

December 1, 2011

Roy A. Hanley  
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8930 Morro Road  
Atascadero, CA 93427

Re: Your Request for Informal Assistance  
**Our File No. I-11-204**

Dear Mr. Hanley:

This letter responds to your request for advice on behalf of city councilmember Carlos Victoria regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> In addition, we base this letter on the facts presented; the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your request seeks general guidance, we are treating your request as one for informal assistance.<sup>2</sup>

### QUESTION

Does the Act limit City Councilmember Victoria’s ability to participate in a vote on a rent-control ordinance regarding mobile homes considering the councilmember and his wife own a mobile home and pay rent on the lot? Even so, would he be able to address the council on behalf of his personal interests?

### CONCLUSION

The city council’s decision could have a material financial effect on Mr. Victoria’s personal finances, disqualifying him from participating in the council’s vote. Even so, the Act permits him to address the city council on his own behalf. See below for discussion.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

## FACTS

You are city attorney for King City and write on behalf of city councilmember Carlos Victoria. Mr. Victoria and his wife live in a mobile home (which they own) and pay rent on the mobile home lot located in the Rio Plaza Mobile Home Estates within King City. The Victorias had a term-lease on the lot until April 2011, at which time the lease converted to a month-to-month.

The city council plans to discuss and vote on a rent control ordinance that would apply to all mobile home parks within King City. Any such ordinance, if passed, would apply to all three mobile home parks in King City – none are singled out for special treatment. A total of 169 spaces would be affected should the ordinance pass.

Mr. Victoria will be called upon to participate in the rent-control decision and also would like to approach the city council regarding his personal interests in the decision.

## ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or 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 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 an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision.

### **Steps One and Two: Is Mr. Victoria a public official making, participating in making, or influencing a governmental decision?**

As a member of the city council, Mr. Victoria is a public official under the Act. (Section 82048.) He will also be called upon to participate in a decision regarding rent control on mobile homes in King City. (Regulation 18702.1.)<sup>3</sup>

#### *Appearances before an official’s agency to represent an official’s “personal interests:”*

Regulation 18702.3(a) provides that with regard to a governmental decision within or before the official’s own agency, or any agency appointed by or subject to the budgetary control of the official’s agency, the official is attempting to use his or her official position to influence

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<sup>3</sup> If a public official’s office is listed in Section 87200 (includes city councilmembers) 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) (copy enclosed), 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, subdivisions (c) and (d) apply. (Section 87105.)

the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency.

Regulation 18702.4, however, provides an exception to the above rule. It states that a public official may appear before his or her agency (or an agency appointed by or subject to the budgetary control of his or her agency)<sup>4</sup> as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her “personal interests.” Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. (Regulation 18702.4(a)(2) and 18702.4(b)(1).)

Based on this standard, even if Mr. Victoria has a disqualifying conflict of interest, he would still be permitted, under the Act, to speak on behalf of himself and his personal interests.

### **Step Three: What are Mr. Victoria’s applicable economic interests?**

A public official has a financial interest in a decision within the meaning of Section 87103 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 one of five enumerated economic interests. (Section 87103; Regulations 18703-18703.5.)

#### *Real Property*

The only economic interest about which you have provided information is Mr. Victoria’s interest in the mobile home he owns with his wife. The Victorias own their mobile home and rent the lot on which it sits. You stated that the continuing lease the Victorias had on the lot has expired and the lease is now on a month to month basis, subject to the city’s potential rent-control ordinance.

Section 82033 provides that an “interest in real property” includes any leasehold, beneficial, or ownership interest in real property located in the jurisdiction that the public official owns directly, indirectly, or beneficially if the fair market value of the interest is \$1,000 or more. This interest does not include a month-to-month tenancy. (Regulation 18233.) Mr. Victoria does not, therefore, have a “real property” interest under the Act.

#### *Personal Financial Effects*

A public official always has an economic interest in his or her personal finances. 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. (Section 87103; Regulation 18703.5.)

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<sup>4</sup> Regulation 18702.3(a) applies the same rule whether the official is attempting to influence his or her own agency, or an agency appointed by or subject to the budgetary control of his or her agency.

**Step Four: Is the interest directly or indirectly involved in the governmental decision?***Personal Financial Effects*

To determine if the reasonably foreseeable financial effect of a governmental decision on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision. (Regulation 18704(a).) "A public official or his or her immediate family is deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family." (Regulation 18704.5.)

Mr. Victoria's interest in his personal finances is therefore directly involved in the decision before the city council.

**Steps Five & Six: What is the materiality standard for disqualification and is it reasonably foreseeable that standard could be reached?**

For a financial effect on an official's personal finances, the financial effect is material if it is at least \$250 in any 12-month period. (Regulation 18705.5(a).) We do not have information regarding whether the rent control ordinance will have this stated effect. Mr. Victoria will need to decide whether the effect is material, given the potential impact on his personal finances, considering the actual rent that he and his wife pay on the lot and the effect on the resale value of his mobile home.

Once a public official has determined the materiality standards applicable to each of his or her economic interests, the next step is determining whether it is "reasonably foreseeable" that the standards will be met. A material financial effect on an economic interest is reasonably foreseeable if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered "reasonably foreseeable," but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra*, at 198.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*, at 71), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

**Steps Seven & Eight: Public Generally and Legally Required Participation Exceptions**

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

You have not presented any facts indicating that either exception would apply. For your information, however, we provide some letters that apply the “public generally” exception.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Heather M. Rowan  
Counsel, Legal Division

HMR:jgl

Enclosure