

State of California



Fair Political Practices Commission

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October 19, 1984

Timothy J. Sabo
Attorney at Law
5855 Topanga Canyon Blvd., Ste. 100
Woodland Hills, CA 91367

Re: Advice Letter No. A-84-213

Dear Mr. Sabo:

Thank you for your request for advice on behalf of Fontana Mayor Nat Simon and City Councilman Donald Day. Both officials are members of the City's Redevelopment Agency Board. This letter is based upon the facts provided in your letter and during my telephone conversations with your associate, Mr. Gondek.

FACTS

The City of Fontana has an existing downtown redevelopment project area. The City and the Redevelopment Agency are considering amending the project area to add a substantial amount of new territory. In order to accomplish this, the City and Redevelopment Agency must amend their Redevelopment Plan. The proposed amendment (known as Amendment #3) will be presented for Redevelopment Agency approval in several months. In the interim, the details of Amendment #3 will be tentatively approved by the Redevelopment Agency through resolutions.

In August, the Redevelopment Agency adopted a resolution which outlined the five subareas to be included in the expanded redevelopment area. The staff is currently considering evidence of blight and is attempting to identify specific projects for each of the subareas. The findings and specific projects will be approved by resolutions. To date, the only specific projects being considered are shopping centers in Areas 1 and 2.^{1/} Ultimately, it is expected that improvements such as street

^{1/} The arrangements for the shopping centers are contingent upon the ultimate approval of Amendment #3.

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repaving, widening, landscaping and lighting, traffic signalization, parking and drainage will be recommended for all five subareas and will be considered for inclusion in Amendment #3. It is likely that some of the specific projects will be approved after the final adoption of Amendment #3.

City Councilmember and Redevelopment Agency Board Member Donald Day

Mr. Day is the sole proprietor of a welding shop located in the southwest portion of Subarea 3 at 16786 Ceres Street, Fontana. The property also contains his private residence. The property is worth over \$100,000 and Mr. Day receives over \$100,000 in annual gross income from his welding business.

Mayor and Redevelopment Agency Board Member Nat Simon:

Mr. Simon owns a vacant piece of real property on Arrow Highway, which is within Subarea 3. The property is zoned commercial.

QUESTIONS PRESENTED

Will the provisions of the Political Reform Act allow Mr. Simon and Mr. Day to participate in the decisions on whether to:

- a. Include Subarea 3 in the expanded redevelopment area;
- b. Approve the staff's findings of blight for each of the five subareas;
- c. Approve the staff's recommendations for specific projects in the five subareas; or
- d. Give final approval to Amendment #3?

CONCLUSIONS

a. Mr. Day and Mr. Simon must disqualify themselves on any decision on whether Subarea 3 is included in the project area, or on any decision which is essential to effectuating the inclusion of Subarea 3 in the project area.

b. Mr. Day and Mr. Simon must disqualify themselves on the determination of blight for Subarea 3 and for their respective parcels of property.

c. Mr. Day and Mr. Simon must disqualify themselves from the decision on a specific project if the decision will foreseeably have a material effect on their respective interests.

d. Mr. Day and Mr. Simon will be disqualified from participating in certain aspects of Amendment #3.

DISCUSSION

Government Code Section 87100^{2/} prohibits a public official from making, participating in the making, or in any way attempting to use his official position to influence, a governmental decision in which he knows or has reason to know he has a financial interest. An official has a "financial interest" within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect^{3/} on:

. . .

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

(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000).

(c) Any source of income. . .aggregating two hundred fifty dollars (\$250) or more in value provided to. . .the public official within 12 months prior to the time when the decision is made. . . .

Section 87103

Donald Day:

Mr. Day has an investment interest in his welding business and it is a source of income to him. In addition, his sources of income include those clients who paid his welding business

^{2/} Hereinafter all statutory references are to the Government Code.

^{3/} See the enclosed copy of 2 Cal. Adm. Code Section 18700 which explains the term "material financial effect."

