



California Fair Political Practices Commission

September 22, 1989

Charles T. Kilian
City Attorney
City of Cupertino
852 N. First Street, Third Floor
San Jose, CA 95112

Re: Your Request for Advice
Our File No. A-89-522

Dear Mr. Kilian:

This is in response to your letter requesting advice on behalf of Cupertino City Councilmembers John Plungy and John Gatto concerning their duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/}

QUESTIONS

1. May Councilmembers Plungy and Gatto participate in decisions concerning the proposed Sunnyvale-Saratoga overpass which will impact a portion of proposed freeway within 300 feet of condominiums owned by the councilmembers?

2. If Councilmembers Plungy and Gatto are disqualified as to decisions that affect portions of the freeway within 300 feet of their properties, may they participate in the city council's consideration of other aspects of the freeway plan?

3. Where Councilmembers Plungy and Gatto are disqualified with respect to certain freeway decisions, may they still be present at the hearings, take testimony, ask questions and debate issues regarding those decisions?

CONCLUSIONS

1. The councilmembers may not participate in the decisions concerning the Sunnyvale-Saratoga overpass unless there will be no financial effect on their real property interests.

^{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. Councilmembers Plungy and Gatto may participate in considering other components of the freeway plan provided they have no disqualifying interest with respect to those other components and the other components will not affect the results of the decisions for which the councilmembers are disqualified.

3. The Act does not prohibit the councilmembers' presence at the public hearing concerning issues for which they are disqualified. However, the councilmembers may not take testimony, ask questions, debate the issues or say or do anything to influence the decisions.

The councilmembers may, however, appear in the same manner as any other member of the general public before the city council solely to represent themselves concerning their interests in real property, provided the property is wholly owned by the councilmembers or members of their immediate family.

FACTS

The Cupertino City Council and the California Department of Transportation have agreed to construct a freeway through Cupertino. The Department of Transportation has proposed to build the freeway through the center of the city with elevated portions over certain streets and some portions depressed below grade.

Councilmembers Plungy and Gatto own and reside in condominiums adjacent to the right-of-way of the proposed freeway. Each councilmembers' interest in his respective condominium is greater than \$1,000. At the nearest point, the proposed freeway is within 300 feet of the councilmembers' condominiums.

You have been asked to request advice on behalf of Councilmembers Plungy and Gatto with respect to the various decisions concerning the new freeway. Specifically, you have asked whether the councilmembers may participate in a decision concerning a proposed elevated portion of freeway over Sunnyvale-Saratoga Street. The street is 1,200 feet from the councilmembers' property, however, if the overpass is constructed as proposed, the freeway will taper down for 2,500 feet in both directions which will still result in a 10-foot elevation of the freeway at the point 300 feet from the councilmembers' property.

ANALYSIS

The Sunnyvale-Saratoga Overpass

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.

Section 87103 specifies that 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, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on:

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1000) or more.

Section 87103(b).

Councilmembers Plungy and Gatto as members of the Cupertino City Council are public officials under the Act. (Section 82048.) Ownership of a condominium is an interest in real property. (Section 82033; Haight Advice Letter, No. A-84-209, copy enclosed.) You have informed us that the councilmembers' respective property interests are greater than \$1,000. Consequently, the councilmembers are prohibited from making or in any way participating in decisions which would have a reasonably foreseeable material financial effect on their property that is distinguishable from the effect on the public generally.

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.) Clearly, the construction and characteristics of a freeway within 300 feet of the councilmembers' real property is likely to have a financial effect on their property. Whether the effect will be an increase or a decrease in the value of the property is not relevant.

In addition, the foreseeable effect on the councilmembers' financial interests must also be material to require disqualification. The Commission has adopted differing guidelines to determine whether an effect is material, depending on the specific circumstances of each decision. The effect of a decision on real property in which an official has a direct, indirect or beneficial ownership interest, is material if:

(1) The real property in which the official has an interest, or any part of that real property, is located within a 300 foot radius of the boundaries (or proposed boundaries) of the property which is the subject of the decision, unless the

decision will have no financial effect upon the official's real property interests.

