

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

April 4, 1996

Carl O. Waggoner
Law Offices of Waggoner & Loeffler
318 McHenry Avenue
Modesto, California 95354

Re: Your Request for Advice
Our File No. A-96-013

Dear Mr. Waggoner:

This is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act")¹ as they pertain to City of Newman Mayor James Silveria and Councilmember Robert Novoa.

QUESTIONS

- 1) May Mayor James Silveria participate in the decision to approve the Historic Preservation Ordinance being considered by the City of Newman, since he has financial interests in the downtown/historic area which would be affected?
- 2) May Councilmember Robert Novoa participate in the decision to approve the Historic Preservation Ordinance being considered by the City of Newman, since he has financial interests in the downtown/historic area which would be affected?

CONCLUSIONS

- 1) Mayor Silveria may participate in the decision to approve the Historic Preservation Ordinance, unless it is reasonably foreseeable that the decision will have a material financial effect on any of his economic interests.

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.

2) Councilmember Novoa may participate in the decision to approve the Historic Preservation Ordinance, unless it is reasonably foreseeable that the decision will have a material financial effect on any of his economic interests.

FACTS

The City of Newman is considering adoption of an Historic Preservation Ordinance which would designate any building older than 50 years as historic. The ordinance will affect the entire downtown of the city. The ordinance will designate certain buildings as historic and will set forth a procedure for any person who plans the demolition, construction, alteration, relocation or removal of an historic building.

Mayor James Silveria owns a building in the downtown area and conducts his contracting business from that building. Councilmember Robert Novoa owns a retail jewelry business and leases space in one of the buildings in the downtown area. During our telephone conversation on March 6, 1996, you informed me that Mr. Novoa has a month-to-month tenancy for his jewelry business. Both buildings referred to above are more than 50 years old.

ANALYSIS

Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official 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:

(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.

(Section 87103(a)-(d).)

The mayor and councilmember both have a number of economic interests that may be affected by the ordinance. If the decision to approve the ordinance will have a reasonable and foreseeable material financial effect on the officials' economic interests, the officials must disqualify themselves from the decision.

A. ECONOMIC INTERESTS

1. Mayor Silveria

(a) Mayor Silveria owns a building in the downtown historic area. (Section 87103(b).)

(b) Mayor Silveria's construction business is located in his building. We would assume that the mayor has an investment worth more than \$1,000 in his construction business. (Section 87103(a) and (d).)

(c) Mayor Silveria has a tenant in the building, who is a source of income to Mayor Silveria. (Presumably the mayor has received more than \$250 from the tenant within the past twelve months.) (Section 87103(c).)

2. Councilmember Novoa

(a) Councilmember Novoa's jewelry business is located in the leased property in the downtown historic area. We would assume that the councilmember has an investment worth more than \$1,000 in his jewelry business. (Section 87103(a) and (d).)

(b) Councilmember Novoa does not have a real property interest in the building where he operates his jewelry business because his lease is a month-to-month tenancy. (Section 82033; Regulation 18233.)²

Thus, each official is required to disqualify himself from making or participating in making any decision which will have a foreseeable and material financial effect on any of their economic interests.

² We previously analyzed this as a leasehold interest in Advice Letter No. 95-389. Pursuant to our telephone conversation on March 6, 1996, you informed me that Councilmember Novoa has a month-to-month tenancy.

B. FORESEEABILITY

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.)

C. MATERIALITY

The Commission has adopted a series of regulations which provide guidance in determining whether the foreseeable financial effect of a decision is material. These regulations apply different standards depending on whether the decision will directly or indirectly affect the official's economic interest. It appears from the facts you have provided that the decision regarding the Historic Preservation Ordinance will affect the officials' interests both directly and indirectly, as discussed below.

