



RAVI MEHTA
CHAIRMAN

FAIR POLITICAL PRACTICES COMMISSION

November 6, 1995

James Heisinger, Jr.
City Attorney
City of Sand City
City Hall
1 Sylvan Park
Sand City, CA 93955

Re: Your Request for Advice
Our File No. A-95-333

Dear Mr. Heisinger:

This is in response to your request for advice on behalf of Mayor David Pendergrass and Councilmembers Ronda Lewis, Michael Morris, Mary Ann Kline, and Mark Hansen, who are members of the Sand City Council, regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. If the mayor and councilmembers of Sand City are disqualified from participating in land use decisions concerning the East Dunes area, is participation by the councilmembers "legally required" within the meaning of Section 87101?
2. Must a quorum of the councilmembers be chosen by random selection to participate in and make those decisions?
3. If the answer is "yes" to question No. 2, if one or more of the councilmembers refuse to participate in the random selection process, does the rule of "legally required participation" still apply?

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, Sections 18000-18995.

CONCLUSIONS

1. Yes. The participation by the councilmembers is "legally required" since there appears to be no alternative source of decision consistent with the purposes and terms of the statutes authorizing the land use decisions.

2. Yes. A quorum of the councilmembers must be chosen by random selection or other similar means to participate in and make those decisions.

3. No. If one or more of the councilmembers refuse to participate in the random selection process or a similar process, the rule of "legally required participation" would not apply.

FACTS

Endangered species and their habitat exist on several of the lots in the East Dunes area within Sand City. Those species and their habitat are protected under the Federal Endangered Species Act. (16 USC Section 1531 et seq.) Development on these lots could result in a "take" of endangered species, requiring the review by the United States Fish and Wildlife Service and approval by the federal agency of a Habitat Conservation Plan" (HCP). (15 USC Section 1539.)

The Sand City Planning Department has been involved in the preparation of a HCP for the East Dunes area since 1992. Once the plan is approved by the Fish and Wildlife Service, a permit could be issued to "take" habitat or species which may occur on other property in the East Dunes area.

In order to resolve the various land use issues raised by requirements of the Local Coastal Program and the Federal Endangered Species Act concerning the East Dunes area, the Sand City Council directed the Sand City Planning Department to undertake a planning study of the East Dunes area. The planning department has been preparing that study, in consultation with the Sand City Design Review Committee, over the past year. The study is now ready to be presented to the city council for consideration, comment and ultimate action.

All of the planning study recommendations would require action by the city council in the form of general plan and zoning ordinance amendments. The Sand City Council is the only body which can legally amend either the Sand City General Plan or the Sand City zoning ordinance pursuant to Government Code Section 65300 and Government Code Sections 65800 et seq.

All of the members of the Sand City Council reside in homes they rent or own which are located in the East Dunes area of Sand City. Councilmember Morris also owns residential rental property in the East Dunes areas from which he receives more than \$250 in

income, annually. Councilmember Morris also operates a business out of his home in the East Dunes area which is his principal source of income. You ask that we assume, for purposes of your advice request, that the decisions to be made by the city councilmembers would have a reasonably foreseeable and material financial effect on each of the councilmembers.² In addition, in a telephone conversation with you on October 24, 1995, you indicated that some of the recommended zoning changes will have a measurable different impact on the mayor and councilmembers. For example, one change would require the construction of a road, resulting in demolition of one of the public official's homes. Therefore, the "public generally" exception of Section 87103 does not apply.

ANALYSIS

I. Legally Required Participation

Section 87101 permits a public official who is disqualified, due to a conflict of interest, from participating in a decision, to participate in the decision to the extent such participation is legally required. Even if participation is deemed to be legally required, the exception has been interpreted narrowly to permit the participation of the fewest financially interested persons possible in any decision. (In re Hudson (1978) 4 FPCC Ops. 13.) This is because "the purposes of the Act are best served by a rule which minimizes participation in government decisions by officials with a conflict of interest." (In re Hudson, supra.)

