



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

September 11, 2014

Rahsaan J. Tilford
Assistant City Attorney
City of Oxnard
Office of the City Attorney
300 West Third Street, Suite 300
Oxnard, California 93030

Re: Your Request for Advice
Our File No. A-14-140

Dear Mr. Tilford:

This letter responds to your request for advice on behalf of Councilmember Ben E. Perello regarding his duties under the conflict of interest provisions of the Political Reform Act (the "Act")¹ and Section 1090. Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act or Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are accurate. If this is not the case, then our advice could be different.

In regards to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Santa Barbara County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that the following advice is not admissible in a criminal proceeding brought under Section 1090 against any individual other than the requestor. (Section 1097.1(c)(5).)

QUESTIONS

1a. Does Councilmember Perello have a disqualifying conflict of interest under the Act that precludes his participation in City decisions involving funding and design for portions of the Santa Clara River Levee System that will protect the City of Oxnard?

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.

b. If he has a conflict of interest, may Councilmember Perello discuss, during public meetings, the need to fund Levee System improvements in the context of City budget discussions or encourage members of the public to participate in City and County meetings involving Levee System improvements?

c. If he has a conflict of interest, may Councilmember Perello attend meetings of the Ventura County Watershed Protection District related to funding and design for portions of the Santa Clara River Levee System and provide public comment as a member of the public?

2. Does Government Code Section 1090 prohibit the City from entering into the agreement with the Ventura County Watershed Protection District to fund improvements to the Santa Clara River Levee System?

CONCLUSIONS

1a. No. Based on the exception in Regulation 18705.2(c)(1), Councilmember Perello does not have a conflict of interest.

b. and c. Because the Councilmember does not have a conflict of interest, we need not respond to these questions.

2. No. The Councilmember does not have a financial interest in the contract at issue under these facts.

FACTS

The City of Oxnard is a general law City of approximately 200,000 people located within Ventura County. The Santa Clara River forms the northern boundary of the City. The City is governed by a five member City Council that consists of an elected Mayor holding a two-year term and four council members elected at large for four-year overlapping terms.

The Ventura County Watershed Protection District (the "District") was formed on September 12, 1944, when the California State Legislature approved the Ventura County Flood Control Act.² The District was formed, in part, to provide for the control and conservation of flood and storm waters and for the protection of watercourses, watersheds, public highways, life and property in the District from damage or destruction from these waters. The District is responsible for building and maintaining the Levee System along the Santa Clara River.

The District, in consultation with the City, is evaluating design alternatives for improvements to a portion of the Santa Clara River Levee System located downstream of the

² Our understanding is that the Board of Supervisors of the County of Ventura also sit as the Governing Board of the Ventura County Watershed Protection District.

U.S. Highway 101 Bridge (SCR-3).³ SCR-3 is composed of four segments (Reaches). Reach 4 is located closest to the U.S. Highway 101 Bridge and has a 2,500 foot long gap in flood protection. The remaining three downstream reaches (Reaches 1 - 3) were built by different agencies over the years, with different sections completed at different times for different purposes. Currently, SCR-3 has neither a unifying design nor a specific design capacity to protect certain properties within the City during high flow events. In its current configuration, SCR-3 does not meet the federally mandated levee certification regulations.

The District has three design alternatives for Reaches 1 - 3 and four design alternatives for Reach 4. Because any improvement to SCR-3 will ultimately affect City residents, the District has requested that the City assist in funding SCR-3 improvements, and make a recommendation on appropriate design alternatives for Reaches 1 - 4. The City anticipates that any City funding would be memorialized in an agreement between the District and the City.

The purpose of future improvements to SCR-3 is to rehabilitate the Levee System to provide adequate protection from a 1% annual-chance (formerly known as 100-year) flood event for properties within the northern part of the City. Currently, the District is in the process of obtaining certification for SCR-3 with the ultimate goal of obtaining accreditation from the Federal Emergency Management Agency (FEMA).

Certification is usually in the form of a statement from a licensed professional engineer or Federal agency responsible for levee system design showing that the system meets current design, construction, maintenance, and operation criteria to provide protection from the 1% annual-chance flood. If the District, through certification, can show that SCR-3 satisfies the regulatory design, maintenance, and operation criteria, FEMA will "accredit" SCR-3 as providing adequate risk reduction from a 1% annual-chance flood event. Accreditation or the District's failure to obtain accreditation will impact many property owners within the northern part of the City that own residential and commercial structures. Property owners that are impacted by SCR-3 are currently located within FEMA Flood Zone X according to a revised Flood Insurance Rate Map (FIRM) that FEMA issued on January 21, 2010.

FEMA assigns the Flood Zone X designation to certain areas on a FIRM that are of moderate risk. A Flood Zone X designation includes areas subject to inundation by a 0.2% annual-chance flood event. Property owners located within Flood Zone X with federally backed, regulated or insured mortgages are not required to obtain flood insurance pursuant to the National Flood Insurance Program (NFIP).

