



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 6, 2015

Randolph S. Hom
City Attorney
678 West 18th Street
Merced, CA 95340

Re: Your Request for Advice
Our File No. A-15-133

Dear Mr. Hom:

This letter responds to your request for advice on behalf of Merced city councilmembers Tony Dossetti, Josh Pedrozo, and Noah Lor regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

May Councilmembers Dossetti, Pedroza and Lor (collectively, the “Interested Councilmembers”) take part in decisions regarding a proposed reimbursement to property owners in the Fahren’s Park Assessment District where each of them owns property in the district?

CONCLUSION

No. Each of the Interested Councilmembers has a financial interest in the decisions. Because the vote requires a supermajority, however, one of them may participate and vote under the “legally required participation” exception, as discussed below.

FACTS

The city council is considering an early bond call under which each property owner in the district would be reimbursed up to \$100 for each property he or she owns. There are seven members on the city council. The city charter requires five affirmative votes to approve the call and reimbursements. The Interested Councilmembers reside and own property within the district and

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.

would, therefore, receive a reimbursement. Fewer than 25 percent of property owners or residential property owners in the city would receive a reimbursement.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest.

Financial Interests

The only interest implicated by your account of the facts is an interest in real property. A public official has a financial interest in any real property in which he or she has a direct or indirect interest of at least \$2,000. (Section 87103(b).) Presumably, each Interested Councilmember has an investment of at least \$2,000 in his property.

Foreseeability and Materiality

Regulation 18701(a), as applied to the facts, provides that a financial effect is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official's agency. As relevant here, a financial interest is the subject of a proceeding if the decision affects a real property interest listed in Regulation 18702.2(a)(1) – (6). Under Regulation 18702.2(a)(3), a financial effect is material if it would impose, repeal, or modify any taxes, fees, or assessments that apply to the official's parcel. Decisions regarding the reimbursements involve a modification of assessments and, therefore, the reasonably foreseeable financial effect of city council decisions regarding the reimbursement is material. The Interested Councilmembers may not participate or vote on decisions involving the reimbursements unless an exception applies.

Public Generally Exception

A public official is prohibited from making, participating in making, or influencing governmental decisions if the reasonably foreseeable material financial effect is distinguishable from the public generally. Regulation 18703 states the financial effect is indistinguishable if “a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.”

A significant segment of the public consists of at least 25% of all real property, commercial real property, or residential real property within the official's jurisdiction. (Regulation 18703(b).) You have indicated that this threshold is not met and, therefore the exception would not apply

Legally Required Participation

An official may participate in a governmental decision in which he or she has a conflict of interest under the “legally required participation” exception. This exception applies only if there is no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision. (See Section 87101 and Regulation 18705.)

The exception cannot be used to allow the official to vote if a quorum can be convened of other members of the agency who are not disqualified under Section 87100, whether or not such other members are actually present at the time of the disqualification. (Regulation 18705(c)(2).) Where a supermajority vote is required, the “quorum” is the minimum number of members needed to adopt the item. (Regulation 18705(d).) The exception requires that participation be limited to the smallest number of officials with a conflict that are “legally required” to make the decision and that a random means of selection be used. (Regulation 18705(c)(3).)

The city charter requires five affirmative votes to approve the reimbursements. Because it takes five councilmembers to make a quorum, one of the three Interested Council Members with a conflict of interest will be permitted to vote under the exception.

When an official is selected, he or she is selected for the duration of the proceedings in all related matters until his or her participation is no longer legally required, or the need for invoking the exception no longer exists. (Regulation 18705(c)(3).)

The selected official must disclose on the record the existence of the financial interest, describe with particularity the nature of the economic interest giving rise to the conflict of interest, and disclose the legal basis for concluding that there is no alternative source of decision. For a real property interest, the official must also disclose the property’s address unless the property is the official’s principal or personal residence in which case the official must state that the property is a residence. (Regulation 18705(b).)

Recusal by the other two Interested Councilmembers

When a public official who holds an office specified in Section 87200 has a conflict of interest in a decision that has been noticed at a public meeting, the official must immediately prior to the discussion of the item, orally identify each type of financial interest involved in the decision, as well as details of the economic interest on the record of the meeting; recuse himself or herself; and leave the room for the duration of the discussion and/or vote on the item. (Section 87105; Regulation 18707). For a real property interest, the official must also disclose the property’s address unless the property is the official’s principal or personal residence in which case the official must state that the property is a residence. (Regulation 18707(a)(1)(A)(iii).)

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl