

# State of California



## Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement • • Statements of Economic Interest  
(916) 322-5662                      322-5660                      322-5901                      322-6441                      322-6444

January 31, 1985

Mark G. Sellers  
Office of the City Attorney  
P.O. Box 1496  
Thousand Oaks, CA 91360

Re: Your Request for Advice  
Our File No. A-84-326

Dear Mr. Sellers:

Thank you for your letter requesting advice regarding the duties of a member of the Planning Commission for the City of Thousand Oaks under the conflict of interest provisions of the Political Reform Act.<sup>1/</sup> My advice is based upon the facts provided in your letter.

### FACTS

A member of the Planning Commission for the City of Thousand Oaks is an attorney. He is a sole practitioner whose clients include approximately 20 homeowner associations of residential development projects in Thousand Oaks. Each homeowner association has paid him in excess of \$250 for his services during the past 12 months.

Each homeowner association is a nonprofit association made up of the property owners in a particular residential development. The activities of the homeowner associations generally include collecting dues, maintaining common areas, and obtaining insurance. Some associations also enforce property restrictions, serve as architectural review boards, and act as a representative for the homeowners on land use and development issues before the City Planning Commission and the City Council. When a new development is proposed in the City, the Planning Commission and City Council generally solicit comments

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<sup>1/</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise specified.

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from homeowner associations for the residential developments located near the proposed new development.

The Planning Commissioner's legal services for the homeowner associations generally involve the enforcement of the conditions, covenants, and restrictions of a given tract and the collection of delinquent association fees. Since his appointment to the Planning Commission, the Planning Commissioner has not engaged in any legal or advisory services to any homeowner association concerning its review of or position on any proposed development or other land use issues, and he intends to refrain from providing those services in the future.

#### QUESTION

Must the Planning Commissioner disqualify himself from participating in the decision on a proposed development or land use request if a homeowner association which has paid him in excess of \$250 during the preceding 12 months expresses its support of or opposition to the proposed development or land use request?

#### CONCLUSION

The Planning Commissioner must disqualify himself from participating in the decision on a proposed development or land use request if it is reasonably foreseeable that the decision would have a significant effect on a homeowner association which has paid him in excess of \$250 during the preceding 12 months, whether or not the homeowner association expresses its support of or opposition to the proposed development or land use request. Disqualification is not required if the decision will not affect the association, even if it will affect individual homeowners who are members of the association.

#### DISCUSSION

The Political Reform Act prohibits any public official from making, participating in, or using his official position to influence a governmental decision when it is reasonably foreseeable that the decision will have a material effect on a source of income to the public official that is distinguishable from the effect on the public generally. Sections 87100 and 87103(c).

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If a homeowner association is a source of income of over \$250 to the Planning Commissioner through payment for legal services, the Planning Commissioner must refrain from participating in any Planning Commission decisions which could have a material financial effect on the homeowner association. In its regulation which defines the term "material financial effect," the Commission states only that a material effect on a source of income that is a nonprofit organization is a significant effect on that organization. 2 Cal. Adm. Code Section 18702(b) (3) (D). Significant effects on a homeowner association would include significant effects on the amount of fees it receives from its members. It would not include effects on the homeowner members of the association which do not increase or decrease the fees to the association. The fact that a homeowner association has taken a position in support of, or in opposition to, a particular decision pending before the Planning Commission may be evidence that the decision could have a material financial effect on the homeowner association, but is not necessarily determinative of a material financial effect on the homeowner association.

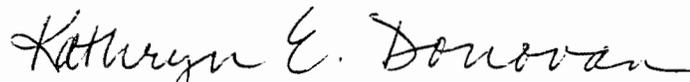
Accordingly, the Planning Commissioner must examine each decision before the Planning Commission and determine whether that decision could have a material financial effect on any homeowner association which is a source of income to him. If he determines that one or more of those homeowner associations would be materially affected by the decision, he is required to disqualify himself from making, participating in, or using his official position to influence that decision.

In addition, the Planning Commissioner must refrain from making, participating in, or using his official position to influence any decision affecting a client homeowner association when there is a nexus between a governmental decision and the purpose of the legal services the Planning Commissioner provides to the association. 2 Cal. Adm. Code Section 18702(b) (3) (B). In effect, the Planning Commissioner may not accomplish as a member of the Planning Commission what he is paid to do as the attorney for the homeowner association. You have stated that the Planning Commissioner will refrain from providing legal services or advice to any homeowner association in connection with the association's review of, or position on, any development project or land use decision. As long as the Planning Commissioner refrains from providing those services, the "nexus" rule would not apply.

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

Very truly yours,



Kathryn E. Donovan  
Counsel  
Legal Division

KED:plh  
Enclosure



Dec 31 10 47 AM  
*City of Thousand Oaks*

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RICHARD P. STALEY  
CITY ATTORNEY

December 21, 1984

Janice McLean  
Fair Political Practices Commission  
P. O. Box 807  
Sacramento, California 95804

Re: Request for Opinion Regarding Possible Conflict of Interest

Dear Ms. McLean:

Pursuant to Mr. Martello's telephone conversation of November 6, 1984, I am requesting, on behalf of the City of Thousand Oaks, a letter opinion as to whether the appointment and service of a new Planning Commissioner, who is a local attorney, presents a potential conflict of interest insofar as many of his clients are organized homeowners associations who may actively support or oppose proposed development projects which are reviewed by the Thousand Oaks Planning Commission.

