

*Russell* Advice letter No. A-14-114 SUPERSEDED This *Dietrick* Advice Letter, No. A-09-102, which contains inaccurate facts which may have affected the analysis and conclusion in that letter.

April 29, 2009

J. Christine Dietrick  
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City of San Luis Obispo  
990 Palm Street  
San Luis Obispo, CA 93401-3249

**Re: Your Request for Advice  
Our File No. A-09-102**

Dear Ms. Dietrick:

You have requested advice on behalf of San Luis Obispo Mayor Dave Romero and Councilmember Jan Marx with respect to their duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Please note that our advice is based solely on provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090. In addition, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A), copy enclosed.) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions provided apply only to prospective actions. Also note our advice is based solely on the facts presented in your request; the Commission does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTION

May Mayor Dave Romero and Councilmember Jan Marx participate in a San Luis Obispo City Council decision concerning a proposed amendment to the Mobilehome Park Conversion Ordinance despite owning mobile homes located in mobilehome parks in the jurisdiction?

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<sup>1</sup> 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.

## CONCLUSION

Mayor Romero and Councilmember Marx may not participate in the city council's decision concerning the proposed amendment to the Mobilehome Park Conversion Ordinance if the decision will have a reasonably foreseeable financial effect on their respective personal finances of \$250 or more in any 12-month period.

Moreover, Councilmember Marx may not participate in the city council's decision concerning the proposed amendment to the Mobilehome Park Conversion Ordinance if the ordinance decision will do any of the following:

- Change the legally allowable use of the leased real property, and the lessee has a right to sublease the real property;
- Change the lessee's actual use of the real property;
- Substantially enhance or decrease the lessee's use or enjoyment of the leased real property;
- Increase or decrease the amount of rent for the leased real property by 5 percent during any 12-month period following the decision; or
- Result in a change in the termination date of the lease; or
- Have a reasonably foreseeable financial effect on the councilmember's personal finances (not including any of the effects above) of \$250 or more in any 12-month period.

## FACTS

The San Luis Obispo City Council will be considering the adoption of an ordinance governing the closure or conversion to other uses of mobilehome parks in the city. You state that the Government Code at Sections 65863.7, 65863.8, and 66427.4 already requires a park owner, prior to closing or converting the park, to submit a report on the impact of the proposed action on the residents of the park. Section 65863.7 provides:

“(a) Prior to the conversion of a mobilehome park to another use, except pursuant to the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7), or prior to closure of a mobilehome park or cessation of use of the land as a mobilehome park, the person or entity proposing the change in use shall file a report on the impact of the conversion, closure, or cessation of use upon the displaced residents of the mobilehome park to be converted or closed. In determining the impact of the conversion, closure, or cessation of use on displaced mobilehome park residents, the report shall address the availability of adequate replacement housing in mobilehome parks and relocation costs.

“(b) The person proposing the change in use shall provide a copy of the report to a resident of each mobilehome in the mobilehome park at least 15 days prior to the hearing, if any, on the impact report by the advisory agency, or if there is no advisory agency, by the legislative body.

“(c) When the impact report is filed prior to the closure or cessation of use, the person or entity proposing the change shall provide a copy of the report to a resident of each mobilehome in the mobilehome park at the same time as the notice of the change is provided to the residents pursuant to paragraph (2) of subdivision (g) of Section 798.56 of the Civil Code.

“(d) When the impact report is filed prior to the closure or cessation of use, the person or entity filing the report or park resident may request, and shall have a right to, a hearing before the legislative body on the sufficiency of the report.

“(e) The legislative body, or its delegated advisory agency, shall review the report, prior to any change of use, and may require, as a condition of the change, the person or entity to take steps to mitigate any adverse impact of the conversion, closure, or cessation of use on the ability of displaced mobilehome park residents to find adequate housing in a mobilehome park. The steps required to be taken to mitigate shall not exceed the reasonable costs of relocation.

“(f) If the closure or cessation of use of a mobilehome park results from an adjudication of bankruptcy, the provisions of this section shall not be applicable.

“(g) The legislative body may establish reasonable fees pursuant to Section 66016 to cover any costs incurred by the local agency in implementing this section and Section 65863.8. Those fees shall be paid by the person or entity proposing the change in use.

“(h) This section is applicable to charter cities.

“(i) This section is applicable when the closure, cessation, or change of use is the result of a decision by a local governmental entity or planning agency not to renew a conditional use permit or zoning variance under which the mobilehome park has operated, or as a result of any other zoning or planning decision, action, or inaction. In this case, the local governmental agency is the person proposing the change in use for the purposes of preparing the impact report required by this section and is required to take steps to mitigate the adverse impact of the change as may be required in subdivision (e).

