

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: June 24, 2016

TO: Honorable City Councilmembers

FROM: City Attorney

SUBJECT: Exempting the New One Paseo Project from a Planning Commission Hearing and Recommendation

INTRODUCTION

On June 27, 2016, the San Diego City Council is scheduled to hear the New One Paseo project (Project), a mixed-use development proposed in the Carmel Valley Community Plan area, which requires a Process Five, or City Council, decision. The Project is proceeding directly to the City Council without a Planning Commission hearing and recommendation because four of the seven Planning Commissioners have reported conflicts of interest, which prohibit them from participating in a decision on the Project. Thus, the Planning Commission cannot obtain a quorum in order to hold a hearing on the Project and provide a recommendation. The purpose of this memorandum is to notify the Council that the Project cannot legally conduct a Planning Commission hearing and obtain a recommendation and to clarify the process for moving the Project forward.

QUESTIONS PRESENTED

1. At this time, can the Planning Commission hear the Project and provide a recommendation to the City Council?
2. What is the process required to exempt the Project from the requirement of a Planning Commission hearing and recommendation?

SHORT ANSWERS

1. No. Due to the required recusals, the Planning Commission does not have a quorum to hear the Project and provide a recommendation.
2. The City Council may exempt the Project actions, through an uncodified ordinance, from the requirement of a Planning Commission hearing and recommendation.

FACTS

The Project is a Process Five mixed-use development in the Carmel Valley area proposed by Kilroy Realty, L.P. (Project Applicant), which includes an Addendum to the previously certified Environmental Impact Report and adoption of the Mitigation, Monitoring, and Reporting Program, a Vesting Tentative Map with public right-of-way and easement vacations, Site Development and Neighborhood Development Permits, amendments to the General Plan, Community Plan and Precise Plan, and a Land Development Code amendment. Pursuant to the San Diego Municipal Code, a Planning Commission hearing and recommendation is required before the City Council can make its decision on the Project. Earlier this year, the Project was tentatively scheduled to be heard by the Planning Commission. Prior to the hearing, four of the seven Planning Commissioners identified conflicts of interest which would prevent them from participating in the making of a decision on the Project and require them to recuse. Specifically, three Planning Commissioners identified they had financial conflicts of interest. Commissioner Susan Peerson disclosed that her husband is a consultant on the Project. Commissioners Douglas Austin and William Hofman each stated that they received payment from the Project Applicant in the last twelve months for work performed on projects unrelated to the current Project. Finally, Commissioner Anthony Wagner declared that he has a personal bias related to the Project, which he stated would make him unable to participate in a fair and impartial manner.

After receiving this information, the Office of the City Attorney analyzed each Commissioner's conflict to determine whether the "legally required participation" exception, codified in California Government Code § 87101, could be used to allow one of the disqualified Commissioners to participate in hearing the Project. A request was sent to the Fair Political Practices Commission (FPPC) to provide advice on whether the "legally required participation" exception in the Political Reform Act of 1974 (Act) could be applied. The FPPC responded that the exception could not be used because it only applies to financial conflicts of interest and under the current scenario one of the conflicted Commissioners has a personal bias, not a financial conflict. *See Neuffer Advice Letter*, No. A-16-049, attached as Exhibit 1.

Due to the recusals and without the use of the "legally required participation" exception, the Planning Commission is without a quorum to hear the Project. As such, as currently proposed, each Project action¹ includes language exempting the action from the requirement of a Planning

¹ The approval of the Addendum to the previously certified Environmental Impact Report and adoption of the Mitigation, Monitoring, and Reporting Program will be considered by resolution because a Planning Commission hearing and recommendation is not required for those items.

Commission hearing and recommendation.² This Office has been asked to address whether the Planning Commission can hear the Project and provide a recommendation to the City Council and to clarify the process to exempt the Project actions from the Planning Commission hearing and recommendation requirement.

