



FAIR POLITICAL PRACTICES COMMISSION

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February 26, 2002

Councilman George Luna
City of Atascadero
P.O. Box 806
Atascadero, CA 93422

**Re: Your Request for Advice
Our File No. A-02-018**

Dear Mr. Luna:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that this letter should not be construed to evaluate any conduct that has already taken place. (Regulation 18329(b)(8)(A).) The Commission does not act as a finder of fact when it renders advice. This advice is based upon the facts as provided in your request letter. This advice is applicable and confers immunity only to the extent that the facts provided to us are correct, and that all of the material facts have been disclosed. *In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code § 83114.

QUESTION

Will you, as a member of the Atascadero City Council, have to recuse yourself from future hearings of the Atascadero City Council convened to discuss a claim for damages filed jointly against the City of Atascadero, the City of Atascadero Unified School District, the Atascadero Historical Society, your spouse (in her capacity as an unpaid board member of the Atascadero Historical Society) and others?²

¹ Government Code §§ 81000 – 91014. Commission regulations appear at Title 2, §§ 18109-18997, of the California Code of Regulations. As used herein "section" refers to a section of the Act and "regulation" refers to a section or subdivision of the Commission's regulations.

² You also asked whether your past recusal from a closed session of the city council, convened to discuss and vote upon this claim, was compelled under the conflict of interest provisions of the Act. Under the Commission's regulations (regulation 18329(b)(8)(A)), advice is not given relating to past conduct.

CONCLUSION

Yes, you will be required to recuse yourself from any future hearings of the Atascadero City Council convened to discuss the claim or any litigation arising from the claim.

FACTS

Your wife, Ursula Luna, is an unpaid volunteer on the Board of the Atascadero Historical Society (a non-profit organization). The Atascadero Historical Society leases a parcel of land owned by the Atascadero Unified School District. This parcel contains a creek bed that is alleged to have suffered ongoing erosion over the past one or more years, to the point that one bank of the creek is said to undercut a walkway of an adjacent bowling alley. A claim has been asserted by the owner of the bowling alley against numerous parties, including the City of Atascadero, Atascadero United School District, the Atascadero Historical Society, and the Board of Directors of the Atascadero Historical Society, both as a body and, with respect to your spouse, individually. The claim aggregates to \$1,016,000.

The Atascadero City Council held a closed session meeting to discuss the claim and to vote whether to accept or deny the claim. Upon the recommendation of the Atascadero city attorney, you recused yourself from this closed session.

ANALYSIS

Section 87100 prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest (regulation 18700, subdivisions (b)(1) – (8)), which is discussed below.

1. & 2. Are you a public official and will you make, participate in making, or influence a governmental decision?

You are an elected member of the Atascadero City Council. Consequently, you are a “public official” within the meaning of the Act and are subject to the conflict-of-interest provisions thereof. (Section 82048; regulation 18701(a).) You asked about your participation as a member of the Atascadero City Council on future matters concerning a claim against the City of Atascadero. A vote by the Atascadero City Council to accept or defend itself against this claim, or causing the City of Atascadero to undertake any other course of action regarding this claim, would be a vote committing or obligating the City of Atascadero. As such, it would constitute a governmental decision within the meaning of the Act. (Section 87100; regulations 18702.1 – 18702.3.)

A vote of the Atascadero City Council on a matter concerning litigation against the City of Atascadero or any political subdivision thereof is a governmental decision. Similarly, your advice, recommendations or communications to fellow members of the city council made with the intent to influence the outcome of any vote on a matter concerning litigation against the City of Atascadero or any political subdivision thereof, would comprise participating in, or influencing, a governmental decision.

3. What are your economic interests?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. The economic interests which might give rise to a conflict of interest are defined in regulations 18703-18703.5. The interest pertinent to your facts is found at subdivision 18703.5: an economic interest in his or her personal finances (expenses, income, assets, or liabilities), as well as those of his or her immediate family. Your spouse is an unpaid volunteer at the historical society. Thus, a vote on matters affecting the financial health of the historical society, such as the claim presently asserted against it, would not advance a source of income to a member of your immediate family. However, any decision by the city council to approve or deny, in whole or in part, the bowling alley's claim could affect the financial liability your wife might face as one who is being named, in her individual capacity, as another defendant under the claim.³

4. Is your economic interest directly or indirectly involved in the decision?

Under our regulations, a public official is deemed to be directly involved in a governmental decision which may have a financial effect on his or her personal finances or those of his or her immediate family. (Regulation 18704.5.)

5. & 6. Will the financial effect on your economic interests be foreseeable and material?

Not all governmental decisions by a public official which impact upon his or her economic interests give rise to a conflict of interest. It is when the impact on his or her economic interests is material (or important) that a conflict of interest might arise. Whether an impact is so significant as to be deemed material depends upon the nature of the economic interest and whether that interest is directly or indirectly implicated in the governmental decision.

A governmental decision has a material financial effect on a public official's economic interest in his or her personal finances when it is reasonably foreseeable that the financial effect will equal at least \$250 in any 12-month period. (Regulation 18705.5.) The determination of materiality is necessarily a factual question. Based on the fact that your spouse is named individually as one of many joint defendants in a claim

³ This would be analogous to the joint and several liability imposed by law on joint tortfeasors.

aggregating \$1,016,000, it appears that your wife's potential liability equals or exceeds the \$250 materiality standard.

When the effect of a governmental decision is deemed to be material under the applicable materiality regulation, a conflict of interest might not arise unless it is reasonably foreseeable that the effect will actually occur. (Section 87103.) No one has a conflict of interest under the Act "on general principles."

Under regulation 18706, an effect upon economic interests is considered reasonably foreseeable if there is a substantial likelihood that it will occur. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. *In re Thorner*, 1 FPPC Ops. 198 (1975). The fact that a claim has been filed and that the City of Atascadero has voted (as you report in a telephone communication with our staff) to deny the claim indicates that litigation concerning the underlying event is more than a mere possibility. It is reasonably foreseeable that a governmental decision by the Atascadero City Council concerning these matters would cause the materiality standard to be met.

7. & 8. Exceptions

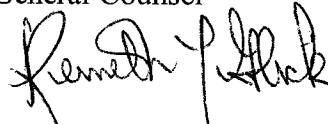
A conflict of interest does not in all instances disqualify a public official from making, participating in making, or influencing a governmental decision. There are two narrow exceptions (regulations 18707 "public generally" and 18708 - "legally required to participate") which may apply. However, nothing in the facts you provide indicate that either of these exceptions are applicable.

Finally, since the Commission's jurisdiction to administer and enforce conflicts-of-issue matters is limited to that conferred under the Act, as amended, you may wish to consult with your city attorney or the state Office of the Attorney General regarding common law, conflict of interest and/or Government Code Section 1090⁴ to further clarify eligibility of participation in the proceedings of the Atascadero City Council.

If you have any questions regarding matters raised in this letter, please be free to contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel



By: Kenneth L. Glick
Counsel, Legal Division

⁴ The conflict-of-interest provisions of the Act and of Government Code Section 1090, et seq. are two distinct statutory schemes, each imposing its own compliance obligations.