



FAIR POLITICAL PRACTICES COMMISSION

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August 4, 2003

Roy A. Hanley
Municipal Advocates Group, LLP
1104-B Vine Street
Paso Robles, CA 93446

**Re: Your Request for Informal Assistance
Our File No. I-03-154**

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 This letter is limited solely to the provisions of the Act and should not be taken as advice or an opinion regarding any other area of the law potentially raised by your letter. In addition, we are providing only informal assistance because there is no specific pending decision before the planning commission.²

QUESTIONS

1. Is there a conflict of interest in Councilmember Tom O'Malley's participation in voting to amend the zoning code in one portion of Atascadero when he owns property affected by decisions to designate lots as "prime" where such designation will not allow mixed uses on such lots?
2. If there is a conflict of interest, as to decision #1, may the Councilmember vote if the decision to designate lots as "prime" is separated from the decision establishing rules for mixed uses on lots that are not designated as prime?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, 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), copy enclosed.)

CONCLUSION

- 1-2. Councilmember O'Malley may not participate in the decision to change the zoning code if the designations of prime and mixed use cannot be separated or if such decisions, although severable, are deemed to have a materially foreseeable financial effect on the governmental decisions.

FACTS

Last year the City of Atascadero adopted many revisions to the general plan. Among those revisions was a provision allowing mixed uses in the CR and CP zones. These zones previously did not allow residential uses. In a couple of months you will be addressing changes to the zoning code to address the revisions in the general plan one of the decisions is to designate lots as prime. This means no mixed use. The City of Atascadero may separate the two decisions. There are approximately 480 lots in the two zones that could qualify for mixed use.

Councilman O'Malley owns one lot in the affected zone. It currently is developed with one commercial tenant, one residential/commercial unit, 3 apartments and storage garages. The mixed residential and commercial use of this lot predated the incorporation of the city. The Atascadero Municipal Code allows the continuance of such nonconforming uses so long as the uses have not become a nuisance. There is no concern that the present use of this lot has or may become a nuisance, so the mixed use will be allowed to continue for the foreseeable future. There are no plans for any change in use or for any further construction on the lot.

In our prior advice letter (A-03-103) concerning Councilmember O'Malley, there was a proposal before the city council to change the zoning text for the entire zone to allow office use on the first floor. Councilmember O'Malley owned property within this zoning area. We advised that 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.

ANALYSIS

As we noted, 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.

Steps 1 – 2: Public Official and Making, Participating or Influencing a Governmental Decision.

As we discussed in a prior advice letter regarding Councilmember O'Malley, the Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; regulation 18700(b)(1).) As a member of the City Council 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. Moreover, Councilmember O'Malley would be acting within the authority of his office or position as a member of the Atascadero City Council by voting to change the zoning code, which would therefore qualify as "making a governmental decision" as defined in the Act.

If a public official is enumerated in section 87200 (87200 filer) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest as discussed in regulation 18702.5(b)(1)(B) on the record of the meeting; (2) recuse himself or herself, and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5 (see enclosed), subdivisions (c) and (d) apply. (Section 87105.) Since members of city councils are enumerated in section 87200, these requirements apply to Councilmember O'Malley.

Step 3: Applicable Economic Interests

As discussed in the prior advice letter, there are five kinds of such economic interests, but the ones you have asked about concern the following:

- A public official has an economic interest in *real property* in which he or she has a direct or indirect interest worth two thousand dollars (\$2,000) or more. (§ 87103(b); reg. 18703.2).
- "Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more." (§87103(a); reg. 18703.1(a).).
- "Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management." (§87103(d); reg. 18703.1(b).).
- "Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made." (§87103(c); reg. 18703.3).

Councilmember O'Malley has an economic interest in *real property* of \$2,000 or more. (§ 87103(b).) Councilmember O'Malley owns a lot that will be affected by the proposed zoning code change considered by the Atascadero City Council.

