California
Fair Political
Practices Commission

September 27, 1990

Daniel S. Hentschke
Brown, Harper, Burns & Hentschke
12770 High Bluff Drive, Suite 240
San Diego, CA 92130

RE: Your Request for Advice
Our File No. A-90-520

Dear Mr. Hentschke:

This is in response to your letter requesting advice on behalf of Jack Moore, Solana Beach Councilmember and Redevelopment Agency member, concerning his duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").[1]

QUESTIONS PRESENTED

1. May Mr. Moore, whose residence is approximately 250 feet from the boundary of a redevelopment project area, vote on or participate in decisions of the city council or redevelopment agency that affect the redevelopment project area generally?

2. May Mr. Moore vote on or participate in decisions of the city council or redevelopment agency involving sub-projects in the redevelopment project area that are located more than 300 feet from Mr. Moore's property?

3. Was it necessary for Mr. Moore to abstain from voting on and participating in the decision to approve the redevelopment plan?

CONCLUSIONS

1. Unless the decisions would have no financial effect on Mr. Moore's real property interests, he may not vote on or participate in decisions of the city council or redevelopment agency that affect the redevelopment project area generally.

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[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. Depending on the precise financial effect of the particular decisions, Mr. Moore may be able to vote on or participate in decisions of the city council or redevelopment agency involving sub-projects in the redevelopment project area more than 300 feet from his property.

3. We decline to respond to this question because it relates to past conduct.

FACTS[2]

Solana Beach is a small coastal city in San Diego County. Its population is less than 15,000, and it is less than ten square miles in area. The city council and redevelopment agency have adopted a redevelopment plan for the Solana Beach Redevelopment Project Area (the "redevelopment project area"). The redevelopment project area is generally the commercial and industrial corridor of the city along Interstate 101 and Cedros Avenue. The redevelopment area also reaches up along Lomas Santa Fe Drive to connect with and include the Earl Warren Junior High School and adjoining industrial property.

Mr. Moore owns a residence located approximately 250 feet from the part of the redevelopment project area that is Lomas Santa Fe Drive. It is located between 300 and 2500 feet from what you call the "primary areas" of the redevelopment project area. Your letters also included a map showing the location of the redevelopment project area and Mr. Moore's residence and land use maps.

ANALYSIS

1. Mr. Moore May Not Participate in Decisions Applicable to the Redevelopment Project Area Generally

Section 87100 prohibits any public official from making, participating in making, or otherwise using his official position to influence a governmental decision in which the official has a financial interest. Mr. Moore, a member of the city council and redevelopment agency, is a "public official." (Section 82048.)

The Act provides a four-part test to determine whether a public official has a conflict of interest in a particular governmental decision. First, is the official making, participating in making, or using his official position to influence a governmental decision? (Section 87100.) Second, is it reasonably foreseeable that the decision will affect the official's economic interest? (Section 87103.) Third, is the effect of the decision on the official's economic interest material? (Id.) Fourth, is

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[2] Our advice is based on the facts presented in your letters of July 30 and August 23, 1990.

the effect of the decision on the official's economic interest distinguishable from its effect on the public generally? (Id.) (See generally, Fishburn Advice Letter, No. A-90-386, copy enclosed.)

A. Making or Participating In A Governmental Decision

Your letter mentions decisions by the city council and redevelopment agency on matters affecting the redevelopment plan area generally, including votes to approve agreements with taxing agencies and the plan for the design of a commercial corridor. Such actions are clearly governmental decisions. (Regulation 18700(b), copy enclosed.)

B. Foreseeable Financial Effect

The second issue is the foreseeability that the decision will affect the official's economic interest. The parameters of a public official's economic interest are set forth in Section 87103. For the purposes of the question at hand,

> An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, . . . on:
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> * * *
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> (b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars ($1,000) or more.
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> * * *

(Section 87103.)

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. To be foreseeable, the effect of a decision must be more than a mere possibility, however certainly is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817; In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.)

