



FAIR POLITICAL PRACTICES COMMISSION

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July 6, 2004

Roy A. Hanley
Municipal Advocates Group, LLP
8930 Morro Road
Atascadero, CA 93422

**Re: Your Request for Advice
Our File No. A-04-129**

Dear Mr. Hanley:

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

QUESTION

May Councilmember O'Malley participate in settlement discussions regarding property within 500 feet of property he currently owns if he transfers his property to his adult children?

CONCLUSION

Because only a spouse or dependent child is considered a member of his "immediate family" for purposes of determining an interest in real property, Councilmember O'Malley would not have an economic interest in real property owned by his adult child. Therefore, he could participate in the settlement discussions, provided there is not a personal financial effect on him.

FACTS

The City of Atascadero is currently being sued by an entity known as Creekside Parcel Associates. Mr. O'Malley is not a defendant in the suit but owns real property within 500 feet of the property which is the subject of the suit.

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

There is the potential for an upcoming vote on a settlement offer from the plaintiff in the lawsuit. Mr. O'Malley wishes to vote on that matter.

Mr. O'Malley has three adult children and would dispose of the real property which serves as his disqualifying interest by giving the property to them, if the transfer qualifies him for participation in the settlement offer decision.

The youngest of the adult children is 21 years of age. None of the adult children is a source of income to Mr. O'Malley. There is no debt owing on the property and the gift of the property from parents to children will not create a situation where the children are paying anything for the property, assuming any debt on the property, or assuming any other debt.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials "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 analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.² (Regulation 18700(b)(1)-(8).) However, your question concerns only the identification of Councilmember O'Malley's economic interests, step three of this analysis.

What are Councilmember O'Malley's economic interests?

Section 87103 provides that a public official has a "financial interest" in a governmental decision "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 any of the official's economic interests, described as follows:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment³ of \$2,000 or more (section 87103(a);

² This analysis is summarized in the Commission document entitled, "Can I Vote? Overview of the Conflict Laws" (enclosed).

³ An indirect investment or interest means any investment or interest owned by the spouse of an official or by a member of the official's immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.)

regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (section 87103(d); regulation 18703.1(b));

- 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 (section 87103(b); regulation 18703.2);
- A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule (section 87103; regulation 18703.5).

"Interest in real property" includes

any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more. Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater." (Section 82033. Emphasis added.)

"Immediate family" is defined at section 82029 as an official's spouse and dependent children. We have advised that a child is considered a "dependent child" for purposes of the Act if the child is under 18 years of age and the official is entitled to claim the dependent child as such for income tax purposes. (*Tierney* Advice Letter, No. A-04-094; *Tremlett* Advice Letter, No. I-89-386.)

Based on the facts that you have provided, Councilmember O'Malley currently has an economic interest in real property located within 500 feet of property which is the subject of the lawsuit and settlement offer. If Councilmember O'Malley transfers all of his interest in this property to one or more of his adult children, he would then no longer have an economic interest in that property under section 82033.⁴ In addition, if he does

⁴ Please be aware that pending legislation, Senate Bill 1351 (Soto), may affect this conclusion by expanding the definition of "immediate family" to include any child, including an adult child.

not receive consideration (i.e., a payment) from any of his children for the transfer of his property to them, then he will not have an economic interest in any of his children as a source of income to him.

Unlike an economic interest in a source of income which requires an official to review his or her sources of income during the 12 months prior to the time the decision is to be made (regulation 18703.3), an economic interest in real property arises from property held at the time the decision is made, provided the official has an interest of \$2,000 or more. (Regulation 18703.2.) The official does not have to "look back" 12 months to identify his real property interest.

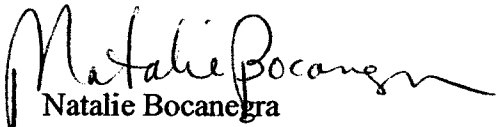
However, as described above, Councilmember O'Malley also has an economic interest in his personal finances and those of his immediate family. (Regulation 18703.5.) "A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing." (*Ibid.*) Consequently, even if Councilmember O'Malley transfers his property to one or more of his adult children, he must determine whether it is reasonably foreseeable that the settlement decision will result in a material financial effect on his personal finances. If it is reasonably foreseeable that his finances will be materially affected,⁵ he will be prohibited from participating in the settlement discussions.

You have not provided information regarding any other economic interests of Councilmember O'Malley's. For purposes of this letter, we assume that he has no other economic interests relevant to the settlement decision you identified in your correspondence.

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

Sincerely,

Luisa Menchaca
General Counsel

By: 
Natalie Bocanegra
Counsel, Legal Division

Enclosure

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⁵ A financial effect on a public official's personal finances is material if it is at least \$250 in any 12-month period. (Regulation 18705.5(a).)