



FAIR POLITICAL PRACTICES COMMISSION

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December 30, 2009

Heather C. Mc Laughlin
City Attorney, City of Benicia
City Hall
250 East L Street
Benicia, California 94510

Re: Your Request for Advice
Our File No. A-09-248

Dear Ms. Mc Laughlin:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ 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. Also, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTIONS

1. May city council members, who have a conflict of interest with respect to decisions involving the city's updated Housing Element, vote on the adoption of the Housing Element?
2. May planning commissioners, who have a conflict of interest with respect to decisions involving the proposed Housing Element, vote to approve and recommend to the city council adoption of the Housing Element?
3. May the city manager, who has a conflict of interest with respect to decisions involving the proposed Housing Element, participate in the preparation and drafting of the Housing Element?

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.

CONCLUSIONS

1. Yes. One council member with a disqualifying conflict of interest may, under the "legally required" exception of Regulation 18708, vote on the decisions, so long as a random means of selection is used to select that council member.
2. Yes. One planning commissioner with a disqualifying conflict of interest may, under the "legally required" exception, vote to approve and recommend the Housing Element, so long as a random means of selection is used to select that commissioner.
3. Yes. The city manager may participate in the preparation and drafting of portions of the Housing Element if governmental decisions involving parcels located within 500 feet of his real property may be segmented from other governmental decisions regarding the Housing Element and all the requirements for segmentation, described below, are followed.

FACTS

You are the City Attorney for the City of Benicia (the "City") and are requesting advice on behalf of the following individuals:

Elizabeth Patterson, Mayor
Michael Ioakimedes, Council Member
Alan Schwartzman, Council Member
Tom Campbell, Council Member
Donald Dean, Planning Commissioner
Dan Healy, Planning Commissioner
Richard Bortolazzo, Planning Commissioner
Lee Syracuse, Planning Commissioner
Rod Sherry, Planning Commissioner
James Erickson, City Manager

The City is updating the Housing Element of its General Plan (the proposed update is hereafter referred to as the "Housing Element"). A draft has been prepared and is currently under review by the California Department of Housing and Community Development ("HCD"). The Housing Element, which covers the current planning period for the years 2007-2014, is one of seven mandatory elements required by state law to be included in the City's General Plan.

The Housing Element must take into account the City's "fair share" of regional housing needs, as determined by the Association of Bay Area Governments ("ABAG"). ABAG has determined Benicia's allocation of housing units for the 2007-2014 planning period, including the number of housing units to be allocated to very low income persons and families, and families whose income is less than 50 percent of the area's median income. As required by law, the City has conducted an inventory of available sites that have the potential for development or redevelopment (collectively the "Potential Allocation Sites") to accommodate the City's fair

share of regional housing needs. The inventory identifies 153 parcels, of varying size and ownership, as Potential Allocation Sites. Once HCD approves the Housing Element, the City's planning commission must consider whether to approve the Housing Element and recommend its adoption to the city council. Government Code Section 65354 provides that in order for a planning commission to recommend adoption of a housing element, the recommendation must be approved by a majority of the members of the planning commission. The City's planning commission consists of seven members. After the Housing Element is approved by the planning commission, it is submitted to the city council for adoption as a General Plan amendment. Under Government Code Section 65356, adoption requires a majority vote of the entire city council. The city council consists of five members, including the mayor.

Mayor Patterson and council members Schwartzman, Ioakimedes and Campbell own real property located within 500 feet of one or more parcels within the Potential Allocation Sites. Council members Schwartzman, Ioakimedes and Campbell operate businesses on their properties. In addition, council member Schwartzman receives income from his wife's business located on one of his properties.²

Planning Commissioners Bortolazzo, Syracuse and Sherry own real property located within 500 feet of one or more parcels within the Potential Allocation Sites from which they derive income. Commissioner Dean owns a personal residence within 500 feet of parcels within the Potential Allocation Sites and operates a home office there. Commissioner Healy owns a personal residence located within 500 feet of a Redevelopment Site identified as the "Southampton Shopping Center." Mr. Healy's residence is separated from the Southampton Shopping Center by the I-780 freeway. To access the shopping center from Mr. Healy's property requires a circuitous route of travel. You state that, given this physical barrier, it appears unlikely that any new development on the Southampton site would affect the value of his home, not even by one penny. However, you have provided no documentation or other information supporting this conclusion.

