



FAIR POLITICAL PRACTICES COMMISSION

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June 10, 1998

Ms. Kirsten M. Powell
Assistant City Attorney
City of Scotts Valley
The Law Offices of Robert J. Loan
255 West Julian Street, Suite 302
San Jose, California 95110-2406

**Re: Your Request for Advice
Our File No. A-98-106**

Dear Ms. Powell:

This letter is in response to your request for advice on behalf of Mr. Ken Anderson, the City of Scotts Valley Director of Public Works, regarding the provisions of the Political Reform Act (the "Act").¹

QUESTION

May Public Works Director Ken Anderson participate in decisions regarding the Glenwood Development Project?

CONCLUSION

Because Mr. Anderson is purchasing a home located within 300 feet of the Glenwood Development Project, he may not make or participate in making a governmental decision concerning the project, unless the decision will have *no* financial effect on his residence.

FACTS

The City of Scotts Valley Director of Public Works is in the process of purchasing a home within 300 feet of the Glenwood Development Project. The home has a view of a large

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

portion of the Scotts Valley area, including the Glenwood Development Project. As Public Works Director for the City of Scotts Valley, Mr. Anderson will be substantially involved in the approval process for this project. You are concerned that the following issues may present a conflict:

- The project will generate traffic at an intersection through which Mr. Anderson will access his property. As the Director of Public Works, Mr. Anderson's job requires him to review traffic reports and make the necessary recommendations to the city council for Conditions of Approval for the project.

- The project application which has been submitted to the City of Scotts Valley proposes 100 acres of open space. A portion of that open space is planned to be adjacent to Mr. Anderson's property. The Public Works Department provides staffing for the Parks and Recreation Commission. That Commission relies on the information provided by the Public Works Department staff, forms a recommendation regarding open space maintenance and the location of trails in the open space, and takes that recommendation to the city council for final action.

- The project application proposes a park facility that will probably be located approximately one-half mile from Mr. Anderson's property. His level of participation on this issue will be similar to that described in previous paragraph, i.e., he and his staff at the Public Works Department will provide information and analysis to assist the Parks and Recreation Commission in forming a recommendation for the city council. The final location of the park within the Glenwood Development Project is not yet fixed, and part of the Parks and Recreation Commission's recommendation will be where to locate the park.

ANALYSIS

The Political Reform Act prohibits a 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. (Section 87100.) A "public official" is defined in Section 82048 and Regulation 18700 as a member, officer, employee, or consultant of a state or local government agency. As Director of Public Works for the city of Scotts Valley, Mr. Anderson is a "public official" under the Act.

1. Making or Participating in a Governmental Decision. Regulation 18700 (copy enclosed) sets forth criteria for determining whether an official is making or participating in a decision. It states in pertinent part:

“(b) A public official ‘makes a governmental decision,’ except as provided in subdivision (d) of this section, when the official, acting within the authority of his or her office or position:

- (1) Votes on a matter;
- (2) Appoints a person;
- (3) Obligates or commits his or her agency to any course of action;
- (4) Enters into any contractual agreement on behalf of his or her agency;
- (5) Determines not to act, within the meaning of subdivisions (b)(1), (b)(2), (b)(3), or (b)(4) above, unless such determination is made because of his or her financial interest. When the determination not to act occurs because of the official's financial interest, the official's determination must be accompanied by disclosure of the financial interest, made part of the agency's official record, or made in writing to the official's supervisor as provided in 2 Cal. Code of Regs. Section 18730(b)(10), to the appointing power, or to any other person specified in a Conflict of Interest Code adopted pursuant to Government Code Section 87300.

(c) A public official 'participates in making a governmental decision,' except as provided in subdivision (d) of this regulation, when, acting within the authority of his or her position, the official:

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

(2) Advises or makes recommendations to the decisionmaker 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 and the purpose of which is to influence a governmental 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 and the purpose of which is to influence a governmental decision... .”

You described several duties of the Director of Public Works that are related to the project. First, he will review traffic reports and make the necessary recommendations to the city council for Conditions of Approval for the project. Second, he and his staff at the Public Works Department will provide information and analysis to the Parks and Recreation Commission to assist the Commission in forming its recommendations to the city council about the open space and park facility proposed for the project. Under regulation 18700(c), the Director of Public Works will be participating in governmental decisions when he reviews the traffic reports and

makes recommendations to the council directly, and when he provides staff analysis and reports to the Parks and Recreation Commission, which in turn makes recommendations to the council.

2. Economic Interests. Section 87103 of the Act provides that a public official has a financial interest in a decision within the meaning of Section 87100 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:

“(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).

Section 82033 defines an “interest in real property” as: “any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official . . . if the fair market value of the interest is one thousand dollars (\$1,000) or more.”

The home that Mr. Anderson is purchasing constitutes an ownership interest in real property worth more than \$1,000 which may be affected by decisions about the project. Therefore, Mr. Anderson may not participate in a decision regarding the project if it is reasonably foreseeable that the decision will have a material financial effect on his residence.

3. Foreseeability and Materiality. Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect of a decision on real property is considered reasonably foreseeable if there is a substantial likelihood that it will affect property values. 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.)

Where a public official's real property is indirectly affected as in this case, Regulation 18702.3(a)(1) provides that the effect of a decision is material as to real property in which an official has an ownership interest if:

“(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 financial effect upon the official's real property interest.”

The residence Mr. Anderson is purchasing is located within 300 feet of the Glenwood Development Project. Therefore, pursuant to Regulation 18702.3(a)(1), Mr. Anderson may not participate in the decisions you described regarding the project, unless the decisions would have

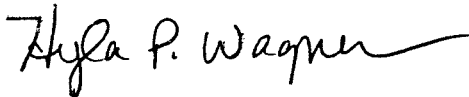
“no financial effect” on his residence. The standard of “no financial effect” is a difficult one to meet, and unlikely to be met in this case, because decisions about traffic flow and open space in a major development that is being built within 300 feet of an official’s property are likely to have some financial effect on the official’s property.

Moreover, although the park facility will probably be located approximately one-half mile from Mr. Anderson’s property, the final location of the park within the Glenwood Development Project is not yet set, and that issue will be part of the Parks and Recreation Commission’s recommendation to the city council. Because the location of the park is not yet finalized and is part of the same project application which gives rise to a conflict of interest for Mr. Anderson, he may not participate in governmental decisions regarding the location of the park unless such decisions would have *no* financial effect on his residence.²

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Hyla P. Wagner
Staff Counsel, Legal Division

Enclosure

SGC:HPW:tls

² The exception for decisions that affect a public official in the same manner as they affect the public generally does not apply in this case, because, as you informed us by phone, ten percent of the population or homeowners of the City of Scotts Valley do not live within 300 feet of the Glenwood Development Project. (Section 87103 and Regulation 18703.)