ANALYSIS

I. THE PLANNING COMMISSION CANNOT HEAR THE PROJECT WITHOUT A QUORUM

A Planning Commission hearing is required by San Diego Municipal Code sections 112.0509(b) and 111.0107 before the City Council can make its decision on the Project. The Planning Commission consists of seven members. *See* San Diego Charter § 41(c). A quorum is the minimum number of members who must be present at a meeting for business to be legally transacted. 62 Op. Cal. Att’y Gen. 698 (1979). Under Robert’s Rules of Order and common law, a quorum consists of a majority of a body. Robert’s Rules of Order Newly Revised (11th ed. 2011), p. 21, ll.17-23, 59 Am. Jur. 2d *Parliamentary Law* § 9 (2016). As such, four Commissioners are necessary for a Planning Commission quorum. “Without the presence of a ‘quorum,’ a deliberative body cannot transact business other than to (1) fix the time to which to adjourn, (2) adjourn, (3) recess, or (4) take measures to obtain a quorum.” 62 Op. Cal. Att’y Gen. 699. Therefore, in order for the Planning Commission to hear the Project, they must have four Commissioners present and capable of voting. 62 Op. Cal. Att’y Gen. 699-700. (“A quorum refers to the number of members present, not to the number of members actually voting on a particular question; however, the quorum members must be entitled to vote.”)

A. Planning Commissioners with a Disqualifying Financial Interest Are Prohibited from Participating in Making a Decision on the Project

Financial conflict of interest statutes exist to prevent or limit the possibility of personal influence over decisions by public officials with financial interests in the decision. *See* Cal. Gov’t Code § 81001; *see also Thorpe v. Long Beach Cmty. Coll. Dist.*, 83 Cal. App. 4th 655, 659 (2000). The Act disqualifies public officials from participating in government decisions in which they have a financial interest. *See* Cal. Gov’t Code § 87100.

California Government Code section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in

² Each action for the Project, Vesting Tentative Map with public right-of-way and easement vacations, Site Development and Neighborhood Development Permits, amendments to the General Plan, Community Plan and Precise Plan, and Land Development Code amendment, will be considered by uncodified ordinance with the following language exempting the action from the requirement of a Planning Commission hearing and recommendation: “*That, notwithstanding San Diego Municipal Code section 112.0509, which provides for a Planning Commission hearing or recommendation prior to certain City Council actions, no Planning Commission hearing or recommendation is required related to the actions being authorized pursuant to this ordinance.*”

which the official has a financial interest. A public official includes any “member, officer, employee or consultant of a state or local government agency.” Cal. Gov’t Code § 82048. “Members” include unsalaried members of committees, boards, or commissions with decision-making authority. Cal. Code Regs., title 2, § 18700. Planning Commissioners are public officials subject to the Act and are participating in a governmental decision when they advise or make recommendations to the City Council as the decision maker. *See* Cal. Code Regs., title 2, § 18704.

Pursuant to California Government Code 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, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following: (1) investments of \$2,000 or more in a business entity; (2) interest in real property worth \$2,000 or more; (3) a source of income that totals \$500 or more within the 12 months prior to the decision in question; (4) a business entity in which he or she is an officer, director, employee, or holds any business position, irrespective of whether he or she has an investment in or receives income from the entity; or (5) gifts from a single donor aggregating \$250 or more in the 12 months prior to the decision in question. *See also* Cal. Code Regs., title 2, §§ 18702.1-18702.5.

Here, the Planning Commissioners would be participating in making a governmental decision by hearing the Project and providing a recommendation to the decision maker. Commissioner Peerson has a financial interest in the decision because it is reasonably foreseeable that the decision will have a material financial effect on her and her husband. In addition, Commissioners Austin and Hofman each have a financial interest because it is reasonably foreseeable that the decision will have material financial effect on the Project Applicant which has been a source of income of \$500 or more within the 12 months prior to the decision in question. Therefore, these three Commissioners have a financial interest and are prohibited from participating in making a governmental decision on the Project.³

B. A Planning Commissioner with a Personal Bias Related to the Project Is Prohibited from Participating in Making a Decision on the Project

In addition to financial conflict of interest laws, the common law doctrine against conflicts of interest and the doctrine of procedural due process require general impartiality in decision-making. *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1171, (1996) (“[T]he common law doctrine against conflicts of interest ... prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties.”) (citation omitted). The intent is to ensure that a governmental proceeding that could result in a deprivation of property is conducted in a fair manner. 16B Am. Jur. 2d *Constitutional Law* § 953 (2016).

