



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

June 29, 2009

Peggy Thomsen
Albany City Council
757 Pierce Street
Albany, CA 94706

**Re: Your Request for Advice
Our File No. A-09-159**

Dear Ms. Thomsen:

This letter is in response to your request for advice regarding your duties under the conflict-of-interest provisions of the Political Reform Act (the "Act")¹ and on behalf of Councilmember Farid Javandel regarding his duties under the Act. Please note that our advice is based solely on 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.

In addition, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A), copy enclosed.) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions provided apply only to prospective actions. Also note our advice is based solely on the facts presented in your request; the Commission does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. May you participate in your private capacity in a city council decision to obtain a parcel of land for a new park that will be located within 500 feet of your home?
2. May you and Councilmember Javandel participate as city councilmembers in decisions to allocate funds from the East Bay Regional Park bonds to specific parks, including

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.

the one within 500 feet of your homes, if you vote on the allocation plan as a single decision, or do the decisions need to be segmented?²

CONCLUSIONS

1. You may not vote on the acquisition of property within 500 feet of your home. However, you may appear before the city council as a member of the public in a public meeting of the agency to represent your personal interest so long as your comments are limited to your personal interests. In addition, you may communicate with the general public or the press.

2. You and Councilmember Javandel may not vote on a plan that includes the park within 500 feet of your homes. The decisions may be segmented, however, as discussed below.

FACTS

The City of Albany is trying to obtain a parcel of land for a new park. The land is within 500 feet of your home. You ask, if you recuse yourself from the city council's open and closed session consideration of the issue, may you act in your private capacity with your neighbors to acquire the park.

You also ask whether you or Councilmember Javandel may participate in city council decisions regarding allocation of East Bay Regional Park WW Bonds to parks in the city, including the parks near your homes.

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).) 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 analytical framework for deciding whether a public official has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) This process is applied below.

Step 1. Are you and Councilmember Javandel public officials?

As city council members, you are both public officials under the Act. (Section 82048.) Consequently, neither of you may make, participate in making, or otherwise use your official positions to influence any decisions that will have a reasonably foreseeable material financial effect on your respective economic interests. (Regulations 18702.1-18702.4.)

² Your question also concerned the duties of other members of the city council. Under the provisions of California Code of Regulations section 18329(b)(8)(B), unless you are an authorized representative of these officials, the Fair Political Practices Commission cannot address your questions or provide analysis.

Step 2. Will you and Councilmember Javandel be making, participating in making, or using or attempting to use your official position to influence a governmental decision?

The Act's conflict-of-interest provisions apply only when a public official make[s], participate[s] in making, or in any way attempts to use his or her official position to influence a governmental decision in which the official knows or has reason to know he or she has a financial interest.³ (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.)

Making a Governmental Decision: A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; Regulation 18702.1(a).)

Participating in Making a Governmental Decision: A public official "participates in making a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decision-maker regarding the governmental decision. (Section 87100; Regulation 18702.2.)

Influencing a Governmental Decision: There are two rules pertaining to whether a public official is using or attempting to use his or her official position to influence a governmental decision. The first rule applies to your situation, it applies when the governmental decision is within or before 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(a).) In these cases, if "the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency" then he or she is attempting to influence a governmental decision. This includes, but is not limited to, "appearances or contacts by the official on behalf of a business entity, client, or customer."⁴

However, an official is not making or participating in making a governmental decision if he or she makes an appearance "as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related

³ Please note, if a public official's office is listed in Section 87200 ("87200 filers" include city council members) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

⁴ The second rule applies when the 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).) Under this rule, the official cannot act or purport "to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency" to influence a decision that will have a material financial effect on his or her economic interests.

solely to the official's personal interest . . ." (Regulation 18702.4(a).) "Personal interest" is defined in Regulation 18702.4(b)(1) to include, but not be limited to: "[a]n interest in real property, which is wholly owned by the official or members of his or her immediate family."

You stated that the decision concerns acquisition of property within 500 feet of your home. Thus, you may appear before the city council as a member of the public in a public meeting of the agency, but only to represent your personal interest. This exception has been construed narrowly to apply when an agency is holding public meetings (*Gallagher Advice Letter, No. I-94-279*) and when your comments are limited to your personal interests. (*McHugh Advice Letter, No. I-98-324.*) However, you may not attempt to contact individual members of the city council to influence a decision related to the project outside of any public city council meetings. (See *Oderman Advice Letter, A-00-082.*)

In addition, Regulation 18702.4(b)(2) specifies that attempting to influence a governmental decision, for the purposes of the Act does not include communicating with the general public or the press. As such, you are free to communicate your views about the decision with public and the press.

Step 3. Identifying the economic interests.

