

February 24, 2012

Gregory G. Diaz
City Attorney
678 West 18th Street
Merced, CA 95340

Re: Your Request for Advice
Our File No. A-12-008

Dear Mr. Diaz:

This letter responds to your request for advice on behalf of members of the Merced City Council regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ This letter is based solely on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, nothing in this letter may be construed to evaluate any conduct that has already taken place.

QUESTION

Do the mayor and members of the Merced city council have conflicts of interest under the Act that would prohibit them from voting on whether to repeal the “Just Cause for Eviction” ordinance in Merced?

CONCLUSION

See below for analysis of each of the four city council members’ potential conflicts.

FACTS

You are the city attorney for the city of Merced. You have been authorized to request our advice on behalf of Mayor Stanley P. Thurston, Mayor Pro-tem Noah Lor, and Councilmembers Mark “Tony” Dossetti and Mary Michal Rawling. The city council will vote on whether to repeal a city ordinance that it passed last year regarding tenants in foreclosed homes. The city

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.

ordinance protects tenants by stating that a landlord must have “just cause” to evict a tenant even if the tenant is current on rent payments.

You have provided information on the following economic interests, and no others:

Mayor Stanley P. Thurston

Mayor Thurston owns a one-half interest in five rental properties in the City of Merced.

Mayor Pro-tem Noah Lor

Mayor Pro Tem Lor has a month to month lease on a home in which he and his family reside. A home and rental property that he owned were the subject of a foreclosure action. The most recent foreclosure occurred in November of 2010.

Councilmember Mary Michal Rawling

Council Member Rawling is the joint-owner of a residential property in the City of Merced in which she and her family reside.

Councilmember Mark “Tony” Dossetti

Council Member Dossetti owns one residential rental property in the City of Merced.

You ask whether the Act prohibits members of the city council, including mayor and mayor pro-tem, from participating in the vote regarding whether to repeal the “Just Cause for Eviction” ordinance.

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 the individual a public official making, participating in making, or influencing a governmental decision?

Each member of the city council is a “public official” within the meaning of the Act.² (See Section 82048.) In addition, the council members are making, participating in making, or

² If a public official’s office is listed in Section 87200, which specifically includes city council members, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) 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 and immediately prior to the discussion of the item; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the

influencing a governmental decision when taking part in the city council's decision on the Just Cause for Eviction ordinance.

Step Three: What are the official'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:

- 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)).
- 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.)
- An economic interest in a 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.)
- An economic interest in a 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.)
- An economic interest in his or her personal finances, including those of his or her immediate family. This is known as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

Mayor Stanley P. Thurston

Mayor Thurston owns a one-half interest in five rental properties in the City of Merced. We assume his interest is at least \$2,000. He has an economic interest in that property. He also has a source of income economic interest in any tenant from whom he receives at least \$500 in a calendar year.³

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.)

³ Mayor Thurston has a 50% interest in the rental properties and a 50% interest in the income. The total annual income from each tenant must be at least \$1,000 to create an economic interest under the Act.

Mayor Pro-tem Noah Lor

Mayor Pro Tem Lor has a month to month lease on a home in which he and his family reside. An “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.” (Section 82033).

An interest in real property does *not* include, however, “the interest of a tenant in a periodic tenancy of one month or less.” (Regulation 18233.) Mayor Pro Tem Lor’s periodic tenancy is on a month-to-month basis and therefore not an “interest in real property” under the Act. He therefore does not have an economic interest for purposes of the Act.

Councilmember Mary Michal Rawling

Councilmember Rawling is the joint-owner of a residential property in the City of Merced in which she and her family reside. Assuming Councilmember Rawling’s interest is at least \$2,000, she has an economic interest in this real property.

Councilmember Mark “Tony” Dossetti

Councilmember Dossetti owns one residential rental property in the City of Merced. We assume his interest in this property is at least \$2,000. He has an economic interest in that property. He also has a source of income economic interest in any tenant from whom he receives at least \$500 in a calendar year.

Step 4: Are the officials’ economic interests directly or indirectly involved in the governmental decision?

“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.)

