



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 24, 2019

Jeff Herdman
204 Corral Ave
Newport Beach, CA 92662

Re: Your Request for Advice
Our File No. A-19-186

Dear Mr. Herdman:

This letter responds to your request for advice as a Newport Beach City Councilmember regarding your duties 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. Also, we are 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.

QUESTION

May Councilmember Herdman participate in governmental decisions regarding maintenance of trees on Marine Avenue in Balboa Island?

CONCLUSION

Yes, based on the facts provided, the exception to the materiality rules for a decision that “solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities” applies and Councilmember Herdman does not have a conflict of interest.

FACTS

Councilmember Herdman was elected to the Newport Beach City Council at the November 8, 2016 General Election. For the past 62 years, he has been a resident of the City living on Balboa Island. Currently, Councilmember Herdman has an ownership interest in two homes on Balboa Island.

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.

On August 3, 2017, the FPPC advised Councilmember Herdman that he had a conflict of interest in decisions related to the improvement of Marine Avenue. (*Torres* Advice Letter, No. A-17-135.) Marine Avenue is Balboa Island's main thoroughfare and shopping district. It is also Balboa Island's primary point of ingress and egress. At least one of Councilmember Herdman's properties is within 500 feet of Marine Avenue. The City Council is currently dealing with a separate issue involving the maintenance of trees on Marine Avenue.

The trees at issue are "specially designated neighborhood trees" pursuant to Newport Beach Council Policy G-1. To date, the Councilmember has recused himself from participating in any agenda item on this topic. Several of the trees are diseased, at least one tree is dead, and others previously removed need to be replaced. A community group opposes removal of the dead tree and replacement of the diseased trees. Councilmember Herdman is concerned that failure to remove the dead and diseased trees may create public safety and liability issues. The City Council is expected to decide on maintenance of these trees, which is separate from the prospective project to improve Marine Avenue.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Specifically, Section 87100 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. The only interest at issue based on the facts provided is an interest in real property in which an official has a direct or indirect interest worth \$2,000 or more. (Section 87103(b).)

A. Foreseeability and Materiality.

Generally, a financial effect is presumed to be reasonably foreseeable if the interest is "explicitly involved" in a decision. An interest is "explicitly involved" in a decision if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) Real property is the subject of a decision when "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).

If an interest is not explicitly involved in the decision, then a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. If the financial result cannot be expected absent extraordinary circumstances not subject to the official's control, then it is not reasonably foreseeable. (Regulation 18701(b).)

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. Regulation 18702.2 defines when a financial effect of a government decision on real property is material. We have previously found that Councilmember Herdman has a disqualifying conflict of interest under Regulation 18702.2 for a project of extensive improvements for Marine Avenue. (*Torres* Advice Letter, No. A-17-135.) Here, however, an exception applies.

B. Exception Under Regulation 18702.2(d).

Regulation 18702.2(d)(1) provides an exception for a decision that “solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities.” In prior letters, we have applied the exception in the following similar circumstances:

- *Gordon* Advice Letter, No. I-07-104, a similar exception in former Regulation 18704.2(a) applied to decisions “repairing, replacing or maintaining existing tree wells and possibly replacing vegetation in or around pedestrian rights-of-way” where the “the primary purpose of the project is for ‘repairs, replacement or maintenance’ by the city to make these areas ‘more pedestrian and maintenance friendly’ and to increase safety in these areas.”
- *Edwards* Advice Letter, No. A-18-011, the materiality exception applies for decisions regarding repairs, replacement, or maintenance of the streets, sidewalks, and sewer laterals for damage caused by the trees, including the removal of trees to prevent further damage.

Under the facts provided, the decisions regarding maintenance of trees on Marine Avenue, specifically the removal and replacement of dead or diseased trees, constitutes repair, replacement or maintenance of the current streetscape and prompted by public safety concerns. Accordingly, the decisions you have described meet the terms of the exception and thus do not have a material financial effect on Councilmember Herdman interests in real property.²

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

Sincerely,

Dave Bainbridge
General Counsel

By: 

John M. Feser Jr.
Senior Counsel, Legal Division

JMF:aja

² You have not indicated whether you currently lease either of your two properties to a tenant. However, to the extent there is no reasonably material financial effect on the property itself, we can similarly conclude that there is no reasonable material financial effect on any interest you may have in a rental business, or sources of income such as the rental business or tenants.