In contrast, property owners with federally backed, regulated or insured mortgages are required to obtain flood insurance if they are located within Flood Zone A. FEMA assigns this designation to certain areas on a FIRM that present a high risk. Under federal regulations, mandatory flood insurance requirements are triggered if subject properties are shown on a FIRM

³ The District is also in the process of evaluating design alternatives for improvements to portions of the Santa Clara River Levee System located upstream of the U.S. Highway 101 Bridge. This portion is referred to as SCR-1. You stated that Councilmember Perello's properties are not affected by levee improvements to SCR-1.

within one of the Special Flood Zone Hazard Designations, which includes Zone A. A Flood Zone A designation includes areas subject to inundation by a 1% annual-chance flood event.

If the District is unable to obtain certification and accreditation for SCR-3 improvements prior to FEMA's issuance of new FIRMs for the Santa Clara River Levee System, the District has indicated that it is highly likely that FEMA will re-designate those areas of the City that have a Flood Zone X designation and are affected by the SCR-3 improvements to a Flood Zone A designation.⁴ Under Federal law, this sort of re-designation results in the requirement that property owners within the newly designated zone with federally backed, regulated or insured mortgages obtain flood insurance.

Councilmember Perello owns two residential properties in the northern part of the City that are located squarely within FEMA Flood Zone X. Neither property is encumbered by a mortgage nor located less than 500 feet from the proposed SCR-3 improvements.

Councilmember Perello's properties are not affected by levee improvements to Reaches 1 and 2 because those portions of SCR-3 protect a different portion of the City. However, Councilmember Perello's properties are directly affected by levee improvements to Reaches 3 and 4 based on modeling of a 1% annual-chance flood event. Any of the proposed design alternatives to Reaches 3 and 4 will likely result in certification and FEMA accreditation of the SCR-3 improvements. These improvements to Reaches 3 and 4 will not result in a new level protection, but will maintain the status quo which will eliminate the possibility of imposition of the NFIP requirement that property owners in those areas obtain flood insurance.

You state that the imposition of, or exemption from, the mandatory NEIP flood insurance requirement may cause downward or upward pressure on property values within the impacted zone. Flood insurance premiums, or the lack thereof, affect the cost of ownership, which has a direct correlation to the purchase price of homes within the impacted zone. In any event, you also state that City decisions involving funding and design alternatives for SCR-3 will impact property owners within the existing FEMA Flood Zone X, including Councilmember Perello's property.

The City has also determined the following:

- The total Number of Residential Parcels within the City of Oxnard is 36,039, with 2,530 within portion of Flood Zone X affected by SCR-3 improvements (approximately 7% of the residential parcels Citywide).
- The total Number of Residential Property Owners within the City of Oxnard is 37,784.
- The total Number of Non-Residential Parcels within the City of Oxnard is 4,300.

⁴ While the District anticipates the eventual re-designation of areas of the City affected by the SCR-3 improvements, the District believes it can obtain a revision of the FIRM once it obtains certification and accreditation of the SCR-3 improvements to eliminate the mandatory NFIP insurance requirement.

- The total Number of Non-Residential Property Owners within the City of Oxnard is 4,545.

ANALYSIS

Section 87100

The Councilmember does not have a conflict of interest with respect to the decision.

Section 87100 prohibits any public official from making, participating in making, or 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 standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Your letter eliminates the need to analyze the initial steps of the standard analysis. The councilmember is a public official and you are asking whether he may make or participate in making the City decisions involving funding and design for portions of the Santa Clara River Levee System in light of the fact that he owns two properties in the area that will be protected by the proposed levee system.

Regulation 18705.2 provides in pertinent part that the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has an interest is material whenever the governmental decision:

“Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to or received by other similarly situated properties in the official’s jurisdiction or where the official will otherwise receive a disproportionate benefit or detriment by the decision.” (Regulation 18705.2(a)(6).)

However, since it appears from your facts that the councilmember will not receive new or improved services that are distinguishable from improvements and services that are provided to or received by other similarly situated properties in the official’s jurisdiction, this materiality standard does not trigger a conflict of interest.

The last applicable standard is essentially a reasonable person standard, which provides that the decision will present a conflict of interest if it:

“Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would

influence the market value of the official's property." (Regulation 18705.2(a)(12).)

The City has stated that it believes the improvements to Reaches 3 and 4 will eliminate the possibility of imposition of the NFIP requirement that property owners in those areas obtain flood insurance. The City also stated that it believes the imposition of, or exemption from, the mandatory flood insurance requirement may cause downward or upward pressure on property values within the impacted zone and that flood insurance premiums, or the lack thereof, affect the cost of ownership, which has a direct correlation to the purchase price of homes within the impacted zone. Therefore, it appears that a reasonably prudent person, using due care and consideration under the circumstances, would believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the councilmember's property because a decision to not move forward with the improvements would likely result in the imposition of the NFIP requirement that property owners in the area obtain flood insurance. (Regulation 18705.2(a)(12).)

