



California Fair Political Practices Commission

March 22, 1989

Robert S. Bower
Rutan & Tucker
611 Anton Boulevard
Post Office Box 1950
Costa Mesa, CA 92628-1950

Re: Your Request for Informal
Assistance
Our File No. I-89-124

Dear Mr. Bower:

You have requested advice on behalf of Councilmember Franco regarding his responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} We do not have sufficient facts to provide a specific answer to your question. Therefore, we consider your letter to be a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).^{2/}

QUESTION

Councilmember Franco owns property within a redevelopment project area. His property is currently zoned residential, but will be rezoned commercial in the future. May he participate in a decision to rezone nearby property, also within the redevelopment zone, from commercial to residential?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to title 2, Division 6 of the California Code of Regulations.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c) (3).)

CONCLUSION

Councilmember Franco may participate in the rezoning decision unless the decision will have a reasonably foreseeable financial effect on the councilmember's own property of \$10,000 or more on the fair market value or \$1,000 or more per 12 month period on the rental value of his property.

FACTS

Councilmember Franco currently owns property in the City of San Fernando which is used as his primary residence. This property is zoned residential (R-2) and is located within a redevelopment project area. Under the city's general plan, Councilmember Franco's property is designated as "commercial." Pursuant to Government Code Section 65860, his property will therefore probably be rezoned commercial (C-2) in the reasonable future.

Approximately 405 feet from Councilmember Franco's property is the closest boundary of a series of contiguous parcels which are currently zoned C-2. These parcels are also located within the redevelopment project area. The Council will be considering the rezoning of those contiguous parcels from C-2 to R-2, to bring them into conformity with their General Plan designation of "residential". If rezoned R-2, multi-family dwellings could be built on these other parcels.

Pursuant to a telephone conversation with Mr. Dan Slater of your office, it is understood that no appraisal has been undertaken to determine what financial effect, if any, the rezoning decision concerning these other parcels would have on Councilmember Franco's property.

Councilmember Franco wishes to know if he may vote on the rezoning of the other parcels from C-2 to R-2 when the matter comes before the City Council.

ANALYSIS

Section 87100 prohibits public officials from making, participating in, or using their official position to influence any governmental decision in which they know or have reason to know they have a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or any member of his or her immediate family, or on "any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more." (Section 87103(b).)

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An official makes a governmental decision when he votes, commits his agency to a course of action, enters into a contract, or appoints someone. (Regulation 18700(b), copy enclosed.) Since Councilmember Franco would be voting on the rezoning matter, the conflict-of-interest provisions of the Act are applicable to his participation in this governmental decision.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Redevelopment Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

You have indicated that Councilmember Franco's property is designated as "commercial" on the general plan for the area, and that it is probable that the property will be rezoned commercial within the reasonable future. If his property is rezoned commercial, the elimination of other nearby commercial property is likely to have an effect upon his property.

It is possible that Councilmember Franco may continue to use the property as his residence. However, the fact that he might not take advantage of the rezoning to change his property from residential to commercial use is not a controlling factor. In re Legan, 9 FPPC Ops. 1 (copy enclosed), the Commission considered, and rejected, a similar argument.

Legan concerned a zoning change affecting undeveloped property. The property owner asserted that the change in zoning would not affect the property's value, because the owner did not intend to develop the property in the foreseeable future. The Commission ruled that the intent of the property owner at the time of the decision did not affect whether the effect of the zoning change on the property's value was reasonably foreseeable. (In re Legan, supra, at 9; Hill Advice Letter, No. A-87-110, copy enclosed.)

Material Financial Effect

Councilmember Franco's property is located 405 feet from the property to be rezoned. Regulation 18702.3 (copy enclosed) details the standard applicable to determine

whether the effect of the rezoning decision is material. That regulation states in relevant part:

(a) The effect of a decision is material as to real property in which an official has a direct, indirect or beneficial ownership interest (not including a leasehold interest), if any of the following applies:

* * *

(3) The real property in which the official has an interest is located outside a radius of 300 feet and any part of the real property is located within a radius of 2,500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the decision and the decision will have a reasonably foreseeable financial effect of:

(A) Ten thousand dollars (\$10,000) or more on the fair market value of the real property in which the official has an interest; or

(B) Will affect the rental value of the property by \$1,000 or more per 12 month period.

