



FAIR POLITICAL PRACTICES COMMISSION

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June 4, 2003

Roy A. Hanley, City Attorney
City of Atascadero
1104-B Vine Street
Paso Robles, CA 93446

**Re: Your Request for Advice
Our File No. A-03-103**

Dear Mr. Hanley:

This letter is in response to your request for advice on behalf of Councilmember Tom O'Malley regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

Is there a conflict of interest in Councilmember Tom O'Malley's participation in voting to change the zoning code in one portion of Atascadero when he owns property affected by the decision?

CONCLUSION

Councilmember O'Malley may participate in the decision to change the zoning code because the zoning change is applicable to all properties in that category.

FACTS

Currently, the City of Atascadero has a downtown zone containing two subdistricts. In the downtown commercial zone, the current zoning does not allow the first floor for office use. The first floor of commercial buildings is zoned for retail or other pedestrian uses. A proposal to

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

change that zoning text for the entire zone to allow office use on the first floor will be brought before the city council.

Councilmember O'Malley owns property that would be affected by the change. There are approximately 300 lots that would be similarly affected. The change in allowed uses would apply equally to all of the lots. Your best estimate is that about 250 different people own the 300 lots, but you are not aware of how many of the lot owners are also residents of the City of Atascadero for voting purposes. The property Mr. O'Malley owns in the affected area is vacant land. There are no current plans for developing or using the piece of property. You have no reason to believe that this change in allowed uses would have an effect on Mr. O'Malley's property value in the next twelve months.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Specifically, 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*.

A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; regulation 18700(a).) The Commission has adopted a standard, eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) All of the first six steps must be met for a conflict of interest to exist.

Step 1 - Public official.

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; regulation 18700(b)(1).) "Public official" is defined as "every member, officer, employee or consultant of a state or local government agency . . ." (§ 82048.) As a member of the City of Atascadero, Tom O'Malley is a "public official" for purposes of the Act (see sections 82041, 82048), and the conflict-of-interest rules apply to him.

Step 2 - Making, participating in making, or using an official position to influence governmental decisions.

The Act's conflict-of-interest provisions apply only where a public official "make[s], participate[s] in making or in any way attempt[s] to use his official position to influence a

governmental decision in which he knows or has reason to know he has a financial interest.” (Section 87100; regulation 18700(b)(2).) The Commission has adopted a series of regulations which define “making,” “participating in making,” and “influencing” a governmental decision, which also provide certain exceptions. (Regulations 18702-18702.4.)

“A public official ‘makes a governmental decision’...when the official, acting within the authority of his or her office or position:

- (1) Votes on a matter;
- (2) Appoints a person;
- (3) Obligates or commits his or her agency to any course of action;
- (4) Enters into any contractual agreement on behalf of his or her agency....” (Regulation 18702.1(a).)

Based on your facts, Mr. O’Malley would be acting within the authority of his office or position as a member of the Atascadero City Council voting to change the zoning code, and therefore would qualify as “making a governmental decision” as defined in the Act.

Step 3 - Identifying the economic interests.

The Act’s conflict-of-interest provisions apply only to conflicts arising from *economic interests*. The economic interests from which conflicts of interest may arise are defined in regulations 18703-18703.5. Identifying which, if any, of these economic interests are held by a public official is the third step in analyzing a potential conflict of interest under the Act. (Reg. 18700, subd. (b)(3).) There are five kinds of such economic interests, but the one you have asked about concerns real property:

- ◆ A public official has an economic interest in *real property* in which he or she has a direct or indirect interest of \$2,000 or more (§ 87103(b); reg. 18703.2);

Your facts indicate that Councilmember O’Malley has an economic interest in *real property* of \$2,000 or more. (§ 87103(b); reg. 18703.2.) Councilmember O’Malley owns “Lot 12” that will be affected by the proposed zoning code change considered by the Atascadero City Council. We limit the remainder of our analysis to this economic interest.

Step 4 - Determining whether the public official’s economic interest is directly or indirectly involved in the governmental decision.

Once an official identifies an economic interest, he or she must determine whether it is “reasonably foreseeable” that the decision(s) in question will have a “material financial effect” on that interest. First, the official must decide whether the economic interest is directly or indirectly involved in the decision. (Reg. 18700, subd. (b)(4).) Having established the degree of involvement, the official can then identify the materiality standard appropriate

to the circumstances. (Reg. 18700, subd. (b)(5).) The official then knows what financial effect would be considered “material” under the Act. Finally, the official must decide whether such a material financial effect is a “reasonably foreseeable” consequence of the decision(s) at issue. (Reg. 18700, subd. (b)(6).)

Real property in which a public official has an economic interest is directly involved in a governmental decision if: “the governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local government subdivision, of the real property in which the official has an interest or a similar decision affecting the real property.”² (Reg. 18704.2 subd. (a)(2))

However, real property in which a public official has an interest is deemed indirectly involved if the decision solely concerns the amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category. (Reg. 18704.2 subd.(b)(1).)

The facts indicate the lot that Councilmember O’Malley owns is indirectly impacted by the change in the zoning code because the governmental decision involves an amendment to an existing zoning code, applicable to all properties in that category. Therefore, under this regulation, Councilmember O’Malley’s economic interest is indirectly involved with the zoning code decision.

Steps 5 & 6 - What is the applicable materiality standard and is it reasonably foreseeable that the financial effect of the governmental decision upon Councilmember O’Malley’s economic interest will meet this materiality standard?

Knowing the degree to which the economic interest is involved in the city council’s decision, the next step is picking the appropriate standard for evaluating the materiality, that is, the importance of the effect of the decision on the economic interest. (Reg. 18700(b)(5).) The sixth, and usually most important step, in deciding whether you have a conflict of interest is using the materiality standards (from step 5) to decide if a *material* financial effect on one or more of your economic interests is reasonably foreseeable as a result of the decision. (Reg. 18706.) As used here, “reasonably foreseeable” means “substantially likely.” (Reg. 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*)

It is important to understand that determinations of reasonable foreseeability and materiality are very fact-dependent, and must be made on a decision-by-decision basis. An effect which may not be reasonably foreseeable at an early stage of a process may become

² “For purposes of this subdivision, the terms ‘zoning’ and ‘rezoning’ shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest.” *Id.*

reasonably foreseeable as the process unfolds. Therefore, a blanket determination of reasonable foreseeability cannot be made at any stage of the process.

For indirectly involved real property, the financial effect of a governmental decision regarding a real property interest is presumed not to be material. "This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest." (Reg. 18705.2, subd. (b)(1).)

Since regulation 18705.2, subd. (b)(1) is applicable, Councilmember O'Malley may participate in the decision to change the zoning code.

Steps 7 & 8- The "Public Generally" and "Legally Required Participation" Exceptions

Since it appears the council member does not have a conflict of interest, we have not gone on to discuss the last two steps in the standard conflict-of-interest analysis.³ Step seven is an exception that applies where the reasonably foreseeable and material financial effect on the official's economic interest is not distinguishable from the effect on the public generally, and step eight is an exception that applies when the official is legally required to participate in the decision.

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

Sincerely,

Luisa Menchaca
General Counsel

By: 
Anthony Pane
Intern, Legal Division

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³ If you determine there is a conflict of interest, you should contact the FPPC and request advice.