

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance •• Administration •• Executive/Legal •• Enforcement
(916) 322-5662 322-5660 322-5901 322-6441

August 7, 1985

Mark Doane
City Attorney
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608

Re: Your Request for Advice
Our File No. A-85-111

Dear Mr. Doane:

You were authorized by Vice Mayor Laura Davenport to seek our advice concerning her obligations under the conflict of interest provisions of the Political Reform Act.^{1/}

You stated the facts as follows:^{2/}

Councilmember A is an officer of and is employed by an architectural and urban planning firm which is located outside the boundaries of Councilmember A's jurisdiction. In addition to drawing a salary from the firm, Councilmember A also holds five percent of the equity stock in the company.

Emeryville is currently in the process of a comprehensive city-wide study which will culminate in a revision of its general plan, the formulation and passage of one or more specific plans and a thorough revision of its planning and zoning ordinances. At this time, no official action has been taken with regard to any of these documents. It is foreseeable that the land use categories pertaining to a great many parcels of property in Emeryville will be changed as a

^{1/} The Political Reform Act is contained in Government Code Sections 81000-91015. All statutory references are to the Government Code.

^{2/} All references to Councilmember A are to Vice Mayor Laura Davenport.

result of the current studies. I anticipate that the new land use categories which will be imposed will be stated in the alternative so as to provide maximum flexibility.

Councilmember A's employer has been retained by a developer for the purpose of studying the feasibility of developing a major regional shopping center on the site of a current steel mill located in Emeryville. Such feasibility studies customarily involve a team of various professionals who report on a variety of topics such as economics, soils and site suitability. If the client/developer determines that the project is infeasible, no implementing actions are taken and the idea is dropped.

The developer does not have any legal interest in the steel mill property, nor has he submitted a Development Application, Application for Rezoning, Application for General Plan Amendment or any other such documentation to the City. If the General Plan and zoning ordinances are amended as a result of the current study to allow a shopping center on the steel mill site, the steel mill will be allowed to remain as an existing non-conforming use.

Your questions are:

1. If the City Council votes to amend the General Plan and zoning ordinances to allow a regional shopping center on the steel mill site, would Councilmember A be disqualified from voting?
2. Would the answer to question No. 1 change if by the time the City Council voted to so change the zoning, the developer in question had acquired a legal interest in the steel mill property?
3. If, prior to the City Council's voting to so change the zoning, Councilmember A retired from the architectural firm and divested all of Councilmember A's stock, would Councilmember A be disqualified from voting?

DISCUSSION

As you know, a public official may not make or participate in a governmental decision in which the official has a financial interest in the outcome. Section 87100. Under Section 87103, an official has a financial interest in a decision when it is reasonably foreseeable that the decision will have a material financial effect on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

...

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87103 (a), (c) and (d)

Since Vice Mayor Davenport receives income from, and has an investment in, Esherick Homsey Dodge and Davis ("Esherick"), the architectural and urban planning firm, she may not participate in any Council decisions where it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on Esherick.^{3/}

Income is defined in the Act to include "any income of any business entity...in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater...." Section 82030(a). Since Vice Mayor Davenport's interest in Esherick is less than 10-percent, sources of income

^{3/} I have enclosed a copy of 2 Cal. Adm. Code Section 18702.2 (effective August 23, 1985) which sets forth materiality guidelines for various types of business entities.

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to Esherick, i.e., its clients, will not be considered sources of income to her. Accordingly, the focus of the analysis is whether it is reasonably foreseeable that any of the Council decisions concerning the revision of the City General Plan will materially affect Esherick.

Your first question is whether Vice Mayor Davenport is precluded from voting on amendments to the General Plan and zoning ordinances to allow a regional shopping center on the steel mill site. My understanding is that, at this point, Esherick has been retained only to do feasibility studies and not to represent or lobby for the developer, Glenn Isaakson. The change to the General Plan and zoning ordinance is a necessary first step to development of the site as a shopping center, and, thus, unless the developer has abandoned the idea altogether for other reasons, these decisions are clearly significant to the developer. However, as I noted above, we are concerned with the foreseeable effects on Esherick, not the developer.