³ The City of San Diego’s Ethics Ordinance, San Diego Municipal Code, Chapter 2, Article 7, Division 35, essentially parallels the Act by making it unlawful for a City official to make, participate in making, or use his or her position to influence a municipal decision in which the official has a disqualifying financial interest. In this case, the City’s Ethics Ordinance also prohibits the Planning Commissioners’ participation in the making of a decision on the Project.

A public officer is required to “exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.” *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928). The courts have recognized that “an individual has the right to a tribunal “which meets ... standards of impartiality.” ... Biased decision makers are ... impermissible and even the probability of unfairness is to be avoided.... The factor most often considered destructive of administrative board impartiality is bias arising from pecuniary interests of board members.... Personal embroilment in the dispute will also void the administrative decision” *Clark*, 48 Cal. App. 4th at 1170 (citation omitted). A member of a commission cannot vote on a matter in which that member has a personal interest. *Id.* at 1171. If that member does vote, the action taken by the body can be invalidated. *Id.* In *Clark*, a neighbor, who had a history of personal interest and bias against the project, became a councilmember after the project permits had been approved by the planning commission, and then voted to deny the permits. *Id.* at 1163-64. The court ultimately determined that the applicant had been denied a fair hearing. *Id.* at 1173.

While the mere suggestion of bias may not be sufficient to overcome the presumption of impartiality and fairness, the probability of bias is too high when there is evidence of financial or personal interest. *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1237 (2000); *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 640 (1996); *Clark*, 48 Cal. App. 4th 1152. Commissioner Wagner has stated that he has a personal bias concerning the Project, which he stated makes him unable to participate in a fair and impartial manner. Unlike the financial conflicts of interest, there are no metrics by which to measure how much of a personal bias is acceptable. Once such a bias is established, Commissioner Wagner must recuse himself from hearing the Project as it would most likely invalidate any action taken on the Project.

With Commissioners Peerson, Austin, Hofman, and Wagner recusing due to conflicts of interest related to the Project, the Planning Commission is without the four Commissioners required to obtain a quorum and hear the Project. Therefore, the Project cannot be heard by the Planning Commission as required by the San Diego Municipal Code.

II. THE CITY COUNCIL MAY ADOPT THE LANGUAGE EXEMPTING EACH PROJECT ACTION FROM THE REQUIREMENT OF A PLANNING COMMISSION HEARING AND RECOMMENDATION

A. If the City Council Adopts Language Exempting Each Action from the Requirement of a Planning Commission Hearing and Recommendation, State Law Would Not Require a Planning Commission Hearing

In general, charter cities are not bound by state zoning and planning laws. 66 Cal. Jur. 3d *Zoning and Other Land Controls* § 128 (2016); *see also* 2012 City Att’y MOL 85 (2012-2; Feb. 6, 2012) (City, as a charter city, is not required under State law to have the Planning Commission review the Capital Improvement Program for conformance with the general plan). The provisions of Division 1, Chapter 3, Local Planning, which addresses the establishment of a planning commission, and Division 1, Chapter 4, Zoning Regulations, which set forth the procedures and standards for the adoption and administration of zoning laws, do not apply to charter cities,

except to the extent they are adopted by charter or ordinance of the city. Cal. Gov't Code §§ 65700 and 65803.

One of the exceptions to the general rule is California Government Code section 65804, which sets forth the minimum procedural standards for city and county zoning hearings and specifically applies to chartered cities. Cal. Gov't Code § 65804. Under California Government Code section 65804, city and county zoning agencies are required to develop and publish procedural rules for conducting their hearings and to incorporate the procedures in Section 65854. Cal. Gov't Code § 65804(a). Although California Government Code section 65854 provides for specific noticing requirements and states “[t]he planning commission shall hold a public hearing on the proposed zoning ordinance or amendment to a zoning ordinance,” the City is not required to have a Planning Commission and if we do, its duties are set forth by ordinance. Cal. Gov't Code §§ 65854 and 65101(a). In fact, state law does not even require a general law city to create a planning commission, nor does it dictate any duties for the planning commissions. The California Government Code states that the legislative body “*may* create one or more *planning commissions* each of which shall report directly to the legislative body.” Cal. Gov't Code § 65101(a) (emphasis added).

