

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

March 12, 1997

Daniel S. Hentschke
City of Solana Beach
635 South Highway 101
Solana Beach, California 92075-2215

Re: Your Request for Advice
Our File No. A-97-058

Dear Mr. Hentschke:

This letter is a response to your request on behalf of Tere' Renteria for advice on the provisions of the Political Reform Act (the "Act")¹ regarding her possible disqualification from participating, as Solana Beach City Councilmember, in any upcoming city council decision relating to the rezoning of certain real property located within the jurisdiction of the city council.

Please bear in mind that nothing in this letter should be construed as evaluation of any conduct which may already have taken place. Further, this letter is based on the facts as they have been presented to us. The Commission does not act as finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

May Councilmember Tere' Renteria make, participate in making, or use her official capacity in any way to influence any city council decision on rezoning and/or amending the land use designation of a certain parcel of real property located within 300 feet of her personal residence in the City of Solana Beach, a small jurisdiction with a population of approximately 13,000 residents?

CONCLUSION

Councilmember Renteria may be able to participate in decisionmaking on a project less than 300 feet from her personal residence under the exception provided at Regulation 18702.3(a)(1), which permits such decisionmaking in cases where the decision will have no

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

foreseeable financial effect on the official's real property interests. The basis for invoking this exception is the appraisal submitted by Robert N. Jones, which concluded that the decision would have no financial effect on Ms. Renteria's property. Councilmember Renteria must, however, make the ultimate factual determination that the appraisal is reliable and correct before she invokes the exception of Regulation 18702.3(a)(1).

FACTS

Tere' Renteria is a member of the city council of Solana Beach, a general law city with a population of approximately 13, 000 persons. Councilmember Renteria and her husband, through a family trust, own a parcel of real property in the City of Solana Beach, which contains a home that is Ms. Renteria's personal residence. The city council now has pending before it an application to rezone certain real property from light industrial to medium-high density residential, together with an associated amendment to the city's general plan. The developer proposes an 87 unit single family dwelling project on the subject property, the boundaries of which lie within 300 feet of Councilmember Renteria's residence. There is, however, a steep slope separating Ms. Renteria's home from the project site, which is served by a different street, and which cannot be seen from Ms Renteria's home. Ms. Renteria, through another trust, owns a second parcel of real property improved with two rental units. This property, however, is more than 2,500 feet from the proposed project.

The rezoning application has been the subject of numerous public hearings by the city council. To date, Councilmember Renteria has not made or participated in the making of any governmental decision relating to the rezoning application, and has sought and obtained legal counsel on her obligations under the Act. Ms. Renteria did appear and testify, in her private capacity as a concerned citizen, at a public hearing before the city council on January 21, 1997, when the city council was considering the rezoning application. At the conclusion of that hearing, the city council was split 4 -1 in favor of the application, with Ms. Renteria not voting. The city council did not make a decision on the application, but continued the matter for further consideration at a later date.

On or about January 21, 1997, Councilmember Renteria received a single page letter from a real estate appraiser stating his opinion that "the topographic and visual barriers present between the two properties in question effectively dilute to zero, any positive or negative impact of a change in the general plan and rezoning" of the project property within 300 feet of Ms. Renteria's residence. This opinion, according to the letter, was based on the appraiser's inspection of the area and efforts to become familiar with the location and nature of the proposed project. No details of the appraiser's analysis are provided in this letter.

On February 21, 1997, you sent a letter to Robert N. Jones, a real estate appraiser, requesting in some detail an independent evaluation of the possible financial impact of the rezoning of the project property on Ms. Renteria's nearby residential property. Mr. Jones responded with a twelve page letter, including attachments, conveying his opinion. You transmitted both letters to me on March 4, 1997, and I received them the following day. As I

explained in our telephone conversation of March 5, 1997, we have extended the statutory response date to your original request by one week, to March 13, 1997, to permit us to consider the impact of this new information on our advice.

ANALYSIS

The Political Reform Act was adopted by California voters through the initiative process in 1974. Included within the Act are conflict-of-interest provisions intended to insure that public officials, whether elected or appointed, would perform their duties in an impartial manner, free from any bias attributable to personal financial interests, or to the financial interests of persons who have supported them. (Section 81001(b).) To further this purpose, Section 87100 provides:

“No public official, at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

A “public official” is defined by the Act to include every member, officer, employee or consultant of a state or local government agency. (Section 82048.) A public official “makes” or “participates in making a governmental decision” when he or she votes on, approves, or otherwise makes use of his or her official position to influence the outcome of a governmental decision. (Regulations 18700(b) and (c); 18700.1.)

