



California Fair Political Practices Commission

July 5, 1990

Edward W. Lee
Assistant City Attorney
Oliver, Stoeber, Barr and Vose
1000 Sunset Boulevard
Los Angeles, CA 90012

Re: Your Request for Advice
Our File No. A-90-355

Dear Mr. Lee:

This is in response to your request for advice regarding the duties of Mayor Roger Creighton of the City of Hermosa Beach (the "city") under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

May Mayor Creighton participate in a vote to bring the city's general plan and zoning designation for a particular area into consistency, as required by Section 65860, in view of the extended period of time that the city council vote on the issue has remained tied 2-2?

CONCLUSION

Mayor Creighton may not participate in the decision despite the extended period of time that the city council vote on the issue has remained tied 2-2. Section 87101 and Regulation 18701 specifically prohibit such participation by Mayor Creighton.

FACTS

The City of Hermosa Beach is currently reviewing its general plan and zoning designations to bring the two into consistency as required by Government Code Section 65860. A certain area of the

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, *et seq.* All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

city, designated Area 10, is composed of 10 lots. Area 10 is currently zoned R-2B by action of the city council on December 13, 1988. Mayor Creighton, who owns and resides in real property within 300 feet of the boundaries of Area 10, did not participate in this decision.

The general plan designation for Area 10 is low density residential. The general plan designation of low density residential allows 0 to 13 dwelling units per acre; a medium density designation allows 14 to 25 dwelling units per acre.

The current zoning of R-2B for Area 10 allows 16.5 dwelling units per acre. A designation of R-1 for Area 10 would allow 9.2 dwelling units per acre.

In your letter you have outlined the following actions by the City Council which have resulted in a 2-2 tie vote on the issue:

On March 21, 1989, the Planning Commission of the City considered and recommended a redesignation of Area 10 under the City's General Plan from low density to medium density to bring the General Plan and Zoning into consistency. Upon consideration by the City Council on May 3, 1989, and again without the participation of the Mayor, the City Council considered the recommendation of the Planning Commission. The remaining four members of the City Council, after several consecutive motions, failed to obtain a majority vote on any motion; each motion resulting in a 2-2 tie vote. The matter was referred back to the Planning Commission to consider a zone change of Area 10 to R-1.

On September 5, 1989, the Planning Commission again considered Area 10 and the possible rezoning to R-1 and again recommended a redesignation from low density to medium density. The City Council on October 10, 1989, again without the participation of the Mayor, was unable to resolve the matter and after several motions again resulted in 2-2 tie voting. The matter was then continued to another date certain for Council to reconsider the matter in light of upcoming elections and a possible change in Council membership. Mayor Creighton was not up for re-election.

On April 10, 1990, the City Council again considered Area 10 under the Consistency Program, once again without Mayor Creighton's participation. The membership of the City Council had changed and three new Council persons were

seated at the April 10 meeting for reconsideration of Area 10. However, the City Council after several consecutive motions to either redesignate or rezone Area 10 to accomplish consistency, failed to obtain a majority vote to resolve the matter.

Based on the above, you have questioned whether the Act would permit Mayor Creighton to participate in the decision.

ANALYSIS

Section 87101 provides as follows:

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.

Regulation 18701 (copy enclosed), adopted by the Commission to implement Section 87101, states in relevant part:

This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Government Code Section 87100, to vote to break a tie.

(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Government Code Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code Section 87100, whether or not such other members are actually present at the time of the disqualification.

Regulation 18701(c).

Thus, the statute and regulation are explicit that a disqualified public official may not vote on a decision in order to break a tie vote.

You have questioned whether the rule of necessity under Section 87101 would, nevertheless, permit Mayor Creighton to participate in the decision regarding Area 10. The rule of necessity is a common law doctrine different from the concept of legally required participation contained in the Act. In its opinions, while recognizing that the concept of legally required

participation in the Act is analogous to the common law rule of necessity, the Commission has also consistently recognized that they are not equivalent. (See, e.g., In re Maloney (1977) 3 FPPC Ops. 69; In re Hudson (1978) 4 FPPC Ops. 13; copies enclosed.) Thus, in Hudson, supra, where three members of a five-member board were disqualified, the Commission permitted participation by only one of the disqualified members even though the Commission noted that the common law rule of necessity appeared to allow all disqualified members of a council or board to vote. The Commission stated:

In the present case, [we] 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.

* * *

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.

In re Hudson, supra at p. 17

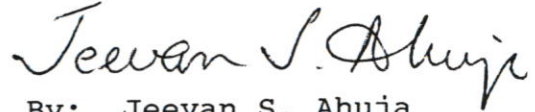
In the Westman Advice Letter, No. A-88-370 (copy enclosed), a question was raised as to whether a member of the Board of Supervisors could vote, despite a conflict of interest, to provide the third vote to break a 2-2 tie. The letter pointed out that since only one member was disqualified the Board of Supervisors had a quorum with which to make decisions; that under such circumstances the disqualified member's participation was not legally required. The letter further advised that the disqualified member's participation would not be considered to be legally required despite a court order mandating the Board of Supervisors to act, since the Board of Supervisors had a quorum with which to act. (Westman Advice letter, supra, at p.5.)

In the circumstances you have outlined, the city council has a quorum with which to act. Accordingly, Mayor Creighton may not participate in decisions regarding Area 10, despite the 2-2 tie vote by the city council on the issue.

If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely

Scott Hallabrin
Acting General Counsel

A handwritten signature in cursive script that reads "Jeevan S. Ahuja". The signature is written in dark ink and is positioned above the typed name and title.

By: Jeevan S. Ahuja
Counsel, Legal Division