



FAIR POLITICAL PRACTICES COMMISSION

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March 3, 2011

Mark A. Blum
City Attorney, City of Kerman
Henry, Logoluso & Blum
441 Madera Avenue, Suite C
Kerman, California 93630

**Re: Your Request for Advice
Our File No. A-11-024**

Dear Mr. Blum:

This letter is in response to your request for advice on behalf of the Mayor and City Council of the City of Kerman (the "City") regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Please note that our advice is based solely on provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090. Also note our advice is based solely on the facts presented in your request; the Commission does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. If, under the facts presented, three of the city council members and the mayor have a disqualifying conflict of interest that would otherwise prohibit them from voting on the Wal-Mart Environmental Impact Report, will the legally required participation exception apply and allow the city council to form a quorum to vote on this matter?

2. If the Mayor is selected by random means as one of the officials to participate in the decision, may he chair the proceedings, or should one of the members without a conflict of interest chair the proceedings?

¹ The Political Reform 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.

3. If the quorum for the meeting is three, but the action only requires two positive votes, may all three members (including those legally required to participate) participate fully in the decision.

4. If the disqualified officials who are selected to participate comply with the advice rendered in this advice letter, will they be immune from prosecution under the Act for the participation in the matter?

CONCLUSIONS

1. If three of the five members have a conflict of interest under the Act, then the rule of legally required participation applies to your facts. Accordingly, the disqualified officials may participate in a random selection process to choose which one official may participate in the decision in order to create a quorum.

2. The legally required participation exception is narrowly construed and applies only when it is legally impossible for the decision to be made without the participation of a disqualified official, and where there is no "alternative source of decision consistent with the purposes and terms of the statute authorizing the decision." Because it is not legally impossible to have the meeting chaired without the mayor chairing the meeting, the mayor is not legally required to chair the meeting and another member, not otherwise disqualified, must do so.

3. Once the city council determines which disqualified official will participate in a decision to achieve a quorum, that official may fully participate without regard to the votes of the other councilmembers.

4. Section 83114(b) provides that so long as a requestor requests advice at least 21 working days prior to the decision, truthfully discloses all the material facts, and acts in good faith in making the decision in reliance on the advice, the advice shall be a complete defense in any enforcement proceeding initiated by the Commission and evidence of good faith conduct in any other civil or criminal proceeding.

FACTS

Kerman is a general law city and governed by its city council. The city council consists of four council members and an elected mayor. The mayor presides over council meetings and represents the city at ceremonial functions, but otherwise serves as a fifth member of the city council. The mayor has no veto power over the acts of the city council.

Wal-Mart has proposed to develop a 160,000 square foot store in the City of Kerman. An environmental impact report ("EIR") has been prepared pursuant to the California Environmental Quality Act, and the City's planning commission has recommended approval of the EIR with mitigation measures, conditions of approval, and other land use approvals, to the city council.

Pursuant to Kerman's Municipal ordinance, the city council has final approval of the EIR and the actions of the Planning Commission. The planning commission is appointed by, and serves at the pleasure of the city council.

It now appears that three or four of the members of the city council have disqualifying conflicts of interest arising from ownership of businesses or real property that may foreseeably be affected, either negatively or positively, by a decision on the proposed Wal-Mart. The quorum requirement for the city council is three members.

On February 9, 2011, you supplemented your facts with the following:

The action the city council will be considering in connection with the question posed is the adoption of a resolution or an ordinance. Kerman is not a charter city, but pursuant to Government Code 36813, has adopted Robert's Rules of Order to govern its proceedings in the absence of any state statute or other procedural requirement, and a vote of two members of a quorum of three would be sufficient for some actions. You asked us to advise assuming that a vote of two members would be sufficient.

ANALYSIS

The primary purpose for the conflict-of-interest provisions of the Act is to ensure that "[p]ublic officials, whether elected or appointed, [should] perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) In furtherance of this goal, Section 87100 of the Act 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. Determining whether a conflict of interest exists under Section 87100 requires analysis of the questions outlined in Regulation 18700 as follows:

- Determine whether the individual is a public official, within the meaning of the Act. (See Section 82048; Regulation 18701.)
- Determine whether the public official will be making, participating in making, or using or attempting to use his/her official position to influence a government decision. (See Regulation 18702.)
- Identify the public official's economic interests. (See Regulation 18703.)
- For each of the public official's economic interests, determine whether that interest is directly or indirectly involved in the governmental decision that the public official will be making, participating in making, or using or attempting to use his/her official position to influence. (See Regulation 18704.)