There are three factual questions which relate to the foreseeability question. First, it must be determined whether it is reasonably foreseeable that the developer will acquire the property so that it can build the shopping center. The fact that it is investigating the site for potential acquisition and development is not enough by itself. If, however, the developer has a legal right (option, contract for sale) to buy the property, it is foreseeable that it will acquire the property. Second, it must be determined whether, even if the developer acquires the property, Esherick is likely to get the contract to build the shopping center if the feasibility study results in a decision to go ahead. This depends on whether there is an agreement or understanding between the developer and Esherick that Esherick will perform all necessary architectural and planning work on the shopping center. Third, it must be determined whether the anticipated payment for this work would be material under the guidelines in 2 Cal. Adm. Code Section 18702.2 (copy enclosed).

If, after asking these questions, it is determined that the developer has a legal right to buy the property, that it is foreseeable that Esherick will be hired to do the architectural work on the shopping center if it is built, and that the payment to Esherick for that architectural work would be material under regulation 18702.2, then Vice Mayor Davenport should not participate in the City decisions. On the other hand, if it is not foreseeable that the developer will acquire the property, if there is no agreement or understanding between the developer and

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Esherick that Esherick will perform the architectural work on the shopping center,^{4/} or if the payment for the work on the center would not be material, then Vice Mayor Davenport would not be precluded from participating in the City decisions.

Second, you asked whether the conclusion would be different if, by the time the City Council voted to change the zoning for the site, the developer had acquired an interest in the property. As I discussed above, this is certainly one of the factors in the analysis of foreseeability. If the developer has an interest in the property, it becomes more likely that the shopping center will be built. However, it must also be foreseeable that Esherick will do the architectural work as discussed above.

Third, you asked whether our analysis would change if, prior to the Council's decisions on the zoning of the site, Vice Mayor Davenport retired from Esherick and sold all of her stock in Esherick back to the firm. If Vice Mayor Davenport sold her stock, she would no longer have an investment in a business entity within the meaning of Section 87103(a) as of the date she sold her stock. However, Esherick would continue to be a "source of income" to her under Section 87103(c) for 12 months following her retirement from, and the sale of her stock to, the firm. Accordingly, if the decisions come before the Council prior to the expiration of 12 months, the above analysis would still apply.

Please feel free to contact me if I can be of further assistance.

Sincerely,

Diane Maura Fishburn
Diane Maura Fishburn
Counsel

Legal Division

DMF:plh
Enclosure

^{4/} What is reasonably foreseeable depends on an analysis of all of the circumstances. If Esherick has performed all of the developer's architectural work in the past or is the only architectural firm in the area with the needed expertise, this would suggest that it is probable they would be selected for this project.



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CITY OF EMERYVILLE

INCORPORATED 1896

1333 PARK AVENUE

EMERYVILLE, CALIFORNIA 94608

TELEPHONE (415) 658-8901

May 9, 1985

Ms. Diane Fishburn, Staff Attorney
Fair Political Practices Commission
P. O. Box 807
Sacramento, California 95804

Re: Request for Legal Opinion

Dear Diane:

Would you please supply me with a written legal opinion regarding the following fact situation:

Councilmember A is an officer of and is employed by an architectural and urban planning firm which is located outside the boundaries of Councilmember A's jurisdiction. In addition to drawing a salary from the firm, Councilmember A also holds five percent of the equity stock in the company.

Emeryville is currently in the process of a comprehensive city-wide study which will culminate in a revision to its general plan, the formulation and passage of one or more specific plans and a thorough revision of its planning and zoning ordinances. At this time, no official action has been taken with regard to any of these documents. It is foreseeable that the land use categories pertaining to a great many parcels of property in Emeryville will be changed as a result of the current studies. I anticipate that the new land use categories which will be imposed will be stated in the alternative so as to provide maximum flexibility.

Councilmember A's employer has been retained by a developer for the purpose of studying the feasibility of developing a major regional shopping center on the site of a current steel mill located in Emeryville. Such feasibility studies customarily involve a team of various professionals who report on a variety of topics such as economics, soils and site suitability. If the client/developer determines that the project is infeasible, no implementing actions are taken and the idea is dropped.

The developer does not have any legal interest in the steel mill property, nor has he submitted a Development Application, Application for Rezoning, Application for General Plan Amendment or any other such documentation to the City. If the General Plan and zoning ordinances are amended as a result of the current study to allow a shopping center on the steel mill site, the steel mill will be allowed to remain as an existing non-conforming use.