While we are not aware of the exact amount of Mr. Moore's interest in his residence, it is almost certain that the interest is more than $1,000. Your analysis assumes the decision to adopt the redevelopment plan could have "some diminimus [sic] impact" on Mr. Moore's property. Since your letter assumes that there will be some effect on Mr. Moore's property from the decision to adopt the redevelopment plan, our analysis assumes that decisions affecting the redevelopment project generally and critical to the

redevelopment project plan, will have at least the same foreseeable effect.[3]

C. Materiality

In order to determine materiality, we must first determine whether the public official's economic interest is directly involved in the decision and whether the effect of the decision is material under Section 18702.1. If the official's economic interest is not directly involved in the decision, or the effect of the decision is not material under Section 18702.1, then we examine whether the decision indirectly affects the official's economic interest. We then determine materiality under the appropriate regulation in Sections 18702.2 through 18702.6. (Regulation 18702, copy enclosed.)

Mr. Moore's economic interest, his residential property, is not directly involved in the decisions by the city council and redevelopment agency. An interest in real property is directly involved if the decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease or inclusion or exclusion from any local governmental subdivision the real property that the official has an interest. (Regulation 18702.1(a)(3)(A), copy enclosed.) That is not the case in the general decisions that you have listed. An interest in real property may also be directly involved if the decision concerns designation or adoption of a redevelopment area and the official's property is located in the area. (Regulation 18702.1(a)(3)(D).) That is also not the case here; Mr. Moore's property does not lie within the redevelopment project area. The effects of the decisions are not otherwise material under the other provisions of Regulation 18702.1.

Mr. Moore's economic interest is, however, indirectly involved in the general decisions. An interest in real property is indirectly involved in a decision if any part of the real

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[3] Your letter of July 30, 1990, states that "Two expert real property appraisers have informally indicated that the impact on Mr. Moore's residence from the approval of the redevelopment plan would be diminimus [sic] and extremely difficult to measure. They also indicated that if they were appraising his property they would likely not make any adjustments to value based upon the facts of this particular circumstance. However, a formal appraisal of the property or a formal written statement by an appraiser that the decision to adopt the plan would have not financial impact has not been obtained." (Emphasis added.) It is not clear that the effect of the decision will only be de minimis. Informal indications are insufficient to show the absence of foreseeability and materiality necessary for us to formally advise that there is no conflict of interest.

property is located within a 300 foot radius of the 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 interest. (Regulation 18702.3(a)(1), copy enclosed.) The property affected by the general decisions on the redevelopment project area would be the entire area of the redevelopment project. (Hurst Advice Letter, No. I-90-359, copy enclosed.) Mr. Moore's residence is less than 300 feet from the redevelopment project area.

Your letter assumes some affect from the decision to adopt the redevelopment plan. The general decisions that you have listed (approval of agreements with taxing agencies, approval of a specific plan for design of the commercial corridor) would appear to affect the success or failure of the entire redevelopment project. Thus, like the decision to adopt the redevelopment plan, the general decisions would have some financial effect on Mr. Moore's property, and therefore a material financial effect under the regulations.[4]

D. Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect upon the public generally.[5] (Section 87103.) If the decision does not affect all the members of the public in the same manner, disqualification may be required unless the effect of the decision is the same as the effect on a significant segment of the public. (Regulation 18703, copy enclosed.)

The Commission further expounded on "significant segment of the public" in In re Owen, (1976) 2 FPPC Ops. 77. There the Commission determined the "significant segment of the public" for planning commissioners who owned a residential property across the street from a redevelopment "core area," a vacant lot within the "core area," and a retail business in the "core area," respectively. The analysis began by examining the effect of the decision upon the public officials' respective property interests. The analysis then moved to examine what other properties were affected in the same way as the public officials' property. The analysis then asked whether those property owners similarly

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[4] Of course if the decisions would have no effect upon Mr. Moore's property, the forseeability and materiality legs of the test would fall, and there would be no conflict of interest. (Regulation 18702.3(a)(1).)

