



## FAIR POLITICAL PRACTICES COMMISSION

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March 15, 2004

Marguerite Battersby, City Attorney  
City of Highland  
c/o Brunick, Battersby, McElhaney  
& Beckett  
Post Office Box 6425  
San Bernardino, CA 92412

**Re: Your Request for Advice**  
**Our File No. A-04-036**

Dear Ms. Battersby:

This letter is in response to your request on behalf of City of Highland Mayor Ross Jones for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> We encourage you to consider whether other laws, such as Government Code 1090 or the Public Contract Code, may also be implicated by your situation. The Commission is charged with interpreting and enforcing the provisions of the Act, and may provide advice only with respect to those provisions. (Section 83114.)

### QUESTION

May Mayor Jones influence city decisions to renew two insurance policies he sold to the city through the city manager?

### CONCLUSION

No. The mayor may not influence city decisions to renew the two insurance policies unless an exception applies.

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

## FACTS

In January of this year, Ross Jones was elected to the Highland City Council following a recall election. He was appointed as city mayor during its reorganization meeting. Mayor Jones is an insurance broker, employed by an insurance brokerage corporation. He has no financial interest in the corporation, but holds a management position as vice president of commercial marketing. For the past ten years, Mayor Jones and his corporation have provided two policies of insurance to the city. One is an earthquake insurance policy, with a premium less than \$4,000. He receives a commission of less than \$100 per year, and his corporation receives an annual commission of approximately \$300 on that policy. The second is a general liability policy issued on the city's annual Citrus Harvest Festival, with an annual premium less than \$350. Mayor Jones receives a commission of less than \$10 and his corporation receives less than \$35 commission on that policy. The total of the two commissions received by Mayor Jones is less than \$100 per year. His employer receives commission less than \$400 per year on the two policies combined. Both policies will be presented to the city manager for annual renewal without action by the city council.<sup>2</sup>

Mayor Jones and his employer would like to continue issuing the two insurance policies to the city. He seeks clarification of his duties and responsibilities under the Political Reform Act regarding his ability, and that of his corporation, to continue providing these two insurance policies. He also seeks advice regarding the ability of his employer to provide these or other insurance policies and coverage to the city with or without corporate commission, his ability to waive his own commission on the two policies, and whether this waiver would alter the Commission's advice. The city and Mayor Jones are aware of the provisions of Government Code sections 1090 et seq.

## ANALYSIS

The Act prohibits a 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 87100.) Pursuant to regulation 18700, an eight-step analysis is applied to determine whether a public official has a conflict of interest in a given governmental decision.

### **Step One: Is Mayor Jones a public official?**

The conflict-of-interest prohibition applies only to public officials. As a member of the city council and mayor for the City of Highland, Mayor Jones is a "member, officer, employee or consultant of a state or local government agency" and, therefore, is a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; regulation 18701(a).)

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<sup>2</sup> In a telephone call on March 2, 2004, you explained that the community development director would be reviewing the Citrus Harvest Festival insurance policy and the director represents the city's interests in the policy's consideration.

**Step Two: Is Mayor Jones making, participating in making, or influencing a governmental decision?**

The Act's conflict-of-interest provisions apply only where a public official "make[s], participate[s] in making or in any way attempt[s] 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, which also provide certain exceptions. (Regulations 18702-18702.4.)

"A public official 'makes a governmental decision,' . . . when the official, acting within the authority of his or her office or position:

- (1) Votes on a matter;
- (2) Appoints a person;
- (3) Obligates or commits his or her agency to any course of action;
- (4) Enters into any contractual agreement on behalf of his or her agency . . . ." (Regulation 18702.1(a).)

Based on your facts, however, Mayor Jones would not be acting within the authority of his office or position as a member of the Highland City Council in offering the city life insurance services, and therefore would not qualify as "making a governmental decision" as defined in the Act. (See *McMahon* Advice Letter, No. A-02-150.)

"A public official 'participates in making a governmental decision,' . . . when, acting within the authority of his or her position, the official:

- (a) Negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision . . .
- (b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:
  - (1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision . . .
  - (2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision . . . ." (Regulation 18702.2.)

Based on your facts, Mayor Jones will not be acting within the authority of his position as a member of the city council in negotiating with the City of Highland on the sale of life insurance services. Additionally, Mayor Jones will not be advising or making recommendations to the decisionmaker of the Highland City Council in his official capacity as a member of the council regarding the sale of life insurance services. Therefore, Mayor Jones would not be participating in making a governmental decision as defined in the Act.

A public official is using or attempting to use his/her official position to influence a governmental decision when:

“(a) With regard to a governmental decision which is within or before an official’s agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency . . . .

(b) With regard to a governmental decision which is within or before an agency not covered by subsection(a), the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or agency to any member, officer, employee or consultant of an agency . . . .”  
(Regulation 18702.3.)

Subdivision (a) applies when the governmental decision is “within or before an official’s agency [the Highland City Council] or an agency appointed by or subject to the budgetary control of his or her agency . . . .” (Regulation 18702.3(a).) Subdivision (b) applies when the relevant governmental decision is within or before an agency other than the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(b).)

Therefore, since the city manager is a part of the city, subdivision (a) would be applicable. Under this rule, “. . . the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.” (Regulation 18702.3(a).) Based on the facts, it appears that Mayor Jones is “attempting to use his or her official position to influence the decision [sale of life insurance policies] . . . .” (Regulation 18702.3(a); *McMahon, supra.*)

**Step Three: What are the “economic interests” of the public official?**

The economic interests that might give rise to a conflict of interest are defined in regulations 18703-18703.5. The specific economic interests that may apply to Mayor Jones are described below:

\* A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 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)); and

\* A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3).

Your concerns focus on a potential conflict of interest arising from Mayor Jones's employment with an insurance company. As noted above, a public official has an economic interest in the source of his or her income if the amount “aggregates to \$500 or more within 12 months prior to the decision.” We assume from your facts that Mayor Jones surpasses this threshold with regard to his employer, the insurance company, and that the company is a source of income to Mayor Jones.

Under regulation 18703.3, a source of income includes sources of commission income. According to your facts, Mayor Jones receives a commission of less than \$100 per year on the earthquake insurance policy and his employer receives an annual commission of approximately \$300 on that policy. On the second policy issued for the city's annual Citrus Harvest Festival, Mayor Jones receives a commission of less than \$10 and his employer receives less than \$35 commission. The total of the two commissions received by Mayor Jones is less than \$100 per year. From these facts it appears that these commissions from the city do not reach the income threshold of \$500 and, therefore, do not qualify the city as an economic interest of Mayor Jones under the Act.

However, Mayor Jones will also have an economic interest in the insurance company as a result of his business position in the company as vice president of commercial marketing. You have not provided information regarding any other of his economic interests. For purposes of this letter, we assume that Mayor Jones has no other economic interests relevant to the decisions identified.

**Step Four: Are the public official's economic interests directly or indirectly involved in the decision?**

A person, including business entities and sources of income, is directly involved in a decision if the person:

- “(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;
- (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Regulation 18704.1(a).)

According to your facts, the public official, as a representative of his employer, will be coming before the city manager in his attempt to renew the insurance policies. Therefore, the insurance company will be directly involved in the decision.

**Steps Five and Six: Will the financial effect of the decision on the public official’s economic interests be material and reasonably foreseeable?**

Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests. This determination takes two steps. First, the official must find the applicable materiality standard in Commission regulations. (Regulation 18700(b)(5), regulation 18705, et seq.) After finding the applicable materiality standard, the official must then decide whether it is reasonably foreseeable that the standard will be met. (Regulation 18700(b)(6).)

An effect is considered “reasonably foreseeable” if the effect is “substantially likely.” (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made depends on the facts surrounding the decision. A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

Where a source of income is directly involved in a governmental decision, **any** reasonably foreseeable financial effect on the source of income is deemed to be material. (Regulation 18705.3(a).) Also, where a business entity is directly involved in a governmental decision, the “general rule” is that the financial effect of the decision on the entity is presumed to be material. (Regulation 18705.1(b)(1).) Since the insurance company is directly involved in the decision to renew the policies, any reasonably foreseeable financial effect is material. Based on these facts, it is reasonably foreseeable that the decision to renew the two insurance policies would have **some** financial effect on the insurance company. This meets the strict standard of the so-called “one-penny” rule. If the decision can reasonably be foreseen as having a financial effect, as little as even one penny upon a public official's directly involved economic interest in a business entity or source of income, it will, in the absence of an exception, be cause for disqualifying the public official from involvement in the decision. Therefore, Mayor Jones has a conflict

of interest in presenting the renewal of the insurance policies to the city and can only present them if an exception applies.

**Steps Seven and Eight: Does this governmental decision come within any exception to the conflict-of-interest rules?**

Application of the "public generally" exception to the type of decisions cited in your letter would only occur where it is determined that the mayor has an actual conflict of interest and would be dependent upon the nature and effect of the governmental decision being made. You have not submitted sufficient facts to provide any further information.

Also, if the public official is legally required to make or participate in the making of a governmental decision, disqualification is not required. (Regulation 18708.) Nothing in the facts that you have provided suggests that this exception is applicable to the city council member in the context of the facts set forth in your letter.

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

Sincerely,

Luisa Menchaca  
General Counsel

By:



Galena West  
Counsel, Legal Division

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