



FAIR POLITICAL PRACTICES COMMISSION

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September 28, 2011

Lona N. Laymon
Assistant City Attorney
City of Banning
Aleshire & Wynder, LLP
1881 Von Karman Ave. Suite 400
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Re: Your Request for Advice
Our File No. A-11-132

Dear Ms. Laymon:

This letter is in response to your request for advice on behalf of the City of Banning regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ 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.) 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.

FACTS

Barbara Hanna, the mayor of the city of Banning, owns a residence located within 500 feet of a development project proposed by Pardee Homes. The project will be a major new community in Banning on 1,543 acres of land located east of Highland Springs Road and north of Wilson Avenue. The Project will include 5,387 dwelling units, a 253-acre golf course, between 36 and 88 acres of commercial development, 66 acres of park land, two elementary schools and a fire station. By adding 5,387 homes, it is estimated that the Project may add approximately 8,000 to 15,000 residents to the city over the course of the next 30 years. The construction rate will be phased, with about 150 homes per year.

The project will consist of five "phases," with each phase representing a distinct geographic location and timeframe during which the land will be developed. Each phase will have its own set of planning decisions. Some planning decisions will be wholly unique to each phase. For example, each phase will have its own design review for architecture and

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.

improvements. The design review for one phase will probably have no impact on the design, traffic circulation or infrastructure for other phases. However, each phase may include planning decisions that *will* have an overall impact on the entire project or phases other than the phase near Mayor Hanna's home. You cite the example of density bonuses.² A decision regarding density bonuses in one phase is likely to affect traffic circulation and infrastructure in other phases.

In the next year or two, the city will primarily be making entire-project decisions rather than single-phase decisions. These decisions will include approval of two specific plans, an environmental impact report, a circulation plan and a water analysis.

Mayor Hanna's residence is located within 500 feet of Phase II. This is the only phase involving real property within 500 feet of Mayor Hanna's real property. In fact, some of the other phases are located quite far from her property.

QUESTIONS AND ANALYSIS

Question 1: Does the "public generally" exception to the Act's conflict-of-interest rules apply to decisions regarding the entire development project if Mayor Hanna owns real property located within 500 feet of one phase of the multi-phased project?

Without additional facts regarding the value of the property and actual financial impact resulting from decisions involving the property, we are unable to apply the public generally exception.

Under Section 87103 and Regulation 18707, 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 indistinguishable from its effect on the public generally. 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, the official may participate in the decision.

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).

² Density bonuses are granted for projects in which a developer agrees to include a certain number of affordable housing units in exchange for permission to build a greater number of market-rate units than would be allowed otherwise.

(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).)

Regulation 18707.9 provides that the effect of a governmental decision on a public official's real property interest is indistinguishable from the effect on the public generally if 5,000, or 10% or more, of all property owners or homeowners in the jurisdiction are affected by the decision "in substantially the same manner" as it will affect the public official.

Regulation 18707.1 requires an official to look at the property owners or homeowners in the city to determine if 10% of them are being affected by the decision in question. For purposes of the public generally exception, financial effects are measured in terms of actual economic impact. Thus, an evaluation of economic impact upon property owners or homeowners is required to determine the applicability of the public generally exception. As previously noted, we have advised that the Commission is not a finder of fact. An official must make a good faith effort to assess the effect of a decision by using some reasonable and objective method of evaluation. Without facts regarding the value of the property and actual economic impact resulting from decisions involving the property, we are unable to apply the public generally exception.

In addition, you have provided the number of property owners and homeowners that own property within 500 feet of the project and concluded that the numbers are insufficient to qualify for the exception. We note, however, that it is possible that owners with property within 500 feet of the project may not be the applicable segment. For example, it is possible that the value of real property located as far as one mile from the project would be affected in substantially the same manner as Mayor Hanna's property. Without an evaluation of financial impacts, this determination cannot be made.

Question 2: Does the Act's "segmentation" exception apply to decisions regarding phases of the project that are not located near Mayor Hanna's property once all decisions regarding the phase within 500 feet of her property have been completed?

No. The single-phase decisions you have described appear to be separate and discreet. The segmentation exception applies only where there is one decision that is large and complex. Decisions that are separate and discreet may be analyzed separately under the Act's conflict-of-interest rules and segmentation may not be necessary.

Question 3: Assuming Mayor Hanna has a conflict of interest in a city council decision, may she nevertheless appear before the city council or otherwise attempt to influence the decision as a "member of the general public"?

Yes. Regulation 18702.4 states that even if a conflict of interest exists, a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her "personal interests." Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. (Regulations 18702.4(a)(2) and 18702.4(b)(1).) You have correctly described in your memorandum the proper procedures for invoking the "member of the general public" exception.

Question 4: May Mayor Hanna, under the "member of the general public" exception, address the city council on decisions regarding the entire project's effects on downtown traffic, local schools, projected water demand, the city's ability to meet such demand or the city's water conservation efforts?

No. These decisions will affect the city as a whole, and it does not appear that Mayor Hanna will be able to separate effects on the city from the effects on her property. Accordingly, she is prohibited from addressing these issues as a member of the general public.

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jgl