



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 8, 2015

Jennifer M. Lyon, City Attorney
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La Mesa Village Plaza
8100 La Mesa Boulevard, Suite 200
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Re: Your Request for Advice
Our File No. A-15-143

Dear Ms. Lyon:

This letter responds to your request for advice on behalf of Ed Spriggs, a councilmember for the city of Imperial Beach, regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Please 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 Section 1090. 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.)

QUESTION

May Councilmember Spriggs, who owns a beachfront condominium, take part in city council decisions regarding a sand replenishment project that would enlarge the beach and protect beachfront structures from storm damage?

CONCLUSION

Yes. Based on the exception to the materiality rules for a decision that “solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities” in Regulation 18702.2(c), Councilmember Spriggs does not have a conflict of interest.

FACTS

Councilmember Spriggs owns and resides in a beachfront condominium located within 500 feet of the coastline in the 1400 block of Seacoast Drive. It is anticipated that the city council will

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.

be voting to partially fund a sand replenishment project that would enlarge the beaches and would provide greater protection for beachfront structures and public utilities from flooding during high tide, high surf, storms and storm surges. The project is in its initial stages under the U.S. Army Corps of Engineers. Sand would be dredged from large deposits located 30-100 feet of water within two miles of the shoreline and placed on the beach.² It is anticipated that the sand could be placed up to the point where existing development meets the beach. Sand replenishment cannot provide permanent shoreline protection because of chronic, natural erosion and its benefits last about five years.

According to Councilmember Spriggs, the purposes of the project are similar to two prior sand replacement projects. The Environmental Impact Report (“EIR”) for the 2012 project stated the purposes of that project were to (1) replenish the littoral cells and receiver sites with suitable beach sand; (2) provide enhanced recreational opportunities and access at the receiver sites; (3) enhance the tourism potential of the San Diego region; and (4) increase protection of public property and infrastructure. The EIR for the 2002 project stated the purposes of the project were to prevent the severe beach erosion resulting from winter storms and prevent storm damage to adjacent beachfront structures, U.S. Naval Communications Station Facilities and public utilities.

The councilmember’s property will not be used for the project and no sand will be placed on his property. During the time that restoration work is conducted, beachfront properties will be impacted by noise and impaired views. However, there would be no permanent changes to his property.

Councilmember Spriggs has owned his condominium since 2001. He believes that the two previous sand replenishment projects did not affect the value of his property and that his property is a valuable oceanfront property regardless of whether the beach is small or large. The larger beach area may attract more tourists. However, the beaches already attract large crowds. The EIR for the 2012 project stated that any increased traffic or demand for parking as a result of a larger beach would not be significant. Councilmember Spriggs believes that there will be no measureable impact to traffic or parking near his residence and that the prior projects focused on their public, rather than private, benefits.

ANALYSIS

The Act’s conflict-of-interest provisions ensure that public officials “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).) Specifically, 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. The only interest implicated by your account of the facts is an interest in real property in which an official has a direct or indirect interest worth \$2,000 or more. (Regulation 87103(b).)

² San Diego Regional Beach Sand Project Fact Sheet (March 2012).

Forseeability and Materiality

Generally, a financial effect is presumed to be reasonably foreseeable if the interest is “explicitly involved” in a decision. An interest is “explicitly involved” in a decision if the interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. (Regulation 18701(a).) Real property is the subject of a decision when “the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6). Under this rule, the councilmember’s real property is not explicitly involved in the funding decision.

If an interest is not explicitly involved in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the official’s control, it is not reasonably foreseeable. (Regulation 18701(b).)

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. Regulation 18702.2 defines when a financial effect of a government decision on real property is material, providing in pertinent part:

“(a) Except as provided in subdivision (c) below, the reasonably foreseeable financial effect of a governmental decision (listed below in (a)(1) through (a)(12)) on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision:

...

“(6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to or received by other similarly situated properties in the official’s jurisdiction or where the official will otherwise receive a disproportionate benefit or detriment by the decision;

...

“(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official’s real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

“(11) would consider any decision affecting real property value located within 500 feet of the property line of the official’s real property . . .

Notwithstanding this prohibition, the 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.”

Thus, Councilmember Spriggs would have a conflict of interest if there is a “realistic possibility” that the decision to approve the project would have one of the material effects listed above.

However, Regulation 18702.2(c) provides an exception to the materiality rules for a decision that “solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities.” In prior letters, we have applied the exception in its prior iteration to certain flood control projects.

Tilford Advice Letter, No. A-14-140: We found the exception to apply where a watershed protection district sought to develop alternative plans for the control and conservation of flood and storm water. Under various proposals, certain properties would receive greater protection than before. If nothing were done at all, these properties were likely to be re-designated by FEMA to a higher risk designation. Thus, implementation of the projects would allow these properties to retain their moderate risk designation. We found that the projects solely concerned repairs, replacement or maintenance of existing facilities on the basis that they were not intended to create a new level of protection, but rather intended to maintain the status quo.

Stepanicich Advice Letter, No. A-14-053: We found the exception to apply to a flood control project that was intended to achieve a nationally accepted standard of flood protection formulated to protect life and property. The various flood control measures that were considered for the project included stabilizing levees, clearing channels, widening channels, modifying bridges, and constructing floodwalls, detention basins and an underground bypass culvert.

Murphy Advice Letter, No. A-07-134: We found that a city council's decisions to finance engineering studies or to hire consulting firms to review facility and environmental concerns for approximately 45 miles of levees were decisions solely concerning the repair or maintenance of the levee system. We said that “flood control work presents a unique question of interpretation. By design, flood control work is performed to increase protection from flooding. However, the majority of flood control work for a city protected by a system of levees could just as easily be classified as ‘repairs’ or ‘maintenance’ as opposed to an ‘improvement,’ despite the fact that the work will in some way increase the city's flood protection.”

Stovall Advice Letter, No. A-08-112: We found that a project to dredge a 14-mile slough was a “storm drainage or similar facility” and that the dredging of the silted-up slough was a repair or maintenance activity.

Cauble Advice Letter, No. I-06-179: We found the exception to apply where a flood control project to remove roots and vegetation from a slough would increase its flood control capacity. Because the slough’s clogging was caused by flood control measures taken twenty years earlier, the project was meant to repair, replace, or maintain the slough’s storm drainage capacity as it once existed.

Under the facts you have provided, the proposed sand replenishment project appears to fall within the exception. If nothing is done at all, ongoing erosion will continue indefinitely, creating greater risk of damage to structures and public utilities from high tide, high surf, storms and storm surges. Prior sand replenishment projects had slowed erosion. This project is intended to do the same and restore the beaches to their condition upon completion of each prior project. On these facts, we find that decisions regarding the proposed project solely concern repairs, replacement or maintenance of existing storm drainage and similar facilities, and therefore, Councilmember Spriggs does not have a conflict of interest in such decisions.

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