In furtherance of this goal, Regulation 18701 provides:

(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

(b) Whenever a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she shall:

(1) Disclose as a matter of official public record the existence of the financial interest;

² As noted in your letter, we have previously rendered informal assistance to you on behalf of Sand City concerning the East Dunes planning decisions. (Heisinger Advice Letter, No. I-94-265.) That informal assistance was not provided to specifically named officials.

(2) Describe with particularity the nature of the financial interest before he or she makes or participates in making the decision;

(3) State the reason there is no alternative source of decision-making authority;

(4) Participate in the decision only in an open meeting of the agency, as required by Government Code Sections 11123 and 54953, or in closed session, as provided in Government Code Sections 11126, 54956.7, 54956.8, 54956.9, 54957 and 54957.6, where participation by the official is legally required for the agency to act.

(c) This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Government Code Section 87100, to vote to break a tie.

(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Government Code Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code Section 87100, whether or not such other members are actually present at the time of the disqualification.

A. Alternative Source of Decision

First, you ask whether the participation of the members is "legally required." The focus of our analysis concerning your first question is whether an alternative source of decision exists. You have indicated that the Sand City Council is the only body which can legally amend either the Sand City General Plan or the Sand City Zoning Ordinance pursuant to Government Code Section 65300 and Government Code Section 65800 et seq. Thus, consistent with the analysis contained in the Hudson Opinion, supra, where no alternative source of decision exists, the participation of one or more of the otherwise disqualified members is legally required. Therefore, a disqualified member or members may participate in the decisions concerning the East Dunes area provided the procedure described in subdivision (b) of Regulation 18701 is followed.

Please note that the city council may bring back only as many disqualified members as is necessary to establish a quorum. In addition, "legally required participation" applies only where disqualification, under Section 87100, has made a quorum impossible.

B. Random Selection Process

You also ask if the selection process should be random and whether the "legally required participation" rule applies when one or more members refuse to participate in the random selection process.

The selection may be by lot or other means of random selection, and the names of all disqualified members must be used to randomly select the member(s) who would be legally required to participate. (Skousen Advice Letter, No. A-88-162; Martin Advice Letter, No. I-88-375; Gilbert Advice Letter, No. I-93-217.) Therefore, if one or more of the disqualified members refuse to participate in the random selection process, the rule of "legally required participation" would not apply. This would also be true when a member who does not have a conflict refuses to participate. This is so because resolution of the problem created by a member's refusal to participate or to attend meetings, for example, is a political or legal issue which is beyond the jurisdiction of the Act. (See, Cohen Advice Letter, No. A-94-274.) Therefore, if one of the members refuses to participate, you would not be permitted to randomly select a previously disqualified member to participate in place of the member who refuses to participate. (Regulation 18701(c)(2).)

Once random selection has resulted in a quorum, the members selected may participate in the decisions without regard to the possible effect of the decisions upon the officials' financial interests. Additionally, the random selection procedure need not be repeated with respect to a series of decisions involving the same general subject matter and the same disqualifying interests. (Hopkins Advice Letter, No. A-82-088; Hill Advice Letter, No. A-87-110.) However, where there are changed circumstances (either as to an official's personal financial interests or as to the proposed decision) which alter the conclusion as to disqualification of any councilmember, a new situation exists requiring a fresh look at the situation and, if appropriate, a new drawing by lot. (Hopkins Advice Letter, supra.)

C. Scope of Participation

Finally, please note that pursuant to subdivision (b) of Regulation 18701, the disqualified member(s) may participate fully at public meetings of the agency and at closed sessions when required by law if participation is legally required. However, the member(s) may not engage in any private discussions with other city officials regarding the decision. (Grunwald Advice Letter, No. A-95-184.)

If you have any further questions regarding this matter,
please feel free to contact me at (916) 322-5660.³

Sincerely,

Steven G. Churchwell
General Counsel

Luisa Menchaca

By: Luisa Menchaca
Counsel, Legal Division

³ 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.