My questions are as follows:

1. If the City Council votes to amend the General Plan and zoning ordinances to allow a regional shopping center on the steel mill site, would Councilmember A be disqualified from voting?
2. Would the answer to question No. 1 change if by the time the City Council voted to so change the zoning, the developer in question had acquired a legal interest in the steel mill property?
3. If, prior to the City Council's voting to so change the zoning, Councilmember A retired from the architectural firm and divested all of Councilmember A's stock, would Councilmember A be disqualified from voting?

Thank you for your early attention to this matter. If you have any questions or need further information, please do not hesitate to call me.

Very truly yours,



Mark Doane
City Attorney



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CITY OF EMERYVILLE

INCORPORATED 1896

1333 PARK AVENUE

EMERYVILLE, CALIFORNIA 94608

TELEPHONE: (415) 658-8901

May 20, 1985

Jeanette E. Turvill, Legal Assistant
Legal Division
Fair Political Practices Commission
P.O. Box 807
Sacramento, CA 95804

Re: Your Advice No. A-85-111

Dear Ms. Turvill:

The following clarification is provided pursuant to your May 17, 1985 request:

1. Vice-Mayor Laura Davenport
Emeryville City Hall
2449 Powell Street
Emeryville, CA 94608
2. Esherick Homsey Dodge and Davis
3. Glenn Isaakson and Associates
4. I have been authorized by Vice-Mayor Davenport to seek this advice on her behalf.

I hope this additional information will be sufficient to allow you to render a response. If not, please give me a call at (415) 658-8901.

Very truly yours,

Mark Doane
City Attorney

MD:lt

cc: Vice-Mayor Davenport

State of California



Fair Political Practices Commission

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May 28, 1985

Mark Doane
City Attorney
City of Emeryville
1333 Park Avenue
Emeryville, CA 94606

Re: A-85-111

Dear Mr. Doane:

Your letter requesting advice under the Political Reform Act has been referred to Diane Fishburn, an attorney in the Legal Division of the Fair Political Practices Commission. If you have any questions about your advice request, you may contact this attorney directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

A handwritten signature in cursive script that reads "Barbara A. Milman" with a small flourish at the end.

Barbara A. Milman
General Counsel

BAM:plh
cc: Vice-Mayor Laura Davenport

State of California



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May 17, 1985

Mark Doane, City Attorney
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608

Re: Your Request for Advice
Our Advice No. A-85-111

Dear Mr. Doane:

We are in receipt of your May 9, 1985 letter requesting written advice concerning a possible conflict of interest situation within your city (letter enclosed).

Regulation 2 Cal. Adm. Code Section 18329, as recently revised by the Commission (copy enclosed), sets forth the requirements that must be met when requesting formal written advice.

Before your letter can be assigned to a member of our staff for response, the information listed below is needed to clarify the facts presented:

1. The name, position and mailing address of councilmember "A".
2. The name of the councilmember's employer, the architectural and urban planning firm.
3. The name of the developer hiring the councilmember's employer to conduct the feasibility study.
4. Your statement that you have been authorized by the councilmember to obtain this advice on his behalf.

When this information has been received, your initial letter and the additional facts provided will be assigned to a member of our staff for review and response. Once all factual information pertinent to this issue has been obtained, the Commission will render a response within 21 working days.

Mark Doane, City Attorney
May 17, 1985
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If you are not seeking formal advice on behalf of any person, you can request the Commission to provide informal assistance. Such assistance may be limited to an explanation in general terms of the requirements of the Political Reform Act (see 2 Cal. Adm. Code Section 18329(c)).

If you have any questions please feel free to contact this office at (916) 322-5901.

Sincerely,



Jeanette E. Turvill
Legal Assistant
Legal Division

JET:plh
Enclosures

CORRESPONDENCE TRANSMITTAL

CORRESPONDENT Loane, Mark ADVICE # ⁸⁵⁻ 111
RE c/t re: Council subrs
DATE REC'D 5/15 DATE DUE 6/13

 LEGAL TA & A ENFORCEMENT

- BARBARA
- KATHY
- BOB
- DIANE
- X JEANETTE

Draft letter (to become model for Firm letter) advising of new 18329 and asking him to either give us the names or to indicate that he seeks only internal assistance, not on behalf of any person. If he wants formal written advice, then we need official's name, address, etc. so that we can send copy of acknowledgment to official.

 ACKNOWLEDGMENT SENT
 REQUEST SEI