



MEMORANDUM

To: Chair Remke, Commissioners Audero, Casher, Wasserman, and Wynne

From: Hyla Wagner, General Counsel
John Wallace, Assistant General Counsel
Heather Rowan, Senior Commission Counsel

Subject: Legal Division's Monthly Report

Date: December 4, 2015

A. Pending Litigation

Frank J. Burgess v. Fair Political Practices Commission.

Frank J. Burgess filed a writ of mandate in Riverside Superior Court on October 4, 2015, seeking relief from the Commission's decision and order in *In re Frank J. Burgess*, Case No. 12/516. Following an administrative hearing in front of an Administrative Law Judge (ALJ), Mr. Burgess challenged that decision to the Commission. After oral argument before the Commission on March 19, 2015 and a thorough review of the record, the Commissioner rejected the ALJ's decision and decided the case based on the record, oral argument, and the parties' supplemental briefing on the "governmental decision" element of the case. The Commission found that Mr. Burgess violated Section 87100 of the Political Reform Act and imposed a \$5,000 fine on July 7, 2015. Mr. Burgess challenges the decision as an excess of the Commission's jurisdiction, an abuse of discretion, and a denial of due process rights. A status conference was scheduled to be held on November 3, 2015, but was continued by the court to December 9th.

B. Outreach and Training

- General Counsel Hyla Wagner participated in a panel for the Assembly Fellows program on November 16, 2015, together with senior legislative committee staff Darren Chesin and Ethan Jones, and attorney Tom Hiltachk. The panel discussed current topics in campaign finance law and answered questions from the fellows.
- Senior Commission Counsel Brian Lau conducted a Continuing Legal Education Brown Bag Lunch for the Sacramento County Bar Association on November 19, 2015. The course provided an update and discussion of the recently revised conflict of interest regulations for members of the association's public law section. Approximately 30 people attended.

C. Probable Cause Decisions

* Please note that a finding of probable cause does not constitute a finding that a violation has actually occurred. The respondents are presumed to be innocent of any violation of the Political Reform Act (the Act)¹ unless a violation is proven in a subsequent proceeding.

None to report.

D. Legal Advice

In November 2015, the Legal Division attorneys responded to the following requests for legal advice:

- **Email & Telephone Requests for Advice:** More than 62 email and telephone requests for legal advice.
- **Advice Letters:** The Legal Division received 8 advice letter requests and issued 20 advice letters.
- **Section 1090 Letters:** The Legal Division received eight advice letter requests concerning Section 1090 and issued two advice letters. This year to date we have received 54 requests regarding Section 1090 (not including conflict of interest letters that incidentally deal with Section 1090 issues).

E. Advice Letter Summaries

Campaign

A-15-209

Kelli Furtado

A mayor is not required to file a “Behested Payment Report” for donations or grants made to a nonprofit organization on which the mayor serves as a board member so long as she does not herself solicit donations and she is not featured in the organization’s written requests for funding.

Conflict of Interest

A-15-152(a)

Gary Schons

It is not reasonably foreseeable that a decision to amend a specific plan will have a material financial effect on a source of income of the county supervisor where the source of income owns real property within the specific plan area and the amendment solely involves building a senior housing facility on property located 3,600 feet or .7 miles from his residence. We find that Supervisor Spitzer does not have a disqualifying conflict of interest under the Act. (*Schons* Advice Letter No. A-15-152(a) SUPERSEDES prior *Schons* Advice Letter No. A-15-152.)

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 this source.

Jesse D. Gutierrez**A-15-156**

Because the two infill projects in question are relatively small and consistent with the existing neighborhood, a planning commissioner is not prohibited from taking part in decisions notwithstanding having interests in his business entity, leased property within 500 feet of the projects, and the current tenant of the leased property. Neither project appears to have a reasonably foreseeable material effect on the planning commissioner's interests.

