



# California Fair Political Practices Commission

December 19, 1988

Ms. Carol Flynn  
Deputy City Attorney  
City of Anaheim  
200 South Anaheim Boulevard  
Suite 356  
Anaheim, CA 92805

Re: Your Request for Advice  
Our File No. I-88-250-430

Dear Ms. Flynn:

This is in response to a request for advice from Jack L. White, City Attorney for the City of Anaheim (hereafter "city"). Mr. White requested that we send our response directly to you. The request for advice asks whether the Political Reform Act<sup>1/</sup> permits various members of the city's planning commission to participate in a decision concerning modification of the height limitation on single family dwellings in the city's scenic corridor overlay zone. You have informed us that the request seeks general guidance as to future actions; consequently, we treat the request as one for informal assistance.<sup>2/</sup>

---

<sup>1/</sup> 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.

<sup>2/</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

QUESTIONS

Mr. White asks whether planning commissioners in the following situations are precluded from participation in planning commission decisions concerning modification of the height limitation on single family dwellings located in the city's scenic corridor overlay zone:<sup>3/</sup>

1. A commissioner who owns a single family dwelling located in the zone and who also owns a real estate office located in the zone which does 95% of its business in the zone.
2. A commissioner who owns a non-real estate business located in the zone.
3. A commissioner who owns a real estate office located in the city, but not in the zone, which does little, if any, business in the zone.

CONCLUSIONS

1. A decision concerning the height limitation on single family dwellings in the zone will not affect owners of these dwellings in a manner that is distinguishable from the public generally. However, such a decision will affect real estate offices that do 95% of their business in the zone in a manner that is distinguishable from the public generally. Therefore, a commissioner whose real estate office does 95% of its business in the zone may not participate in decisions concerning the height limitation.

2. Without additional facts as to the nature of the non-real estate business located in the zone we are unable to advise you on whether a commissioner who owns such a business may participate in the decision. To determine the nature and extent of the facts necessary for us to make such a determination, please refer to Section 87103 and Regulations 18702-18702.6 and 18703.

3. A decision concerning the height limitation on single family dwellings in the zone will not have a material financial effect upon real estate offices located in the city but not in the zone and that do little or no business in the zone. Therefore, a commissioner who owns such a business may participate in decisions concerning the height limitation.

---

<sup>3/</sup> Mr. White's letter, dated October 28, 1988, posed two questions that were different from those now addressed. Pursuant to our telephone conversation on December 8, 1988, you requested that we specifically address the questions stated in this letter.

#### FACTS

The City of Anaheim's zoning ordinance creates a scenic corridor overlay zone of approximately 14,400 acres located on the eastern edge of the city. The zone comprises approximately 33% of the city's land area and, as of 1987, contained approximately 23% of the city's single family dwellings (approximately 9,000 out of 39,600 single family dwellings city-wide). While population statistics on the zone are not current, it appears that it contains at least 14% but no higher than 28% of the city's population.<sup>4/</sup>

Single family dwellings located in the zone are restricted to 25 feet in height, while those not in the zone are limited to either two stories or 35 feet in height. The city's planning commission has received numerous height variance requests from owners of single family dwellings located in the zone. As a result, the planning commission staff has prepared a report setting forth alternatives that the planning commission can pursue in responding to the numerous variance requests.

Included among the alternatives are maintenance of the current 25-foot limit, increase of the limit and relaxation of the limit in specified circumstances.

#### ANALYSIS

Section 87100 prohibits any public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his immediate family,<sup>5/</sup> or on:

---

<sup>4/</sup> The city's current population is approximately 234,000. As of 1983, the zone was known to contain approximately 32,000 persons (approximately 14% of 234,000). At build-out, which apparently has not yet occurred, the zone's projected population is 65,000 (approximately 28% of 234,000).

<sup>5/</sup> An official's "immediate family" are his spouse and dependent children. (Section 82029.)

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103.

We assume that the commissioner who, in your hypothetical, owns a single family dwelling in the zone has a direct investment in the real property that is worth at least \$1,000. We also assume that this commissioner, as well as the one who owns a real estate office outside the zone, has at least a \$1,000 investment in his or her real estate business, is at least a partner in the business or has received income from the business during the past 12 months aggregating \$250 or more. You have asked us to assume that these commissioners do not own the real property on which their businesses operate. Therefore, these commissioners must disqualify themselves from participating in decisions concerning the height limitation if the decisions would foreseeably and materially affect their residential property or their businesses in a manner that is distinguishable from their effect on the public generally.

We assume that the commissioner who, in your hypothetical, owns a non-real estate business in the zone has a direct investment in the business worth at least \$1,000, is a partner in the business or receives income from it. This commissioner may also own the real property on which the business operates. Accordingly, he or she will be disqualified from participating in decisions concerning the height limitation if those decisions would foreseeably and materially affect the business or the real property on which the business operates in a manner that is distinguishable from the effect of the decision on the public generally.

#### Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required; however, if the effect is a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPFC Ops. 198, copy enclosed.)

The decision concerning the height limitation of single family dwellings in the zone includes many options. One option is to maintain the height limitation as it is. If this is done, one possible result is that homes built adjacent to the zone can be built with higher roof lines and, presumably, with more square footage and greater architectural diversity. This, in turn, may have the effect of restricting the value of homes in the zone vis-a-vis homes adjacent to the zone. Another option is to raise the height limitation and thereby permit the addition of square footage and architectural diversity to homes in the zone. This, presumably, would have the effect of increasing the value of homes in the zone. A third option is to raise the height limitation for some areas in the zone but not others. This decision would probably increase the value of homes subject to the modification vis-a-vis homes not subject to the modification.

Obviously, the options available to the planning commission are numerous and the precise effect of the selection of any one option is uncertain. Nevertheless, we believe that there is a substantial likelihood that the selection of any of the available options will, at the very least, have a long-term effect on the value of single family dwellings in the zone.

Therefore, it is reasonably foreseeable that the planning commission's decision will have an effect upon the value of the home owned by the commissioner who resides in the zone. Any effect on the value of property in the zone will also have a foreseeable effect on real estate commissions, since real

estate commissions are based on the selling price, or fair market value of property. (See In re Oglesby (1975) 1 FPPC Ops. 71, 80, copy enclosed.) Thus, it is reasonably foreseeable that the decision will affect the real estate office of this commissioner because it does 95% of its business in the zone. It is also reasonably foreseeable that the decision will affect the real estate commissions on any property sold in the zone by the commissioner whose real estate office is located outside the zone.

As to the commissioner who operates a non-real estate business in the zone, we are unable to determine on the basis of the facts provided whether there is a substantial likelihood that the decision will affect his business. For instance, if the business involves architecture or construction, it is foreseeable that some benefit may inure to its owners if the height limitation is modified. On the other hand, if the business is a restaurant or clothing shop, the effects of the decision may be practically non-existent. Therefore, absent additional information concerning the nature of this commissioner's business, we are unable to further analyze whether this commissioner is able to participate in a decision on the height limitation.

#### Materiality

As stated above, it is reasonably foreseeable that a decision on the height limitation will affect the property value of the home owned by the commissioner who lives in the zone and the businesses of the commissioners who own real estate businesses. We must next determine whether the effect of such a decision will be "material" as to these commissioners.

Regulation 18702 sets forth the general approach to the question of whether the effect of a decision is material. Generally, if the decision directly affects an official's economic interests then the question of materiality is analyzed under Regulation 18702.1. If the decision indirectly affects an official's economic interests, the question of materiality is analyzed under Regulations 18702.2 through 18702.6. (Section 18702(a).)

The decision on the height limitation has a direct effect upon single family dwellings in the zone. Therefore, as to the commissioner who owns a home in the zone, the analysis of materiality would begin with Regulation 18702.1. Under this regulation, the effect of a decision is deemed material if the decision involves the zoning or rezoning of real property in which the official has an interest of \$1,000 or more. (Section 18702.1(a)(3)(A).) However, subdivision (a)(3)(E) of

Regulation 18702.1 states that the terms "zoning" and "rezoning" do not include amendments to an existing zoning ordinance or other land use regulation where the change involves matters such as the uses permitted or applicable development standards. In other words, if the zoning designation is to remain intact and the change only involves details within the zoning designation, there is no zoning change and subdivision (a)(3)(A) of Regulation 18702.1 does not apply.

It appears from the information provided to us that any modification of the height limitation by the planning commission would not involve the rezoning of the zone but merely the amendment of the zoning code which creates the zone. Accordingly, under the provisions of Regulation 18702.1(a)(3)(E), the height limitation decision does not directly affect the real property interest of the commissioner who owns a home in the zone. Therefore, as to this commissioner, the question is whether the decision indirectly affects his real property interest.

Regulation 18702.3 sets forth guidelines on whether a real property interest which is indirectly affected by an official's decision is nevertheless "material." Subdivision (c) of this regulation would apply to the commissioner who owns a home in the zone. This subdivision refers to the monetary standards in subdivision (a)(3)(A) and (B) of Regulation 18702.3 to determine the materiality question. Subdivision (a)(3)(A) states that a decision is material if it has a reasonably foreseeable financial effect of "\$10,000 or more on the fair market value of the real property in which the official has an interest." Though the financial effect of the decision cannot be easily ascertained, it is possible that the planning commission would decide to increase the height limitation and thereby permit homeowners to add square footage to their homes. In such a case, it is reasonably foreseeable that the decision would act to increase the value of these homes by \$10,000 or more. On this basis, the decision would be material as to this commissioner because he or she owns a home in the zone.