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\$250 or more within the last 12 months. He also owns an interest in real property. Mr. Day must disqualify himself on any decision which will foreseeably have a material financial effect on any of his interests.

a. Mr. Day's property and welding business are located within Subarea 3. Because the purpose of redevelopment is to eliminate blight and increase property values, it is presumed that the decision to include Subarea 3 in the redevelopment project area will have a material financial effect on Mr. Day's interests. Therefore, he must disqualify himself on this decision and on any other decisions which are essential to effectuating the inclusion of Subarea 3 in the project area.

b. Using the information provided in a Redevelopment Agency's staff report, the Redevelopment Board will decide whether to approve the staff's findings of "blight" for each of the five subareas. In certain cases, the Board will analyze the staff's finding of blight for individual parcels within a subarea. These individual parcels will then be included, or excluded, from the subareas based upon whether the Board agrees with the staff's findings.

Mr. Day must disqualify himself from the decision on whether Subarea 3 is "blighted" because this finding is essential to Subarea 3's inclusion in the expanded redevelopment project area. In addition, Mr. Day must disqualify himself from any consideration of whether his parcel of property is blighted.

c. With regard to the approval or disapproval of specific projects in each subarea, Mr. Day must determine whether his disqualification is required on a case-by-case basis. This determination will depend upon the facts of the situation. It does not appear that the projects proposed for Subareas 1 and 2 will have a material effect on Mr. Day's interests.

d. With regard to the overall approval of Amendment #3, Mr. Gondek and I discussed the possibility of having the amendment considered in two parts: Part I would include those aspects of the amendment which will foreseeably have a material effect on Mr. Day's interests, and Part II would include those aspects which will not. Once the other board members vote on the portion of the amendment that Mr. Day is disqualified on, Mr. Day will be able to vote on the other aspects of the amendment.

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Mr. Nat Simon:

Mr. Simon's real property interest is located in Subarea 3. Thus, the above analysis is also applicable to Mr. Simon.

If I can be of any help to you in the future, please feel free to contact me at (916) 322-5901. My advice is confined to the provisions of the Political Reform Act.

Very truly yours,

Janis Shank McLean
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Enclosure

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August 17, 1984

Mr. John Keplinger
Fair Political Practices Commission
1100 "K" Street
Post Office Box 807
Sacramento, California 95804

Dear Mr. Keplinger:

This request is being submitted to you in my role as legal counsel to the Fontana Redevelopment Agency (the "Agency"). The City Council members of the City of Fontana, California (the "City"), also serve as Agency members, although each of these public bodies is represented by separate legal counsel. In my capacity as legal counsel for the Agency, one of my duties is to advise Agency members regarding the applicability of certain provisions of the Political Reform Act of 1974 regarding actions contemplated by the Agency.

Currently, the Agency and the City are initiating certain studies and reports necessary for the adoption of a proposed Amendment No. 3 to the Redevelopment Plan for the Downtown Redevelopment Project ("Amendment No. 3"). As currently proposed, Amendment No. 3 will add certain land to the redevelopment project area of the Downtown Redevelopment Project. On August 7, 1984, the Agency adopted its Resolution No. FRA 225 which approves the selection of a redevelopment project area for Amendment No. 3.

Agency/City Council member Donald Day owns certain real property which is located in one of subareas of the redevelopment project area included in Amendment No. 3. Mr. Day has previously disqualified himself from participating in Agency and City Council consideration of Amendment No. 3, and did not participate in the consideration and adoption by the Agency of its Resolution No. FRA 225. In this regard Mr. Day has requested the advice of the Executive Director of the Fair Political Practices Commission concerning his eligibility to

participate in the adoption by the Agency and the City Council of Amendment No. 3. Therefore, pursuant to Government Code Section 83114(b), I am submitting this request for written advice regarding the eligibility of Mr. Donald Day to participate in the adoption of Amendment No. 3 .

