

March 27, 2014

Edward Z. Kotkin
Xerox Center
1851 East First Street, Suite 900
Santa Ana, CA 92705

Re: Your Request for Advice
Our File No. A-14-038

Dear Mr. Kotkin:

This letter responds to your request for advice on behalf of Mayor William Molinari regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Because 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), this letter is based on the facts presented.² We also note that we do not provide advice on past conduct and our advice is based solely on the provisions of the Act. (Section 83114(b); Regulation 18329(a).)

QUESTION

Does Mayor Molinari have a conflict of interest that prohibits him from participating in upcoming decisions regarding a claim and potential related litigation under the Government Claims Act, in which he is named as an individual, that includes a demand for punitive damages?

CONCLUSION

As discussed below, the nature of the decision will determine whether Mayor Molinari may participate in the city council’s voting.

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 We note that City Attorney Arnold M. Alvarez-Glasman also requested our advice regarding this matter. Because you currently represent Mayor Molinari in this matter, we are responding to your request.

FACTS³

You have been retained by elected Mayor and city councilmember of Montebello William Molinari and you write on his behalf.

Between 2001 and 2004 the City of Montebello (the “City”) approved entitlements and approvals permitting Garfield Financial Corp. (“Garfield”) to construct a residential project in the City (the “Project”). As a condition of approval, Garfield was required to construct certain offsite public improvements for which the City agreed to pay to the extent the improvements benefited the public and private properties surrounding the area. The City also agreed that other public improvements would be completed by the City itself, as part of the City’s overall planned improvement of the area. By the end of 2005, Garfield completed construction of the Project, and by the end of 2008 Garfield completed the improvements. By the time Garfield completed the Project, the City had not completed the improvements. Garfield completed the improvements itself, but the City has not accepted them.

On January 6, 2014, the City received a claim from Garfield pursuant to the California Government Claims Act. The claim named the City, and Mayor Molinari individually. The claim alleged that the City had failed to complete improvements in the area of the Project despite “repeated requests and reminders,” and that the City had completed similar improvements along “virtually the entire length” of the surrounding area besides the area directly in front of the Project. The claim alleges that the City failed to complete this area out of spite. Garfield claims that as a result of the City’s failure to complete the improvements, they completed the improvements themselves, and that the improvements and loss of sales cost the company millions of dollars.

Garfield claims that the City “intentionally and capriciously failed to complete” the improvements to delay the project, chiefly at the direction of Mayor Molinari, who Garfield alleges had “personal animosity” towards Garfield stemming from the alleged refusal of Garfield to comply with Mayor Molinari’s request that some of his friends and family be added to the top of the waiting list to purchase the planned low income units in the development. Garfield alleges that Mayor Molinari “made statements ... implying that he would make things difficult” for Garfield and the Project, and that the City’s “mistreatment” of Garfield was due in part to the “malicious actions and directions of Mayor Molinari in retaliation” Garfield’s claim states that the actions were “intentional and without justification, and with malicious intent to harm” Garfield and the Project, and therefore rise to a claim for punitive damages. Mayor Molinari adamantly denies these allegations. He further asserts that the allegations contained in the claim are false and should be summarily denied.

³ These facts are based on the information provided in your request, as well as those provided in the request for advice by City Attorney Alvarez-Glasman. In your letter you did not contest the facts provided by the city attorney, but instead provided additional facts.

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 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 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.

You have correctly identified that Mayor Molinari is a public official, so we turn initially to Step Two regarding the decisions at issue.

Step Two: Is Mayor Molinari Making, Participating in Making or Influencing a Governmental Decision?

Generally, when a public official votes on a governmental decision or action, he is making or participating in a governmental decision. Here, there are two core decisions at issue:

1. *Whether the city will indemnify Mayor Molinari for acts taken within the scope of his employment.*
2. *Whether the city will indemnify Mayor Molinari on the issue of punitive damages.*

1. The Commission has determined that public officials must be able to make, participate in making, and influence decisions affecting their own compensation and the terms and conditions of their own employment or contract. Regulation 18702.4(b)(3) therefore contains exceptions to the definition ‘decisionmaking’ that take this into account. We have previously found that decisions regarding defense and indemnification for actions taken within the scope of one’s position are part of the “terms and conditions” of public employment if the employer (here, the city) is required to indemnify. (See e.g. *Cronin* Advice Letter, A-97-579.) Mayor Molinari would therefore be able to participate in the decision regarding whether the city will indemnify him for acts taken within the scope of his official duties. Based on the exception in Regulation 18702.4(b)(3), he would not be making, participating, or influencing a governmental decision on this issue and may participate.

2. Whether the city will indemnify a public official for actions that are subject to punitive damages generally turns on the fact that providing such indemnification is optional for the city. Section 995.2 of the Government Claims Act states, in part:

(a) A public entity may refuse to provide for the defense of a civil action or proceeding brought against an employee ...if the public entity determines any of the following:

- (1) The act or omission was not within the scope of his or her employment.

(2) He or she acted or failed to act because of actual fraud, corruption, or actual malice.”

Therefore, the city must first determine whether the acts or omissions for which the Mayor is being sued were within the scope of his employment or the result of actual fraud, corruption, or actual malice. Because this initial decision could have a material financial effect on the Mayor, he must recuse himself and follow the procedures in Section 87105.

If the city determines that the acts or omissions alleged were within the scope of his employment and not fraudulent or malicious, the Mayor may then participate in the decision regarding whether the city will indemnify him, as the matter will also be considered part of the “terms and conditions” of his employment under Regulation 18702.4(b)(3).

If the city determines, however, that the acts or omissions alleged were not within the scope of his employment or the result of actual fraud, corruption, or actual malice, the Mayor may not participate in the decision regarding whether to indemnify him. Because the acts are determined to be beyond scope of his official duties, defense of such acts cannot be considered “terms and conditions of employment” under Regulation 18702.4(b)(3).

Steps Three-Six: Is it reasonably foreseeable that the decision will have a material financial effect on any of Mayor Molinari’s financial interests that are directly involved?

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.) The only identified economic interest at issue is the Mayor’s “Personal Finances.” That is, if a decision will have a material financial effect on Mayor Molinari’s “personal expenses, income, assets, or liabilities, as well as those of his or her immediate family,” he has an economic interest in the decision. (Section 87103, Regulation 18703.5.)

An official is “directly involved” in a governmental decision if the decision has *any* financial effect on his personal finances or those of his family. (Regulation 18704.5.) The expense of hiring counsel will meet this standard. An effect on one’s personal finances is material if it is at least \$250 in any 12-month period. (Regulation 18705.5.) If the city does not indemnify the Mayor in any of these scenarios and he hires private counsel, that cost is sure to exceed \$250. Therefore, it is reasonably foreseeable that the governmental decisions addressed above will have a material financial effect on Mayor Molinari’s personal finances.

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
Senior Counsel, Legal Division

HMR:jgl

cc: Arnold M. Alvarez-Glasman
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