City manager Erickson owns a personal residence within 500 feet of one of the Potential Allocation Sites.

ANALYSIS

Section 87100 of the 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 a financial interest. The FPPC has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).)

You have correctly concluded that the city council members, planning commissioners and city manager are "public officials" (Section 82048), that they will be making, participating in making or attempting to influence governmental decisions relating to the City's Housing Element (Regulations 18702.1, 18702.2 18702.3) and that each of them has one or more

² For purposes of our analysis, we assume that the income derived by city council members or planning commissioners from their properties is equal to \$500 or more on an annual basis.

economic interests that will be directly involved in the decisions. (Section 87103, Regulations 18703-18703.5, inclusive, and Regulation 18704.2.) You believe that, with the possible exception of Mr. Healy's economic interest in his residence, the applicable materiality standard is met (18700(a),) and that it is reasonably foreseeable that these decisions will have a material financial effect on these public officials' economic interests (Regulation 18706).³ Accordingly, we will begin our analysis at Step 7.

Step 7. May the disqualified city council members and planning commissioners vote to approve the Housing Element and may the city manager participate in decisions involving the Housing Element because the financial effects on their interests are not distinguishable from the effect on the public generally?

A public official who determines that his or her economic interest will experience a material financial effect as a result of a governmental decision may nevertheless participate in the decision if the financial effect on his or her interest is not distinguishable from its effect on the public generally. (Section 87103, Regulation 18707.) Under the basic rule provided in Regulation 18707.1, if a "significant segment" of the jurisdiction is affected by the governmental decision in substantially the same manner as it would affect the official's economic interests, then the official may participate in the decision. To apply the "public generally" exception, an official must meet both parts of this two-part test—the decision must affect a significant segment of the jurisdiction and the significant segment must be affected in substantially the same manner as the official's interest.

You state that it is speculative to say that the named public officials' economic interests would be affected by Housing Element decisions in "substantially the same manner" as: 10 percent or more or 5,000 individuals who are residents of the City; 10 percent or more or 5,000 property owners or residential property owners in the City; or 25 percent or more or 2,000 business entities operating within the City. Because you have concluded that the "public generally" exception does not apply under these circumstances, we will not address this issue.

Step 8. Legally Required Participation ("Rule of Necessity")

Even if a material financial effect on a public official's economic interest is reasonably foreseeable, he or she still may nevertheless participate in the decision if the official is legally required to participate (Section 87101; Regulation 18708). 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

³ If Commissioner Healy wishes to provide additional information, such as an appraisal, to show that selection of the Southampton Shopping Center for inclusion in the Housing Element would have no effect on his economic interest, our analysis and answers to your questions could be different. For example, if it is determined that the decision to include the Southampton Shopping Center would have no effect, not even a penny's worth, on his real property, he would be permitted to participate in the decision. There would be no reason to invoke the "rule of necessity," which permits a public official to participate in making a decision notwithstanding the official's conflict of interest.

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, the regulation requires participation by the smallest number of officials with a conflict that are "legally required" in order for the decision to be made; a random means of selection may be used to select only the number of officials needed, and; when the official is selected, he or she is selected for the duration of the proceedings in all related matters until his or her participation is no longer required, or the need for invoking the exception no longer exists. (Subdivision (c)(3).) Where a supermajority is required, the necessary quorum for decisionmaking is the minimum number of members needed for that adoption. (Subdivision (d).)

In addition, all disqualified members of the entity must participate in the selection process. (*Steele* Advice Letter, No. A-05-071.) Also, while the public official may participate fully in public deliberations regarding the matter, and at closed sessions required by law, he or she may not attempt to influence the outcome of the matter "behind the scenes" by engaging in private discussions with other members or staff. (*Grunwald* Advice Letter, No. A-95-184; *Romney* Advice Letter, No. A-99-263.)