Question Presented:

Mr. Day owns and operates a welding shop located on property which he also owns. Mr. Day's principal residence is located on the same property. Mr. Day's home and welding shop are included within one (1) of the five (5) subareas of the redevelopment project area described by Amendment No. 3. Mr. Day receives more than one hundred thousand dollars (\$100,000) per year income from the operation of his welding shop. The value of the real property on which his home and welding shop are located is estimated to exceed one hundred thousand dollars (\$100,000).

It is proposed that the Agency consider evidence of blight and identify specific public improvement projects for Amendment No. 3 on a subarea-by-subarea basis. Thus it is proposed that the Agency make certain findings regarding the existence of blight in each of the five (5) subareas included in Amendment No. 3 in two (2) separate resolutions. One such resolution will deal with Subareas 1, 2, 4 and 5 and the other resolution will deal solely with Subarea 3. Specific public improvement projects for each of the five (5) subareas shall also be identified in a similar manner by resolutions of the Agency and the City Council.

Under the circumstances presented herein, may Mr. Day participate in consideration by the Agency and the City Council of the adoption of Amendment No. 3 insofar as such consideration does not include the subarea in which his property is located?

Amendment No. 3 As Proposed

The Agency is currently in the early stages of the planning and consideration of Amendment No. 3. The amendment will add a substantial amount of new territory to the existing redevelopment project area of the Downtown Redevelopment Project. The redevelopment project area described by Amendment No. 3 consists of five (5) subareas. A map showing the approximate location of the

five (5) subareas of Amendment No. 3, as selected and approved by the Planning Commission of the City of Fontana in accordance with Health and Safety Code Section 33326, and as approved by Agency Resolution No. FRA 225, dated August 7, 1984.

Subarea 1, Subarea 2 and Subarea 3 of Amendment No. 3 are contiguous with portions of the existing redevelopment project area of the Downtown Redevelopment Project. Subarea 4 and Subarea 5 of Amendment No. 3 are not currently contiguous with any portion of the existing redevelopment project area. However, upon adoption of Amendment No. 3, Subarea 4 will be contiguous with a portion of Subarea 3.

The physical conditions which are present within each of the subareas of Amendment No. 3 are separate and distinct from each of the other subareas. The Agency staff is currently in the process of identifying the specific types of redevelopment assistance and public improvements which are necessary in each of the five (5) subareas in order to eliminate the conditions of blight which are present therein.

In Subarea 1 of Amendment No. 3 the Agency and City Staff are currently working with the proponents of an enclosed retail shopping mall. The proponents of the enclosed retail shopping mall have requested certain types of redevelopment assistance in connection with their development proposal. The Agency has given the proponents of the enclosed retail shopping mall an exclusive right to negotiate for the acquisition of certain property and for certain redevelopment assistance in connection with that project.

In Subarea 2 the Agency has made a commitment to provide a developer with a pledge of a certain portion of the tax increment revenues which may be allocated and paid to the Agency upon adoption of Amendment No. 3. On August 7, 1984, the Agency approved a reimbursement agreement with that developer. This pledge of redevelopment assistance, as is also the case in connection with the proposed shopping mall, is contingent upon final adoption of Amendment No. 3.

At present, no specific plans for development have been submitted for consideration by landowners or developers to the Agency in connection with the other three (3) subareas included in Amendment No. 3. As of this time, no specific

public improvement projects have been identified and proposed for any of the other three (3) subareas. Nevertheless, Agency and City Staff are currently studying the need for various public improvements within each of the other subareas, and it is anticipated that certain public street repaving or widening, street landscaping and lighting, traffic intersection signalization, parking or drainage improvements may be eventually recommended by the Agency and City Staff for Subarea 3, Subarea 4 or Subarea 5.

