



## FAIR POLITICAL PRACTICES COMMISSION

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April 10, 2000

Jolie Houston  
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**Re: Your Request for Advice  
Our File No. A-00-041**

Dear Ms. Houston:

This letter is in response to your request for advice on behalf of Councilmember Roland Velasco regarding the provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTIONS

May Councilmember Velasco participate in city council decisions concerning the approval, denial, or modification of the city's general plan of the proposed designation of the Hecker Pass Special Use District?

May Councilmember Velasco participate in city council decisions concerning the approval, denial, or modification of a specific plan for the Hecker Pass Special Use District if the city proposes such a specific plan?

May Councilmember Velasco participate in city council decisions concerning the approval, denial, or modification of the addition of an area of land to the proposed designation of the Hecker Pass Special Use District?

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<sup>1</sup> Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

## CONCLUSION

Councilmember Velasco may not participate in general plan decisions related to the Hecker Pass Special Use District because it is reasonably foreseeable that those decisions will have some financial effect on his property interests. We do not have enough facts to determine whether he can participate in specific plan decisions or decisions related to adding a parcel to the Hecker Pass area. However, it is very likely that a conflict of interest exists with respect to those decisions.

## FACTS

The City of Gilroy (the "city") is currently in the process of updating its general plan pursuant to California Government Code section 65350, et seq. As part of the general plan review process, certain areas of the city are being called out for special designation. One such area has been designated in the proposed land use plan map as a special land use district called the "Hecker Pass Special Use District." The intent of the proposed Hecker Pass Special Use District is to establish a special set of land use controls and development parameters for that area. The proposed Hecker Pass Special Use District designation has primarily been applied to an area that was previously designated as "Rural Residential." The proposed distribution of land uses for the Hecker Pass Special Use District calls for the clustering of residential development in the southern and northern portions of it. The remainder of the site is proposed to be kept in agricultural uses, with some "Agri-Tourism" development allowed to capitalize on the area's tourism potential. The city may consider the addition of an area of land to the Hecker Pass Special Use District that is adjacent to and within 300 feet of Councilmember Velasco's property.

The proposed Hecker Pass Special Use District will maintain a similar level of density as was allowed under the previous "Rural Residential" designation in the current general plan. The general plan proposes future establishment of a specific plan pursuant to California Government Code section 65450 et seq. to implement the proposed goals and objectives for this area. The exact distribution and configuration of land uses will be determined in the future through the specific plan process, taking into consideration the development and design guidelines of the new general plan.

City planning staff informs you that the approximate land area for the proposed Hecker Pass Special Use District comprises approximately 368 acres (less than 5 percent of the total land area of the new general plan) and there are approximately 6 homes and 20 people residing in this proposed district, which is otherwise currently vacant agricultural land.

Councilmember Velasco owns a condominium located at 1555 Hecker Pass Highway, on the corner of Hecker Pass Highway and Santa Teresa Boulevard. He pays association fees of \$165 per month to cover upkeep of common areas, and he is a member of the association's board

of directors. The common area of his condominium complex is directly adjacent to, and within 300 feet from, the eastern most boundary of the proposed Hecker Pass Special Use District. At its closest point, his condominium is 258 feet from the boundary of the proposed district.

### ANALYSIS

The Act's conflict-of-interest provisions help to insure that public officials perform their duties impartially, free from bias attributable to their own financial interests or those of persons who have supported them. (Section 81001(b).) Specifically, Section 87100 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.

A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an ordered process for determining whether the Act's conflict-of-interest restrictions apply to a given public official with regard to a particular governmental decision. (Regulation 18700(b).)

#### **Is Councilmember Velasco a "public official"?**

The conflict-of-interest provisions of the Act apply only to "public officials." A "public official" is defined to include "every member, officer, employee or consultant of a state or local government agency ...." (Section 82048.) As a member of the city council, Councilmember Velasco is a "public official" within the meaning of the Act.

#### **Will Councilmember Velasco be participating in a governmental decision?**

The Act's conflict-of-interest provisions come into play only when a public official makes, participates in making, or in some way attempts to use his or her official position to influence a governmental decision in which the official knows — or has reason to know — that he or she has a financial interest. (Section 87100.) You have specifically asked whether Councilmember Velasco may vote on general and specific plans for the city, thus the Act's conflict-of-interest provisions apply. (Regulation 18702.1(a)(1).)

#### **What are Councilmember Velasco's economic interests?**

The "economic interests" from which conflicts of interest may arise are described by Section 87103 and Regulations 18703-18703.5. There are six kinds:

- A public official has an economic interest in a *business entity* in which he or she has a direct or indirect *investment*<sup>2</sup> of \$1,000 or more (Section 87103(a); Regulation 18703.1(a));
- A public official has an economic interest in a *business entity* in which he or she is a *director, officer, partner, trustee, employee, or holds any position of management* (Section 87103(d); Regulation 18703.1(b));
- A public official has an economic interest in *real property* in which he or she has a direct or indirect interest of \$1,000 or more (Section 87103(b); Regulation 18703.2);
- An official has an economic interest in any *source of income*, including promised income, totaling \$250 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- A public official has an economic interest in any *source of gifts* to him or her if the gifts total \$300 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family — this is known as the “personal financial effects” rule (Section 87103; Regulation 18703.5).

You indicate that Councilmember Velasco owns a condominium in a homeowners’ association. We have advised that ownership of a condominium is considered an undivided interest in common in a portion of real property coupled with a separate interest in a space called a unit. (*Jones Advice Letter, No. A-90-715.*) Councilmember Velasco’s condominium unit is presumably worth \$1,000 or more, and his interest in the homeowners’ association costs him \$1,980 annually. Therefore, Councilmember Velasco has a property interest in his condominium unit, as well as a separate property interest in the common grounds of the complex.

