



# California Fair Political Practices Commission

May 10, 1988

Honorable Charles D. B. Curry  
Councilmember  
City of Pacifica  
City Hall 170 Santa Maria Ave.  
Pacifica, CA 94044

Re: Your Request for Advice  
Our File No. A-88-158

Dear Councilmember Curry:

This is in response to your letter requesting advice regarding your responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1/</sup>

## QUESTIONS

1. Can you participate in a decision of the city council relative to a proposed land development project in light of your neighboring real property interest?
2. Does the "public generally" exception apply to your situation?
3. If it is determined that you have a financial interest in the decision of the city council, are you allowed to participate in the decision under the rule of "legally required participation"?

## CONCLUSION

1. You are prohibited from participating in the decisions of the city council regarding the development project because it is reasonably foreseeable that the decision will have a material financial effect on your real property interest.

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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 Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

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2. Since such a small percentage (less than 2-percent) of the residents of the City of Pacifica will be similarly affected by the proposed development, your circumstance does not fall within the "public generally" exception of the Act.

3. The rule of "legally required participation" specifically disallows participation by a disqualified public official for purposes of breaking a tie. Therefore, since there are sufficient city councilmembers qualified to participate in the decision, you are prohibited from involving yourself in the decision. However, you may address the city council, as any other member of the public, representing solely your own interests.

#### FACTS

You are a member of the Pacifica City Council. The city council has been asked to take action on a number of issues stemming from a land development project, the history of which is outlined below.

In 1984, the voters of the City of Pacifica approved a development plan for a project in an area known as Mori Point. The approved development plan rezoned Mori Point from agricultural and commercial/recreational to planned development, so as to allow development of a maximum of 60 detached single family dwellings, an equestrian and commercial complex, and a hotel/conference center with associated restaurants and retail uses. The development plan provided that the ridgeline area and marsh area should be restricted to open space.

The development plan measure provided that the Mori Point project would have to undergo discretionary review by the planning commission, including approval of an Environmental Impact Report and various land use permits. The planning commission could add appropriate conditions and revisions to the project and could approve or deny the project.

Any decisions by the planning commission may be appealed to the city council, which has final legal authority to approve or disapprove the project. Moreover, all land use permits, a general plan amendment and coastal land use plan amendment must be approved by the city council in order for the Mori Point project to be built.

The developer of Mori Point has submitted an application for approval of a specific plan, tentative map and variance

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from the city's hillside preservation district ordinance. The planning commission reviewed and approved the application with numerous conditions attached. The action of the planning commission is now being appealed to the city council by the developer (because of the conditions placed on approval) and by a number of citizens of Pacifica.

Your residence borders on the designated open space area of the Mori Point project, and is located approximately 400 feet from proposed residences in the project, which reportedly will be among the highest priced residences in the city.

#### ANALYSIS

As a member of the Pacifica City Council you are a public official. (Section 82048.) Consequently, the Act requires that you not participate in any governmental decision in which you have a financial interest. (Section 87100.) 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, or on:

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

Section 87103(b).

Since the value of your residence is more than \$1,000, you are prohibited from participating in a decision if it is reasonably foreseeable that it will have a material financial effect on the value of your residence, distinguishable from its effect on the public generally.

#### Foreseeable Material Financial Effect

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 FPPC Ops. 198, copy enclosed.)

The decisions to be made by the city council will affect the amount and type of development activity which will occur in the Mori Point area. It is reasonably foreseeable that these decisions will affect the value of nearby real properties, most

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particularly the properties immediately adjacent to the proposed development project.<sup>2/</sup> It is necessary, however, to determine whether the effect on your property interest will be material before deciding whether or not you must disqualify yourself from the decisions of the city council.

The effect of a decision is considered material if it is "significant." (Regulation 18702(a), copy enclosed.) The standard for determining whether the effect of a governmental decision on real property is material is set forth in Regulation 18702(b)(2)(B). A decision is material if it will increase or decrease:

(B) The fair market value of the property by the lesser of:

1. Ten thousand dollars (\$10,000); or
2. One half of one percent if the effect is one thousand dollars (\$1,000) or more.

Regulation 18702(b)(2)(B).

You estimate the value of your house at between \$200,000 and \$250,000. A material financial effect on your property would be an increase or decrease of \$1,250 or more in the fair market value.

While it may be difficult to calculate specifically how property values approximately 400 feet from the proposed development project will be affected, under these circumstances it is reasonably foreseeable that there will be a significant increase in value. The relatively low density of the proposed residential properties, their projected value, and the nearby facilities included in the plan would appear to significantly enhance the value of your real property. Therefore, based on the facts known to us, we conclude that the effect would be material, and disqualification is required.

If you believe we have overlooked any facts concerning the foreseeable financial effect on your real property, feel free

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<sup>2/</sup> The dedicated open space bordering your property was included in the plan adopted in 1984, and cannot be altered without a vote of the people. Thus, the upcoming decisions of the city council cannot involve this land, and we will not consider the effect of this portion of the proposed project on your real property interests.

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to contact us to discuss this matter further. You may wish to seek the advice of a professional in the field of real property appraisal to establish more precisely whether a material financial effect exists. In the past we have suggested contacting the county appraiser's office.

#### Public Generally

Even if decisions regarding the proposed development project would have a material financial effect on your interests, your disqualification from these decisions is required only if the effects on your interests are distinguishable from the effect upon the public generally. (Section 87103.)

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, copy enclosed.) The "public" is the population of the City of Pacifica because that is the jurisdiction of the city council. (See In re Owen (1976) 2 FPPC Ops. 77, 81, and In re Legan (1985) 9 FPPC Ops. 1, copies enclosed.)

As you noted in your facts, you reside in the West Fairway Park neighborhood which has approximately 160 houses. The Mori Point project is immediately adjacent to your neighborhood, and is bordered on each of its other sides by open space, a golf course, undeveloped lands and the ocean, respectively. It would be fair to say, then, that the residents of West Fairway Park will be similarly affected by the proposed project, but that other residents of Pacifica will not.

In order to be considered a significant segment of the public, the Commission has held that a group must be "large in numbers and heterogeneous in quality." (See In re Ferraro (1978) 4 FPPC Ops 62, 67, copy enclosed and In re Legan, supra.) The City of Pacifica has a total of 13,500 residences. Thus, your neighborhood constitutes less than two-percent of the residences of the city. Such a small group does not meet the test of the "public generally" exception.

#### Legally Required Participation

The rule of legally required participation is set forth in Section 87101, which provides:

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

Regulation 18701 clarifies the phrase "legally required participation", and provides as follows:

(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

(b) Whenever 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 shall:

(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.

(c) This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Government Code Section 87100, to vote to break a tie.

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(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Government Code Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code Section 87100, whether or not such other members are actually present at the time of the disqualification.

The Act will allow a disqualified public official to participate in the decision, but only if there exists no alternative source of the decision consistent with the terms of the statute authorizing the decision. For example, if there were a decision before the city council which required a majority vote and three of the five councilmembers were required to disqualify themselves due to conflicts, the Act allows for random selection of one of the disqualified councilmembers for participation in the decision. (In re Hudson (1978) 4 FPPC Ops. 13, copy enclosed.) On the other hand, where only two members are prohibited from participating, the remaining three individuals are sufficient to meet the majority vote requirement and the participation of the other councilmembers is not "legally required." (In re Mackenzie Brown (1978) 4 FPPC Ops. 19, copy enclosed.)

In your situation, the statute requires that action be taken by at least a majority vote of the city council - three of the five-member council. If you disqualify yourself there are still four members qualified to participate in the decision. Since only three votes are legally required to approve a general plan amendment, the rule of legally required participation does not apply.

Finally, I would like to point out that even though you are prohibited from participating as a decisionmaker in the issues surrounding the proposed development project, you are not prohibited altogether from voicing your concerns to the city council. You may appear as a member of the general public before the agency to represent yourself on matters related solely to your personal interests, and you may communicate with the press or general public regarding your views on the issue. (Regulations 18700 and 18700.1, copies enclosed.)


I trust this response provides sufficient guidance regarding your responsibilities under the Act. If you have

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questions concerning this advice, please feel free to contact  
me at (916) 322-5901.

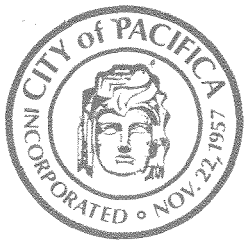
Sincerely,

Diane M. Griffiths  
General Counsel

  
By: Lilly Spitz  
Counsel, Legal Division

DMG:LS:plh  
Enclosures

88-158



*Scenic Pacifica*

CITY HALL • 170 Santa Maria Avenue • Pacifica, California 94044

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MAYOR  
Ginny Silva Jaquith  
MAYOR PRO TEM  
Fred Howard  
COUNCIL  
Charles D.B. Curry  
Peter Loeb  
Jon Galehouse

June 1, 1988

Diane M. Griffiths  
General Counsel  
Fair Political Practices Commission  
Legal Division  
P. O. Box 807  
Sacramento CA 95814

Re: Advice Letter No. A-88-158

Dear Ms. Griffiths:

Thank you for your Advice Letter of May 10, 1988 concerning a conflict of interest question involving the Mori Point project in the City of Pacifica. I appreciate the expedited response as well as the informal telephone advice I have received from your staff. This has been very helpful to me.

