California
Fair Political
Practices Commission

July 18, 1986

David Benjamin
City Attorney
City of Walnut Creek
P.O. Box 8039
Walnut Creek, CA 94596

Re: Your Request for Advice on Behalf of Merle Hall
Our File No. A-86-148

Dear Mr. Benjamin:

This is in response to your follow-up questions to my response to your original advice request letter, our File No. A-86-148. Your follow-up advice request on behalf of City Councilmember Merle Hall is a composite of several letters, telephone conversations, and a June 11 meeting I had with you and Councilmember Hall. You seek formal written advice regarding Councilmember Hall's duties under the Political Reform Act.1/

QUESTION

Where a decision will not affect a lease's terms, the time the lease has left to run, or the legally permissible use of the leased property, is an official holding a lease option required to disqualify himself from participating in making such a decision which may affect the fair market value of the subject property?

CONCLUSION

An official with a leasehold interest in real property does not have to disqualify himself from participating in making a decision that will not affect the lease's terms, the time the lease has to run, or the legally permissible use of the leased property by the lessee, even where the property value itself will be affected.

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

ANALYSIS

Section 87100 provides that 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. Due to economic interests arising from several properties that he owns, Councilmember Hall has sought our advice.

In November 1985 Walnut Creek voters passed Measure H, a traffic control initiative. Measure H contained a building moratorium for certain city areas, to limit traffic congestion. The maximum allowed development of buildings on any parcel in these areas was limited by Measure H to 10,000 square feet. A problem concerning property aggregation arose: Can an owner or owners of adjacent parcels aggregate them such that the 10,000 square foot limitation is surpassed? In other words, can an owner or owners of four adjacent parcels, zoned commercial, aggregate the parcels and develop a 40,000 square foot building, instead of developing four 10,000 square foot buildings? To date this issue is unresolved, and a decision settling the matter is currently pending.

Councilmember Hall sought written advice from us, as he owns several adjacent parcels in downtown Walnut Creek. Because Councilmember Hall stated that these properties are developed to their "best and highest use" such that the fair market value for them would not be altered regardless of whether aggregation is permitted, we responded on May 15 (our File No. A-86-061) that Councilmember Hall could participate in the aggregation discussion.

Subsequently, Councilmember Hall informed us by telephone that he has a leasehold interest in another parcel located at 1630 Riviera, with an option to buy. The option price is $195,000. The land, due to Measure H restrictions, is currently valued at $125,000. If aggregation is allowed, the property value will rise to $150,000 and no higher, because some adjacent parcels are not developed to their "best and highest use" and aggregation with them could enhance all the lots' development potential. Councilmember Hall contends that his option is essentially worthless, as no one would pay $195,000 for land worth $150,000 or less, thus no one would pay anything for his option. Consequently, although his option otherwise is an "interest in real property," it would not be worth $1,000 or more. Sections 82033 and 87103(b). Hence, under these unusual facts, the option does not form a basis for requiring disqualification, because it is not worth at least $1,000.

Councilmember Hall also has a leasehold interest in the property. He pays $1,000 per month and sub-leases it for $500 per month, leaving him with a $500 monthly loss. The Commission has consistently valued leasehold interests as the amount of rent owed during a 12-month period (see regulation 2 Cal. Adm. Code Section 18729(b),2/ copy attached, and the Overstreet Opinion, 6 FPPC Opinions 12 (No. 80-010, March 2, 1981) copy attached). This would place the value of Councilmember Hall's leasehold interest at greater than $1,000 under both Section 87103 and Regulation 18702(b)(2). However, the Commission, in Overstreet, differentiated between effects on a person's leasehold interest and effects on property value.

The Commission distinguished effects on leasehold interests from property values in the Overstreet Opinion, supra, where it stated at p.5 that:

> We note, however, that decisions which will affect the fair market value of a piece of rental property will not necessarily affect the value of a leasehold interest in the property. The effects on a leasehold interest must take into account the terms of the lease, the time it has left to run, limits the lease might contain on the uses to which the property may be put by the lessee, etc.

The staff has proposed some regulations on this subject as well, which are in accord with Overstreet. These regulations have not yet been considered by the Commission. Copies are enclosed for your benefit should you wish to comment on them.