Councilmember O'Malley also has an economic interest in a business entity, both in holding a position of management, and as one who has a direct investment of two thousand dollars or more. (§87103(a) & (d).) The facts indicate Councilmember O'Malley owns one lot in the affected zone, which he leases to a commercial tenant. The lot also contains three apartments and storage garages. Therefore, both types of economic interests mentioned apply.

Finally, the funds he receives from renting a portion of the lot he owns, means the tenant is a source of income to Councilmember O'Malley. If his income totals \$500 or more within the past twelve months, then the tenant is a source of income. (Section 87103(c).)

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).)

1. Real Property

As we have discussed in the prior advice letter, real property in which a public official has an economic interest is directly involved in a governmental decision if: "[t]he 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 governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property. 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." (Reg. 18704.2 subd. (a)(2).)³

³ As we discussed in our prior letter, real property in which a public official has an interest is deemed indirectly involved if "[t]he decision solely concerns the amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category."³ (Reg. 18704.2 subd.(b)(1).) Because neither the "prime" decision nor the "mixed use" decision will apply

You have stated there is one major decision which will determine which properties will be designated "prime." Councilmember O'Malley's property is among the properties proposed to be designated as prime. Therefore, Councilmember O'Malley's economic interest is directly involved in the decision. In addition, regulation 18704.2(a)(1) states that if real property, in which the official has an interest, or any part of the real property, is located within 500 feet of the boundaries of the property which is the subject of the governmental decision, it is directly involved. Thus, even if Councilmember O'Malley's property was not proposed to be designated as prime, his property would be directly involved if it is within 500-feet of any other property proposed to be prime.

You also ask, however, whether it makes a difference if the issue of mixed uses is made separately. Assuming that decision is subsequently made without Councilmember O'Malley participating, we understand that if the council member's property is designated prime, the mixed use decision will not apply to his property. Thus, his property would be indirectly involved if there is a second decision and his property is determined to be prime (without his participation). Otherwise, his property is directly involved in that decision also and he may not participate in that decision either.

As to both the economic interests that are business entities as well as sources of income, the same standard applies. Councilmember O'Malley's economic interests are directly involved where the person: "(1) [i]nitiates the proceeding in which the decision will be made by filing an application, claim, appeal or similar request or; (2) [i]s a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person." (Regulation 18704.1, subd. (a)(1) and (2).)

Based on the facts presented, you have not indicated whether the business or sources of income have initiated the proceeding before the city council. For purposes of this analysis we assume that neither your business nor sources of income are named parties or the subject of the proceeding. Therefore the two economic interests relating to business entities are not directly involved in the governmental decision before the city council, and are thus indirectly involved.

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

to all properties in the zoning category, the exception will not apply.

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.*)

For directly involved real property, the applicable standard is a presumption of materiality where the particular piece of real property is within 500 feet of the governmental decision. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property.

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.”⁴ (Reg. 18705.2, subd. (b)(1).) There are insufficient facts to determine whether the presumption would be rebutted. Therefore, you must analyze this on a decision-by-decision basis.

For indirectly involved sources of income which are business entities as well as economic interests that are business entities, the financial effect of a governmental decision on the business entity not listed with the New York Stock Exchange, the Fortune 500, the NASDAQ or the American Stock Exchange, is material if it is reasonably foreseeable that:

“(A) [t]he governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

(B) [t]he governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

(C) [t]he governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.” (Reg. 18705.1 (c)(4).)

Whether any of these standards is met with respect to the decisions in question is a factual determination. Thus you must apply these standards on a decision-by-decision basis yourself.

⁴ Regulation 18705.2 includes examples of specific circumstances that would be considered. (see enclosed)

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

Since you have provided no facts relevant to the last two steps in the standard conflict-of-interest analysis, we have not gone on to discuss the last two steps in the standard conflict-of-interest analysis.⁵ 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

Enclosures

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⁵ If you determine that one of these exceptions may apply, you should contact the FPPC and request further advice.