While the San Diego Charter creates the Planning Commission, it is the San Diego Municipal Code which sets forth the relevant duties of the Planning Commission. San Diego Charter § 41(c); SDMC §§ 111.0105, 111.0202, 112.0504, 112.0506-112.0509, 123.0103-123.0107. One such duty of the Planning Commission is to provide a hearing and recommendation on Land Development Code amendments. SDMC § 111.0107. However, if the City Council approves the exemption language for each action, there is no requirement for a Planning Commission hearing and recommendation on the Project, pursuant to any State law requirement, including California Government Code Section 65854.

B. The Language Exempting Each Action from the Requirement of a Planning Commission Hearing and Recommendation May Be Adopted So Long as it Does Not Violate the Principles of Equal Protection

The actions on the Project may be exempt from the requirement of a Planning Commission hearing and recommendation so long as the exemption does not violate the principles of equal protection.⁴ The California Constitution, article 1, section 7, guarantees the equal protection of the law, and is interpreted co-extensively with the Federal Constitutional provision. 13 Cal. Jur. *Constitutional Law* § 339 (2016); *Landau v. Superior Court*, 81 Cal. App. 4th 191 (1998). Equal protection requires that people who are similarly situated to others be treated the same under the law. *People v. Cruz*, 207 Cal. App. 4th 664, 674 (2012). In order for an equal protection claim to be successful, there must be a showing that the government has adopted a classification that affects two similarly situated groups unequally for the purposes of the law that is challenged. *Id.* Here, each Project action includes language exempting the action from the requirement of a

⁴ See 2013 City Att'y MOL 29 (2013-4; Apr. 3, 2013) (Memorandum of Law analyzed whether the City could exempt a project from findings required under the San Diego Municipal Code and concluded that the City could exempt a project from such findings).

Planning Commission hearing and recommendation because the Planning Commission cannot obtain a quorum to hear the Project due to required recusals. These recusals are specific to this particular Project and the Project Applicant. This set of circumstances is unique, and therefore, it is unlikely that other projects could show that they are similarly situated to the Project such that a claim for a violation of equal protection could proceed.

Furthermore, when the subject classification does not involve a fundamental right or suspect class, such as in this case, it will survive an equal protection claim if it is rationally related to a legitimate government purpose. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988). The court will uphold the classification “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Cruz*, 207 Cal. App. 4th at 675 (citation omitted). Under the San Diego Municipal Code, a Planning Commission hearing and recommendation must occur before the City Council can make its decision on the Project.⁵ As analyzed above, due to the required recusals, the Planning Commission lacks a quorum to hold the hearing required by the San Diego Municipal Code. If the Planning Commission does not hold a hearing on the Project, the Project is unable to proceed forward to City Council for a final decision. Therefore, the purpose of exempting each Project action from the requirement of a Planning Commission hearing and recommendation is to allow the Project to proceed forward to City Council without violating the Act or due process, which is a rational basis for such an exemption.

⁵ San Diego Municipal Code sections 112.0509(b) and 111.0107(a)(1)(A) already allow for the item to proceed to the City Council without a Planning Commission recommendation if the Planning Commission is unable to act within 60 calendar days after the initial hearing. Examples of other types of projects which are exempt under the San Diego Municipal Code from a Planning Commission hearing and recommendation are transitional housing facilities, public right-of-way vacations, and capital improvement program projects. SDMC §§ 141.0313, 125.0940, 112.0601.

Honorable City Councilmembers

June 24, 2016

Page 8

CONCLUSION

Due to the required recusals by four Planning Commission members based on conflicts of interest, the Planning Commission does not have a quorum to hear the Project and provide a recommendation. In order for the City Council to make a decision on the Project without a Planning Commission hearing and recommendation, the Council may exempt the actions on the Project from the requirement of a Planning Commission hearing and recommendation.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Corrine Neuffer
Corrine Neuffer
Deputy City Attorney

CLN:dkr:mm

Doc. No.: 1304751_6

Attachment: Fair Political Practices Commission advice letter dated March 25, 2016

cc: Kevin L. Faulconer, Mayor

Andrea Tevlin, IBA

Elizabeth Maland, City Clerk

Exhibit 1



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

March 25, 2016

Corrine L. Neuffer
Deputy City Attorney
Office of the San Diego City Attorney
1200 Third Avenue, Suite 1100
San Diego, California 92101

Re: Your Request for Advice
Our File No. A-16-049

Dear Ms. Neuffer:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when rendering advice. (*In re Oglesby* (1975), 1 FPPC Ops. 71.).

