FAIR POLITICAL PRACTICES COMMISSION
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May 10, 2011

Mr. Garrad Marsh
c/o Mr. Lance Olson, Esq.
Olson, Hagel & Fishburn, LLP
REDACTED

Re: Advisory Letter
FPPC Case No. 09/473 (Garrad Marsh)

Dear Mr. Marsh:

The Fair Political Practices Commission ("FPPC") enforces the provisions of the Political Reform Act ("Act").[1]

In approximately July 2009, we received a complaint alleging that you committed multiple violations of the Act's conflict of interest provisions in your capacity as a Modesto City Councilmember. The allegations were based in part upon your vote of June 2, 2009 to freeze the construction cost index annual inflationary adjustment for the 1999, 2003, and 2006 capital facilities fees programs for fiscal year 2009-2010. Also, the allegations were based in part upon your vote of July 7, 2009 to freeze the annual inflationary adjustment for the wastewater capacity charge and the water connection charge for fiscal year 2009-2010. (The remaining allegations of the complaint lacked sufficient substance and support to warrant investigation/prosecution.) With respect to these two votes, the complaint alleged that the votes financially benefitted your local real property and development interests, in violation of Section 87100.

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."

In a case like this, to determine whether an individual violated the conflict of interest provisions of the Act, the FPPC considers the following issues, in the order provided: (1) was the individual a public official; (2) did the official use or attempt to use his official position to

[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.

influence a governmental decision; (3) did the official have an economic interest directly or indirectly involved in the governmental decision; (4) what is the applicable materiality standard for each involved economic interest; and (5) was it reasonably foreseeable that the governmental decision would have a material financial effect on the official's economic interest. (See Section 87100 and Regulations 18700, et seq.)

Our investigation revealed that on account of your real property and/or development interests, you did have a conflict of interest with respect to the two votes in question, but the "public generally exception" may apply in your case. This exception is described below.

Notwithstanding a determination that the reasonably foreseeable financial effect of a governmental decision on a public official's economic interests is material, a public official does not have a disqualifying conflict of interest in the governmental decision if the official can establish that the governmental decision is to establish or adjust assessments, taxes, fees, charges, rates, or other similar decisions, which are applied on a proportional basis on the official's economic interests and on a significant segment of the jurisdiction. (See Regulation 18707 and 18707.2.)

For purposes of this exception, Regulation 18707.1, subdivision (b)(1), sets forth different definitions for "significant segment," depending upon the economic interests involved.

For example, for decisions that affect the personal expenses, income, assets, or liabilities of a public official or a member of his or her immediate family, "significant segment" means: (i) ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents; or (ii) 5,000 individuals who are residents of the jurisdiction. (Regulation 18707.1, subd. (b)(1)(A).)

As another example, for decisions that affect a public official's interest in real property, "significant segment" means: (i) ten percent or more of all property owners or all residential property owners in the jurisdiction of the official's agency or the district the official represents; or (ii) 5,000 property owners or residential property owners in the jurisdiction of the official's agency. While the public official must identify ten percent or more of residential property owners or 5,000 residential property owners as provided above, and not residential properties, the official may choose to count each residential property affected as being owned by one property owner if, and only if, the official counts himself or herself as the sole owner of the public official's residential property regardless of his or her actual ownership interest. "Residential property" means any real property that contains a single family home, or a multi-family structure of four units or fewer, on a single lot, or a condominium unit. (See Regulation 18707.1, subd. (b)(1)(B).)

In this case, the votes in question pertained to the adjustment of assessments, taxes, fees, charges, rates, or other similar decisions, and it appears that a "significant segment" of Modesto was affected by each vote. However, there is some question as to whether or not the "proportional basis" part of the "public generally exception" has been met due in part to the fact that it may be argued that you were poised to develop 14 subdivisions.

Nevertheless, based upon the unique facts of this case and the language of the regulations cited above, it appears that the "public generally exception" may apply in your favor, and for this reason, we are closing this case with this advisory letter and without further prosecution.

Although we have decided not to pursue an enforcement action in this matter, please be advised that any failure to comply with the provisions of the Act in the future could result in an enforcement action. Please refer to the FPPC website at www.fppc.ca.gov for current information. In addition, our Legal Division and Technical Assistance Division can provide advice and assistance for issues which may arise in the future. You may contact either division by calling our toll-free number: 1-866-ASK-FPPC (1-866-275-3772).

If you have any questions regarding this matter, please feel free to contact me at (916) 322-5660.

Very truly yours,

REDACTED

Neal P. Bucknell
Senior Commission Counsel
Enforcement Division

cc: Mr. Roger Brown, Esq.