



California Fair Political Practices Commission

September 7, 1990

Donald G. Freeman
Perry and Freeman
P.O. Box 805
Carmel by the Sea, CA 93921

Re: Your Request for Advice
Our File No. A-90-525

Dear Mr. Freeman:

This is in response to your request for advice regarding the Carmel city councilmembers' duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ You requested advice on behalf of the councilmembers.

QUESTION

May an otherwise-disqualified councilmember, who is participating in a decision in order to provide a legally required quorum, second a motion after both of the two non-disqualified councilmembers refuse to second each others' motions?

CONCLUSION

A councilmember with a disqualifying financial interest may participate fully, including seconding a motion, if there are insufficient non-disqualified participants to form a quorum and the councilmember is selected at random to form a quorum.

FACTS

Three out of the five members of Carmel by the Sea's City Council have disqualifying financial interests in a pending decision on a proposed ordinance which would prohibit new subordinate

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.

units in the R-1 Land Use District. The remaining two have "differences of opinion regarding the adoption of the proposed ordinance," and presumably will refuse to second the other's motion. Without a second, a motion may not be voted upon.

ANALYSIS

Section 87101 provides that a public official otherwise precluded from participating due to a disqualifying financial interest may participate in the decision "to the extent his participation is legally required for the action or decision to be made." It further provides that "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) further specifies that a public official is not legally required to make or to participate in the making of a governmental decision unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision. Subsection (c) provides that the regulation shall be construed narrowly, and shall not be construed to permit an official, who is otherwise disqualified under Section 87100, to vote to break a tie.

Legally required participation is to be construed as a statutory analogue to the common law "rule of necessity." (In re Maloney, 3 FPPC Ops. 69, 74, copy enclosed.) Under this rule, where an administrative body has a duty to act upon a matter before it and is the only entity capable of acting in the matter, the fact that its members may have a personal interest in the result does not disqualify them. (Gonsalves v. City of Dairy Valley, (1968) 265 Cal. App. 2d 400, 404.) However, Regulation 18701(c) has been interpreted by the Commission to require that steps be taken to minimize the bias that may result from the participation of individuals who are financially interested in the decision. (In re Hudson, 4 FPPC Ops. 13, 17, copy enclosed.)

Therefore, unlike the common law, the Commission limits the number of financially interested persons who can participate in the decision to that which is minimally necessary to constitute a quorum. (Hudson, supra.) The preferred procedure for selecting which disqualified member(s) will participate is by lot or other random means of selection. (Hudson, supra, at p. 18).

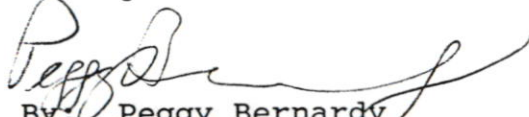
Previous advice issued by the Commission limited the scope of the randomly selected councilmember's participation to voting. Discussion, questioning, and making and seconding motions were prohibited. (Miranda Advice Letter, No. I-88-373; Skousen Advice Letter, No. A-88-162, copies enclosed.) This advice was criticized as unnecessary and extremely cumbersome. Councilmembers voting on matters wished to elicit more information or comment on the decision before voting, yet they were prohibited from doing anything but voting.

The Commission amended Regulation 18701 in 1989 to permit full participation by the randomly selected councilmember at public meetings of the agency and at closed sessions when required by law. The reason for the amendment was to prevent the absurd situations that were occurring under the prior version of the regulation. (See Final Statement of Reasons, copy enclosed.) In the circumstances you describe, there are two councilmembers without disqualifying financial interests. With a third councilmember chosen at random, there will be a quorum. The third councilmember may participate fully at public meetings of the agency and at closed sessions when required by law, but may not engage in any private discussions with other public officials regarding the decision.

I trust this letter has provided you with the guidance you requested. If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel



By: Peggy Bernardy
Counsel, Legal Division

SH:PB:aa

Enclosures