In sum, the Overstreet Opinion leads to a different materiality standard for leasehold interests than does Regulation 18702(b)(2). The proposed regulations are in accord with Overstreet and would not alter its result in this case. This standard differentiates between financial change on a person's leasehold interest and effect on the value of the underlying property. Since any change in property value will affect the landowner from whom Councilmember Hall rents, and not Councilmember Hall's leasehold interest, he does not have to disqualify from the

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2/ Regulations 2 Cal. Adm. Code Sections 18000, et seq., all references to regulations are to Title 2, Division 6 of the California Administrative Code.

aggregation decision, based upon his leasehold interest in the property at 1630 Riviera.3/

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

Sincerely,

Robert E. Leidigh
Counsel
Legal Division

REL:MS:plh
Enclosures

3/ However, Councilmember Hall advises us that his sub-tenant has a month-to-month lease, and can thus be removed with 30 days notice. If it is reasonably foreseeable that the change in value of the property to the owners, resulting from a decision to permit aggregation, would cause the owners to buy-out or otherwise release Councilmember Hall from his lease, disqualification would be required.

California Fair Political Practices Commission

May 5, 1986

David Benjamin
Walnut Creek City Attorney
P.O. Box 8039
Walnut Creek, CA 94596

Re: 86-148

Dear Mr. Benjamin:

Your letter requesting advice under the Political Reform Act has been received on May 5, 1986 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

Robert E. Leidigh
Counsel
Legal Division

REL:plh
cc: Merle Hall

Similarly, the city's charter makes lawmaking a power to be shared by the board of supervisors and the mayor. It circumscribes the legislative powers of the board by giving the mayor a limited veto power. The importance of the mayor's role in the legislative process is also aPparent from section 2.302 of the charter, which provides that in the event of an absence of the mayor for which he or she or the board has failed to designate an acting mayor, no ordinance shall take effect by reason of the mayor's failure to approve or veto the ordinance. Under such circumstances, the time limits for approval or disapproval do not commence until an acting mayor is designated or elected or the mayor returns. Clearly under the charter, the mayor has a significant and unique function in the city's lawmaking process. The "alternative source of decision" which plaintiffs characterize as a satisfactory substitute would effectively eliminate the mayor's role in that process. To so restrict the mayor's duty and discretion either to approve or veto legislation would unquestionably be inconsistent with the terms of the charter and with the separation of powers doctrine underlying its provisions.

III

Section 3.100 of the city's charter authorizes the mayor to designate a member of the board of supervisors to act as mayor in his or her absence. As already stated, when the mayor vetoed the rent control ordinance on January 19, she knew that she would be away from the city from January 23 through January 27, i.e., during the 10 days allowed her to act upon the ordinance. Pursuant to the charter, she designated various members of the board to act as mayor during her absence None of those acting mayors had a conflict with respect to the ordinance.

It has been suggested that where there is a legal means of temporarily replacing an administrative officer who has a conflict of interest, the common law rule of necessity is inapplicable. (See **Caminetti v. Pac. Mutual L. Ins. Co.**, **supra**, 22 Cal.2d 344, 366 [insurance commissioner permitted to act despite conflict of interest because no other officer statutorily authorized to make decision].)

A similar principle appears in opinions of the FPPC interpreting section 87101. for example, in **Matter of Hudson**, **supra**, 4 FPPC Opinions 13, the participation of three of the five members of Petaluma's Board of building Review was necessary to achieve a quorum, but three board members had a financial interest in an appeal pending before the board. The FPPC noted that the board was the only body authorized to hear the appeal, and that no provision in the city's ordinances permitted either changing the quorum requirements or temporarily appointing an alternate member to resolve conflict of interest problems. Under the circumstances, no alternative source of decision existed, and participation of at least one of the disqualifed board members was "legally required" within the meaning of section 87101.

Relying on the foregoing authority, plaintiffs argue that the mayor's participation in the decision on the ordinance was not legally required under the peculiar facts of this case because when she received the ordinance, she knew that others would be acting as mayor during the time she had to act on the legislation.

