



# California Fair Political Practices Commission

October 6, 1992

Joyce M. Hicks  
Assistant City Attorney  
City of Oakland  
City Hall  
One City Hall Plaza  
Oakland, CA 94612

Re: Your Request for Advice  
Our File No. A-92-492

Dear Ms. Hicks:

This is in response to your letter requesting advice on behalf of Oakland City Councilmember Frank Ogawa regarding his responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

Please note that nothing in this letter should be construed to evaluate any conduct which may have already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Ogelsby (1975) 1 FPPC Ops. 71.)

## QUESTION

May Councilmember Ogawa participate in the city council's consideration of the Dunsmuir Heights project where the councilmember owns a residence within 2,500 feet of the project site?

## CONCLUSION

Councilmember Ogawa may participate in the city council's consideration of the Dunsmuir Heights project so long as the project will not have a financial effect on the value of his residence of \$10,000 or more, or on the rental value of the residence of \$1,000 or more per 12-month period.

<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.

### FACTS

The Oakland Planning Commission is currently considering the proposed Dunsmuir Heights project (the "project"). The project consists of a 132-acre planned unit development which will include 341 residential units and related infrastructure improvements. The project required a general plan amendment to proceed. This amendment has already been approved. After the planning commission reaches a determination as to whether the plan should be approved, the plan will be considered by the Oakland City Council.

Councilmember Ogawa owns a personal residence within 2,500 feet of the project site. You stated that Mr. Ogawa has obtained two letters from a real estate broker in the jurisdiction attesting that there will be no financial effect on Councilmember Ogawa's property that will result from the project. You have asked whether the councilmember may participate in the city council's deliberation concerning the project.

### ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his official position to influence a governmental decision in which the official has a financial interest. Section 87103 specifies that an official has a financial interest in a decision where it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her 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).

We assume that the councilmember's interest in his residence is greater than \$1,000. Thus, Councilmember Ogawa is prohibited from making or in any way participating in decisions which would have a foreseeable<sup>2</sup> material financial effect on his property that is distinguishable from the effect on the public generally.

Regulation 18702.3 provides that the effect of a decision on real property in which an official has an economic interest is material if:

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<sup>2</sup> An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

(3) The real property in which the official has an interest is located outside a radius of 300 feet and any part of the real property is located within a radius of 2,500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the decision and the decision will have a reasonably foreseeable financial effect of:

(A) Ten thousand dollars (\$10,000) or more on the fair market value of the real property in which the official has an interest; or

(B) Will affect the rental value of the property by \$1,000 or more per 12 month period.

Councilmember Ogawa's residence is more than 300 feet from the Dunsmuir Heights project, but within 2,500 feet of the project site. Consequently, he must disqualify himself from participating in any decision regarding the Dunsmuir Heights project that could foreseeably increase or decrease the fair market value of his real property by \$10,000 or more, or the rental value of his property by at least \$1,000 in a 12-month period. (Regulation 18702.3(a)(3)(A).)

Regulation 18702.3(d) sets forth factors that must be considered in determining whether a decision will have a material financial effect on the councilmember's real property.<sup>3</sup>

1. The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which the official has an interest;

2. Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;

3. Whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, the effect on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

You have submitted two letters from a real estate broker in the jurisdiction attesting to the fact that the project will not have a material financial effect on the councilmember's residence as described in Regulation 18702.3.

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<sup>3</sup> The factors to be considered are not limited to the factors specified in Regulation 18702.3(d).

The Commission cannot determine whether there will be a material financial effect on the councilmember's property or evaluate the accuracy of the appraisal letters. However, it is important to note that formal written advice is the application of the law to a particular set of facts provided by the requestor. (Regulation 18329.) Thus, any immunity that flows from the letter, is only applicable to the extent that the underlying facts that you have submitted are accurate.

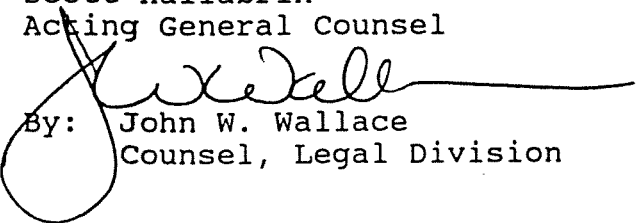
Thus, for example, if it is reasonable to rely on the assessment of materiality made by the broker, the councilmember may participate in the decision.<sup>4</sup> Conversely, if reliance on the broker's opinion by the councilmember was unreasonable, he may be in violation of the Act if he participates in the decisions. Accordingly, it is to the benefit of the councilmember that a thorough assessment of financial effects is made and that the facts and analysis on which the assessment is based are thoroughly documented.

We do note that it does not appear that the factors in Regulation 18702.3(d) were considered in reaching the conclusion. Consequently, it would not appear that reliance on the broker's bare conclusions, conclusions which did not take into account Regulation 18702.3(d), would be advisable.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.<sup>5</sup>

Sincerely,

Scott Hallabrin  
Acting General Counsel

  
By: John W. Wallace  
Counsel, Legal Division

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<sup>4</sup> For example, in the Stone Advice Letter, No. A-92-133a, we advised that if the person performing the appraisal was qualified to determine the values of the real property in issue and determined, based on the Commission's materiality regulations, that decisions would have no material financial effect on the official's real property interests, his determinations and the official's reliance would be considered a good faith effort to assess the materiality of the pending decisions on the official's real property interests.

<sup>5</sup> Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.