As previously stated, the financial effect of the proposed rezoning of the contiguous parcels on Councilmember Franco's own property has not yet been determined. Such determination of value should be based upon the effect of the rezoning on the current fair market value of his property taking into account its General Plan designation as "commercial." As stated previously, whether or not he actually intends to develop the property as commercial property should not enter into the determination. "We must look at the objective effect upon the value, not whether the owner will act to realize the increased value by selling or developing the property." (In re Legan, supra, at 9.)

"Public Generally" Exception

Even if it is ascertained that the effect will be material, the councilmember may still be able to vote if the effect on his property is not distinguishable from the effect on the public generally. (Section 87103.) Regulation 18703 (copy enclosed) provides, in part:

A material financial effect of a governmental decision on an official's interests, as described in Government Code Section 87103, is distinguishable from its effect on the public generally unless the decision will affect the official's interest in

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substantially the same manner as it will affect all members of the public or a significant segment of the public.

The "public" is all the persons residing, owning property, or doing business in the jurisdiction of the agency in question. (In re Legan, supra, at 15.) In the case of a city council, this would be the entire city. Consequently, for the public generally exception to apply, the proposed rezoning would have to affect a significant segment of the City of San Fernando in substantially the same manner as it would affect Councilmember Franco. (Dowd Advice Letter, No. A-88-214; Burnham Advice Letter, No. A-86-210, copies enclosed.)

The Commission has never adopted a strict arithmetic test for determining what constitutes a significant segment of the public. However, in order to apply the public generally exception, the population affected must be large in number and heterogeneous in nature. (In re Ferraro (1978) 4 FPPC Ops. 62; Flynn Advice Letter, No. I-88-430, copies enclosed.)

According to the information you have provided, San Fernando has a population of about 20,485. Those similarly affected by the rezoning would be owners of other property located about 400 feet from the area to rezoned whose property was also designated for commercial use on the general plan. Although the materials that you provided do not indicate which properties fall within this distance, it appears that a significant portion of the surrounding area will remain residential. It is unlikely therefore, that the total number of similarly affected property owners would constitute a large enough group to be considered the public generally.

If you have any further questions regarding this matter please contact me at (916) 322-5901.

Very truly yours,

Diane M. Griffiths
General Counsel



By: Margaret W. Ellison
Counsel, Legal Division

DMG:MWE:aa

Enclosures

RUTAN & TUCKER

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CENTRAL BANK TOWER, SUITE 1400

SOUTH COAST PLAZA TOWN CENTER

611 ANTON BOULEVARD

POST OFFICE BOX 1950

COSTA MESA, CALIFORNIA 92628-1950

A. W. RUTAN (1980-1972)
LAMES B. TUCKER, SR. (1988-1960)
MILFORD W. DAHL, SR. (1979-1988)
H. RODGER HOWELL (1965-1983)

TELEPHONE (714) 641-5100
(213) 625-7566

TELECOPIER (714) 546-9035

TELEX 910 596-1883

CABLE ADDRESS RUTAN TUC 25MA

February 23, 1989

IN REPLY PLEASE REFER TO

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VIA TELECOPY

Ms. Margaret Ellison
Legal Division
FAIR POLITICAL PRACTICES COMMISSION
428 "J" Street, Suite 800
P. O. Box 807
Sacramento, CA 95804-0807

Re: City Councilmember's Rezoning Vote

Dear Ms. Ellison:

The undersigned is the City Attorney of the City of San Fernando. We have been authorized by Councilmember Evelio Franco to request formal written advice from your office pursuant to Government Code § 83114(b).

Councilmember Franco currently owns property which is used as his primary residence. This property is zoned R-2. Under the City's General Plan, however, Councilmember Franco's property is designated as "commercial". Pursuant to Gover... s will proba... in the reasc... thin a redev

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Ms. Margaret Ellison
February 23, 1989
Page 2

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The question to which we would like your advice is whether Councilmember Franco may vote on the rezoning of the other parcels from C-2 to R-2 when that matter is brought before the City Council.