Each of the five (5) subareas of Amendment No. 3 will be studied separately in order to identify specific redevelopment activities which will most closely satisfy the redevelopment requirements of each. It is also proposed that the Agency members will take specific official action to approve projects identified by the Agency Staff to be included within Amendment No. 3 on a subarea-by-subarea basis. Thus, consideration of specific redevelopment activities in Subarea 3 will be separate and distinct from consideration of specific redevelopment activities in Subareas 1, 2, 4 and 5. The purpose of such separate consideration is to lay the foundation for redevelopment in each of the five (5) subareas of Amendment No. 3 based upon the specific physical conditions and needs of each such subarea for redevelopment assistance.

Agency Member Donald Day

Mr. Donald Day is an Agency and City Council Member. Mr. Day operates a welding shop on property which also serves as his principal residence. This property is located in the southwest portion of Subarea 3 at 16786 Ceres Street, Fontana, California. Mr. Day has been in business at this location for the last twenty-seven (27) years. Mr. Day is the sole proprietor of his welding business and the property is used exclusively by Mr. Day for residential and business purposes. The property, as improved with welding shop facilities, is estimated to have a current market value in excess of \$100,000. Mr. Day derives an annual income from his business which is in excess of one hundred thousand dollars (\$100,000) per year. The property is designated as "M-1" under City zoning regulations and the residential use of the property is a legal nonconforming use.

Effect of the Project on the Financial Interests of Agency Member Donald Day

In its published opinions, the Fair Political Practices Commission (the "Commission") has outlined the analysis for determining whether a public official is required to disqualify himself or herself from participation in a governmental decision. In the Thorner opinion the Commission stated this analysis as follows:

"Under the foregoing sections, several elements must be present before a public official is required to disqualify himself from participation in a governmental decision. First, it must be reasonably foreseeable that the governmental decision will have a financial effect. Second, the anticipated financial effect must be on a financial interest of the official, as defined in Sections 87103(a) through (d). Third, the anticipated financial effect must be material. And fourth, the governmental decision's anticipated financial effect on the official's financial interest must be distinguishable from its effect on the public generally."
1 FPPC 198, 202 (Thorner, 1975).

At this time it is not anticipated that the adoption of Amendment No. 3 will affect the status of nonconforming legal land uses within any of the subareas. Such uses shall be permitted to continue under Amendment No. 3 and the redevelopment plan, as amended, and shall be subject to zoning and land use regulations as may be adopted or amended by the City. The adoption of Amendment No. 3 will have no foreseeable financial effect upon Mr. Day's ability to continue to use the property for his principal residence.

However, the primary economic character of Mr. Day's property in terms of the financial interest which may be affected by the adoption of Amendment No. 3 must be viewed as business or investment oriented. The fact that Mr. Day also uses the property as his principal residence does not affect its economic suitability for business or investment purposes. Therefore, it appears appropriate to view the primary economic character of the property which Mr. Day owns in Subarea 3 as business oriented and to view the question of Mr. Day's eligibility to participate in the consideration of Amendment No. 3 in this light.

The adoption of Amendment No. 3 is not expected to have a material financial effect on the welding shop business of Mr. Day. It is unlikely that redevelopment activities within Subarea 3 will directly result in any significant increase in business for Mr. Day's welding shop. In general, a welding shop enterprise is the type of business which is built upon the experience and reputation of its proprietor rather than the presence or absence of certain amenities in the surrounding neighborhood such as adequate parking, public landscaping or other public improvements. See: 4 FPPC 19, 21 (Brown, 1978).

The Commission has noted in one of its decisions that "one of the major goals of a redevelopment plan is increasing property values, in particular within the project area and less directly within the entire community. In redeveloping the blighted areas of the community, all property becomes more valuable, particularly that which has been redeveloped." 1 FPPC 75, 80 (Oglesby, 1975); see also 3 FPPC 38, 41 (Gillmor, 1977). However, the extent of the financial impact of adoption of Amendment No. 3 on the value of property located in Subarea 3 cannot be foreseen at present.

