

1 GARY S. WINUK
Chief of Enforcement
2 MILAD DALJU
Commission Counsel
3 **FAIR POLITICAL PRACTICES COMMISSION**
428 J Street, Suite 620
Sacramento, CA 95814
Telephone: (916) 322-5660

5 Attorneys for Complainant
6
7

8 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION
9 STATE OF CALIFORNIA
10

11
12 In the Matter of) FPPC No. 11/804
13)
14 JACK BERRY, SR.,) STIPULATION, DECISION and
Respondent.) ORDER
15)
16)

17
18 Complainant, the Fair Political Practices Commission, and respondent Jack Berry, Sr.,
19 (“Respondent”) agree that this Stipulation will be submitted for consideration by the Fair Political
20 Practices Commission at its next regularly scheduled meeting.

21 The parties agree to enter into this Stipulation to resolve all factual and legal issues raised in this
22 matter and to reach a final disposition without the necessity of holding an administrative hearing to
23 determine the liability of Respondent, pursuant to Section 83116 of the Government Code.

24 Respondent understands, and hereby knowingly and voluntarily waives, any and all procedural
25 rights set forth in Sections 83115.5, 11503 and 11523 of the Government Code, and in Sections 18361.1
26 through 18361.9 of Title 2 of the California Code of Regulations. This includes, but is not limited to,
27 the right to personally appear at any administrative hearing held in this matter, to be represented by an
28 attorney at Respondent’s own expense, to confront and cross-examine all witnesses testifying at the

1 hearing, to subpoena witnesses to testify at the hearing, to have an impartial administrative law judge
2 preside over the hearing as a hearing officer, and to have the matter judicially reviewed.

3 It is further stipulated and agreed that Respondent violated the Political Reform Act by: making a
4 governmental decision in which he knew, or had reason to know, he had a financial interest, in violation
5 of Government Code section 87100 (Count 1).

6 All counts are described in Exhibit 1, which is attached hereto and incorporated by reference as
7 though fully set forth herein. Exhibit 1 is a true and accurate summary of the facts in this matter.

8 Respondent agrees to the issuance of the Decision and Order, which is attached hereto.
9 Respondent also agrees to the Commission imposing upon him an administrative penalty in the amount
10 of \$3,000. A cashier's check from Respondent in said amount, made payable to the "General Fund of
11 the State of California," is submitted with this Stipulation as full payment of the administrative penalty,
12 to be held by the State of California until the Commission issues its decision and order regarding this
13 matter. The parties agree that in the event the Commission refuses to accept this Stipulation, it shall
14 become null and void, and within fifteen (15) business days after the Commission meeting at which the
15 Stipulation is rejected, all payments tendered by Respondent in connection with this Stipulation shall be
16 reimbursed to Respondent. Respondent further stipulate and agree that in the event the Commission
17 rejects the Stipulation, and a full evidentiary hearing before the Commission becomes necessary, neither
18 any member of the Commission, nor the Executive Director, shall be disqualified because of prior
19 consideration of this Stipulation.

20
21 Dated: _____

Gary Winuk, Enforcement Chief,
On behalf of the
Fair Political Practices Commission

22
23
24 Dated: _____

Jack Berry, Sr., Respondent

1 **DECISION AND ORDER**

2 The foregoing Stipulation of the parties “In the Matter of Jack Berry, Sr.” FPPC No. 11/804,
3 including all attached exhibits, is hereby accepted as the final decision and order of the Fair Political
4 Practices Commission, effective upon execution below by the Chair.

5
6 IT IS SO ORDERED.

7 Dated: _____

8 _____
9 Ann Ravel, Chair
Fair Political Practices Commission

EXHIBIT 1

INTRODUCTION

In this matter, Respondent Jack Berry, Sr., (“Respondent”), in his position as an Oroville City Councilmember, impermissibly made a government decision which had a reasonably foreseeable material financial effect on his real property. For the purposes of this Stipulation, Respondent’s violation of the Political Reform Act (the “Act”) is stated as follows:¹

COUNT 1: Respondent Jack Berry, Sr., in his capacity as an Oroville City Councilmember, made a governmental decision in which he knew, or had reason to know, he had a financial interest, by voting on two resolutions related to the imposition of special taxes, in violation of Government Code section 87100.

