



FAIR POLITICAL PRACTICES COMMISSION

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January 29, 2001

Councilor Owen Newcomer
5443 Brookmead Drive
Whittier, CA 90601-2440

**Re: Your Request for Advice
Our File No. A-00-228**

Dear Councilor Newcomer:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act ("the Act").¹

QUESTION

As a council member for the City of Whittier, may you participate in decisions regarding construction of a neighbor's fence on property on which the city has an easement? You also inquire whether you may participate in the council's decisions on other fences further removed from your property.

CONCLUSION

You may not participate if it is reasonably foreseeable that the decisions will result in a material financial effect on your economic interest (your home). You must make a good faith effort to assess the effect of decisions concerning the developments by using some reasonable and objective method of evaluation.

FACTS

Your neighbor, who lives directly across the street from you, and within 300 feet, is requesting city council approval (1) for the right to build a fence partially onto the city's easement, and (2) for a lower insurance requirement than the normal insurance

¹ Government Code sections 81000 – 91015. Commission regulations appear at Title 2, sections 18109-18996, of the California Code of Regulations.

requirement. The fence in question is appropriate in scale and design for the property and the neighborhood. If constructed, the fence would intrude six to seven inches onto the city's easement. You do not believe the fence is likely to affect the value of your property, except to the extent that beautification of the neighborhood inures to the benefit of all property in the area.

You believe the council's decision in this matter will neither encourage nor discourage similar requests in the future. As a point of background, you note that you have a similar fence on your residential property, constructed prior to your ownership, that also intrudes on the city easement. You estimate that there are thousands of such fences constructed throughout the town.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials "should 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." (§ 81001, subd. (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*.

A public official has a "financial interest" in a governmental decision within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (§ 87103; Reg. 18700(a).) The Commission has adopted a standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which is applied here. (Reg. 18700, subd's. (b)(1)-(8).) The Commission recently enacted changes in its regulatory scheme to determine where a conflict may exist. Those changes are expected to take effect on February 1, 2001. Where those changes may impact the analysis in your case, we will assess your situation under both circumstances.

1. Public official.

The Act's conflict-of-interest provisions apply only to "public officials." (§§ 87100, 87103; Reg. 18700, subd. (b)(1).) "Public official" is defined as every member, officer, employee or consultant of a state or local government agency. (§ 82048.) A "local government agency" means a county, city or district of any kind, including a school district, or any other local political subdivision, or any county board commission. (§ 82041.) As a member of the Whittier City Council, you are a "public official," for purposes of the Act (see Sections 82048, 82041), and the conflict-of-interest rules apply to you.

2. The Act's conflict-of-interest rules apply to this decision.

The Act's conflict-of-interest provisions apply only where a public official "make[s], participate[s] in making, or in any way attempt[s] to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (§ 87100; Reg. 18700, subd. (b)(2).)

The decisions involved in this case are governmental decisions to exempt a city resident from certain local ordinances regarding fencing of his property.

3. Identifying economic interests.

The Act's conflict-of-interest provisions apply only to conflicts arising from *economic interests*. The economic interests from which conflicts of interest may arise are defined in Regulations 18703-18703.5. Identifying which, if any, of these economic interests are held by a public official is the third step in analyzing a potential conflict of interest under the Act. (See Regulation 18700(b)(3).) The economic interest at issue in here is your residential property:

A public official has an economic interest in *real property* in which he or she has a direct or indirect interest of \$1,000 or more (Section 87103(b); Regulation 18703.2).

The request for advice indicates you own your personal residence across from your neighbor. We assume the value of your interest in your home (real property) is \$1,000 or greater.² Therefore, it is an economic interest for purposes of the Act.

4. Determining whether the public official's economic interest is directly or indirectly involved in the governmental decision.

Once it has been determined that a public official has an economic interest in certain real property, the next step in the analysis is determining the degree to which the real property is involved in the government decision. (Regulation 18700(b)(4).) This step is important because different criteria for evaluating the materiality of the financial effect on the real property may apply, depending upon whether the real property is directly or indirectly involved in the governmental decision.

