



California Fair Political Practices Commission

December 12, 1990

Cary S. Reisman
City Attorney, City of Maywood
Sallin, Kress, Reisman, Price and Dilkes
2800 Twenty-Eighth Street, Suite 315
Santa Monica, CA 90405-2934

Re: Your Request for Informal Assistance
Our File No. I-90-723

Dear Mr. Reisman:

This letter is in response to your request for advice regarding the duties and responsibilities of a councilmember and a planning commissioner under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Your request for advice does not include the names of the public officials whose duties are in question, and you have not stated that these officials have authorized your request for advice on their behalf. Consequently, we treat your letter as a request for informal assistance pursuant to the provisions of Regulation 18329(c) (copy enclosed).²

QUESTION

Under the provisions of the Act, are public officials who own more than three residential rental units disqualified from participating in decisions regarding amendments to the zoning ordinance?

CONCLUSION

Under the provisions of the Act, public officials who own more than three residential rental units are disqualified from participating in decisions regarding amendments to the zoning

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c).)

ordinance if these amendments will have a material financial effect upon their properties. The "public generally" exception does not apply.

FACTS

You are the contract city attorney for the City of Maywood. The city is in the process of adopting a new zoning ordinance. The new ordinance is designed primarily to reenact the prior zoning ordinance. The new ordinance will make the language of the existing ordinance easier to understand and will amend the existing ordinance in accordance with a newly-adopted general plan.

Among the proposed changes is a provision which would: (1) change the requirements for rebuilding after a catastrophe from 50 percent of assessed value to 50 percent of appraised market value; (2) exempt property which is nonconforming as a result of changes in development standards from the amortization schedule otherwise applicable; and (3) permit rebuilding of nonconforming property damaged in a catastrophe which is nonconforming solely as a result of changes in development standards without regard to the percentage of damage.

During the course of a hearing on the new ordinance it was determined that one member of the city council owns four residential rental units and one of the planning commissioners owns ten residential rental units in the city. Each of their properties is nonconforming as a result of changes in development standards which took place in 1966. Under the current zoning ordinance, neither person would be able to rebuild the same number of units in the event of catastrophic destruction.

The proposed amendments will not change the zone of any of the affected properties. The amendments will not change development standards significantly. However, the proposed amendments will modify or exempt the application of the prior development standards with regard to all nonconforming residential properties in the city, including those owned by public officials.

A majority of the residential properties in the city fail to meet the development standards adopted in 1966. Other city officials own nonconforming residential property. However, none of these officials own more than three residential rental units in the city.

ANALYSIS

The conflict-of-interest provisions of the Act prohibit public officials from making, participating in making or in any way attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. (Section 87100.) Councilmembers and city planning commissioners are public officials. (Section 82049; Regulation 18700, copy enclosed.)

An 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, on a member of his or her immediate family,³ or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

Section 87103.

Residential rental units constitute interests in real property. For purposes of our discussion we assume that the councilmember and the planning commissioner each hold an interest in real property which is worth at least \$1,000. Consequently,

³ A public official's "immediate family" are his or her spouse and dependent children. (Section 82029.)

the public officials must disqualify themselves from participating in decisions regarding the proposed amendments to the zoning ordinance if such decisions will have a foreseeable and material financial effect upon their rental units which is distinguishable from the effect of the ordinance on the public generally.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Comm. (1987) 196 Cal.App.3d 983, 989-991; Witt v. Morrow (1977) 70 Cal.App.3d 817; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

The proposed amendments to the zoning ordinance include provisions which will facilitate rebuilding nonconforming property which is damaged in a catastrophe. It is foreseeable that these provisions will have a financial effect on property held by the public officials because the proposed amendments will reduce the cost of rebuilding. For example, a property owner affected by the zoning ordinance as amended will be able to rebuild property damaged by a catastrophe without regard to certain development standards. Thus, the effect of the proposed amendment upon the public officials' interest in real property is reasonably foreseeable. If the effect is material, these two public officials who own more than three residential rental units may not participate in decisions regarding the proposed amendments.

Materiality

Regulation 18702 (copy enclosed) sets forth the guidelines for determining whether an official's financial interest in a decision is "material" as required by Section 87103. If the official's financial interest is directly involved in the decision, then Regulation 18702.1 (copy enclosed) applies to determine materiality.

A decision is material if an official's real property interests are directly involved in a decision and the decision will have any financial effect on those interests. An official's interest in real property is directly involved in the decision if:

- (A) The decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of real property in which the official has a direct or indirect interest (other than a leasehold interest) of \$1,000 or

more, or a similar decision affecting such property;

* * *

(E) For purposes of this subdivision, the terms "zoning" and "rezoning" shall refer to the act of establishing or changing the zoning or land use designation on the subject property, but shall not refer to an amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category.

Regulation 18702.1(a)(3)(A) and (E).

Regulation 18702.1(a)(3)(E) excludes amendments to an existing zoning ordinance which are applicable to all properties designated in that category. Your facts indicate that the proposed amendments to the zoning ordinance will not be applicable to all properties but rather would apply to nonconforming property only. Therefore, the public official's properties are directly involved in the decision and they must disqualify themselves from participating in decisions related to the proposed amendments if these decisions will have any financial effect upon their properties. Consequently, the public officials may not participate in decisions regarding amendments to the zoning ordinance unless the "public generally" exception discussed below applies.

Public Generally

Even when the effect of a decision on a public official's economic interests is material, participation is not prohibited if the effect of the decision on the public official's interest is not distinguishable from the effect on the public generally. For the "public generally" exception to apply, a decision must affect the official's interests in substantially the same manner as it would affect a significant segment of the public. (Regulation 18703.)

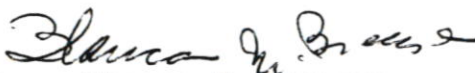
The "public" consists of the entire jurisdiction of the agency in question. (In re Owen (1976) 2 FPPC Ops. 77, copy enclosed.) This is so because all the residents of the jurisdiction are constituents of the official. (In re Legan (1985) 9 FPPC Ops. 1, copy enclosed.) Consequently, for the "public generally" exception to apply to your facts, the decision to amend the zoning ordinance must affect a significant segment of the population of the City of Maywood in substantially the same manner as it would affect the councilmember and the planning commissioner. (Hirsch Advice Letter, No. A-90-196, copy enclosed.)

In the matter of In re Ferraro (1978) 4 FPPC Ops. 62, 67 (copy enclosed), the Commission stated that a group that was large in numbers and heterogeneous in quality constituted a significant segment of the public for the purposes of the "public generally" exception. Applying these principles, the Commission concluded that owners of three or fewer residential rental units in the City of Los Angeles constituted a significant segment of the public. In reaching its conclusion, the Commission stated that while the owners of a small number of rental units constitute a significant segment of the public, persons who own large numbers of rental units or whose primary business activity revolves around ownership and management of rental property are members of an industry and are more likely than not to be most concerned with protecting and benefiting the common business interests of the industry. Thus, while owners of three or fewer rental units constitute a significant segment of the public, owners of more than three rental units are members of an industry. The public generally exception, therefore, does not apply to the councilmember or the planning commissioner on whose behalf you are seeking our advice.

We trust this letter adequately responds to your inquiry. Should you have any further questions regarding this matter, do not hesitate to call me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel


By: Blanca M. Breeze
Counsel, Legal Division

SH:BMB:plh:90723

Enclosures