MEMORANDUM OF LAW

DATE: September 16, 1991

TO: Mayor Maureen O'Connor

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Arising from Ownership of "Right of First Refusal" Interest in Real Property/Item No. 33 on Council Docket of September 16, 1991

This is in response to your memorandum of September 12, 1991, in which you ask whether you have a conflict of interest arising from your ownership of a "right of first refusal" in real property which would prohibit you from participating in or voting on Item No. 33 of the Council Docket of September 16, 1991.

BACKGROUND FACTS

You hold a "right of first refusal" in a single family residence located at 311 Dunemere Drive, as listed on page B-1 of your most current Statement of Economic Interest ("SEI"). The value of this interest is listed on your SEI as between $1,000 and $10,000.

Item No. 33 on the September 16 Council Docket pertains to a request for an appeal from a Planning Commission decision to grant a Coastal Development Permit ("CDP"). The CDP would allow demolition of an existing house and construction of a new two story, 3,916 square foot residence on a lot located a 7257 Dunemere Drive.

The residence at 311 Dunemere in which you have an interest is located 230-250 feet from 7257 Dunemere Drive.

APPLICABLE LAW

The law to be applied in this case is the Political Reform Act of 1974 (Government Code section 81000 et seq.) (the "Act"). In lieu of setting out all of the relevant law and applicable regulations, we attach a copy of a Memorandum of Law dated September 11, 1989 (with its Attachment C only), which discusses the applicable law in some detail.

ANALYSIS

Under the present facts, it is clear that you have an economic interest within the meaning of the Act, by virtue of the fact that you hold a "right of first refusal" in the Dunemere property, which is valued at $1,000 or more.

Therefore, the question presented is whether the governmental decision before Council, that is, whether to grant a hearing for the appeal pertaining to the property at 7257 Dunemere, would reasonably foreseeably

have a material financial effect on your interest in the property at 311 Dunemere. We find that the decision will have that effect for the following reasons.

According to Fair Political Practices Commission ("FPPC") rules adopted in October 1988, whether an interest in real property will be materially affected by a governmental decision is determined by application of FPPC Regulations 18702.1 and 18702.3. (2 Cal. Code of Regs. 18702.1 and 18702.3.) If a public official's real property is directly involved in the governmental decision at hand, then regulation 18702.1 applies. For example, if a public official's property were to be acquired by the City for public use, then Regulation 18702.1 would apply. In the present case, the property at 311 Dunemere will not be directly affected by the Council's decision pertaining to 7257 Dunemere, therefore, Regulation 18702.1 does not apply.

If, on the other hand, the official's real property is only indirectly involved in the governmental decision, then Regulation 18702.3 would apply. For decisions involving indirect impacts on real property, the determination of materiality depends primarily on the number of feet the public official's property is from the property that is the subject of the governmental decision.

The rules are explained more fully below.

A. The 300-foot Rule:

If a public official's property is within 300 feet of the subject property, then the public official must show that the decision will have no financial effect on the public official's property. In other words, with properties that close to the subject property, the FPPC creates a presumption that there will be a material financial effect on the public official's property resulting from the governmental decision (Regulation 18702.3(a)(1)).

B. The 300 to 2500-foot Rule:

If a public official's property is between 300 and 2500 feet from the subject property, then the result will be material if there is a reasonably foreseeable change (increase or decrease) in the fair market value of $10,000 or more, or change (increase or decrease) in rental value of $1,000 or more per twelve month period in the official's property (Regulation 18702.3(a)(3)).

C. The Over 2500-foot Rule:

If a public official's property is more than 2500 feet from the subject property, then the decision will not have a material effect unless special circumstances will make the fair market value or rental value change by the amounts stated above and there will not be a similar effect on at least 25% of all properties within 2500 feet of the public official's property or there are not at least ten other properties within 2500 feet of the public official's property (Regulation 18702.3(b)(1) and (2)).

In short, the FPPC regulations shift the presumptions on materiality depending on how close the public official's property is to the subject property.

The present facts show that the property at 311 Dunemere is located less than 300 feet from the property at 7257 Dunemere, that is, the property which will be the subject of the Council's decision. Since the property is less than 300 feet from the subject property, FPPC regulation 18702.3 places the burden on you as the public official to show that there will be no financial effect on your property resulting from the Council's decision to grant or deny the appeal.

The question requires a factual determination. Therefore, we asked City Manager Jack McGrory for his assistance. Mr. McGrory determined that there will be some financial impact on the property at 311 Dunemere because there will certainly be a change in fair market value to the property at 311 Dunemere as a result of the construction at 7257 Dunemere. Under the FPPC rules, the change in value does not have to be large to be "material" if the official's property is within 300 feet of the subject property. Therefore, we conclude that there will be a material financial effect on your interest in the Dunemere property and, consequently, you will have a conflict of interest that prohibits you from participating in or voting on Item 33 of the September 16, 1991, Council Docket.

There are no facts present to indicate that you would fall within the "public generally" exception, which would have enabled you to participate in the decision despite the conflict of interest.

CONCLUSION

You have a conflict of interest arising from your ownership of a "right of first refusal" in property at 311 Dunemere that prohibits you from participating in or voting on Item 33 of the September 16 Council Docket pertaining to the property at 7257 Dunemere.

JOHN W. WITT, City Attorney
By
Cristie C. McGuire
Deputy City Attorney

CCM:jrl:011(x043.2)
Attachments
cc Jack McGrory, City Manager
ML-91-69