It would be most helpful to us if we could have your response by March 17, 1989. You may telecopy the response to the telecopy number printed above. Please let me know if you require any additional information.

Thank you for your assistance.

Very truly yours,

RUTAN & TUCKER



Robert S. Bower

RSB:ps
Enclosure

cc: Evelio Franco, Councilmember
City of San Fernando
cc: Don Penman, City Administrator
City of San Fernando

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RUTAN & TUCKER

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ATTORNEYS AT LAW

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Ms. Margaret Ellison
February 23, 1989
Page 2

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Robert S. Bower

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cc: Evelio Franco, Councilmember
City of San Clemente
cc: Don Penman, City Administrator
City of San Clemente

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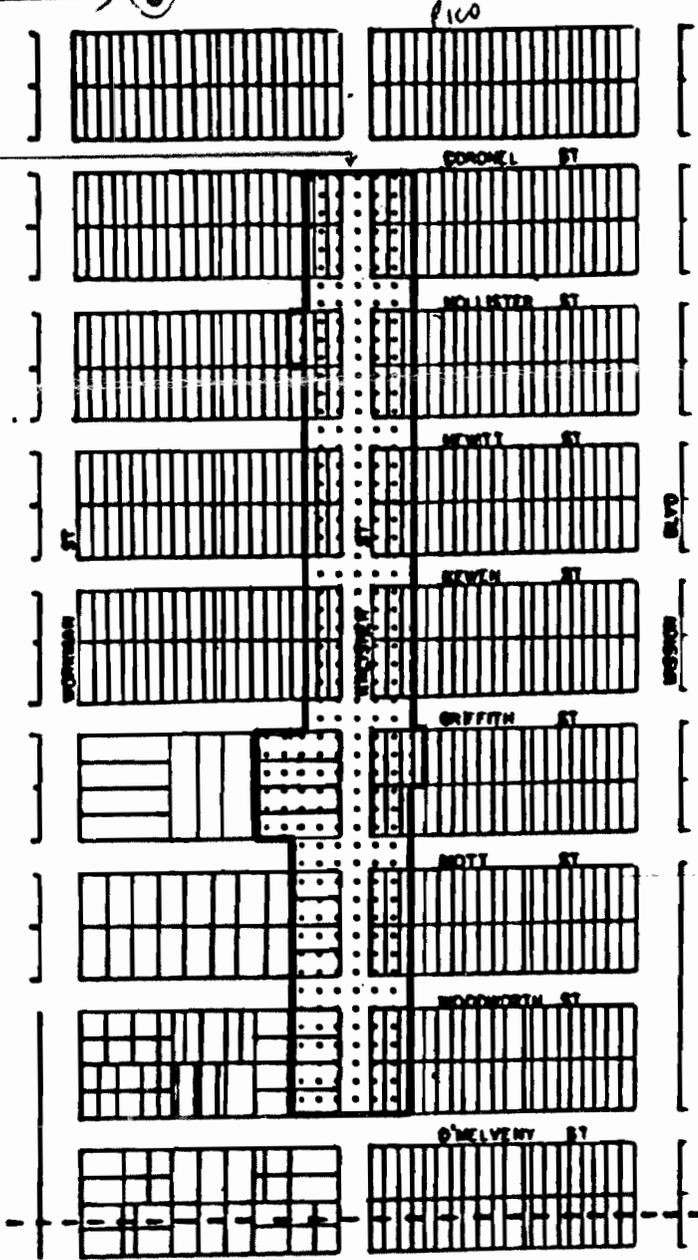
ZONE CHANGE 1987-02

Councilmember's
property

KALISHER STREET

Handwritten: 1/2 mile

Other parcels (all
with dots)



LEGEND

PROPOSED ZONE CHANGE AREA



SAN FERNANDO CITY BOUNDARY



SCALE





California Fair Political Practices Commission

February 27, 1989

Robert Bower
Rutan & Tucker
Central Bank Tower, Suite 1400
South Coast Plaza Town Center
611 Anton Boulevard
P.O. Box 1950
Costa Mesa, CA 92628-1950

