



FAIR POLITICAL PRACTICES COMMISSION

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March 23, 2005

Heather C. McLaughlin, City Attorney
City Attorney's Office
City Hall
250 East L Street
Benicia, CA 94510

Re: Your Request for Advice
Our File No. A-05-033

Dear Ms. McLaughlin:

This letter is in response to your request on behalf of Mayor Steve Messina and City Council Member Dan Smith, for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. May Mayor Messina and Council Member Smith participate in governmental decisions regarding the Benicia Unified School District?
2. May Mayor Messina and Council Member Smith participate in governmental decisions or negotiations involving the closing of schools in the Benicia Unified School District?

CONCLUSIONS

1. Mayor Messina and Council Member Smith may participate in governmental decisions regarding Benicia Unified School District so long as these decisions will not have a reasonably foreseeable material financial effect on their economic interests.
2. Mayor Messina and Council Member Smith may not participate in governmental decisions or negotiations involving the closing of schools in the Benicia Unified School District.

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

FACTS

Mayor Messina and Council Member Smith both own property within 500 feet of two elementary schools in the Benicia Unified School District (BUSD). You also state that the BUSD is considering budget cuts and other ways to help balance its budget. One possibility is to close one of the elementary schools in the district.

On February 9, 2005, the 7-11 committee (an appointed citizens committee to research, evaluate and recommend whether and which school's closure, is or is not in the district's best interest) recommended BUSD close Mills Elementary School. Mills is located within 500 feet of real property owned by Council Member Smith. On February 17, 2005, at the BUSD Board meeting, the Board received and discussed this recommendation and decided to go forward with the environmental review to close Mills Elementary School.

At the city council meeting on February 15, 2005, the city manager brought before the city council a discussion of a joint use agreement between the city and the BUSD. This agreement would offer city-provided maintenance and improvement of fields (at certain school sites) in return for expanded rights to use BUSD facilities and other consideration. The city manager's recommendation is to discuss options with the BUSD at a joint meeting between the school board and the city council on February 28, 2005.

At a school board meeting on February 17, 2005, one of the issues discussed by the Board was the need to determine whether the city will commit to leasing the closed school and if so, would the BUSD earn enough money from the lease to offset any fees it pays the city for taking over the school field maintenance. The city's decisions regarding how they will or will not help the BUSD, may affect the BUSD's decision whether or not to close an elementary school, though Mills Elementary has been recommended. It is not yet determined which school will be closed.

ANALYSIS

Your inquiry implicates the Act's conflict of interest rules, sections 87100 et seq. In applying section 87103, the Commission employs an eight step analytical framework to assist in determining whether a public official has a disqualifying conflict of interest. (Regulation 18700(b) (1) – (b) (8).) We review your circumstances within this eight-step framework.

Steps 1 & 2. Are Mayor Messina and Council Member Smith public officials who may make, participate in making, or use their official positions to influence a governmental decision?

Section 87100 of the Political Reform 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 an economic interest. A "public official" is defined in section 82048 and regulation 18701 as every natural person who is a member, officer, employee, or consultant of a state or local government agency. Mayor Messina and Council Member Smith are public officials who may make, participate in making, or use their official positions to influence governmental decisions you have described.

Step 3. What are the public officials' economic interests?

A public official has an economic interest in any real property in which the public official has a direct or indirect interest worth \$2,000 or more in fair market value. (Section 87103; regulation 18703.2.)

You have not disclosed any additional economic interests, but we note that a public official always has an economic interest in his or her personal finances. (Section 87103; regulation 18703.5.) However, since you have not suggested that these decisions might have a foreseeable material financial effect on Mayor Messina's or Council Member Smith's personal finances apart from possible effects on the value of their real property, we confine our analysis to possible conflicts originating with effects on their real property in which they have an interest worth \$2,000 or more in fair market value. (Regulation 18705.5.)

Step 4. Are the public official's economic interests directly or indirectly involved in a governmental decision?

Pursuant to section 87103 and regulation 18704.2, real property in which a public official has an economic interest is directly involved in a governmental decision when:

- (1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the real property which is the subject of the governmental decision.