The argument is unpersuasive. As did plaintiffs' first contention, this argument ignores the requirement that according to FPPC regulation, any alternative source of decision must be "**consistent with the purposes and terms of the law authorizing the decision.**" (Cal. Admin. Code, tit. 2, § 18701, subd. (a).) The charter merely authorizes the mayor to designate an acting mayor to serve in his or her absence. We find nothing in the charter which suggests that this provision was intended to enable or require a mayor to delegate decision-making power in the event of a conflict of interest.

According to the charter, the mayor is empowered to take action upon an ordinance as soon as it is transmitted by the clerk of the board of supervisors. Under plaintiffs' theory, however, a mayor with a conflict of interest in a particular ordinance could act or not act upon that ordinance depending upon whether he or she happened to be planning a trip in the immediate future. Plaintiffs cite no authority which supports the novel proposition that the mayor's power to act on legislation is dependent on the timing of his or her travel plans.

Finally, plaintiffs' argument ignores the fact that under the authority of the charter, the mayor himself or herself selects the board members who serve in his or her stead. We fail to see how permitting a public official with a conflict of interest to designate his or her own temporary replacement in the decision-making process would remedy the problems inherent in having that official participate in the decision himself or herself.

In sum, we conclude that the Political Reform Act did not prohibit the mayor from vetoing this ordinance. Judgment is affirmed.

SCOTT,J.

We Concur:
WHITE, P.J.
MERRILL, J.

TRIAL COURT:
Superior Court, City and County of San Francisco

TRIAL JUDGE:
Stuart R. Pollak

COUNSEL FOR APPELLANTS:
Robert De Vries
Ivy Court Building-Suite 3
414 Gough Street

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1. Unless otherwise indicated, all statutory references are to the Government Code.

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2. In an advisory opinion, the FPPC has concluded that rent control decisions will not affect the interests of owners of three or fewer residential rental units in a manner distinguishable from their effect upon a significant segment of the public generally., therefore a council member who owns three or fewer rental units may vote on or participate in the consideration of a rent control ordinance. In contrast, the FPPC concludes that it is reasonably foreseeable that a rent control ordinance will have a material financial effect, distinguishable from its effect on the public generally, on the ownership interest of persons who own four or more residential units. (**Matter of Ferraro** (1978) 4 FPPC Opinions 62, 66-68.) The mayor apparently coes not disagree with this conclusion.

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3. The rule of necessity also means that a Judge is not disqualified because of personal interest in the matter at issue if there is no other judge or court available to hear and decide the case. (**Olson v. Cory** (1980) 27 Cal.3d 532 537., **see Atkins v. United States** (Ct. Cl. 1977) 556 F.2d 1028.,)

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4. The regulation also specifies what a public official with a financial interest in a decision shall do if legally required to make or participate in the making of the decision. (Cal. Admin. Code, tit. 2, § 18071, subd. (b).) Plaintiffs do not argue that the mayor failed to comply with these requirements.

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5. The mayor's veto power is not absolute, as the board may override a veto by a two-thirds vote. (Charter of the City and County of San Francisco, § 2.303.)

REAL PROPERTY

Mayor's Veto of Rent Control Law Valid Despite Financial Interest

Cite as 86 Daily Journal D.A.R. 1158

AFFORDABLE HOUSING ALLIANCE et al:
Plaintiffs-Appellants,
v.
DIANNE FEINSTEIN, etc., et al.,
Defendants-Respondents.

No. A028378
Super. Ct. No. 819346
City and County of San Francisco
California Court of Appeal
First Appellate District
Division Three
Filed March 31, 1986

Plaintiffs, a nonprofit corporation entitled the Affordable Housing Alliance and David Spero, a resident of the City and County of San Francisco (the city), brought an action against Dianne Feinstein in her capacity as the city's mayor (the mayor) and other defendants, seeking to have set aside the mayor's veto of a rent control ordinance enacted by the board of supervisors. Summary judgment was entered for defendants. The question in this case is whether the mayor violated the California Political Reform Act of 1974 (the Act) (Gov. Code, § 81000 et seq.)[1] when she vetoed the ordinance even though she had a financial interest in the decision within the meaning of the Act. We conclude that the mayor's participation in the decision on the ordinance was legally required; therefore no violation of the Act occurred.

