



California Fair Political Practices Commission

July 22, 1993

Richard Kuhlemeier
1230 Seacoast Drive, #8
Imperial Beach, CA 91932

Re: Your Request for Advice
Our File No. A-93-253

Gary J. Clark
365 Calla Avenue
Imperial Beach, CA 91932

Re: Your Request for Advice
Our File No. A-93-262

Kent Wages
160 Dahlia Avenue
Imperial Beach, CA 91932

Re: Your Request for Advice
Our File No. A-93-263

Regina Crosby
156 Elkwood Avenue
Imperial Beach, CA 91932

Re: Your Request for Advice
Our File No. A-93-264

Dear Commissioners:

This is in response to your letters requesting advice regarding your responsibilities as Imperial Beach Planning Commissioners under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

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.

Please note that nothing in this letter should be construed to evaluate any conduct which may have already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.)

QUESTION

May you participate in decisions of the City of Imperial Beach regarding a comprehensive set of amendments to the city's general plan and zoning changes where each of you have economic interests that may be affected by portions of the decisions?

CONCLUSION

Commissioner Clark, you may participate in the decisions affecting R-1 zoned property so long as the decisions will affect your residence in substantially the same manner as a significant segment of the population.

Commissioners Crosby, Kuhlemeier, and Wages, you are disqualified from participation in decisions affecting your property if the effect on your property will be material.

However, all of you may participate in other decisions related to the general plan update to the extent that the decisions may be segmented from decisions affecting your economic interests, as discussed below.

Moreover, once all the specific decisions related to a general plan have been finalized, the final vote to adopt or reject the plan will not require disqualification so long as the plan is not modified at that time. If at the time the plan is considered, specific decisions regarding particular types of land or areas of the city are raised, each one would constitute a separate governmental decision which must be analyzed to determine if disqualification is required.

FACTS

The City of Imperial Beach and the Imperial Beach Planning Commission will be considering comprehensive amendments to the city's general plan and zoning changes. Each of you have economic interests that may be affected by portions of the decisions. You stated that the decisions will involve changes in:

1. Development Standards and Height for R-1 Properties.

Commissioner Gary J. Clark: You own a single-family residence as your personal residence on a lot which is zoned R-1. You estimated that the area of the lot is 6,000 square feet and that the estimated fair market value of the property is \$150,000.

There are 309 acres of property zoned R-1, consisting of 4,031 units.

2. Density and Height Permitted for RHD Property.

Commissioner Regina Crosby: You own a variety of real property interests in the city. You own a single family residence at which you reside which you stated had a current value of \$200,000. The property is 4,500 square feet in size.

Commissioner Richard Kuhlemeier: You own a condominium, which you use as your personal residence, and common area within the condominium complex. The current value of your unit is \$295,000. The complex is 10,500 square feet in size.

Commissioner Kent Wages: You own a residence, on a lot which is zoned RHD. You estimate that the area of the lot is 5,000 square feet and that the estimated fair market value of the property is \$150,000.

There are 285 acres of RHD zoned property in the city. There are 711 property owners owning RHD property and 4,055 units in RHD and R-2A zones.

3. Density and Height Permitted for R-2A Property.

Commissioner Regina Crosby: You own several rental properties in R-2A zones. The total area of these lots is 7,500 square feet and they are valued at \$185,000.

4. Density and Height Permitted for SP-1 Property.

Commissioner Regina Crosby: You also own several rental properties in SP-1 zones. The value of these properties is \$250,000 and are 4,500 square feet in size.

The City of Imperial Beach has a population of 27,778. The total area of the city is 2,863 acres, of which 246 acres are a military air field and 902 acres are open space and a wildlife preserve.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using the official's position to influence a governmental decision in which the official has a financial interest. Section 87103 specifies that a public official has a financial interest in a decision 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:

1. Any real property in which the public official has a direct or indirect interest worth \$1,000 or more (87103(b)); or,
2. Any source of income aggregating \$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. (Section 87103(c)).