Governmental Decisions Prior to February 1, 2001:

Under the Commission's regulations, real property which is not considered directly involved under the rules stated above is considered *indirectly involved* for purposes of determining the applicable materiality standards. (Reg. 18704.2(b).) Because the governmental decision at issue does not involve the issuance of a permit regarding your property, impose fees on the property or otherwise satisfy the criteria of

² Regulation 18703.2 has been amended. For decisions February 1, 2001 and after, the threshold is real property worth \$2,000 or more.

Regulation 18704.2, your property is indirectly involved in decisions regarding your neighbor's request to build a fence on his property.

Governmental Decisions February 1, 2001, and After:

At its December 8, 2000 meeting, the Commission adopted draft regulations which revise the materiality standards for real property. We anticipate these amendments to be effective February 1, 2001, and would apply to decisions occurring after that date. Under the revised regulations, because your property is within 500 feet of the subject property, it would be considered directly involved in those decisions. (Rev. Reg. 18704.2.) A copy of this regulation is enclosed for your consideration.

Once the official finds the relevant materiality standard, he or she must determine whether it is reasonably foreseeable that the materiality standard will be met as a result of the decision.

5. Materiality standards that apply to your property.

Governmental Decisions Prior to February 1, 2001:

For indirectly involved real property interests, the effect of a decision is material if the public official's property is located within a 300-foot radius of the boundaries of the property which is the subject of the decision, unless the decision will have no financial effect upon the official's property. (Regulation 18705.2(b)(1)(A), copy enclosed.)

You stated that your residential property is easily within 300 feet of your neighbor's property. Because your residence is located "within 300 feet" of the property that is the subject of the decision, any financial effect on your property resulting from the decisions about your neighbor's property is deemed material.

Governmental Decisions February 1, 2001, and After:

Similarly, under the new regulatory standard, the financial effect of a governmental decision on the real property that is directly involved is presumed to be material. (Rev. Reg. 18705.2.)

6. Using the materiality standards to decide if it is reasonably foreseeable that the decision will have a material financial effect.

The sixth step in deciding whether an official has a conflict of interest is using the materiality standards to decide if a *material* financial effect on one or more of the official's economic interests is reasonably foreseeable as a result of the decision. (Regulation 18706.)

As used here, "reasonably foreseeable" means "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) 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. (*Ibid.*)

While you have asked whether your property would go up in value as a result of your neighbor's beautification project, we must advise you that the Commission does not act as a finder of fact when it renders advice; we are not in a position to determine the financial effect of the decision on your property.³ We must leave the factual determination of materiality for you to make. We stress that the threshold material financial effect is minimal - just one penny of effect - that would cause a conflict to arise.

Governmental Decisions Prior to February 1, 2001:

Your determination should be made considering the following factors, among others:

- The proximity of the property which is the subject of the decision and the magnitude of the proposed project, or change in use, to the property in which the official has an interest;
- Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;
- 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 18705.2(b)(4).)

If you have considered these factors and you determine there will be no financial effect on your real property interest as described above, you may participate in the decision.

Governmental Decisions February 1, 2001, and After:

After February 1, 2001, a presumption arises that a financial effect is material on directly involved real property. (Reg. 18705.2, subd. (a)(1).) This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property.

³ Thus, this advice is applicable and confers immunity (see Section 83114) only to the extent that the facts provided to us are correct and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.)

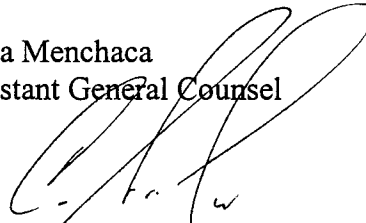
Steps Seven and Eight: Exceptions

We have not gone on to analyze the latter two steps. Step seven is an exception that applies where the reasonably foreseeable and material financial effect on the official's economic interest is not distinguishable from the effect on the public generally, and step eight is an exception that applies when the official is legally required to participate in the decision. You have not provided any facts to suggest that these exceptions may apply.

You may monitor the progress of the amendments on the Commission's website – www.fppc.ca.gov. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
Assistant General Counsel



By: C. Scott Tocher
Staff Counsel, Legal Division

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