

February 19, 2015

Brian Pierik
Burke, Williams & Sorenson, LLP
2310 East Ponderosa Drive – Suite 25
Camarillo, CA 93010-4747

Re: Your Request for Advice
Our File No. A-15-003

Dear Mr. Pierik:

This letter responds to your request for advice on behalf of Thomas O'Malley, the mayor of the City of Atascadero, regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ This advice applies only to the conflict of interest provisions of the Act and no other general conflict of interest prohibitions such as common law conflict of interest, Section 1090 or incompatible offices pursuant to Section 1099. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS²

Mayor O'Malley, together with his wife, owns a lodging business in the Atascadero Tourism Business District (the "District"). May he make or participate in the following decisions:

1. Appoint members, including himself or his wife, to the District's Advisory Board (the "Advisory Board")? If not, may he address the city council on matters regarding appointments as a member of the public regarding his personal interests?

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 One of your questions is whether Mayor O'Malley may serve as a member of the Advisory Board. Nothing in the Act precludes him from doing so.

2. Re-impose an annual assessment on lodging establishments located within the District for the next fiscal year?

3. Approve the funding of programs recommended by the Advisory Board? If not, may he address the city council regarding funding matters as a member of the public regarding his personal interests?

FACTS

Mayor O'Malley, who serves as a member of the Atascadero city council, owns, together with his wife, a business called "Portola." The business operates a bed-and-breakfast establishment and also provides event-planning services.

The District was established by ordinance in 2013 pursuant to the Parking and Business Improvement Area Law of 1989 (California Streets and Highways Code Section 36500 et seq.), and is codified in Chapter 16 of Title 3 of the Atascadero Municipal Code. The District encompasses the entire city and imposes on each lodging business an assessment equal to two percent of the rent charged per occupied room or space per night for transient occupancies. Revenue generated by the assessment is used to fund tourism promotions and marketing programs and activities for the purpose of increasing transient stays at the city's lodging establishments.

The District's Advisory Board is composed of five members, all of whom must be lodging business owners, their employees or authorized representatives. Members are appointed by the city council, following a nomination process facilitated by lodging businesses. Board members serve at the pleasure of the city council and receive no compensation.

In order to continue the promotions and marketing programs, the city council must adopt an annual resolution of intention to levy the assessment for the next fiscal year and, following a public hearing, adopt an annual resolution re-imposing the assessment. In addition, the city council approves the funding of programs recommended by the Advisory Board as part of the city council's review and approval of the Advisory Board's annual report

ANALYSIS AND CONCLUSIONS

The Act's conflict of interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) 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 conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Regulation 18700(a).)

As a city council member, Mayor O'Malley is a public official under the Act.³ (Sections 87200 and 82048.) By voting on or participating in decisions to appoint members to the Advisory Board, re-impose the annual assessment for the next fiscal year and approve the funding of programs recommended by the Advisory Board, he will be making, participating in making, or otherwise using his official position to influence a governmental decision.⁴

Question 1 – Decisions to appoint members to the Advisory Board.

Generally, a public official may appoint members to a board or commission so long as the official has no financial interest in the appointment decision.

Mayor O'Malley's personal finances (personal expenses, income, assets, or liabilities, as well as those of his immediate family, Section 87103; Regulation 18703.5) may be implicated in a decision to appoint himself or his wife to the Advisory Board. However, you have indicated that members of the Advisory Board do not receive any compensation for their service. Therefore, a decision to appoint himself or his wife will have no effect on Mayor O'Malley's personal finances, and he is not prohibited from participating in such decisions.

Questions 2 and 3 – Decisions to re-impose the annual assessment and approve the funding of programs recommended by the Advisory Board.

The financial interest implicated in these questions is an interest in a business entity, as an investment and a source of income. Under Section 87103, a public official has a financial interest in:

A business entity in which he or she has a direct or indirect investment of \$ 2,000 or more (Section 87103(a); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d);

Any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)⁵

³ Note that the mayor's wife is not a public official, and therefore, the Act does not limit her conduct.

⁴ When a public official who holds an office specified in Section 87200 has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18704.5(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. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18704.5(c) and 18704.5(d) apply.