Regulation 18702.3(a)(1) (copy enclosed).

The councilmembers' real property is within 300 feet of the proposed freeway right-of-way. And, although the location of the overpass is more than 300 feet away, the descending portion of the overpass will be within 300 feet of the councilmembers' condominiums. With property in such close proximity to the property which is the subject of the decision, the councilmembers may participate in the decision only if there will be no financial effect on their real property. Thus, if the decisions will have any financial effect on the condominiums of the councilmembers, they must disqualify themselves from participating in the decision.^{2/}

However, even if the councilmembers have a financial interest that will be financially affected by the overpass decision, they may still participate if the effect on their interests is not distinguishable from the effect on the public generally. (Regulation 18703, copy enclosed.) For the "public generally" exception to apply, the decision must affect the official's interests in substantially the same manner as it will affect a significant segment of the public in Cupertino. (In re Legan, (1985) 9 FPPC Ops. 1, copy enclosed.) Although we have not been provided with sufficient information on the characteristics of Cupertino, it would appear from the map you provided that the segment of the population of Cupertino within 300 feet of the proposed overpass is not significantly large to invoke the exception.

Other Freeway Decisions

You have also asked if, due to their property interests, the councilmembers are disqualified as to all the decisions concerning the freeway. Generally, decisions are analyzed independently to determine if there will be a foreseeable material financial effect on an official's financial interest. (In re Owen (1976) 2 FPPC Ops. 77, copy enclosed.) Consequently, many times, large and complex decisions may be divided into separate decisions so that where a public official has a disqualifying financial interest as to one component of the decision, he may still participate in considering the other components provided the decisions are not

^{2/} You have not asked about decisions concerning portions of the freeway that are more than 300 feet away and within 2,500 feet of the councilmembers' property. Under such circumstances, the councilmembers may participate provided the decision will not affect the fair market value of their real property by \$10,000 or more, or the rental value of the property by \$1,000 or more per 12 month period. (Regulation 18702.3(a)(3).)

interrelated and the official has no disqualifying interest with respect to the other components. (Huffaker Advice Letter, No. A-86-343, copy enclosed.) However, under some circumstances a series of decisions may be too interrelated to be considered separately. (Miller Advice Letter, No. A-82-119, copy enclosed.)

For example, if other decisions concerning the freeway are presented to the city council as alternatives to the decisions for which the councilmembers are disqualified, the councilmembers would not be able to participate in any of the decisions. (Nord Advice Letter, No. A-82-038, copy enclosed.) This is because the determination of the other decisions would effectively determine the results of the decisions for which the councilmembers are disqualified. Thus, where the decisions are too interrelated to be decided separately, the councilmembers must disqualify themselves as to all the decisions under consideration. (Scher Advice Letter, No. A-88-479, copy enclosed.)

Where other decisions concerning the freeway are not interrelated to the decisions from which the councilmembers are disqualified, the following procedure should be followed to permit them to participate:

(1) The decisions from which the councilmembers have a disqualifying financial interest should be segregated from the other decisions.

(2) The decisions from which the councilmembers are disqualified should be considered first, and a final decision reached by the city council without Councilmembers Plungy and Gatto participating in any way.

(3) Once a decision has been made on the portions of the freeway for which the councilmembers have a disqualifying interest, Councilmembers Plungy and Gatto may participate in the deliberations regarding other portions of the proposed freeway, so long as those deliberations do not result in a reopening or in any way affect the decisions from which they were disqualified. (Huffaker Advice Letter, supra.)

Participation in a Governmental Decision

Section 87100 prohibits any public official from making, participating in 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. This prohibition is broadly interpreted in order to fulfill the purposes of the Act which are best served by a rule which minimizes participation in government decisions by officials with a conflict of interest. (In re Hudson (1978) 4 FPCC Ops. 13, copy enclosed.)

