



# California Fair Political Practices Commission

May 22, 1989

Gertrude L. Hill  
City Clerk-Treasurer  
City of Whittier  
13230 Penn Street  
Whittier, CA 90602-1772

Re: Your Request for Informal  
Assistance  
Our File No. I-89-160

Dear Ms. Hill:

This is in response to your request for information on behalf of the members of the City of Whittier Planning Commission concerning their duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Since your request does not refer to a specific governmental decision, we are treating your question as a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).<sup>2</sup>

## QUESTIONS

1. Can a planning commission make a governmental decision when a majority of its members declare a conflict of interest?
2. How can the planning commission make the decision?
3. Can a planning commissioner participate in a decision in order to provide a quorum?

---

<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. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

4. Can a commissioner discuss an issue once he or she has declared a conflict of interest?

5. Can a commissioner discuss an issue after he or she is selected to complete a quorum under the rules of legally required participation?

#### CONCLUSIONS

1. Assuming that neither the city's ordinances nor other laws permit resort to an alternate method for making a governmental decision, the Act permits a planning commissioner to participate in a decision to the extent that his or her participation is legally required in order to obtain a quorum for the action or decision to be made.

2. Any members who are not disqualified must be part of the quorum. The remaining members necessary to constitute a quorum may be chosen from among the disqualified members by lot or other random means of selection.

3 and 5. A disqualified commissioner who is chosen at random to participate in the quorum may vote, but his participation is otherwise limited to what is legally required. He may not participate in the discussions. Pending amendments to Regulation 18701 would permit participation in the discussions during public meetings.

4. Once a commissioner has declared a conflict of interest, he or she may not discuss or otherwise participate in the decision nor use his or her position to influence any member, officer, employee or consultant of the commission. The only exception to this is when the commissioner's participation in the decision is "legally required," as discussed above.

#### FACTS

Recently, the City of Whittier Planning Commission was unable to take action on an issue because four of its five members declared a conflict of interest. The city is in the process of rebuilding certain areas with respect to destruction caused by the 1987 earthquake. You anticipate facing repeated conflicts of interest and would like guidance on how to proceed in the event that a majority of the commission has a conflict.

#### ANALYSIS

A planning commissioner is a public official. (Section 82048.) A public official who has a conflict of interest with respect to a particular decision may not make, participate in making or in any way use his or her official position to influence the decision. (Section 87100.) This means that the official may not vote on the decision, participate in the negotiations, advise or make recommendations, give an opinion, contact, appear before

or otherwise attempt to influence any member, officer, employee or consultant of the agency. (Regulations 18700 and 18700.1, copies enclosed.)

Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent that his or her participation is legally required in order for the action or decision to be made. The fact that an official's vote would be needed to break a tie does not make his or her participation legally required. (Section 87101.)

If local ordinances or other laws recognize some alternative method for making the decision, the official's participation is not legally required. For example, if local ordinance permitted the city council to make a governmental decision in the event that the planning commission was unable to act, the city council would represent an alternative source of decision. In such a case, the rule of legally required participation could not be used to allow a disqualified planning commissioner to participate in the decision.

If a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she must:

(1) Disclose as a matter of official public record the existence of the financial interest;

(2) Describe with particularity the nature of the financial interest before he or she makes or participates in making the decision;

(3) Attempt in no way to use his or her official position to influence any other public official with respect to the matter;

(4) State the reason there is no alternative source of decision-making authority;

(5) Participate in making the decision only to the extent that such participation is legally required.

(Regulation 18701(b), copy enclosed.)

Legally required participation is to be construed as a statutory analogue to the common law "rule of necessity." (In re Maloney, 3 FPPC Ops. 69, 74, copy enclosed.) Under this rule, where an administrative body has a duty to act upon a matter before it and is the only entity capable to act in the matter, the fact that its members may have a personal interest in the result

does not disqualify them. (Gonsalves v. City of Dairy Valley, (1968) 265 Cal. App. 2d 400, 404.) However, Regulation 18701(c) requires a narrow construction of "legally required participation." This has been interpreted by the Commission to require that steps be taken to minimize the bias that may result from the participation of individuals who are financially interested in the decision. (In re Hudson, 4 FPPC Ops 13, 17, copy enclosed.)