Each of you own real property in the jurisdiction that may be affected by these decisions. Thus, each of you have an economic interest in the decisions in question and may not participate in any decision that will have a foreseeable and material financial effect on your property.

Additionally, Commissioner Crosby, you have other properties that you rent to other persons. All these persons are also considered economic interests, because they are sources of income to you. Thus, you may not participate in any decision that will have a foreseeable and material financial effect on your real property or on these sources of income.

Foreseeability and Materiality

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.) In each of your cases, it is foreseeable that the decision to change the zoning characteristics applicable to your real property will have some financial effect on that interest.

However, in order for disqualification to be required, the financial effect on your interests must also be material. Regulation 18702 sets forth the guidelines for determining whether an official's economic interest in a decision is "materially" affected as required by Section 87103. Generally, where a governmental decision concerns the zoning or rezoning of property in which an official has an interest, the effect of the decision is deemed material and the official may not participate. (Regulation 18702.1(a)(3)(A).)

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. According to your facts, the city council will not be rezoning any of your property, but will be changing the characteristics of all R-1, RHD, R-2A and SP-1 zoned property.

Since this decision involves changes within the definition of the zoning categories which will be applicable to all properties in that category, the exemption in subdivision (E) of Regulation

18702.1 would apply to each of you. Thus, Regulation 18702.1(a)(3)(A) does not require your disqualification.

However, the determination of whether a conflict of interest exists does not end with the application of 18702.1(a)(3)(E). Regulation 18702(a) provides:

In order to determine if a decision's effect is material, it must first be determined if the official's economic interest is directly involved and the effect of the decision is material under Section 18702.1. If the official's economic interest is not directly involved in the decision, or the effect of the decision is not material, under Section 18702.1, then it must be determined if the effect is material under the appropriate regulation of Sections 18702.2 through 18702.6.

[Emphasis added.]

Thus, the effects of the decisions must still be analyzed under the standards of Regulation 18702.3, the applicable regulation, to determine if the indirect effect on your property interest is significant enough to result in disqualification.

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 the distances can be determined, the monetary standards contained in Regulation 18702.3(a)(3) must be 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) Ten thousand dollars (\$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.

The evaluation of materiality is necessarily a factual determination that the Commission cannot make. However, if any zoning decision will foreseeably increase or decrease the fair market value of your real property by \$10,000 or more, or the rental value of the property by \$1,000 in a 12-month period, you may not participate in the decision. (Regulation 18702.3(a)(3).)

The "Public Generally" Exception

If you find that any of the zoning decisions is likely to affect your property by the amount set forth in Regulation 18702.3(a)(3), you may still participate in the decision if the effect on your property is not distinguishable from the effect on

the public generally. For the "public generally" exception to apply, a decision must affect your 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. (In re Legan (1985) 9 FPPC Ops. 1.) Consequently, for the "public generally" exception to apply to this situation, the zoning decision must affect a significant segment of the population of Imperial Beach in substantially the same manner as it would affect your economic interests. (Dowd Advice Letter, No. A-88-214; Burnham Advice Letter, No. A-86-210.)

Commissioner Clark: You own a single-family residence as your personal residence on a lot which is zoned R-1. You stated that there are 4,031 units on R-1 property. If we assume that each residence has a separate owner, this would constitute 14.5 percent of the population.² Thus, it appears that the "public generally" exception would apply provided that your residence will be affected in the same manner as other residences on R-1 zoned property.

Commissioners Kuhlemeier and Wages: Both of you own property zoned RHD. Commissioner Kuhlemeier, you own a condominium, which you use as your personal residence, and common area within the condominium complex. Commissioner Wages, you own a residence on a lot which is zoned RHD. You estimated that the area of the lot was 5,000 square feet and that the estimated fair market value of the property is \$150,000.