An official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the

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decision, the official contacts, appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. (Regulation 18700.1, copy enclosed.) However, the Act does not prohibit the official's presence at the public hearing concerning issues for which he is disqualified.^{3/} Consequently, the councilmembers may be present while issues in which they have a financial interest are determined, but they may not take testimony, ask questions, debate the issues or say or do anything to influence the decisions.

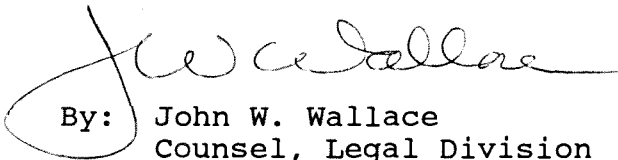
There is an exception to this general rule, which may apply here. Regulation 18700.1 provides that an otherwise disqualified official may appear in the same manner as any other member of the general public before his or her agency in the course of its prescribed governmental function to represent his or her personal interests in real property if the property is wholly owned by the official or members of his or her immediate family.

From the facts you have provided it appears that the councilmembers are the sole owners of their respective properties. If this is the case, they may appear before the Cupertino City Council, in the same manner as any other member of the public, to advocate on behalf of their property interests with respect to the decision from which they are disqualified. However, their comments must be limited to their personal interests, and they should take care to clarify that they are not acting in any official capacity. (Larsen Advice Letter, No. A-87-151, copy enclosed.) The councilmembers still would be prohibited from privately discussing these matters with other members of the city council or with other city officials.

I trust that this answers your questions. If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh
Enclosures

^{3/} Please note, however, that the disqualified members may not attend nor obtain a recording or transcript of closed meetings of the city council relating to the disqualified councilmembers' area of conflict. (Hamilton v. Town of Los Gatos, (1989) ___ Cal. App. 3d ___, 89 Daily Journal D.A.R. 11125.)



City of Cupertino

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Office of the City Attorney

852 N. First Street, Third Floor
San Jose, California 95112
(408) 971-6411

August 29, 1989

Fair Political Practices Commission
428 J Street, Suite 80
Sacramento, CA 95814

Re: Request for Advice

To Whom It May Concern:

This office has been directed by two City Councilmembers to seek an opinion from the Commission regarding their participation in hearings involving the design of a new freeway extension (Highway 85) bisecting the City of Cupertino. The following are the relevant facts.

The City Council has previously approved the extension of the freeway through the City and has executed agreements with the local transit authority and CalTrans. These agreements call for an elevated freeway over Sunnyvale-Saratoga Road. The tentative design, as proposed by CalTrans, provides that the apex of the elevation at that intersection be approximately 25 feet from grade with a possible sound wall which will extend approximately 10 feet higher. The present CalTrans plan also calls for the freeway elevation to taper down to grade some 2,500 feet north of Sunnyvale-Saratoga Road.

The two Councilmembers in question each own and reside in residential units in a condominium development which is adjacent to the Highway 85 right of way. A map showing the proximity of the units to the proposed freeway is enclosed. Each unit is worth in excess of \$100,000 and is within 300 of the proposed freeway right of way, but each is also over 1,200 feet from the intersection of the freeway with Sunnyvale-Saratoga Road.

The present CalTrans plan calling for a "tapering down" of the elevated freeway provides for approximately a ten foot elevation difference to existing grade at the closest point to the two condominium units. In addition to the ten-foot

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elevation difference, there would also be a ten-foot sound wall which would be built regardless of whether the freeway was elevated or at grade.

The freeway is proposed to be built on earth fill which would slope from the road edge to existing grade.

The City Council has scheduled future hearings to consider the CalTrans plan together with other alternatives which would not involve an elevated freeway at the location closest to the two condominium units. In addition, a citizen's group has requested that the Council also consider modifying the general freeway plan to provide for a depressing of the freeway below grade. The first of these hearings is scheduled for September 19, 1989.

