

MEMORANDUM OF LAW

DATE: July 7, 1995

TO: Scott Tillson, Chief of Staff for Councilmember Harry Mathis

FROM: City Attorney

SUBJECT: Determination Regarding Potential Conflict of Interest Arising Out of Assessment District Decision

This is in response to your request of June 12, 1995, for a determination as to whether Councilmember Mathis has a financial conflict of interest under the Political Reform Act (the "Act").

The Act is codified at Government Code sections 81000-91015.

All statutory references in this memorandum are to the Government Code unless otherwise indicated. The Fair Political Practices Commission (the "FPPC") has adopted regulations interpreting the Act, which regulations appear at 2 California Code of Regulations, sections 18000-18954. All references to regulations in this memorandum are to Title 2, Division 6 of the California Code of Regulations.

QUESTION

May Councilmember Mathis participate in decisions involving or affecting the Mid-City Landscape and Lighting Maintenance District ("Maintenance District"), since the Councilmember owns property exceeding \$1,000 in value immediately adjacent to the District?

CONCLUSION

It is reasonably foreseeable that there will be a material financial affect on Councilmember Mathis's economic interest in real property, which is located immediately adjacent to a Maintenance District, resulting from Council's decisions pertaining to setting the annual assessments for the District. Therefore, the Councilmember will be disqualified from participating or voting on Maintenance District decisions unless the "public generally" exception applies. We find that the public generally exception applies and the Councilmember may fully participate and vote on Maintenance District decisions.

FACTS

On June 13, 1995, a preliminary hearing was held to allow public testimony relating to establishing the annual assessments for the Mid-City Landscape and Lighting Maintenance District. The City Council is scheduled to take action on the proposed assessments on July 18, 1995.

The Maintenance District lies partially in the Mid-City and partially in the North Park community areas. The Maintenance District provides for maintenance of street trees, landscaped medians, benches and street lights.

Councilmember Mathis has a financial interest exceeding \$1,000 in property located at four separate street numbers on Georgia Street. The property is a single parcel containing four dwelling units. Paul Toomey of the City's Engineering Department informs us that this property is immediately adjacent to, but not within, the boundaries of the Maintenance District. The Maintenance District lies partially in Council District 2 and partially in Council District 3, however, none of the Maintenance District lies in Council District 1, which is the District Mr. Mathis represents.

ANALYSIS

Among other things, the Act contains provisions that require a public official to disqualify him or herself from making or participating in governmental decisions. A "public official" is defined in Section 82048 and Regulation 18700 and includes every natural person who is a member, officer, employee, or consultant of a state or local government agency. A city councilmember is a "public official" within this definition.

The test for determining whether a public official is disqualified from decisionmaking is located in Section 87100. This section prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

For purposes of Section 87100, the term "financial interest" provides in relevant part:

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:

...

Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

Section 87103(b) (emphasis added).

Councilmember Mathis has an interest in real property worth more than \$1,000. Therefore, under Section 87103(c), he may not make,

participate in making, or in any way attempt to use his official position to influence a governmental decision which will have a reasonably foreseeable material financial effect, distinguishable from its effect on the public generally, on his real property interest.

Restated, Section 87103(c) demands resolution of three questions: (1) will there be a reasonably foreseeable financial effect on the Councilmember's property resulting from the Council's decision on the assessment fees; (2) assuming there is some reasonably foreseeable financial effect on the Councilmember's property, will that financial effect be material; and, (3) assuming the financial effect is material, thereby creating a disqualifying financial conflict of interest for the Councilmember, will the "public generally" exception apply, nonetheless, to allow the Councilmember to participate and vote on the Maintenance District's annual assessment fees.

A. Foreseeability

The first question to be resolved under the above-cited test is whether a reasonably foreseeable financial effect on the Councilmember's real property will result from the Council's decisions on the annual assessment fees for the Maintenance District. Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. The statute requires more than a possibility, but less than a certainty. See, e.g., *In re Thorner*, 1 FPPC Ops. 198 (1975).

In this case, the decision involves setting the annual fees for an already existing landscape and lighting maintenance district. Since the Councilmember's property is immediately adjacent to the Maintenance District, it is reasonably foreseeable that there may be some benefit to his real property resulting from the ongoing maintenance of the neighboring landscaping and lighting, which is paid for by these annual assessment fees. Since it is reasonably foreseeable that there may be some financial effect on the Councilmember's real property interest, the next question to be resolved is whether that financial effect will be material.

B. Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's economic interest in a decision is "materially" affected as required by Section 87103. If the official's financial interest is directly involved in the decision, then Regulation 18702.1 applies to determine materiality. On the other hand, if the official's financial interest is indirectly affected by the decision, then Regulations 18702.2 through 18702.6 apply to determine whether the effect of the decision is material.

In the present case, the Councilmember's property is adjacent to, but not located within, the Maintenance District's boundaries.

