

State of California



Fair Political Practices Commission

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Technical Assistance •• Administration •• Executive/Legal •• Enforcement •• Statements of Economic Interest
(916) 322-5662 322-5660 322-5901 322-6441 322-6444

March 13, 1985

Michael J. Rainville
Sinsheimer, Schiebelhut & Baggett
P.O. Box 31
San Luis Obispo, CA 93406

Re: Your Request for Advice
Our File No. A-85-024

Dear Mr. Rainville:

Thank you for your letter requesting advice on behalf of the members of the Port San Luis Harbor District regarding the conflict of interest provisions of the Political Reform Act.^{1/}

QUESTION

If a public official is disqualified from participating in a governmental decision because of a conflict of interest, under what circumstances is the public official's participation "legally required for the action or decision to be made" within the meaning of Section 87101?

CONCLUSION

A disqualified public official's participation in a governmental decision is "legally required for the action or decision to be made" only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

DISCUSSION

Section 87100 prohibits any public official at any level of state or local government from making, participating in, or in any way attempting to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. When a public official is required to disqualify himself from participating in a governmental decision, he may not be counted for purposes of determining whether a quorum is present, he may not ask questions or otherwise participate in any discussion about the decision, and he may not vote on the decision. These restrictions apply only with regard to the decisions from which the public official is required to disqualify himself, and do not limit the public official's ability to participate in other matters considered by the agency at the same meeting.

Section 87101 contains a limited exception to the prohibition in Section 87100. Section 87101 provides as follows:

Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section.

The Commission has adopted regulation 2 Cal. Adm. Code Section 18701, which interprets the phrase "legally required participation" as used in Section 87101. Regulation 2 Cal. Adm. Code Section 18701 provides as follows:

(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

(b) Whenever a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she shall:

(1) Disclose as a matter of official public record the existence of the financial interest;

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(2) Describe with particularity the nature of the financial interest before he or she makes or participates in making the decision;

(3) Attempt in no way to use his or her official position to influence any other public official with respect to the matter;

(4) State the reason there is no alternative source of decision-making authority;

(5) Participate in making the decision only to the extent that such participation is legally required.

(c) This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Government Code Section 87100, to vote to break a tie.

(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Government Code Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code Section 87100, whether or not such other members are actually present at the time of the disqualification.

Thus, Section 87101 permits a public official whose participation in a decision is "legally required for the action or decision" to participate in the decision although he has a financial interest in the decision, but only if there exists no alternative source of decision consistent with the terms of the statute authorizing the decision. For example, if three members of a five-member board were disqualified from participating in a decision because of conflicts of interest, and the statute authorizing the board's action provides that the board may not act on the matter without the participation of at least three members, then one of the three disqualified members would be permitted to participate in the board's decision because the participation of at least three board members is legally required. However, if two board members were disqualified, and only two of the other three qualified board members were present at the meeting, then the participation of one of the disqualified board members would not be legally required for the action or decision to be made, within the meaning of Section

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87101. In other words, if enough members are qualified to vote on a particular matter so that it would be possible to attain a quorum, then the participation of any disqualified member is not legally required pursuant to Section 87101.

As you requested, I have enclosed a copy of the Hudson Opinion, 4 FPPC Opinions 13 (No. 77-007, Feb. 7, 1978), in which the Commission emphasized that the rule of legally required participation is to be narrowly construed to minimize participation in government decisions by officials with a conflict of interest.

If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Very truly yours,



Kathryn E. Donovan
Counsel
Legal Division

KED:plh
Enclosure

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January 31, 1985

Fair Political Practices Commission
Legal Division
P. O. Box 807
Sacramento, California 95804

Attention: Diane Fishburn

Re: Port San Luis Harbor District/Request for Assistance
Regarding Interpretation of Model Conflict of Interest
Code

Dear Ms. Fishburn:

This letter is written pursuant to our telephone conversation on January 31, 1985. As I informed you during our conversation, this firm represents the Port San Luis Harbor District ("District") in various matters, and has been asked to advise the District on certain issues concerning conflicts of interest. We in turn request your assistance in interpreting the provisions of Section 8 of the Model Conflict of Interest Code and Government Code Sections 87100 and 87101 with regard to the issues specified below.

As a starting point, we note that Government Code Section 87100 prohibits a public official from participating in making a governmental decision in which that public official has a financial interest. Government Code Section 87101 provides a limited exception to that general prohibition when the public official's participation is legally required for the action or decision to be made. However, Government Code Section 87101 specifically states that "[t]he fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section." Section 8 of the Model Conflict of Interest Code apparently incorporates the general prohibition of Government Code Section 87100 and the limited exception of Government Code Section 87101.

During our conversation, I briefly outlined the issue we are concerned with. Specifically, we are requesting your advice as to whether, given the provisions contained in Government Code

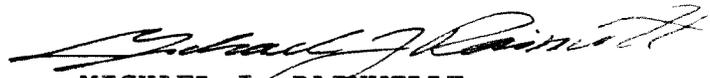
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Sections 87100 and 87101 and in Section 8 of the Model Conflict of Interest Code, the presence of an interested public official may still be counted for purposes of determining whether or not a quorum exists at a public meeting where scheduled topics for discussion involve issues in which a public official holds a financial interest. You advised me that the presence of an interested public official may not be counted towards a quorum. We assume that other unrelated topics of business could be conducted and that the interested public official would count towards a quorum for those unrelated topics. An exception you noted to the general rule excluding interested public officials was when so many of the public officials were financially interested that no quorum was possible. You indicated that under these circumstances the Fair Political Practices Commission would interpret the exception contained in Government Code Section 87101 as allowing all of the interested public officials to be counted towards a quorum and to vote on the issue that they were financially interested in. We would appreciate receiving a copy of the Hudson opinion you referred to and a further elaboration of the Fair Political Practices Commission's position on this issue.

Thank you for your assistance in this matter. Should you require further information or have any questions concerning this matter, please do not hesitate to contact us.

Sincerely,

SINSHEIMER, SCHIEBELHUT & BAGGETT



MICHAEL J. RAINVILLE

MJR/rb

cc: William S. King, Harbor Manager,
Port San Luis Harbor District