

December 1, 2011

Bruce C. Cline  
City Attorney  
Office of the City Attorney  
50 Natomas Street  
Folsom, CA 95630

Re: Your Request for Advice  
**Our File No. A-11-212**

Dear Mr. Cline:

This letter responds to your request for advice on behalf of Vice Mayor Ernie Sheldon regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup>

### **QUESTIONS**

1. May Vice Mayor Sheldon participate in decisions regarding the Big League Dreams (“BLD”) proposal to operate a facility at Lembi Park?
2. If Vice Mayor Sheldon has a conflict of interest may he participate in discussions about the BLD proposal before the City Council after recusing himself from participating in the decision?
3. If Vice Mayor Sheldon has a conflict of interest, may he communicate with the press or the public?

### **CONCLUSIONS**

1. Because the Folsom Athletic Association (the “FAA”) is a source of income to Vice Mayor Sheldon, he is prohibited from participating in any decision that will have a material financial effect on this source of income, as described below.

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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.

2. Since he does not have a “personal interest” in BLD, he may *not* speak as a member of the public before the city council and must leave the room for the duration of the discussion and vote on the BLD proposal. However, even if this exception applied, he would be required to limit his comments to his personal interests, and would have to make clear that he is not speaking in the interest of any other person or group and that he is not acting in any official capacity.

3. The Act does not prohibit Vice Mayor Sheldon from discussing the BLD project generally with members of the press or the public, provided that these individuals are: (1) not members, officers, employees, or consultants of the city and (2) he does not ask them to discuss his concerns about the project with members, officers, employees or consultants of the city.

### **FACTS**

You are the City Attorney for the City of Folsom and you request advice on behalf of Vice Mayor Sheldon.

#### *Folsom Athletic Association:*

The (“FAA”), a 501(c)(3) corporation has for a number of years run the concession stand/snack bar at Lembi Park through a contract with the City. The concession stand sells beer, soft drinks, and food and is open during sporting events and other activities at the park. The concession stand is run by employees or volunteers from the FAA. The contract with the City provides that the FAA pays the City 10 percent of the gross receipts and has maintenance and other responsibilities associated with the concession stand. The contract is expired but the FAA continues to operate the concession stand, which is on City property in the center of the park.

Vice Mayor Sheldon is the Executive Director of FAA. He received at least \$4,800 in compensation from FAA in the past 12 months.

#### *The Big League Dreams Proposal:*

The City entered into a license agreement with The Big League Dreams (“BLD”) to explore optional locations for a BLD replica youth baseball/softball and adult softball park in Folsom. BLD facilities exist in a number of cities in California. Typical facilities have soccer, baseball and youth/adult softball fields as well as concession stands/restaurants, gift shops, batting cages and similar amenities.

The City has a proposal from BLD relating to establishing a BLD replica facility at Lembi Park. The BLD proposal provides that the city would continue to own the land and would construct the facility and BLD would operate the facility. BLD’s facility would include a food and drink establishment, as well as vending opportunities. If the project were

to go forward, the Lembi snack bar concession run by FAA would be eliminated and replaced by the food establishment operated by BLD.

You wish to know whether Vice Mayor Sheldon may participate in decisions, discussions, and public policy debates on the issue of whether BLD should locate at Lembi Park. If Vice Mayor Sheldon has a conflict of interest, you wish to know whether he may participate in discussions regarding the BLD proposal as a member of the public, including making presentations before the City Council and being present in the city council chambers during the discussion of the proposal. You also wish to know whether Vice Mayor Sheldon may discuss the proposal with the public and members of the press.

### **ANALYSIS**

The Acts conflict-of-interest provisions ensure that public officials will “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).) 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 analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule 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.

#### **STEPS 1 & 2: IS VICE MAYOR SHELDON A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?**

As a member of the Folsom City Council, Vice Mayor Sheldon is a public official under the Act. (Section 82048.) As a city council member, he will be called upon to consider whether the city should approve or disapprove certain development projects that come before the city council. Therefore, he will be making, participating in making, or otherwise using his official position to influence a governmental decision.

A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive intervening review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.)

A public official is attempting to use his or her official position to influence a governmental decision if, for the purpose of influencing the decision, the official contacts or appears before or otherwise attempts to influence, any member, officer, employee, or

consultant of his or her agency. (Regulation 18702.3(a).) With regard to governmental decisions that are within or before an agency other than the official's agency, the official is attempting to use his official position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency. (Regulation 18702.3(b).)

Therefore, if Vice Mayor Sheldon participate in discussions, vote on decisions, or attempts to influence any member of the city council involving the BLD Proposal, he will be making, participating in making, or influencing governmental decisions.

*Appearances before an official's agency to represent his "personal interests:"*

Regulation 18702.4 states that even if a conflict of interest is present, a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her "personal interests." Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. (Regulation 18702.4(a)(2) and 18702.4(b)(1).)

An official's "personal interests" include, but are not limited to: (A) An interest in real property which is wholly owned by the official or members of his or her immediate family. (B) A business entity wholly owned by the official or members of his or her immediate family. (C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control. (Regulation 18902.4(b)(1)(A-C).)