Re: Letter No. 89-124

Dear Mr. Bower:

Your letter requesting advice under the Political Reform Act was received on February 23, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Margaret Ellison an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329.)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
General Counsel

DMG:plh

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A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATION

CENTRAL BANK TOWER, SUITE 1400

SOUTH COAST PLAZA TOWN CENTER

611 ANTON BOULEVARD

POST OFFICE BOX 1950

COSTA MESA, CALIFORNIA 92628-1950

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JAMES B. TUCKER, SR. (1888-1950)
MILFORD W. DAHL, SR. (1919-1988)
F. ROGER HOWELL (1925-1983)

TELEPHONE (714) 641-5100
(213) 625-7586

TELECOPIER (714) 546-9035

TELEX 910 596-1882

CABLE ADDRESS RUTAN TUC C5MA

February 23, 1989

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JAMES R. MOORE*
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VIA TELECOPY

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

Re: City Councilmember's Rezoning Vote

Dear Ms. Ellison:

The undersigned is the City Attorney of the City of San Fernando. We have been authorized by Councilmember Evelio Franco to request formal written advice from your office pursuant to Government Code § 83114(b).

Councilmember Franco currently owns property which is used as his primary residence. This property is zoned R-2. Under the City's General Plan, however, Councilmember Franco's property is designated as "commercial". Pursuant to Government Code Section 65860, his property thus will probably be rezoned C-2 (commercial) sometime in the reasonable future. This property is located within a redevelopment project area.

Approximately 405 feet from Councilmember Franco's property (1-1/2 blocks away) is the closest boundary of a series of contiguous parcels which are currently zoned C-2 (commercial). These contiguous C-2 parcels are also located

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Ms. Margaret Ellison
February 23, 1989
Page 2

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Robert S. Bower

RSB:ps
Enclosure

cc: Evelio Franco, Councilmember
City of San Clemente
cc: Don Penman, City Administrator
City of San Clemente

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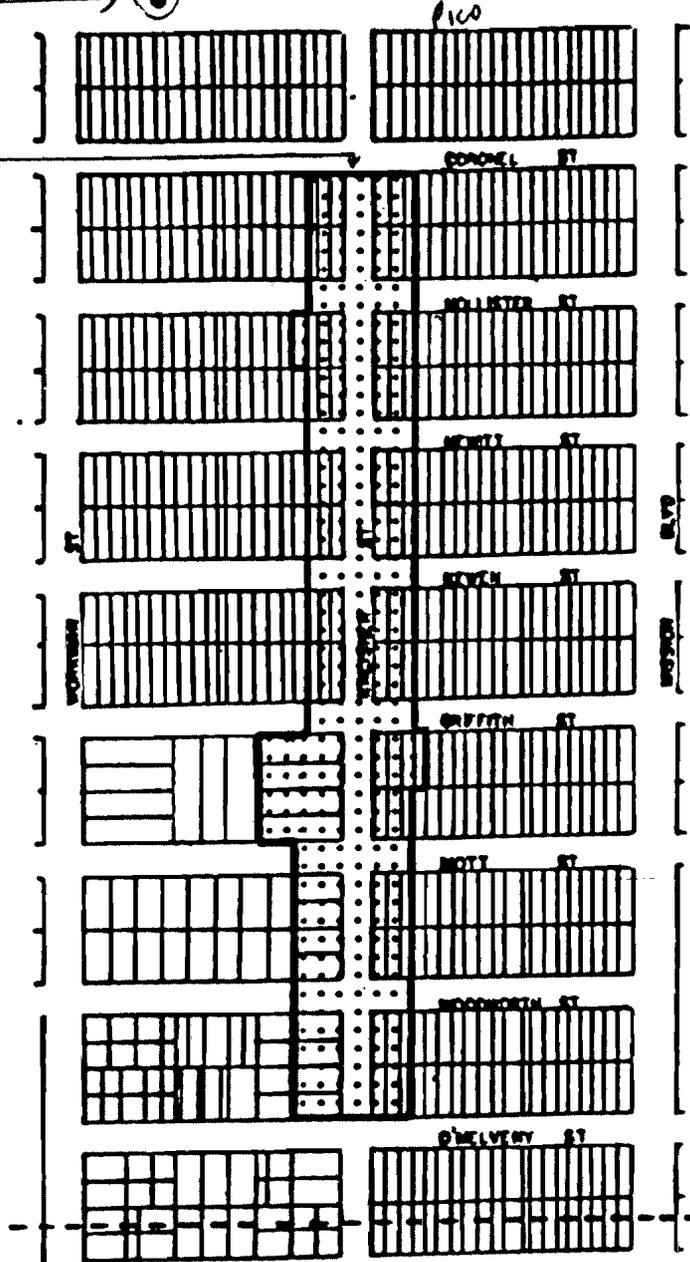
ZONE CHANGE 1987-02

