



# California Fair Political Practices Commission

October 4, 1989

Anthony J. Dias  
City Manager  
1416 "C" Street  
P.O. Box 308  
Livingston, CA 95334

Re: Your Request for Informal Assistance  
Our File No. I-89-501

Dear Mr. Dias:

You have requested advice on behalf of Livingston City Attorney Nelson F. Gomez regarding his responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Because your request is of a general nature and does not relate to a specific decision, we treat your letter as a request for informal assistance.<sup>2</sup>

## QUESTION

Does ownership of real property within the jurisdiction of the city create a disqualifying conflict of interest for the city attorney?

## CONCLUSION

Ownership of real property within the jurisdiction of the city may create a disqualifying conflict of interest for the city attorney. The city attorney may not participate in any decision which will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on his interests in real property. Whether a disqualifying obligation exists must be determined on a decision-by-decision basis.

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<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 Administrative Code 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), copy enclosed.)

### FACTS

The City of Livingston retains Mr. Nelson F. Gomez under contract to serve as the city attorney. He resides and maintains a separate law practice in the neighboring City of Turlock. Mr. Gomez is also a partner or individual investor in several real estate ventures, including a small subdivision. All of these real estate ventures are located outside the jurisdiction of the City of Livingston.

You have advised me that the city is experiencing rapid growth. At present, the total population consists of 7,200 persons. The city occupies 1,020 acres of land and the average size of a city lot is 6,000 square feet.

Recently, Mr. Gomez has initiated the purchase of ten acres within the City of Livingston and an adjacent ten acres within the city's sphere and urban development boundary. Upon completion of the transaction, Mr. Gomez plans to immediately subdivide the ten acres within the city limits for single family residential development, and annex, zone and subdivide the adjacent ten acres in the future. Mr. Gomez has apprised the city council and you of this activity.

The city council and Mr. Gomez understand that purchase of this property within the jurisdiction of the city may give rise to a conflict of interest. You have requested advice regarding whether conflicts of interest may interfere with Mr. Gomez' ability to provide legal review, advice, and defense to the city on zoning, annexation and land use matters, subdivision and development agreements, development exactions and fees, eminent domain, and the development of infrastructure such as domestic water wells, drainage and sewer facilities.

### ANALYSIS

Section 87100 prohibits a 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.

As the contract city attorney for the City of Livingston, Mr. Gomez is a public official and is subject to the conflict-of-interest provisions of the Act whenever he participates in the making of a governmental decision. (Regulation 18700(a)(2), copy enclosed.)

A public official participates in the making of a governmental decision when, acting within the authority of his or her position, he or she:

(1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

Regulation 18700(c)(1) and (2).

As city attorney, Mr. Gomez advises and make recommendations to the city council and staff. Because of the nature of his position, he exercises judgment and influences decisions. Pursuant to the conflict-of-interest provisions of the Act, Mr. Gomez must disqualify from participating in decisions in which he has a financial interest.

An official has a financial interest in a decision if it will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on, among other interests, any real property in which the public official has a direct or indirect interest worth one thousand dollars or more. (Section 87103(c).) For purposes of our analysis we assume that Mr. Gomez' investment in real property within the City of Livingston is worth at least one thousand dollars.

#### Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Redevelopment Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.)

For example, it is reasonably foreseeable that a decision to amend the general plan and impose a moratorium on subdivisions would have an effect on the real property Mr. Gomez intends to subdivide. If the effect is material, Mr. Gomez must abstain from participating in the decision.

Materiality

Even when the effect of a decision on the public official's interest is foreseeable, no conflict of interest arises unless the effect would be material. Whether or not the effect of a decision is material in any given case would depend upon whether the effect is direct or indirect.