QUESTION

Does the Act permit the City of San Diego's Planning Commission to invoke the "legally required participation" exception with respect to the governmental decision on whether to recommend approval of a land-use project if three of its seven commissioners have a disqualifying conflict of interest under the Act and a fourth commissioner abstains due to personal bias?

CONCLUSION

No. The Planning Commission may not invoke the "legally required participation" exception because it can convene a quorum of commissioners who do not have 87100 conflicts of interest with respect to the decision.

FACTS

The City of San Diego's Planning Commission will soon consider whether to recommend approval of a land-use project. The Planning Commission consists of seven commissioners. Three of those commissioners have a disqualifying conflict of interest under the Act. Another commissioner has stated that he will voluntarily abstain from participating in the making of the

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.

decision because he has a non-financial conflict of interest due to personal bias that makes him unable to participate in a fair and impartial manner.

Due to the disqualification of three commissioners under the Act and the voluntary abstention of a fourth commissioner, the Planning Commission may not be able to take action with respect to the decision on whether to recommend approval of the land-use project.

ANALYSIS

Section 87100 prohibits a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which he or she knows or has reason to know he or she has a financial interest. Section 87101, however, provides that that prohibition does not prevent a public official from making or participating in the making of a governmental decision to the extent his or her participation is legally required for the action or decision to be made.

The "legally required participation" exception contained in Section 87101 has been narrowly interpreted to permit the participation of the fewest financially interested persons possible in any decision. (*In re Hudson* (1978) 4 FPPC Ops. 13; *Gillig* Advice Letter, No. A-96-150; *Hill* Advice Letter, No. I-89-160.) Consequently, Regulation 18705 provides in pertinent part:

"(a) A public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision within the meaning of Section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision....

"(c) This regulation shall be construed narrowly, and shall:

"(1) Not be construed to permit an official, who is otherwise disqualified under Section 87100, to vote to break a tie.

"(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Section 87100, whether or not such other members are actually present at the time of the disqualification."

Thus, a public official disqualified under Section 87100 may participate in the making of a governmental decision only if a quorum cannot be convened of other members who are not disqualified under Section 87100.

Because the Planning Commission consists of seven commissioners, it would require at least four commissioners to convene a quorum. (See Regulation 18705(d).) Three commissioners are disqualified under Section 87100 with respect to the decision at issue. However, four commissioners, including the commissioner who has stated he will voluntarily abstain, are not disqualified under Section 87100. Therefore, the Planning Commission may not invoke the "legally

required participation" exception to allow a commissioner otherwise disqualified under Section 87100 to vote because a quorum can be convened of other commissioners who are not disqualified under Section 87100.

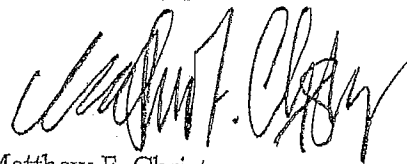
We note that Regulation 18705(c)(2) prohibits the invocation of the "legally required participation" exception when a quorum may be convened without inclusion of a public official with a disqualifying financial interest under Section 87100 "whether or not such other members are actually present at the time of the disqualification." This clause indicates it is not the actual ability of non-disqualified members to participate in making the decision that is relevant, but rather the legal ability to do so. Here, the commissioner that would voluntarily abstain from participating in making the decision at issue due to personal bias is legally able to participate under the Act, and this provides further support for the conclusion that the Planning Commission may not invoke the "legally required participation" exception in these circumstances.

Accordingly, we conclude that the Planning Commission may not invoke the "legally required participation" exception because it can convene a quorum of commissioners who do not have 87100 conflicts of interest for the decision on whether to recommend approval of the project.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Matthew F. Christy
Counsel, Legal Division

MFC;jgl