



## FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807

(916) 322-5660 • Fax (916) 322-0886

July 30, 1998

David A. De Berry  
City Attorney, City of Orange  
300 E. Chapman Avenue  
Orange, California 92866

**Re: Your Request for Informal Assistance  
Our File No. I-98-163**

Dear Mr. De Berry:

This letter is in response to your request for informal assistance regarding the provisions of the Political Reform Act (the "Act").<sup>1</sup> Informal assistance does not provide the requestor with the immunity conferred by formal written advice. (Regulation 18329(c)(3).)

### QUESTIONS

1. Should a lighting renovation plan be analyzed under regulation 18702.3(a)(2), and does the regulation apply whether or not such improvements have any financial effect?
2. Do the comments in the attached minutes interpreting regulation 18702.3(a)(1) accurately portray how the "300-foot rule" is applied?
3. In an enforcement action, who carries the burden of showing whether a materiality threshold has or has not been reached, the official or the Commission?

### CONCLUSIONS

1. Yes, the effect of a lighting renovation plan should be analyzed under regulation 18702.3(a)(2). The effect of the decision will be deemed material, under regulation 18702.3(a)(2), if the official's real property will receive "new or substantially improved services."

---

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

2. The comment correctly states that the materiality threshold in regulation 18702.3(a)(1) will not be met if the governmental decision will have no financial effect on the official's property, which is within 300 feet of property that is the subject of the decision. To show no financial effect, the official should, by analogy, consider the factors in regulation 18702.1(d) and any other relevant factors. To determine materiality, the official must make a good faith effort to assess the effect of the decision on his or her property by using some reasonable and objective method of valuation.

3. In an enforcement action, the Commission has the burden of establishing the materiality element of the conflict-of-interest violation.

### FACTS

The City of Orange will be undertaking two public improvement projects that have received conceptual approval. In the coming months, specifics concerning each project will be before the city council, including the award of bids. One project involves the renovation of the city's historic plaza area and the other involves a master plan for lighting in the city's national historic district. Some councilmembers have ownership interests in property near these projects. You have provided a copy of minutes of a city council meeting, dated May 26, 1998. In the minutes, one councilmember is discussing the "300-foot rule" as follows:

"[T]he 300 foot rule is really what they consider a litmus test. It is not an absolute in having to disqualify yourself. I think that needs to be made clear because, in that case, you have to make a decision whether there is a financial impact on property [within 300 feet of the project area], whether it is positive or negative .... I could not, in my investigation determine how a new street lamp post could affect my property .... In my fourteen years in real estate, I could not determine in any way possible, any formula used, that by changing a street lamp we would change the property value, either good or bad ... And that is really a litmus test for the conflict of interest, the 300 foot rule. It's not an absolute, it's simply to make a public official stop, re-look at an issue that he is going to vote on, to determine if there is a financial impact, either positive or negative."

### ANALYSIS

#### **Conflict of Interest Law**

Pursuant to section 87100, public officials may not make, participate in making or in any way attempt to use his or her official position to influence a governmental decision in which the official has a financial interest.

### **Economic Interest**

An 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 on, among other enumerated economic interests, any real property in which the public official has a direct or indirect interest worth \$1,000 or more. (Section 87103(b).)

You indicate that some councilmembers own real property near the project areas. Therefore, they may not make, participate in making, or use their official position to influence any decision if it is reasonably foreseeable that the project decisions will have a material financial effect on their property.

### **Foreseeability**

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 is considered to be 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.)

### **Materiality**

Once an effect is determined to be reasonably foreseeable, the official must then determine whether the effect is material. The Commission has promulgated a series of regulations containing guidelines for determining whether the foreseeable effect of a decision is material. These regulations apply different standards depending on whether the decision will directly or indirectly involve the official’s economic interest. If the official’s real property is directly involved in the decision, the effect of the decision is presumed to be material. (Regulation 18702.1(a).)

