



California Fair Political Practices Commission

November 15, 1988

Charles R. Martin
City Attorney
City of Irwindale
5050 North Irwindale Avenue
Irwindale, CA 91706

Re: Your Request for
Informal Assistance
Our File No. I-88-375

Dear Mr. Martin:

This is in response to your request for advice regarding the "rule of necessity," and its relation to the provisions of the Political Reform Act.^{1/} Your letter appears to relate to hypothetical situations rather than a specific pending decision. Therefore, we consider your letter to be a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).^{2/}

QUESTIONS

1. A five-person city council considers whether to build a city park. Three of the five councilmembers own property within 250 feet of the proposed park and are thus disqualified from participating in the decision. As a result, the council has no quorum and cannot act. May the disqualified councilmembers draw lots so that one can participate in the decision even though there is no "necessity" for the park?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

2. Assume the same facts as in Question 1 but that one disqualified councilmember is permitted to participate in the decision and three affirmative council votes are legally necessary to pay the warrant for the park. If less than three councilmembers vote in favor of the warrant, can one or both of the remaining disqualified members vote?

3. Assume the same facts as in Question 1 but that only two of the five councilmembers are disqualified. If the vote to pay the warrant is 2-1, can another of the disqualified members be selected by lot to vote?

CONCLUSIONS

1. Assuming that neither the city's ordinances nor other laws permit the changing of quorum requirements for the council or the temporary appointment of alternate council members, one of the otherwise disqualified council members may be randomly selected to vote on the park.

2. Assuming that a total of three councilmembers constitutes a quorum for purposes of voting on whether to pay the warrant, no other disqualified council members may take part in that vote.

3. Assuming a total of three councilmembers constitutes a quorum and none of the three is disqualified from voting on matters concerning the park, no disqualified council members may take part in votes concerning the park or the warrant.

ANALYSIS

Government Code Section 87100 states:

No 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.

Government Code Section 87101 creates an exception to Section 87100. It states:

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 18701(a) (copy enclosed), that further defines the term "legally required participation." This provision states, in part:

(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.

Regulation 18701(a).

Based upon these provisions, a public official may participate in a governmental decision in which he has a financial interest if his participation is legally necessary. However, if his vote is only necessary to break a tie or if there exists a legal alternative by which the decision can be made without him, his participation is not considered to be legally necessary. (Section 87101; Regulation 18701(c).)

Based upon your letter we assume the following: (1) That each of the councilmembers in question has a financial interest in decisions concerning the park, including payment of the warrant for the park; (2) That three members constitutes a quorum for the city council; and (3) That there exists no legal alternative by way of ordinance or otherwise that permits decisions on the park to be made without a quorum of the city council.

Thus, the following issues are presented: (1) Can a public official who has a financial interest in a governmental decision participate in the decision if his participation is necessary to create a quorum? (2) Once a quorum has been obtained, can a public official who has a financial interest in a decision participate in the decision because a minimum number of votes is necessary in order to make the decision?

In the matter of In re Hudson (1978) 4 FPPC Ops. 13, the Commission concluded that "the failure to achieve a quorum because of disqualification based on conflicts of interest makes it appropriate to invoke the rule of "legally required participation." (See 4 FPPC Ops. at p. 14.) As a result, one of three disqualified city council members was permitted to participate in a decision in which he had a financial interest so that a quorum was created for a five-member council. The Commission limited participation to only one of the three disqualified members on the grounds that such an approach posed less danger of a "biased" decision. (See 4 FPPC Ops. at p. 17.) As to the manner of selection of the one disqualified member, the Commission stated that "the preferred means for selection is by lot or other means of random selection." (See 4 FPPC Ops., p. 18.)

