

RAVI MEHTA  
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

May 17, 1996

George H. Eiser  
City Attorney  
City of National City  
Office of the City Attorney  
1243 National City Boulevard  
National City, California 91950

Re: Your Request for Informal  
Assistance  
Our File No. I-96-141

Dear Mr. Eiser:

This is in response to your request for informal assistance regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Informal assistance does not provide the requestor with the same immunity provided by a formal advice letter or opinion.

QUESTION

When an official is legally required to participate in a decision to constitute a quorum of three, may the official actually discuss and vote on the issue, even if only two votes are required to approve the decision?

CONCLUSION

Yes. A previously disqualified official who is legally required to participate in a decision to constitute a quorum may fully participate in the decision, even if the official's vote is not required to approve the decision.

FACTS

National City is a general law city with a five-member city council. Three members of the city council constitute a quorum.

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<sup>1</sup> Government Code Sections 81000-91015. Commission regulations appear at Title 2, Sections 18000-18995 of the California Code of Regulations.

In some cases, three affirmative votes of the council are necessary to take action (e.g., enactment of an ordinance). However, in most cases, only a majority of a quorum -- two votes -- is necessary to take action.

Ordinarily, when three members of the council are disqualified due to a potential conflict of interest, you requalify one of the three members (selected at random) in order to constitute a quorum. You permit the requalified member to not only be present to constitute a quorum, but to fully participate and vote as well.

Your inquiry arises from the situation where only two votes are legally required to take action. According to the Attorney General, in such a case, a disqualified member may be requalified in order to constitute a quorum; however, that member may not participate or vote on the issue. (61 Ops. Cal. Atty. Gen. 243.) However, you have received telephone advice from staff attorneys at the FPPC that the requalified member may not only be present to constitute a quorum, but may vote on the pending issue as well.

#### 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 87101 provides that Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made.

The Attorney General's opinion you cite interprets Commission Regulation 18701(a), which, at the time the opinion was drafted, provided that when an official's participation is legally required, then the official shall "attempt in no way to use his or her official position to influence any other public official" and "participate in making the decision only to the extent that such participation is legally required." (repealed Regulation 18701, emphasis added.)

The Attorney General quite accurately interpreted the language of the regulation to mean that if the official's participation was only necessary to reach a quorum, then the official could only participate to that extent. Thus, the official could be counted to reach the quorum but could not discuss or vote on the matter.

The Commission recognized in 1989 that this strict application of the rule of legally required participation led to concern among public officials. Public officials were placed on the record as present for a decision to constitute a quorum, yet could not discuss or debate the issue in question. Moreover, the

disqualified public official could not make or second a motion despite the fact that the official was being counted as part of the quorum. (May 23, 1989 Staff Memorandum to Commission.) To avoid these results, the Commission amended Regulation 18701.

Regulation 18701 now goes on to provide that:

(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) 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.

(Regulation 18701(b).)

Thus, a formerly disqualified official who is randomly chosen to fill out the quorum requirement may fully participate in the decision. You stated in your letter that the City requires three members to constitute a quorum. Therefore, if disqualified officials are required to participate in order to have three officials to fill out the quorum requirements, then those randomly selected officials may participate fully in the decision.

The phrase "legally required for the action or decision made" in Section 87101 refers to the body's ability to act -- the quorum.<sup>2</sup> The concept of legally required participation is

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<sup>2</sup> A quorum is defined as the "number of members who must be present in a deliberative body before business may be transacted." (Black's Law Dictionary (5th ed).) It is up to each deliberative body to determine what constitutes a quorum for that particular body and decision; the Political Reform Act does not provide guidance on that question. Once the deliberative body determines how many officials are necessary to take action, then it may determine if legally required participation is necessary. (Leidigh Advice Letter, No. A-93-130a.)

concerned with the number of officials necessary to constitute a quorum to enable a body to act, not the number of votes necessary to carry a decision. Accordingly, if the public body needs three people to act, legally required participation may apply even if only two people are necessary to approve a matter. This is contemplated in the further language of Regulation 18701, which provides that the regulation shall:

[N]ot 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.

(Regulation 18701(c)(2)  
emphasis added.)

The language of this regulation implicitly contemplates that a disqualified official may participate if a quorum cannot be convened of other members of the agency, not if a majority cannot be convened. The question of what number of the quorum is required to approve or disapprove a decision is irrelevant to the legally required participation analysis. The only fact to consider is how many officials are required for the board to reach a quorum for that particular decision and thus to act,<sup>3</sup>

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<sup>3</sup> It is essential to note that each "legally required participation" question must be answered based on the independent facts. For instance, "legally required participation" may not be used if there are vacancies in the body or if an official refuses to participate. (Heisinger Advice Letter, No. A-95-333; Schechtman Advice Letter, No. A-92-198.) Further, once an official is requalified, you must evaluate each decision separately to determine if the conflicts analysis changes and a new random selection is required. (Hopkins Advice Letter, No. A-82-088.) If you need advice about any specific instances of legally required participation please do not hesitate to contact our office.

If you have any further questions, please feel free to contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell  
General Counsel

A handwritten signature in black ink, appearing to read "Liane Randolph", written over the printed name.

By: Liane Randolph  
Counsel, Legal Division

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