



FAIR POLITICAL PRACTICES COMMISSION

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October 3, 2000

Thomas B. Brown, City Attorney
City of Napa
955 School Street
P.O. Box 660
Napa, CA 94559-0660

**Re: Your Request for Advice
Our File No. A-00-195**

Dear Mr. Brown:

This letter is in response to your request for advice on behalf of Councilmember Ray Sercu regarding the provisions of the Political Reform Act ("the Act").¹

QUESTIONS

May council member Sercu, who rents one single unit condominium to a tenant, participate in city council decisions about placing the repeal of Napa City Charter section 172, which prohibits the city council from enacting any form of rent control, on the March 2001 ballot? May council member Sercu participate in the decisionmaking, if any is proposed, on the adoption of an actual rent control ordinance, in addition to the repeal of Charter section 172?

CONCLUSION

Council member Sercu may participate in council decisions about placing the repeal of Charter section 172 on the ballot and subsequent consideration of a rent control ordinance. Even if council member Sercu would otherwise have a conflict, he may participate in these council decisions based on the public generally exception. In the *Ferraro* Opinion, the Commission stated that owners of three or fewer rental properties constitute a significant segment of the general public, and these council decisions would affect council member Sercu in substantially the same manner as they would affect all owners of three or fewer units in the City of Napa.

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

FACTS

Section 172 of the Napa City Charter provides as follows: "An owner of any real property has the sole right to establish the price for which that property may be sold, leased, rented, transferred or exchanged." Your office has construed this section as prohibiting the city council or the electorate by initiative from adopting what is commonly referred to as a rent control ordinance. Recently, the city council has been requested to consider sponsoring a ballot measure to be placed on the March 2001 ballot repealing Charter section 172. It is also possible, although the matter has not been discussed to date, that the city council would be asked to place some form of rent control, either in the form of a charter amendment or ordinance, on the ballot for voter consideration as well.

Council member Ray Sercu owns a single unit condominium which he currently rents to a tenant for \$1,450 per month. He owns no other rental units, although he does own a mobile home which he currently makes available for use rent free by his daughter. He does not anticipate that any other person will occupy this mobile home, or that the mobile home will be rented for money or any other form of remuneration at any time in the foreseeable future.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests 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 governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; regulation 18700(a).) To determine whether a public official has a financial interest in a governmental decision, the Commission has adopted a standard analysis.

A. Public official.

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; regulation 18700(b)(1).) As a Napa city council member, Mr. Sercu is a "public official," for purposes of the Act (see sections 82048, 82041), and the conflict of interest rules apply to him.

B. The Act's conflict-of-interest rules apply to this decision.

The Act's conflict-of-interest provisions apply only where a public official "make[s], participate[s] in making, or in any way attempts to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Section 87100; regulation 18700(b)(2).) The Commission has adopted a series of regulations which define "making," "participating in making," and "influencing" a governmental decision, and which provide certain exceptions. (Regulations 18702-18702.4.) In this case, the governmental decision council member Sercu will be making is whether to place the repeal of Napa City Charter section 172 on the March 2001 ballot, and consideration of a rent control ordinance, if one is proposed.²

C. Identifying economic interests.

The Act's conflict-of-interest provisions apply only to conflicts arising from *economic interests*. The economic interests from which conflicts of interest may arise are defined in regulations 18703-18703.5. Identifying which, if any, of these economic interests are held by a public official is the third step in analyzing a potential conflict of interest under the Act. (See regulation 18700(b)(3).) There are five kinds of such economic interests:

- A public official has an economic interest in a *business entity* in which he or she has a direct or indirect *investment*³ of \$1,000 or more (section 87103(a); regulation 18703.1(a)); or 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);
- A public official has an economic interest in any *source of income*, including *promised* income, which aggregates to \$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 aggregate to \$300 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);

² Voting to place a measure on the ballot is a governmental decision that can give rise to disqualification for public officials. (See, e.g., *Arnold* Advice Letter, No. A-92-094; *Skoulsen* Advice Letter, No. A-88-162; and *Larsen* Advice Letter, No. A-87-164.)

³ 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, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.)

- 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).

The economic interest of council member Sercu’s that you have identified is an interest in real property – his single unit condominium which he rents to a tenant for \$1,450 per month.⁴

D. Determining whether the public official’s economic interest is directly or indirectly involved in the governmental decision.

Once it has been determined that a public official has an economic interest in certain real property, the next step in the analysis is determining the degree to which the real property is involved in the governmental decision in question. (Regulation 18700(b)(4).) Different criteria for evaluating the materiality of the financial effect on the real property apply depending upon whether the real property is *directly or indirectly* involved in the governmental decision.

The Commission’s regulations provide that real property is *directly involved* in a governmental decision when the decision involves: (1) the zoning, annexation, sale, purchase, or lease, of the official’s property; (2) the issuance or denial of a license or permit authorizing a specific use of the official’s property; (3) the imposition or modification of taxes or fees on the official’s property; or (4) the adoption or amendment of a redevelopment plan when the official’s property is located within the project area. (Regulation 18704.2(a)(1)-(4).)

Under the Commission’s regulations, real property which is not considered directly involved under the rules stated above is considered *indirectly involved* for purposes of determining the applicable materiality standards. (Regulation 18704.2(b).) Therefore, council member Sercu’s rental condominium is considered *indirectly involved* in decisions about placing the repeal of Charter section 172 on the ballot and possible consideration of a rent control ordinance.

E. Materiality standard.

Decisions about placing the repeal of Charter section 172 and possible adoption of a rent control ordinance may affect an interest in real property, but do not involve a particular “development” or other subject property from which the distances can be

⁴ We note that council member Sercu also has an economic interest in the tenant who is a source of income to him under section 87103(c). However, this economic interest does not create a conflict of interest for him because under the public generally exception these decisions will affect the tenant in the same manner as other tenants in the City of Napa, a group that the Commission has stated constitutes a significant segment of the public. (*In re Overstreet* (1981) 6 FPPC Ops. 12.) There may also be an economic interest in a business entity based on section 87103(a), (d). However, the “public generally” analysis that follows is equally applicable. Therefore, we don’t specifically discuss this interest further.

determined. Therefore, the monetary standards of regulation 18705.2(c) apply: the effect of the decision will be considered material as to council member Sercu's property if it has a reasonably foreseeable financial effect of: (1) \$10,000 or more on the fair market value of his property; or (2) will affect the rental value of the property by \$1,000 or more per 12-month period. (Regulation 18705.2(b)(1)(C).)

F. Using the materiality standard to decide if it is reasonably foreseeable that the decision will have a material financial effect.

The next step in deciding whether you have a conflict of interest is using the materiality standards to decide if a *material* financial effect on one of more of your economic interests is reasonably foreseeable as a result of the decision. (Regulation 18706.) As used here, "reasonably foreseeable" means "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*)

In this case, the question is whether a decision about the repeal of Charter section 172 or the adoption of a rent control ordinance would affect the rental value of council member Sercu's condominium by \$1,000 or more in a year. You stated that council member Sercu rents his condominium to a tenant for \$1,450 per month. The Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.) We are not in the best position to determine the financial effect of a decision on the rental value of an official's property; this determination is up to the official. Council member Sercu must determine whether it is substantially likely that placing the repeal of Charter section 172 on the ballot or a rent control ordinance would affect the rent he receives from his condominium by \$84 per month. If so, he would have a conflict under the Act, unless the decisions would affect him in substantially the same manner as the public generally.

G. Public generally.

Even if a material financial effect on one or more of a public official's economic interests is reasonably foreseeable, he or she may not be disqualified. If the reasonably foreseeable material financial effect of a governmental decision on the public official's economic interest is *indistinguishable* "from its effect on the public generally," then the public official does not have a conflict. (Section 87103; regulations 18700(b), 18707(a).) This rule is referred to as the "public generally" exception. This exception exists because a public official is less likely to be biased by a financial impact on his or her economic interests when a significant part of the community is substantially likely to feel essentially the same impact from the governmental decision.

Generally, the reasonably foreseeable material financial effect on a public official's economic 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" it will affect the public official's economic interest. (Regulation 18707(b)(1),(2).)

In *In re Ferraro* (1979) 4 FPPC Ops. 62, the Commission concluded that individuals who own three or fewer rental units constitute a "significant segment" of the public. The Commission distinguished owners of three or fewer rental units, who were not considered part of the rental property industry, from owners of four or more rental units whom they considered to be a part of the rental property industry. The Commission stated:

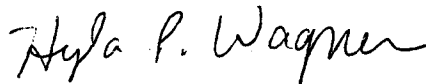
"For the very reason that this diverse group of citizens is not a part of the rental property industry, we conclude that it is a significant segment of the public. In order to be considered a significant segment of the public, we think that a group usually must be large in numbers and heterogeneous in quality. The class of persons owning three or fewer units meets both these standards and therefore constitutes a significant segment of the general public."

In this case, city council decisions about whether to place the repeal of Napa City Charter section 172 on the ballot, or about the adoption of a rent control ordinance, will affect all owners of three or fewer rental units in much the same manner. Therefore, we conclude that the effect of the decisions on the interests of council member Sercu is not distinguishable from its effect upon all owners of three or fewer units, a group the Commission concluded in *Ferraro* constitutes a significant segment of the public.

As you may be aware, the Commission is currently considering amendments to the conflict-of-interest regulations cited in this letter. You may monitor the progress of the amendments on the Commission's website – www.fppc.ca.gov. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

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Assistant General Counsel



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