**Are Councilmember Velasco’s economic interests directly or indirectly involved in the decisions?**

The next step in analyzing a potential conflict of interest is to determine whether the official’s interests are directly or indirectly involved in the governmental decision(s) at issue.

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<sup>2</sup> An indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official’s agents, spouse, or dependent children own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.)

(Regulation 18700(b)(4).) Real property is directly involved in a decision if the decision involves, among other things, the sale, purchase, or lease of the property; the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of that property; or the imposition, repeal, or modification of taxes or fees imposed on the property. (Regulation 18704.2.) The governmental decisions at issue do not directly involve Councilmember Velasco's property interests as set forth in this regulation. Thus, his real property interests are indirectly involved in the decisions for purposes of determining materiality. (Regulation 18702.4(b).)

### **What is the correct materiality standard to apply?**

The materiality standard to apply when real property is indirectly involved in a governmental decision is found in Regulation 18705.2(b). That regulation applies different tests that are generally determined by the distance between the official's property interest and the property that is the subject of the decision. It provides that the effect of a decision is material if:

“(A) The real property in which the official has an interest, or any part of that real property, is located within a 300 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no financial effect upon the official's real property interest.”  
(Regulation 18705.2(b)(1)(A).)

Both of Councilmember Velasco's real property interests lie within a 300 foot radius of the proposed Hecker Pass Special Use District. Therefore, decisions related to the Hecker Pass area are presumed to be material unless Councilmember Velasco determines that it is not reasonably foreseeable that a particular decision will have *any* financial effect (even a penny's worth) on either of his property interests. (See also Regulation 18705(c)(2).) “Reasonably foreseeable” is defined in Regulation 18706 as “substantially likely.”

### General Plan Decisions

Therefore, Councilmember Velasco will have a disqualifying conflict of interest in a given general plan update decision, or series of interlinked decisions, if it is reasonably foreseeable that the particular decision will have any financial effect on his property interests. This is a very fact-specific question. We have advised that a public official may consider the factors described in Regulation 18705.2(b)<sup>3</sup> to evaluate whether there will be no financial effect on property to such close proximity to real property that is the subject of a decision.

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<sup>3</sup> Please note that the Commission renumbered its conflict of interest regulations in October 1998. Regulation 18705.2(b) was previously Regulation 18702.3.

(*Hentschke* Advice Letter, No. A-97-058.) Such factors include consideration of any change in character to a neighborhood, including traffic, view, privacy, intensity of use, noise, air emission and similar traits. (Regulation 18705.2(b)(4)(C).)

You indicate that the proposed Hecker Pass Special Use District will maintain a similar level of density as was allowed under the previous "Rural Residential" designation in the current general plan. This may mean that the decision to designate the area will have no effect on Councilmember Velasco's property interests. On the other hand, you indicate that the intent of the proposed Hecker Pass Special Use District is to establish a special set of land use controls and development parameters for that area. Similarly, you indicate that the proposed distribution of land uses for the Hecker Pass Special Use District calls for the clustering of residential development in the southern and northern portions of it. This clustering of residential units and the land use control and development factors are likely to have some financial effect on Councilmember Velasco's property. Therefore, we conclude that he may not participate in the decisions.

#### Specific Plan Decisions

Whether or not Councilmember Velasco has a conflict in specific plan decisions related to the Hecker Pass Special Use District is decided by the same question: Is it reasonably foreseeable that the decision will have *any* financial impact on his property interests? You indicate that the general plan proposes future establishment of a specific plan to implement the proposed goals and objectives for this area. The exact distribution and configuration of land uses will be determined in the future through the specific plan process, taking into consideration the development and design guidelines of the new general plan. Because we have determined that Councilmember Velasco has a conflict with respect to general plan decisions, it is likely that specific plan decisions implementing the general plan will have at least *some* financial effect, and thus a conflict will likely exist. Councilmember Velasco should consider the factors listed above when analyzing whether or not a particular specific plan decision will have a financial effect on his property interests.

#### Decisions Related to Adding an Additional Parcel of Land to the Hecker Pass Area

You indicate that the city may consider the addition of an area of land to the proposed designation of the Hecker Pass Special Use District. That area of land is adjacent to, and within 300 feet from, the proposed district. Again, the same analysis applies. Councilmember Velasco will have a conflict of interest if it is foreseeable that the decision will have *any* financial effect on his property interests. Councilmember Velasco should apply the factors of Regulation 18705.2(b) to make this determination.

**Does the “public generally” exception apply?**

If Councilmember Velasco determines that he has a conflict of interest that would disqualify him from participating, he would still be able to participate in the decision if the public generally exception applied. If the reasonably foreseeable material financial effect of a governmental decision on the official’s economic interest is *indistinguishable* from its effect on “the public generally,” then the public official is considered not to have a disqualifying conflict of interest. (Section 87103; Regulation 18707(a).)

The reasonably foreseeable material financial effect on a public official’s financial interest is *indistinguishable* from the effect on the public generally if it is also reasonably foreseeable that the decision will affect a “significant segment” of the public “in substantially the same manner” as it will affect the official’s economic interest. (Regulation 18707(b)(1), (2).) You indicate that Councilmember Velasco’s decisions related to the proposed Hecker Pass Special Use District will not affect a “significant segment” within the meaning of the Act because it will not affect 10 percent or more of the population and/or 10 percent or more of all property owners and/or all homeowners within the jurisdiction of the city. Moreover, we have advised that to be similarly affected, the significant segment would have to be located within a 300-foot radius of the property impacted. (*Blakely* Advice Letter, No. A-95-202.) Therefore, this exception will not apply.

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

Sincerely,

Luisa Menchaca  
Assistant General Counsel



By: Deborah Allison  
Staff Counsel, Legal Division

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