Jolie Houston**A-15-183**

A city councilmember, elected at large, is not prohibited from participating in decisions that have no reasonably foreseeable financial effect on his interests. He is prohibited, however, from participating in other decisions with identifiable and reasonably foreseeable financial effects, including decisions that would impact his rental properties.

Jeanne MacLeamy**A-15-186**

Because the decision to purchase a 15-acre property may result in an assessment on the official's property, the official's interest in his property is explicitly involved in the decision and the decision's effect on the property is considered foreseeable and material. Accordingly, the official may not take part in the decisions.

Anthony P. Condotti**A-15-190**

The Act does not prohibit a planning commissioner from appearing before the city's Board of Building Appeals on behalf of his client as long as he does not act or purport to act in his public capacity.

Elizabeth Beryt**I-15-196**

Regulation 18703(e)(3) permits an otherwise disqualified official to take part in a decision under the Act's public generally exception if (1) the decision affects residential property within a specific area, (2) is generally aimed at reducing a nuisance or improving public safety, and (3) the body making the decision gathers sufficient evidence to support the need to act in the specific location. For a board member with a residential property interest who may incur additional fees resulting from decisions imposing additional requirements on wastewater treatment systems within an impaired watershed, Regulation 18703(e)(3) permits the official to take part in the decisions because the decisions affect residential properties in designated categories based upon location, the decisions generally aim to alleviate hazardous conditions resulting from wastewater discharge, and there appears to be sufficient evidence of a need to act within the designated categories as determined by the total maximum daily load assessments by the agency's staff.

Samantha Olson**I-15-197**

Salary from a resource conservation district is not considered income under Section 82030, subdivision (b)(2) of the Act because the district is a local governmental agency. Thus, salary from the district does not disqualify the board member from taking part in agency decisions implicating the district.

Anthony P. Condotti**A-15-198**

A councilmember who is a building designer and contractor may take part in decisions regarding amendments to the city's Zoning Code that would (i) impose new restrictions on the construction of professional and medical offices, (ii) modify the requirements for secondary dwelling units, or (iii) change the maximum building heights requirements for properties zoned as Single Family Residential. Under the facts provided, it is not reasonably foreseeable that these decisions will materially affect his financial interests.

Jonathan P. Lowell**A-15-202**

The Act does not prohibit a councilmember from taking part in the governmental decision on whether to approve a development despite his residence being .65 miles (3,432 feet) away from the development. There is no reasonably foreseeable material financial effect on his real property interest in his residence. The impact of increased traffic, noise and air pollution would not affect the market value of the councilmember's residence because those impacts are mitigated or insignificant.

Ashlee Titus**A-15-206**

A member of the Cambria Community Services District may not vote to lift a freeze on the issuance of water hookups for undeveloped single-family parcels where her property is on a waiting list for such hookups, even though she has no plans to develop the property and it would take 12 years for her property to reach the top of the list. In determining whether a decision will have a reasonably foreseeable material financial effect on an official's property, the decision's effect on the value of the official's property, not the probability that the owner will act to realize the increased value by selling or developing the property, is the appropriate inquiry.

Glen R. Googins**A-15-207**

The Act prohibits a councilmember from taking part in the governmental decision on whether to approve a development project because the decision would have a reasonably foreseeable material financial effect on the councilmember's employer. The councilmember is employed as a Division Manager at a waste disposal and recycling company that holds an exclusive franchise agreement with the city for all waste disposal and recycling within the city, and receives a salary and bonus tied to the improving the financial performance of the company. Because the company would receive additional revenue due to the approval of the development under the agreement, there is a nexus between the councilmember's income and the financial effect of the decision that gives rise to a conflict of interest under the Act.

Jeffrey A. Mitchell**A-15-208**

The City Manager of the City of the West Sacramento who also serves as the Executive Director of a Redevelopment Successor Agency and Chief Executive Officer of the Sacramento-Yolo Port District may participate in decisions on behalf of each agency regarding the terms of an option to purchase and subsequent sale of property owned by the Successor Agency to the Port District, the assignment of the option to a developer, negotiation of the developer agreement and the processing of the developer's entitlement requests despite owning property within 500 feet of the proposed development. The financial effect of these decisions on his real property is indistinguishable from

the effect on the public generally, defined as residential property located within ¼ mile of the development.

