



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

December 20, 2002

Sonia Rubio Carvalho
Best Best & Krieger, LLP
5 Park Plaza, Suite 1500
Irvine, CA 92614

Re: Your Requests for Advice
Our File Nos. A-02-293, A-02-294, and A-02-314

Dear Ms. Carvalho:

This letter is in response to your requests for advice on behalf of Mayor Christina Cruz-Madrid (A-02-293), Councilmember Dick Stanford (A-02-294) and Planning Commissioner John Burke Hamilton (A-02-314) regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter should not be construed as advice on any conduct that may have already taken place. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders advice; this advice is applicable and confers immunity 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; Govt. Code section 83114.)

QUESTIONS

1. What is the appropriate standard to determine whether a public official may rely on a written real estate appraisal to rebut the presumption, at regulation 18705.2(a), that a governmental decision on a real estate development project will have a reasonably foreseeable material financial effect upon directly involved real property owned by the official?
2. Based on this standard, may Mayor Cruz-Madrid, Councilmember Stanford, and Planning Commissioner Hamilton rely upon the written real estate appraisals separately provided to each, concerning the reasonably foreseeable financial effects of the Monrovia Nursery Development Project on each of their personal residences?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

CONCLUSION

If these officials individually find that the appraisal of their property omits no pertinent facts and that the involved appraiser is duly qualified, the appraisal is appropriate evidence on which to rely when rebutting the presumption of a material financial effect, as found in regulation 18705.2(a)(1). The standard used to determine whether an appraisal is appropriate evidence for this purpose is discussed in our analysis below.

FACTS

The Monrovia Nursery Company (the "Nursery") currently owns property within the City of Azusa ("Azusa") that it intends to develop into a residential community. The Nursery and Azusa have entered into an agreement for the development of this property and Azusa has approved plans submitted by the Nursery to develop this property. The plans contemplate a 520-acre master planned residential community consisting of approximately 24 residential neighborhoods, a commercial center, and over 240 acres of parks and open spaces (the "Project").

Mayor Madrid owns a single-family residence that is located in Azusa and within 500 feet of the Project's boundaries. Councilmember Stanford owns a residential condominium unit that is located in Azusa and within 500 feet of the Project's boundaries. Planning Commissioner Hamilton owns a single-family residence that is also located in Azusa and within 500 feet of the Project's boundaries.

In an effort to determine whether the Project will have any effect, financial or otherwise, on their respective properties, each of these officials recently obtained a real estate appraisal by an experienced real estate broker licensed by the State of California. These appraisals each conclude that the Project will have no effect, financial or otherwise, on the public officials's respective properties. In reaching this conclusion, each appraisal considered the following factors:

- a. The reasonably foreseeable effect of the Project upon the development potential or income producing potential of the official's real property;
- b. The use of the public official's real property; and
- c. Whether the Project will result in a change to the character of the neighborhood in which the public official's real property is located, including, but not limited to, effects on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

The appraisals note that the Project's new homes will be separated from the public officials's properties by a large hill, and with respect to Mayor Cruz-Madrid and Planning Commissioner Hamilton, the Beatty Water Detention basin as well. For this reason, the Project will be a discrete community separated from the officials's properties. In addition, there will be no direct access between the Project and Councilmember Stanford's property, and the direct access between the Project and the remaining officials's properties is limited to a small segment of the Project comprised of 32 homes.

The appraisals conclude that these factors determine the Project will have no impact on the officials's property values.

ANALYSIS

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. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict-of-interest (regulation 18700, subdivisions (b)(1) – (8)), which is discussed below. The general rule, however, is that a conflict of interest may occur whenever a public official makes a governmental decision which may have a reasonably foreseeable and material financial effect on one or more of his or her financial interests.

Steps 1. - 4. Are Mayor Cruz-Madrid, Councilmember Stanford, and Planning Commissioner Hamilton public officials who will make, participate in making, or influence a governmental decision in which one or more of his or her economic interests are directly involved?

