



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

May 5, 2025

Melissa M. Crosthwaite
Senior Assistant City Attorney
City of Santa Ana
20 Civic Center Plaza
P.O. Box 1988
Santa Ana, California 92702

Re: Your Request for Advice
Our File No. A-25-050

Dear Ms. Crosthwaite:

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.

Also note that 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

May Councilmember David Penaloza participate in decisions related to the adoption of the proposed Ordinances limiting industrial uses where his primary residence is located within the Transit Zoning Code/Specific Development (SD) 84 ("TZC") that is the subject of the decisions?

CONCLUSION

Based on the facts provided, the financial effect of the decision on the Councilmember's leasehold interest is indistinguishable from the financial effect on the significant segment of residential properties in Ward 6, the area he was elected to represent, and the decision will not have

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 18104 through 18998 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.

a unique effect on the Councilmember's interest. Therefore, the Councilmember is not prohibited from taking part in the decision under the Act's public generally exception.

FACTS AS PRESENTED BY REQUESTER

The Transit Zoning Code/Specific Development (SD) 84 ("TZC") is a specific development area of the City that is currently zoned residential and mixed use but contains various "overlay zones" that permit industrial uses. The TZC is located in the central urban core of the City and comprises over 100 blocks and 450 acres. It includes the following neighborhoods: Civic Center, Downtown and the Logan and Lacy neighborhoods, the latter two identified as "environmental justice communities" by the City. In addition to the one hundred and twenty-nine industrial businesses located in the TZC, there are approximately 2,380 housing units in the TZC.

David Penaloza is a City councilmember representing Ward 6. He is serving a four-year term that expires in November of 2026. Councilmember Penaloza has entered into a year-long lease for real property ("Property") on the eastern edge of the Lacy neighborhood, close to the Downtown neighborhood. The value of the lease is over \$2,000. He resides at the Property with his wife and children. Councilmember Penaloza's primary residence is located approximately 2,300 feet east of the Light Industrial (M1) and Heavy Industrial (M2) overlay zones within the TZC and 2450 feet from the nearest M1 property to his home. Both the Logan and the Lacy neighborhoods are located in Ward 6, and there are 2,382 residential units in Ward 6 that are also within 2450 feet of this M1 property. There are approximately 14,227 residential addresses in Ward 6.

On April 16, 2024, the City adopted a 45-day interim urgency ordinance, or moratorium, to prohibit the "commencement, establishment, relocation, or expansion of industrial uses within the TZC" ("Moratorium"). The purpose of the Moratorium was to "immediately offer protection of public health, safety, and welfare from industrial uses significantly causing pollution burden to adjacent residential neighborhoods within the SD-84 Zoning District." The Moratorium was further extended on May 21, 2024 for 10 months and 15 days in order to provide sufficient time for staff to continue with data tracking and reporting, research appropriate regulations, and coordinate with outside regulatory agencies and City departments to determine whether further, permanent action is necessary and to generate recommendations to the Planning Commission and City Council.

City staff immediately began the process of studying appropriate regulations for industrial uses in the TZC. This process involved community meetings and public outreach as well as review of records and activities of regulatory agencies. In addition, City staff monitored Code Enforcement Division activities and implementation of the City's Noxious Uses Ordinance pertaining to these facilities. The City Staff Report dated April 16, 2024 provided that in the Lacy and Logan neighborhoods within the TZC, the Code Enforcement Division has investigated over 33 commercial and industrial properties in the past nine months and currently has 17 active open cases that have been issued Notice of Violations and administrative citations for the following types of violations: illegal storage, land use, zoning, property and landscape maintenance, unpermitted work, business license, and certificate of occupancy. These violations include issues of odors, dust, traffic, noise, vibrations, and other documented impacts. The City Staff Report states, "The close proximity of active open industrial cases during a short period is creating a public nuisance that is harming public health, safety, and general welfare of the two residential neighborhoods from the concentration of open code enforcement cases nearby." Additionally, the May 21, 2024 Staff

Report states that the City would collect data from outside regulatory agencies to further understand the activities between external regulatory agencies and industrial businesses that “may place additional impacts on public health, safety, and welfare in affected neighborhoods adjacent to industrial businesses in the TZC. This information would enable City staff to understand the correlation and environmental burdens that may be attributed to permitted activities for industrial businesses in historically environmentally disadvantaged communities, specifically the Logan and Lacy neighborhoods.”