Source of Income and Business Interest

Regarding the income that Mayor Thurston and Councilmember Dossetti receive from their rental properties, the income is only directly involved in the city council’s decision if the source of income, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is 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(a).)

There are no facts to suggest that the sources of income fit within either the sections above. The sources of income from the rental properties are therefore indirectly involved.

Real Property

Three of the council members have interests in real property. Regulation 18704.2(a) states that an interest in real property is directly involved in a decision if any of the following apply:

“(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located ‘within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision’ if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.

“(2) 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 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.

“(3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.

“(4) The governmental decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

“(5) The governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

“(6) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.” (Regulation 18704.2(a).)

Based on your facts, none of the above requirements apply to the city council’s vote regarding the ordinance at issue. The officials’ properties are therefore not directly involved in the decision.

Regulation 18704.2(b)(1) states that a property is indirectly involved in a governmental decision 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 standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category. The ordinance at issue will affect all of the properties held for rental in Merced. While we question whether any of the council members’ property are involved at all, we analyze them as real property indirectly involved in the governmental decision.

Steps Five and Six: Will the governmental decision have a reasonably foreseeable material financial effect on the public officials’ economic interests?

A conflict of interest arises only when the reasonably foreseeable financial effect of a governmental decision on a public official’s economic interest is material. (Regulation 18700(a).) An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) Whether the financial consequences of a governmental decision are reasonably foreseeable at the time the decision is made depends on the facts surrounding the decision. A financial 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.)

Materiality, Source of Income.

Mayor Thurston and Councilmember Dossetti have rental properties that provide income. The individuals who rent those properties are sources of income to each.⁴ Regulation 18705.3(b)(3) states:

“The effect of a decision is material as to an individual who is a source of income to an official if any of the following applies:
“(A) The decision will affect the individual’s income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

⁴ We assume that the tenants have a leasehold interest, that is, more than a month-to-month tenancy and therefore have a real property interest.

“(B) The decision will affect the individual’s real property interest in a manner that is considered material under [Regulation 18705.2(b)].”

The decision regarding Just Cause for Eviction could effect Mayor Thurston and Councilmember Dossetti’s sources of income, who are the tenants in their rental properties. Assuming the tenants have a leasehold interest, the decision will be considered material if the decision would be considered material under Regulation 18705.2(b)(2). This regulation states that the effect on the economic interest that is indirectly involved is presumed not to be material unless circumstances suggest otherwise. The listed circumstances that would rebut this presumption and are relevant here are: changing the lessee’s actual use of the real property or resulting in a change in the termination date of the lease. (Regulation 18705.2(b)(2)(B) and (E).) The governmental decision would therefore have a material financial effect on the councilmembers’ sources of income.

Because there are no facts to suggest that any of the properties that the councilmembers hold are in foreclosure, nearing foreclosure, or in financial distress, we do not find it reasonably foreseeable that the council’s decision will have a material effect on the sources of income. We remind you, however, that each councilmember must make this determination on his own.

Materiality, Real Property

The financial effect of a governmental decision on real property that is indirectly involved in the general decision (as all the properties and sources of income are), is presumed not to be material. The presumption may be rebutted under specific circumstances, including, for example, circumstances where the decision affects:

- (A) The development potential or income producing potential of the real property in which the official has an economic interest;
- (B) The use of the real property in which the official has an economic interest;
- (C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

You have not offered any facts to suggest that the decision will affect the properties in a way that would rebut the presumption of immateriality. The effect of the decision on both the real property interests and the source of income interests is not material.

Further, the decision at issue applies to individuals who rent a property in Merced. If the owner from whom those individuals rent fail to pay the mortgage and the bank reclaims the property, the ordinance states that the bank, as property owner, can evict a tenant without just cause. Not only does the decision concern bank-owned properties (properties that an individual has, in-effect, turned over to the bank) rather than the private owners pre-foreclosure privately held rental properties, it is not reasonably foreseeable that the decision before the city council would have any effect (let alone a material one) on the council members’ properties.

Because we find no conflict of interest for any of the listed council members, we do not address whether any exception might apply.

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