



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 13, 2020

Brian A. Pierik
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Re: Your Request for Advice
Our File No. A-20-057

Dear Mr. Pierik:

This letter responds to your request for advice 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.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Under the Act, may Camarillo City Councilmember Kevin Kildee take part in various governmental decisions relating to the City’s trolley service, given that he owns a business and leases property less than 500 feet from a trolley stop?

CONCLUSION

Councilmember Kildee may not take part in the package of decisions pertaining to the City’s trolley service, given that the package would have reasonably foreseeable, material financial effects on Councilmember Kildee’s real property interest. However, Councilmember Kildee may be able to take part in certain trolley-related decisions if properly segmented from those which would have a reasonably foreseeable, material financial effect, as detailed below.

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.

FACTS AS PRESENTED BY REQUESTER

The City of Camarillo operates a trolley service that travels a route through the center of the City on surface streets to the north and south of the 101 Freeway. There are various trolley stops along the route. The trolley has an average of 182 passengers per day, or approximately 69,000 riders per year. City Councilmember Kevin Kildee leases space at a shopping center where he operates his clothing store business. Councilmember Kildee's lease is for a period of years, and he has approximately six months remaining in the lease. The property is located within 500 feet of a trolley stop. Pursuant to the City's website, the trolley provides transportation from the Metrolink Train Station to the City's premier "shopping and restaurants." The trolley stops at nine shopping centers. You have also indicated that the businesses along the route at one time contributed funds for the operation of the trolley. However, you have also indicated that, according to the City's Director of Public Works, the business community along the trolley route previously decided, as a whole, that the trolley service was not beneficial enough to them, and consequently stopped contributing funds toward the operation of the service. The Director of Public Works also stated that, based on general observation and feedback from the trolley operators, the amount of business generated by the trolley service is minimal and limited to the larger stores such as Target, and "the outlet mall is indifferent to the existence of the trolley."

At various budget review and adoption meetings in the near future, the City Council may discuss and consider the following items:

- Trolley ridership numbers;
- Cost and funding sources to provide trolley service;
- Purchasing a new or used trolley versus continuing to lease a trolley vehicle from the contract service provider;
- Changing the trolley route and/or service schedule;
- Charging a fare for trolley rides, which have been free in the past; and
- The process to possibly terminate the trolley service if it is determined there is no unmet need after implementing a fare and documenting any complaints about the trolley service.

ANALYSIS

Section 87100 of the Act provides that "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Section 87103 further specifies that "[a] public official has a financial interest in a decision within the meaning of Section 87100 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 certain enumerated economic interests.

As pertinent to the facts provided, those economic interests include "[a]ny business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more," and "[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more." (Section 87103(b).) Councilmember Kildee has a

potentially disqualifying economic interests in his clothing store as a business entity. He also has a real property leasehold interest.

From the facts provided, it does not appear that Councilmember Kildee's economic interests will be explicitly involved in governmental decisions pertaining to the City's trolley as the interest are not a named party in, or the subject of, the proceedings and the decisions not affect property as specified in Regulation 18702.2(a)(1)-(6).² (Regulation 18701(a)). Regulation 18701(b) provides the standard for determining whether a financial effect is reasonably foreseeable when an official's economic interest is not explicitly involved in a decision. The regulation states, "[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 18702.2 contains the standards for determining when a governmental decision's financial effect on an official's real property is "material." With respect to governmental decisions involving the trolley and trolley stop near your properties, in general, the relevant provision will be subdivision (c). Where a public official's real property interest is a leasehold interest, the reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold interest as the lessee of the property is material only if the governmental decision will:

- (1) Change the termination date of the lease;
- (2) Increase or decrease the potential rental value of the property;
- (3) Change the official's actual or legally allowable use of the property; or
- (4) Impact the official's use and enjoyment of the property.

(Regulation 18702.2(c).)³

None of the decisions would change the termination date of Councilmember Kildee's lease or his actual or legally allowable use of the property. (Regulation 18702.2(c)(1), (3).) Nor would the decisions impact his use and enjoyment of the property. (Regulation 18702.2(c)(4).) However, with respect to Regulation 18702.2(c)(2), it appears that the planned governmental decisions may increase or decrease the potential rental value of the property. Although the Director of Public Works has characterized the perceived effect on small businesses as minimal, the trolley service is geared towards transporting potential customers to these businesses and does so on the scale of approximately 69,000 potential customers per year. Accordingly, it appears that the termination of such a service, which comes at no cost to the businesses that stand to benefit from it, may have an effect on the potential rental value of the property.

² Based on the facts provided, it appears that the decisions in question include determining how to fund the trolley, if the City considers any fee or assessment on properties or businesses along the route, the councilmember's interest will be explicitly involved in the decision. However, because we have determined that the councilmember is disqualified under the more lenient standard for interests not explicitly involved, it is unnecessary to further consider disqualification under the explicitly involved standard.

³ Regulation 18702.2(a)(7), pertaining to real property interests located within 500 feet of property affected by the governmental decision, is inapplicable to leasehold property interests.

In regard to Councilmember Kildee's interest in his business, Regulation 18702.1 provides, in relevant part, that the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity, including a business entity that is a source of income to the official, is material where the decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or greater than \$1,000,000, or five percent of the entity's annual gross revenues and at least \$10,000. (Regulations 18702.1(a)(2)(A)-(B), 18702.3(a)(4).) The reasonably foreseeable financial effect of a governmental decision on an official's business entity interest is also material where the decision may cause the entity to incur, avoid, reduce, or eliminate expenses equal to or greater than \$250,000, or one percent of the entity's annual gross revenues and at least \$2,500. (Regulation 18702.1(a)(3)(B).) However, in light of the conclusion that Councilmember Kildee is disqualified based upon his interest in real property, it is unnecessary to further consider the potential effects of the decision on his business interest.⁴

Because the package of decisions would have a reasonably foreseeable, material financial effect on Councilmember Kildee's real property interests, he is generally disqualified from taking part in the decision-making process under the Act. However, Regulation 18706(a) provides that an agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated⁵ to the decision in which the official has a disqualifying financial interest;
- (2) The decision in which the official has a financial interest is segmented from the other decisions;
- (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
- (4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

Apart from decisions that may terminate or fund the trolley, it may be possible for the City to segment other minor operating decisions. However, whether a decision may be segmented is a fact-based determination that can be made only on a case-by-case basis. If Councilmember Kildee needs assistance regarding the segmentation of any particular decision once final decisions regarding the continuation of the trolley and its funding have been made, the councilmember may wish to seek further advice at that time identifying the nature of the specific decision.

⁴ Similarly, we do not further examine disqualification based upon any interest in costumers of his business.

⁵ The term "inextricably interrelated" means the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

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

Sincerely,

Dave Bainbridge
General Counsel

Kevin Cornwall

By: Kevin Cornwall
Counsel, Legal Division

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