However, Regulation 18705.2(c)(1) provides an exception to the materiality rules where a decision solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities. While this new language, effective this year, differs somewhat from the prior language, the substance of the exception remains the same. In prior letters we applied the former exception to flood control projects under certain circumstances.

For example, in the *Stepanicich* Advice Letter, No. A-14-053, we found that the San Francisquito Creek Joint Powers Authority, which was formed to provide a coordinated, effective multi-jurisdictional approach to facilitate and perform levee bank stabilization channel clearing, plan flood control measures, and make recommendations to Member Entities for funding and alternatives for long-term flood control for member entity consideration met the requirements for the exception.

And in the *Murphy* Advice Letter, No. A-07-134, we found that a City Council's decisions to finance engineering studies or to hire consulting firms to review facility and environmental concerns for approximately 45 miles of levees protecting the City were decisions solely concerning the repair or maintenance of the levee system.⁵

An important element here is that, under your facts, the project is not intended to create a new level of protection, but rather intended to *maintain* the status quo. You stated: "If the District is unable to obtain certification and accreditation for SCR-3 improvements ... the District has indicated that it is highly likely that FEMA will *re-designate those areas of the City that have a Flood Zone X designation and are affected by the SCR-3 improvements to a Flood Zone A designation.*" This supports the conclusion that the project solely concerns repairs, replacement, or maintenance of existing facilities. Therefore, the exception to the conflict of interest rules for

⁵ The *Murphy* letter also provided a caveat that a proposed flood solution or facility providing protection for an official's property interest that is beyond the level of protection provided for the remainder of the City would not fall within the exception. This is not the case under your facts.

repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities applies and the councilmember does not have a conflict of interest.⁶

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.)

Is the City Councilmember subject to Section 1090 and will he make and participate in the making of a contract?

Section 1090 provides, in part: “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by anybody or board of which they are members.” City councils and their members are plainly covered by this prohibition. (See, e.g., *Thomson v. Call, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

The councilmember wishes to make and participate in decisions pertaining to the funding and design of portions of the Santa Clara River Levee System, which will be effectuated by an agreement between the District and the City. Thus, the decisions in question involve a contract.

Does the councilmember have a financial interest in the contract?

Although Section 1090 nowhere specifically defines the term “financial interest,” case law and Attorney General Opinions provide a definition that has been applied by various courts:

“The phrase ‘financially interested’ as used in Government Code section 1090 means any financial interest which might interfere with a city officer’s unqualified devotion to his public duty. The interest may be direct or indirect. It includes any monetary or proprietary benefit, or gain of any sort, or the contingent possibility of monetary or proprietary benefits. The interest is direct when the city officer, in his official capacity, does business with himself in his private capacity. The interest is indirect when the city officer, or the board of which he is a member, enters into a contract in his or its official capacity with an individual or business firm, which individual or business firm, by reason of the city officer’s relationship to the individual or business firm at the time the contract is entered into, is in a position to render actual or potential pecuniary benefits directly or

⁶ Because the materiality exception applies, we do not address Question h and Question c.

indirectly to the city officer based on the contract the individual or business firm has received.” (*People v. Watson*, 15 Cal.App.3d 28, 37-38 (1971).)

This definition has been applied by the courts in a variety of contexts. (See *People v. Gnass*, 101 Cal.App.4th 1271, 1299, fn. 9 (2002); *People v. Honig, supra*, 48 Cal.App.4th at pp. 322-323, 332; *People v. Vallergera*, 67 Cal.App.3d 847, 867 (1977); *People v. Darby*, 114 Cal.App.2d 412, 433-436 (1952).) (See also, 2006 Cal. AG LEXIS 47; 89 Ops. Cal. Atty. Gen. 258 (November 22, 2006).)

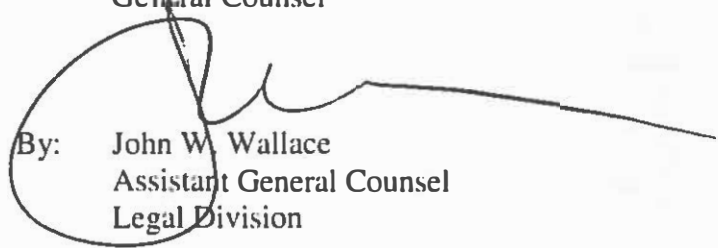
Under this formulation of “financial interest,” it would be a clear Section 1090 conflict of interest if the councilmember had a financial relationship with or interest in a potential contractor to provide services under the agreement, or even having a financial relationship with the District itself.

However, under these facts, the official does not have a financial interest in the City’s contract as contemplated by Section 1090 simply due to the fact that his property, in addition to numerous other properties in the City owned by a large and diverse portion of the public that the official serves, will peripherally benefit from the contract. Thus, we conclude that Section 1090 does not apply in this context.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By:  John W. Wallace
Assistant General Counsel
Legal Division

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