



FAIR POLITICAL PRACTICES COMMISSION

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August 31, 2009

David M. Fleishman
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Hanley & Fleishman, LLP
8930 Morro Road
Atascadero, CA 93422

Re: Your Request for Advice
Our File No. A-09-204

Dear Mr. Fleishman:

This letter responds to your request for advice on behalf of members of the City Council of the City of Pismo Beach regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Please bear in mind that we do not provide advice on sources of law outside the Act, such as common law conflict of interest.

QUESTION

May members of the Pismo Beach City Council vote on an ordinance designating fire hazard severity zones within the City, when they own residential real property inside, or within 500 feet of, the proposed zones?

CONCLUSION

Your account of the facts shows that the councilmembers are entitled to invoke the "legally required participation" exception to the Act's conflict of interest rules, under which two of the four presumptively disqualified councilmembers may be selected to form the quorum of three that is needed to vote on designating the "very high fire hazard severity zones" by city ordinance, as required by Government Code Section 51179.

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.

FACTS

Your office serves as the City Attorney for the City of Pismo Beach, and has been asked to seek written advice on behalf of four of the five city council members regarding the city council's adoption of an ordinance required by Government Code Section 51179.

Recently, the City received a recommended "very high fire hazard severity zone" map from the Director of Forestry and Fire Protection, issued under Government Code Section 51178. Government Code Section 51179 provides, in pertinent part, that:

"A local agency shall designate, by ordinance, very high fire hazard severity zones in its jurisdiction within 120 days of receiving recommendations from the director pursuant to subdivisions (b) and (c) of Section 51178."

Because the City must respond to this recommendation by adoption of an ordinance, only the City Council has the power to act as required by Government Code Section 51179, by designating these very high fire hazard severity zones. The residences of two councilmembers are located within the very high fire hazard severity zones indicated on the map, and the residences of two other councilmembers are situated within 500 feet of the prescribed zones. You are concerned that four of the five members of the City Council have potential conflicts of interest in any decision regarding this ordinance, which can only be adopted by a quorum of three councilmembers.

You observe that foreseeable effects on the councilmembers' economic interests in their residential real properties are difficult to quantify, but you note that Government Code Section 51183.5 requires certain disclosures to potential purchasers of real property located within these zones, and more generally that the value of properties situated within these zones may be adversely affected. It is also possible that insurance premiums for these properties might increase, but you have not investigated this possibility.

Finally, you note that the proposed zones do not encompass the entire city, but cover 25 percent of the area, so the effect of the decision on councilmembers living in or near the zones would be different from the effect on most city residents.

ANALYSIS

The Act's conflict of interest provisions are designed to ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interest 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 when it is “reasonably foreseeable” that the decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step analytical framework to determine whether a public official has a disqualifying conflict of interest in a particular governmental decision, which we apply below. (See Regulation 18700(b)(1)-(8).)

Step One: Are Members of the City Council Public Officials?

The Act’s conflict of interest provisions apply only to “public officials.” (Section 87100.) A “public official” is “every member, officer, employee, or consultant of a state or local government agency.” (Section 82048, Regulation 18701.) Members of the City Council are therefore public officials within the meaning of the Act.²

Step Two: Will the Members of the City Council be Making, Participating in Making, or Using their Positions to Influence a Governmental Decision?

A public official “makes a governmental decision” when the official, acting within the purview of his or her office or position, votes on a matter, 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. (Regulation 18702.1.)

A public official “participates in making” a governmental decision when he or she, without substantive review, negotiates, advises, or makes recommendations on a decision. (Regulation 18702.2.)³ A public official is using his or her official position to “influence a governmental decision” if he or she contacts or appears before, or otherwise attempts to influence any member, officer, employee, or consultant of the City regarding the decisions. (Regulation 18702.3.)

The members of the City Council will be called upon to designate “very high fire hazard severity zones” within the City. Therefore they will be making, participating in making, or otherwise using their official positions to influence a governmental decision.

² 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. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105.)

³ Exception: making or participating in a governmental decision does not include appearances by a public official 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 solely to the official’s wholly owned real property or business entity. (See Regulation 18702.4.)

Step Three: Identifying the Councilmembers' Economic Interests—Possible Sources of Conflicts of Interest.

A public official has a “financial interest” in a governmental decision if it is reasonably foreseeable the decision will have 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.) as follows:

- 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));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Regulation 18703.2);
- An economic interest in any source of income, including promised income that aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- 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 also known as the “personal financial effects” rule (Section 87103, Regulation 18703.5).

“Indirect investment or interest” means any investment or interest owned by a business entity in which the official owns directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103(e).)

Your question is confined to possible effects on four councilmembers' economic interests in their residential real property. Because your question concerns only economic interests in real property, and you have not provided any facts concerning other possible economic interests, our analysis is limited to the real property interests you posit.

Step Four: Are the Councilmembers' Economic Interests Directly or Indirectly Involved in the Decisions You Describe?