I

On January 17, 1984, the board of supervisors passed ordinance No. 109-83-5.1 which amended the city's Administrative Code provisions relating to rent control. Included in the ordinance was a limitation on the amount of rent that residential landlords could charge new tenants moving into a vacant unit. On January 18, the ordinance was submitted to the mayor pursuant to the requirements of section 2.302 of the city's charter. On January 19, she vetoed the ordinance.

The mayor was away from the city from January 23 through January 27, 1984, and knew that she would be absent for that period when she vetoed the ordinance. She designated various members of the board of supervisors to act as mayor in her absence; none of the acting mayors had a conflict of interest with respect to the ordinance.

The mayor has an ownership interest worth more than $1,000 in five or more residential apartments located at 1075 Sutter Street in the city. On January 26, plaintiffs filed this action to set aside the veto on the ground that because of that ownership, the mayor had a financial interest in the enactment of the ordinance within the meaning of section 87103 of the Act and was therefore prohibited by section 87101 from participating in the decision on its enactment.

The parties filed motions for summary judgment or summary adjudication of the issues. After a hearing, summary judgment was entered in favor of defendants, and this appeal followed.

II

The Act was enacted by initiative. Its implementation and administration are the responsibility of the Fair Political Practices Commission (FPPC). (§ 83100 et seq.) The FPPC is authorized to adopt rules and regulations to carry out the purposes and provisions of the Act (§ 83112), to issue advisory rulings about possible conflicts of interest involving state or local public officials (§ 83114), and to investigate possible violations of the Act (§ 83115).

Chapter 7 of the Act establishes rules relating to financial conflicts of interest of public officials. (§ 87100 et seq.; **Hays v. Wood** (1979) 25 Cal.3d 772, 778.) Section 87100 prohibits any public official from knowingly participating in or influencing a governmental decision in which he or she has a "financial interest." (**Hays v. Wood, supra**, 25 Cal.3d at p. 778.) As relevant here, a public 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 . . . [¶] . . . [a]ny real property in which the public official has a direct or indirect interest worth more than one thousand dollars ($1,000)." (§ 87103, subd. (b).)

Plaintiffs contend that the mayor had a financial interest in the enactment of the rent control ordinance and that her veto of the ordinance was therefore improper. The mayor acknowledges the existence of her financial interest as that term is defined in the Act.[2] She argues that notwithstanding that interest, her participation in the consideration of the ordinance was legally required and proper under section 87101 of the Act and the common law rule of necessity.

According to the common law rule of necessity, "where an administrative body has a duty to act upon a matter which is before it and is the only entity capable to act in the matter, the fact that the members may have a personal interest in the result of the action taken does not disqualify them to perform their duty."[3] (**Gonsalves v. City of Dairy Valley** (1968) 265 Cal.App.2d 400, 404; see also Caminetti v. Pac. Mutual L. Ins. Co. (1943) 22 Cal.2d 344, 365-366.)

The Act includes a "statutory analogue" to the common law rule of necessity. (See **Matter of Hudson** (1978) 4 FPPC Opinions 13, 15.) Section 87101 establishes a limited exception to the rule that a public official shall not participate in a governmental decision in which he or she has a financial interest. In pertinent part, that section provides that a public official is not Prevented from "making or participating in the making of a governmental decision to the extent his [or her] participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his [or her] participation legally required for purposes of this section."

The FPPC has adopted a regulation clarifying when participation in an action or decision is legally required. "A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 **unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.**"[4] (Cal. Admin. Code, tit. 2, § 18701, subd. (a), emphasis added.)

In this case, plaintiffs argue that the mayor was not legally required to participate in the decision on the rent control ordinance because there was an alternative source of decision under the city's charter. According to section 2.302 of the charter, "Each proposed . . . ordinance . . . adopted by the supervisors shall, within twenty-four hours of such action, be transmitted to the mayor by the clerk of the board . . . ." [¶] The mayor shall either approve each . . . ordinance . . . by signing and returning same . . . within the time limit, or he [or she] shall disapprove and veto any . . . ordinance, or veto or reduce any separate appropriation item therein and shall return each . . . ordinance . . . within the time limit. His [or her] failure to make such return shall constitute approval and such ordinance or resolution shall take affect [sic] without the mayor's signed approval."[5]

Plaintiffs reason that the mayor's participation in the decision on the ordinance was not legally required because it would have taken effect automatically without her signature. Plaintiffs cite a FPPC regulation which provides in pertinent part that a public official makes a governmental decision when he or she, acting within the authority of his or her office, "[d]etermines not to act . . . unless such determination is made because of his or her financial interest . . . ." (Cal. Admin. Code, tit. 2, § 18700, subd. (b)(5).) Plaintiffs urge that according to this regulation, the failure of the mayor to take action on an ordinance because of a conflict of interest would not constitute a governmental decision within the meaning of the Act.

The flaw in plaintiffs' argument is apparent. Notwithstanding that regulation, the failure of a mayor to sign or veto an ordinance constitutes approval of the ordinance, according to the plain language of the city's charter. Under plaintiffs' reasoning, a San Francisco mayor would be compelled to approve every ordinance in which he or she had a financial interest within the meaning of the Act. Surely plaintiffs cannot seriously be arguing for tl:at one-sided result.

Plaintiffs' argument also ignores the requirement that there must be an alternative source of decision "consistent with the purposes and terms of the statute authorizing the decision." (Cal. Admin. Code, tit. 2, § 18701, subd. (a).) The respective roles which the charter assigns to the mayor and the board of supervisors in the city's legislative process are analogous to the roles of the President and the United States Congress in the federal legislative scheme. (See U.S. Const., art. I, § 7.) The provisions in the federal Constitution requiring that all legislation be presented to the executive before becoming law and granting the executive a qualified power to nullify proposed legislation by veto have been characterized as "integral parts of the constitutional design for the separation of powers." (**Ins. v. Chada** (1982) 462 U.S. 919, 946-947.) "It is beyond doubt that lawmaking was a power to be shared by both Houses ano the President." (**Id.**, at p. 947.)

MERLE HALL INVESTMENTS

1111 CIVIC DRIVE, SUITE 330
WALNUT CREEK, CALIFORNIA 94596
(415) 933-4000

April 21, 1986

Mary Lou Lucas, Mayor
City of Walnut Creek
P.O. Box 8039
Walnut Creek, Ca 94596

Re: Mt. Diablo Redevelopment Agency - Resignation

Dear Mayor Lucas,

The primary business item before the Mt. Diablo Redevelopment Agency continues to be the Town Centre Project. As you know, my interests in nearby properties continue to preclude my participation in the discussion. Accordingly, I feel the agency would benefit by replacing me with a member better able to contribute. Therefore, this letter shall serve as my resignation from the agency.

Sincerely yours,

Merle D. Hall

MDH/nem

California
Fair Political
Practices Commission

June 3, 1986

David Benjamin
City Attorney
City of Walnut Creek
P.O. Box 8039
Walnut Creek, CA 94596

Re: Your Request for Advice on Behalf of Merle Hall
Our File No. A-86-148

Dear Mr. Benjamin:

Your letter seeks advice on behalf of Walnut Creek City Councilmember Merle Hall. Your letter states the facts succinctly and these facts and your question are quoted below.

FACTS

Pursuant to Health & Safety Code §33200, the Walnut Creek City Council has declared itself to be the Redevelopment Agency of the City of Walnut Creek. The governing body of the Redevelopment Agency, therefore, consists of the five Council Members sitting at any particular time.

The Redevelopment Agency has one active project in the predevelopment stage: The Town Centre project. The details of this project, including its site and presently approved scope of development, have been set forth in prior correspondence with your agency. (See Council Member Hall's request for advice dated November 28, 1983 (your advice No. A-83-266)). The procedural posture of the Town Centre project is as follows: In 1974, the City Council adopted a Redevelopment Plan for the Mt. Diablo Redevelopment Project Area, an area which includes the site of the Town Centre project. On February 28, 1984, the City Council, with Council Member Hall abstaining, rezoned certain property in the project area to permit the scope of development planned for the Town Centre project. On October 16, 1984, the Redevelopment Agency, with Mr. Hall again abstaining, approved a