Your facts do not indicate any potential personal interest Vice Mayor Sheldon would have in BLD. If he does not have a "personal interest" in BLD, he may not speak as a member of the public before the city council and must leave the room for the duration of the discussion and vote on the BLD proposal. (Section 87105.)

*Appearances before the press or public:*

An official is not attempting to use his or her official position to influence a governmental decision of an agency, as described in Regulation 18702.3(a), if the official communicates with the general public or the press. (Regulation 18702.4(b)(2).)

For instance, we have advised that a city councilmember may express his or her opinion to reporters and media outlets by writing a newspaper article or appearing on a radio program regarding the matter in which he or she has a conflict-of-interest under the Act. (*Edelen* Advice Letter, No. I-07-059; *Acker* Advice Letter, No. A-01-117.)

Therefore, the Act does not prohibit Vice Mayor Sheldon from discussing the BLD project generally with the press, friends, neighbors or other members of the community, even if he does so in an attempt to rally their support or opposition to the project, unless they are members, officers, employees or consultants of the city. (*McHugh* Advice Letter, No. I-98-324; Regulation 18702.4(b)(2).)

*Recusal Requirements:*

If a public official's office is listed in Section 87200 ("87200 filers" include members of a city council) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105.)

**STEP 3: DOES VICE MAYOR SHELDON HAVE A POTENTIALLY DISQUALIFYING ECONOMIC INTEREST?**

A public official has a financial interest in a decision within the meaning of Section 87103 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 one of five enumerated economic interests, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Regulation 18703.2);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);

- An economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule. (Section 87103; Regulation 18703.5).

Under the facts you have presented, Vice Mayor Sheldon has an economic interest in FAA, a nonprofit 501(c)(3) corporation through his business position and as a source of income. (Section 87103(c) and (d).)

Finally, Vice Mayor Sheldon also has an economic interest in his personal finances if the decision will result in an increase or decrease in his “personal expenses, income, assets, or liabilities.” (Section 87103.) These are the only economic interests identified from the facts presented.

**STEP 4: ARE VICE MAYOR SHELDON’S ECONOMIC INTERESTS DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?**

Regulation 18704(a) provides:

“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. If a public official's economic interest is not directly involved in a governmental decision, it is indirectly involved.”

*Sources of Income and Business Entities:*

For governmental decisions that affect sources of income and business entities, the standards set forth in Regulation 18704.1(a) apply. Regulation 18704.1(a) states:

“(a) A person, including business entities, sources of income and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Based on the facts presented, FAA is not a named party in, or the subject of, the

proceedings and is therefore not directly involved in the decisions involving BLD. Therefore, Mayor Sheldon's economic interests in FAA would be indirectly involved in the decisions.

*Personal Finances:* For governmental decisions that affect personal expenses, income, assets, or liabilities, the standards set forth in Regulation 18704.5 apply. Regulation 18704.5 states:

“(a) A public official or his or her immediate family are deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.”

#### **STEP 5: MATERIALITY STANDARD**

*Sources of Income and Business Entities:* Regulation 18705.3(b)(2) states that for indirectly involved sources of income that are nonprofit entities, including governmental entities, the effect of a decision is material if any of the following applies:<sup>2</sup>

“(F) For an entity whose gross annual receipts are \$100,000 or less, the effect of the decision will be any of the following:

- (i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$10,000 or more.
- (ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$2,500 or more.
- (iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$10,000 or more.

Thus, for example, if the decision involving the BLD proposal would impact FAA to the thresholds set forth above due to the closure of the FAA concession stand, a conflict of interest would exist.

*Personal Finances:* Regulation 18705.5(a) states that a “reasonably foreseeable financial effect on a public official's personal finances is material if it is a least \$250 in any 12-month period.” You have not described any effects on Vice Mayor Sheldon's personal finances other than effects on FAA, therefore we do not analyze this economic interest.

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<sup>2</sup> You have not provided sufficient financial information regarding FAA, Vice Mayor Sheldon's source of income. The “nonprofit” standard provided is merely as an example. The FAA may fall under a different standard in the regulation depending on the amount of its gross annual receipts.

**STEP 6: REASONABLY FORESEEABLE**

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) Whether the financial consequences of a governmental decision are reasonably foreseeable at the time the decision is made depends on the facts surrounding the decision. A financial 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.)

It should be noted that the determination of whether the financial consequences of a governmental decision are “reasonably foreseeable” at the time the decision is made is ultimately a factual determination.

If it is reasonably foreseeable that the applicable materiality standard for any of your economic interests will be met in light of the specific facts surrounding a specific decision, then you will be prohibited from participating in that decision.

**STEPS 7 AND 8: PUBLIC GENERALLY & LEGALLY REQUIRED PARTICIPATION**

Even if a material financial effect on a public official's economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official's economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707 et seq.), or if the official is legally required to participate (Section 87103; Regulation 18708).

You have not presented any facts indicating that the “public generally” exception or the “legally required participation” exception would be applicable to Vice Mayor Sheldon’s situation, thus we do not further analyze this issue.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Emelyn Rodriguez  
Counsel, Legal Division

ER:jgl