### *Direct Effect*

Regulation 18702.1(a)(3) lists the types of decisions in which an official's interest in real property is considered to be directly involved—decisions to redevelop, zone or rezone the official’s real property; decisions involving a permit authorizing a specific use of the property; decisions to annex the property; decisions concerning assessments on the property; and decisions to include or exclude the property from a city, county or other local governmental subdivision. The decisions about which you are requesting advice do not appear to be the type of decisions set forth in regulation 18702.1(a)(3). Therefore, by default, the councilmembers’ real property interests will be indirectly involved in the decisions concerning the two public improvement projects.

### *Indirect Effect*

For real property interests indirectly involved in a governmental decision, the appropriate standard to determine materiality is contained in regulation 18702.3, which provides in pertinent part:

“(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.

(2) The decision involves construction of, or improvements to, streets, water, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or substantially improved services.” (Regulation 18702.3(a)(1)-(2).)

### **Question # 1**

You have specific questions regarding this provision. First, you would like to know whether a lighting renovation plan is a decision covered by subdivision (a)(2). In the past, we have advised that lighting decisions involve “improvements to streets” and are, therefore, governed by subdivision (a)(2). (*Green Advice Letter*, No. A-89-214.) You would also like to know whether the effect of a decision is material under subdivision (a)(2) if the decision has no financial effect. If the official’s real property will receive “new or substantially improved services,” a material financial effect on the property is presumed.

### **Question # 2**

You have also inquired as to whether the minutes from a past city council meeting accurately reflect how the materiality test in subdivision (a)(1) should be applied. Pursuant to subdivision (a)(1), if an official’s property is located within 300 feet from property that is the subject of a decision, the effect of the decision on the official’s property is presumed to be material, unless the decision will have no financial effect on the official’s property. This is a “one-penny” rule—if there is any financial effect whatsoever, the official will have a conflict of interest. (*Ennis Advice Letter*, No. A-97-270.)

Commission regulations do not provide express guidance on how to apply the exception to the 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 regulation 18702.3(d):

“(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 nonexclusively enumerated in subdivision (d) may sensibly be adopted to evaluate whether there will be no financial effect on property governed by subdivision (a)(1). (*Hentschke* Advice Letter, No. A-97-058.) To determine materiality, the official must make a good faith effort to assess the effect of the decision on his or her property by using some reasonable and objective method of valuation. Ultimately, the public official bears the responsibility of applying the standards set forth in the materiality regulations. Thus, the official will only benefit by conducting a thorough assessment of the financial effects of a decision and documenting the facts and analysis on which the assessment is based. (*Mandeville* Advice Letter, No. A-93-403.)

### Question # 3

Your final query deals with whether it is the official or the Commission who carries the burden of showing whether a materiality threshold has or has not been reached. Under the enforcement provisions of the Act, the Commission may bring an administrative or civil action against an official who participated in a decision in which he or she had a conflict of interest.<sup>2</sup> (Sections 83116, 91001; *Alby* Advice Letter, No. I-97-195.) In such proceedings, the Commission has the burden of proving that a violation has occurred. Since materiality is an element of a conflict-of-interest violation, the Commission has the burden of establishing that element by a preponderance of the evidence.

---

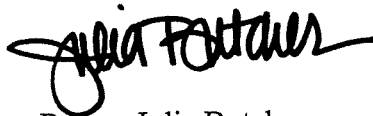
<sup>2</sup> The attorney general, district attorneys and private parties have concurrent jurisdiction to enforce the conflict-of-interest provisions of the Act. (Sections 91001, 91003, 91005.) In addition, any official who violates a conflict-of-interest law may be subject to discipline by his or her agency. (Section 91003.5.)

On the other hand, the respondent has the burden of proving any affirmative defenses. For example, section 83114 provides that formal written advice from the Commission is a complete defense in any enforcement proceeding initiated by the Commission and is evidence of good faith conduct in any other civil or criminal proceeding. (Section 83114(b).) When rendering formal written advice, the Commission does not act as the finder of fact. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) In addition, the Commission's advice is only applicable to the extent that all material facts have truthfully been disclosed. (Section 83114(b).) As a result, when requesting formal written advice from the Commission for the purpose of obtaining immunity from prosecution, the official bears the burden of showing that the materiality thresholds have not been met.

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

Sincerely,

Steven G. Churchwell  
General Counsel



By: Julia Butcher  
Staff Counsel, Legal Division

SGC:JB:tls