[5] Your letter of July 30, 1990, correctly analyzes that Regulation 18703.1, which applies the public generally standard to small jurisdictions, does not apply because Mr. Moore's property is less than 300 feet away from the boundaries of the property which is subject of the decisions.

affected constituted a significant segment of the public. Important was whether the decision would have a "peculiar impact" on the value of the public official's property and whether the decision would have a "particular and identifiable effect" on the public official's property. (Id. at 81-82.)

In the context of redevelopment zones, the Commission has been aware of the actual effect of such zones. "[I]t is intended and anticipated that redevelopment will have a financial impact on real property and businesses located in and near the redevelopment zone." (In re Gillmor, (1977) 3 FPPC Ops. 38, 41, emphasis added.) Given the special effect upon property located in or near redevelopment zones, we have focused, absent facts showing the same effect on other properties, on property that is located at the same distance or less from the redevelopment zone in order to determine the segment of the public that is affected in the same way as the public official. (See Hurst Advice Letter, supra; Wiczynski Advice Letter, No. A-90-162; Case Advice Letter, No. A-90-059; Cosgrove Advice Letter, No. I-89-178; copies enclosed.) This focus is also based on the understanding that properties in the immediate vicinity of a redevelopment project will experience inconveniences such as increased traffic congestion that are not likely to affect property located at a greater distance from the project. (Case Advice Letter, supra.) Here, we cannot ascertain from your letters and the maps and tables enclosed with your letters whether the properties that are the same distance away from the redevelopment zone are a significant segment of the public. In order to make this determination we would have to compare the population of owners of similar residential properties 250 feet away or less from the redevelopment zone with the population of Solana Beach.

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

We have advised in the past that 36 percent of the housing units and population of a county constituted a significant segment of public. (Marsh Advice Letter, No I-90-151, copy enclosed.) We have advised that the 25 percent of a city's population served by a new bridge was a significant segment of the population. (Christensen Advice Letter, No. A-89-422.) We have also advised that two percent of the similarly situated homeowners and one percent of the population of a city's population are not a significant segment of the public. (Remelmeyer Advice Letter, No. 87-210; Zamboni Advice Letter, No. A-89-021; copies enclosed.) The residential units in a development zone constituting five percent of the residences in a city are not a significant segment of the population. (Cosgrove Advice Letter, No. A-89-120.) We have also said that 15 land owners out of the entire city of

Carlsbad was not a significant segment of the population of Carlsbad. (Biondo Advice Letter, No. I-90-241, copy enclosed.)

We are not able to ascertain from your submitted materials whether the effect experienced by Mr. Moore will be shared by other property owners in the city and, if so, who those other property owners may be. You suggest that all other residential properties west of Interstate 5 would be affected in the same way as Mr. Moore's property. While the owners of residential properties west of Interstate 5 would constitute a significant segment of the public, we cannot ascertain from materials provided to us that the effect on those owners is the same as the effect on Mr. Moore. To make such a showing Mr. Moore will need to make a reasonable, good faith showing of the common impact of the governmental decision. What is a reasonable, good faith showing may only be determined on a case-by-case basis. Such showing at minimum should consider the factors listed in Regulation 18702.3(d) (copy enclosed).[6] Although an independent professional appraisal is not always necessary, we have advised in the past that obtaining such an appraisal, which considers the above factors, constituted a reasonable, good faith effort. (Green Advice Letter, No. A-90-075, copy enclosed).

You argue that the Commission in Owen has determined that "the effect of a adoption of a redevelopment plan on property outside of the project area will often be the same regardless of the precise location of that property." (Your letter of August 23, 1990.) Our reading of Owen is to the contrary. In applying the test of "significant segment" to the facts in Owen, the Commission specifically found that location of the public official's property was important: "[W]e conclude that residential home owner within and in the immediate vicinity of the "core area" constitute a "significant segment' of the public . . . ." (Emphasis added.) While the Commission does go on to mention that the plan will have a substantially similar effect on numerous other properties, "perhaps throughout the entire city as well [as] those near the "core area," it is clear that the Commission based its opinion on the fact that the properties located in or near the redevelopment area were a significant segment of the public.

