

[NOTE: In 2014, the California Fair Political Practices Commission amended Regulation 18706 to state that an outcome is “reasonably foreseeable” if it is a “realistic possibility.” An outcome need not be “substantially likely” to be considered “reasonably foreseeable.”]

October 17, 2003

SDEC Formal Advice Letter No. FA03-10

Advice Provided to:

Bill Baber
Office of Mayor Dick Murphy
202 “C” Street, 11th Floor
San Diego, CA 92101

Re: Request for Advice Regarding Disqualification from Municipal Decisions Involving Residential Rental Property

Dear Mr. Baber:

This advisory opinion is in response to your memo to the City of San Diego Ethics Commission dated October 2, 2003. You have requested an advisory opinion from the Ethics Commission concerning whether or not Mayor Murphy may participate in a municipal decision concerning a proposed “Good Cause Termination of Tenancy” ordinance, in light of his personal real property interests. Your questions and the Commission’s responses are detailed below.

QUESTIONS

1. Is Mayor Murphy prohibited from participating in the municipal decision regarding the proposed “Good Cause Termination of Tenancy” ordinance under SDMC section 27.3561 or any other provision of City or State law?
2. If the answer to the first question is yes, what activities are covered under this prohibition?

SHORT ANSWER

1. Because the Mayor’s rental properties are indirectly involved in the municipal decision, any financial effect the decision may have on those properties is presumed not to be material. This presumption may be rebutted, however, by proof that there are special circumstances that make it reasonably foreseeable that the decision will: (1) change the legally allowable use; (2) change the lessee’s actual use; (3) enhance or decrease the lessee’s use or enjoyment; (4) increase or decrease the amount of rent by 5 percent during any twelve month period; or (5) result in a change in the termination date of the lease. Even if the presumption is rebutted, the “public

generally” exception would still allow Mayor Murphy to participate in the municipal decision if a significant number of lessors of residential property in the City are affected by the decision in substantially the same manner as the decision affects the Mayor. The Commission may not offer advice on whether the presumption can be rebutted or whether the “public generally” exception applies because each of these issues requires a factual determination that must be made by the Mayor.

2. If Mayor Murphy’s interests do not fall under the “public generally” exception, and if the Mayor determines that it is reasonably foreseeable that the municipal decision will have a material financial effect on his economic interests, then he will be prohibited from “influencing a municipal decision.” This prohibition includes promoting, supporting, opposing, participating in, or seeking to modify or delay any action by another City Official with regard to that decision.

BACKGROUND

According to the information you provided, the City of San Diego’s Land Use and Housing [LU&H] Committee met on September 3, 2003, to discuss the recommendation of the City’s Affordable Housing Task Force to adopt an ordinance regarding Good Cause Termination of Tenancy for all residents whose tenancy period exceeds twenty-four months. The proposed ordinance would require a lessor to provide written notice stating the grounds upon which the lessor seeks to recover possession, and would require the lessor to prove such grounds at a trial or other hearing, should the lessor’s statement be disputed.

At the September 3, 2003, meeting, the members of the LU&H Committee voted to accept the recommendation and to direct the City Attorney to return with a draft ordinance. Mayor Murphy is not a member of the Committee.

According to the information you provided, Mayor Murphy has an ownership interest in two residential rental properties in the City of San Diego. He has rented one of these properties to the same tenant for more than twenty-four months.

ANALYSIS AND CONCLUSION

Section 27.3561 of the San Diego Municipal Code [SDMC] prohibits a City Official from knowingly influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on the City Official or on the City Official’s economic interests. For purposes of this section, “material financial effect” is deemed to have the same meaning as that set forth in title 2, sections 18705 through 18705.5 of the California Code of Regulations. SDMC § 27.3561(c).

Title 2, section 18705.2 of the California Code of Regulations sets forth the materiality standards for interests in real property that are directly and indirectly involved in a municipal decision. California Code of Regulations section 18704.2, as well as advice letters issued by the Fair Political Practices Commission, provide guidance in determining whether the real property

interests of Mayor Murphy are directly or indirectly involved in the municipal decision concerning the proposed ordinance. Section 18704.2(a) provides that real property is directly involved in a governmental decision if: (1) the official's real property is located within 500 feet of the boundaries of the property which is the subject of the decision; (2) the decision involves zoning, annexation, sale, purchase, or lease of the official's property; (3) the decision involves the issuance or denial of a license or permit authorizing a specific use of the official's property; (4) the decision involves the imposition or modification of taxes or fees on the official's property; (5) the decision involves the adoption or amendment of a redevelopment plan when the official's property is located within the redevelopment area; or (6) the decision involves construction of or improvements to streets, water, sewer, storm drainage, or similar facilities, and the official's property will receive new or improved services.