The Hudson opinion is directly on point with the hypothetical situation posed in your letter. On that basis, it is clear that one of the three council members, even if he has a financial interest in a decision on the park, can participate in the decision so long as he is selected by random or other impartial means. The Hudson opinion also makes clear that only the minimum number of otherwise disqualified members necessary to achieve the quorum can participate in the decision. In Hudson, that number was one because only one additional member was necessary to achieve the quorum. This is equally true for the situation posed by your hypothetical.

The remaining issue is whether a second or third otherwise disqualified council member can vote where the law requires a minimum of three votes for approval of a measure. In other words, if the quorum of three members voted 2-1, or the council voted 2-2, on a measure that legally required three votes for passage, could a disqualified member join the vote? As mentioned above, Hudson limited the participation of disqualified council members to one so as to decrease the danger of a "biased" decision by the council. This also had the effect of overcoming the legal impediment (e.g., lack of a quorum) that was necessary for the council to act. The requirement for a minimum of three affirmative votes does not create an additional legal impediment to the council's ability to act. The impediment will be overcome once the council achieves a quorum, at which time it can legally act to adopt the measure by a 3-0 vote or legally act to not adopt the measure by less than a 3-0 vote. Therefore, participation by an additional disqualified member is not legally necessary for the council to act.

Finally, you mention the "rule of necessity" in your letter and pose several of your questions in the context of this rule. The "rule of necessity" has been applied at common law to allow all otherwise disqualified members of a council or board to vote on matters in which they had a financial interest. (See Aluisi v. County of Fresno (1960) 178 Cal App. 2d 443; Gonsalves v. City of Dairy Valley (1968) 265 Cal. App. 2d 400; Brenkwitz v. City of Santa Cruz (1969) 272 Cal. App. 2d 400.) As stated in the Hudson opinion, supra, while this rule is analogous to the concept of "legally required participation" contained in the Political Reform Act, "the purposes of the Act are best served by a rule which minimizes participation in government decisions by officials with a conflict of interest." (See 4 FPPC Ops. at p. 17.) Accordingly, the "rule of necessity" has not been followed by the Commission in its analysis and treatment of conflict of interest problems.

Charles R. Martin
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Should you have any questions or require additional information please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

By: Scott Hallabrin
Counsel, Legal Division

DMG:SH:ld

Enclosures



CITY OF IRWINDALE

5050 NORTH IRWINDALE AVENUE · IRWINDALE, CALIFORNIA 91706
(818 962 3381)

September 26, 1988

Ms. Kathryn E. Donovan, Counsel
Legal Division
California Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Dear Ms. Donovan:

A clarification please on your interpretation of the "Rule of Necessity":

1. Assume the question before the five-man council is a public improvement (let's say a park):
 - a. Three of the five disqualify themselves as owning property within 250 feet and do not participate. Following G.C. 87101 (p. 12 of your handbook), may the disqualified councilmen draw straws so that one can participate, even though there is no real "necessity" for a park?
 - b. If one councilman by lot does participate but votes "no" against the two "yes" votes--since it takes three affirmative votes to pay the warrant for the park, may another name be selected by lot to vote?
 - c. If this man also votes "no", thus making the vote 2-2, may the fifth councilman vote?
2. Same facts re a park:
 - a. Only two councilmen disqualify themselves, but the remaining vote is 2-1 to buy the park site--since three affirmative votes are needed to pay a warrant, may a fourth member be selected by lot to vote?
 - b. If the fourth man so selected votes "no", thus making the vote 2-2, may the fifth man vote?

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Kathryn E. Donovan
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In all cases, it is assumed that those selected by lot will follow the rules about participation and influence, and merely vote.

3. There are, I suppose, two alternatives:
 - a. We could say that a park is not a "necessity" and abandon the project; or
 - b. Acquire the park on a 2-1 vote and then declare that the need to pay for it (after entering into escrow) is a legal necessity to avoid litigation, and proceed by lot.

Very truly yours,


~~Charles R. Martin~~
City Attorney
City of Irwindale

/cd



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5050 NORTH IRWINDALE AVENUE · IRWINDALE, CALIFORNIA 91706
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