“(j) This section is applicable when the closure, cessation, or change of use is the result of a decision by an enforcement agency, as defined in Section 18207 of the Health and Safety Code, to suspend the permit to operate the

mobilehome park. In this case, the mobilehome park owner is the person proposing the change in use for purposes of preparing the impact report required by this section and is required to take steps to mitigate the adverse impact of the change as may be required in subdivision (e).”

Section 66427.4 provides:

“(a) At the time of filing a tentative or parcel map for a subdivision to be created from the conversion of a mobilehome park to another use, the subdivider shall also file a report on the impact of the conversion upon the displaced residents of the mobilehome park to be converted. In determining the impact of the conversion on displaced mobilehome park residents, the report shall address the availability of adequate replacement space in mobilehome parks.

“(b) The subdivider shall make a copy of the report available to each resident of the mobilehome park at least 15 days prior to the hearing on the map by the advisory agency or, if there is no advisory agency, by the legislative body.

“(c) The legislative body, or an advisory agency which is authorized by local ordinance to approve, conditionally approve, or disapprove the map, may require the subdivider to take steps to mitigate any adverse impact of the conversion on the ability of displaced mobilehome park residents to find adequate space in a mobilehome park.

“(d) This section establishes a minimum standard for local regulation of conversions of mobilehome parks into other uses and shall not prevent a local agency from enacting more stringent measures.

“(e) This section shall not be applicable to a subdivision which is created from the conversion of a rental mobilehome park to resident ownership.

The city council will be considering an ordinance to clarify the scope of the report, establish a procedure including a public hearing, and define the types of conditions that appropriately may be imposed to mitigate resident impacts. The new ordinance will not affect rents that can be charged nor the existing rent stabilization ordinance in the jurisdiction.

Two members of the city council own mobile homes in parks in the city.

- Mayor Dave Romero is the trustee of a family trust through which the mayor and his spouse, and their daughter and son-in-law, share equal interests in a mobile home. The mayor’s daughter and son-in-law reside in the mobile home and pay the space rent (\$441 per month). You stated there was no lease agreement and that the occupancy of the space is on a month-to-month basis. The mayor and his wife pay the registration fee for and pay to insure the mobile home.
- Councilmember Jan Marx and her spouse own (through a revocable living trust) a mobilehome in a different park in the city. Councilmember Marx and her spouse rent the

mobilehome to her daughter for \$411 per month plus payment of utilities. The money was paid to the park as rent. The unit is held by a year-to-year lease.

The city's total population is approximately 44,000 and there are approximately 1,300 units in the city's mobilehome parks which would be subject to the proposed ordinance. The city does not have data regarding the number of persons that reside in these units. The city believes that the proposed ordinance will affect all residents in mobilehome parks in the city in substantially the same manner.

You also noted that the city currently has no conversion/closure applications pending. Further, the city has no indication that either park in which the officials own mobile homes are considering closure or conversion to a different use.

### ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Specifically, 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.

The Commission has adopted an eight-step standard analysis to decide whether an official has a disqualifying conflict of interest. (Regulation 18700(b)(1)-(8).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

#### **Step One and Two: Are the individuals in question public officials, who will be making, participating in making, or influencing a governmental decision?**

The mayor and city councilmember are public officials under the Act. (See Section 84048(a).) The officials will be voting on the draft Mobilehome Park Conversion Ordinance and will therefore be making governmental decisions. (Regulation 18702.1(a).)

#### **Step Three: Do the officials have an economic interest in the decision at issue?**

A public official has a "financial interest" in a governmental decision within the meaning of the Act if it is reasonably foreseeable that the governmental 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 one of six enumerated economic interests. (Section 87103; Regulation 18700(a).) The applicable economic interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more.<sup>2</sup> (Section 87103(a), Regulation 18703.1(a).)

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<sup>2</sup> For purposes of Section 87103, "indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or

- An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the “personal financial effects” rule. (Section 87103, Regulation 18703.5.)

According to your facts, both officials currently own mobile homes in the jurisdiction. The mayor’s mobile home is on a lot leased on a month-to-month basis and the councilmember’s is located on a lot that is subject to a year-to-year lease. Section 82033 provides that an “interest in real property” includes any leasehold, beneficial or ownership interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official if the fair market value of the interest is \$2,000 or more.

