

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

October 21, 1997

James Grosser
Planning Commissioner
City of Azusa
213 E. Foothill Blvd.
Azusa, California 91702

**Re: Your Request for Advice
Our File No. A-97-492**

Dear Mr. Grosser:

This letter responds to your request for advice about the Political Reform Act (the "Act").¹

I. QUESTION

Based upon the facts presented below, are you disqualified under the Act from participating in decisions regarding the project?

II. CONCLUSION

If you conclude (1) that the decisions are *not* substantially likely to affect the fair market value of your residential rental property by \$10,000 or more *or* to affect the fair market rental value by \$1,000 or more per 12-month period, *and* (2) that the decisions are *not* otherwise substantially likely to have a personal financial effect on you or your immediate family, then you may participate.

III. FACTS

You are a member of the Planning Commission of the City of Azusa ("city"). In the normal course of your duties, you will be asked to make decisions on a development project now moving through the city's land use approval process.

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

The Monrovia Nursery Company ("nursery") owns property within the city. The nursery, in association with Lewis Homes of California ("Lewis"), has submitted plans to the city for the development of a 520-acre master planned residential community located on the existing nursery property. This proposed development project, known as the Rosedale Project ("project"), will consist of approximately 24 residential neighborhoods, a commercial center, and over 240 acres of parks and open spaces.

You own residential real property which is located approximately 2080 feet from the boundary line of the project. You have received an appraisal opinion from Beryl L. Simmerok, a Certified General Appraiser, dated August 6, 1997. The appraiser's opinion, which expressly considered the factors enumerated in Regulation 18702.3(d), concludes that there will be no financial effect on your residential real property.

IV. ANALYSIS

A. Introduction.

The Act's conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Specifically, Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. As a public official,² you will have a disqualifying conflict of interest with regard to governmental decisions about the project if the decisions will have a reasonably foreseeable and material financial effect on your financial interests which is distinguishable from the effect on the public generally.

B. Making, participating in making, or using your official position to influence governmental decisions.

The Act's conflict-of-interest provisions apply only where a public official "make[s], participate[s] in making, or in any way attempts to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Section 87100.)

² The Act's conflict-of-interest provisions apply only to "public officials." "Public official," for purposes of the Act, is defined to include every member, officer, employee, or consultant of a state or local agency (with certain exceptions not relevant here). (Section 82048; Regulation 87100.) As mayor, you are a public official for purposes of the Act.

By voting on the decisions about the project, you would be making governmental decisions. (Regulation 18700(b)(1).) By taking part in deliberations and negotiations leading up to a vote, you would be using your official position to influence the decisions. (Regulation 18700.1(a).) Thus, the Act's conflict-of-interest rules are applicable to the situation you describe in your advice request.

C. Identifying potential financial interests.

1. Introduction

The Act's conflict-of-interest provisions apply only to *financial* conflicts. "Financial interest" is defined, for purposes of the Act, in Section 87103. Section 87103 recognizes six kinds of potential financial interests for purposes of the Act:

- A business entity in which the public official has an investment of \$1,000 or more;
- Real property in which the public official has an interest of \$1,000 or more;
- Any source of income which aggregates to \$250 or more within 12 months prior to the decision;
- A business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management;
- A donor of gifts to the public official if the gifts aggregate to \$290 or more within 12 months prior to the decision;
- Finally, the public official has a financial interest if the governmental decision will have a "personal effect" on him/her or his/her immediate family, whether positive or negative, of at least \$250 in any 12-month period. (This is known as the "personal effects" rule.)

(Section 87103; Regulation 18702.1(a)(4).)

2. Real property interest.

Your residential real property is a financial interest recognized by the Act. (Section 87103(b).)

3. The “personal effects” rule.

In addition to the impact on your real property interest, you must consider whether the project decisions will have personal financial effects on you or your immediate family.³ (Section 87103, first paragraph.) You may have a financial interest in the project decisions if the reasonably foreseeable impact of the decisions results in the personal expenses, income, assets, or liabilities of you or your immediate family increasing or decreasing by at least \$250 in any 12-month period. (Regulation 18702.1(a)(4).) When applying this “personal effects” rule, the impact on your residential real property is not considered, because that impact is analyzed separately (see preceding section). (*Ibid.*)

D. Reasonable foreseeability and materiality.

1. Introduction

In part IV.C., we identified two potential financial interests of yours which are implicated in the project decisions. The next step in the analysis is determining whether the project decisions will have a reasonably foreseeable and material financial effect on either of these potential financial interests.