Disposition and Development Agreement ("DDA") for the Town Centre project. This document, entered into by the Redeveloper and the Redevelopment Agency, sets forth the terms and conditions for the development of Town Centre, including its scope of development and its schedule for completion. On November 5, 1985, the citizens of Walnut Creek approved Measure H, the "Traffic Control Initiative." On its face, this measure has the apparent effect of prohibiting construction of Town Centre. After the passage of Measure H, the Redeveloper asked the City Council to place a measure on the November 1986 ballot that would exempt redevelopment projects from the prohibitions of Measure H. The City Council declined to promote passage of an initiative measure that would exempt Town Centre from the terms of Measure H; that initiative is being circulated in an attempt to qualify for the November 1986 ballot or a subsequent special election. The Redeveloper has also requested certain amendments to the DDA which would, among other things, change the identity of the Redeveloper and amend the scope of development and schedule of performance called for by the present DDA. Any such amendments will require the approval of the Redevelopment Agency and, possibly, the City Council.

Against this background, Council Member Hall has decided to resign his seat on the Redevelopment Agency, and he has done so (see Council Member Hall's letter of Resignation, dated April 21, 1986). This resignation was tendered pursuant to a recent amendment to Health & Safety Code §33200, which provides in relevant part as follows:

> If a member of a legislative body of a City...does not wish to serve on the [redevelopment] agency, the member may so notify the legislative body of the city..., and the legislative body of the city...shall appoint a replacement who is an elector of the city...to serve out the term of the replaced member.

The City Council is now considering a replacement to serve out the remainder of Council Member Hall's term.

Council Member Hall's financial interests have been set forth in detail in his requests for advice dated November 28, 1983 (your advice No. A-83-266), June 11, 1985 (your advice No. A-83-266), February 19, 1986 (your advice No. A-86-061), and Council Member Hall's follow-up letter dated April 18, 1986. Council Member Hall has informed me that there have been no changes in the relevant financial interests since the date of his last letter of April 18, 1986.

QUESTION

The question presented by this request is whether the Political Reform Act allows Council Member Hall to participate, as a member of the City Council, in the selection of a new member to serve on the Redevelopment Agency. Because §33200 provides that the appointment shall be made by the legislative body, of which Council Member Hall remains a member, I have advised Council Member Hall that he may participate in the selection of his replacement unless other laws prohibit his participation. I have concluded that the only applicable law that might prohibit his participation is the Political Reform Act of 1974, and specifically the conflict of interest provisions which gave rise to his resignation from the Agency....

ANALYSIS

Initially, it is important to note two things: (1) Prior to writing this letter, I have received and reviewed the letter from Walnut Creek Councilmembers Munn and Skoog; and (2) there is insufficient information available through their letter and yours to determine if, in fact, Councilmember Hall would be required to disqualify himself as to the upcoming decisions before the Redevelopment Agency regarding the Town Centre project if he had remained a member of that agency. Obviously, if disqualification would not be required as to these specific decisions, the question posed by your letter is moot.

However, in order dispose of your question, I shall assume, for the purposes of this discussion only, that Councilmember Hall would be required to disqualify himself as to at least one of the Town Centre decisions currently pending before the Redevelopment Agency.

The legal arguments raised in the Munn/Skoog letter regarding the application of Health & Safety Code Section 33200 are not a subject on which this agency may advise. Our analysis and advice is limited to the provisions of the Political Reform Act of 1974 (the "Act").1/ The Act specifically requires disqualification when an official has a financial interest in a governmental decision. Sections 87100 and 87103. Disqualification is personal as to the official and does not prohibit the agency from acting without the official's input and participation. This scheme obviously envisions that the disqualified official may be supplanted in the decision-making process where delegation or transfer of the decision is appropriate. See Advice Letter to Dianne Feinstein (A-84-014), copy enclosed. See also, Section 87100. This is the case so long as the disqualified official does not make, participate in making, or use his/her official position to influence the making of the decision by the person to whom the decision is delegated. Thus, where a board is made up of principals with alternates, a principal may disqualify and the alternate may participate so long as the principal does not in any way attempt to influence the alternate on that decision.