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 or her immediate family or on, among other interests, any real property in which the public official has a direct or indirect interest worth \$1000 or more. (Section 87103(b).)

Councilmember Renteria is a public official by virtue of her membership on the city council. Her interest in the personal residence owned through the family trust is presumably worth \$1000 or more. Any council approval, grant or denial of a zoning variance, rezoning application, or the like, is a governmental decision. Accordingly, Councilmember Renteria will have a disqualifying conflict of interest on this matter if the zoning decision would foreseeably have a material financial effect on her or her real property interest.

An effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required, but the effect must be more than a mere possibility. (*Downey Cares v. Downey Community Development Comm.* (1987) 196 Cal.App.3d 983, 989; *Witt v. Morrow* (1977) 70 Cal.App.3d 817, 822.) Since zoning decisions commonly have a financial impact on neighboring properties and property values, it would ordinarily be foreseeable that the matter at issue here will have some effect on Ms. Renteria’s property.

The Commission has promulgated regulations containing guidelines for determining the

materiality of effects on real property interests. Regulation 18702.3(a)(1) is especially pertinent:

“(a) The effect of a decision is material as to real property in which an official has a direct, indirect or beneficial ownership interest (not including a leasehold interest), if any of the following applies:

(1) The real property in which the official has an interest, or any part of that real property, is located within a 300 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no foreseeable financial effect upon the official’s real property interest.”

* * *

Under the plain language of this regulation, it is clear that any decision on the project will have, by definition, a *material* financial effect on Councilmember Renteria’s property, “unless the decision will have no foreseeable financial effect upon the official’s real property interest.” Commission regulations do not provide express guidance on how to apply the exception to presumptive material effect contemplated by the final clause of subdivision (a)(1). In the past, we have suggested an approach that takes into consideration the factors described in subdivision (d) of Regulation 18702.3 (See. e.g. *Fitzpatrick* Advice Letter, No. A-93-054.) Subdivision (d) provides as follows:

“(d) For a decision which is covered by subdivision (a)(3) or (b)(1) or (c), factors which shall be considered in determining whether the decision will have the effects set forth in subdivision (a)(3)(A) or (B) include, but are not limited to:

- (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) In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, effect on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.”

The factors non-exclusively enumerated in subdivision (d), for determination of the effects set forth in subdivision (a)(3)(A) or (B), may sensibly be adopted for a determination that there will be no foreseeable financial effect on property governed by subdivision (a)(1) as well. Evidence that there will be “no foreseeable financial effect” can take the form of an independent appraisal. (*Johnson* Advice Letter, No. A-96-025). Thus an independent appraisal taking into account the factors listed in subdivision (d), and omitting no other pertinent factor, is appropriate evidence on which to rely when invoking the exception of subdivision (a)(1).

The recent appraisal by Mr. Jones states a conclusion of “no foreseeable financial effect” on Ms. Renteria’s property after consideration of all the factors listed in Regulation 18702.3(d),


and Mr. Jones notes no additional factors that might change that conclusion. On its face, therefore, the appraisal seems to be a sufficient basis for claiming the exception of "no foreseeable financial effect" provided by subdivision (a)(1) for properties within 300 feet of the project property. The actual sufficiency of any appraisal is, of course, a question of fact that the Commission cannot decide. Ms. Renteria must bear in mind that her choice to participate in a governmental decision based on the evidence of an appraisal immunizes her under the Act only to the extent that reliance on the appraisal was reasonable at the time of the decision.

You have provided us with no reason to believe that the rezoning decision might have a greater impact on the councilmember's rental property, more than 2,500 feet away from the project, than it would have on the much closer residential property.² Accordingly, on the assumption that the Jones appraisal is accurate in its conclusion, Councilmember Renteria may invoke the exception stated at Regulation 18702.3(a)(1), and participate in the decisionmaking about which you have inquired.

If you have any other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Lawrence T. Woodlock
Staff Counsel, Legal Division

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² Because the facts point to no foreseeable financial effect on either of Ms. Renteria's properties, it is not necessary to determine whether these properties are affected in the same manner as "the public generally," within the meaning of Regulations 18703 and 18703.1.