



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

July 12, 2023

Adrian Granda
Director, Department of Government Affairs
City of San Diego
202 C Street, 11th Floor
San Diego, CA 92101

Re: Your Request for Informal Assistance
Our File No. I-23-102

Dear Mr. Granda:

This letter responds to your request for advice on behalf of the City of San Diego regarding Section 84308 of the Political Reform Act (the “Act”).¹ Because it does not relate to a specific governmental decision, we are treating it as a request for informal assistance.²

Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. Under the Act, where the San Diego Mayor—a “strong mayor”—would otherwise be disqualified from taking part in a license, permit, or entitlement for use proceeding under Section 84308, does the “legally required participation exception” permit the officer to take part in the proceeding by approving or vetoing a decision by the City Council?

2. If the San Diego Mayor takes part in an entitlement for use proceeding pursuant to the legally required participation exception, is the officer required to return all or a portion of the otherwise disqualifying contribution exceeding \$250?

3. Under the Act, if the San Diego Mayor takes part in an entitlement for use proceeding under Section 84308 pursuant to the legally required participation exception, may the San Diego Mayor permissibly solicit, direct, or receive a contribution exceeding \$250 from a party, participant, or agent thereof, while the proceeding is pending and for 12 months thereafter?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSIONS

1. Yes. Consistent with California case law and the San Diego City Charter establishing the San Diego Mayor's exclusive duty to approve or veto resolutions by the City Council, the legally required participation exception permits the San Diego Mayor to take part in entitlement for use proceedings the officer would ordinarily be disqualified from under Section 84308. Note, however, that the San Diego Mayor's requirements for disclosure under Section 84308 and Regulation 18705 would still apply.

2. No. The legally required participation exception permits officials to take part in a governmental decision *despite* the presence of a conflict that would otherwise disqualify the official from participating in the decision. In the same way that a public official would not be required to return income or gifts before taking part in a governmental decision pursuant to the legally required participation exception, the San Diego Mayor would not be required to return or pay down a contribution in order to take part in an entitlement for use proceeding pursuant to that same exception.

3. No. Although the legally required participation exception would apply, such that the San Diego Mayor's participation in the proceeding via approval or veto of a City Council decision would not violate Section 84308, the exception would not apply to separate violations of Section 84308, such as the San Diego Mayor's soliciting, directing, or receiving a contribution exceeding \$250 from a party, participant, or agent while the proceeding is pending and for 12 months thereafter, or the San Diego Mayor's failure to make required disclosures.

FACTS AS PRESENTED BY REQUESTER

Voters in the City of San Diego approved Proposition D locally on June 8, 2010, which amended the City Charter (or "Charter") to make permanent a "strong mayor" form of government, where the San Diego Mayor no longer sits as a member of the City Council and is vested with certain specified nondelegable duties. One such duty is that upon action by the City Council, most ordinances and resolutions go to the San Diego Mayor for action, and the San Diego Mayor may either attach a signature or veto. If the San Diego Mayor takes no action within 10 days, ordinances and resolutions are deemed approved. The San Diego Mayor cannot delegate this authority to any other officer and these regulations are outlined in the Charter of the City, which requires a local vote of the people to amend.

ANALYSIS

The Act

Historically, under Section 87100 of the Act, public officials have generally been prohibited from taking part in governmental decisions that would have a reasonably foreseeable, material financial effect on certain economic interests of the official's, distinguishable from the effect on the public generally. Separately, Section 84308 has historically applied to a much smaller number of public officials, and has prohibited those officials from taking part in license, permit, or other entitlement for use proceedings when a party or participant in the proceeding has contributed more than \$250 to the official within the preceding 12 months. In such proceedings, a party is generally

considered to have an inherent financial interest under Section 87100 as the named party or subject of the relevant governmental decisions (see, e.g., Regulations 18701(a); 18702.1(a)(1); 18702.2(a)(1)-(6); 18702.3(a)(1).) A “participant” in such a proceeding is statutorily defined as one who has a financial interest in the decision under Section 87100. (Section 84308(a)(2).)

