



California Fair Political Practices Commission

April 16, 1992

Roger W. Krauel
City Attorney
Cities of Coronado,
Del Mar, and Encinitas
c/o Krauel & Krauel
Governor Park
5090 Shoreham Place, Suite 101
San Diego, CA 92122-5934

Re: Your Request for Informal Assistance
Our File No. I-92-119

Dear Mr. Krauel:

This is in response to your letter requesting assistance on behalf of the cities of Coronado, Del Mar, and Encinitas concerning the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Please note that Commission advice is the application of the law to a particular set of facts provided by the requestor. Since your questions appear hypothetical in nature and you have not specified a specific public official on whose behalf you have requested this advice, we are treating your request as one for informal assistance.²

QUESTION

You have posed the following hypothetical question:

May a city councilmember participate in the consideration of amendments to an existing zoning ordinance with respect to 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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

development in a specific zoning category which will be applicable to all the properties in that zoning category if the councilmember owns property which is in that zoning category?

DISCUSSION

The General Zoning Decisions

Pursuant to Regulation 18702.1(a)(3)(A), where a governmental decision concerns zoning or rezoning, and a public official resides in the zone, the effect of the decision is deemed material and the official may not participate. However, Regulation 18702.1(a)(3)(E) defines "zoning" decisions to exclude amendments to an existing zoning ordinance which are applicable to all properties designated in that category.

Thus, in the Hirsch Advice Letter (No. A-90-196, copy enclosed), we advised:

Since these decisions involve changes within the definition of particular zoning categories which will be applicable to all the properties designated in that category, we conclude that the decisions fall within the exemption provided by subdivision (E) of Regulation 18702.1. Thus, under the facts presented, Regulation 18702.1(a)(3)(A) does not apply to the councilmembers' properties involved in the decision.

The basis for the exception appears to be that the decision in question generally involves de minimis changes within the definition of particular zoning categories which will be applicable to all the properties. Thus, the financial effect from the decision will generally be small in contrast to a decision to rezone property or approve some specific project or plan. Moreover, generally redefining a specific zoning category will affect a large segment of the population of the jurisdiction in substantially the same manner. Thus, the exception provides that in this narrow class of decisions, the direct standard of materiality will not apply.

However, even if the financial effect of the decision is not considered material under the direct involvement analysis, public officials must still determine whether the indirect financial effect of the decision on the official's interest is material. (Regulation 18702.) Thus, the effects of the decisions must still be analyzed under the standards of Regulation 18702.3 to determine if the indirect effect on the councilmember's property is significant enough to result in disqualification.

In the Hirsch Advice Letter, supra, we advised that Regulation 18702.3(c) was the appropriate section to look to in determining the materiality of indirect effects on real property. Regulation 18702.3(c) states that for decisions which may affect

an interest in real property, but which do not involve a subject property from which distances can be determined, the monetary standards contained in Regulation 18702.3(a)(3)(A) and (B) are applied.

Regulation 18702.3(a)(3) provides that the effect of a decision on real property in which an official has an economic interest is material if the decision will have a reasonably foreseeable financial effect of: (A) \$10,000 or more on the fair market value of the real property in which the official has an interest; or (B) will affect the rental value of the property by \$1,000 or more per 12-month period.

Thus, when the decision falls within the narrow exception in Regulation 18702.3 (a)(3)(E), it is appropriate to apply the subdivision (c) standard of Regulation 18702.3 to those with property that is subject to the zoning change and, additionally, to those properties within 300 feet of the properties subject to the rezoning decision.

For example, suppose a city council were confronted with a decision to change the R1 zoning definition to increase permissible ceiling height within the zone. Three councilmembers own property that would be affected. Councilmember Smith owns R1 property and would be directly affected. Councilmember Jones owns an R2 lot that is next door to (within 300 feet of) Councilmember Smith's property and therefore would be affected indirectly. Councilmember Black owns R2 property that is over 300 feet away from Councilmember Smith's property and therefore would also be indirectly affected.

Due to the exception in 18702.1(a)(3)(E), Councilmember Smith who owns the R1 property would be required to disqualify himself if the decision would have a reasonably foreseeable financial effect of:

(A) Ten thousand dollars or more on the fair market value of his real property; or

(B) Would affect the rental value of the property by \$1,000 or more per 12 month period. (Regulation 18702.1(a)(3)(E); Regulation 18702.3(c); Regulation 18702.3(a)(3).)

Similarly, in order to avoid application of a stricter standard to persons indirectly affected by the decision than that imposed upon the actual owner of the property directly affected, the Commission has interpreted the materiality regulations to apply the same test to officials owning property within 300 feet of the property subject to the decision. Thus, Councilmember Jones who owns R2 property next door to Councilmember Smith would be required to disqualify himself if the decision would have a reasonably foreseeable financial effect of \$10,000 or more on the

fair market value of the real property or would affect the rental value of the property by \$1,000 or more per 12 month period.³ (Regulation 18702.3(c); Regulation 18702.3(a)(3).)

Finally, Councilmember Black would be required to disqualify himself if the decision would have a reasonably foreseeable financial effect of \$10,000 or more on the fair market value of his real property or would affect the rental value of the property by \$1,000 or more per 12 month period, the same standard to be used by Councilmembers Smith and Jones. (Regulation 18702.2(a)(3).)

Of course as stated above, actual application of the exception is necessarily fact dependent. Consequently, you should contact us if confronted with such a situation.

The "Public Generally" Exception

As you note, public officials with financial interests that will be materially affected by a decision may participate in the decision if the effect on their property is not distinguishable from the effect on the public generally. For the "public generally" exception to apply, a decision must:

1. Affect a significant segment of the public. The "public" consists of all persons residing, owning property, or doing business in the jurisdiction of the agency in question. (In re Legan, (1985) 9 FPPC Ops. 1; In re Owen (1976) 2 FPPC Ops. 77; Churton Advice Letter, No. I-91-321.) This is so because all the residents of the jurisdiction are constituents of the official. The Commission has never adopted a strict mathematical formula for determining what constitutes a significant segment of the public. (Churton Advice Letter, supra.)

2. Affect that significant segment of the public in substantially the same manner as it would affect the official's interests. (Regulation 18703; See, e.g., Biondo Advice Letter, No. I-90-543.)

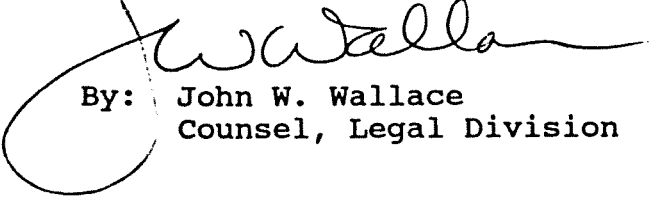
Thus, whether the "public generally" exception as provided by Regulation 18703 is applicable necessarily depends on the particular facts of a specific decision.

³ To the extent that prior advice letters have interpreted the application of the exception in Regulation 18702.1(a)(3)(E) differently, they are superseded by this letter.

I trust that this answers your questions. If you have any further questions regarding this matter or a question concerning a specific decision, please feel free to contact this office at (916) 322-5901.⁴

Sincerely,

Scott Hallabrin
Acting General Counsel


By: John W. Wallace
Counsel, Legal Division

SH:JWW:aa

⁴ Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.