As to this commissioner's ownership of a real estate office that does 95% of its business in the zone, it is clear that the height limitation decision would not directly affect this business. Therefore, Regulation 18702.1 is not applicable to this commissioner. However, the decision would have an indirect effect on this commissioner's business. Regulation 18702.2(g)(1) states that the effect of a decision is material as to a business entity in which an official has an economic interest if the decision will result in an increase in the business' gross revenues of \$10,000 or more in a fiscal year.

As stated above, increases in the value of real property correspondingly increase the commissions received by real estate businesses for the sale of the property. (In re Oglesby, supra, 1 FPPC Ops. at p. 80.) Again, while the effects of any height limitation decision by the planning commission are speculative, we nevertheless feel that one potential effect of a modification of the height limitation is to increase property values of homes in the zone. If this occurs, it is reasonably foreseeable that many real estate offices will increase their annual gross revenues from the sale of homes in the zone by \$10,000 or more. Therefore, the height limitation decision is material to the commissioner whose real estate office does 95% of its business in the zone.

However, we do not feel that the decision is material as to the commissioner whose real estate office does little or no business in the zone. As with the commissioner whose real estate office does 95% of its business in the zone, Regulation 18702.2(g)(1) states that the effect of the decision is material if the gross revenues of the affected business will increase or decrease by \$10,000 or more in a fiscal year. In optimum conditions, a real estate commission is normally 6% of the gross sale price of a home. Therefore, this commissioner's office would have to increase the annual aggregate sale price of homes it sells in the zone by \$167,000 to net a \$10,000 increase in commissions. Since this office does little or no business in the zone it appears that the \$10,000 threshold will not be met. The decision would not be material as to this commissioner and, therefore, he or she is not disqualified from participating in the decision.

#### Public Generally

The remaining issue is whether the decision on the height limitation will affect the commissioner who owns a home and real estate office in the zone in a manner that is distinguishable from the effect on the public generally. For the "public generally" exception to apply, a decision must affect the official's interests in substantially the same manner as it will affect a significant segment of the public. (Regulation 18703.)

As to this commissioner's ownership of a home in the zone, the decision will affect his home in the same manner as the public generally if it can be shown that homeowners in the zone constitute a significant segment of the public. As to his or her real estate office, the decision will affect the business in the same manner as the public generally if it can be shown that real estate businesses selling homes in the zone constitute a significant segment of the public.

In the matter of In re Ferraro (1978) 4 FPPC Ops. 62, 67 (copy enclosed), the Commission stated that a group that was large in numbers and heterogeneous in quality constituted a significant segment of the public for the purposes of the "public generally" exception. Applying these principles, the Commission concluded that owners of 3 or fewer rental units in the City of Los Angeles constituted a significant segment of the public.

In the matter of In re Owen (1976) 2 FPPC Ops. 77, 81 (copy enclosed), the Commission concluded that homeowners in the immediate vicinity of the "core area" in the City of Davis constituted a significant segment of the public. However, in the matter of In re Brown (1978) 4 FPPC Ops. 19 (copy enclosed), the Commission held that a decision affecting less than 50% of the retail business community in a city did not affect a significant segment of the public. The Commission has also issued numerous advice letters on the "significant segment of the public" question.<sup>6/</sup>

A common thread in the Commission's analysis of this question appears to be the test first articulated in Ferraro, supra: whether the group under consideration is large and diverse with its only common bond being the relationship in the grouping. In the Ferraro and Owen opinions, supra, a city's owners of rental property and homeowners living near a particular area of a city were found to meet the Ferraro test. In the Brown opinion, supra, members of the retail business community, though apparently large in number, were not sufficiently diverse to meet the Ferraro test.

Applying this analysis to the matter at hand, we conclude, on the basis of the information presented to us, that owners of homes in the city's scenic corridor overlay zone constitute a significant segment of the public. This group owns approximately 9,000 of the 39,600 single family homes in the city (approximately 23%). Furthermore, the scenic corridor itself covers approximately 15 square miles, which represents approximately one-third of the city's land area. A segment of the public that is this large, that covers such a major portion of the city's land area and whose only common bond is its location in the zone appears to be sufficiently diverse to represent a significant segment of the public. Therefore, we conclude that, in his capacity as a homeowner in the zone, the commissioner will be affected by the decision on the height limitation in a manner that is no different from the public generally.

---

<sup>6/</sup> See, for example: Waggoner Advice Letter, No. A-85-89; Levinger Advice Letter, No. A-87-061; Morgan Advice Letter, No. A-81-507; and Hazard Advice Letter, No. A-86-302 (copies enclosed).

