BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of: Opinion requested by: F. Mackenzie Brown, City Attorney, City of San Clemente	No. 77-024 Feb. 7, 1978

BY THE COMMISSION: We have been asked the following question by F. Mackenzie Brown, City Attorney of the City of San Clemente:

Does ownership of property within the proposed boundaries of a municipal improvement district prevent a council member from voting on the formation of the district and approval of the assessment to be levied against owners of property within the district?

CONCLUSION

Although ownership of land in a municipal improvement district may not result in disqualification in every case, in this case it is reasonably foreseeable that decisions concerning the formation of and assessment for the municipal improvement district will have a material financial effect, distinguishable from their effect on the public generally, on the interests in real property owned by two council members. Therefore, the council members may not vote or participate in any decisions concerning formation of or assessments for the district. Government Code Sections 87100, 87103.

FACTS

The City of San Clemente is considering the formation of a municipal improvement district in its downtown area. The district, to be formed pursuant to the Municipal Improvement Act of 1913,[1] would encompass seven to ten square blocks in an area that is zoned for commercial use and is largely used for commercial purposes. The proposed improvements will cost between $1.5 and $3.5 million and

[1] Streets and Highways Code Sections 10000, et seq.

will include beautification and development of vacant parcels into parking lots. The improvements will be financed by assessments on the property located within the district. The assessments will be allocated among property owners on the basis of a formula based on acreage and street frontage. Bondholders have a lien on the property included in the district. The city does not guarantee payment of the bonds.

Two San Clemente council members own land within the proposed boundaries of the assessment district. One is a lawyer who owns the land on which his office is located. The other owns a commercial property and operates a locksmith business on that land.

ANALYSIS

Under the Political Reform Act of 1974, a public official is not permitted to:

> ... 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.
>
> Government Code Section 87100[2/]

A public official has a "financial interest" in a decision if:

> ... it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:
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> (a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars ($1,000);
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> (b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars ($1,000);
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> (c) Any source of income ... aggregating two hundred fifty dollars ($250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; or

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2/ All statutory references are to the Government Code unless otherwise noted.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee or holds any position of management.

Section 87103.

Both San Clemente council members have financial resources which could be affected by the council decisions in connection with the improvement district. Both own real property and operate businesses within the district. Thus, each has an interest in real property, a source of income and, in all likelihood, an investment in a business entity within the meaning of Section 87103(a), (b) and (c).

Under the foregoing sections, several elements must be present before a council member is required to disqualify himself from participation in a decision concerning the improvement district. First, it must be reasonably foreseeable that the decision will have a financial effect. Second, the anticipated financial effect must be on at least one of the economic interests described above. Third, the anticipated effect must be material and, fourth, the effect must be distinguishable from its effect on the public generally.

In this case, it is reasonably foreseeable that the improvement district decisions will have financial effects upon the property of the two council members.[3] The decision to form the district will determine whether or not the two council members' properties will be assessed to pay for the improvements. Decisions concerning the district's boundaries, the size of the district and the amount of money which will be spent for improvements will affect the size of the assessment that is levied against the properties.

Furthermore, it is reasonably foreseeable that the street beautification and increased parking brought about through the improvement district will have a financial effect on the council members' properties. The street beautification and parking project is intended to improve the business climate of the downtown area. It is foreseeable that the project will increase the business in the area and as a result increase the income potential and value of downtown commercial properties, including the council members' properties.

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[3] It is unlikely that decisions concerning the formation of the improvement district will have a material financial effect upon the business entities owned by the two council members. Neither of their businesses is of the kind which is likely to gain any significant amount of business from the parking and beautification project that is proposed.

It is our conclusion that the financial effects upon the members' properties will be material. Our regulation provides that:

> ... [t]he financial effect of a governmental decision on a financial interest of a public official is material if, at the time the official makes, participates in making or attempts to use his or her official position to influence the making of the decision, in light of all the circumstances and facts known at the time of the decision, the official knows or has reason to know that the existence of the financial interest might interfere with the official's performance of his or her duties in an impartial manner free from bias.
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> 2 Cal. Adm. Code Section 18702(a)

Applying the regulation to the facts presented in this case, we believe that the financial effect of decisions involving the formation of and assessments levied by the district are of the kind which might interfere with the council members' ability to perform their duties "in an impartial manner free from bias." Of course, not every decision concerning the district will have a material financial effect on the financial interests of the council members. For example, once the district is formed and a commitment made to the overall plan for improvements, many decisions concerning the particular design of the improvements may not have a material impact upon the financial interests of the council members.