Whether the financial consequences of a governmental decision are *reasonably foreseeable* at the time the decision is made is highly situation-specific. A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Whether a financial effect is *material* is determined under various regulations promulgated by the FPPC, depending upon the nature of the interest and the degree to which it is involved. (Regulation 18700 et seq.)

We understand your advice request to inquire about a series of land use decisions. It is important to understand that determinations of reasonable foreseeability and materiality are very fact-dependent, and must be made on a decision-by-decision basis. An effect which may not be reasonably foreseeable at an early stage of a process may become reasonably foreseeable as the process unfolds. Therefore, a “blanket” determination of reasonable foreseeability cannot be made at any stage of a process or a series of decisions which applies to the entire process or series of decisions. This means that you must consider the impact of each decision, as that decision is made, on your financial interests; in other words, you may not decide this issue once and forget about it.

³ For purposes of the Act, “immediate family” means the spouse and dependent children. (Section 82029.)

2. Real property interest.

Your residential real property is indirectly involved in the council's decisions about the project.⁴ The materiality rules for indirectly involved real property interests are found in Regulation 18702.3. For property like yours, which is located more than 300 feet but less than 2,500 feet from the boundaries of the project, subsection (a)(3) applies. That subsection provides that the impact of the council's decisions about the project will be deemed material if *either* of the two following conditions are met:

- The impact of the decisions will be material if the decisions will have a reasonably foreseeable financial effect of \$10,000 or more on the fair market value of your property.
- The impact of the decisions will be material if the decisions will have a reasonably foreseeable financial effect of increasing or decreasing the rental value of the property by \$1,000 or more per 12-month period. (Regulation 18702.3(a)(3).)

Subsection (d) of Regulation 18702.3 sets out factors which must be considered while determining whether either of these conditions are true as to your residential real property.⁵

Thus, the matter boils down to this crucial question of fact: is it reasonably foreseeable, that is, is there a substantial likelihood, that the council's decisions about the project will result in either these conditions being true as to your residential real property?

You have provided us with an appraiser's opinion that there will be "no effect" on your property. In reaching this opinion, the appraiser expressly considered the factors set out in Regulation 18702.3(d). An appraisal conducted by a disinterested and qualified real estate professional who considers the factors listed in Regulation 18702.3(d) will be considered a good faith effort to assess the materiality of pending governmental decisions indirectly affecting a

⁴ Regulation 18702.1(a)(3) states the conditions in which a real property interest is considered to be *directly involved* in a governmental decision. None of these conditions are true as to residential real property in connection with the project decisions. Therefore, by default, the residential real property is indirectly involved in the decisions.

⁵ "(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, effects on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood." (Regulation 18702.3(d).)

public official's property. (*Confer* Advice Letter, No. A- 94-345; *Chiozza* Advice Letter, No. A-94-114.) However, it remains your ultimate responsibility as a public official to evaluate the situation and decide if you have a conflict of interest.

We cannot assess from a distance whether the impact of the decisions about the project will be material. If you conclude that the decisions are *not* substantially likely to affect the fair market value of your residential real property by \$10,000 or more, *or* to affect the fair market rental value by \$1,000 or more per 12-month period, then you may participate.

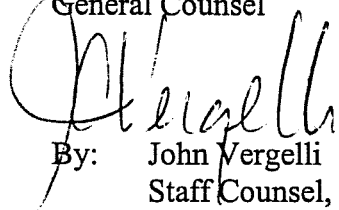
3. The "personal effects" rule.

From a distance, we cannot say whether it is substantially likely, that is, reasonably foreseeable, that the project decisions will have personal financial effects on you or your immediate family of at least \$250 in any 12-month period. As explained above, the impact on your real property interests is not considered as you apply this "personal effects" rule. The financial impact, if any, must derive from something other than your real property interest. (Regulation 18702.1(a)(4).) You must make this determination on a decision-by-decision basis, as the land use decisions unfold.

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

Sincerely,

Steven G. Churchwell
General Counsel



By: John Vergelli
Staff Counsel, Legal Division

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