



FAIR POLITICAL PRACTICES COMMISSION

November 19, 1997

Alexander Simas
Kirk & Simas
2415 Professional Parkway
Santa Maria, California 93455-1684

**Re: Your Request for Advice
Our File No. I-97-523**

Dear Mr. Simas:

This letter responds to your request on behalf of the members of the Guadalupe City Council for advice about the Political Reform Act (the "Act").¹ Because your request is not framed in the context of a particular decision, we handle it as a request for informal assistance. (Regulation 18329(c).) Informal assistance does not provide immunity. (Regulation 18329(c)(3).)

You have requested "ratification of the propriety of past conduct." Commission advice is prospective *only*, and under no circumstances ratifies past conduct. (Regulation 18329.) Nothing in this letter should be construed as ratifying any person's past conduct.

I. QUESTION

To what extent may an otherwise disqualified public official participate in the making of a government decision under Section 87101?

II. CONCLUSION

An otherwise disqualified member who is "reinstated" under Section 87101 may participate fully in the matter—including taking part in deliberations and voting—in open sessions of the body, and in such closed sessions as are required by law. However, the reinstated public official may not attempt to influence the outcome of the matter in any other way.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

III. FACTS

You have concluded that three members of the five-member Council have disqualifying conflicts of interest in an ongoing redevelopment project. (The Council also sits as the Guadalupe Redevelopment Agency.) The Council has invoked what you describe as the “Rule of Necessity” to allow it to act upon the redevelopment project.

You have concluded that there is a contradiction between the Attorney General and the FPPC as to the extent to which an otherwise disqualified member may participate under Section 87101, which permits such a public official to participate in the making of a governmental decision to the extent that his or her participation is legally required for the action or decision to be made. You understand the FPPC to allow an otherwise disqualified member, once properly chosen, to participate fully in the decision making process for all purposes, including discussion of the matter and voting on the matter. You cite *In re Hudson* (1978) 4 FPPC Ops. 13. You understand the Attorney General to have opined that the conflicted member who returns under the Rule may participate only to make a quorum and may neither deliberate nor vote on any matter. You cite 61 Ops. Cal. Atty. Gen. 243, 253-54 (1978) for this interpretation.

Upon invoking Section 87101, the Council chose to follow “the stricter Attorney General standard,” as you understand it. The randomly chosen, otherwise disqualified member sat solely for the purposes of making a quorum and abstained from deliberating or voting.

IV. ANALYSIS

Section 87101 provides that a public official who is otherwise disqualified from taking part in a governmental decision because he/she has a financial interest in the decision may nonetheless take part “to the extent that his participation is legally required for the action or decision to be made.”² Regulation 18701 elaborates on this statutory rule.³

² You have referred to Section 87101 as the “Rule of Necessity.” Section 87101 and the Rule of Necessity are not the same thing. The latter is a common law principle, which exists independently of the Act. (See, e.g., *Gonsalves v. City of Dairy Valley* (1968) 265 Cal. App. 2d 400.) This advice letter interprets the Act, including Section 87101, only—not the common law Rule of Necessity.

³ Regulation 18701 provides, in its entirety:

“(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) 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;

Once it has been determined that the Section 87101 may be properly invoked (see, e.g., *Riddle* Advice Letter, No. A-97-294; *Grunwald* Advice Letter, No. A-95-184), and the minimum number of otherwise disqualified members have been randomly selected to participate (*In re Hudson* (1978) 4 FPPC Ops. 13), the issue about which you inquire arises. The answer to your question is this: an otherwise disqualified member who participates under the authority of Section 87101 may participate fully in the matter, including taking part in deliberations and voting, in open sessions of the body, and in such closed sessions as are required by law. However, the reinstated public official may not attempt to influence the outcome of the matter “behind the scenes.” (Regulation 18701(b)(4); *Riddle, supra*; *Grunwald, supra*.)

The Attorney General’s opinion (61 Ops. Cal. Atty. Gen.243, 253-54 (1978)) cited in your advice request is not persuasive authority to the contrary. (*Eiser* Advice Letter, No. I-96-141.) That opinion, issued in 1978, interprets Section 87101 to allow an otherwise disqualified public official to participate only to the extent necessary to form a quorum—the official may not vote or take part in deliberations. (*Ibid.*) Until 1989, the Commission’s advice about this issue was similar: when an otherwise disqualified public official participated under Section 87101, he or she could not participate in discussion, ask questions, make or second a motion, or in any way influence the decisionmaking other than to cast a vote. (See, e.g., *Skousen* Advice Letter, No. A-88-162.) This advice was based upon the version of Regulation 18701 then in effect. Back then, the regulation provided that an otherwise disqualified public official participating under Section 87101 could not attempt “to use his or her official position to influence any other public official with respect to the matter.”

In 1989, the Commission amended Regulation 18701, deleting the language quoted in the preceding paragraph, and adding current subsection (b)(4). In the Final Statement of Reasons for the regulatory action, the Commission found the following:

“Such a strict application of the law has caused great concern and consternation among public officials and agencies across the state. Prohibiting discussion or debate by a reinstated public official, it is argued, serves no purpose. Moreover, public officials who participate in decisions may need clarification, or may want to shed light on a particular element of the decision prior to a vote.

(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.”

“In an effort to avoid such absurd results, while continuing the protection against bias intended in the law, Regulation 18701 would allow a reinstated public official to fully participate in *public meetings* of the agency. A public official would still be precluded from discussing or attempting to persuade other public officials regarding the decision in private meetings prior to the public vote on the decision. Only where the public official is required by law to participate in the decision in closed session will he or she be allowed to do so.” (Emphasis in original.)

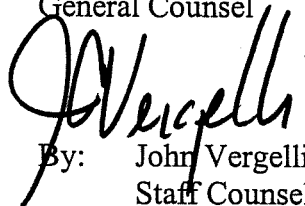
We conclude that the Attorney General’s opinion you cite is unpersuasive because it pre-dates the relevant amendments to Regulation 18701(b). (*Eiser, supra.*)

In your advice request, you also inquire about the procedures for invoking Section 87101 “in light of” *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511. The answer to your question lies in Regulation 18701(b)(1)-(3), which provides specific guidance on what must be done before an otherwise disqualified member may participate under Section 87101. We are not sure what you mean by your reference to the *Kunec* case. There, a redevelopment agency’s action was invalidated for failure to comply with Regulation 18701. As we read it, the case did not call into question the requirements of the Regulation—only the agency’s failure to comply with it.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: John Vergelli
Staff Counsel, Legal Division

SGC:JV:tls