



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 28, 2015

William T. Peake
40 Quarterdeck Way
Pacific Grove, CA 93950

Re: Your Request for Advice
Our File No. A-15-227

Dear Mr. Peake:

This letter responds to your request for advice regarding your duties as a Pacific Grove City Councilmember under the conflict of interest provisions of the Political Reform Act (the "Act").¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

As a Councilmember, may you make, participate in making, or influence decisions regarding the update to the Implementation Plan for the City's Local Coastal Program, despite owning two real property parcels located outside of the Coastal Zone but within 500 feet of the City's Coastal Zone boundary?

CONCLUSION

Based on your facts, you may participate in the City's Local Coastal Program Implementation Plan so long as components of the plan for which you have a conflict of interest can be segmented as discussed below.

FACTS

The City of Pacific Grove is a charter city and is in the process of updating its Local Coastal Program ("LCP"). You stated that LCPs are basic planning tools used by local governments to guide development in the coastal zone, in partnership with the California Coastal Commission (the "CCC"). An LCP consists of a local government's land use plans, zoning ordinance, zoning district maps and other ordinances, which when taken together, meet the requirements of, and implement

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.

the provisions and policies of the California Coastal Act at the local level and governs parks, open space, and development in the City's Coastal Zone. The City is 2,561 acres. The Coastal Zone is 17.9% of the City area. Including all City areas within 500 feet of the Coastal Zone boundary, the total significant area is approximately 30% of the City. The City's 458-acre Coastal Zone extends along the coast from the City of Monterey to Pebble Beach and encompasses a diversity of natural and built resources including many sandy beaches, a recreation trail, archeological sites, a golf course, the Asilomar Dunes area, endangered and special status species, many historic resources including the oldest continuously operating lighthouse on the west coast, and the Retreat area.

The certification of an LCP will allow the City to govern decisions that determine the short- and long-term conservation and use of coastal resources. Property owners and residents will no longer be subject to a separate CCC permit process and will no longer need to travel out of the area to meet with CCC staff or attend CCC hearings, unless a permit is appealed. The CCC retains permanent coastal permit jurisdiction over development proposed on tidelands, submerged lands, and public trust lands; the CCC also acts on appeals from certain local government coastal permit decisions. The California Coastal Act provides for CCC review of the LCP at least every five years, and, in addition, the City may prepare and submit LCP amendments for the CCC's review on a periodic basis. Amendments must be "certified" before becoming effective.

The LCP is divided into two major parts: the Land Use Plan and the Implementation Plan.

1. The Public Resources Code defines the Land Use Plan (the "LUP") as the ". . . relevant portions of a local government's general plan, or local coastal element which are sufficiently detailed to indicate the kinds, location, and intensity of land uses, the applicable resource protection and development policies, and, where necessary, a listing of implementing actions."

The LUP is further divided into four major sections, each of which focuses on a major group of Coastal Act Policies: Resource Management, Land Use and Development, Public Facilities, and, Public Shoreline Access. Each section includes background information, a summary of applicable Coastal Act policies, a discussion of existing local policies and LUP policies.

2. The Implementation Plan (the "IP") includes zoning and ordinance revisions and proposes other programs needed to carry out the LUP's goals, policies, and land use designations.

Although the City has a certified LUP, the second component of the LCP, the IP, was never certified and thus the LCP process is incomplete. The City has been operating with one half of the required LCP for almost 25 years.

Your Interests: You own two residential properties within 500 feet of the City's Coastal Zone boundary. Both properties are valued at more than \$2,000. One property is residential rental property situated outside of the Coastal Zone but within 211 feet of the Coastal Zone boundary. Your primary residence is outside of the Coastal Zone but within 438 feet of the Coastal Zone boundary. As a result of the update to the LCP, the properties you own will not receive new or improved services distinguishable from improvements and services provided to or received by other similarly situated properties in the City. During a telephone call on December 14, 2015, however,

you stated that a specific rezoning decision within the IP will be within 500 feet of your rental property.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. A conflict of interest may arise only when it is reasonably foreseeable that the decision will have a material financial effect on the official or his or her immediate family that is distinguishable from its effect on the public generally. (Section 87103.)

Foreseeability: For a financial interest that is not explicitly involved in a decision (such as your properties), Regulation 18701(b) states:

“A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

Materiality: Regulation 18702.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on real property in which an official has a financial interest is material. As relevant to your facts, the financial effect will be material if the decisions:

“(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official’s real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

“(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official’s real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18702.1. Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official’s property; or

“(12) 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.”

