BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of: Opinion requested by: Matthew L. Hudson, City Attorney, City of Petaluma	No. 77-007 Feb. 7, 1978

BY THE COMMISSION: We have been asked the following question by Matthew L. Hudson, City Attorney for the City of Petaluma:

The Chief Building Inspector and the Fire Marshal of the City of Petaluma ordered the owner of a structure located in the city either to make repairs in order to comply with the city's building code or to demolish the structure. The owner appealed this order to the city's Board of Building Review.

The Board of Building Review is authorized to review orders of the Chief Building Inspector. The Board consists of five members who qualify for service by reason of experience and training in the field of building construction. A quorum of the Board requires three members and a decision requires a majority of the quorum.

Three members of the present Board, Richard Lieb, Charles Phillips and Albert Brians, performed services in their private capacities for the owner of the structure in question during the twelve-month period prior to the owner's appeal and each received more than $250 for the services rendered. In particular, the owner constructed a building for which Mr. Lieb was the architect, Mr. Phillips was the general contractor and Mr. Brians was the plumbing subcontractor.

Messrs. Lieb, Phillips and Brians have acknowledged that they have a "financial interest" in the Board's decision concerning the owner's appeal within the meaning of Government Code Section 87103(c) and, therefore, are prohibited from making, participating in making or in any way attempting to

use their official positions to influence that decision. Government Code Section 87100. The City Attorney has asked whether the participation of the disqualified members of the Board is "legally required" within the meaning of Government Code Section 87101.

CONCLUSION

The failure to achieve a quorum because of disqualification based on conflicts of interest makes it appropriate to invoke the rule of "legally required participation" in the present case. Government Code Section 87101. Application of the rule to the facts of this case allows one of the disqualified members to participate in the decision in question.

ANALYSIS

The Political Reform Act prohibits a public official[1/] from making, participating in making or in any way attempting to use his official position to influence a governmental decision in which he knows he has a financial interest. Government Code Section 87100.[2/] A public official has the requisite financial interest in a governmental decision if "it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on ... [a]ny 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...." Section 87103. In the present case, three members of the five-member board have received requisite income from the owner of the structure in question. Moreover, we have been informed that it is reasonably foreseeable that the decision concerning the structure will have a material financial effect on the source of income. Hence, the public officials are required to disqualify themselves from participating in the decision.

There is, however, a limited exception to the prohibition contained in Section 87100. Section 87101 provides:

1/ It is clear that Messrs. Lieb, Phillips and Brians are "public officials" since they are members of a local government agency. See Government Code Sections 82041 and 82048.

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

> Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section.

We have clarified the meaning of this exception to the Act's general disqualification requirement by adopting a regulation which provides, in pertinent part:

> 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).

We previously have recognized that this "regulation reflects our conclusion that 'legally required participation' is the statutory analogue to the common law 'rule of necessity' recognized by the California courts." See Opinion requested by R. J. Maloney, 3 FPPC Opinions 69, 74 (No. 76-082, Aug. 18, 1977). Explaining the "rule of necessity," one California court has noted that:

> The rule is well settled that where an administrative body has a duty to act upon a matter which is before it and is the only entity capable to act in the matter, the fact that the members may have a personal interest in the result of the action taken does not disqualify them to perform their duty. It is a rule of necessity which has been followed consistently.
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> Gonsalves v. City of Dairy Valley, 265 Cal. App. 2d 400, 404 (1968).

See also Caminetti v. Pacific Mut. Life Ins. Co., 22 Cal. 2d 344, 366 (1943); Thompson v. City of Long Beach, 41 Cal. 2d 235, 243 (1953).