1. Mayor Silveria

Mayor Silveria owns a building in the downtown/historic area from which he operates his contracting business. Therefore, his property will be directly involved in the decision to adopt the ordinance. An official's real property is directly involved in a decision if 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 the official's property in which the official has a direct or indirect interest of \$1,000 or more. (Regulation 18702.1(a)(3)(A).) (Thacher Advice Letter, No. A-93-048.)

Since the decision to adopt the Historic Preservation Ordinance involves the inclusion of the mayor's property in the historical preservation district and the restrictions which will be placed on historical properties, the effect on Mayor Silveria's property is deemed to be material and he is disqualified from participating in this decision to adopt the ordinance.

Mayor Silveria's tenant is a source of income to him if the tenant has paid him over \$250 within the past twelve months. (Section 87103(c).) If the tenant is an individual and is occupying the property pursuant to a lease of more than one month, the tenant has a leasehold interest in the property as defined by Section 82033 and Regulation 18233. A decision indirectly involving the tenant will materially affect the tenant if the decision will affect (1) the tenant's income, investments or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or if the decision will affect the

tenant's leasehold interest in a manner that is considered material under Regulation 18702.4, copy enclosed. (Regulation 18702.6(a).)

If the tenant is a business entity, please refer to Regulation 18702.2 (copy enclosed). Under Regulation 18702.2, the material effect of a decision on a business entity is determined by considering the size of the business involved. For a relatively small business, Regulation 18702.2(g) provides that the effect is material if:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

Mayor Silveria must determine whether the decision will have a material financial effect on his tenant.

Mayor Silveria must also determine if his contracting business will be materially affected by the ordinance decision by referring to the economic factors and thresholds set forth in Regulation 18702.2.

Please note that an official only needs one disqualifying economic interest to bar participation in a decision. Mayor Silveria may not participate in the ordinance decision because he has a property interest which is materially affected. However, we have also noted the indirect analysis for his other economic interests, should this be necessary for other decisions.

2. Councilmember Novoa

A decision to approve the ordinance will have a material financial effect on Councilmember Novoa's jewelry business if any of the factors in Regulation 18702.2 are met.

Since Councilmember Novoa has a month-to-month lease, he does not have a leasehold interest in real property and therefore he does not have a property interest which may be affected.³

³ The terms "interest in real property" and "leasehold interest" as used in Government Code Section 82033 shall not include the interest of a tenant in a periodic tenancy of one month or less. (Regulation 18233).

D. PUBLIC GENERALLY EXCEPTION

Even if the effect of a decision on an official's economic interests is material, the official may participate in the decision if the decision will affect a significant segment of the public in substantially the same manner as it will affect his or her economic interests. (Regulation 18703, copy enclosed.) The material financial effect is indistinguishable from its effect on the public generally if both subdivisions (a)(1) and (a)(2) apply:

(1) Significant Segment: The governmental decision will affect a "significant segment" of the public generally as set forth below:

(A) The decision will affect:

(i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents, or

(ii) Ten percent or more of all property owners, all home owners, or all households in the jurisdiction of the official's agency or the district the official represents, or

(iii) Fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession; or,

(B) The decision will affect 5,000 individuals who are residents of the jurisdiction; or,

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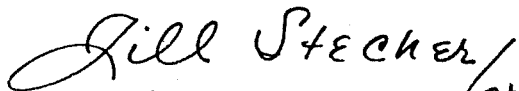
(2) Substantially the Same Manner: The governmental decision will affect the official's economic interest in substantially the same manner as it will affect the economic interests of the segment identified in subdivision (a)(1) of this regulation.

We do not have any facts with which to determine if the public generally exception applies to either Mayor Silveria or Councilmember Novoa. Therefore, Mayor Silveria and Councilmember Novoa may participate in the decision to approve the Historic Preservation Ordinance if it is not reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on any of their economic interests.

I trust this answers your questions.

Sincerely,

Steven G. Churchwell
General Counsel



By: Jill Stecher *ak*
Counsel, Legal Division

SGC:JS:ak

Enclosures