

RAVI MEHTA  
CHAIRMAN



## FAIR POLITICAL PRACTICES COMMISSION

May 6, 1997

Lyle L. Lopus  
Assistant City Attorney  
City of Fremont  
Office of the City Attorney  
39100 Liberty Street  
Post Office Box 5006  
Fremont, California 94537

**Re: Your Request for Advice  
Our File No. A-97-224**

Dear Mr. Lopus:

This letter is a response to your request for advice on behalf of city councilmember Judy Zlatnik and planning commissioners Laurie Manuel and Cyndy Mozzetti regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTIONS

1. May city councilmember Judy Zlatnik and planning commissioners Laurie Manuel and Cyndy Mozzetti participate in a governmental decision to impose a moratorium on development in Fremont's Niles District?
2. If the public officials involved are disqualified under the conflict-of-interest provisions of the Act, may the rule of "legally required participation" be invoked to "bring back" a sufficient number of councilmembers to make the governmental decision whether to impose a moratorium on development in Fremont's Niles District?

### CONCLUSIONS

1. Ms. Manuel and Ms. Mozzetti may not participate in any governmental decision regarding the proposed moratorium because there is a reasonably foreseeable material financial effect on their respective interests in real property. Ms. Zlatnik may not participate in any

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<sup>1</sup> Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

governmental decision regarding the proposed moratorium, unless you find that the foreseeability standard is not met. The "public generally" exception could apply to any of the above official's situation, but that is unlikely.

2. The rule of "legally required participation" may be invoked to requalify a sufficient number of public officials to make the government decision whether to impose a moratorium on development in Fremont's Niles District even if a super majority of votes is needed to make the decision.

### FACTS

This request arises out of a proposal that city of Fremont impose a moratorium on development in its Niles District pursuant to Government Code Section 65858. Government Code Section 65858, in pertinent part, provides:

"(a) Without following the procedures otherwise required prior to the adoption of a zoning ordinance, the legislative body, to protect the public safety, health and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses which may be in conflict with a contemplated general plan, specific plan, or zoning proposal which the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time ...."

Decisions made pursuant to Government Code Section 65858 require a four-fifths super majority vote.

The matter is scheduled to come before the planning commission on May 8, 1997. As presently proposed, the moratorium would prohibit all residential development other than construction of single family detached residences on existing lots. Fremont's Niles District contains about 800 single family detached homes and about 250 condominiums. The Niles District also has a business district and some industry.

City of Fremont Councilmember Judy Zlatnik owns a single family house in which she resides in the Niles District. Planning Commissioner Laurie Manuel owns two single family homes in the Niles District, one in which she resides and one in which she rents. Planning Commissioner Cyndy Mozzetti has a property interest in a house in the Niles District. All four houses are zoned for single family detached residential use. Ms. Mozzetti also has property interests in a number of commercial properties in the Niles District. It is not anticipated that the moratorium will be directed at the use of the commercial properties.

You state that Ms. Zlatnik's residence is in a relatively new tract development, and a "change in zoning" affecting her own or any other residential properties would not be likely to result in a change of the use of her property or of her nearby neighbors' properties. Ms.

Manuel's two residences and the residence in which Ms. Mozzetti has an interest are in a much older neighborhood, and it is not unlikely that a change in the zoning affecting their neighborhood might result in new development in that neighborhood. According to Government Code Section 65858, the proposed moratorium cannot last more than two years, and can initially last for only 45 days.

## ANALYSIS

### *Introduction*

The Act was adopted by the people of the State of California by initiative in 1974. The purpose for the conflict-of-interest provisions of the Act is to ensure that public officials would perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who supported them. (Section 81001(b).) In furtherance of this goal, Section 87100 prohibits any public official from making, participate in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

### *Economic Interests in Real Property*

Section 87103 specifies that a public official has a financial interest in a decision 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, among other things, any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more. You have stated that all three public officials that you seek advice on the behalf of have an economic interest in real property according to Section 87103 in the Niles District. Each of these public officials must disqualify themselves from the governmental decision at issue if the decision will have a reasonably foreseeable material financial effect on their interest in real property, distinguishable from the public generally.

### *Foreseeability*

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.) Generally, the Commission has found that it is reasonably foreseeable that a decision to change the zoning of real property in which a public official has an interest will have some financial effect on that interest. (See, for example, *Bianchi* Advice Letter, No. A-95-356; *McMurtry* Advice Letter, No. A-95-021; *Robbins* Advice Letter,

No. A-92-174.)<sup>2</sup>

You imply in your letter that you think that there would be some financial effect on Ms. Manuel's and Ms. Mozzetti's properties. Therefore, the foreseeability standard is met with regard to their economic interests. However, you imply that there may not be a substantial likelihood that there will be a financial effect on Ms. Zlatnik's real property interest. Given our past advice on this issue, we find that there is a substantial likelihood that some financial effect on real property will occur from a zoning change on any property. However, the Commission is not the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Therefore, this issue is left for you to resolve as to Ms. Zlatnik's real property interest.