In this case, all of the schools in the district are possibly subject to closure; therefore, in a decision to close one of the schools, all of the district's schools are the subject of the decision. Accordingly, Mayor Messina's and Councilman Smith's economic interests are directly involved in the decision since each owns real property within 500 feet of one of these schools.

As for decisions involving the Benicia Unified School District, you have not provided us with facts as to what these decisions would involve, however generally such decisions would be indirectly involved so long as the subject matter of the decisions does not involve the officials' economic interests.

Step 5. Will the decision have a material financial effect on the public officials' economic interests?

Once the public officials' economic interests have been classified as directly or indirectly involved in a governmental decision, next you must identify the materiality standard appropriate to each economic interest (Section 87103.) Regulations 18705.1 – 18705.5 establish materiality thresholds for every type of economic interest.

For directly involved real property, any financial effect is presumed material. This presumption may be rebutted by proof that is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (Section 87103; regulation 18705.2 (a) (1).)

For indirectly involved real property, the financial effect of a governmental decision is presumed not to be material. This presumption too can be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an interest. (Section 87103; regulation 18705.2(b) (1).)

Therefore, Mayor Messina and Council Member Smith would be presumed to have a financial interest in any decisions regarding the closing of schools in BUSD, unless this presumption can be rebutted with proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on their economic interests involved.

Decisions regarding BUSD not involving the officials' economic interests will be presumed not to be material unless this presumption is rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public officials have an interest.

Step 6. Will the decision have a reasonably foreseeable material financial effect on your economic interest?

Once you have found the proper materiality standards for the economic interests involved, the next step is to determine whether it is "reasonably foreseeable" that the decisions will have an effect defined as "material" for any of the economic interests.

A material effect on an economic interest is reasonably foreseeable if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Section 87103; regulation 18706(a).) An effect need not be certain to be considered "reasonably foreseeable," but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) If a material financial effect on any of the public official's economic interests is "reasonably foreseeable," a public official has a conflict of interest that prohibits him or her from taking any decision-making role in that decision – unless the "public generally" or "legally required participation" rules apply.

If a financial effect is presumed *not* to be material, it is not reasonably foreseeable that such an effect will be material. If any financial effect *is* presumed to be material, in the absence of proof that there will be no financial effect, a material financial effect is reasonably foreseeable.

Therefore, Mayor Messina and Council Member Smith would have a presumed financial interest in any decisions regarding the closure of schools in the BUSD, unless this presumption can be rebutted with proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on their economic interests involved.

Decisions regarding BUSD, not directly involving the public officials' economic interests, will be presumed not to be material unless this presumption is rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public officials have an economic interest.

Steps 7 & 8. Exceptions

Even if you determine that Mayor Messina and Council Member Smith have a financial interest that will foreseeably be materially effected by the decisions; they may still participate in the decisions if the effect on their financial interests is not distinguishable from the effect on the public generally. For the "public generally" exception to apply, the decisions must affect the public official's real property in substantially the same manner as the decisions will effect a significant segment of the City of Benicia generally. (Section 87103, regulation 18707.)

Any effects on real property owned by Mayor Messina and Council Member Smith located within 500 feet of the schools in the BUSD that may arise from the governmental decisions involved here seem to be unique to the officials. This is because of the close proximity of their real property to the schools. The public generally exception is not likely apply under these facts unless it can be shown that the decisions will effect a significant segment of the City of Benicia generally in *substantially the same* manner it would affect Mayor Messina or Council Member Smith. (See regulation 18707.1 for further explanation of how to calculate a significant segment.)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that they may have a disqualifying conflict of interest. This "legally required participation" rule applies only in certain very specific circumstances where the government agency would be paralyzed from acting. Your account of the facts does not suggest that this exception might apply here².

² The Commission does not act as a finder of fact when it issues legal opinions. Our opinion is only applicable to the extent that the facts provided to us are correct and that all of the material facts have been provided. (*In re Oglesby*, 1FPPC Ops. 71, 75-083.)

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

Sincerely,

Luisa Menchaca
General Counsel



By: Sukhdip Brar
Intern, Legal Division

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