A number of proposed alternatives may not involve a foreseeable financial impact on the condominium development because those alternatives involve construction which would be over 1200 feet away, which could not be viewed from the condominiums, which would not have a significant impact on the use, noise, air quality, or traffic within the development, and would have the same financial impact on most of the properties within a 2,500 foot radius from the construction.

However, other alternatives involving the construction of an elevated or depressed freeway within 300 feet of the condominiums could have a foreseeable economic impact on those units.

I request advice on the following issues:

1. Are the Councilmembers precluded from participating in evaluating alternatives which involve construction of an elevated freeway within 300 feet of their condominium units?

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2. Are the Councilmembers precluded from participating in evaluating the construction of a depressed freeway within 300 feet of their condominium units?

3. If the above two questions are answered in the affirmative, should those alternatives be eliminated by a vote of the remaining three Councilmembers, may the two other Councilmembers participate in the remaining alternatives that do not involve construction of an elevated or depressed freeway within 300 feet of their units?

4. If the answers to the above questions are all in the affirmative, may the two Councilmembers be present during the entire hearing, take testimony on all issues, ask questions on all issues, debate all issues, but abstain from voting with respect to any question described in issues 1 and 2? If not, what would be the appropriate procedure?

Thank you for your help in this matter.

Sincerely,



Charles T. Kilian

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enc.



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The two Councilmembers in question each own and reside in residential units in a condominium development which is adjacent to the Highway 85 right of way. A map showing the proximity of the units to the proposed freeway is enclosed. Each unit is worth in excess of \$100,000 and is within 300 of the proposed freeway right of way, but each is also over 1,200 feet from the intersection of the freeway with Sunnyvale-Saratoga Road.

The present CalTrans plan calling for a "tapering down" of the elevated freeway provides for approximately a ten foot elevation difference to existing grade at the closest point to the two condominium units. In addition to the ten-foot

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August 29, 1989
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elevation difference, there would also be a ten-foot sound wall which would be built regardless of whether the freeway was elevated or at grade.

The freeway is proposed to be built on earth fill which would slope from the road edge to existing grade.

The City Council has scheduled future hearings to consider the CalTrans plan together with other alternatives which would not involve an elevated freeway at the location closest to the two condominium units. In addition, a citizen's group has requested that the Council also consider modifying the general freeway plan to provide for a depressing of the freeway below grade. The first of these hearings is scheduled for September 19, 1989.

A number of proposed alternatives may not involve a foreseeable financial impact on the condominium development because those alternatives involve construction which would be over 1200 feet away, which could not be viewed from the condominiums, which would not have a significant impact on the use, noise, air quality, or traffic within the development, and would have the same financial impact on most of the properties within a 2,500 foot radius from the construction.

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4. If the answers to the above questions are all in the affirmative, may the two Councilmembers be present during the entire hearing, take testimony on all issues, ask questions on all issues, debate all issues, but abstain from voting with respect to any question described in issues 1 and 2? If not, what would be the appropriate procedure?

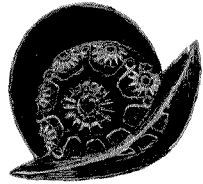
Thank you for your help in this matter.

Sincerely,



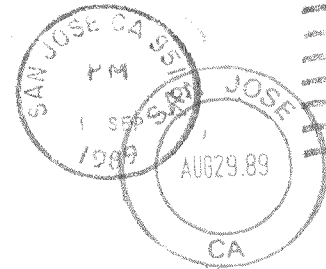
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852 N. First Street, Third Floor
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City of Cupertino



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428 J Street, Suite 80
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California Fair Political Practices Commission

September 12, 1989

Charles T. Kilian
City Attorney's Office
852 N. First Street, Third Floor
San Jose, CA 95112

Re: Letter No. 89-522

Dear Mr. Kilian:

Your letter requesting advice under the Political Reform Act was received on September 6, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John Wallace 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,

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

Kathryn E. Donovan
General Counsel

KED:plh