You acknowledge that these individuals are public officials who will be making, participating in making and influencing governmental decisions with respect to the Project. (Regulation 18701, and regulations 18702 through 18702.3.) You also correctly identify that their respective principal residences are an economic interest to them (section 87103(b); regulation 18703.2) and that, by virtue of being located within 500 feet of the proposed boundaries of the Project, each of the official's economic interest in his or her residence will be directly involved in those decisions (regulation 18704.2(a)). Your question pertains to steps 5 and 6 of our standard analysis.

Steps 5. & 6. What is the applicable materiality standard and is it reasonably foreseeable that the financial effect of the governmental decisions upon their economic interest in their residential real property will meet this materiality standard?

Materiality: Not all governmental decisions by a public official which impact his or her economic interests give rise to a conflict of interest. It is when the reasonably foreseeable impact on his or her economic interests is material (or important) that a conflict may arise. The determination of materiality is necessarily a factual question. In this regard, we are not finders of fact and our analysis is dependent upon the facts you supply.

Regulation 18705.2(a)(1) provides that the financial effect of a governmental decision on directly involved real property is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect at all on the real property. Any proof relied upon by a public official in this regard must be reasonable and objective. Ultimately, this is a factual question for the public official to decide.

Foreseeability: Under regulation 18706, an effect upon economic interests is considered reasonably foreseeable if there is a substantial likelihood that it will occur. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Again, the determination of foreseeability is necessarily a factual question that is ultimately for the public official to decide. In determining whether a governmental decision will have a reasonably foreseeable material financial effect on an economic interest, an official may consider, among other relevant facts, the factors listed in regulation 18706(b).

When these two factors above are considered together, the question becomes “is it reasonably foreseeable that there will be *any* financial effect on the value of the official’s real property?”² The respective personal residences that are individually an economic interest to these officials are located within 500 feet of the proposed boundaries of the Project. Given this proximity and the presumption under our regulations described above, the officials ordinarily have a conflict of interest potentially prohibiting their involvement in decisions concerning the Project. However, an official may take steps to determine, as factual matter, that a particular decision will not have the presumed effect upon his or her interest in real property.

Appraisals: A public official may seek third-party assistance, such as a real estate appraisal, to help decide whether the presumption holds true and that a decision will have a reasonably foreseeable material financial effect in his or her situation. We have advised in the context of both directly and indirectly involved real property that an appraisal conducted by a disinterested and otherwise qualified real estate professional, which is based upon an accurate understanding of the underlying facts, and also considers the factors listed in regulation 18705.2(b)(1)(A)-(C), will generally be considered as a good faith effort by a public official to assess the financial effect of a decision on his or her property. (*Vadon* Advice Letter, No. A-02-080 (directly involved real property); *Perkins* Advice Letter, No. A-99-024 (indirectly involved real property).)

However, a public official may not simply rely on a third-party appraisal without further inquiry into whether the person conducting the appraisal is qualified to do so, whether the appraisal considered all of the appropriate factors described in our regulations, and whether the conclusion reached by the appraiser is objectively defensible (e.g., based on a full and accurate assessment of the underlying facts). (*O’Harra* Advice Letter, A-00-174.) When these criteria are met, a public official may find that a third-party appraisal provides a reasonable and objective basis for rebutting the presumption that a decision will have a reasonably foreseeable material financial effect on his or her economic interest in directly involved real property.

In these instances, the appraisals reach the conclusion of no financial effect based on the application of the facts to our regulations. For instance, the appraisals discuss the topographical features that isolate the Project from the surrounding neighborhoods where

² This is a strict standard (the so-called “one-penny” rule). If the decision can reasonably be foreseen as having a financial effect as little as even one penny upon a public official’s directly involved economic interest in real property, it will, in the absence of an exception, disqualify the public official from involvement in the decision.

Foreseeability: Under regulation 18706, an effect upon economic interests is considered reasonably foreseeable if there is a substantial likelihood that it will occur. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Again, the determination of foreseeability is necessarily a factual question that is ultimately for the public official to decide. In determining whether a governmental decision will have a reasonably foreseeable material financial effect on an economic interest, an official may consider, among other relevant facts, the factors listed in regulation 18706(b).

