



FAIR POLITICAL PRACTICES COMMISSION

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September 17, 2014

Councilman Patrick Mullany
c/o Mr. Robert Patterson, Esq.
Slovak Baron Empey Murphy & Pinkney LLP



Re: Advisory Letter
FPPC Case No. 14/114

Dear Councilman Mullany:

The Fair Political Practices Commission (“FPPC”) enforces the provisions of the Political Reform Act (the “Act”).¹ This letter is in response to a sworn complaint received in January 2014, which alleged a conflict of interest on your part—as an Indian Wells City Councilman. After investigation, the FPPC is closing its file on this matter with an advisory letter as discussed below.²

Based upon the allegations of the complaint and our investigation, it appears that:

- You live in a Landscape, Lighting, and Maintenance District (LLMD), which requires you to pay extra taxes/assessments over-and-above what non-LLMD residents must pay. Roughly one-third of the city’s parcels are in LLMD’s. Taxes/assessments for these parcels vary widely. You do not appear to be similarly situated with respect to other residents who pay LLMD taxes/assessments. Rather, you appear to be one of a small number of LLMD residents (potentially less than 10% of the population) who are levied in excess of \$700 annually. (For 2012-2013, your total LLMD levy was approximately \$977.)

¹ The 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 All statutory references and discussions of law pertain to the Act’s provisions as they existed at the time of the events in question in 2013.

- In 2012, the city council voted to put a parcel tax on the ballot that would eliminate the extra LLMD taxes/assessments for LLMD residents by requiring all residents of the city to share the cost. (Pursuant to the advice of the city attorney, you did not vote on this because of a potential conflict of interest.) The ballot measure failed.
- In January 2013, you used your official position as Indian Wells City Councilman to place on the agenda a request for the City Council to consider directing staff to explore other avenues of equitable funding of LLMD's. You participated in the discussion, explaining how certain communities within the city are charged with LLMD costs, and you asked the city to consider alternatives to the current situation. You and the other members of the city council voted to direct staff to add the item for future discussion.

Section 87100 provides: "No 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."

Generally, a public official has a disqualifying conflict of interest when it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulations 18700-18709.) Economic interests include a public official's personal finances, and any impact of \$250 or more in any 12-month period is material. (Section 87103; Regulations 18703.5, 18704.5, and 18705.5.)

Section 87105 provides that upon identifying a conflict of interest or a potential conflict of interest and immediately prior to the consideration of the matter, the public official in question must do all of the following:

1. Publicly identify the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required.
2. Recuse himself from discussing and voting on the matter (or otherwise acting in violation of Section 87100).
3. Leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.³

In this case, as described above, it appears that you caused the LLMD issue to be revisited by the city council by having the matter put back on the agenda on at least one occasion. Also, you participated in the discussion, asked the city to consider equitable alternatives to the current situation, and you voted to add the matter for future discussion. These

³ However, a public official is allowed to appear as a member of the general public before his or her agency in the course of its general function to represent himself on matters solely related to his personal interests as set forth in Regulation 18702.4.

actions were an attempt to use your official position to influence a governmental decision. (See Regulation 18702.3, subd. (a): “[T]he official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, *or otherwise attempts to influence, any member, officer, employee or consultant of the agency. . . .*” Emphasis added.)

At the time, it was reasonably foreseeable that your actions could lead to reduced LLMD taxes/assessments for you and other property owners (and potentially, increased taxes for non-LLMD residents if a plan similar to the failed ballot measure were adopted). However, the extent of the impact on your personal finances (and on others) is unclear. Also, it appears that an exception known as the “public generally” exception may apply in your favor.

The “public generally” exception provides that a public official does not have a disqualifying conflict of interest if the official can establish that the governmental decision will affect his economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulations 18707-18707.10.)

Along these lines, Regulation 18707.2, subdivision (a), provides that the exception applies if the decision is to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, which are applied on a *proportional* basis on the official’s economic interest and on a significant segment of the jurisdiction (5,000 residents *or* at least 10% of the population).

In this case, it appears that a significant segment of the jurisdiction would be affected by LLMD changes (since roughly one-third of the city’s parcels are in LLMD’s). Thus, it is likely that the “public generally” exception would apply for LLMD changes—if the changes are to be applied on a *proportional* basis on your economic interest and on the significant segment. The same cannot be said for *non-proportional* changes.⁴

Please note that our Legal Division and Technical Assistance Division can provide advice and assistance for issues which may arise in the future. Should you have any questions about the difference between “proportional” and “non-proportional” changes, or should you have any other questions, do not hesitate to contact either division by calling our toll-free number: 1-866-ASK-FPPC (1-866-275-3772). Also, you may refer to the FPPC website at www.fppc.ca.gov for current information.

Although we are closing this matter with an advisory letter, the information in this case will be retained and may be used against you should an enforcement action become necessary

⁴ As stated above, you do not appear to be similarly situated with respect to other residents who pay LLMD taxes/assessments. Rather, you appear to be one of a small number of LLMD residents (potentially less than 10% of the population) who are levied in excess of \$700 annually. If, for instance, the city council voted to eliminate LLMD taxes/assessments entirely and to make all city residents pay a flat, equal amount, such a vote potentially would provide substantially greater savings to you than it would to a significant segment of the population.

due to newly discovered information and/or failure to comply with the Act in the future. Failure to comply with the provisions of the Act in the future may result in monetary penalties of up to \$5,000 per violation.

Your cooperation in ensuring that the requirements of the Act are consistently satisfied is greatly appreciated. Please feel free to contact me at (916) 322-5660 with any questions you may have regarding this letter.

Very truly yours,

A black rectangular redaction box covering the signature of Neal P. Bucknell.

Neal P. Bucknell
Senior Commission Counsel,
Enforcement Division

cc: Mr. Dana Reed, Esq.