Councilmember's
property →

KALISHER STREET

up street

Other parcels (all
with dots)



LEGEND

PROPOSED ZONE CHANGE AREA



SAN FERNANDO CITY BOUNDARY



STREET



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ATTORNEYS AT LAW

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CENTRAL BANK TOWER SUITE 1400

SOUTH COAST PLAZA TOWN CENTER

611 ANTON BOULEVARD

POST OFFICE BOX 1950

COSTA MESA, CALIFORNIA 92628-1950

A. W. RUTAN (880-1972)
JAMES B. TUCKER (511-888-1950)
MURRAY W. SAKL (919-1988)
RODGER HOWE (925-1983)

TELEPHONE (714) 641-5100

(213) 625-7586

TELECOPIER (714) 546-9035

TELEX 910 590-883

CABLE ADDRESS RUTAN TUC CSM

February 23, 1989

IN REPLY PLEASE REFER TO

DARVIN F. CHALLENGER*
JAMES R. MOORE*
WILLIAM A. BE
RICHARD A. GURNETT*
LEONARD A. HAMPEL*
JOHN B. HURBUT, JR.
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Re: City Councilmember's Rezoning Vote

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The undersigned is the City Attorney of the City of San Fernando. We have been authorized by Councilmember Evelio Franco to request formal written advice from your office pursuant to Government Code § 83114(b).

Councilmember Franco currently owns property which is used as his primary residence. This property is zoned R-2. Under the City's General Plan, however, Councilmember Franco's property is designated as "commercial". Pursuant to Government Code Section 65860, his property thus will probably be rezoned C-2 (commercial) sometime in the reasonable future. This property is located within a redevelopment project area.

Approximately 405 feet from Councilmember Franco's property (1-1/2 blocks away) is the closest boundary of a series of contiguous parcels which are currently zoned C-2 (commercial). These contiguous C-2 parcels are also located

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A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

Ms. Margaret Ellison
February 23, 1989
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within the redevelopment project area. A map showing the location of the Councilmember's property in proximity to the contiguous C-2 parcels is attached (The parcels running in the center of the map with dots are the contiguous C-2 parcels.) On March 20, the Council will be considering the rezoning of those contiguous C-2 parcels to R-2, to bring them into conformity with their General Plan designation of "residential". If rezoned to R-2, multi-family dwellings (duplexes) could be built on these other parcels.

The question to which we would like your advice is whether Councilmember Franco may vote on the rezoning of the other parcels from C-2 to R-2 when that matter is brought before the City Council.

It would be most helpful to us if we could have your response by March 17, 1989. You may telecopy the response to the telecopy number printed above. Please let me know if you require any additional information.

Thank you for your assistance.

Ms. Ellison:

Attached is a corrected Page 2 of the letter that was sent to you on February 23 from the City Attorney of the City of San Fernando Mr. Robert S. Bower re Councilmember's Rezoning Vote. The carbon copies of the letter referred to City of San Clemente rather than City of San Fernando. Please replace page 2 with this one in place of the one attached to your original letter. Thank you very much.

