



FAIR POLITICAL PRACTICES COMMISSION

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February 18, 2010

Patrick L. Enright
City Attorney
City of South Lake Tahoe
1901 Airport Road, Suite 300
South Lake Tahoe, CA 96150

Re: Your Request for Advice
Our File No. A-10-006

Dear Mr. Enright:

This letter responds to your request for reconsideration of advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act")¹ provided in our previous advice letter to former City Attorney Catherine L. DiCamillo, on the behalf of Councilmember Hal Cole, dated February 24, 2009. (*DiCamillo* Advice Letter, No. A-09-028.) 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. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

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.

QUESTION

If a governmental decision has a reasonably foreseeable material financial effect on Councilmember Cole's economic interests, does the "public generally" exception allow him to, nevertheless, make, participate in making, or influence government decisions regarding the redevelopment of the South Lake Tahoe Redevelopment Area #2 ("Project Area #2")?

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.

CONCLUSION

The public generally exception does not appear to apply to Councilmember Cole's circumstances. Accordingly, Councilmember Cole may not make, participate in making, or influence governmental decisions regarding Project Area #2.

FACTS

For the purposes of this letter, the facts presented have been described in our previous advice letter dated February 24, 2009. (*DiCamillo* Advice Letter, *supra*.) The only fact relevant to this analysis, not previously presented, is that Councilmember Cole's three rental properties, within 500 feet of Project Area #2, consist of five total units including two duplexes and a single family residence.

ANALYSIS

As fully analyzed in our previous letter dated February 24, 2009 (*DiCamillo* Advice Letter, *supra*), we assume for purposes of this analysis that Councilmember Cole has a disqualifying conflict of interest and may not make, participate in making, or influence any government decision regarding Project Area #2 because the decision would have a reasonably foreseeable financial effect on his economic interests in the properties located within 500 feet of the project area. Therefore, we address only the question of whether the "public generally" exception to the Act's conflict-of-interests provisions permit Councilmember Cole to take part in a decision regarding Project Area #2 despite the financial effect on his economic interests in his real properties.²

The "Public Generally" Exception

Even if a public official determines that his or her economic interests will experience a material financial effect as a result of the governmental decision before the official, he or she may still participate under the "public generally" exception if the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.)

² We emphasize that we have limited our analysis of the public generally exception to its application to Councilmember Cole's economic interests in his real properties. Notwithstanding our analysis of Councilmember Cole's economic interests in his real properties, Councilmember Cole is also disqualified from making, participating in making, or influencing any decision regarding Project Area #2 if the decision will have a reasonably foreseeable material financial effect on any other economic interests he may have including, but not limited, his economic interests in his rental business, tenants of the rental business, or his personal finances. However, in light of our conclusion that the public generally exception does not apply to the Councilmember Cole's economic interests in his real properties and that his interests in properties within 500 feet of Project Area #2 disqualify him from taking part in any decision regarding the project, we find it unnecessary to further consider the councilmember's other economic interests or whether the public generally exception applies to these interests.

Regulation 18707 (b) sets forth a four-step process to determine “if the effect of a decision is not distinguishable from the effect on the public generally:”

“(1) Step One: Identify each specific person or real property (economic interest) that is materially affected by the governmental decision.

“(2) Step Two: For each person or real property identified in Step One, determine the applicable ‘significant segment’ rule according to the provisions of [Regulation 18707.1(b)].

“(3) Step Three: Determine if the significant segment is affected by the governmental decision as set forth in the applicable ‘significant segment’ rule. If the answer is ‘no,’ then the analysis ends because the first prong of a two-part test set forth in [Regulation 18707.1(b)] is not met, and the public official cannot participate in the governmental decision. If the answer is ‘yes,’ proceed to Step Four.

“(4) Step Four: Following the provisions of [Regulation 18707.1(b)(2)], determine if the person or real property identified in Step One is affected by the governmental decision in ‘substantially the same manner’ as other persons or real property in the applicable significant segment. If the answer is ‘yes’ as to each person or real property identified in Step One, then the effect of the decision is not distinguishable from the effect on the public generally and the public official may participate in the decision. If the answer is ‘no’ as to any person or real property identified in Step One, the public official may not participate in the governmental decision unless one of the special rules set forth in [Regulations 18707.2 through 18707.9] applies to each person or real property triggering the conflict of interest.” (Regulation 18707(b)(1)-(4).)

Step One: Councilmember Cole’s potential conflict of interest was addressed in our previous advice letter dated February 24, 2009. (*DiCamillo Advice Letter, supra.*) For purposes of this letter, we must assume that Councilmember Cole has a disqualifying conflict of interest and may not make, participate in making, or influence any government decision regarding Project Area #2 because the decision would have a reasonably foreseeable financial effect on his economic interests in the properties located within 500 feet of the project area.