In the present case, the Board of Building Review is the only body that is authorized to hear an appeal from an order of the Chief Building Inspector and the Fire Marshal. Furthermore, there is no provision in the City of Petaluma ordinances which would permit either the changing of the quorum requirements of the Board or temporary appointment of an alternate member or members to the Board as a means of resolving the problem created by the conflicts of interest of the three Board members. It is clear, therefore, that under these facts no alternative source of decision exists. The failure to achieve a quorum as a result of the members' conflicts of interest would preclude the Board from acting and would "necessarily result in a failure of justice." Caminetti v. Pacific Mut. Life Ins. Co., 22 Cal. 2d 344, 366 (1943). We think that under these circumstances it is appropriate to invoke Section 87101.[3/]

Having concluded that the concept of "legally required participation" is applicable in the instant case, it remains for us to decide precisely what the doctrine requires. In considering this question, we are guided by our own admonition in our regulation on legally required participation that the "regulation shall be construed narrowly," 2 Cal. Adm. Code Section 18701(c), and by the suggestion of Professor Davis that it is appropriate to employ means to minimize the impact of application of the "rule of necessity." See Davis, Administrative Law Text, §12.05 at 252-53 (3d ed. 1972).[4/]

This approach derives from the fact that application of the doctrine of "legally required participation" necessarily

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3/ Although Section 87101 is applicable in some cases where there is a failure to achieve a quorum due to the prohibition contained in Section 87100, we intimate no opinion concerning whether Section 87101 will be applicable when a quorum is not attainable for other reasons.

4/ For example, Professor Davis expressed approval of the decision of an appellate court to employ a stricter standard of review when reviewing the decision of a commission that was "biased" but had proceeded pursuant to the "rule of necessity." The court observed that it would scrutinize the commission's determinations with "great care" and that "the evidence necessary ... to establish the fact that the findings of the commission were awry is much less than it would otherwise be...." Wis. Tel. Co. v. Public Service Comm'n., 232 Wis. 274, 324, 287 N.W. 122, 147 (1939).

requires participation in a decision by an individual or individuals who have a "financial interest" in a decision and, therefore, may be biased. To the extent that the impact of this bias can be minimized, we think it is appropriate to do so.

In the present case, this approach leads us to conclude that only one of the three disqualified members of the Board may participate in the hearing to review the order of the Chief Building Inspector and the Fire Marshal. Allowing only one of the three disqualified members to participate means that a quorum can be achieved and a decision therefore made. But it will be a decision reached by a Board that consists of two members without a financial interest in the decision and only one member with such an interest. If all three disqualified members were permitted to participate under the guise of "legally required participation," the decision would be made by a Board consisting of three members with a financial interest in the decision and only two members without a financial interest. The former approach obviously poses less danger of a "biased" decision and thereby limits the impact of application of the "legally required participation" concept.

We note that previous cases applying a common law "rule of necessity" appear to allow all disqualified members of a council or board to vote. See Aluisi v. County of Fresno, 178 Cal. App. 2d 443 (1960); Gonsalves v. City of Dairy Valley,[5] 265 Cal. App. 2d 400 (1968); Brenkwitz v. City of Santa Cruz, 272 Cal. App. 2d 812 (1969). While the common law rule of necessity is analogous to the concept of "legally required participation" contained in the Political Reform Act, we believe that the purposes of the Act are best served by a rule which minimizes participation in government decisions by officials with a conflict of interest. Opinions requested by R. J. Maloney, 3 FPPC Opinions 69 (No. 76-082, Aug. 18, 1977); F. Mackenzie Brown, 4 FPPC Opinions 19 (No. 77-007, Feb. 7, 1978).

Turning to the question of the manner in which the one disqualified member should be chosen, we believe that

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[5] Cases such as Gonsalves, apply what is designated as a rule of necessity. Under the Political Reform Act, these officials would be allowed to participate because the proposed decision would not affect them in a way that is distinguishable from its effect on the public generally. Section 87103. See Opinion requested by William L. Owen, 2 FPPC Opinions 77 (No. 76-005, June 2, 1976).

the preferred means for selection is by lot or other means of random selection. However, we do not believe that the Political Reform Act prevents the use of other impartial and equitable means of selection of the disqualified member.

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

Daniel H. Lowenstein
Chairman