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. The economic interests from which conflicts of interest may arise are defined in Section 87103 and Regulations 18703-18703.5. The only economic interest you and Councilmember Javandel describe is your interest in your respective homes -- "[a] public official has an economic interest in any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more in fair market value." (Regulation 18703.2.) Since these are the only economic interests you identify, we confine our analysis to them.

Step 4. Determining whether the public official's economic interest is directly or indirectly involved in the governmental decision.

Step four requires a determination of whether the economic interest is directly or indirectly involved in the governmental decision the public official will be making. (Regulation 18700(b)(4).) Real property in which a public official has an economic interest is directly involved in a governmental decision if, among other things, "(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 property which is the subject of the governmental decision." (Regulation 18704.2(a)(1).) Therefore, both of you have economic interests that are directly involved in the governmental decision.

Steps 5 and 6. Is it reasonably foreseeable that a material financial effect will occur?

After deciding whether the property is directly or indirectly involved in the governmental decision, step five requires a determination of the materiality standard. (Regulation 18700(b)(5).) If the real property in which an official has an economic interest is directly involved in a governmental decision, the materiality standards of Regulation 18705.2(a) apply. (Regulation 18704.2(c)(1).)

Regulation 18705.2(a)(1) provides that the financial effect of a governmental decision on real property which is directly involved in the governmental decision is presumed to be material. "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.) Any financial effect includes as little as one penny's worth. If the real property in which an official has an economic interest is indirectly involved in a governmental decision, the materiality standards of 18705.2(b) apply. (Regulation 18704.2(c)(2).)

"The financial effect of a governmental decision on real property which is indirectly involved in the governmental decision is presumed not to be material. This presumption may 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 economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision affects:

"(A) The development potential or income producing potential of the real property in which the official has an economic interest;

"(B) The use of the real property in which the official has an economic interest;

"(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood." (Regulation 18705.2(b)(1).)

Whether the presumption is rebutted is a factual question for you and Councilmember Javandel to decide.

Assuming there are no facts to show the parks decisions will have no financial effect on yours or Councilmember Javandel's properties, you therefore have a conflict of interest by participating in these governmental decisions unless there are additional facts, as explained below, which remove the conflict of interest. Obviously, as described under Step 2 above, you and councilmember Javandel would still be permitted to represent your personal interests in a public meeting before the city council.

Steps 7 and 8. The “public generally” and “legally required participation” exception

The “public generally” exception allows an official to participate in a decision despite a conflict of interest if the effect of the decision on the official’s interest is not distinguishable from the effect on the public generally. (Section 87103; Regulation 18707.)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, you have not presented any facts indicating that the “public generally” or the “legally required participation” exceptions are applicable to your circumstances or those of Councilmember Javandel, so we will not address them further.

Segmentation.

We have previously advised, however, that large and complex decisions may, under certain circumstances, be divided into separate decisions so that an official who has a disqualifying interest in one component of the decision may still participate as to other components in which the official has no financial interest. (Regulation 18709; *Merkuloff* Advice Letter, No. I-90-542; *Huffaker* Advice Letter, No. A-86-343.)

Regulation 18709 provides the procedures for segmentation and states as follows:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are “inextricably interrelated” when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

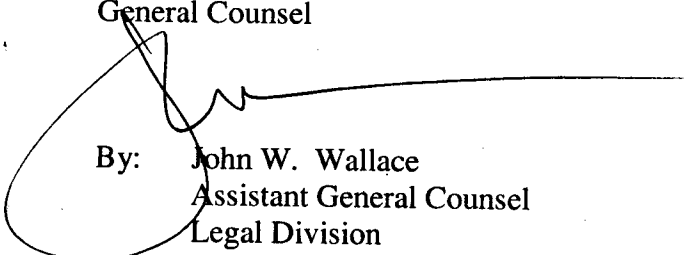
In the past, the Commission has advised that some decisions may be too interrelated to be considered separately. For example, if the resolution of one decision will effectively determine the result of the other decision, the decisions may not be segmented. (See generally *Yang* Advice Letter, No. I-06-198; *Stone* Advice Letter, No. A-06-007; *Barker* Advice Letter, A-05; *Hull* Advice Letter, No. A-04-052.)

Segmentation may apply if the decisions can be broken down into separate decisions that are not inextricably interrelated to the decisions in which you have a disqualifying conflict of interest. Under the guidelines of this regulation, the decision regarding the parks near your home and Councilmember Javandel’s home must be segmented and made before the rest of the package is voted on. When these first decisions are made, you may not participate in the park decision near your home and Councilmember Javandel may not participate in the park decision near his home. You have not provided sufficient information to allow us to fully apply this rule. Therefore, we are unable to further analyze this issue.

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

Sincerely,

Scott Hallabrin
General Counsel



By: John W. Wallace
Assistant General Counsel
Legal Division

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