FACTUAL SUMMARY

Many of the residential development projects in Thousand Oaks have included the creation and continuation of an active homeowners association, established for the implementation and enforcement of the project's CC&R's. These associations are created for condominium projects as well as single family housing developments. These homeowners associations are nonprofit associations made up of the property owners in that particular subdivision. Each year the property owners can vote and elect nonsalaried boards of directors who run the associations, conduct meetings, collect dues, obtain insurance and maintain the common areas. There are approximately seventy-five (75) such associations within the city.

The level of activity of the individual associations differs from one to the other. Some serve only to collect dues and maintain common areas such as greenbelts, parks and streets. Some associations also enforce parking restrictions, serve as architectural review boards, and most importantly, for purposes of this opinion request, act as a representative for the homeowners on land use and development issues of interest before city commissions and councils. The City of Thousand Oaks, as a general

practice, solicits the input of neighboring homeowners associations for a new development which input is presented to the Planning Commission and City Council. After a city request for input, the association's board of directors hold a special meeting to review the proposed development project and the homeowners who attend vote on an official homeowners' position to be conveyed to the Planning Commission and City Council. These homeowner association meetings may be attended by only one or two or as many as a hundred plus homeowners, depending on the size of the association and how controversial the particular project may be.

The new Planning Commissioner is an attorney who maintains an office within the City of Thousand Oaks. He is a sole practitioner. As part of his practice for the past few years, he represents or has represented approximately twenty (20) homeowner associations, which are located within the city limits. He is retained by vote of the board of directors. The vast majority of his work for these homeowner associations (perhaps 95%) involves non-land use issues such as the enforcement of the CC&R's of a given tract (i.e., maintenance of property/prohibition against storage within a sideyard area; or prohibition against maintaining a business on the premises) and the collection of delinquent association fees (monthly dues) and/or foreclosure for nonpayment of those fees.

Since his appointment as commissioner, he has not engaged in any legal or advisory services to any homeowner associations concerning its review or position on any proposed development or land use issues and he will not do so in the future. He has received in excess of \$250.00 in income from each of these homeowner associations over the past twelve (12) months for legal services.

Question:

If one of his homeowner association clients or former homeowner association clients (which client has paid more than \$250 for legal services during the past 12 months) appears before the Planning Commission to oppose or support or submits a written position on any development project or land use request, must this commissioner disqualify himself?

STATUTES AND REGULATIONS INVOLVED

Government Code §87103(c):

As sole proprietor of his law practice, and as a recipient of at least \$250.00, within the prior twelve months, from each of the homeowner associations he represents, issues are presented under Government Code §87103(c) and Title 2, §18702(b)(3) [source of income], California Administrative Code.

Must a Planning Commissioner abstain from voting on the proposal because his vote may negatively affect a former or present client's

willingness to continue to employ him as their attorney on unrelated matters, thus, affecting his source of income from that client?

This situation could be analogized to a commissioner who owns many other types of businesses, such as the owner of an automobile agency where car purchasers of that agency appear at a hearing and oppose the project. The commissioner's voting on the project, it could be argued, may cause those people not to patronize his business establishment in the future. Such an argument may present a potential for an overly speculative conflict forcing a commissioner to abstain on voting based upon the mere chance that the client or patron showed up at the hearing to protest and the client just may seek a new attorney at some time in the future. It is just as easy to speculate that clients or patrons who are very concerned about the development project and did not show up or contact the commissioner could decide to retain or terminate future business with that commissioner based upon his vote. Also, since topics are unrelated, the commissioner's vote may have no effect whatsoever on future patronizing decisions. Certainly, if the client was the applicant, that would be grounds for disqualification. Some concern has been expressed that if a conflict exists, what if someone wants to negate a commissioner's vote and that person convinces a client of the commissioner to appear at the hearing and oppose the project? Is serving the public good?

§18702(b)(3)(B):

In Mr. Martello's telephone conversation, you discussed other possible areas of conflict under §18702 and one of those was the nexus conflict of §18702(b)(3)(B). A nexus problem may be presented if the commissioner was retained by the homeowners association as a lobbyist, consultant or representative to influence governmental decisions or to provide support to the association's efforts in mobilizing support or opposition to a development proposal. It does not appear to be a nexus between the governmental decision and the purpose for which the official receives income, if the nature of the Planning Commissioner's services are primarily involved with debt collection and covenant enforcement.

Business Investment: 18702(b)(1):

The commissioner holds a direct investment interest in his law firm of \$1,000 or more, and thus it must be determined whether it is reasonably foreseeable that the effects of his decision at the commission will have a significant financial effect on his law practice.

It seems difficult or impossible to pinpoint the effects of a governmental decision, if any, on a homeowner association's continued willingness to employ the commissioner as their "collections" counselor.

REQUEST

The above is intended merely as a brief recall of some of the issues you discussed by telephone and some concerns expressed by the elected and appropriate officials who must deal with the day-to-day situations confronted on planning commissions and city councils. I request your review, comments, and opinion on the above-described factual circumstances and the existence, if any, of a conflict of interest. If we can provide any other or further information, please do not hesitate to contact us.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Mark G. Sellers", with a long horizontal flourish extending to the right.

MARK G. SELLERS  
Acting City Attorney

jt:C2