SUMMARY OF THE LAW

Conflict-of-Interest

The primary purpose for the conflict-of-interest provisions of the Act is to ensure that “public officials, whether elected or appointed, 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, subd. (b).)

In furtherance of this goal, Section 87100 prohibits public officials from making, participating in making, or attempting to use their official positions to influence a governmental decision in which they know, or have reason to know, that they have a financial interest. Under Section 87103, a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on a recognized economic interest of the official. For purposes of Sections 87100 and 87103, there are six analytical steps to consider when determining whether an individual has a conflict of interest in a governmental decision.²

First, the individual must be a public official as defined by the Act. Section 82048 defines “public official” to include members of a state or local governmental agency.

Second, the official must make, participate in making, or attempt to use his or her official position to influence a governmental decision. Under Regulation 18702.1, subdivision (a) (1), a public official “makes a governmental decision” when the official votes on a matter.

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 18109 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.

² Neither the Public Generally Exception (Section 87103, Regulation 18707) nor the Legally Required Participation Exception (Section 87101, Regulation 18708) apply to this case.

Third, the official must have an economic interest that may be financially affected by the governmental decision. Under Section 87103, subdivision (b), an economic interest of a public official includes any real property in which the public official has direct or indirect investment worth \$2,000 or more.

Fourth, it must be determined if the economic interest of the official is directly or indirectly involved in the decision. Under Regulation 18704.2, subdivision (a)(4), real property in which a public official has an economic interest in is directly involved in a governmental decision if the government decision involves the imposition, repeal, or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

Fifth, it must be determined what materiality standard will apply to the economic interest of the public official. Under Regulation 18705.2, subdivision (a)(1), if real property is directly involved in a governmental decision, the financial effect of a governmental decision is presumed to be material.

Sixth, it must have been reasonably foreseeable, at the time the governmental decision was made, that the decision would have a material financial effect on the economic interest of the official. Under Regulation 18706, subdivision (a), a material financial effect on an economic interest is reasonably foreseeable if it is substantially likely that one or more of the materiality standards applicable to the economic interest will be met as a result of the governmental decision.

Whether the financial consequences of a decision are “reasonably foreseeable” at the time of a governmental decision depends on the facts of each particular case. An effect of a decision on real property is considered “reasonably foreseeable” if there is a substantial likelihood that it will affect property values, either positively or negatively, or will alter or change the use of the property in some manner. Certainty of the effect is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

SUMMARY OF THE FACTS

Respondent has been an Oroville City Councilmember since January 4, 2011, and at all times relevant to this matter. Respondent owns, and owned at all times relevant to this matter, developed real property that lies within both Oroville Community Facilities Districts (“CFD”) No. 2006-1 and 2006-2.

On August 2, 2011, Respondent voted against Resolution 7783, which would have imposed a \$600 annual special tax on all developed real properties in CDF No. 2006-1. Respondent also voted against Resolution 7784, which would have imposed an additional \$600 annual special tax on all developed real properties in CDF No. 2006-2. Both resolutions failed 3-2.

On August 14, 2011, the Oroville City Council reconsidered both resolutions. Respondent recused himself from the vote on the resolutions, and both resolutions passed.

In an interview with the Enforcement Division, Respondent stated that at the time he voted on the two resolutions, he knew that he had a conflict-of-interest in the decision and that it would be a violation of the Act to vote on the matters, but that he voted on the matters anyway because he was trying to make a point regarding other city councilmembers' habit of voting on matters in which they have a conflict-of-interest in.

1. Respondent Was a Public Official as Defined by the Act

At all times relevant to this matter, Respondent was an Oroville City Councilmember. Therefore Respondent was a public official as defined in Section 82048, and subject to the prohibition against making a governmental decision in which he had a financial interest under Section 87100.

