



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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March 25, 2016

Corrine L. Neuffer  
Deputy City Attorney  
Office of the San Diego City Attorney  
1200 Third Avenue, Suite 1100  
San Diego, California 92101

Re: Your Request for Advice  
**Our File No. A-16-049**

Dear Ms. Neuffer:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when rendering advice. (*In re Oglesby* (1975), 1 FPPC Ops. 71.).

#### QUESTION

Does the Act permit the City of San Diego's Planning Commission to invoke the "legally required participation" exception with respect to the governmental decision on whether to recommend approval of a land-use project if three of its seven commissioners have a disqualifying conflict of interest under the Act and a fourth commissioner abstains due to personal bias?

#### CONCLUSION

No. The Planning Commission may not invoke the "legally required participation" exception because it can convene a quorum of commissioners who do not have 87100 conflicts of interest with respect to the decision.

#### FACTS

The City of San Diego's Planning Commission will soon consider whether to recommend approval of a land-use project. The Planning Commission consists of seven commissioners. Three of those commissioners have a disqualifying conflict of interest under the Act. Another commissioner has stated that he will voluntarily abstain from participating in the making of the

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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.

decision because he has a non-financial conflict of interest due to personal bias that makes him unable to participate in a fair and impartial manner.

Due to the disqualification of three commissioners under the Act and the voluntary abstention of a fourth commissioner, the Planning Commission may not be able to take action with respect to the decision on whether to recommend approval of the land-use project.

### ANALYSIS

Section 87100 prohibits a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which he or she knows or has reason to know he or she has a financial interest. Section 87101, however, provides that that prohibition does not prevent a public official from making or participating in the making of a governmental decision to the extent his or her participation is legally required for the action or decision to be made.

The “legally required participation” exception contained in Section 87101 has been narrowly interpreted to permit the participation of the fewest financially interested persons possible in any decision. (*In re Hudson* (1978) 4 FPPC Ops. 13; *Gillig* Advice Letter, No. A-96-150; *Hill* Advice Letter, No. I-89-160.) Consequently, Regulation 18705 provides in pertinent part:

“(a) A public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision within the meaning of Section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision....

“(c) This regulation shall be construed narrowly, and shall:

“(1) Not be construed to permit an official, who is otherwise disqualified under Section 87100, to vote to break a tie.

“(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Section 87100, whether or not such other members are actually present at the time of the disqualification.”

Thus, a public official disqualified under Section 87100 may participate in the making of a governmental decision only if a quorum cannot be convened of other members who are not disqualified under Section 87100.

Because the Planning Commission consists of seven commissioners, it would require at least four commissioners to convene a quorum. (See Regulation 18705(d).) Three commissioners are disqualified under Section 87100 with respect to the decision at issue. However, four commissioners, including the commissioner who has stated he will voluntarily abstain, are not disqualified under Section 87100. Therefore, the Planning Commission may not invoke the “legally

required participation” exception to allow a commissioner otherwise disqualified under Section 87100 to vote because a quorum can be convened of other commissioners who are not disqualified under Section 87100.

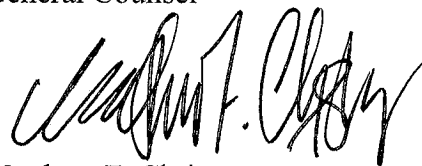
We note that Regulation 18705(c)(2) prohibits the invocation of the “legally required participation” exception when a quorum may be convened without inclusion of a public official with a disqualifying financial interest under Section 87100 “whether or not such other members are actually present at the time of the disqualification.” This clause indicates it is not the actual ability of non-disqualified members to participate in making the decision that is relevant, but rather the legal ability to do so. Here, the commissioner that would voluntarily abstain from participating in making the decision at issue due to personal bias is legally able to participate under the Act, and this provides further support for the conclusion that the Planning Commission may not invoke the “legally required participation” exception in these circumstances.

Accordingly, we conclude that the Planning Commission may not invoke the “legally required participation” exception because it can convene a quorum of commissioners who do not have 87100 conflicts of interest for the decision on whether to recommend approval of the project.

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

Sincerely,

Hyla P. Wagner  
General Counsel



By: Matthew F. Christy  
Counsel, Legal Division

MFC:jgl