

April 17, 2012

John Bakker City Attorney
City of Dublin
555 12th Street Suite 1500
Oakland CA 94607

Re: Your Request for Advice
Our file No. I-12-043

Dear Mr. Bakker:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your inquiry is general in nature, we provide you with informal assistance.²

Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of the fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

May Mayor Sbranti participate in brainstorming discussion sessions that will evaluate the parking situation in "Area G," when he owns real property in that area?

CONCLUSION

Mayor Sbranti may not participate in brainstorming discussions regarding the parking situation in his area unless he can show that there will be no reasonably foreseeable material financial effect upon his real property as a result of those discussions.

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.

² Informal assistance does not confer the immunity provided by a Commission opinion or formal written advice. (Regulation 18329(c)(3).)

FACTS

You are the City Attorney for the City of Dublin and are requesting advice on behalf of Mayor Tim Sbranti. Your inquiry relates to the City Council's consideration of issues related to parking in a neighborhood that the Mayor and his wife own a residence.

City residents have been voicing complaints to City Staff and apparently members of the City Council, regarding a lack of parking in an area of the City consisting of more than 30 acres and sometimes referred to as "Area G." This area has seen significant development in the last fifteen years, and much of the development has been done in compliance with the City's current parking regulations. Mayor Sbranti owns a condominium home in the area at 4243 Clarinbridge Circle, #140 in Dublin.

At a recent City Council meeting, a different member of the City Council asked City staff to place an item on a future Council agenda at which staff would give a report to the Council addressing the current parking issues in the area and the Council would discuss steps that might be taken to address those issues. At that time, no member of the Council referenced any particular steps that they would like the City to take.

At this time staff has not identified any concrete decisions that the City Council might make that would require the Mayor to recuse himself from making, or participating in making that decision due to his real property interest in his home. It is not clear whether and to what extent the City Council might raise the possibility of taking some sort of action that might directly involve the Mayor's interest in his home, and that might require that he recuse himself from the discussion.

The nature of the decisions that are currently before the City Council are "brainstorming sessions" where there is a possibility that at some point in the Council's discussion a proposal may arise that might directly involve the Mayor's interest in his real property.

ANALYSIS

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 an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which we apply to your question. (Regulation 18700(b)(1)-(8).)

Step One: Is Mayor Sbranti a “public official?”

The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency (Section 82048.) As a Mayor of the Dublin City Council, Mayor Sbranti is a public official within the meaning of the Act.³

Step Two: Is Mayor Sbranti making, participating in making, or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.)

A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Mayor Sbranti is making, participating in making, or influencing a governmental decision when participating in brainstorming sessions regarding the parking situation in Area G.

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 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.

However, Regulation 18702.4 provides an exception to the above rule. It states that a public official may appear before his or her agency 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).)

³ Because Mayor Sbranti’s position is one listed in Section 87200 is required to leave the room or announce his conflict of interest to the audience as listed in Regulation 18702.5 should any decision take place at public meeting.

An official's "personal interests" include, but are not limited to, an interest in *real property* that is *wholly owned by the official or members of his or her immediately family*. (Regulation 18702.4(b)(1)(A).) If this exception applies, Mayor Sbranti must limit his comments to his personal interests, and should make clear that he is not speaking in the interest of any other person or group, and that he is not acting in any official capacity. (*Burns* Advice Letter, No. A-06-178, citing to *McHugh* Advice Letter, No. 1-98-324; *Gallagher* Advice Letter, No. 1-94-279; and *Larsen* Advice Letter, No. A-87-151.)

Furthermore, Mayor Sbranti may not discuss his support or opposition to a decision in which he has a conflict of interest with other district officials, board members, employees or consultants outside of any public Board meetings. (*Simonian* Advice Letter, No. A-08-096; *Burns* Advice Letter, No. A-06-178, citing *McHugh* Advice Letter, No. I-98-324.)

Step Three: What are Mayor Sbranti's "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, including:

- 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 any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- 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);
- 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).

From the facts you submitted, the only economic interest indicated is Mayor Sbranti's economic interest in his real property. Because you have not provided any facts indicating that any other economic interest may be affected, our analysis is limited to Mayor Sbranti's interest

in his real property.⁴

Step Four: Is Mayor Sbranti's economic interest directly or indirectly involved in the decision?

Regulation 18704.2(a) states that real property in which a public official has an economic interest is *directly* involved in a governmental 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...

“(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

“(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.”

Mayor Sbranti's real property is in the area that is the subject of the brainstorming session. Therefore, his real property would be directly involved those brainstorming decisions.

⁴ A public official always has an economic interest in his or personal finances. However, any financial effect a decision may have on Mayor Sbranti's real property is considered an effect on his real property interests and would not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).) Because you do not include information suggesting this economic interest is implicated, we do not discuss it further.

Step Five: What is the applicable materiality standard?

Regulation 18705.2(a)(1) provides the materiality standard for directly involved real property as follows:

“The financial effect on the real property is presumed to be material. 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.” (Emphasis added.)

Under this rule, the financial effect of the decision is material even if it has only a one penny effect. This is known as the “one penny rule.” In order to rebut the presumption, one would have to establish that the decision would not even affect the property’s value by one cent.

Step Six: Reasonably Foreseeable

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 standard 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 surrounding 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* (1975) 1 FPPC Ops. 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.

While ultimately the determination of whether the financial effect is material must be left up to Mayor Sbranti’s informed judgment, the financial effect on Mayor Sbranti’s interest in his real property is *presumed to be material* because the property is within the area that is the subject of these governmental brainstorming decisions.

Accordingly, Mayor Sbranti may not make, participate in making, or influence governmental decisions regarding the parking situation in Area G, unless he can rebut the presumption of materiality by showing that his participation in the governmental decision will not have ***any*** reasonably foreseeable material financial effect upon his economic interest either positively or negatively.

Steps Seven and Eight: Public Generally & Legally Required Participation

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 the "public generally" or the "legally required participation" exceptions are applicable to Mayor Sbranti's circumstances, so we will not address them further.

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