



FAIR POLITICAL PRACTICES COMMISSION

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February 24, 2009

Alex M. Peltzer
City Attorney
100 Willow Plaza, Suite 300
Visalia, CA 93291

Re: Your Request for Advice
Our file No. A-09-015

Dear Mr. Peltzer:

This letter responds to your request for advice on behalf of Mayor Jesus Gamboa regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Also, please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTIONS

1. Does Mayor Jesus Gamboa of Visalia have a disqualifying conflict of interest that would preclude him from participating in the city council's vote on rent control for mobile home parks?
2. Does the Mayor have a disqualifying conflict of interest preventing him from participating in a possible vote on whether the city should assume code enforcement responsibilities over mobile home parks?

CONCLUSION

1. Mayor Gamboa is unlikely to have a disqualifying conflict of interest because, based on your facts, the presumption of materiality is rebutted.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2. The Mayor does not have a disqualifying conflict of interest in the possible vote regarding whether to assume mobile home code enforcement from the state.

FACTS

You represent the mayor for the city of Visalia, Jesus Gamboa. Mayor Gamboa owns and resides in his principal residence in Visalia, which abuts a mobile home park. The city council will soon need to vote on whether to implement rent control for mobile home parks within the city. The city council might also make other decisions concerning whether the city should assume from the State of California code enforcement over mobile home parks, but no other decisions are currently before the council. While enforcing codes could have the potential to mandate physical changes to the mobile home parks, the only decision before the council would be whether or not to take over code enforcement from the State.

You provided estimates from the Visalia's planning department regarding the demographics of Visalia as related to mobile home parks. There are ten mobile home parks in Visalia that this decision could affect. There are approximately 33,500 single-family, residential properties within Visalia, of these, 2,600 are within 1,000 feet of a mobile home park. You believe that less than half of those are within 500 feet of a mobile home park, and a fraction of these are adjacent to a mobile home park.

You have also stated the rent control ordinance must be constitutionally valid. To be valid, the ordinance must allow the property owner to get a fair return on his or her investment. Also, you add that a fair return ensures the continued economic viability of a mobile home park. You explained during our telephone conversation that the rent control ordinance would apply to the owner of the mobile park and the spaces he or she leases to the owners of a the mobile homes. The rent control ordinance would apply, if passed, to the commercial property rather than individual owners.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials "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.

The Commission has adopted an eight-step standard analysis to decide whether an official has a disqualifying conflict of interest. (Regulation 18700(b)(1)-(8).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

Step One: Is Mayor Gamboa a public official?

As Mayor of the City of Visalia, Mayor Gamboa is a public official under the Act. (Section 82048.) Consequently, he may not make, participate in making, or otherwise

use his official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of his economic interests. (Regulations 18702.1-18702.4.)

Step Two: Will Mayor Gamboa be making, participating in making, or using or attempting to use his official position to influence a governmental decision?

Mayor Gamboa will be voting with the city council regarding mobile home parks. By voting on or otherwise participating in the city's decision, he will be making, participating in making, or otherwise using his official position to influence a governmental decision.

Step Three: Does Mayor Gamboa have a financial interest in the decisions at issue?

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests. (Section 87103; Regulations 18703-18703.5.) The applicable economic interests include:

1. An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).) An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
2. An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
3. Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
4. Any source of gifts to the public official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
5. A public official also 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 also known as the "personal financial effects" rule. (Section 87103, Regulation 18703.5.)

Based on the facts you provided, Mayor Gamboa has an economic interest in his home in Visalia. While you have not stated the property's worth, he presumably has an economic interest of at least \$2,000 in the property. (Section 87103.) Your request for advice provided no other facts regarding any other potential economic interests.

Accordingly, our analysis is limited to Mayor Gamboa's economic interest in the real property upon which his residence is located.

Step Four: Is the economic interest directly or indirectly involved in the governmental decision?

Real property in which a public official has an economic interest is directly involved in a governmental decision if any part of the real property is within 500 feet of the boundaries of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).) Mayor Gamboa's property is "adjacent to" a mobile home park, and therefore within 500 feet of the park. The city's decision will affect all mobile home parks in Visalia. Mayor Gamboa's property is therefore directly involved in the decision.

Regarding the decision to assume code enforcement of mobile home parks, the subject of the governmental decision is whether to adopt regulations. Mayor Gamboa's property would be indirectly involved in this decision.

Step Five: Materiality Standard

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).) For real property directly involved in a governmental decision, any financial effect, even "one penny," is presumed to be material. (Regulation 18705.2(a)(1).) This is known as the "one penny" rule. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (*Ibid.*)

Regarding the decision whether the city will assume code enforcement of mobile home parks from the State, the impact is presumed not to be material.

Step Six: Is it Reasonably Foreseeable that the Decision Will Have a Material Financial Impact on Mayor Gamboa's property interest?

