



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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September 5, 2017

Robert L. Patterson  
SBEMP LLP  
1800 E. Tahquitz Canyon Way  
Palm Springs, CA 92262

Re: Your Request for Advice  
Our File No. A-17-123

Dear Mr. Patterson:

This letter responds to your request for advice regarding the Conflict of Interest provisions of the Political Reform Act (the "Act")<sup>1</sup> and Section 1090. Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

In regard 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 Riverside 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, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

### QUESTION

Does the Act or Section 1090 prohibit a City Councilmember, who lives within a City Improvement Area or a City Sub-Improvement Area and is subject to a Special Tax, from taking part in decisions regarding the refinancing of bonds that will result in a refund of a portion of the special taxes paid by everyone located within those areas?

### CONCLUSION

Neither the Act nor Section 1090 prohibits a City Councilmember, with property in an Improvement Area or Sub-Improvement Area subject to a Special Tax, from taking part in decisions to refinance bonds that will result in a reduction and refund of the Special Tax so long as the reduction and refund applies equally, proportionally, or by the same percentage to all other properties within the Area subject to the Special Tax.

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<sup>1</sup> 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.

## FACTS

Most developed property within the City of Beaumont is located within the boundaries of Community Facilities Districts 93-1 ("CFD 93-1"), 2016-1, 2016-2, 2016-3 and 2016-4 (collectively "Districts"). Within CFD 93-1, there are 72 Improvement Areas and additional Sub-Improvement Areas. The Districts were formed pursuant to the Mello Roos Community Facilities Act (the "Mello Roos Act"). In fiscal year 2016-2017, 13,566 parcels were within the Districts.

Under Section 53340, special taxes within the Districts, or Improvement and Sub-Improvement Areas therein, are levied pursuant to a rate and method of apportionment, which sets forth the methodology and rates under which special taxes are levied. Some, but not all, of the Improvement and Sub-Improvement Areas have issued bonds to pay for the cost of authorized public facilities. Pursuant to covenants to bond owners, Districts are required to levy Special Taxes under each of the Improvement and Sub-Improvement Areas in an amount at least equal to the Special Tax Requirement (defined as the amount necessary to pay debt service on any outstanding bonds, pay administrative costs and to pay directly for the costs of acquiring public facilities related to the areas). Some Special Taxes are based on the number of square feet in the dwelling, while others are a fixed dollar amount for dwellings below a certain number of square feet and another amount for dwellings above a certain threshold. Some of the Improvement and Sub-Improvement Areas are also subject to special taxes for a services component - as opposed to a facilities component - which was not financed by the issuance of bonds. These special taxes generally are set at a specified dollar amount for each lot and increase in accordance with the consumer price index.

The City believes that significant savings may be available to property owners within Districts if the bonds used to finance facilities are refunded with new financing at lower interest rates. The City is currently working with its financial consultants and public finance attorneys to identify refunding options that will render the greatest tax savings for property owners within the City of Beaumont.

The City is a general law city governed by a City Council composed of five members who are all elected at large. Four councilmembers own property within the Districts. At least one councilmember owns more than one property within the Districts. Some of the Improvement or Sub-Improvement Areas within which the councilmembers own real property will be subject to the bond refunding program being considered by City Staff.

As mentioned above, a majority of the developed area of the City is within the Districts. 8,578 parcels or 63.23% of the parcels within the Districts will be subject to refunded bonds. At this time, it is unknown what the amount of the tax savings will be for each of the properties within the Districts. However, there will probably be differences in the tax savings attributable to each property based on its Improvement and/or Sub-Improvement Area.

## ANALYSIS

### **The Political Reform Act**

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. A public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests set forth in Section 87103. As pertinent to this request, the only interests implicated by your account of the facts are interests in properties within the Districts owned by multiple councilmembers. Under Section 87103(b), an official has an interest in any real property in which he or she has a direct or indirect interest worth \$2,000 or more. Thus, we must determine if decisions to refinance a bond, which will result in a refund of special taxes for property owners, will have a foreseeable and material effect on the officials’ various property interests.

#### *Foreseeability and Materiality*

A governmental decision’s financial effect on a public official’s interest is presumed to be reasonably foreseeable if the interest is a named party in, or the subject of, the decision. Regulation 18701(a) provides:

“Financial Interest Explicitly Involved: A financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Additionally, Regulation 18702.2(a)(3) provides that the reasonably foreseeable financial effect of a governmental decision on real property is material whenever the governmental decision “[w]ould impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel.”

Accordingly, the financial effect of a decision that will result in a refund of special taxes that apply to an official’s property is both foreseeable and material under applicable regulations. Absent an applicable exception, the official will have a disqualifying financial interest in the decision.

#### *Public Generally Exception*

Section 87103 prohibits an official from taking part in a decision only if the effect of the decision on the official’s interest is distinguishable from the effect on the public generally. Regulation 18703(a) sets forth the general rule to determine if the effect of the decision on the official’s interest is distinguishable from the effect on the public generally.

“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 his or her financial interest is not unique compared to the effect on the significant segment.”

In most cases, a “significant segment of the public” is defined as at least 25 percent of (1) the businesses or non-profit entities; (2) the real property, commercial real property, or residential real property; or (3) the individuals within the official’s jurisdiction. (Regulation 18703(b).) However, Regulation 18703(e) provides additional limited exceptions, which apply in special circumstances. As pertinent to your question, Regulation 18703(e)(1) provides an exception if the official establishes:

“The decision establishes or adjusts assessments, taxes, fees, or rates for water, utility, or other broadly provided public services or facilities that are applied equally, proportionally, or by the same percentage to the official’s interest and other businesses, properties, or individuals subject to the assessment, tax, fee, or rate.”

In this case, decisions to refinance bonds that will result in a reduction and refund of Special Taxes applicable to property owners are decisions to adjust taxes. Moreover, the Special Taxes imposed for improvements within the Community Service Districts are for broadly provided public services or facilities. You have indicated that the Special Taxes applicable to any particular property depends on the Improvement or Sub-Improvement Area in which the property is located. So long as all properties subject to the Special Tax within an Improvement or Sub-Improvement Area will receive a reduction and refund that applies equally, proportionally, or by the same percentage to all other properties subject to the Special Tax within the Improvement or Sub-Improvement Area, an official with a property within the Improvement or Sub-Improvement Area may take part in decisions to refinance a bond and reduce the Special Tax applicable to the properties under Regulation 18703(e)(1).

### **Section 1090**

Section 1090 provides, in part, that “[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 any body or board of which they are members.” Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed and covers a broad range of actions by a public official other than actually approving a contract, including actions involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitation for bids.

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351.)

For decisions regarding the refinancing of bonds to reduce existing Special Taxes, it is questionable whether the decisions involve a contract. Generally, a regulatory matter or rate setting would not be considered a contract for purposes of Section 1090. (See 84 Ops.Cal.Atty.Gen. 34 2001.) On the other hand, the actual refinancing will clearly involve a contract with a lender. Nonetheless, even to the extent that decisions regarding the refinancing of bonds are decisions involving a contract, Section 1090 applies only if the official has an interest in the contract.

Under Section 1091.5(a)(3), an official has a non-interest in the receipt of public services provided by his or her agency or board as long as he or she receives them in the same manner as if he or she were not a public official.

“If the financial interest arises in context of the affected official’s or employee’s role as a constituent of his or her public agency and the recipient of its services, there is no conflict so long as the services are broadly available to all other similarly situated, rather than narrowly tailored to specially favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.” (*Lexin v. Superior Court* (2010) 47 Cal.4<sup>th</sup> 1050, 1092.)

In this case, any interest in a contract to refinance the bonds results from the official’s interest in property subject to the Special Tax for improvements within the applicable district. Under these facts, any interest in the decision arises out of the receipt of public services that are broadly provided to all constituents within the same Improvement or Sub-Improvement Area and the official is receiving these services in the same manner as if he or she were not a public official. Accordingly, Section 1090 does not prohibit an official from taking part in or an agency from considering these decisions.

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

Sincerely,

Jack Woodside  
General Counsel



By: Brian G. Lau  
Senior Counsel, Legal Division

BGL:jgl