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions"; to "enable the reviewing court to trace and examine the agency's mode of analysis"; and to ensure "that administrative decision-making is careful, reasoned, and equitable". (Citations omitted.)

Here, the Council declined to make any findings at all. The reasons are evident from the record as a whole. There was no "orderly analysis" leading to the adoption of the pier-

head line for the Marina. In fact, there was no analysis to speak of whatsoever. A review of the June 3 Council meeting transcript makes it abundantly clear that the City had, at best, an incomplete comprehension of the history of the Marina and petitioner's rights with respect thereto. (See generally A.R., Exhibit 14.) Moreover, the Council did not even have the benefit of the City Attorney's opinion regarding the legal issues involved. Gail Hutton claimed to have received petitioner's position paper at 4 p.m. on June 3, 1985, the day of the Council meeting (id., pages 22, 26-27), notwithstanding that petitioner's representatives had delivered the position paper to City representatives on May 31, 1986. (Break Decl., ¶ \_\_\_\_.) The Council therefore did not make an informed decision on the matter and should, at the very least, have deferred its decision until the City Attorney had an opportunity to evaluate any legal issues, as suggested by one Council member. (See A.R., Exhibit 14, at pages 27-28.) The City's decision-making was thus not "careful, reasoned, and equitable." It was careless and, as already discussed, unexcusably inequitable.

Having failed to make any findings supporting its decision establishing a pierhead line for the Marina, the City acted contrary to the requirements of Topanga, and has therefore abused its discretion. The writ must issue.

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Even Had There Been Findings, There Was  
No Evidence That Could Support The City's Actions

Even if the Council had made findings, however, the administrative record does not contain evidence sufficient to support the Council's decision on Resolution No. 5523. The pierhead line established by the City operates to deprive petitioner of property rights in two ways: it eliminates side-ties on two piers in the Marina, which has been a legal use since 1975, and it revokes expansion opportunities at the end of the parking area, vested by the Judgment.

A prior lawful, vested use can be ordered discontinued upon a finding of public nuisance or upon payment of just compensation. (McCaslin v. City of Monterey Park, supra, 16 Cal.App.2d 339, 346-47, 350.) The City's staff, which proposed the pierhead line, even admitted that no public health, safety, or welfare consideration justifies the action. (See Break Decl., ¶ \_\_\_\_.) Moreover, there was no evidence before the Council of any nuisance resulting from either the use of the side-ties or the potential expansion, save Ms. Mary Ellen Houseal's lay opinion regarding the necessary width of the channel. (See A.R., Exhibit 14, pages 18-19.) Ms. Houseal's estimate of minimum width was, however, contradicted by Mr. Cook, the Director of the City's Department of Public Works (and author of the Staff Report), who stated at the May 31 meeting (but for some strange reason not at the June 3 Council meeting) that forty feet is a minimum safe width at the point where the Marina constricts the channel. (Break Decl., ¶ \_\_\_\_.) With use

of the side-tie mooring on Dock "D" which presently extends the farthest in the existing channel, the channel width is approximately sixty feet. (See A.R., Exhibit 9, Ex. "C.") Indeed, evidence available to the City which was referenced in the position paper submitted to the City by petitioner supports expansion of boating facilities in the Marina. (See id., Exhibit 11, page 14.) The Coastal Element of the City's General Plan in effect at the time of the Council meeting documents a shortage of boating facilities in the City. (Id., Section 2.2.8.) Thus, there neither was nor could be evidence of any public necessity or nuisance sufficient to justify the City's action.

A review of the evidence by this Court can lead only to the conclusion that the Council abused its discretion in making a decision that is not supported by the weight of the evidence (see § 1094.5(c)), and the writ must therefore issue.

#### CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Court issue the peremptory writ and an order enforcing the Judgment, and remand the proceedings to the Council, commanding that it set aside Resolution No. 5523 and take whatever further action is deemed necessary or desirable consistent with this Court's judgment.

Respectfully submitted,

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