Step Two: The applicable “significant segment” for decisions that affect an interest in real property, under Regulation 18707.1(b)(1)(B)(i), is “[t]en percent or more of all property owners or all residential property owners in the jurisdiction of the official’s agency or the district the official represents” or “5,000 property owners or residential property owners in the jurisdiction of the official’s agency.”

Step Three: Under the facts you have provided, 1,667 of the 12,088 residential properties³ in the city, or 13.7 percent, are located within Project Area #2. In addition, 2,311 of the 12,088 residential properties in the city, or 19.1 percent, are located within 500 feet of the boundaries of Project Area #2. Moreover, while an official must indentify a significant segment consisting of ten percent or more residential property owners or 5,000 residential property owners, Regulation 18707.1(b)(1)(B)(iii) permits an official “to count each residential property affected as being owned by one property owner if, and only if, the official counts himself or herself as the sole owner of the public official’s residential property regardless of his or her actual ownership interest.”

Based upon the number of residential properties you have identified that are in or within 500 feet of Project Area #2, it appears that decisions regarding the project area will affect the minimum threshold of ten percent of the property owners as provided in Regulation 18707.1(b)(1)(B)(i), so long as Councilmember Cole chooses to count each residential property affected as being owned by one property owner as specified in Regulation(b)(1)(B)(iii).⁴

Step Four: The final step requires Councilmember Cole to determine the financial effect on his respective economic interests and measure this effect against the financial effect on the public generally. What becomes critical for Councilmember Cole is the identification that the minimum threshold of the significant segment identified is affected in “substantially the same manner.”

Many factors play a role in determining whether or not an economic interest in real property will be financially affected in a manner substantially the same as the significant segment identified including, but not limited to: the proximity of the property to a specific project or property subject to the government decision; the location of the property; the impact on the property from noise or traffic; the impact on the property due to development potential; and the size of a property. (See Regulation 18707.1(b)(2)(A); also see *Berger Advice Letter*, No. A-05-054.)

Turning to the facts you have provided, Councilmember Cole is the owner of eleven parcels of real property within the City of South Lake Tahoe including three residential rental properties, consisting of 5 units, within 500 feet of Project Area #2. As we determined in our previous letter dated February 24, 2009, (*DiCamillo Advice Letter, supra*), even if the decisions regarding Project Area #2 will affect the significant segment

³ “Residential property” includes “any real property that contains a single family home, or a multi-family structure of four units or fewer, on a single lot, or a condominium unit. (Regulation 18707.1(b)(1)(B)(iv).)

⁴ While the “significant segment” is not limited to properties in or within 500 feet of the project area, under the facts you have provided, the “significant segment” would certainly include these properties.

you have identified, it is unlikely that Councilmember Cole's economic interests in real properties will be affected in "substantially the same manner" as the significant segment.⁵

Even setting aside a potential financial effect on Councilmember Cole's properties 500 feet or more from Project Area #2, the fact that Councilmember Cole owns three properties, consisting of five rental units, within 500 feet of the project indicates that the financial effect of a decision regarding the project will be substantially magnified as compared to the financial effect on property owners with only one property. For this reason, it does not appear that the public generally exception applies to Councilmember Cole's circumstances even barring potential financial effects on Councilmember Cole's other economic interests.⁶

Notwithstanding our conclusion regarding the application of the public generally exception of Regulation 18707.1 to Councilmember Cole's particular circumstances, your request for advice has pointed to the specialized public generally exception of Regulation 18707.9, which provides the following in subdivision (b)(5):

"A public official will be affected in substantially the same manner for purposes of this subdivision if the decision will be applied on a proportional or 'across-the-board' basis on the official's economic interests as on other residential property owners or other owners of residential rental property affected by the decision."

However, Regulation 18707.9(b)(5) applies only "for purposes of" Regulation 18707.9(b), and Regulation 18707(b)(3) expressly states that Regulation 18707.9(b) only applies to economic interests that "are not directly involved in the decision (as provided in [Regulations] 18704.1, 18704.2(a), and 18705.1)." Additionally, as more fully explained in the *Givner* Advice Letter, No. A-09-152, Regulation 18707.9, including subdivision (b), only applies to an official's economic interests in residential rental properties if the official owns three or fewer residential property units. Accordingly, the specialized public generally rule in Regulation 18707.9, including subdivision (b), does not apply to Councilmember Cole's circumstances.

⁵ For example, in the *Shirey* Advice Letter, No. A-06-132, we stated that "given the fact that there are two properties owned by the Commissioner, it is unlikely that the dollar value impact on these two properties will be substantially the same as on property owners' homes where they only own one home."

⁶ Regulation 18707.9 was adopted to codify the Commission's opinions *In re Ferraro*, 4 FPPC Ops. 62 (1978), and *In re Overstreet*, 6 FPPC Ops. 12 (1981), which provide that owners of three or fewer residential rental units would be treated the same as other residential rental property owners in determining whether a significant segment of rental property owners were affected in substantially the same manner.

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, appearing to be 'B. Lau', written over a horizontal line.

By: Brian G. Lau
Counsel, Legal Division