

December 30, 2011

Sandra J. Levin
City Attorney
300 S. Grand Avenue, Suite 2700
Los Angeles, CA 90071-3137

Re: Your Request for Advice
Our File No. A-11-205

Dear Ms. Levin:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090. Also note, our advice is based solely on the facts presented in your request; the Commission does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Finally, please note, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTION

Do three Los Alamitos City Council Members have a conflict of interest in participating in decisions related to pending litigation against them and the City when the subject of the litigation involves a contract made with a franchisee that agreed to indemnify the City and its officials for costs of litigation as a part of that contract.

¹ 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.

CONCLUSION

The City Council Members do not have a conflict of interest in participating in governmental decisions relating to the litigation or other franchisee agreements so long as the decisions will have no reasonably foreseeable material financial effect upon their economic interests.

FACTS

You are the City Attorney for Los Alamitos. You are writing to request advice on behalf of three Los Alamitos City Council Members, Mayor Kenneth Stephens, Mayor Pro Tempore Troy Edgar, and Council Member Marilyn Poe. The request concerns the potential for conflicts of interest where the three Council Members are named as respondents and defendants in a writ petition seeking to void a waste hauling franchise agreement that contains an indemnification provision in favor of the City and its employees and agents. The Council Members do not own any interest in the franchise, nor have they received any funds from the franchisee within the past 12 months. The sole potential economic interest under consideration is the indemnification.

The petitioner of the writ petitions against the City, the franchisee and three individual Council Members is alleging violations of the Los Alamitos Municipal Code and Government Code Section 1090 and seeking to void the City's award of an exclusive trash franchise. The petition names the City in all three causes of action but names the individual council members only in the cause of action under Section 1090. The three named officials voted in favor of the agreement and still remain on the Council at this time. The Petition did not seek monetary damages as to any parties, but sought to void the Franchise Agreement.

Early in the case, the court granted the City's Special Motion to Strike the Government Code Section 1090 claim as to the individual defendants, finding the claim rose from acts in furtherance of their right of petition of free speech under the Constitution, and that the petitioner failed to support its claim. This left no remaining cause of action against the individuals. The petitioner appealed the ruling and the appeal is pending. A second cause of action was dismissed on demurrer and no appeal was filed. The trial court ruled in favor of the petitioner on the one remaining claim, finding that the contract award procedure under the municipal code had not been followed correctly and declaring the contract void. The City must decide whether to appeal the decision.

Counsel for the city has defended both the individual council members and the City at the City's expense. The franchisee has been reimbursing the City for all costs of the defense pursuant to the indemnification clause. The franchisee has not agreed to reimburse the City for costs resulting from criminal conduct (and no such conduct has been established), though initially there was a claim against the Council Members under Section 1090 that has now been dismissed but is on appeal. No payment has been made by the individual council members or to individual council members in connection with the lawsuit.

The City Council will be deciding whether to appeal the adverse ruling in the lawsuit and defend the favorable ruling as well as various other issues concerning how to proceed in defense of the litigation. The City Council must also consider whether to amend certain ordinances pertaining to the award of waste franchise agreements, whether to award a waste franchise and, if so, to whom.

ANALYSIS

POTENTIAL CONFLICT OF INTEREST

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).) 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.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

STEPS 1 & 2: ARE THE THREE NAMED PUBLIC OFFICIALS MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

Each of the named Council Members is a public official under the Act. (Section 82048.) Consequently, they may not make, participate in making, or otherwise use their official positions to influence any decisions that will have a reasonably foreseeable material financial effect on any of their economic interests. They will be called upon to make decisions with regard to appealing the adverse ruling, defend the favorable ruling and other issues concerning how to proceed in the defense of the litigation. They may also be called upon to make decisions concerning awards of franchise agreements. Therefore, they will be making, participating in making, or otherwise using their official positions to influence a governmental decision.²

² *Recusal Requirements:* If a public official 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, orally 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), 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.) Because the city council members are “public officials” under sections 87200 and 87105 of the Act, these requirements apply to them. Thus, if they have a conflict of interest in a decision noticed at a public meeting, they must, among other requirements, leave the room during the duration of the discussion and/or vote of the item.

STEP 3: DO THE THREE NAMED OFFICIALS HAVE A POTENTIALLY DISQUALIFYING ECONOMIC INTEREST?

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, including:

- (1) An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); 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).)
- (2) 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.)
- (3) An economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- (4) An economic interest in any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- (5) 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.)