In our letter to Councilmember Bixler (Advice Letter No. A-92-175) we advised:

Under your facts, the population considered to be the "public" against which you would compare the population with interests in RHD property and your interests would include those persons living on the military installation. (Takahashi Advice Letter, No. I-90-535.) You have not provided us with the population of the RHD zone to make a determination with respect to the application of the public generally exception. However, you did state that the City of Imperial Beach has a population of 26,645 people and that there are 711 property

² On July 7, 1993, Lynn McDougal, City Attorney for the City of Imperial Beach stated that census figures indicated that approximately 2.85 persons reside in these households. Arguably, all persons residing on such properties would be similarly affected, making the number of persons similarly affected much greater.

owners within the RHD district. This figure means that approximately 2.7 percent of the population in the jurisdiction has property interests in RHD zoned property and may be affected similarly to the effect on your financial interests. This segment of the population is far too small to constitute a "significant segment" of the public.

Your letters have provided no new facts to change this conclusion. Thus, the "public generally" exception would not apply to you.

Commissioner Crosby: You own a variety of real property interests in the city. You own a single family residence at which you reside which you stated had a current value of \$200,000; several rental properties in R-2A zones; and several rental properties in SP-1 zones.

Clearly, even if a decision's effect on property holders in a given zoning category will be substantially the same, your extensive property holdings suggest that the effect will be much greater on you. (In re Gillmor (1977) 3 FPPC Ops. 38.)

Your facts indicate you own multiple properties within each zoning category. Thus, for example, if it is determined that decisions will enhance the value of all the real property in the specific category in a similar amount, the number of properties you hold would mean that you would be affected multiple-times greater than the rest of the persons owning property in that zoning category. The only persons similarly affected would be those with the same number of properties. The group of persons holding so many properties would appear to be very small in relation to the population of the jurisdiction as a whole. Thus, the "public generally" exception would not apply.³

Segmentation of Decisions

In cases where you have an interest in a specific zoning category which will be materially affected by a decision, the decision may be segmented so that you may still participate as to other components in which you do not have a financial interest. (Huffaker Advice Letter, No. A-86-343.)

For example, if the decisions concerning the RHD zoning category are segmented and decided without Commissioners Kuhlemeier and Wages participating, they may participate in all other aspects of the general plan update. Where decisions are segmented, the following procedure should be used:

³ Please be aware that the Commission is currently considering amendments to the "public generally" exception. These amendments may be adopted at the September Commission meeting and may change the advice provided in this letter.

1. The decisions for which you have a disqualifying financial interest must be segregated from the other decisions;
2. The decisions for which you are disqualified must be considered first, and a final decision reached by your agencies without your participation;
3. Once a decision has been made on the portions of the general plan for which you have a disqualifying interest, you may participate in the subsequent deliberations regarding other portions of the plan, so long as: (1) those deliberations do not result in a reopening or in any way affect the decision from which you were disqualified, and (2) those decisions will not have a material financial effect on your economic interests. (Huffaker Advice Letter, supra.)

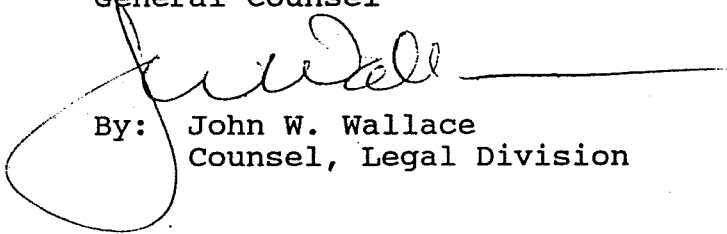
Finally, we have also advised that once all the specific decisions related to a general plan have been finalized, the final vote to adopt or reject the plan will not require disqualification so long as the plan is not modified at that time. (Marino Advice Letter, No. I-89-291.) This is the case because the general plan as a whole will affect the public generally in substantially the same manner.

However, if at the time the plan is considered, specific decisions regarding particular types of land or areas of the city are raised, each one would constitute a separate governmental decision which must be analyzed to determine if disqualification is required. (Section 87100; Section 87103; Regulation 18700.)

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.⁴

Sincerely,

Jeff Marschner
General Counsel


By: John W. Wallace
Counsel, Legal Division

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.