



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

October 22, 2021

Amanda B. Freeman
Senior Deputy City Attorney
2600 Fresno Street
Room 2031
Fresno, CA 93721

Re: Your Request for Advice
Our File No. A-21-135

Dear Ms. Freeman:

This letter responds to your request for advice on behalf of the Mayor of the City of Fresno, Jerry Dyer, regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

May the Mayor take part in a City Council decision regarding a potential “no smoking” ordinance specifically applicable to multi-unit rental properties, given that he owns a duplex and triplex that would be subject to the ordinance?

CONCLUSION

Yes, although the Act would ordinarily prohibit the Mayor from taking part in a decision revoking a land use entitlement for his real property, the “public generally” exception permits his participation in the decision because the decision’s effect on his economic interest is not unique compared to the effect on the public generally.

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 18109 through 18998 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.

FACTS AS PRESENTED BY REQUESTER

Jerry Dyer, the Mayor of Fresno, has 100% ownership of a duplex and triplex within the City of Fresno. The City has before it a proposed ordinance which would ban smoking in and around multi-unit rental properties. “Multi-unit rental property” is defined by the ordinance as “all residential property containing two or more rental units where the majority of the units, whether rental or not, share at least one common wall with an adjacent unit.”

A copy of the ordinance included with the September 30, 2021 City Council meeting Information Packet. The ordinance prohibits smoking in multi-unit rental properties and specifies it “does not create a private right of action for a tenant against a landlord for any damages the tenant may suffer due to another tenant’s breach of any smoking provision in a lease or other rental agreement, so long as the landlord has fully complied with the terms of this Ordinance.” The ordinance also requires every landlord to deliver to their multi-unit rental property tenants a copy of the ordinance and written notice of the prohibition. Landlords with knowledge of violations are also required to take reasonable steps to investigate and enforce the regulations, including providing a written notice to a tenant of the landlord’s knowledge of the violation. Failure to comply with the provisions of the ordinance subject the violator to assessments beginning at \$250 for the first violation and up to \$1,000 for the third (and every subsequent) violation within one year of the first violation.

In 2017, the City adopted the Rental Registry Improvement Act, which requires rental properties to register with the City. Properties are exempt if the unit is newly constructed and has passed final inspection of the City within the last ten years or the unit is subject to routine interior and exterior periodic inspection by another government agency. In a follow-up email and phone-call, you indicated there are approximately 59,863 total units within multi-unit rental property units on the rental registry. You have also indicated that, according to 2020 U.S. Census data, there are 178,831 total residential units citywide. Accordingly, units within multi-unit rental properties make up more than 25 percent of the City’s residential real property.

The ordinance was considered for adoption on October 14, 2021. Mayor Dyer did not take part in the governmental decision, but, per the City Municipal Code, has ten days to approve or veto the item, or else the ordinance is passed by default.

ANALYSIS

Under Section 87100 of the Act, “[n]o 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.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain specified economic interests. (Section 87103.)

Among those specified economic interests is “[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.” (Section 87103(b).) A public official also has an economic interest in “[a]ny business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more,” as well as “[a]ny

source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made. Mayor Dyer has an economic interest in his duplex and triplex as business entities and as real property. He also has economic interests in his business entity and a potential interest in his tenants as sources of income.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Under Regulation 18702.2(a)(5), the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, the property. Because the prohibits smoking in all multi-unit rental properties, the decision affects all multi-unit rental properties’ land use entitlements. Therefore, under the standards of Regulation 18701(a) and Regulation 18702.2(a)(5), Mayor Dyer’s real property interest is explicitly involved and it is reasonably foreseeable that the decision would have a material financial effect on Mayor Dyer’s real property interest. (See *Jex* Advice Letter, No. I-21-063 [applying Regulation 18702.2(a)(5) to a proposed short term vacation rental ordinance applicable to all single family and duplexes].) Accordingly, unless an exception applies, the Act broadly prohibits Mayor Dyer from taking part in the decision. Given this conclusion, we need not further analyze whether Mayor Dyer is also disqualified from taking part in the decision based on his business entity and source of income interests.

Under the “public generally exception,” a public official that has financial interest in a decision may still participate if the official demonstrates that the financial effect is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18703.) A governmental decision’s financial effect on a public official’s financial interest is considered indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).) A significant segment of the public includes:

- (1) At least 25 percent of:
 - (i) All businesses or non-profit entities within the official’s jurisdiction;
 - (ii) All real property, commercial real property, or residential real property within the official’s jurisdiction; or
 - (iii) All individuals within the official’s jurisdiction.

(Regulation 18703(b).) A “unique effect” on a public official’s economic interest includes a disproportionate effect on the official’s use or income-producing potential of their real properties,

or a disproportionate effect resulting from the cumulative effect of the official's multiple interests in similar entities or properties that is substantially greater than the effect on a single interest. (Regulation 18703(c)(1), (3).)

There are some 59,863 units in multi-unit rental properties in the City. There are approximately 178,831 total residential units citywide. Therefore, units in multi-unit rental properties make up approximately 33 percent of the City's residential real property, well above the 25 percent threshold for constituting a significant segment of the public. Examining whether there is a unique effect on Mayor Dyer, we note that Mayor Dyer owns two multi-unit rental properties with a total of five units. However, *every* property affected is a multi-unit rental property and the incremental increase in the potential cumulative financial effect on 5 total units in comparison to the other multi-unit properties is not disproportionate. Consequently, it appears the ordinance does not have a unique effect on Mayor Dyer's economic interests. Accordingly, the public generally exception permits Mayor Dyer to take part in decisions pertaining to the smoking ordinance.

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

Sincerely,

Dave Bainbridge
General Counsel


By: Kevin Cornwall
Counsel, Legal Division

KMC:dkv