California
Fair Political
Practices Commission

April 6, 1993

Margaret A. Sloan
City Attorney
26379 Fremont Road
Los Altos Hills, CA 94022

Re: Your Request for Advice
Our File No. A-93-095

Dear Ms. Sloan:

This is in response to your request for advice on behalf of Robert Johnson, Mayor pro tem of the Town of Los Altos Hills under the conflict-of-interest provisions of the Political Reform Act.[1/]

QUESTION

Does the "public generally" exception permit Mayor Johnson to participate in a decision to set sewer rates affecting his real property interests?

CONCLUSION

The "public generally" exception applies to Mayor Johnson's real property interests. He may participate in the decision to set sewer rates.

FACTS

Robert Johnson was elected to the Los Altos City Council in 1988. He and his wife own a personal residence within the Town of Los Altos Hills. His property is located in what is known as the Palo Alto Sewer Basin. Sewage from the properties that are connected to sewers in the Palo Alto Sewer Basin flows through pipes owned and maintained by the Town into pipes owned and maintained by the City of Palo Alto and ultimately to the Palo Alto sewage treatment plant.

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.

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Every year the City of Palo Alto determines the annual service charge on each property within the Palo Alto Sewer Basin for the privilege of maintaining each single residential connection to the sanitary sewer facilities of the City of Palo Alto. Shortly thereafter, the Town of Los Altos Hills sets an additional service charge on each property within the Palo Alto Sewer Basin for the privilege of maintaining each single residential connection to the sanitary sewer facilities of the Town. These service charges are levied against each parcel of land, including the property owned by Mr. Johnson.

In a telephone conversation, you indicated that all single family dwellings are assessed the same rate.

Los Altos Hills has a population of 7,512. All properties within the Town, except for public facilities and a few stables, are single family homesites. There are 2,662 homes in the Town, of which 1,193 are connected to sewers. Five Hundred Eighty homes with sewers are located in the Palo Alto Basin and 613 homes are located in another sewer basin, where the sewage flows to the City of Los Altos.

ANALYSIS

Section 87100 prohibits public officials from making, participating in, or using their official position to influence a governmental decision in which they know or have reason to know they have a financial interest.

A public official has an interest within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on:

> (b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars ($1,000) or more.
>
> Section 87103(b)

Accordingly, Mr. Johnson may not make, participate in making, or attempt to use his official position to influence a governmental decision if the decision will have a reasonably foreseeable[2/] material financial effect, distinguishable from the effect on the public generally, on his real property interests.

2/ Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

Material Financial Effect

Commission Regulation 18702.1 sets forth standards to determine when a decision will have a material financial effect on real property interests which are the subject of a decision. The real property is deemed to be the subject of a decision, and disqualification is required, if the decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on such property. (Regulation 18702.1(a)(3)(C).)

The decision before Mr. Johnson imposes a sewer fee on his principal place of residence. Such decision has a direct material financial effect on his real property interests. Disqualification is required unless the decision is not distinguishable from the effect on the public generally.

The "Public Generally" Exception

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 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.) This is so because all the residents of the jurisdiction are constituents of the official. Thus, Mr. Johnson may participate in the decision to assess a sewer fee if the effect on his financial interests is substantially the same as the effect on a significant segment of the population of the Town of Los Altos Hills.

We do not have population figures. The number of residences in the Town is known, and because the sewer assessment is the same on each single residential connection, the number of residential units in the Town is an appropriate number to use. (In re Legan (1985) 9 FPPC Ops. 13.)

You stated that of the 2,662 homes in the Town, 1,193 are connected to sewers. Five Hundred Eighty homes with sewers are located in the Palo Alto Basin and 613 homes are located in another sewer basin. Approximately 22 percent of the total homes in the Town are located in the Palo Alto Basin and subject to the fee assessment.

The Commission has never adopted a strict arithmetic formula for determining what constitutes a significant segment of the public. However, in order to apply the "public generally" exception, the affected population must be large and heterogeneous in nature. (In re Ferraro (1978) 4 FPPC Ops. 62.) The population affected appears to be heterogeneous in nature, and 22 percent of

the dwelling units in the city represents a significant segment of the public.[4/] You indicated that all of the single family dwellings within the basin would be assessed substantially the same rate. Thus, the "public generally" exception would permit Mr. Johnson to participate in the sewer fee assessment decision since a significant portion of the population in the Town would be affected in the same manner.[5/] (See also Peck Advice Letter No. I-92-215.)

I hope this has been helpful to you. If you need further assistance, please feel free to contact the Commission's Legal Division at (916) 322-5901.

Sincerely,

Jeff Marschner
General Counsel

By: Jeanette E. Turvill
Political Reform Consultant
Legal Division

JM/JET/jt

4/ The "public generally" exception is an exception to the general rules requiring disqualification on the basis of an official's economic interests. It is a fundamental rule of statutory construction that an exception to a general rule is to be narrowly construed. (Julius Goldman's Egg City v. Air Pollution Control Dept. of Ventura County (1981) 116 Cal.App.3d 741.) As such, the narrow interpretation of the exception is preferred.

5/ The Commission will be considering amendment of its existing regulation concerning "public generally" (Regulation 18703) at its March 1993 meeting. As a result, our analysis of the "public generally" issue may change and it could affect our future advice on this issue.