Staff also prepared environmental documentation as part of the California Environmental Quality Act (“CEQA”) review. The result of these efforts was Zoning Ordinance Amendment (“ZOA”) No. 2024-02 and Amendment Application (“AA”) No. 2024-03. Together, ZOA No. 2024-02 and AA No 2024-03 (“proposed Ordinances”) amend regulations to, in pertinent part:

- Delete the M1 and M2 overlay zones from the text and Map of the TZC, which effectively creates legal nonconforming uses of the existing approximately one hundred and twenty-nine (129) industrial uses in the TZC;
- Adopt operational standards for industrial uses that become legal nonconforming uses by adoption of the Ordinances. The operational standards address air emission and dust, light, glare and heat, ground vibration, material or waste storage, hazardous materials, liquid and solid waste, site maintenance, truck parking and loading, and also require that all compounding, processing, packaging or assembly of merchandise and treatment of products be done in an enclosed building;
- Define “noxious uses” as, generally, a use that is located within one thousand (1,000) feet of a park, school or property used for residential purposes and whose primary business operations involve any two (2) of more of certain defined activities, such as emitting or generating particulate matters or storing, processing or disposing of listed or hazardous waste, and further regulate these specific industrial uses by providing that such uses, if requiring a new certificate of occupancy for any reason other than a change in business name without ownership, or is determined to be in violation of federal, State or local law, as further defined, would lose their legal nonconforming status;
- Provide for termination of legal nonconforming use by an amortization process. This individualized process to determine an appropriate amortization period for a specified legal nonconforming industrial use would entail a hearing before a neutral hearing officer with experience in law and land use who will review each use on a case-by-case basis, based on specified criteria, following a recommendation from staff.

ANALYSIS

The Act's conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) The financial interests that may give rise to an official's disqualifying conflict of interest under the Act are set forth in Section 87103 and include: any real property in which the public official has a direct or indirect interest worth more than \$2,000 or more. (Section 87103(b)).

Councilmember Penaloza has a real property leasehold interest which may be affected by the proposed Ordinances' decisions. We consider whether it is reasonably foreseeable that the decisions would have a material financial effect on his leasehold interest.

Foreseeability and Materiality

A financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) Regarding financial interests not explicitly involved in a decision, a financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. (Regulation 18701(b).)

Regulation 18702.2 defines when the financial effect of a government decision on real property is material. For a leasehold interest in real property, Regulation 18702.2(c) provides that the effect of a decision is material only if the decision will: (1) change the termination date of the lease; (2) increase or decrease the potential rental value of the property; (3) change the official's actual or legally allowable use of the real property; or (4) impact the official's use and enjoyment of the real property.

The proposed Ordinances seek to curtail the current Light and Heavy industrial uses within the TZC's overlay zones in order to address environmental concerns, air emissions, air pollution, hazardous materials, and waste impacting the nearby residential neighborhoods. Notably, Councilmember Penaloza's property is 2,450 feet from the nearest M1 industrial property that will be affected by the decision. The proposed Ordinance decisions would not change the termination date of the official's residential lease or change the allowable residential use of the property. However, because these decisions will address items such as the area businesses' noxious uses (i.e., emitting particulate matter or processing hazardous waste), with a focus on the impacts on the Logan and Lacy residential neighborhoods, it is arguable that the proposed Ordinances decisions would have the potential to impact Councilmember Penaloza's use and enjoyment of his property by improving the air quality, noise, and environment in the Lacey neighborhood. It is also arguable that the decisions would increase or decrease the potential rental value of the official's property, as the Ordinances seeks to phase-out certain industrial uses in the TZC zone and will alter the permitted uses, development standards and business operations.

However, it is unnecessary to determine whether it is reasonably foreseeable that the decisions would have a material financial effect on Councilmember Penaloza's interest in his residence considering the conclusion below that the public generally exception applies to the extent there is a potential financial effect on the Councilmember's interest.

Public Generally Exception

An official may participate despite a financial interest under the "public generally" exception, which applies when the financial effect of the decision on the official's interest is indistinguishable from its effect on the public generally. (See Section 87103.) In general, an effect on an official's interest is indistinguishable from its effect on the public generally if a significant segment of the public is affected and the effect on the official's interest is not unique when compared to the effect on the significant segment of the public. (Regulation 18703.)

Where the official's only interest is that of a primary residence, as we have here, a "significant segment of the public" is at least 15 percent of residential real property within the official's jurisdiction. (Regulation 18703(b).) The official's jurisdiction is defined as the local agency involved or the designated geographical area the official was elected to represent. (Regulation 18703(d).) Relevant to these facts, a "unique effect" includes circumstances where the decisions would have a disproportionate effect on the official's real property due to the proximity of the property subject to the decision. (Regulation 18703(c).)

Councilmember Penaloza's jurisdiction is Ward 6, the area he was elected to represent, for purposes of this analysis. There are approximately 14,227 residential addresses in Ward 6. Councilmember Penaloza's property is 2,450 feet from the nearest M1 industrial property that will be affected by the decision. 2382 Ward 6 residences— 16.7 percent — are also within the 2450-foot distance to this M1 industrial property. Because the facts indicate that the significant segment of residential properties in his Ward are the same distance or closer to the nearest affected industrial property at issue, there is no indication that Councilmember Penaloza's leased property will be uniquely affected by the decisions. Therefore, under Regulation 18703's public generally exception, Councilmember Penaloza may participate in the Ordinances

If you have other questions on this matter, please contact me at KHarrison@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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