So long as a disqualified public official does not seek in any way to influence the decision of a stand-in as to the specific decision as to which disqualification is required, no impropriety exists in turning that decision over to another person to make.

Councilmember Hall is not alleged to have a financial interest in the appointment of a replacement on the Redevelopment Agency Board. Rather, it is contended that he has a disqualifying financial interest in the decisions to be made by the Redevelopment Agency Board, which his replacement would participate in making. Absent a specific agreement between Mr. Hall and the appointee that the latter will vote in a particular manner on a particular decision, it is not reasonably foreseeable that the appointment of any given person will affect Councilmember Hall's financial interests.

Such an agreement, so that in essence the appointee would function as Merle Hall's agent, if tied to the appointment of

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

his replacement would seem to be most improper and would appear to be violative of the replacement's own duty "to exercise the powers conferred on him with disinterested skill, zeal and diligence and primarily for the benefit of the public." Noble v. City of Palo Alto (1928) 89 Cal.App. 47, 51.

In the instant case, we have no statement on the record by any potential appointee. No potential appointee is currently faced with the duty of exercising his or her public powers with "disinterested skill, zeal and diligence." Again, we believe that conditioning or otherwise tying the appointment to a promise of specific future action would appear to violate the above standard. However, if, in fact, such was to occur, then disqualification as to the appointment decision would be required of Mr. Hall, assuming that the Redevelopment Agency decision in question would also, in fact, have dictated his disqualification.

There are two situations in which disqualification might be required, based upon the previously expressed intentions of elected officials who already hold a public office. In our Advice Letter to Commissioner Montgomery, No. A-85-222, copy enclosed, we advised that under certain circumstances, where voting intentions were stated in advance by councilmembers, disqualification might be required. In a recent appellate court case involving San Francisco Mayor Dianne Feinstein, the court, in dicta, stated that the Mayor might have had a conflict in appointing a member of the Board of Supervisors as acting Mayor, during her absence, to sign or veto an ordinance adopted by the Board of Supervisors.2/ There, the Board of Supervisors had already voted upon the ordinance in question. Presumably, the Court was considering the fact that, in picking a supervisor to act in her stead, the Mayor would be doing so with the foreknowledge of how any particular supervisor selected would likely act on the ordinance in question.

Councilmember Hall has stated that he intends to participate in the appointment process only as a member of the City Council and only as to the Council's final action on the appointment. Councilmembers Munn and Skoog have alleged otherwise. We are unable to resolve these factual differences

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2/ Affordable Housing Alliance v. Dianne Feinstein (1986) 86 Daily Journal D.A.R. 1158 (copy enclosed).

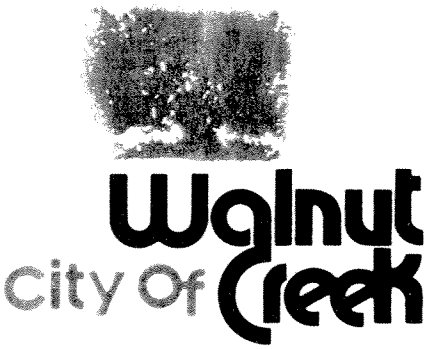
and will assume that Mr. Hall will abide by his stated role. Under such facts, he is not required to disqualify himself from voting on the selection of his replacement on the Redevelopment Agency Board.

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

Sincerely,

Robert E. Leidigh
Counsel
Legal Division

REL:plh
Enclosures



May 2, 1986

Robert E. Leidigh
Counsel, Legal Division
Fair Political Practices Commission
P. O. Box 807
Sacramento, California 95804-0807

Re: Request for Advice on Behalf of Merle Hall

Dear Mr. Leidigh:

I have been authorized by Merle Hall, Council Member of the City of Walnut Creek, to submit on his behalf this request for formal written advice pursuant to Government Code §83114(b). Council Member Hall's mailing address is 1111 Civic Drive, Walnut Creek, California 94596. This request seeks guidance on Council Member Hall's obligations under the conflict of interest provisions of the Political Reform Act of 1974. The facts material to the consideration of the question presented below are as follows:

I. Statement of Facts.

Pursuant to Health & Safety Code §33200, the Walnut Creek City Council has declared itself to be the Redevelopment Agency of the City of Walnut Creek. The governing body of the Redevelopment Agency, therefore, consists of the five Council Members sitting at any particular time.