Ms. Carol Flynn  
December 19, 1988  
Page 10

In applying the same analysis to this commissioner's real estate business, it is clear that his business is part of a much smaller group (e.g., real estate brokers) which is homogeneous in nature. This group does not meet the Ferraro test as constituting a significant segment of the public. Therefore, as to his real estate business, this commissioner will be affected by a decision on the height limitation in a manner that is different from the public generally. Because of this difference, this commissioner may not participate in the height limitation decision.

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

Sincerely,

Diane M. Griffiths  
General Counsel

  
By: Scott Hallabrin  
Counsel, Legal Division

DMG:SH:ld

Enclosures



Office of  
CITY ATTORNEY

CITY OF ANAHEIM, CALIFORNIA

CIVIC CENTER, 200 South Anaheim Boulevard, Third Floor  
Anaheim, California 92805

FPPC

Nov 7 9 18 AM '88

Telephone:  
714/999-5169

October 28, 1988

Diane Griffith, Esq.  
Fair Political Practices Commission  
P.O. Box 807  
Sacramento, CA 95804-0807

Dear Ms. Griffith:

The City of Anaheim requests advice on whether a conflict arises under the Political Reform Act, based on the following fact situation:

Under the City's Zoning Ordinance there is a scenic corridor overlay zone covering approximately 14,400 acres of the easternmost area of the City. Enclosed is a copy of a map of the City outlining the Scenic Corridor area. The City as a whole is 45.019 square miles. Absent the scenic corridor area the City is approximately 99 percent developed. With the scenic corridor, the City is approximately 80% developed. As can be seen on the enclosed map, the scenic corridor comprises approximately one-third of the City. The total population of the City is 234,000. As of 1983 the population in the scenic corridor was 32,041. The projected population at build out in the scenic corridor is 65,000. As of July of 1987 the City had 39,632 single-family dwellings of which 9,004 (or 22.72%) were in the scenic corridor.

The scenic corridor overlay zone restricts the height limit on single-family residential structures to 25 feet. The height limit on single-family residences outside the corridor is either two stories or 35 feet. Enclosed is a report to the Planning Commission explaining the proposal to change the height limit in the scenic corridor overlay zone.

Please address the following issues:

- 1) Do Planning Commission members residing within the scenic corridor overlay zone have a conflict of interest precluding their participation in the decision-making process relating to amending the height limit?

Diane Griffith, Esq.  
October 28, 1988  
Page 2

- 2) Do Planning Commission members who may have businesses in the scenic corridor overlay zone have a conflict of interest precluding their participation in this matter? (Note: the height study relates to single-family residential structures.)
- 3) Does a Planning Commissioner who owns a realty office located in the scenic corridor overlay zone and who does approximately 95% of his business in the scenic corridor have a conflict precluding his participation in the height study decision?

Does the fact that he does business throughout the City and the State of California affect the conflict analysis?

- 4) Does a Planning Commissioner who has an office in the City located outside the scenic corridor overlay zone have a conflict?

Would the conflict be present whether or not he does realty business in the scenic corridor?

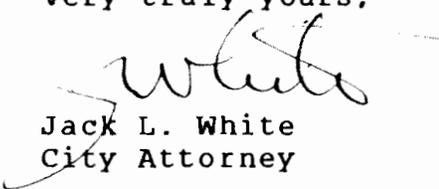
- 5) Is the scenic corridor a significant segment of the public generally?

On October 17, 1988 I spoke to Gay Meader, an appraiser of the Orange County Assessor's Office who advised that they do not compute height in determining the assessed valuation of single-family residential property, but compute the square footage, which does not necessarily involve the height.

Additionally, we received a copy of amendments to the California Administrative Code relating to guidelines to determine "material financial effect." It is our understanding that these guidelines will be effective mid-November. The changes noted in Sections 18702.1 (a)(1), (a)(2) and (a)(3), 18702.1 (b), 18702.1 (c) and 18702.1 (d) impact our situation. Would you kindly take these sections into consideration in addressing our issues.

Please send your response to Carol J. Flynn, Deputy City Attorney, City of Anaheim, 200 S. Anaheim Boulevard, Suite 356, Anaheim, CA 92805. Thank you for your assistance in this matter.

Very truly yours,



Jack L. White  
City Attorney

JLW:CJF:dm  
2152V



# California Fair Political Practices Commission

November 8, 1988

Jack L. White  
City Attorney  
Civic Center  
200 So. Anaheim Blvd., Third Floor  
Anaheim, CA 92805

Re: 88-430

Dear Mr. White:

Your letter requesting advice under the Political Reform Act was received on November 7, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Scott Hallabrin, 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,

*Kathryn E. Donovan*  
Diane M. Griffiths  
General Counsel *for*

DMG:plh