### ***Materiality***

Regulation 18702 sets forth the guidelines for determining whether an official's economic interest in a decision is "materially" affected as required by Section 87103. Generally, where a governmental decision concerns the zoning or rezoning of property in which an official has an interest, the effect of the decision is deemed material and the official may not participate. (Regulation 18702.1(a)(3)(A).) After reading the enabling statute, Government Code Section 65858, which pertains to interim zoning procedures, and your characterization of the decision as contemplating a "change in zoning," it is clear that Regulation 18702.1(a)(3)(A) applies in the instant case. In addition, the exception in Regulation 18702.1(a)(3)(E) to what is considered zoning or rezoning does not apply. Therefore, the financial effect on the economic interests at issue are material and will be disqualifying unless the public generally exception applies.

### ***The "Public Generally" Exception***

For a disqualifying conflict of interest to exist, the reasonably foreseeable financial effect of a governmental decision on the public official's financial interest must be "distinguishable from its effect on the public generally." (Section 87103.) The material financial effect on a public official's financial interest is *indistinguishable* from the effect on the public generally if the decision will affect a "significant segment" of the public generally "in substantially the same manner" that it affects the public official. (Regulation 18703(a)(1),(2). Copy enclosed.)

For real property interests, a "significant segment" of the public generally can be comprised of any of the following:

- either: (1) 10 percent or more of the population; *or* (2) 10 percent or more of all property owners, home owners, or households in the jurisdiction of the commission or your district (Regulation 18703(a)(1)(A)(i), (ii)); *or*
- at least 5,000 individuals who are residents of the jurisdiction (Regulation 18703(a)(1)(C)); *or*

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<sup>2</sup> It is not necessary that the zoning change be permanent to find that there is some effect.

- If neither of the above are met, if “due to exceptional circumstances regarding the decision” it is determined that a significant segment of the population is affected. (Regulation 18703(a)(1)(D).)

“Substantially the same manner” is defined in Regulation 18703(a)(2):

“(2) Substantially the Same Manner: The governmental decision will affect the official’s economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (a)(1) of this regulation.”

You have not provided us with sufficient facts about the proposed change to the zoning laws to allow us to make a determination on this issue.

#### ***General Discussion of “Legally Required Participation” Exception***

Section 87101 permits an official who is otherwise disqualified from participation under Section 87100 to make or participate in the making of a governmental decision when the official’s participation is legally required. Regulation 18701 (copy enclosed) provides that this exception does not apply when there is an alternative source of decision consistent with the purposes and terms of the statute authorizing the decision; when the disqualified official’s vote is merely needed to break a tie; or where a quorum can be convened of other members of the agency who are disqualified under Section 87100, whether or not such other members are actually present at the time of the disqualification. These rules apply to decisions which require a four-fifths. (*Leidigh* Advice Letter, No. A-93-130a.)

You have provided no facts indicating whether there is an alternative source through which the decision regarding the moratorium issue may be made. Further, you have not provided any other information regarding the vote. Thus, you must apply the above general rules to determine if the “legally required exception” may be used.

#### ***Selection Process***

To apply the “legally required participation” exception, not all officials who have been disqualified can be requalified to vote, but only the number sufficient to permit the public body to act. (*In re Hudson* (1978). 4 FPCC Ops. 13, 17.) To select who those officials are, the preferred method of selection is by any random means which is “impartial and equitable.” (*In re Hudson, supra.*) If two members are disqualified under Section 87100 for a decision requiring a four-fifths vote, then one of the two disqualified members may be requalified. (*Leidigh* Advice Letter, *supra.*)

#### ***Conclusion***

Ms. Manuel and Ms. Mozzetti may not participate in any governmental decision

regarding the proposed moratorium unless the public generally exception applies since there is a reasonably foreseeable material financial effect on their respective interests in real property. Ms. Zlatnik may not participate in any governmental decision regarding the proposed moratorium unless you find that the foreseeability standard is not met or that the public generally exception applies. Also, it is possible that the "legally required participation" exception may apply.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell  
General Counsel

A handwritten signature in black ink, appearing to read 'Marte Castaños', with a long horizontal flourish extending to the right.

By: Marte Castaños  
Staff Counsel, Legal Division

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