2. Respondent Made a Governmental Decision

At the August 2, 2011, Oroville City Council meeting, Respondent, in his capacity as a member of the Oroville City Council, voted against the motion to pass Resolutions 7783 and 7784. Consequently, Respondent made a governmental decision for the purposes of Regulation 18702.1, subdivision (a)

3. Respondent Had an Economic Interest in Real Property

For purposes of this matter, Respondent owned real property in Oroville, California. As the real property was worth \$2,000 or more, Respondent had an economic interest in real property for the purposes of Section 87103, subdivision (b).

4. Respondent's Economic Interest Was Directly Involved in the Decision

Respondent's real property was within the boundaries of CDF No. 2006-1 and CDF No. 2006-2, and therefore would have been imposed with a special annual tax had either Regulation 7783 or 7784 passed. Therefore, the governmental decision made on August 2, 2011, against passing Resolutions 7783 and 7784 directly involved Respondent's economic interest in real property under Regulation 18704.2, subdivision (a)(4).

5. Applicable Materiality Standard

Because Respondent's economic interest was directly involved in his governmental decision, the financial effect of the decision on his real property is presumed to be material. (Regulation 18705.2(a)(1).)

6. It Was Reasonably Foreseeable That the Applicable Materiality Standard Would be Met

The governmental decision that Respondent made on August 2, 2011, was against the imposition of a total of \$1,200 in annual special taxes on his real property. It was reasonably foreseeable at the time Respondent made the governmental decision that the imposition of \$1,200 in annual special taxes would have had some financial effect on that real property.

Thus, by making the above governmental decision in which he had a financial interest, Respondent committed a violation of Government Code Section 87100.

CONCLUSION

This matter consists of a single count of violating the Act, which carries a maximum administrative penalty of \$5,000.

In determining the appropriate penalty for a particular violation of the Act, the Enforcement Division considers the typical treatment of a violation in the overall statutory scheme of the Act, with an emphasis on serving the purposes and intent of the Act. Additionally, the Enforcement Division considers the facts and circumstances of the violation in context of the factors set forth in Regulation 18361.5, subdivision (d)(1)-(6): the seriousness of the violations; the presence or lack of intent to deceive the voting public; whether the violation was deliberate, negligent, or inadvertent; whether the Respondent demonstrated good faith in consulting with Commission staff; and whether there was a pattern of violations.

In this matter, the conduct of participating in a governmental decision in which an official has a financial interest is a serious violation of the Act as it creates the appearance that a governmental decision was made on the basis of an official's financial interest.

Recent fines approved by the Commission for a violation of the conflict-of-interest provisions include:

In the Matter of Michael Allen, FPPC No. 10/123. In February 2011, the Commission approved a \$3,000 penalty where the respondent, as a member of a city planning commission, made governmental decisions by voting to adopt two resolutions concerning the city's general plan, which affected his sources of income. In mitigation, the Commission considered that the respondent cooperated with the investigation, and had no history of violations under the Act.

In the Matter of Jordan Ehrenkranz, FPPC No. 09/043. In March 2012, the Commission approved a \$3,000 penalty where the respondent, as a member of a city council, made governmental decisions by voting on decisions related to a moratorium on a hillside development in which he had a financial interest. In mitigation, the Commission considered that the respondent cooperated with the investigation, and had no history of violations under the Act.

In this matter, Respondent has no history of violations under the Act, and cooperated with the Enforcement Division's investigation. Additionally, at the August 16, 2011, Oroville City Council meeting, Resolutions 7783 and 7784 were reconsidered, Respondent recused himself, and both resolutions passed. Therefore any possible financial effect of Respondent's violation was reversed soon after the violation occurred.

However, Respondent deliberately and knowingly violated the Act.

PROPOSED PENALTY

After consideration of the factors of Regulation 18361.5, and consideration of penalties in prior enforcement actions, the imposition of a \$3,000 penalty on Respondent is recommended.