With respect to the mayor, Regulation 18233 expressly excludes a periodic tenancy of one month or less from this definition. We have also advised that while a mobile home itself is an asset, it does not constitute a real property interest because it is considered to be personal property. (*Jorgensen* Advice Letter, No. A-90-017). Accordingly, the mayor’s tenancy within the mobile home park does not give rise to an economic interest in real property.

The councilmember holds a lease in the park on a year-to-year basis and therefore the exception that applies to the mayor’s lot does not apply to the councilmember. Thus, if the payments on the lease are \$2,000 or more annually, the councilmember would have a leasehold interest in real property as defined in the Act.

Finally, Section 87103 and Regulation 18702.1(a)(4) provide that decisions which will have a reasonably foreseeable material financial effect on the official’s personal expenses, income, assets, or liabilities are also potentially disqualifying. Consequently, the mayor and the councilmember may not make, participate in making or in any way attempt to use their official position to influence a governmental decision if it is reasonably foreseeable that the decision will

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trust in which the official, the official’s agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.” A public official’s “immediate family” includes only the official’s spouse and dependent children. (Section 82029.)

have a material financial effect, distinguishable from the effect on the public generally, on their personal finances.

**Step Four: Are the officials' economic interests directly or indirectly involved in the decision?**

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision. (Regulation 18704(a).) For a governmental decision that affects real property interests, Regulation 18704.2 applies.

Real property in which a public official has an economic interest is directly involved in a governmental decision under the following circumstances:

“(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located “within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision” if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.

“(2) The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property. For purposes of this subdivision, the terms “zoning” and “rezoning” shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest.

“(3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official, has an interest.

“(4) The governmental decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

“(5) The governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

“(6) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.”

As we discussed above, the mayor does not have a real property interest and therefore this regulation would not apply to him. However, the councilmember leases property in a mobile home park that will be affected by the decision in question. However, it cannot be said that the park itself is the subject property. Generally, decisions concerning generally applicable ordinances, even rent-control ordinances, do not involve a particular subject property from which the distances can be determined. (See e.g., *Brown Advice Letter*, No. A-00-195.) None of the other criteria for when property is directly involved appear to apply. Therefore, the councilmember’s property is considered indirectly involved in the decision. (Regulation 18704(a).)

As for the officials’ economic interest in their personal finances, if facts suggest any financial effect on their personal finances (such as changes in rent), the officials’ economic interest in their personal finances is deemed to be directly involved in the governmental decision. (Regulation 18704.5.)

**Steps Five and Six: What is the applicable materiality standard and will the material financial affect be reasonable foreseeable?**

A conflict of interest may arise only when the reasonably foreseeable<sup>3</sup> impact of a governmental decision on a public official’s economic interests is material. (Regulation 18700(a).) The materiality standard for indirectly involved leasehold interests (such as that held by the councilmember) is set forth in Regulation 18705.2(b)(2). The financial effect of a governmental decision on indirectly involved real property is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the governmental decision will:

“(A) Change the legally allowable use of the leased real property, and the lessee has a right to sublease the real property;

“(B) Change the lessee’s actual use of the real property;

“(C) Substantially enhance or significantly decrease the lessee’s use or enjoyment of the leased real property;

“(D) Increase or decrease the amount of rent for the leased real property by 5 percent during any 12-month period following the decision; or

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<sup>3</sup> A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered “reasonably foreseeable,” but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

“(E) Result in a change in the termination date of the lease.”

The facts you provide do not reveal that any of these effects will occur. Thus, it would not appear the presumption is rebutted, and therefore adoption of the ordinance would not result in a material financial effect on the councilmember’s leasehold interest. However, this is ultimately a determination that the councilmember will have to make.

Effects on an official’s personal finances are material as stated in Regulation 18705.5(a), which provides:

“A reasonably foreseeable financial effect on a public official’s personal finances is material if it is at least \$ 250 in any 12-month period. When determining whether a governmental decision has a material financial effect on a public official’s economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered.”

Any governmental decision that affects the officials’ personal finances by \$250 or more in any 12-month period is considered a material financial effect. For example, if the decision affected the rent owed by the mayor by \$250 or more in any 12-month period or the rent owed under a new lease made by the councilmember by \$250 within 12 months of the governmental decision, this would be considered a material financial effect on their personal finances. Based on your facts, it is not reasonably foreseeable that the decision will have such an effect on either official.

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

Sincerely,

Scott Hallabrin  
General Counsel

By: John W. Wallace  
Assistant General Counsel  
Legal Division

JWW:jgl

Enclosure