In all likelihood the implementation of Amendment No. 3 following its adoption may eventually result in a material financial effect on such real property by increasing its fair market value by the lesser of either \$10,000 or one-half of one percent ($\frac{1}{2}\%$) of its fair market value, provided certain other official action is taken by the Agency to implement Amendment No. 3 within Subarea 3. 2 Cal.Admin. Code Section 18702(b)(2)(B) 1 and 2. However, any increase in value which the property owned by Mr. Day may experience in the near term is very unlikely to be the result of the adoption of Amendment No. 3 unless certain specific or unique public improvements are authorized to be constructed in Subarea 3 or the Agency proposes to provide certain specific types of redevelopment assistance to owners or prospective developers of land within Subarea 3.

In addition, the identification of specific public improvements in other subareas included in Amendment No. 3 is not currently anticipated to affect the value of property in Subarea 3. Both the proposed shopping mall located in Subarea 1 and the other redevelopment assistance proposed in Subarea 2 affect property which is located more than one mile from the site of Mr. Day's property. It is not anticipated that specific redevelopment proposals which are being studied

in connection with either Subarea 1 or Subarea 2 will have a significant financial effect upon the value of Mr. Day's property or upon the value of any other property located in Subarea 3.

The Commission has recently noted in an advice letter to the City Attorney of the City of San Bernardino (No. 84-045, herein, the "Quiel Letter"), that there are circumstances in which the adoption of a redevelopment plan will not have a material financial effect on the value of property. "Although the adoption of a Redevelopment Plan often has a material financial effect on the commercial property owners in the Redevelopment Area, under the specific circumstances presented here, it does not appear that the adoption of the Plan itself will have a significant effect on the market values of business property in the area." Quiel Letter, p. 7.

At this time, the circumstances to which the Commission referred in the Quiel Letter are similar to the circumstances involved in Subarea 3 of Amendment No. 3. In the Quiel Letter, the proposed redevelopment plan was primarily intended to be a planning device. The proposed redevelopment plan, as described in the Quiel Letter, did not provide for specific projects or public improvements which would directly or immediately affect any property within the proposed redevelopment project area.

The situation in the case of Mr. Day and Amendment No. 3 is similar to the situation described in the Quiel Letter. Although specific redevelopment activities and projects have been proposed in Subarea 1 and Subarea 2, no specific proposals for similar types of redevelopment activities have been proposed for Subarea 3 in which Mr. Day's property is located. Subarea 3 is located in excess of one mile from either Subarea 1 or Subarea 2, and it is highly unlikely that redevelopment activities in either of those subareas will result in an identifiable increase or decrease in the value of Mr. Day's property.

In an advice letter to K. D. Lyders, City Attorney of the City of Oxnard (No. 82-158, herein, the "Lyders Letter"), the Commission has noted that ordinarily the distance between the business property owned by a public official and the site of a proposed redevelopment project plays an important factor in determining whether the approval of such a redevelopment project is likely to have a material financial effect on the public official. The facts regarding one of the questions in

the Lyders Letter are similar to the facts involving Mr. Day's participation in connection with Amendment No. 3. Consideration of Amendment No. 3, insofar as it affects Subareas 1, 2, 4 and 5 is not anticipated to have any foreseeable financial effect upon Mr. Day's property. Each of said subareas of Amendment No. 3 is located at a considerable distance from Mr. Day's property and only Subarea 4 is contiguous with the subarea in which Mr. Day's property is located. Therefore, in accordance with the reasoning of the Lyders Letter, Mr. Day need not be disqualified from participation in considering matters pertaining to Amendment No. 3 which are not likely to have a significant financial effect upon his property in view of the distance separating each of the five (5) subareas of Amendment No. 3.