Therefore, the Councilmember's property will be only indirectly affected by the decision and the applicable regulation for determining materiality is Regulation 18702.3, which reads in relevant part:

(a) The effect of a decision is material as to real property in which an official has a direct . . . ownership interest . . . if any of the following applies:

(1) The real property in which the official has an interest, or any part of the real property, is located within a 300 foot radius of the boundaries . . . of the property which is the subject of the decision, unless the decision will have no financial effect upon the official's real property interest.

Regulation 18702.3(a)(1) (emphasis added).

In the present case, Councilmember Mathis's property is located immediately adjacent to the Maintenance District, therefore, it is wholly or partially within 300 feet of the property whose assessment rates will be set by the City Council. Since the Councilmember's property is within 300 feet of the Maintenance District, Regulation 18702.3(a)(1) requires that the decision as to the assessment rates have no financial effect on the Councilmember's property to avoid a finding of materiality. Although not a real property appraiser, given his lengthy experience with various types of improvement (assessment) districts, Paul Toomey of the City's Engineering Department opined that there could well be some financial benefit to properties adjacent to landscape and maintenance districts. Given that opinion, we find that the financial effect of the Council's decision as to the annual assessment fees for the Maintenance District will be material as to the Councilmember's property. Therefore, unless the Councilmember's property fits within the "public generally" exception, he may not participate or vote on the Maintenance District's annual assessments.

C. Public Generally

Even though the effect of the decision on Councilmember Mathis's real property interest is material, Councilmember Mathis is not disqualified from participating in the assessment rate setting decision if the decision will affect a significant segment of the public in substantially the same manner as it will affect Councilmember Mathis's economic interest. Regulation 18703. There is a special rule for determining whether the public generally exception applies to assessment decisions. Regulation 18703(b). This regulation states in relevant part:

The financial effect of a

governmental decision on an . . . official's economic interest is indistinguishable from the decision's effect on the public generally if any of the following apply:

(1) The decision is to establish or adjust assessments . . . which are applied on a proportional basis on the official's economic interest

The Council's decision on July 18 will be to adjust the assessment rates for properties in the Maintenance District. Therefore, the special rule for assessment decisions technically applies here to make the determination as to the "public general exception. However, since the Councilmember's property is immediately adjacent to, but not in the District, there is no "proportional" assessment to his property and it is not possible fully apply this regulation to these particular facts. Nonethel we engage in the "significant segment" analysis in order to reach a conclusion, because the same analysis would be used if the special rule did not apply.

and on a significant segment of the jurisdiction as defined in subdivision (a)(1) above (emphasis added).

Regulation 18703(a)(1), defining "significant segment," reads in relevant part as follows:

Significant segment: The governmental decision will affect a "significant segment" of the public generally as set forth below:

(A) The decision will affect:

(i) Ten percent of
sic more of the population
in the jurisdiction of the
official's agency or the
district the official
represents, or

(ii) Ten percent or
more of all property owners,
all home owners, or all
households in the
jurisdiction of the
official's agency or the
district the official
represents, or

...

(B) The decision will affect 5,000 individuals who are residents of the

jurisdiction; or

...

(D) The decision will affect a segment of the population which does not meet any of the standards in subdivisions (a)(1)(A) through (a)(1)(C), however due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.

The determination whether a significant segment of the public will be affected by the Council's decision on the assessments is fact-based, for which we asked the assistance of Mr. Toomey of the Engineering Department. At our request, he examined maps showing the Maintenance District and the surrounding area. In Mr. Toomey's professional opinion, the Maintenance District and its immediately surrounding area comprise much less than ten percent of the City's population and property owners. Therefore, we conclude that the Council's decision will not affect a "significant segment" of the public pursuant to subdivisions (i) and (ii) of Regulation 18703(a) (1)(A).

Mr. Toomey also stated that in his opinion far fewer than 5,000 individuals who are residents of the City will be affected by the Council's decision on this Maintenance District's assessments. Therefore, Regulation 18703 (a)(1)(B) does not apply.

Only if we find "exceptional circumstances" as required by Regulation 18703(a)(1)(D) can it be determined that a significant segment of the public will be affected by the decision. The term "exceptional circumstances" is not defined in the regulation and we found no interpretations of this term in the FPPC's formal or informal rulings or private advice letters. However, it is clearly a factual determination, and we again turned to Mr. Toomey for assistance.

Mr. Toomey pointed out that the properties immediately adjacent to the Maintenance District are only minimally benefitted by the landscaping and lighting improvements, if they are even benefitted at all. Moreover, the Councilmember's property is only one of a huge number of properties that are located immediately adjacent to the district and benefitted in the same way as the Councilmember's property. In light of these facts, we believe it is reasonable to conclude that "exceptional circumstances" exist to justify a conclusion under Regulation 18703(a)(1)(D) that a significant segment of the public will be affected by the Council's decision in the same way as the Councilmember's property will be affected.

Therefore, we find that the "public generally" exception applies and the Councilmember may fully participate and vote on matters pertaining to the Maintenance District.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

CCM:jrl:011(x043.2)

cc Paul Toomey

ML-95-43