When an official's economic interest is directly affected by a decision, Regulation 18702.1 (copy enclosed) provides that the effect will be deemed material. An official's real property interest is directly affected by a decision if:

(A) The decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of real property in which the official has a direct or indirect interest (other than a leasehold interest) of \$1,000 or more, or a similar decision affecting such property;

(B) The decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of such property;

(C) The decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on such property; or

(D) The decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

(E) For purposes of this subdivision, the terms "zoning" and "rezoning" shall refer to the act of establishing or changing the zoning or land use designation on the subject property, but shall not refer to an amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development

standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category.

Regulation 18702.1(a)(3).

You have stated that Mr. Gomez plans to subdivide the ten acres he intends to purchase within the city and annex, zone and subdivide the adjacent ten acres in the future. Development of a subdivision on ten acres of his property will require permits and other land entitlements. Moreover, annexation, zoning and subdivision of the adjacent ten acres may require changing the zoning or land use designation of his property. Pursuant to Regulation 18702.1, supra, Mr. Gomez may not participate in any such decision related to his property.

Regulation 18702.3 (copy enclosed) provides guidelines for determining the existence of a conflict of interest when real property owned by the official is indirectly involved in the decision. This would be the case, for example, if real property situated within 300 feet from Mr. Gomez' land were the subject of a decision or if the city made other land use decisions which would indirectly affect Mr. Gomez' real property.

Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87103.) The effect of a decision is distinguishable from the effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public, or a significant segment of the public. (Regulation 18703, copy enclosed.) The "public" is the population of the City of Livingston. (See In re Owen (1976) 2 FPPC Ops. 77, 81, and In re Legan (1985) 9 FPPC Ops. 1, copies enclosed.) For the "public generally" exception to apply in this case, any land use decision in which Mr. Gomez participates should affect Mr. Gomez' interests in substantially the same manner as it would affect a significant segment of the public. (Regulation 18703.)

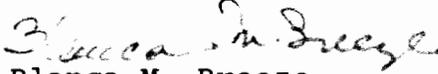
If Mr. Gomez completes the purchase of the ten acres within the jurisdiction of the city and the adjacent ten acres which he expects to annex, a determination of whether the public generally exception would apply must be made on a case-by-case basis. For example, imposition of development exactions and fees will most likely affect Mr. Gomez in a manner which is distinguishable from the effect on the public generally.

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Page 6

I trust this letter is responsive to your inquiry. Should you want further assistance in this matter, do not hesitate to contact me at (916) 322-5901.

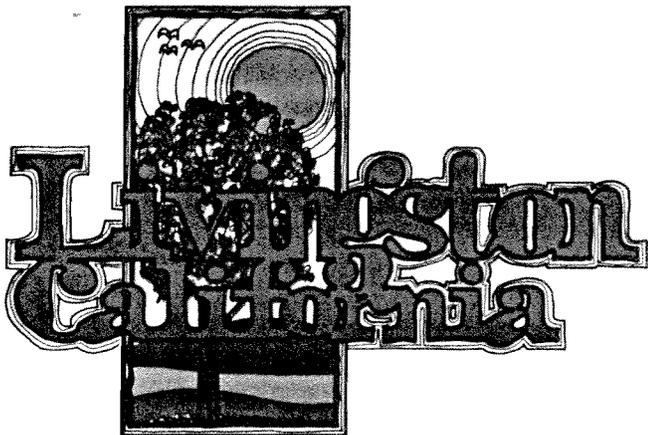
Sincerely,

Kathryn E. Donovan  
General Counsel

  
By: Blanca M. Breeze  
Counsel, Legal Division

KED:BMB:plh

Enclosures



FPPC  
Aug 23 10 10 AM '89

August 21, 1989

John Larson, Chairman  
Fair Political Practices Commission  
428 "J" Street, Suite 800  
P.O. Box 807  
Sacramento, CA 95804

RE: Opinion - Conflict of Interest - City Attorney

Dear Mr. Larson:

The Livingston City Council is requesting the Fair Political Practices Commission's opinion regarding a potential conflict of interest by the City Attorney. The facts concerning this situation are outlined below:

The Livingston City Attorney, Nelson F. Gomez, is retained under contract to serve as the City Attorney. He resides and maintains a separate law practice in the neighboring City of Turlock. Mr. Gomez is also a partner or individual investor in several real estate ventures, including a small subdivision. All these real estate ventures have been outside Livingston's City Limits and Sphere of Influence.