Lauren C. Valk

A-15-211

The Act does not prohibit a planning commissioner from taking part in the governmental decision on whether to approve a project to demolish the city's existing library and to construct a new expanded library because there is no reasonably foreseeable financial effect on his financial interests. The fact that the commissioner's spouse performs volunteer work for nonprofit organizations that support the library project would not give rise to a conflict of interest under the Act because she does not receive income and because the organizations do not meet the Act's definition of a "business entity."

Scott E. Porter

A-15-215

The mayor may participate in making a decision related to Chevron's application to subdivide and then develop property in the city because none of the mayor's interest will be foreseeably materially affected by the decision. The fact that the mayor's employer does business with the applicant is not a basis for a conflict of interest since the employer is not connected with the specific project under consideration and there are no facts to indicate that the decision on the project will have any financial effect on his employer.

Shahiedah Coates

A-15-217

A councilmember's primary residence is located within 500 feet of property that is the subject of a dispute under the city tree ordinance claiming the trees are blocking another resident's view. The decision has been appealed to the city council as to whether the trees in question must be removed. However, due to the location of the trees in proximity to the councilmember's property, the councilmember's property would not be impacted by the outcome of the decision. Because the decision will not foreseeably and materially affect the councilmember's property, he will not have a conflict of interest.

Roman J. Muños

A-15-219

The superintendent of the Ceres Unified School District who also serves as the district's representative and president of the governing board of the Central Region School Insurance Group, a joint powers authority, may hold both offices simultaneously without creating a potentially disqualifying conflict of interest under the Act.

Gifts

Humberto Peraza

A-15-200

A trustee at a community college asked for advice regarding a trip to Israel for an Educational Seminar for Southern Pacific Latino Leaders sponsored by the American Israel Education Foundation. Payments for travel, lodging and subsistence are reportable gifts, but not subject to gift limits because they are in connection with a legislative or governmental purpose and/or concern international public policy, and are provided by a 501(c)(3) organization. Any other payments, such as expenses paid for entertainment purposes will be considered reportable gifts subject to the \$460 gift limit because those items would not be related to a legislative or governmental purpose.

Revolving Door

Lan Saadatnejadi

I-15-157

The permanent ban does not prevent a former employee of Caltrans from accepting a position as a consultant with the agency on an as-needed basis involving proposed transportation projects, if the official did not participate in any specific proceedings or contracts included in the new Caltrans agreement.

Section 1090

Leslie E. Devaney

A-15-213

A city councilmember does not have a financial interest in a contract between the city and the councilmember's employer under Section 1090 if the decision will have no impact on the official's salary, position, or any bonus. Section 1090 does not prevent the city from entering the contract. The councilmember does, however, have a conflict of interest under the Act based on his employment and must recuse himself from any related decision.

Karl H. Berger

A-15-225

A city councilmember does not have a conflict of interest in a decision to lease city property to the Lions Club of which he is a member because, under Section 1090 and the Act, he does not have a financial interest in the decision.

F. Upcoming Regulations

The proposed regulations schedule for the upcoming three months is set forth below, subject to modification.

January 21, 2016

- **Lobbying Regulations (Regulation 18616).** Require more detailed reporting of "other payments to influence" to disclose who these payments are made to and what they are used for. Overhead expenses, including rent, utilities, office supplies, and subscriptions to legislative tracking services, would not have to be itemized.

February 18, 2016

- **2015 Legislation Implementation Package.** Regulatory Changes necessitated by legislation enacted in 2015.

March 17, 2016

- **Lobbyist Definition (Regulation 18239).** Amend the definition of "direct communication" to clarify that the "ride along exception" does not apply to *any* person who meets or speaks with a qualifying official in the company of a registered lobbyist, but applies only in specific circumstances.