At such time as a specific redevelopment project activity is proposed for Subarea 3 which may have a foreseeable and material financial effect upon Mr. Day, another analysis of his financial interests, as defined by Government Code Section 87103, may be necessary. In Gillmor, supra, the Commission noted that a specific high-rise apartment project proposal in a redevelopment project area which had been previously established pursuant to a City of Santa Clara ordinance had a positive financial impact upon investments in nearby properties owned by the mayor. If a proposal similar to the one analyzed in the Gillmor opinion or the mall project as proposed for Subarea 1 were proposed in the Subarea 3 on a site in close proximity to his business property, Mr. Day would in all likelihood be disqualified from further participation. However, as mentioned above, such facts are not applicable to this request for advice to the Commission.

CONCLUSION

At this time it does not appear reasonably foreseeable that the adoption of Amendment No. 3 will have a material financial effect on the economic interests of Mr. Day. It is not anticipated that any cost, assessment or other financial liability shall be imposed upon Mr. Day merely because his property is included in Subarea 3 of Amendment No. 3. In addition, the designation of a redevelopment project area for Subarea 3 is not currently anticipated to result in the direct expenditure of any Agency funds for the elimination of blight in said Subarea 3. Each specific expenditure to eliminate blight in Subarea 3 must be separately approved by the Agency, and in some instances by the City Council as the legislative body, after the approval of Amendment No. 3. Thus, unlike the situations examined in Oglesby, Gillmor and Brown, the approval of Amendment

No. 3 by the City Council will not in itself authorize the expenditure of any sums in Subarea 3 which may specifically benefit property owned by Mr. Day nor the property of any other property owner in Subarea 3.

In the short term, no material financial effect upon Mr. Day is likely to occur as a result of the adoption of Amendment No. 3. Any long term financial effect upon his property or business in Subarea 3 is contingent upon the adoption of specific redevelopment programs which affect Subarea 3 by the Agency. See Oglesby and Gillmor. Thus, it is not reasonably foreseeable that Mr. Day will be financially affected in a material manner by the mere adoption of Amendment No. 3. Of course, specific programs authorized after the adoption of Amendment No. 3 which affect Subarea 3 could have a material financial effect on Mr. Day personally or on his business interests and real property holdings. In such a case Mr. Day would be disqualified from participation as a Council/Agency member. However, the anticipated effect of Amendment No. 3 on the financial interests of Mr. Day is not such to require his disqualification at this time in connection with the adoption of Amendment No. 3.

Amendment No. 3 is intended to be a redevelopment planning document which will have applicability to the diverse conditions found within each of the five (5) subareas. As such, the Agency plans to consider specific redevelopment proposals for each of the five (5) subareas of Amendment No. 3 as a separate matter. As described above, it is proposed that the Agency consider the evidence regarding the existence of blight and the identification of specific public improvements for each of the five (5) subareas of Amendment No. 3 by separate action. Although Mr. Day may not be eligible to participate in the consideration of such matters in connection with Subarea 3, there does not appear to be a need to disqualify him from such participation in consideration of the evidence of blight or the approval of specific public improvements within Subareas 1, 2, 4 and 5 of Amendment No. 3.

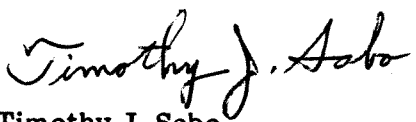
As Agency Attorney I respectfully request the Executive Director of the Commission to review the foregoing analysis. In the event that the Commission finds that the adoption of Amendment No. 3 is likely to have a significant financial effect upon the property which Mr. Day owns in Subarea 3, I would sincerely appreciate guidance from the Commission regarding suggestions for the manner in which the Agency may further consider Amendment No. 3 insofar

as the other subareas may be concerned so as to permit participation by Mr. Day regarding those matters which do not foreseeably have a significant financial effect upon his property in Subarea 3.

If I may be of any assistance to your office in connection with this request for advice, please do not hesitate to call me at your earliest convenience.

Very truly yours,

TIMOTHY J. SABO
A PROFESSIONAL CORPORATION


Timothy J. Sabo

AMENDMENT #3 TO THE DOWNTOWN REDEVELOPMENT PROJECT AREA SUB AREAS 1-5