When these two factors above are considered together, the question becomes “is it reasonably foreseeable that there will be *any* financial effect on the value of the official’s real property?”² The respective personal residences that are individually an economic interest to these officials are located within 500 feet of the proposed boundaries of the Project. Given this proximity and the presumption under our regulations described above, the officials ordinarily have a conflict of interest potentially prohibiting their involvement in decisions concerning the Project. However, an official may take steps to determine, as factual matter, that a particular decision will not have the presumed effect upon his or her interest in real property.

Appraisals: A public official may seek third-party assistance, such as a real estate appraisal, to help decide whether the presumption holds true and that a decision will have a reasonably foreseeable material financial effect in his or her situation. We have advised in the context of both directly and indirectly involved real property that an appraisal conducted by a disinterested and otherwise qualified real estate professional, which is based upon an accurate understanding of the underlying facts, and also considers the factors listed in regulation 18705.2(b)(1)(A)-(C), will generally be considered as a good faith effort by a public official to assess the financial effect of a decision on his or her property. (*Vadon* Advice Letter, No. A-02-080 (directly involved real property); *Perkins* Advice Letter, No. A-99-024 (indirectly involved real property).)

However, a public official may not simply rely on a third-party appraisal without further inquiry into whether the person conducting the appraisal is qualified to do so, whether the appraisal considered all of the appropriate factors described in our regulations, and whether the conclusion reached by the appraiser is objectively defensible (e.g., based on a full and accurate assessment of the underlying facts). (*O’Harra* Advice Letter, A-00-174.) When these criteria are met, a public official may find that a third-party appraisal provides a reasonable and objective basis for rebutting the presumption that a decision will have a reasonably foreseeable material financial effect on his or her economic interest in directly involved real property.

In these instances, the appraisals reach the conclusion of no financial effect based on the application of the facts to our regulations. For instance, the appraisals discuss the topographical features that isolate the Project from the surrounding neighborhoods where

² This is a strict standard (the so-called “one-penny” rule). If the decision can reasonably be foreseen as having a financial effect as little as even one penny upon a public official’s directly involved economic interest in real property, it will, in the absence of an exception, disqualify the public official from involvement in the decision.

these officials's residences are located. The appraisals describe how either the lack of, or the limited direct access between the Project and the streets proximate to these officials's properties will mean very little, if any, incremental vehicular traffic will occur. In addition, the topographical features of the area mean that the Project will have no impact on the view of the surrounding foothills and valley from the officials's residences. Moreover, the appraisals describe how the Project will not change the character of the immediate neighborhoods, in the context of affecting privacy, intensity of use, noise levels, air emissions, or similar neighborhood traits.

The independent appraisals obtained by these officials appear to take into account the factors listed in our regulations. Therefore, if these officials individually find that the appraisal of their property omits no pertinent facts, reaches an objectively defensible conclusion, and that the involved appraiser is duly qualified, the appraisal is appropriate evidence on which the official may rely when rebutting the presumption of a material financial effect, as found in regulation 18705.2(a)(1). However, whether the evidence is sufficient to rebut the presumption that a particular decision will have a reasonably foreseeable financial effect on a public official's economic interests is a factual question, not a legal conclusion. Therefore, this determination is always ultimately one to be made by an official, and not the Commission through its response to an advice request. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

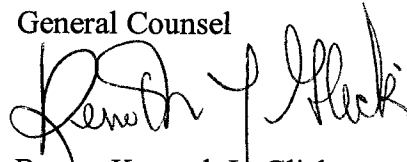
7.& 8. Will the governmental decision have an economic impact upon the officials indistinguishable from the impact upon the public generally? Are one or more of the officials legally required to participate in decision regarding the Project?

You have not inquired about these exceptions nor provided us with the facts necessary to determine whether either of these exceptions applies. For reference, you may obtain further information about these exceptions by examining regulations 18707 - 18707.9, which describe the "public generally exception (step 7) and regulation 18708, which describes the "legally required participation exception (step 8).

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

Sincerely,

Luisa Menchaca
General Counsel



By: Kenneth L. Glick
Counsel, Legal Division

KLG:jg

I:\AdviceLtrs\02-293