2. Mr. Moore May Be Able To Vote On or Participate In Decisions on Sub-projects In the Redevelopment Project Area and Located More Than 300 Feet From Mr. Moore's Property

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6 While 18702.3(d) applies to properties at a distance greater than 300 feet from the boundaries of the property which is the subject of the decision, the factors listed are still important guidelines in determining the effect on property less than 300 feet away.

Your second question asks whether Mr. Moore may vote on or participate in "specific" project decisions on projects in the redevelopment area and located more than 300 feet from Mr. Moore's residence. We understand your question to concern decisions concerning "sub-projects" that are a part of the redevelopment plan but may not affect the redevelopment project area generally.

A. Making or Participating In A Governmental Decision

A governmental decision includes a vote on a matter, appointment of a person, obligating or committing an agency to any course of action, or entering into a contractual agreement on behalf of an agency. (Regulation 18700(b).) As discussed above, the test for materiality examines the distance of the official's property from the property that is the "subject of the decision." (Regulation 18702.3(a)(1); 18702.3(b).) Accordingly we have said that the conflict-of-interest provisions of the Act focus on an official's financial interests with regard to a particular vote. (Hurst Advice Letter, supra; Nord Advice Letter, A-82-038; Green Advice Letter, No. A-89-214; copies enclosed.) In the context of land use decisions, the distance limitations of Regulation 18702.3 may be measured from the boundaries of the sub-projects within the general project area. (Green Advice Letter, No. A-89-214.)

We are mindful, however, that government decision making may entail a series of interrelated decisions, each decision dependent on its predecessors or a precondition to its successors. In such instances we have determined that where one decision, from which an official is not disqualified, would effectively determine the result of another decision, from which the official would be disqualified, the official is disqualified as to both decisions. Thus for example where two alternative courses of action are presented separately for vote, a planning commissioner disqualified on one course of action also cannot vote on the other. (Hurst Advice Letter, supra; see also Nord Advice Letter, supra.)

As discussed above, Mr. Moore is disqualified from voting or participating in decisions affecting the redevelopment project in general. It is not clear from your letter what effect the votes on the specific sub-project decisions could have on the overall success or failure of the redevelopment project as a whole. Nor is it clear whether Mr. Moore has a financial interest in any of the sub-project decisions. So long as each sub-project decision will not affect the outcome of the overall project or is not interrelated and interdependent with other decisions in which Mr. Moore has a financial interest, the decisions concerning the sub-projects will be considered separate "governmental decisions."

B. Foreseeable Financial Effect, Materiality, Public Generally

Without the precise decisions before us, we cannot determine whether a decision on a sub-project will have a foreseeable financial effect on Mr. Moore's residence. Similarly, without an understanding of the effect of the decision, we cannot determine whether that effect would be "material." It does not appear that decisions on the sub-projects will directly affect Mr. Moore's residence. However there may be an indirect effect. Regulation 18702.3(a)(3) and (b) set forth the standards for determining whether property will be indirectly materially affected by a decision. Absent more facts we must leave that analysis to you.

With regard to the "public generally" element of the conflict-of-interest standard, again without knowing the precise nature of the governmental decision we cannot advise you on whether the effect of such decision on Mr. Moore is the same as the effect on the public generally or a significant segment of the public.

3. We Decline To Render Advice On Past Conduct

Your third question asks about the propriety of past conduct: Mr. Moore's decision to abstain on the vote on adoption of the redevelopment project area. The Commission may decline to give formal written advice and informal assistance if the advice or assistance is sought regarding past conduct. (Regulation 18329(b)(8)(A), (c)(4)(A).) We decline to render advice on this question on this ground. However for general advice on this issue, we recommend our analysis on Question 1.

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

Sincerely,

Scott Hallabrin
Acting General Counsel

By: Mark Morodomi
Staff Counsel

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