

May 7, 2013

Michelle Vassel
Administrative Assistant-Deputy City Clerk
P O Box 545
Fortuna CA 95540

Re: Your Request for Informal Assistance
Our File No. I-13-051

Dear Ms. Vassel:

This letter responds to your request for advice on behalf of the Fortuna City Council regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because you have not named the councilmember in question, we are treating your request as one for informal assistance

This letter is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Moreover, the Commission does not provide advice relating to past conduct. (Regulation 18329(b)(8)(A).) Finally, 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.

QUESTION

May a city council member who owns business property within 500 feet of a flood control project participate in the city council's consideration of four alternative approaches for the project?

CONCLUSION

Because the various alternatives before the city council will all financially affect the councilmember's property, the councilmember may not make, participate in making, or influence

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.

the decision. The public generally exception would not apply. However, once the council, without the councilmember's participation, selects an alternative the councilmember may be able to participate in future decisions consistent with the segmentation process discussed below.

FACTS

A Fortuna City Council member owns business property within 500 feet of a public works project. The City is seeking direction regarding a preferred alternative from the City Council so that a major flood control project can move forward to final design and ultimately construction. The project is funded one half from a Federal source and locally through City bond proceeds. The project has already been approved by the city council. The future voting will be for a specific alternative. The alternatives are:

1. Improve the existing channel.
2. Realign Rohner Creek.
3. Improve the channel and construct a Field Bypass Culvert.
4. Improve channel and construct a Fontana Blvd Bypass Culvert.

You stated that selection of any of the alternatives is likely to result in the removal of the Council Member's property from the FEMA flood hazard zone. However, you also stated that there will be no alternative selected that would affect the official's property financially differently than any other property. The ultimate project benefit will be for the entire community. There are well over 150 property owners within the 500' radius of the project. You also stated (in an April 26, 2013 communication) that the improvements would likely also affect property in proximity to those within 500 feet in a similar manner. You noted that 192 properties could be removed from the FEMA flood hazard zone because of the project. Finally, you noted that there were approximately 4,613 parcels in the city of Fortuna.

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 a given governmental decision.

We need not consider the initial steps of the eight-step process. You have confirmed that the city councilmember, a public official under Sections 82048 and 87200, wishes to make and participate in the project decisions as a city councilmember. (Regulation 18702 et seq.) Further,

you have identified real property as his economic interest as defined in Section 87103(b) of the Act. Finally, you stated that his property interest is within 500 feet of the nearest boundary of the one of the alternatives with respect to the project and therefore is directly involved in the decision.² (Regulation 18704.2(a)(2).) When an official's property is directly involved in a decision, the official has a conflict of interest unless he can demonstrate that there will be no financial effect on his property. You noted that the councilmember would likely be removed from a FEMA flood hazard zone, which could financially affect the value of his real property, by one penny.

Your question concerns the public generally exception. Pursuant to this exception, even when a public official has a conflict of interest, he or she is not disqualified from making, participating in making, or influencing governmental decisions if the effect on the public official's economic interest is indistinguishable from the manner in which the decision will affect the public generally. (Regulation 18707.)

For a member of the Fortuna City Council, the public generally is made up of the entire population of Fortuna. In considering whether an affected group constitutes a significant segment of the public, Regulation 18707.1(b)(1)(B) defines "significant segment" as 10% percent or more of all property owners or all residential property owners in the jurisdiction of the official's agency or the district the official represents; or 5,000 property owners or residential property owners in the jurisdiction of the official's agency.³

You noted that there were well over 150 property owners within the 500-foot radius of the project. You also stated (in an April 26, 2013 communication) that the improvements would likely also affect other property in a similar manner. You estimated that 192 properties could be removed from the FEMA flood hazard zone because of the project. Finally, you noted that there were approximately 4,613 parcels in the city of Fortuna. While 192 properties is a large segment of the population, it is not 10 percent of the total parcels in the city and therefore the public generally exception would not apply.⁴

² When a public official has an interest in one of two or more alternative options within a decision, the public official is disqualified as to the entire decision.

³ Regulation 18707.10 provides a specialized form of the public generally exception applicable to small jurisdictions. While Fortuna meets many of the criteria in this exception, it does not meet the entire criterion and therefore, this specialized exception is not applicable under your facts.

⁴ If a public official has a conflict of interest in an agenda item noticed at a public meeting, then he or she must: (1) publicly identify the financial interest immediately prior to discussion of the item, as detailed in Regulation 18702.5(b); (2) recuse himself or herself from discussing, voting on, or otherwise influencing the matter; and (3) leave the room until after the discussion, vote, or conclusion of any other disposition of the matter. (Section 87105.) However, assuming the councilmember solely owns the real property in question, the councilmember may stay and speak as a member of the public so long as any public testimony is limited to the councilmember's personal interests.

Segmentation

Regulation 18709(a) sets forth the requirements for segmentation of a decision:

“An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.”

Subdivision (b) of Regulation 18709 further states that “decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

Another way to look at segmentation is to say that once the steps have been followed, the official may participate in certain decisions that merely “implement” decisions that have already been made so long as the remaining decisions will not result in reopening. or in any way affect, the decisions from which the official was disqualified and the remaining decisions will not independently have a material financial effect on the official’s economic interests. (*Warne* Advice Letter, No. 1-02-052; *Olson* Advice Letter, No. A-00-237.) If a particular decision is an implementation decision, it is possible that the official could participate in that decision regardless of a conflict of interest arising from another decision, provided the implementation decision does not independently create a conflict of interest. For example, once an alternative is selected, subsequent decisions concerning contractors may not have an effect on the councilmember that differs from the effect on any other member of the public.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division