As amended by SB 1439, effective January 1, 2023, however, Section 84308 now applies to a much wider scope of public officials; more specifically, the statute’s provisions now apply to officers of local government agencies whose members are directly elected by voters. As such, public officials such as city councilmembers and mayors may be prohibited from taking part in entitlement for use proceedings involving a party or participant who has donated \$250 or more to the officer within the preceding 12 months. Additionally, the officer must disclose any such contribution received. (Section 84308(c).) The officers may also be prohibited while a proceeding is pending and for 12 months following the final decision from accepting, soliciting, or directing a contribution of more than \$250 from any party, participant, or agent thereof if the officer knows or has reason to know that the participant has a financial interest. (Section 84308(b).) This prohibition applies regardless of whether a contribution is accepted, solicited or directed on the officer’s own behalf, or on behalf of any other officer, or on behalf of any candidate for office or on behalf of any committee. (*Ibid.*)

Notably, Section 87101 of the Act provides, “Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent the official’s participation is legally required for the action or decision to be made.” Given that a party or participant’s financial interest under Section 87100 may prevent an officer from taking part in an entitlement for use proceeding under Section 84308, Section 87101 is applicable in the context of Section 84308.

Regulation 18705(a) (as amended June 15, 2023)—the “legally required participation exception”—specifies that a public official who has received a disqualifying contribution under Section 84308 may establish that the official is legally required to make or to participate in the making of a governmental decision if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision. If no such alternative source of decision exists, the official is not prohibited from taking part in the entitlement for use proceeding, notwithstanding the officer having received a generally disqualifying contribution under Section 84308. An official who participates in a decision under this exception is required to state the existence of the potential conflict and the legal basis for concluding there is no alternative source of decision in accordance with Regulation 18705(b).

You have inquired how Section 84308 and the legally required participation exception may apply to the San Diego Mayor, given that San Diego has a “strong mayor” form of government in which the Mayor may sign or veto most resolutions and ordinances passed by the City Council, but may not delegate that authority to another official. The case most relevant to your inquiry is *Affordable Hous. Alliance v. Feinstein* (1986) 179 Cal.App.3d 484 (*Feinstein*).

In *Feinstein*, the California Court of Appeal held that the Mayor of San Francisco—a strong mayor—was legally required to participate in a governmental decision by approving or vetoing a city council decision in which she had an otherwise disqualifying financial interest. In reaching that conclusion, the court rejected the argument that the mayor was not legally required to participate in

the decision because the mayor could have simply refrained from approving or vetoing the ordinance altogether, after which the ordinance would be considered approved by default. (*Feinstein, supra*, at p. 490.)

Although *Feinstein* did not specifically deal with Section 84308, the court's interpretation of the Act and its legally required participation exception in the context of strong mayor governments informs our analysis of Section 84308's application. Here, as in *Feinstein*, the City of San Diego has established a strong mayor form of government with a legislative process analogous to the roles of the U.S. President and the Congress. Under San Diego's Charter, the San Diego Mayor has "a significant and unique function in the city's lawmaking process" and "[t]o . . . restrict the mayor's duty and discretion either to approve or veto legislation would unquestionably be inconsistent with the terms of the charter and with the separation of powers doctrine underlying its provisions." (See *Feinstein, supra*, at p. 491.) As such, consistent with *Feinstein*, it would be an unreasonable interpretation of Section 87101 and Regulation 18705 to find that the legally required participation exception does not apply merely because an ordinance or resolution would take effect by default if the San Diego Mayor abstained from approving or vetoing it. Because San Diego ordinances and resolutions take effect after ten days if the San Diego Mayor takes no action, requiring the San Diego Mayor's recusal would effectively still involve the San Diego Mayor approving each City Council decision via *inaction*. (See *Feinstein, supra*, at p. 490.) The San Diego Mayor's legally required participation via approval or veto of ordinances and resolutions is further suggested by the lack of provisions pertaining to recusal or substitution in the event of a conflict of interests.

For these reasons, we believe that the legally required participation exception under Section 87101 and 18705 would apply to permit the San Diego Mayor to approve or veto a City Council decision in an entitlement for use proceeding, even if the San Diego Mayor has received a contribution from a party, participant, or agent thereof that would ordinarily require recusal under Section 84308. In such instances, the legally required participation exception applies to permit participation despite the presence of an ordinarily disqualifying factor; in other words, the San Diego Mayor is not required to return or pay down a contribution in excess of \$250 that would ordinarily result in disqualification, just as a public official legally required to take part in a governmental decision would not be required to return income or gifts that would ordinarily result in disqualification under Section 87100.

Application of the legally required participation exception is not without its limits. As discussed above, Section 87101 provides that "Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent the official's participation is legally required for the action or decision to be made." Stated differently, the legally required participation exception is a narrow one and only permits an official to *participate* in a governmental decision they would otherwise be disqualified from participating in.

The San Diego Mayor who takes part in an entitlement for use proceeding pursuant to the legally required participation exception is not excused from the Act's other provisions. Notably, the San Diego Mayor would be required to make the various disclosures required by the Act, including the disclosure required under Section 84308. Section 84308(c) provides:

Prior to rendering any decision in a proceeding involving a license, permit, or other entitlement for use pending before an agency, each officer who received a

contribution within the preceding 12 months in an amount of more than two hundred and fifty dollars (\$250) from a party or from any participant shall disclose that fact on the record of the proceeding.

This disclosure requirement is expanded on in Regulations 18438.8, pertaining to disclosures under Section 84308, and 18705, which speaks to the disclosure requirements under the legally required participation exception. As required by Section 84308(c) and these regulations, before the San Diego Mayor exercises their veto power pursuant to the legally required participation exception, the Mayor (or an employee on the Mayor's behalf) must:

- (1) Disclose the existence of the conflict and describe with particularity the nature of the economic interest—that is, the fact that the conflict involves a contribution or contributions from a party or participant greater than \$250 within the preceding 12 months, as well as the name of the party or participant who made the contributions;
- (2) Give a summary description of the circumstances in which the San Diego Mayor believes the conflict may arise;
- (3) Disclose the legal basis for concluding there is no alternative source of decision; and
- (4) Make the disclosure in the manner detailed in Regulation 18705(b)(4), as appropriate for an item that occurs in an open session, closed session, or other type of meeting.

(Regulation 18705(b); see also 18438.8(a) [requiring disclosure of the fact of a contribution greater than \$250 and made within the preceding 12 months and the identity of the contributor be disclosed at the beginning of a public meeting].)

Consistent with these requirements, we recommend that when the San Diego Mayor intends to exercise their veto power pursuant to the legally required participation exception and despite receipt of an otherwise disqualifying contribution under Section 84308, they include a disclosure containing the necessary information as part of the meeting agenda. If the veto is done outside the context of a public meeting, we recommend the disclosure be posted in a conspicuous manner on the appropriate City website and a copy of the disclosure be filed with and maintained by the agency official who maintains the agency's statements of economic interests, or other designated office for the maintenance of such disclosures, within 30 days of the making of or participating in the decision. (See Regulation 18705(b)(4)(C).)

While disclosure is one of the more notable requirements still applicable to the San Diego Mayor, we again emphasize that the legally required participation exception is a narrow one and only applies to allow the San Diego Mayor to take part in a governmental decision they would otherwise be disqualified from under Section 84308. Consistent with this understanding, the San Diego Mayor would still be prohibited, for example, from soliciting, directing, or receiving a contribution exceeding \$250 from a party, participant, or agent thereof while the proceeding is pending and for 12 months thereafter. (Section 84308(b).)

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

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Counsel, Legal Division

KMC:aja