Recently, Mr. Gomez has presented an accepted offer to purchase ten acres within the City and an adjacent ten acres that is within the City's sphere and urban development boundary. Mr. Gomez plans to immediately subdivide for single family residential development the ten acres within the City Limits, and annex, zone and subdivide the adjacent ten acres in the future. Mr. Gomez has apprised the Council and me of this activity.

The City Council and Mr. Gomez clearly understand that a conflict of interest has developed concerning this specific property. The Council, however, needs guidance concerning other potential conflicts of interest arising from Mr. Gomez' real estate venture. These include his ability to provide legal review, advice, and defense as City Attorney on zoning, annexation and land use matters, subdivision and development agreements, development exactions and fees, eminent domain, and the development of infrastructure, such as domestic water wells, drainage and sewer facilities.

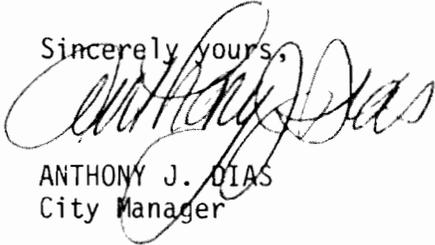
CITY OF LIVINGSTON

1416 'C' STREET P. O. BOX 308 LIVINGSTON, CALIFORNIA 95334 (209) 394-8041

John Larson, Chairman  
Fair Political Practices Commission  
Page 2  
August 21, 1989

We would appreciate your opinion regarding City Attorney Gomez' potential conflict of interest arising from his real estate venture within the City of Livingston. Please call me if you have any questions or need further information.

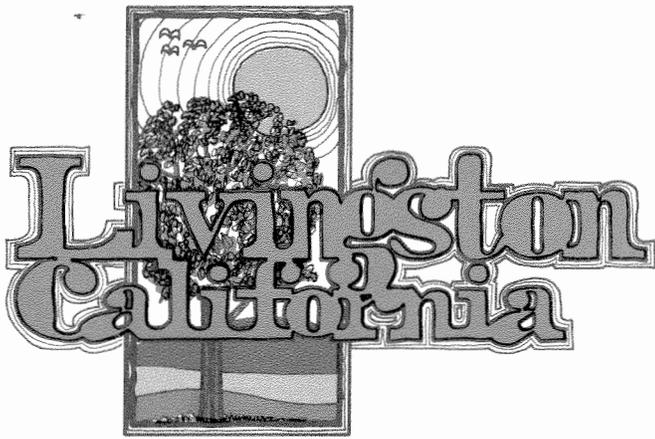
Sincerely yours,

A handwritten signature in cursive script, appearing to read "Anthony J. Dias", written over the typed name and title.

ANTHONY J. DIAS  
City Manager

SLH:fma

cc: City Council  
Nelson F. Gomez, City Attorney  
JoAnne Speers, League of California  
Cities' Staff Attorney

FPPC  
Aug 23 10 10 AM '89

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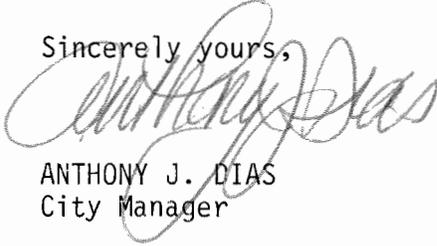
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Page 2  
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Sincerely yours,

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ANTHONY J. DIAS  
City Manager

SLH:fma

cc: City Council  
Nelson F. Gomez, City Attorney  
JoAnne Speers, League of California  
Cities' Staff Attorney



# California Fair Political Practices Commission

August 24, 1989

Anthony J. Dias  
City Manager  
City of Livingston  
P.O. Box 308  
Livingston, CA 95334

