

September 30, 2014

Joseph M. Montes
Santa Clara City Attorney
Burke Williams & Sorensen, LLP
444 South Flower Street, Suite 2400
Los Angeles, CA 90071-2953

Re: Your Request for Informal Assistance
Our File No. I-14-162

Dear Mr. Montes:

This letter responds to your request for advice 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 advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), this advice is based solely on the facts presented. In addition, because you have sought general guidance not limited to a specific official or decision, we are treating your request as one for informal assistance. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) Please also note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Government Code Section 1090.

QUESTIONS

1. Under Regulation 18705.2(a)(11), does a decision to impose, repeal, or modify assessments within an assessment district, the boundaries of which are “within 500 feet of the property line of the official’s real property,” constitute “a decision affecting real property value located within 500 feet of the property line of the official’s real property” such that the Councilmember presumably has a conflict of interest?

2. If the answer to question 1 is “yes,” does the public generally exception apply if the Councilmember owns property within 500 feet of a district zone that has at least 5,000 property owners and the decision is regarding district-wide assessments for that zone?

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.

CONCLUSIONS

1. The decisions you describe will not have a measurable financial effect on the value of the councilmembers' property, which is outside the various districts.

2. Because we conclude that the decision will not have a material financial effect on the councilmembers' property outside the districts, we need not address the exceptions to the conflict of interest rules.

FACTS

The City has a population of approximately 210,000 residents in a jurisdiction of approximately 60 square miles. It has adopted several assessment districts over the years, including the Landscape Maintenance District 1, Landscape Maintenance District T1, and Drainage Benefit Assessment District. Each of the districts is divided into financially independent zones. The Landscape Maintenance Districts have a total 61 zones; the Drainage Benefit Assessment District has ten zones. A few of the zones have more than 5,000 properties, but most do not.

Each year the City Council is required to decide whether to impose annual assessments on properties in the respective zones for each of the districts, based upon information provided by district staff concerning the estimated cost of maintenance within each district zone. The annual assessments may be imposed at the same rates as prior years, at reduced rates, or at increased rates pursuant to the Consumer Price Index.

You stated that various combinations of the City Councilmembers considered and took action for fiscal year 2014-15 on these matters based on the public hearings and recommendations from District staff (with Councilmembers recusing themselves, as a precaution, if they owned property within 500 feet of a district's boundaries). For example:

- Landscape Maintenance District 1, Zone 8: The Council considered increasing the assessments from \$214.90 to \$216.01 per equivalent dwelling unit. "Equivalent dwelling unit" methodology uses the single family home as the basic unit for measurement. The Council decided not to impose the increase and kept the assessments at \$214.90.
- Landscape Maintenance District 1, Zone 24: The Council considered increasing the assessments from \$642.35 to \$660.17 per equivalent dwelling unit. The Council decided not to impose the increase and imposed reduced assessments at \$250.
- Landscape Maintenance District 1, Zone 26: The Council considered increasing the assessments from \$85.88 to \$88.26 per equivalent dwelling unit. The Council decided not to impose the increase and kept the assessments at \$85.88.
- Landscape Maintenance District 1, Zone 28: The Council considered increasing the assessments from \$74.63 to \$75.03 per equivalent dwelling unit. The Council decided not to impose the increase and kept the assessments at \$74.63.

- Drainage Benefit Assessment District, Zone 22: The Council decided to increase the assessment by \$1.59, from \$295.27 to \$296.86 per equivalent dwelling unit.

Accordingly, even where the Council was deciding whether to increase assessments per equivalent dwelling unit by a few dollars or less, Councilmembers who merely owned property within 500 feet of the zone recused themselves, which required the holding of multiple public hearings so that separate configurations of the Council could independently vote on the imposition of assessments. You also stated that such a protocol appears to provide limited if any practical benefit because the Councilmembers do not own property in the subject zone and the imposition of the assessments at these rates on other properties is extremely unlikely to have any material financial effect on the Councilmembers' financial interests (e.g., the value of property owned by the Councilmembers outside the District).

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 foreseeable² that the decision will have a material financial effect on one or more of the public official's interests.³ (Section 87103.)

You ask specifically about officials that own real property within 500 feet of the assessment district that is the subject of the city decision. For purposes of this analysis, we assume that each councilmember owns residential property in which they have an ownership interest of \$2,000 or more. We do not opine on any other property or other interests set forth in Section 87103.

Revised Regulation 18705.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on real property in which an official has a financial interest is material. Pertinent to your facts, the financial effect will be material if the decision:

“(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18705.1. Notwithstanding this prohibition, the

² A financial effect need not be likely to happen in order to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.

³ When a public official who holds an office specified in Section 87200 (including planning commissioners) has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally identify each type of interest involved in the decision as well as details of the 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.

Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property; or

“(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.”

Under the general facts you have provided, it does not appear that any of the actions taken by your city council will have any financial effect on property outside the assessment districts. You ask specifically about subdivision (a)(11). Subdivision (a)(11) in the amended regulation differs from the old regulation in that it does not apply a “one-penny” rule, but rather focuses on the facts and circumstances of the decision and whether there are sufficient facts to indicate that there will be reasonably foreseeable *measurable* impact on the official's property. (Regulation 18705.2(a)(11).)

While the proximity of a councilmember's residence to property that is the subject of a decision is a factor to be considered, the distance would not in itself result in a measurable impact on the value of the councilmember's property. In this case, the increase or decrease of an existing assessment would seem to have no financial effect on property owners outside the district no matter how close their property is to the district boundaries.⁴

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

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⁴ We are mindful that Commission advice is only as good as the facts on which it is based. There may be some assessment district decisions, not like the ones described here, that by virtue of the significant improvements that the assessments are financing in the district will have some financial effect on property beyond its boundaries. Thus, you should view this general advice narrowly and request additional advice for new assessment districts or different factual scenarios.