You have indicated that under Government Code Section 65354, a recommendation by the planning commission for adoption of the Housing Element must be made by not less than a majority of the total membership of the commission. Because four out seven planning commissioners have a conflict of interest, Section 87101 may be invoked to permit one of these commissioners to participate in the decision to approve and recommend adoption of the Housing Element. Under Government Code Section 65356, adoption of the Housing Element must be made by not less than a majority of the total membership of the city council. Because four out of five council members have a conflict of interest, one of these council members may participate in the vote regarding adoption of the Housing Element.⁴

Segmentation

As you point out, the city manager does not vote on adoption of the Housing Element, but instead may advise the city council as to matters relating to the Housing Element. Therefore, the "legally required exception" does not apply to the city manager. However, he may be permitted to participate in the decisionmaking process leading up to adoption of the Housing Element if the decisions may be "segmented. Segmentation is generally applied to a large and complex decision which, under certain circumstances, may be divided into separate decisions, thus enabling an official who has a disqualifying conflict of interest in one component of the decision to 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.)

⁴ As you have noted, participation in a decision under the "legally required participation" rule requires that certain disclosure procedures must be followed. These are set forth in Regulation 18708(b).

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.”

Segmentation is available only if a decision can be broken down into separate decisions that are not inextricably interrelated to a decision in which the City Manager has a disqualifying conflict of interest. Under the guidelines of this regulation, a decision to include parcels within 500 feet of the city manager’s residence within the Housing element and decisions regarding other portions of the Housing Element would need to be segmented. The decision affecting the City Manager’s economic interest must be voted on before the other decisions may be voted on.

Under Regulation 18709(b), if the resolution of one decision will effectively *alter the result* of another decision, the decisions are inextricably related. (See *Thomsen* Advice Letter, No. A-09-159; *Yang* Advice Letter, No. I-06-198; *Stone* Advice Letter, No. A-06-007; *Barker* Advice Letter, No. A-05-164; *Hull* Advice Letter, No. A-04-052.) Also, in the past, the Commission has advised that if the resolution of one decision will in *any way affect* the decision from which a public official is disqualified, the decisions may not be segmented. (*Barker* Advice Letter, No. A-03-022; *McLaughlin* Advice Letter, No. A-02-132; *Ennis* Advice Letter, No. A-94-203.)

You have indicated that decisions regarding the Housing Element can be segmented so that decisions affecting only that portion of the Housing Element affecting the city manager's economic interest can be acted upon separately from all other decisions relating to the Housing Element. ABAG has allocated 532 housing units for Benicia's share of regional housing needs. The inventory has identified 153 parcels as Potential Allocation Sites. You indicate that the city manager's real property is within 500 feet of one small vacant parcel and a somewhat larger area and that these sites constitute an extremely small fraction of all sites identified in the land inventory. The selection or omission of these parcels would necessarily have some effect on decisions regarding the other parcels. For example, if the parcels near the city manager's home are included in the designation for housing units, fewer other parcels would be needed to comply with ABAG's mandate. Similarly, if the parcels near the city manager's home are excluded, the odds of the remaining parcels being included would be increased. We recognize, however, that because of the variety of the size of parcels and the as yet unknown density of potential housing units, it is impossible to ascertain how many parcels are required to meet the 532 housing unit allocation. Under these circumstances, it appears that a decision to include or exclude one or both parcels located near Mr. Erickson's home would be so insignificant, as compared with decisions to designate all other necessary parcels, that the decisions would not be inextricably intertwined. Therefore, segmentation of these decisions is appropriate.

CONCLUSION

One council member and one planning commissioner may participate in making decisions regarding the House Element so long as they follow the procedures under the "legally required participation" rule. The city manager may participate in making such decisions if these decisions can be "segmented" by breaking down the decisions into separate decisions that are not inextricably interrelated with those in which he has a conflict of interest.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jgl