An effect upon economic interests is considered "reasonably foreseeable" if there is a substantial likelihood that it will occur. (Regulation 18706(a).) 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 certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

You offer that the facts in Mayor Gamboa's situation suggest that the presumption of materiality is rebutted because it is not reasonably foreseeably that the governmental decision will have a material effect on the Mayor's financial interest. Specifically, Mayor Gamboa's home is near the mobile home park, not in it, and a rent control ordinance would only directly affect the potential value of real property subject to its application. Although rent control could keep the value of the subject property suppressed and may impact surrounding properties, the mobile home market is entirely different from the single family home market, and one does not necessarily foreseeably affect the other.

Given the limited facts you have presented, that the rent control ordinance is applied only to the commercial property containing the mobile home parks, we do not see how this would affect the value of single-family homes in the area, as those values should not be reasonably foreseeably financially affected by the rental price of a mobile home space nearby. Accordingly, we think that the financial effect on the surrounding single-family homes would be far too speculative and not reasonably foreseeable.

Ultimately, however, it is up to the public official to assess, through a good faith effort, financial effects of the decision by using some reasonable and objective method of valuation. (*Hensley* Advice Letter, No. A-07-113; *Moock* Advice Letter, No. A-01-140; *O'Harra* Advice Letter, No. A-00-174.) Mayor Gamboa, with your assistance, will have to determine whether it is reasonably foreseeable that the decisions before the city council will have a material financial effect on any of his financial interests.

Whether the city or the State pursues code enforcement for mobile home parks, the effect on any one park is likely not reasonably foreseeable. Even if one assumes that by assuming code enforcement responsibilities, the codes related to mobile home parks will be enforced more carefully, it would be difficult to determine which parks are not in compliance and whether non-compliance means some change in property value for the surrounding properties. Again, however, Mayor Gamboa must make this determination.

Step 7: Does the "Public Generally" Exception Apply?

You have suggested that, if there is a disqualifying conflict of interest, the "public generally exception might apply to the facts in Mayor Gamboa's case. As discussed above, we think it is likely that Mayor Gamboa could participate in the decisions related to the mobile home park rent control and whether to assume code enforcement. Even so, a discussion regarding this exception follows.

"Notwithstanding a determination that the reasonably foreseeable financial effect of a governmental decision on a public official's economic interests is material, a public official does not have a disqualifying conflict of interest in the governmental decision if the official can establish that the governmental decision will affect the public official's economic interests in a manner [that] is indistinguishable from the manner in which the decision will affect the public generally as set forth in Title 2 California Code of Regulations Sections 18707.1 - 18707.9."

(Regulation 18707.)

Even if a public official otherwise has a conflict of interest, he or she may still be able to participate in the governmental decision in question. 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)(7), 18707(a).)

To come under the purview of the public generally exception, the decision affecting the public official's economic interests must also affect a significant segment of the public generally in substantially the same manner as it affects the public official.

(Regulation 18707.1(b)(1) and (2).) The public generally exception applies if both prongs of this two-prong test are met. First the official must determine if the decision affects a significant segment of the population. If the prong is met, then the official must determine that the segment is affected in substantially the same manner as the public official.

For real property, the “significant segment” test is met if the decision in question also affects ten percent or more of all property owners in the jurisdiction of the official’s agency, or the district the official represents, to qualify under the public generally exception. (Regulation 18707.1(b)(B)(i).) This exception also applies if the decision affects 5,000 property owners in the jurisdiction. (Regulation 18707.1(b)(1)(B)(ii).)

You stated that approximately 4,000 of the 33,000 single family residential parcels in Visalia are located within 1,000 feet of a mobile park, and “less than half” of those are within 500 feet. Of those, a fraction are adjacent to mobile home parks. Based on the facts you provided, Mayor Gamboa does not meet the first prong of the “public generally” exception.

Step 8: Does the “Legally Required Participation” Exception Apply?

You have asked whether, even if Mayor Gamboa has a conflict of interest that would prevent his participation, can he invoke the legally required exception in the event there is a tied vote among the remaining four councilmembers. The “legally required participation” exception is found in Section 87101 of the Act, which reads as follows:

“Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official’s vote is needed to break a tie does not make his participation legally required for purposes of this section.”

(Section 87101.) In addition, Regulation 18708, which interprets Section 87101, states in pertinent part:

“(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.”

(Regulation 18708(c).)

In light of both the statutory and regulatory language, Mayor Gamboa cannot rely on the “legally required participation” exception to allow him to cast a tie-breaking vote. (See *McHugh* Advice Letter, I-08-203; *see also* *Freeman* Advice Letter, A-90-525.)

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in black ink that reads "Heather M. Rowan". The signature is written in a cursive style.

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl