



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 31, 2020

Mark Hensley
Hensley Law Group
2600 W. Olive Avenue, Suite 500
Burbank, CA 91505

Re: Your Request for Advice
Our File No. A-20-086

Dear Mr. Hensley:

This letter responds to your request for advice on behalf of El Segundo City Councilmember Scot Nicol regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also 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.

QUESTION

Under the Act, may Councilmember Nicol take part in the development and issuance of requests for proposals relating to the development and economic revitalization of the Downtown Specific Plan area, where he leases commercial property?

CONCLUSION

Under the Act, Councilmember Nicol would generally be disqualified from taking part in the development and issuance of requests for proposals, given that it is likely the development and economic revitalization of the Downtown Specific Plan area would impact the rental value of his leased property. If necessary, for the purposes of convening a quorum, otherwise disqualified officials may be randomly selected to permissibly take part in the decisions, subject to the requirements of Regulation 18705.

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 18110 through 18997 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.

FACTS AS PRESENTED BY REQUESTER

Scot Nicol has served as a Councilmember for the City of El Segundo since 2018. He is also a licensed real estate agent and maintains an office in the Downtown Specific Plan area of the City. On February 24, 2019, he entered into a five-year, triple-net lease for the office space. Pursuant to the lease, base monthly rent charges increase by 3% each year and subletting is prohibited without the lessor's prior written consent. Because the property expenses—including real estate taxes—are passed through to the tenants as a component of rent, those expenses (and, therefore, the total rent charged to the Councilmember) could increase if the property were sold and reassessed at market value. The lease provides that the premises may be used for a real estate office and for no other purpose.

Over the next several months, the City Council is expected to consider one or more projects that may involve amendments to the Downtown Specific Plan, including amendments that would affect the uses allowable in the Specific Plan area as well as applicable development standards, including, without limitation, parking, height, and minimum setback standards.

There are five members on the El Segundo City Council. Several members have potential financial conflicts of interest with respect to the Downtown Specific Plan amendments due to business interests and/or their ownership of real property in or around the area. If Councilmember Nicol is disqualified due to a conflict of interest, there would not be enough qualified councilmembers to constitute a quorum.

In a follow-up email, you further stated that the projects coming before the City Council are not yet clearly defined, but essentially include rezoning many blocks in the downtown area to potentially increase the allowable height of buildings, reduce parking requirements, and perhaps allow different uses. The City Hall is located in the downtown area and part of the project will look at moving some or all aspects of the City Hall (which currently consists of general administration and fire and police stations) and allowing the current City Hall property to be developed by a private party. From the City staff's perspective this could result in a significant change to the downtown area. It will take months of consulting work to develop detailed proposals and plans and probably years to finalize the process.

In *Hensley* Advice Letter, No I-20-077, we issued informal advice based on the above information, and explained, “[w]ithout specific decisions related to specific projects, it is not feasible to advise on whether a particular governmental decision would have a reasonably foreseeable, material financial effect on Councilmember Nicol’s economic interests.” After that letter was, you contacted our office and, through a telephone conversation and follow-up email, provided the following additional information:

The City is starting the planning process for a development project. The next steps for the City Council, after conflict of interest questions have been determined, is developing and issuing two requests for proposals (RFPs). One RFP would be for developers who would potentially be interested in developing the Civic Center property (City Hall). The other RFP would be for a consultant to assist with developing changes to zoning standards and uses throughout the Downtown Specific Plan area, with the ultimate intent of developing what would likely be a mixed-use project involving residential and retail space in the Downtown Specific Plan area. The Council

will be giving preliminary direction in both cases about the types of development they want to encourage and the potential changes to the current zoning laws to encourage that development. It will focus on building height, parking requirements, permissible building uses, and possibly request that potential developers include a specific number or proportion of shops, restaurants with outdoor dining, etc. You have heard from City staff that they believe this project would likely bring significant changes to the downtown area, with the goal of encouraging development and revitalizing the downtown area. In an additional follow-up email, you specified that Councilmember Nicol's leased property is located 468 feet away from the City Hall property.

ANALYSIS

Under Section 87100 of the Act, "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." "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, a member of his or her immediate family," or on certain specified economic interests. (Section 87103.) Among those specified economic interests are:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

(Section 87103(a)-(b).)

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)." Here, Councilmember Nicol's economic interests are not explicitly involved in the governmental decision.

Where an official's economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, "[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

The reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold interest as the lessee of the property is material only if the governmental decision will:

- (1) Change the termination date of the lease;
- (2) Increase or decrease the potential rental value of the property;
- (3) Change the official's actual or legally allowable use of the property; or
- (4) Impact the official's use and enjoyment of the property.

(Regulation 18702.2(c).)


Since *Hensley* Advice Letter, No. I-20-077 was issued, you have clarified that the City will be developing and issuing two RFPs related to developing and revitalizing the Downtown Specific Plan area, where Councilmember Nichol's leased property is located. Although the City is still in the early phases of planning this project, given the scope of the project and the proximity of Councilmember Nicol's leased property to the City Hall property, it is reasonably foreseeable that these decisions will lead to a change in the potential rental value of the property. (Regulation 18702.2(c)(2).) Because the decisions would have a reasonably foreseeable, material financial effect on Councilmember Nicol's real property interest, he is disqualified under the Act from taking part in the decisions. Accordingly, we need not further analyze the potential financial effects the decisions may have on his business or clients.

As discussed in *Hensley* Advice Letter, No. I-20-077, Regulation 18705 describes specific steps that a public official must take in order to participate when the otherwise disqualified official is legally required to take part in a governmental decision, including use of a random means of selection for the purpose of convening a quorum. However, as also discussed in *Hensley* Advice Letter, No. I-20-077, the legally required participation exception under Regulation 18705 would not apply if a councilmember refused to participate in the random selection process.

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

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