⁵ As noted above, the official also has an interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. (Section 87103; Regulation 18703.5.) However, the mayor's interest in his personal finances does not appear to apply here. Under Regulation 18705.5(a), a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects on the official's personal

MATERIALITY

These decisions are analyzed under recently amended Regulation 18705.1(a),⁶ which provides that the reasonably foreseeable financial effect of a governmental decision on a business entity (including a business entity that is a source of income) in which an official has a financial interest is material whenever the business entity:

“(1) Initiates the proceeding in which the governmental decision will be made by filing an application, claim, appeal, or request for other government action concerning the business entity;

“(2) Offers to make a sale of a service or a product to the official’s agency;

“(3) Bids on or enters into a written contract with the official’s agency;

“(4) Is the named manufacturer in a purchase order of any product purchased by the official’s agency or the sales provider of any products to the official’s agency that aggregates to \$1,000 or more in any 12-month period;

“(5) Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement that the official’s agency is authorized to issue;

“(6) Is the subject of any inspection, action, or proceeding subject to the regulatory authority of the official’s agency; or

“(7) Is otherwise subject to an action taken by the official’s agency, the effect of which is directed solely at the business entity in which the official has an interest.”

Where, as here, none of the above factors is present, Regulation 18705.1(b) provides that the financial effect is material only if “a prudent person with sufficient information would find it is reasonably foreseeable that the decision’s financial effect would contribute to a change in the price of the business entity’s publicly traded stock, or the value of a privately-held business entity.” (Regulation 18705.1(b).)

The stated purpose of the tourist promotions and marketing programs that are funded through the District is to *increase transient stays* at the city’s lodging establishments. In order to carry out this purpose, the city council must re-impose the assessment each year and approve the

finances and would not be analyzed separately under the “personal financial effects” rule. Accordingly, the personal financial effects rule does not appear to apply to Mayor O’Malley’s circumstances and we will not discuss it further.

⁶ Effective January 14, 2015.

funding of promotions and programs. As a lodging business, Mayor O'Malley's business enjoys the benefits of the promotions and programs that are expected to increase demand for its services. Accordingly, as the stated purpose of the marketing programs is to increase business, and increased business has an effect on overall value, the financial effect of these decisions on Mayor O'Malley's business would be material.

FORESEEABILITY

A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on the official's financial interests. (Regulation 18700(a).) The applicable foreseeability rule is: "A financial effect need not be likely 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." (Regulation 18701(b).)

Since its creation, the Advisory Board has made recommendations to the city council to re-impose the assessment each year and to fund specific promotions and programs that are expected to benefit lodging businesses by increasing demand for their services. Thus, the financial effects of these decisions are a realistic possibility, more than hypothetical or theoretical and are, therefore, reasonably foreseeable. Because the decisions will have a reasonably foreseeable material financial effect on Mayor O'Malley's business, he is prohibited from participating in the decisions, unless an exception applies.

PUBLIC GENERALLY EXCEPTION

Even if a public official determines that a decision will have a reasonably foreseeable material financial effect on his or her interest, the official may still participate if the financial effect of the decision on his or her interest is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.)

Regulation 18707.7 provides a specialized form of the "public generally" exception, applicable when a decision will affect a single industry, trade, or profession in substantially the same manner as the decision will affect an official's economic interest. Under this specialized form of the exception, a single industry, trade, or profession may constitute a significant segment of the public only if it is the "predominant industry" within the official's jurisdiction or in the district represented by the official. With respect to public officials who are not elected state officers, an industry, trade, or profession that constitutes 50 percent or more of business entities in the jurisdiction of the official's agency or the district the official represents is a "predominant" industry, trade or profession. (Regulation 18707.7(b).) Under the facts that you provided, lodging businesses do not constitute 50 percent of business entities in the jurisdiction. Therefore, the public generally exception does not apply.

Accordingly, Mayor O'Malley may not participate in city council decisions to re-impose assessments or approve funding for programs recommended by the Advisory Board.⁷

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

Sincerely,

John W. Wallace
Assistant General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

⁷ Under certain circumstances, members of an advisory body are subject to the Act's conflict of interest rules on the basis that the members make governmental decisions. While you did not specifically ask this question, we bring this to your attention to assist Mayor O'Malley should he be appointed to the Advisory Board. The rules are found in Regulations 18701(a) and 18702.1(a). See, also, the *Wieboldt* Advice Letter, No. A-11-237. Also there is a special "public generally" exception in Regulation 18707.4 that applies to appointed members of boards or commissions.