

82050(a)

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

June 27, 1977

77-06-123

Clark M. Palmer
Novato City Attorney
1001 Fourth Street
Novato, CA 94947

Dear Mr. Palmer:

Thank you for your letter of June 7, 1977, in which you ask whether Mayor David E. Milano may participate in a matter that is soon to come before the Novato City Council. You have advised us that Mayor Milano is the sole owner of a heating, ventilating and air conditioning contracting firm in Novato. During the period January 1, 1974, through April 22, 1977, Mr. Milano's company has been the heating subcontractor on 100 percent of the residential development in Novato done by a company called Debra Homes. Debra Homes is currently proposing a new residential development on an 87-acre site within the city of Novato and requires approval of the plan by the City Council. You have asked if Mayor Milano is required to disqualify himself from participating in this decision if he announces in advance that he intends to abstain totally from submitting any bids or performing any work in connection with the resulting construction. You have told us to assume that it is reasonably foreseeable that the decision to approve the residential development will have a material financial effect on Debra Homes. Thus, the only question is whether Debra Homes is a "source of income" to Mayor Milano within the meaning of Government Code Section 87103(c) ^{1/} If so, Mayor Milano is required to disqualify himself from participating in the decision.

The governing provisions are Government Code Sections 87100, 87103 and 82030(a). Section 87100 provides:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

^{1/} All statutory references are to the Government Code unless otherwise noted.

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Section 87103 expands upon that provision by providing, in relevant part:

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

...(c) Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made....

Section 82030(a) of the Act defines "income," as used in Section 87103(c), to encompass in this case not only Mr. Milano's contracting firm, but also the customers of that firm that have been a source of income of \$250 or more over the past twelve months. This is because Section 82030(a) provides, first, that "income" means "income of any nature from any source," and provides further:

Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater.

Since Mr. Milano is the sole owner of his business, the 10 percent threshold is met. If Debra Homes has provided income of \$250 or more in the past twelve months to Mr. Milano's contracting firm, therefore, the Act requires that Mr. Milano disqualify himself from participating in the decision to approve the residential development proposed by Debra Homes.

If you have any further questions, please contact me.

Sincerely,



Michael J. Baker
Chief
Legal Division

MJB:jo

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June 7, 1977

Fair Political Practices Commission
P. O. Box 807
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Gentlemen:

This letter will constitute a request under Section 83114 of the Government Code, on behalf of the City Council of the City of Novato, for written advice with respect to the duties of a public official under the Political Reform Act of 1974.

Novato's mayor, David E. Milano, is a heating, ventilating and air conditioning contractor in this city. He performs this type of work in this area for a number of general contractors and land developers and estimates he is presently providing perhaps 75% of the heating, ventilating and air conditioning installations for new residential development in Novato. Among Mr. Milano's major customers is Debra Homes, Inc., of Santa Rosa, a substantial residential subdivider and home builder in Sonoma and Marin Counties.

During the period of January 1, 1974 through April 22, 1977, Mr. Milano has been the heating subcontractor on 100% of Debra Homes' residential work within the City of Novato. All such work is awarded on the basis of competitive bidding, but Mr. Milano has consistently managed to be the low bidder due to his competitive advantage over other heating subcontractors, none of whom are locally based. He has generally not been the low bidder on Debra Homes' projects in Sonoma County because he is not competitive against Sonoma-based subcontractors.

Debra Homes is currently proposing a major new residential development on an 87 acre site within the City of Novato, known as "San Marin East". Precise development plans therefor have been filed with the city and will shortly come before the city council for approval (under the applicable "planned unit" zoning, this will be essentially the equivalent of a tentative subdivision map). If the developer's past practices continue, Mayor Milano recognizes that it would be reasonably foreseeable for approval of the proposed project to have a material financial effect on the income of his business and that he would consequently be prohibited by Government Code Section 87100 from participating in the council's decision on the plans. What is not clear to us, however -- and the reason for this request -- is whether he could participate in that decision

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without a conflict of interest if he so announced in advance and totally abstained from submitting any bids or performing any work in connection with the resulting construction.

Obviously, as to Mayor Milano this developer is a "source of income...aggregating \$250 or more in value received by or promised to the public official within 12 months prior to the time when the decision is made" under Government Code Section 87103(c). And although we have no actual data, from the size of the project I assume the decision "will affect the source of income in the manner described in subsection (b)(1) above", as specified in Title 2, California Administrative Code, Section 18702(b)(3)(A). It does not seem, however, that the council's decision would "directly affect the amount of income to be received by the official" or that there is "a nexus between the governmental decision and the purpose for which the official received income", under subsections (3)(B) and (3)(C) of Section 18702(b). The latter conclusion appears to have support in a portion of your "Thorner" opinion (1 FPPC Opinion No. 75-089) dealing with MMWD Director Pamela Lloyd: "Nor would any benefit to Dinwiddie necessarily bear any relation to Director Lloyd's income from Dinwiddie, a factor we believe may be considered in determining whether there may be a material financial effect on a source of income".

My reading of the statute and regulations suggests that these circumstances would not involve "a financial effect" of the proposed decision on "a financial interest" of an official in the sense the statute prohibits, but a contrary interpretation could obviously be made, and Mr. Milano does not wish to risk even a good-faith violation of the law. Since the matter is expected to reach the city council in the very near future, your earliest possible response will be greatly appreciated.

Yours very truly,


Clark M. Palmer
Novato City Attorney

CMP/cv

cc: Mayor Milano
cc: City Manager