Therefore, unlike the common law, the Commission requires that only so many financially interested persons participate in the decision as may be necessary to constitute a quorum. (Hudson, supra.) An otherwise disqualified member may not be selected to make up a quorum if a quorum can be convened of other members who are not disqualified, whether or not such other members are actually present at the time of the disqualification. (Regulation 18701(c)(2).) The preferred procedure for selecting which disqualified member(s) will participate is by lot or other random means of selection. (Hudson, supra, at p. 18.)

Thus, to the extent that the planning commission cannot achieve a quorum by any other means, members who would otherwise be disqualified may be chosen at random to participate in the decisions in accordance with the procedure outlined above. The commissioners chosen may each vote, but they may not participate in discussions. (Miranda Advice Letter, No. I-88-373; Skousen Advice Letter, No. A-88-162, copies enclosed.)<sup>3</sup>

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

Very truly yours,

Kathryn E. Donovan  
General Counsel



By: Margaret W. Ellison  
Counsel, Legal Division

KED:MWE:aa

Enclosures

---

<sup>3</sup> The Commission has noticed amendments to Regulation 18701 which would permit the planning commissioners to engage in discussions during public meetings, in addition to voting on decisions when their participation is legally required. A copy of the notice and text of the amendments is enclosed. These amendments will be considered for adoption on June 6, 1989.

F F C  
MAR 12 8 15 AM '89

# CITY OF WHITTIER

13230 PENN STREET, WHITTIER, CALIFORNIA 90602 1772 (213) 946 8200

March 7, 1989

Lily Spitz, Staff Attorney  
Fair Political Practices Commission  
P. O. Box 807  
Sacramento, CA 95804

Dear Ms. Spitz:

This letter is in reference to our telephone conversation of yesterday concerning the Planning Commission's ability to be rehabilitated when a conflict of interest develops which involves a majority of the Commission Members. Specifically, a recent instance was cited wherein the City of Whittier Planning Commission was unable to take action on an issue before the Commission when four of its five members declared a conflict of interest.

We would appreciate receiving your response in writing, so that a written opinion will be available for the record should a similar situation occur in the future. Please include comments concerning -

- ° Government Code Section 87101
- ° whether a Commission can be rehabilitated when a majority of the members declare a conflict of interest
- ° how the Commission can be rehabilitated
- ° the obligation of a Commissioner to participate in a decision in order to provide a quorum
- ° a Commissioner's inability to discuss an issue, once he/she has declared a conflict of interest: he/she has been rehabilitated and has elected to participate in action taken by the Commission.

Fair Political Practices Commission  
Page 2  
March 7, 1989

It is important that we receive a response from you as quickly as possible. It is apparent our Planning Commission Members will be facing repeated conflicts, as we attempt to rebuild certain areas of our community from destruction caused by the 1987 earthquake.

Sincerely,



Gertrude L. Hill  
City Clerk-Treasurer

GLH:mb



# California Fair Political Practices Commission

March 14, 1989

Gertrude L. Hill  
City Clerk-Treasurer  
13230 Penn Street  
Whittier, CA 90602-1772

Re: Letter No. 89-160

Dear Ms. Hill:

We received your letter requesting confirmation of advice under the Political Reform Act on March 13, 1989. Your letter has been assigned to Lill Spitz for response. If you have any questions, you may contact Ms. Spitz directly at (916) 322-5901.

If the letter is appropriate for confirmation without further analysis, we will attempt to expedite our response. A confirming response will be released after it has gone through our approval process. If the letter is not appropriate for this treatment, the staff person assigned to prepare the response will contact you shortly to advise you. In such cases, the normal analysis, review and approval process will be followed.

You should be aware that your letter and our response are public records which may be disclosed to any interested person upon receipt of a proper request for disclosure.

Sincerely,

*Diane M. Griffiths*  
*by Red*

Diane M. Griffiths  
General Counsel

DMG:plh:confadv1