The Redevelopment Agency has one active project in the pre-development stage: The Town Centre project. The details of this project, including its site and presently approved scope of development, have been set forth in prior correspondence with your agency. (See Council Member Hall's request for advice dated November 28, 1983 (your advice No. A-83-266)). The procedural posture of the Town Centre project is as follows: In 1974, the City Council adopted a Redevelopment Plan for the Mt. Diablo Redevelopment Project Area, an area which includes the site of the Town Centre project. On February 28, 1984, the City Council, with Council Member Hall abstaining, rezoned certain property in the project area to permit the scope of development planned for the Town Centre project. On October 16, 1984, the Redevelopment Agency, with Mr. Hall again abstaining, approved a Disposition and Development Agreement ("DDA") for the Town Centre project. This document, entered into by the Redeveloper and the Redevelopment Agency, sets forth the terms and conditions for the development of Town Centre, including its scope of development and its schedule for completion. On November 5, 1985, the citizens of Walnut Creek approved Measure

H, the "Traffic Control Initiative." On its face, this measure has the apparent effect of prohibiting construction of Town Centre. After the passage of Measure H, the Redeveloper asked the City Council to place a measure on the November 1986 ballot that would exempt redevelopment projects from the prohibitions of Measure H. The City Council declined, with Council Member Hall abstaining. The Redeveloper has now decided to promote passage of an initiative measure that would exempt Town Centre from the terms of Measure H; that initiative is being circulated in an attempt to qualify for the November 1986 ballot or a subsequent special election. The Redeveloper has also requested certain amendments to the DDA which would, among other things, change the identity of the Redeveloper and amend the scope of development and schedule of performance called for by the present DDA. Any such amendments will require the approval of the Redevelopment Agency and, possibly, the City Council.

Against this background, Council Member Hall has decided to resign his seat on the Redevelopment Agency, and he has done so (see Council Member Hall's letter of resignation, dated April 21, 1986). This resignation was tendered pursuant to a recent amendment to Health & Safety Code §33200, which provides in relevant part as follows:

> If a member of a legislative body of a City...does not wish to serve on the [redevelopment] agency, the member may so notify the legislative body of the city..., and the legislative body of the city...shall appoint a replacement who is an elector of the city...to serve out the term of the replaced member.

The City Council is now considering a replacement to serve out the remainder of Council Member Hall's term.

The question presented by this request is whether the Political Reform Act allows Council Member Hall to participate, as a member of the City Council, in the selection of a new member to serve on the Redevelopment Agency. Because §33200 provides that the appointment shall be made by the legislative body, of which Council Member Hall remains a member, I have advised Council Member Hall that he may participate in the selection of his replacement unless other laws prohibit his participation. I have concluded that the only applicable law that might prohibit his participation is the Political Reform Act of 1974, and specifically the conflict of interest provisions which gave rise to his resignation from the Agency. In prior telephone conversations with you, you advised me informally that the conflict of interest provisions did not bar Council Member

Hall's participation in the vote to appoint his successor. Because of the sensitive nature of this issue, however, I have advised Council Member Hall to seek formal written advice from the Fair Political Practices Commission.

II. Council Member Hall's Financial Interests.

Council Member Hall's financial interests have been set forth in detail in his requests for advice dated November 28, 1983 (your advice No. A-83-266), June 11, 1985 (your advice No. A-83-266), February 19, 1986 (your advice No. A-86-061), and Council Member Hall's followup letter dated April 18, 1986. Council Member Hall has informed me that there have been no changes in the relevant financial interests since the date of his last letter of April 18, 1986.

III. Question Presented.

May Council Member Hall participate, as a member of the City Council, in the Council's vote to appoint a successor to his seat on the Redevelopment Agency of the City of Walnut Creek?

Thank you for your advice on this matter. If you have any questions, please feel free to call me or to call Council Member Hall directly. His phone number is (415) 933-4000.

Very truly yours,

DAVID BENJAMIN
City Attorney

DB:ct
cc: Mayor and City Councilmembers
City Manager