Real property in which a public official has an economic interest is considered directly involved in a governmental decision under any of the following circumstances:

- The property is located within 500 feet of the boundaries of the property that is the subject of the decision. (Regulation 18704.2(a)(1).)
- The decision involves a zoning or rezoning, annexation or de-annexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district, or other local governmental subdivision of the real property in which the official has an interest or a similar decision affecting the real property. (Regulation 18704.2(a)(2).)
- The decision involves the issuance, denial, or revocation of a license, permit or other land use entitlement authorizing a specific use of the real property in which the official has an interest. (Regulation 18704.2(a)(3).)
- The decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest. (Regulation 18704.2(a)(4).)
- The decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions, and real property in which the official has an interest or any part of it is located within the boundaries or the proposed boundaries of the redevelopment area. (Regulation 18704.2(a)(5).)
- The decision involves construction of or improvements to streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services. (Regulation 18704.2(a)(6).)

Real property not directly involved in a governmental decision is indirectly involved. (Regulation 18704(a).) Your account of the facts indicates that the residential real property interests of all four councilmembers are *directly* involved in the decision to designate the "very high fire hazard severity zones," since the properties either lie within the zones to be designated by the decision, or within 500 feet of them.

Step Five: Material Financial Effects.

Regulation 18705.2(a)(1) provides that *any* financial effect of a governmental decision on real property directly involved in a governmental decision is presumed to be material. Under this regulation the presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect at all on the real property. You have not suggested that there is any reason to believe that the decision would have no financial effect on the councilmembers' residential real property, or other grounds sufficient to rebut the presumption that any effects would be material. We must therefore conclude that these real property interests are directly involved in the decision to designate these very high fire hazard severity zones.

Step Six: Reasonable Foreseeability.

Whether a financial effect of a governmental decision is reasonably foreseeable at the time the decision is made depends on the facts of each particular case. The effect of a decision is "reasonably foreseeable" if it is "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.*) The Commission does not act as a finder of fact when providing advice. (*In re Oglesby, supra*, 1 FPPC Ops. 71.)

Your account of the facts seems to raise no question on the foreseeability that the decision at issue will have *some* financial effect on each of the councilmembers' real property interests, effects that are presumptively material. Our analysis therefore proceeds under the assumption that it is reasonably foreseeable that this decision will have a material financial effect on the councilmembers' real property interests.

Steps Seven and Eight: Public Generally and Legally Required Participation.

An official who might otherwise have a conflict of interest in a particular decision may still participate in that decision, under certain circumstances. The "public generally" rule may be invoked when the financial effect of a decision upon a public official's economic interests is not distinguishable from the effect of the decision on a significant segment of the public generally. (Section 87103; Regulation 18707(a).) You have not provided information sufficient for us to determine whether the "public generally" exception might apply to any of the councilmembers, and we therefore do not consider it.

An official with a conflict of interest may nonetheless participate in the decision under the "legally required participation" exception. This is an exception that applies when an agency is unable to assemble a quorum of its members without the participation of one or more officials who have a conflict of interest. Section 87101 is designed to provide a means through which a decisionmaking body can avoid paralysis when it is impossible to assemble a quorum of members who are not disqualified from taking part

in a decision by Section 87100, the Act's general rule governing conflicts of interest. Section 87101 provides 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.”

Regulation 18708 elaborates the process by which Section 87101 is given effect. In brief, when a decisionmaking body cannot muster a quorum of members free from any conflict of interest as defined by Section 87100, one or more of the disqualified officials – the number required to make up a quorum – are selected to take part in the decision. (See the *Battersby* (I-02-141), *Cronin* (A-97-579) and *Pilot* (A-97-265) advice letters.)

Section 87101 applies only when conflicts of interest render it impossible for a decisionmaking body to gather a quorum of its members, and our analysis has reached the point where it appears that the exception would apply under the circumstances you have described, where four of the five councilmembers have a presumptive conflict of interest in any decision to designate the “very high fire hazard severity zones” required by Government Code Section 51179. It seems clear that there is no alternative source of decision since only the City Council may designate the zones by the ordinance required by Government Code Section 51179.

Regulation 18708(b) prescribes particular disclosures required of the affected officials to establish entitlement to invoke the “legally required participation” exception, while subdivision (d) of the same regulation provides for a random selection of just the number of decisionmakers needed to make up a bare quorum of the decisionmaking body – in this case, two of the four councilmembers must be chosen to make up the quorum of three necessary to adopt an ordinance.

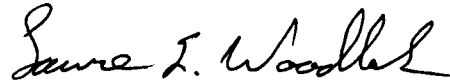
In deciding which disqualified officials are “legally required” to participate in a decision, *all* disqualified officials must participate in a random selection process, such as drawing straws. (See, e.g., *Battersby*, *supra*, and the *Heisinger* Advice Letter, No. A-95-333.) A mechanism for random selection from among all disqualified officials fosters a neutral selection process by ensuring that all officials who qualify for selection under Section 87101 have an equal opportunity to be chosen, minimizing the possibility that the decision might be manipulated through an artfully selected pool.

In summary, your account of the facts indicates entitlement to invoke the “legally required participation” exception to the Act's conflict rules, to select two of the four presumptively disqualified members to form the quorum of three necessary to vote on designating the “very high fire hazard severity zones” as required by Government Code Section 51179.

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in cursive script that reads "Lawrence T. Woodlock".

By: Lawrence T. Woodlock
Senior Counsel, Legal Division

LTW:jgl