

Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA. 95811

August 16, 2019

Dear Sukhi Brar,

I am writing to you in reference to File No. A-17-135 where you, as Senior Counsel, Legal Division advised that I, Councilman Jeff Herdman, have a conflict of interest in participating in the decisions related to the improvement of Marine Avenue for the reason of these improvements having a positive material financial effect upon my financial interests. Also, these eventual improvements are within a 1000 foot radius of my permanent residence as well as income/rental property that I own.

I have attached a copy of your communication regarding this matter to our then Assistant City Attorney, Michael Torres for your reference.

While I can certainly understand the above ruling, and have no problem with my having to recuse myself from any decisions having to do with the *capital improvements* that will eventually be made to Marine Ave., I am writing to you today to get your advice on a separate issue that our city council is currently dealing with related to the maintenance of trees on Marine Ave. It would appear to me that the care of these trees, including removal and replacement, do not fall within the realm of capital improvement, nor does the care of these trees effect the property value (up or down) of my home or rental property. In other words, the care, maintenance, removal/replacement of these trees would not result in any type of financial gain for me.


Marine Avenue, and my home, are both on Balboa Island where I live in the City of Newport Beach. It is an expectation of my constituents who live on Balboa Island that I represent and advocate for them. The care of these "specially designated neighborhood trees" (per Newport Beach Council Policy G-1) on Marine Avenue are currently being dealt with by our city council. Thus far, I have recused myself from any agenda item dealing with this topic. Several of the trees are diseased, and one is dead. The removal of the dead tree and replacement of these diseased and dead trees with the same species is facing opposition from a faction of citizens within the community. They do not want the diseased trees removed. The council is grappling with the safety and liability issues that these trees present if they are not removed and replaced.

Our City Attorney is interpreting your ruling on my involvement in decisions having to do with the capital improvements planned for Marine Avenue to also include the maintenance and care of the trees on Marine Avenue. This I do not agree with for the reasons stated in the paragraph above. I am actually being prevented from exercising my fiduciary responsibilities as a councilman to represent and advocate for my constituents. I am also being deprived of my responsibility to protect the safety of pedestrians, vehicles, as well as business and property owners on Marine Avenue (the trees are located along the two-block business district of Marine Ave.). These recusals are all because of an assumed financial gain I might potentially realize?

I am not questioning at all your ruling on my having to recuse myself from capital improvement project decisions related to the refurbishment of Marine Avenue. I am, however, asking you to provide clarification on my ability to make decisions when it comes to policies and practices related to the maintenance, removal and replacement of the Marine Avenue trees.

Again, the capital improvement refurbishment plans for Marine Avenue which will include new sidewalks, a new street, new light poles, possible planters, etc. are completely separate from this issue of the maintenance of trees on this same street.

Much thanks for your consideration of this request, and I look forward to your quick response due to the fact that our Council is currently dealing with the matter of Marine Avenue tree maintenance.



Jeff Herdman
Newport Beach City Council
District 5



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1500 CALIFORNIA STREET, SUITE 1000, SAN FRANCISCO, CA 94109
TELEPHONE: (415) 398-0336

August 3, 2017

Michael Torres
Assistant City Attorney
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

Re: Your Request for Advice
Our File No. A-17-135

Dear Mr. Torres:

This letter responds to your request for advice regarding 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

Does City Council Member Herdman have a conflict of interest in participating in decisions before the Newport Beach City Council involving improvements to Marine Avenue when he owns real property within 500 feet of the improvements and owns a second property that is accessed by Marine Avenue.

CONCLUSION

Yes, City Council Member Herdman has a conflict of interest in participating in the decisions related to the improvements of Marine Avenue because there will be a reasonably foreseeable material financial effect upon his financial interests.

FACTS

You are the Assistant City Attorney for the City of Newport Beach ("City") and are seeking advice on behalf of City Council Member Jeff Herdman. Council Member Herdman was elected to the City Council at the November 8, 2016 General Election. For the past 62 years Council Member

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.

Herdman has been a resident of the City living on Balboa Island. Balboa Island consists of three picturesque islands: Balboa Island, Little Balboa Island, and Collins Isle. According to the 2010 census, Balboa Island has approximately 2,111 homes and 2,756 residents, but Balboa Island is used and enjoyed by all City residents and visitors from throughout the world. Council Member Herdman has an ownership interest in two homes on Balboa Island. One home is located on Balboa Island and the other home is located on Little Balboa Island.

Marine Avenue is Balboa Island's main thoroughfare and shopping district. It is also Balboa Island's primary point of ingress and egress. Given the high volume of foot and vehicle traffic, Marine Avenue is approaching or exceeding its useful life expectancy. The City is in the beginning stages of developing options to rehabilitate and improve Marine Avenue. Based on our preliminary analysis, the City anticipates rehabilitation will include repair and or replacement of Marine Avenue's existing streets, sidewalks, curbs, and storm drainage facilities. The City also anticipates rehabilitation may involve modifications and the installation of new improvements to Marine Avenue's aesthetic features. Contemplated aesthetic modifications and improvements include replacing existing benches, trees, news racks and bike racks, upgrading existing streetlights, adding string lights, and altering certain pieces of existing concrete to include color and or texture.

Since his election to the City Council, out of an abundance of caution, Council Member Herdman has recused himself from participating on any items related to Marine Avenue or its rehabilitation, because Marine Avenue is located within 500 feet from at least one of his homes.

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.)

At issue here is City Council Member Herdman's financial interest in the residential real property that he owns within 500 feet of Marine Avenue and another property in the City that is also accessed by Marine Avenue.

Reasonably Foreseeable: For a financial interest that is not explicitly involved in a decision (such as City Council Member Herdman's real property), Regulation 18701(b) states that a financial effect can be reasonably foreseeable where it is a realistic possibility under ordinary circumstances.

Material Financial Effect: Regulation 18702.2(a) sets the materiality standard for real property interests and provides a list of circumstances to consider. 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... 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.”

As listed above, the contemplated improvements to Marine Avenue are extensive. It appears the City Council will be considering a widespread and intensive improvement plan to Marine Avenue that will result in the entire street becoming a more desirable place to visit. Council Member Herdman owns real property that is within 500 feet of these improvements. Due to the proximity of Council Member Herdman’s real property to Marine Avenue it is likely that such improvements will influence the market value of Council Member Herdman’s real property. Therefore, there is a reasonably foreseeable material financial effect upon Council Member Herdman’s financial interest and he is prohibited from participating in the decisions related to the Marine Avenue improvements absent an exception.

Public Generally Exception:

The Act prohibits an official from making, participating in making, or influencing a decision only if the decision’s effect on the official’s interest is distinguishable from the effect on the public generally. (Section 87103.) Commonly referred to as the “public generally exception,” Regulation 18703(a) sets forth the general rule:

“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.”

Therefore, to invoke the exception, the official must establish that a significant segment of the public is affected and the effect on his or her interest is not unique compared to the effect on the significant segment.

For purposes of the exception, a “significant segment of the public” consists of at least 25 percent of (1) the businesses or nonprofit entities; (2) the real property, commercial or residential; or (3) the individuals within the official’s jurisdiction. (Regulation 18703(b).) With respect to the decision at issue, the “significant segment of the public” is 25 percent of the residences within the City Council district the Council Member represents.

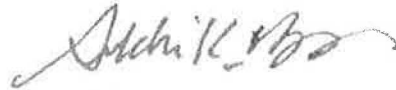
It is unlikely that a significant segment of at least 25% percent of the real properties in the city or the Council Member's district will be affected by the changes to Marine Avenue, therefore the public generally exception would not apply in this case.²

In sum, we conclude that the Act prohibits Council Member Herdman from participating in the decisions relating to the Marine Avenue improvements because those decisions will have a reasonably foreseeable material financial effect on his real property interest distinguishable from the effect on the public generally.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Sukhi K. Brar
Senior Counsel, Legal Division

SKB:jgl

² We do not reach the unique effect prong of the public generally analysis because the significant segment prong is not met. However, because Council Member Herdman's real property is located within 500 feet of Marine Avenue the effect upon his real property is unique compared to the effect on others further away and it is likely that the second prong would not be met. You stated that there are approximately 2,111 homes on Balboa Island and approximately 2,756 residents but have not provided information indicating how many individuals and residences are in the district total. If you have facts that show that at least 25% of those individuals or residences in the district will be affected in a way that is not unique to Council Member Herdman's specific real property, please seek further assistance