May I ask that you clarify certain of my responsibilities and limitations in light of your Advice Letter. I am currently involved in a number of other issues and projects, some of which relate to Mori Point. I would like you to clarify whether I may participate in the following projects:

Open Space Task Force

I am a member of the City's Open Space Task Force. The City Council established this task force to inventory open space lands in the City of Pacifica and to identify techniques to conserve and preserve these lands. The Task Force will prioritize these open space lands in terms of their importance to the City and recommend preservation, acquisition, open space easements, or other techniques that could preserve important open space areas if development were to occur in those areas. The Task Force will also discuss a City of Pacifica trails system linking coastal bluffs and ridgelines.

One of the forty open space areas being studied is Mori Point. May I participate in decisions about the Open Space Task Force's recommendations for Mori Point? These could include suggested limitations on development, identification of areas for open space, and suggestions for acquisition by public agencies. The Open Space Task Force could recommend that Mori Point remain as open space and be part of a blufftop trails system running the length of Pacifica, or it could recommend that development be allowed subject to development standards and regulations.

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The Open Space Task Force will have to decide which recommendations to make. These recommendations are advisory only, will have no present effect on the development potential of these lands, and will not change their zoning or General Plan designations. These recommendations will be presented to the Planning Commission and City Council. There is no current plan as to whether or how any recommendations would be implemented. The Open Space Task Force recommendations are to serve as a policy study to hopefully guide the City's decision-making process in the future in respect to the development of these lands.

Expansion of the Golden Gate National Recreation Area (GGNRA)

The preservation of open space is a high policy priority of mine. Accordingly, I have been very active in the community in support of the efforts to preserve the City's open space. I am a member of our U. S. Congressman Tom Lantos' Advisory Committee. As such, I would like to work to expand the GGNRA boundaries so that the National Park Service can acquire additional parcels in the City of Pacifica. One of these parcels could be Mori Point. May I lobby public officials to expand the GGNRA to include Mori Point? May I solicit help from private foundations such as the Trust for Public Lands to assist the GGNRA in acquiring Mori Point? If the City of Pacifica were to be involved in discussions concerning acquiring Mori Point, could I participate in that decision-making process?

I believe that I should be able to participate in all of the above-listed decisions, since, if the land were to remain as open space, my property value would certainly be unchanged. However, in light of your letter, I would like further clarification. I would be glad to provide such further information as you require.

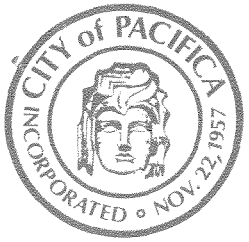
I would appreciate your response to these questions to guide my future activities in the City of Pacifica.

Very truly yours,



Charles D. B. Curry  
Councilmember

jh



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MAYOR  
Ginny Silva Jaquith  
MAYOR PRO TEM  
Fred Howard  
COUNCIL  
Charles D.B. Curry  
Peter Loeb  
Jon Galehouse

April 26, 1988

Diane M. Griffiths  
General Counsel  
Fair Political Practices Commission  
Legal Division  
P. O. Box 807  
Sacramento CA 95814

Re: Request for Advice Letter  
URGENT -- RESPONSE REQUESTED ON OR BEFORE MAY 9, 1988

Dear Ms. Griffiths:

I respectfully request an expedited Advice Letter regarding a potential conflict of interest question. I am a member of the Pacifica City Council. The following is a summary of the facts and the question presented.

In 1984, the voters of the City of Pacifica approved a development plan for a project in an area known as Mori Point. The approved development plan rezoned Mori Point from agricultural and commercial/recreational to planned development so as to allow development of a maximum of 60 detached single family dwellings, an equestrian and commercial complex, and a hotel/conference center with associated restaurants and retail uses. (A copy of the ballot measure and development plan is enclosed, marked "Exhibit A".) The development plan provided that the ridgeline area (Parcel B) and marsh area (Parcel F) should be restricted to open space. (See Tentative Map, "Exhibit B".) The measure provided that the Mori Point project would have to undergo discretionary review by the Planning Commission, including approval of an Environmental Impact Report and various land use permits (Specific Plan, Tentative Subdivision Map, and variance from the slope coverage formula of the Hillside Preservation District). The Planning Commission could add appropriate conditions and revisions to the project and could approve or deny the project. Any decisions by the Planning Commission are appealable to the City Council, who have final legal authority to approve or disapprove the project. These land use permits must all be approved in order for the Mori Point project to be built. A

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general plan amendment and Coastal Land Use Plan amendment must also be approved by the City Council in order for the project to be built.