- Determine the applicable materiality standard for each economic interest, based upon the degree of involvement determined pursuant to Regulation 18704. (See Regulation 18705.)
- Determine whether it is reasonably foreseeable that the governmental decision will have a material financial effect (as defined in California Code of Regulations, title 2, section 18705) on each economic interest identified pursuant to Regulations 18703. (See Regulation 18706.)
- Determine if the reasonably foreseeable financial effect is distinguishable from the effect on the public generally. (See Regulation 18707.)
- Determine if the public official's participation is legally required. (See Regulation 18708.)

According to your facts, you have already concluded that the officials in question have conflicts of interest based on their ownership of businesses or real property located near the site of the new Wal-Mart. Thus, we do not reanalyze the existence of the conflict of interest under the first six steps of the analysis. Your questions solely concern the application of the exception in step 8 of the standard analysis -- whether the official's participation is legally required. (Regulation 18708.)

Section 87101 allows an official, who is otherwise disqualified to participate in a governmental decision, if the official's participation is "legally required." (Section 87101; Regulation 18708.) This exception is narrowly construed and applies only when it is legally impossible for the decision to be made without the participation of a disqualified official, and where there is no "alternative source of decision consistent with the purposes and terms of the statute authorizing the decision." (Regulation 18708(a), (c), and (d); *In re Tobias* (1999) 13 FPPC Ops. 5.) Typically this exception is invoked when, due to disqualification, an agency is unable to convene a "quorum" of its members.

The city council has four members and an elected mayor. Three members constitute a quorum. Because you have concluded that four of the five members have a conflict of interest under the Act, then the rule of legally required participation would apply to your facts since there would only be one member left and three are needed to constitute a quorum. Accordingly, the four disqualified officials could participate in a random selection process to choose which two officials can participate in the decision in order to create a quorum. (*In re Hudson* (1978) 4 FPPC Ops. 13.)

Your second question is whether the mayor, if selected to participate despite his conflict of interest, may chair the proceedings or should one of the members without a conflict of interest chair the proceedings. As noted above, this exception is narrowly construed and applies only when it is legally impossible for the decision to be made without the participation of a disqualified official, and where there is no "alternative source of decision consistent with the purposes and terms of the statute authorizing the decision." Thus, while we conclude it is legally impossible to achieve a quorum of the body without the disqualified member's participation, it does not appear legally impossible to have the meeting chaired without the

mayor chairing the meeting. Therefore, the mayor is not legally required to chair the meeting and another member, not otherwise disqualified, should chair the meeting.

You also asked the following: if the quorum for the decision is three, but the action only requires two positive votes for approval, may all three members (including those legally required to participate) participate fully in the decision. Once the city council determines which disqualified official will participate in a decision to achieve a quorum, that official may fully participate without regard to the votes of the other councilmembers.²

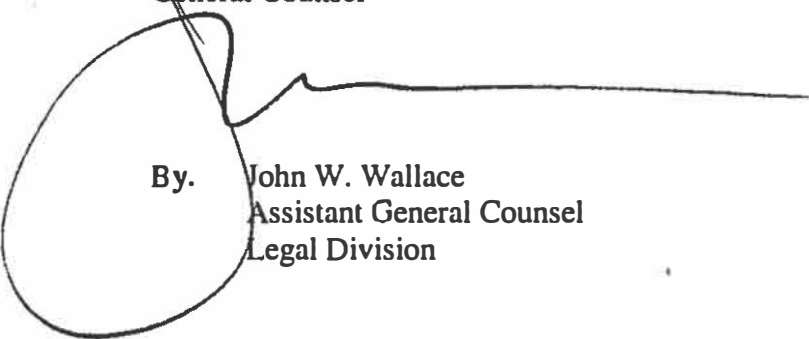
Your last question is if the disqualified officials who are selected to participate comply with the advice rendered in this advice letter, will they be immune from prosecution under the Act for the participation in the matter. Section 83114(b) provides:

“Any person may request the Commission to provide written advice with respect to the person’s duties under this title. Such advice shall be provided within 21 working days of the request, provided that the time may be extended for good cause. It shall be a complete defense in any enforcement proceeding initiated by the Commission, and evidence of good faith conduct in any other civil or criminal proceeding, if the requester, at least 21 working days prior to the alleged violation, requested written advice from the Commission in good faith, disclosed truthfully all the material facts, and committed the acts complained of either in reliance on the advice or because of the failure of the Commission to provide advice within 21 days of the request or such later extended time.”

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

Sincerely,

Scott Hallabrin
General Counsel

By.  John W. Wallace
Assistant General Counsel
Legal Division

² As you point out, Section 87101 does provide that the fact that a disqualified official’s vote is needed to break a tie does not make the official’s participation legally required for purposes of this section. However, this limitation presupposes that a quorum exists and that the body is deadlocked. This exception would not allow requalifying a disqualified official to break the tie under such circumstances. It would not apply in this case.