RSB:ps
Enclos

cc: E
C
cc: D
C

Secretary to Robert S. bower, Rutan & Tucker

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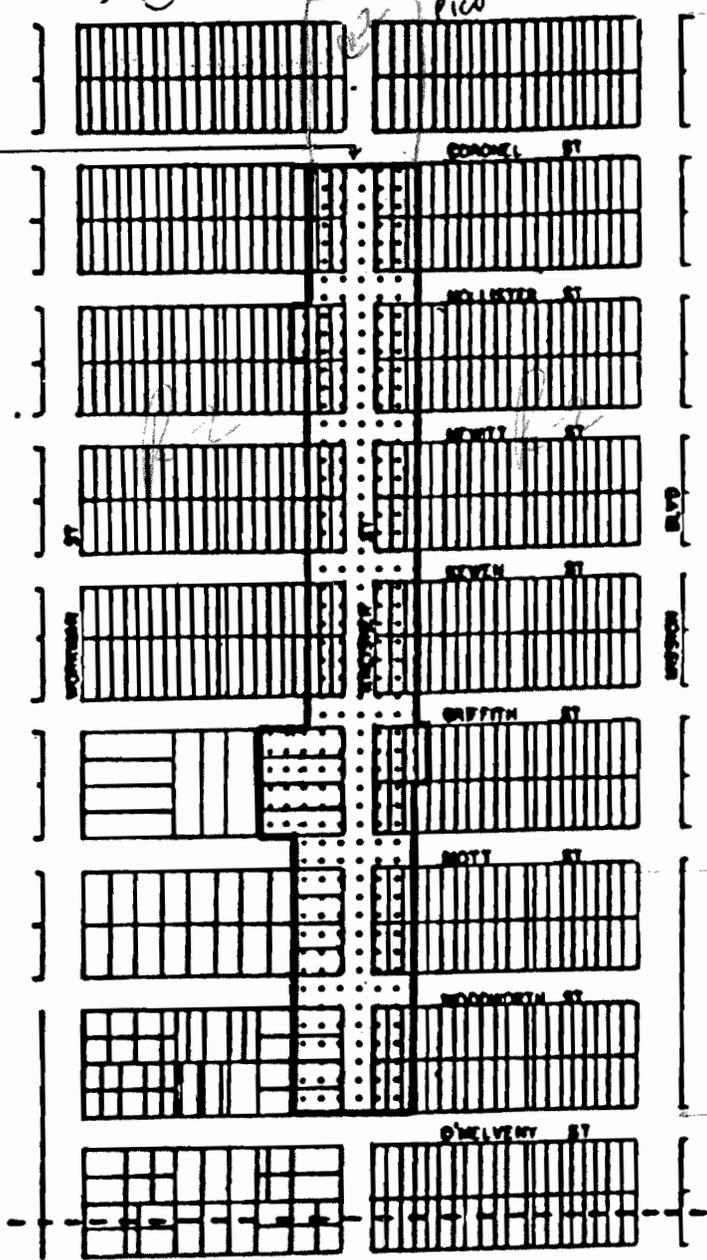
*R-2 to
residential C-2*

ZONE CHANGE 1987-02

Councilmember's
property

KALISHER STREET

Other parcels (all
with dots)



*all R-2
C-2 under
'93 map plan*

LEGEND
 PROPOSED ZONE CHANGE AREA 
 SAN FERNANDO CITY BOUNDARY - - - - -



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It would be most helpful to us if we could have your response by March 17, 1989. You may telecopy the response to the telecopy number printed above. Please let me know if you require any additional information.

Thank you for your assistance.

Very truly yours,

RUTAN & TUCKER



Robert S. Bower

RSB:ps
Enclosure

cc: Evelio Franco, Councilmember
City of San Clemente
cc: Don Penman, City Administrator
City of San Clemente

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RUTAN & TUCKER

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RUTAN & TUCKER



Robert S. Bower

RSB:ps
Enclosure

cc: Evelio Franco, Councilmember
City of San Fernando
cc: Don Penman, City Administrator
City of San Fernando

7/394/063060-0001/007

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