

January 11, 2012

David M. Fleishman
Hanley & Fleishman, LLP
8930 Morro Road
Atascadero, CA 93422

Re: Your Request for Advice
Our File No. A-11-215

Dear Mr. Fleishman:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) There are other bodies of law, separate and apart from the Act's conflict-of-interest provisions that may apply to the situation you have described. We urge you to check with the Attorney General's office to determine whether any other laws are applicable in light of the fact you present.

QUESTION

Does the Act prohibit a city council member from voting to approve a development agreement if a portion of the developer fees will be used to fund rehabilitation of the city hall building and the council member owns real property within 500 feet of the city hall property?

CONCLUSION

No. The decision will not have a reasonably foreseeable material financial effect on the council member's real property.

FACTS

The City Council for the City of Guadalupe has asked you, as City Attorney, to request advice regarding a council member's possible conflict of interest.

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.

The City Council will be considering a development agreement for a large parcel of land within the city limits. The developer is a private entity with whom the city will enter into a development agreement that includes various development impact fees to be paid by the developer. The agreement also provides that the developer will pay for public infrastructure improvements, such as water and sewer lines. The vast majority of these improvements will be constructed on the development site, which is just south of the currently developed part of the city. However, there are a few improvements that will be provided by the developer that are not located on the project site. Among these are a gravity sewer line that will run from the project site to the city's wastewater treatment plant and a potential water well site. In addition, the developer is required to pay a fee to be applied to the rehabilitation of the city's existing city hall.

The council member owns property located within 500 feet of the corner of the lot on which the city hall building is located. When any work has been proposed to be done on the City Hall property in the past, the council member has stepped down from the decision. You state that, in this situation, "no work is actually being done under the development agreement." Rather, the development agreement will be imposing a fee on the developer which will, at some later time, be used for work on the City Hall building. The fee is similar to sewer impact fees, water system impact fees and other infrastructure fees. You ask whether the council member has a disqualifying conflict of interest in a decision to approve the development agreement.

ANALYSIS

The Act's 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 standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) 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.

Step 1. Is the council member a "public official" within the meaning of Section 87100?

Under Section 87200, members of city councils are public officials.

Step 2. Will the city council member be making, participating in making, or using his or her official position to influence a governmental decision?

When the council member votes to approve the development agreement, the council member will be making a governmental decision. (Regulation 18702.1.)

Step 3. What are the council member's economic interests?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- A public official has 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).)
- A public official has an economic interest in a business entity 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).)
- A public official has 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 official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official 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 commonly referred to as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

Real Property

The council member has an economic interest in the real property he or she owns.

Personal Finances

A public official always has an economic interest in his or her personal finances. However, a financial effect on the value of real property owned directly or indirectly by a public official is not considered a separate financial effect on the official's personal finances and would

not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not appear to apply to the circumstances and we will not discuss it further. You have provided no facts indicating any other potential economic interests.

Step 4. Will the economic interests of the council member be directly or indirectly involved in the decision he or she will make, participate in making or influence as a public official?

Under Section 18704.2(a)(1), real property is directly involved in a governmental decision if:

“(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.” (Emphasis added.)

The real property that is the subject of the decision is the area that will be developed. The council member’s real property is not within 500 feet of this area. Accordingly, the real property is indirectly involved.²

Step 5. What is the applicable materiality standard?

Regulation 18705.2(b)(1) states that the financial effect of a governmental decision on real property which is indirectly involved in a governmental decision 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 official has an economic interest that make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the official has an interest.

Step 6. Is it reasonably foreseeable that the financial effects of the governmental decision on the council member’s economic interest will meet the applicable materiality standard?

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. 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.)

² Regulation 18704.2 (a) lists additional circumstances in which real property is deemed to be directly involved. The facts you have presented do not indicate that any of these circumstances are present.

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby*, supra), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the official. Nonetheless, the facts you have provided do not suggest any circumstances that would rebut the presumption of materiality. Accordingly, the Act's conflict-of-interest rules do not prohibit the council member from making or participating in making a decision to approve the development agreement. Please note, however, that future decisions coming before the city council must be analyzed separately to determine if the decision will have a reasonably foreseeable material financial effect on the council member's real property.

Steps Seven and Eight. Does the governmental decision come within any exception to the conflict-of-interest rules?

Because the council member does not have a disqualifying conflict of interest, there is no need to address exceptions.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

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