The developer of Mori Point submitted an application for approval of a Specific Plan, Tentative Map and variance from the City's Hillside Preservation District Ordinance. The Pacifica Planning Commission reviewed this application and approved it. Both the developer and certain citizens of Pacifica appealed the Planning Commission's action to the City Council. The City Council must now make a determination of whether to uphold or reverse the actions of the Planning Commission in approving the project.

I reside at 220 Seaside Drive, Pacifica. My wife and I own our residence in joint tenancy. I estimate the current fair market value of my residence as \$200,000 to \$250,000. I have no facts to indicate whether approval of this project will increase or decrease my property value or affect it in any way. I feel it is speculative as to which effect, if any, would occur.

My single family residence is adjacent to a portion of the proposed project (Parcel F) which is designated to remain as open space. (A map of the proposed project which indicates the relationship of my property to the proposed project is enclosed as "Exhibit C".) My back yard abuts Parcel F which is existing open space. The proposed project would require that Parcel F be restricted to open space which shall either be dedicated to a public agency or, if not accepted by a public agency, restricted to privately owned and maintained open space. This area is partially wetlands and is the habitat of the endangered San Francisco Garter Snake and it is unknown whether this area could ever be developed, regardless of whether this particular project is approved or disapproved.

As you can see from the map, the proposed residences in the Mori Point project are adjacent to this open space area. The closest proposed lot line to my property line is 370 feet. The closest proposed house to my property line is 420 feet. I have also included a description of the project from the Environmental Impact Report proposed for this project ("Exhibit D").

I would appreciate your opinion whether I may participate in the decision of whether to uphold or reverse the decisions of the Planning Commission granting the land

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use approvals for this project (approval of the EIR, Specific Plan, Tentative Map and variance from the Hillside Preservation District). The Council is also considering approval of a General Plan amendment and Local Coastal Plan amendment to permit this development to occur.

Because the next City Council hearing on this project is May 9, 1988, I would greatly appreciate your expedited response. If I could receive a written response by May 9th, this would be greatly appreciated. If that is not possible, I would appreciate an interim response by telephone by May 9th, to be followed by the final written report. I must make a determination whether to participate or not at the City Council meeting on this appeal which will be held on May 9, 1988.

Please also advise me as to whether I may participate under FPPC Regulation Section 18703 because any effect on my real property would be in substantially the same manner as its effect on a significant segment of the public. The population of Pacifica is approximately 36,000 and there are approximately 13,500 residences. The neighborhood adjacent to the Mori Point project to the north is Fairway Park, which has approximately 160 houses in West Fairway Park, 80 houses in East Fairway Park, and a golf course. I live in West Fairway Park. (See "Exhibits C and E".) The area adjacent to Mori Point to the south is undeveloped and is an abandoned quarry site.

Lastly, please advise me whether, if I do have a conflict, I can participate in a decision if it is legally required pursuant to FPPC Regulation Section 18701. I understand that I cannot vote to break a tie. However, one decision the City Council must make on this project is whether or not to approve a General Plan Amendment. Government Code Section 65356 requires that a vote by the majority of the Council (3 votes) is necessary to approve such an amendment. If I disqualify myself, and the vote on such an amendment is 2 to 2, may I vote to break this tie so a General Plan Amendment can be approved, since 3 votes are legally required to approve such an amendment?

If you require any further information or documents, I will promptly supply it. Please call me if you have any questions concerning my request at (415) 355-3716 or (408) 756-3662. If I am unavailable, please call Susan M. Schectman, the Pacifica City Attorney, at (415) 875-7307.

Diane M. Griffiths  
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I greatly appreciate your prompt assistance. I apologize for the request for expedited review, but I have an upcoming public hearing date that I cannot avoid.

Very truly yours,

  
CHARLES D. B. CURRY  
Councilmember

SMS:jh

cc: Mayor Jaquith and Councilmembers  
Dan Pincetich, City Manager  
Susan M. Schectman, City Attorney



# California Fair Political Practices Commission

April 29, 1988

Charles D. B. Curry  
Councilmember  
City Hall  
170 Santa Maria Avenue  
Pacifica, CA 94044

Re: 88-158

Dear Mr. Curry:

Your letter requesting advice under the Political Reform Act was received on April 28, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Lilly Spitz, 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,

A handwritten signature in cursive script that reads "Diane M. Griffiths".

Diane M. Griffiths  
General Counsel

DMG:plh