Because the municipal decision concerning the proposed "Good Cause for Termination of Tenancy" ordinance does not involve a "particular development or other subject property from which the distances can be determined," the 500-foot rule set forth above does not apply. *In re Brown*, FPPC Adv. Ltr. A-00-195. Additionally, section 18704.2(b)(1) provides that when the municipal decision involves amending a land use regulation that is applicable to all properties in a zoning or similar category, the real property in which a public official has an interest is not directly involved in a governmental decision, but is indirectly involved if the amendment is applicable to all other properties designated in that category. Thus, although the municipal decision involves the leasing of real property owned by an official, the subject decision is "applicable to all other [leased] properties" in the City, and therefore the Mayor's rental properties would be considered indirectly involved. Because the remaining criteria set forth in Section 18704.2(a) do not apply to the facts you have described, Mayor Murphy's interest in his two residential rental properties is considered indirect for purposes of determining materiality.

Title 2, section 18705.2(b)(2) of the California Code of Regulations provides that the financial effect of a governmental decision on real property in which a public official has a leasehold interest and which is indirectly involved in the government decision is presumed not to be material. This presumption may, however, be rebutted by proof that there are special circumstances that make it reasonably foreseeable that the decision will: (1) change the legally allowable use; (2) change the lessee's actual use; (3) enhance or decrease the lessee's use or enjoyment; (4) increase or decrease the amount of rent by 5 percent during any twelve month period; or (5) result in a change in the termination date of the lease.

The determination of materiality is necessarily a factual question. *In re Soley*, FPPC Adv. Ltr. A-01-181. The facts you have provided do not indicate whether the presumption of non-materiality could be rebutted. Although the proposed ordinance could result in a change in the termination date of the leases for the properties owned by the Mayor, particularly the tenancy of less than two years, the specific facts surrounding each tenancy are necessary to determine whether this is the case. This is a determination that the Mayor must make. If no facts exist to rebut the presumption, the Mayor will not be disqualified by virtue of his ownership interest in the two residential properties.

Even if the materiality presumption is rebutted, there exists a “public generally” exception under which a City Official may still participate in a municipal decision. Under this exception, the Mayor may participate in the decision if the financial effect of the decision on his interests is indistinguishable from the effect on the public generally. Cal. Code Regs. tit. 2, § 18707. This exception is premised on the assumption that a public official is less likely to be biased by a financial impact on his or her economic interests when a significant segment of the community is substantially likely to experience the same impact from a governmental decision. *In re Condotti*, FPPC Adv. Ltr. A-99-154. In order for the “public generally” exception to apply to an official who owns three or fewer residential property units¹, the municipal decision must affect at least 10 percent or 5,000 of the City’s property owners or homeowners. Cal. Code Regs. tit. 2, § 18707.9(a).

You have not provided any specific information regarding the number of property owners in the City or the number of property owners who will be affected by the proposed ordinance. When providing legal advice, the Commission is not a finder of fact and cannot make any conclusions regarding whether the “public generally” provision applies. Because this is a question of fact, the determination ultimately must be made by the Mayor. If he determines that the subject municipal decision will affect at least 10 percent or 5,000 property owners or homeowners in substantially the same manner, then the exception will apply and he may participate in the decision.

If, on the other hand, the Mayor makes the determination that the “public generally” exception does not apply, and there are facts indicating that it is reasonably foreseeable that the proposed ordinance will have a material financial effect on the Mayor’s economic interests, then the Mayor would be disqualified from influencing the municipal decision. According to the definitions set forth in the Ethics Ordinance, “influencing a municipal decision” means “affecting or attempting to affect any action by a City Official on one or more municipal decisions by any method, including promoting, supporting, opposing, participating in, or seeking to modify or delay such action.” SDMC § 27.3503. Accordingly, if the Mayor determines that he has a disqualifying interest, he should refrain from any activity that could be construed as attempting to affect the actions of the City Council.

CITY OF SAN DIEGO ETHICS COMMISSION

By
Stacey Fulhorst
Investigator

SF/s

¹ Your letter indicates that the Mayor owns two rental properties. An official’s principal residence does not count as a “residential property unit” for purposes of section 18707.9(a). If the Mayor owns more than three residential property units, the provisions of section 18707.9(b) would apply instead.