Because it is foreseeable that some decisions in connection with the improvement district will have a material financial effect on the interests of the council members, we must then determine whether the effect upon their interests is distinguishable from the effect upon the public generally. A material financial effect on a decision on an official's interest is distinguishable from the effect on the public generally:

> ... unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public....
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> 2 Cal. Adm. Code Section 18703

The Commission has previously held that residential homeowners are a significant segment of the public and that retail merchants doing business within the jurisdiction constitute a significant segment of the public. In the Matter of Opinion Requested by William L. Owen, 2 FPPC Opinions 77 (No. 76-005, June 2, 1976). But in that opinion, we also held that the class of commercial lessors was not a significant segment of the public because its members would be directly and particularly affected by a specific decision.

In this case, the relevant category of downtown commercial property owners is a small one relative to either the class of all San Clemente commercial property owners or the entire San Clemente business community. Approximately 50% of the commercial property in the city is located outside the proposed assessment district. As in the case of the Davis commercial lessors, we do not believe that the class of downtown commercial property owners can be considered a significant segment of the public. Because the improvement project is limited to the downtown area, commercial property in the improvement district will reap direct benefits and incur direct costs that will not be shared by other commercial property in the city. In fact, increased downtown business and the concomitant increase in downtown property values may be gained at the expense of commercial property in other parts of the city. Therefore, the effect of the proposed decisions will be distinguishable from their effect on the public generally. Consequently, the two council members must disqualify themselves from decisions concerning creation of the improvement district.

The San Clemente city attorney has called our attention to a number of cases decided under common law prior to the adoption of the Political Reform Act. See, Jeffery v. City of Salinas, 232 Cal. App. 2d 29, 42 Cal. Rptr. 486 (1965); Federal Construction Co. v. Curd, 179 Cal. 489, 494, 179 P. 469 (1918); 46 Cal. Op. Atty. Gen. 74 (1965). These cases appear to apply a per se rule that allows owners of property within an assessment district to vote on matters concerning the district despite the existence of a conflict of interest. Some of these cases rely on a doctrine similar to that expressed in the "public generally" rule of Section 87103. For example, in the Curd case the court stated:

> ... While these various bodies are as a rule executive and administrative as to most of their functions, there are certain matters committed by the law of their creation to their judgment and

> discretion, which matters are judicial in their nature; such as the fixing of water rates, the equalizing of taxes, the determination of benefits, the correction of errors in assessments and the like. Quite frequently the entire community to which the members of these boards or bodies belong are directly and beneficially interested in the result of the hearing and determination of such matters and they themselves are, therefore, interested parties therein. Of necessity, therefore, in many of such matters, unless the members of the body designated by statute as the sole body to hear and determine the same are qualified notwithstanding their interest so to do, they never could be determined without recourse in every instance to actions in regularly constituted judicial tribunals....
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> 179 Cal. at 494

Other cases rely upon a rule of necessity doctrine that allows a council member with a conflict of interest to participate if no one can take the council member's place. Jeffery v. City of Salinas, supra, at 40. This doctrine is recognized in a modified form by Section 87101 which allows a public official with an otherwise disqualifying conflict of interest to act if his participation is "legally required for the action or decision to be made." By regulation, the Commission has further explained the "legally required participation" provision:

> (a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.
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> 2 Cal. Adm. Code Section 18701(a)

The cases cited by the city attorney were decided on the basis of common law in the absence of any specific statutory provision. Although these cases espouse principles similar to those contained in Chapter 7 of the Political Reform Act we feel constrained to follow the statutory provisions of the Political Reform Act and not the per se rule suggested by earlier cases. As is noted in our analysis of

the facts before us, we have previously interpreted the "public generally" rule of Section 87103 in a manner which requires disqualification unless the decision will affect the interests of all of or a significant segment of the public within the decision-maker's jurisdiction in substantially the same manner. This is not a per se rule but rather one which requires examination of each situation to determine if a particular public official's financial interests are affected and to determine if that effect is distinguishable from the effect on the public generally.

Similarly, the "legally required participation" concept of Section 87101 leads to a different result than the common law rule enunciated in Jeffery. Under the Jeffery formulation, a city council member can vote despite a conflict of interest so long as there is no legal means of temporarily replacing the member. Under Section 87101, participation is legally required only if there is no alternative means of decision-making. Therefore, the Commission has stated that an otherwise disqualified member can vote only in some cases where his or her vote is necessary to obtain the quorum needed to take action.[4/] In the instant situation it is not necessary to reach the question of legally required participation because only two of the five San Clemente council members will be disqualified from voting on the improvement district creation and assessment. We are informed that the necessary council quorum is three. Therefore, even if the two council members with property within the district are disqualified, the council still may act on improvement district issues.

Approved by the Commission on February 7, 1978. Concurring: Lowenstein, McAndrews, Quinn and Remcho. Commissioner Lapan was absent.

Daniel H. Lowenstein
Chairman

4/ See Opinion requested by Matthew L. Hudson, 4 FPPC Opinions 13 (No. 77-007, Feb. 7, 1978).