



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 29, 2019

Mark Vanni
Deputy City Attorney
200 East Santa Clara Street,
16th Floor Tower
San Jose, CA 9113-1905

Re: Your Request for Informal Assistance
Our File No. I-19-084

Dear Mr. Vanni:

This letter responds to your request for advice on behalf of City of San Jose Councilmember Maya Esparza regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Because your inquiry is general in nature, we are treating your request as one for informal assistance.²

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 Esparza participate in decisions relating to the City's Apartment Rent Ordinance ("ARO") or its Ellis Act Ordinance ("EAO"), where she has a leasehold interest in an apartment subject to both ordinances?

CONCLUSION

Under the public generally exception, Regulation 18703(e)(4) allows an official to take part in a decision that affects all renters of residential property within the official's jurisdiction if the only interest the official has in the decision is an interest in a residential leasehold. Ordinances, such as the City's ARO and EAO, that apply to any potential renter in the City if they sign a lease to rent

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 Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

a unit covered by the ordinance, as opposed to those applicable to a particular class of renters, are ordinances that "affect all renters of residential property in a jurisdiction," and Councilmember Esparza is not prohibited from taking part in the decisions despite her interest in her apartment.

FACTS AS PRESENTED BY REQUESTER

Councilmember Esparza represents District 7 in the City of San Jose and assumed office on January 1, 2019. Currently, Councilmember Esparza rents an apartment unit through a yearly lease that is rent stabilized under the City's Apartment Rent Ordinance ("ARO") and subject to its Ellis Act Ordinance ("EAO"). No particular decisions under either ordinance are at issue at this time.

The ARO protects tenants from excessive and unreasonable rent increases if they lease a rent stabilized unit in an apartment complex. The ARO limits annual rent increases, requires notices to be provided to the City, regulates how much and what types of costs may be passed through to tenants, provides for monitoring of rents, and an administrative review process for housing-related disputes. Access to rent stabilized units are not limited to any particular class of persons. Anyone in San Jose enjoys the protections of the ARO if they sign a lease to rent a unit covered by the ordinance.

Per the latest census data, you report there are approximately 314,038 residential dwellings in the City. Of those 314,038 residential dwellings, approximately 137,197 are rental units, or approximately 44 percent of all residential dwellings. Of those 137,197 residential rental units, the ARO is estimated to apply to 39,009 rental units, approximately 28 percent of all residential rental units or approximately 12 percent of all City residential dwellings. The ARO is estimated to provide protection to over 120,927 tenants.

The City's Ellis Act Ordinance closely mirrors California's statutory requirements.³ It also imposes additional requirements on owners of both rent stabilized and non-rent stabilized properties, although not all its requirements apply to non-rent stabilized units. Such requirements can include providing tenants with relocation assistance, paying for a relocation consultant, and the right to return to the rental unit if the owner returns the unit to the rental market within 5 years.

Out of the approximately 137,197 rental units in the City, the EAO applies to approximately 88,000, or approximately 64 percent of all residential rental units or approximately 28 percent of all residential dwellings. Like the ARO, the protections under the EAO are not limited to any particular class of persons. Anyone in San Jose enjoys the protections of the EAO if they sign a lease to rent a unit covered by the ordinance.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a

³ The Ellis Act (Sections 7060-7060.7), broadly regulates how all property owners may remove any tenants from residential rental units in order to withdraw all units in a building from the rental market.

material financial effect, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Under Section 87103(b), an official has a financial interest in any real property in which the official has a direct or indirect interest of \$2,000 or more. An "interest in real property" includes any leasehold in real property located in the jurisdiction owned by the official, where the fair market value is \$2,000 or more. (See Section 82033).

You have identified that Councilmember Esparza has a real property interest in her leased rent-stabilized apartment unit. We assume the value of the leasehold is \$2,000 or more.

Foreseeability and Materiality

The standard for foreseeability varies depending on whether an interest is explicitly involved in the decision at issue. A financial effect is presumed reasonably foreseeable where the official's financial interest is explicitly involved as a named party in, or subject of, the decision.⁴ (Regulation 18701(a).) Generally, a rental property is not the subject of a decision involving rent control ordinance. (See *Gelb* Advice Letter, No. A-91-523.)

For a financial interest that is not explicitly involved in the decision, the financial effect of the decision on an official's interest is reasonably foreseeable if it can be recognized as a realistic possibility and is more than a hypothetical or theoretical possibility. (Regulation 18701(b).)

Leasehold Interest

Applicable to these facts, the real property materiality standard for a leasehold interest is met 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 property.

(Regulation 18702.2(c).)

Decisions related to either City ordinance would have a reasonably foreseeable and material financial effect on the Councilmember's financial interest, because Councilmember Esparza's rental unit is subject to both the ARO and EAO, and decisions affecting either ordinance could foreseeably affect the potential value of her leasehold.

Public Generally Exception

Where the financial effect of a decision on an official is indistinguishable from the effect on the public generally, the public official may participate in the decision under the public generally

⁴ A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, or if the decision affects a real property interest described in Regulation 18702.2(a)(1)-(6).

exception. (Section 87103.) Relevant to this issue, Regulation 18703(e) provides specific rules for special circumstances, including where the decision solely impacts an official's leasehold interest. The exception in Regulation 18703(e)(4) applies where the official establishes that the decision affects all renters of residential property within the official's jurisdiction, and affects only interests resulting from the official's leasehold interest in his or her residence. Rent control or tenant protection ordinances, which may apply to a limited number of residential units, are deemed to affect all residential renters in a jurisdiction where the ordinance is not limited to a particular class of renters, and thus potentially available to any renter.

The public generally exception in Regulation 18703(e)(4) is applicable in regards to the ARO and EAO, so long as Councilmember Esparza's only interest at issue is her residential leasehold. Although the two ordinances at issue affect a percentage of the overall rental properties in the City, the protections under the ARO and the EAO are not limited to any particular class of persons, and apply to any potential renter in the City if they sign a lease to rent a unit covered by the ordinance. We recommend that additional advice be sought if a decision affects other financial interest for the official, or if the decisions affect a class of renters.

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

Sincerely,

Dave Bainbridge
General Counsel



By: L. Karen Harrison
Counsel, Legal Division

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