Ordinarily, the Government Claims Act (Government Code Section 995) requires a public entity to defend and indemnify its employees in pending litigation on account of an act or omission in the scope of his employment as an employee of the public entity, upon an employee’s request, unless certain statutory exceptions apply. (*Stone v. Regents of the University of California* (1999) 77 Cal.App. 4th 736; *Stewart v. City of Pismo Beach* (1995) 35 Cal.App. 4th 1600; *Romney* Advice Letter, No. A-99-292.) Accordingly, all costs of litigation, including attorney’s fees, are borne by the public entity, and the public official is indemnified against any decision awarding damages for his or her official conduct. Consequently, any economic interest a public official may have in his or her personal finances is not involved in decisions concerning this type of litigation. In the absence of an economic interest, the conflict-of-interest provisions of the Act do not limit a public official’s involvement in a governmental decision. (Regulation 18700(b)(2) - (b)(6).)

You have indicated that there are claims against the Council Members under Section 1090, which could lead to criminal liability. Thus far those claims were dismissed, but the dismissal is being appealed. While the Government Claims Act requires indemnification of a public official for any actions in his or her official or *individual* capacity, it does not cover actions that are not within the employee's scope of employment, among other things. (See Gov. Code §995, 995.2 & 995.8; see also *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 745-749.)

Accordingly, if the actions upon which the Section 1090 claim is based would not be subject to indemnification under the Government Claims Act, nor from the franchisee, the official would have an economic interest in his or her personal finances because he or she would likely incur personal financial expenses greater than \$250 in defending against the claim. The answer to this question determines whether or not the official has an economic interest (Step 3) in the decision (they do not if the decision involves a matter within the scope of their employment or in which they are entitled to be indemnified; they do if the decision involves a matter beyond the scope of their employment and in which they are not entitled to be indemnified). Because we are not the finder of fact in this regard (*In re Oglesby* (1975) 1 FPPC Ops. 71), we cannot determine whether or not each of the officials has an economic interest in the decision regarding the Government Code section 1090 claims. You must make this determination based on the law governing indemnification and the facts surrounding these causes of action.³ Please note that we have previously advised that public officials may participate in the initial determination as to whether the alleged conduct that is the basis for the litigation is within the scope of employment, since indemnification is generally considered part of the terms and conditions of public employment because a public employer is obligated to provide such if the employee was acting within the scope of his or her employment. (See *Cronin* Advice Letter, No. A-97-579; *Smith* Advice Letter, No. A-87-305.) This conclusion also applies to the scope of the franchisee indemnification clause. Regulation 18702.4(a)(3) provides that a public official does not make or participate in making a governmental decision if the action relates to the official's "compensation or the terms or conditions of their employment or contract." Similarly, Regulation 18702.4(b)(3) provides that a public official is not influencing a governmental decision where the official "negotiates his or her compensation or the terms or conditions of his or her employment or contract." (See *Romney* Advice Letter, No. A-99-292.)

However, if you determine that any of the officials does have an economic interest in the governmental decision because it involves a claim against the official for acts beyond the scope of employment or for which he or she is not entitled to indemnification, he or she would have a conflict of interest with regard to any decision on these issues and would be prohibited from participating. This is so because there would be a reasonably foreseeable material financial

³ We note that a mere allegation that a claim involves actions that were outside the scope of the official's employment does not mean the official is not entitled to indemnification and unable to participate. If this were the case, almost every claim would make such an allegation, if for no other reason than to prevent the officials from participating in the governmental decisions. (See e.g., *Cronin* Advice Letter, No. A-97-579.) Such is not the law.

effect on the official's economic interest in his or her personal finances as a result of the governmental decision. (Steps 4-6.)

Does the “legally required participation” exception apply?

Section 87101 permits an official who is otherwise disqualified from making a governmental decision to participate in the decision when the official's participation is legally required. For instance if so many of the council members are disqualified from participating that there are not enough eligible to make a decision this exception may be invoked. The rule does not apply when there is an alternative source of decision-making consistent with the statute authorizing the decision. (Regulation 18708.) Thus, it only applies when it is legally impossible for the decision to be made without the participation of the disqualified official and does not apply when the disqualified official's vote is merely needed to break a tie or when a quorum can be convened of other members of the city council who are not disqualified, whether or not such other members are actually present at the time of the disqualification.

The “legally required participation” rule, Regulation 18708(c), is construed narrowly and only allows the participation of the smallest number of disqualified persons necessary to constitute a quorum. (*In re Hudson* (1978) 4 FPPC Ops, 13.) The best random method of selecting which disqualified member should participate is by lot. Other means of random selection that are impartial and equitable may also be used. Whatever method the council uses, all disqualified officials must participate in the random selection and all must have an equal likelihood of being chosen. (*Heisinger* Advice Letter, No. A-95-333.)

Once the council determines which disqualified official will participate in a decision, that official is selected for the duration of the proceedings in all related matters unless the legal necessity for legally required participation ceases to exist. A disqualified official who participates under the authority of Section 87101 may participate fully in the matter, including taking part in deliberations and voting in open sessions of the body and in such closed sessions as are required by law.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Sukhi K. Brar
Counsel, Legal Division

SKB:jgl