Re: Letter No. 89-501

Dear Mr. Dias:

Your letter requesting advice under the Political Reform Act was received on August 22, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Blanca M. Breeze 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*

Kathryn E. Donovan  
General Counsel

KED:plh



CALIFORNIA ASSOCIATION OF SCHOOL PSYCHOLOGISTS  
180 El Camino Real, Suite 5, Millbrae, California 94030 (415) 697-9672

August 21, 1989

Wayne Embrey  
428 'J' St., #800  
Sacramento, CA 95814

Aug 22 3 20 PM '89  
P.P.P. Co.

Dear Mr. Embrey,

This letter is to confirm the information I received from you in our telephone conversation last Friday, August 18, 1989, and my understanding regarding the new requirements of Proposition 73 and their effect on our Political Action Committee.

We have a general purpose recipient committee, sponsored by a professional association. We collect approximately \$1500-2000 per year in small donations, with no receipts over \$2500 from a single source. My understanding from you is that funds that existed on January 1, 1989 have not been frozen and that we are free to use them for our intended purpose.

If this is not correct, please communicate with me immediately, so that our activities are within the law.

Thank you.

Sincerely,

J. Richard Russo  
Treasurer, School Psychology Political Action Committee

JRR:rh



CALIFORNIA ASSOCIATION OF SCHOOL PSYCHOLOGISTS  
180 El Camino Real, Suite 5, Millbrae, California 94030 (415) 697-9672

August 21, 1989

Wayne Embrey  
428 'J' St., #800  
Sacramento, CA 95814

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FPP G

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If this is not correct, please communicate with me immediately, so that our activities are within the law.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "J. Richard Russo" followed by a small flourish.

J. Richard Russo  
Treasurer, School Psychology Political Action Committee

JRR:rh



# California Fair Political Practices Commission

August 24, 1989

J. Richard Russo  
Treasurer, School Psychology  
Political Action Committee  
180 El Camino Real, Suite 5  
Millbrae, CA 94030

Re: Letter No. 89-502

Dear Mr. Russo:

Your letter requesting advice under the Political Reform Act was received on August 22, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5662.

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 the 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,

A handwritten signature in cursive script that reads "Jeanne Pritchard".

Jeanne Pritchard  
Chief Technical Assistance  
and Analysis Division

JP:plh



# California Fair Political Practices Commission

September 22, 1989

J. Richard Russo, Treasurer  
School Psychology Political Action Committee  
180 El Camino Real, Suite 5  
Millbrae, CA 94030

Re: Your Request for Advice  
Our File No. A-89-502

Dear Mr. Russo:

We have received your letter of August 21, 1989, seeking written confirmation of the advice I gave you in a telephone conversation on August 18, 1989, regarding the recent court ruling affecting Proposition 73. This is to confirm that your letter accurately reflects that advice.

Section 85306, as added by Proposition 73, prohibited candidates and committees from using campaign funds held on January 1, 1989, to support or oppose a candidacy. On September 15, 1989, the United States District Court declared Section 85306 invalid. (Service Employees International Union, AFL-CIO, CLC; et al. v. Fair Political Practices Commission, Case No. CIVS 89-0433 LKK-JFM, May 15, 1989, copy enclosed.) Contributions received prior to January 1, 1989 may be used to support or oppose candidates subject to the same restrictions imposed on the use of funds collected on January 1, 1989 and after.

A copy of your letter is enclosed for your convenience.

If you have additional questions, please contact me at (916) 322-5662.

Sincerely,

Kathryn E. Donovan  
General Counsel

By: Wayne P. Imberi  
Political Reform Consultant

KED:WPI:eam

Enclosures



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September 22, 1989

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School Psychology Political Action Committee  
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Sincerely,

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General Counsel

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By: Wayne P. Imberi  
Political Reform Consultant

KED:WPI:eam

Enclosures



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Enclosures