Because the IP includes various specific decisions on zoning and ordinance revisions and other programs needed to carry out the goals, policies, and land use designations of the LUP, we have broken up our analysis into three general categories. Note that conflicts must be analyzed on a decision-by-decision basis so you may want to seek additional advice when new facts arise.

1. Decisions uniquely affecting coastal areas near your real property.

Decisions that uniquely affect coastal areas near your properties will have a material financial effect on your properties, absent a showing that there will be no reasonably foreseeable measurable impact on the property. For example, on December 14, 2015 we discussed a specific rezoning proposal included as part of the IP that was within 500 feet of your rental property. You would have a conflict of interest with respect to that specific decision. Moreover, because this decision is part of the IP, you would not be able to participate in the IP decisions as a whole unless the decisions for which you have a conflict of interest can be segmented.

The segmentation rule in Regulation 18706 recognizes that even related decisions can be analyzed separately under limited circumstances such that where an official has a conflict of interest with one of the related decisions, he or she may still participate in other decisions so long as they are not inextricably interrelated. 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.

Regulation 18706 provides the method for segmentation of a governmental decision:

“(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.

Thus, so long as you comply with Regulation 18706 in connection with decisions uniquely affecting coastal areas near your real property, you may participate in other decisions so long as the decisions (1) will not result in a reopening of, or otherwise financially affect, the initial decision for which

you had the conflict of interest, and (2) you do not have an independent financial interest in these other decisions.

2. Decisions affecting specific coastal areas remote from your property.

Other parts of the IP may uniquely affect coastal areas distant from your properties. Generally, you will not have a conflict of interest in these decisions unless there are special circumstances. For example, a very large project even farther than 500 feet from an official's real property could still have a material financial effect on the official's real property. This of course will depend on the specific facts of the decision and you should seek advice if you believe a significant decision within the IP may affect your property despite being beyond 500 feet.

3. Decisions uniformly affecting the entire coastal area, including area near your real property.

Under Regulation 18703, a governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on the official's financial interest is not unique compared to the effect on the significant segment. A "significant segment," as defined as:

"(b) A significant segment of the public is at least 25 percent of:

"(1) All businesses or non-profit entities within the official's jurisdiction;

"(2) All real property, commercial real property, or residential real property within the official's jurisdiction; or

"(3) All individuals within the official's jurisdiction."

Initially, we note that your properties are not in the coastal zone but will be impacted indirectly by being in proximity to the zone. This suggests that the effects on your property would be similarly shared by other properties near the coastal zone. You stated that the City is 2,561 acres. The Coastal Zone is 17.9% of the City area and when you include the City area within 500 feet of the Coastal Zone boundary (similar to your properties), the total area is approximately 30% of the City. Since more 30% of all the City's property is within or in 500 feet of the coastal zone, this exception would apply to general decisions that apply to the coastal zone as a whole.

Note that the exception will not apply if there is a "unique effect" on your property. (Regulation 18703(c).) A "unique effect" includes a disproportionate effect on:

"(1) The development potential or use of the official's real property or on the income producing potential of the official's real property or business entity.

"(2) An official's business entity or real property resulting from the proximity of a project that is the subject of a decision.

“(3) An official’s interests in business entities or real properties resulting from the cumulative effect of the official’s multiple interests in similar entities or properties that is substantially greater than the effect on a single interest.

“(4) An official’s interest in a business entity or real property resulting from the official’s substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage.

“(5) A person’s income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official.

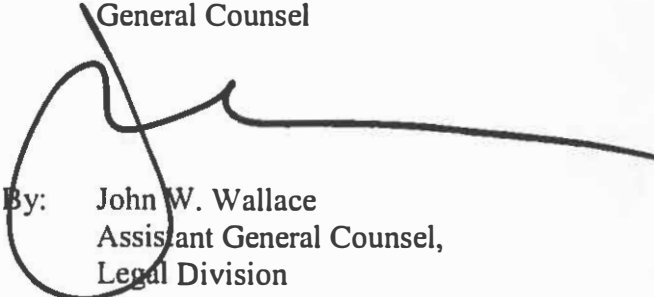
“(6) An official’s personal finances or those of his or her immediate family.”

The only definition that could apply to you is Regulation 18703(c)(3) because you own two residences near the coastal zone. Ownership of two residential properties, however, would not constitute “multiple interests in ... properties that is *substantially greater* than the effect on a single interest.” Consequently, the public generally exception could apply and you would not have a conflict of interest.

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

Sincerely,

Hyla P. Wagner
General Counsel

By:  John W. Wallace
Assistant General Counsel,
Legal Division

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