

January 25, 2012

Daniel J. McHugh
City Attorney
P O Box 3005
Redlands, CA 92373

Re: Your Request for Informal Assistance
Our file No. I-11-223

Dear Mr. McHugh:

This letter responds to your request for advice, on behalf of Redlands City Councilmember Bob Gardner, 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 it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your questions are general in nature, we are treating your request as one for informal assistance.²

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other laws that may apply such as Government Code Section 1090 or common law conflict of interest.

QUESTION

May Councilmember Gardner take part in governmental decisions regarding the budget of the city's sports park and the city's lease-leaseback agreement that was used to finance the park despite the fact that his personal residence is within 500 feet of the boundaries of the park?

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114, Regulation 18329(c)(3).)

CONCLUSION

Councilmember Gardner's economic interest in his residence, within 500 feet of the sports park, is directly involved in decisions related to the park regarding the budget or the city's lease-leaseback agreement. The financial effect of the decisions on this economic interest is presumed to be material. Accordingly, Councilmember Gardner may not make, participate in making, or influence the decisions unless he can (1) rebut the presumption of materiality by showing that it is not reasonably foreseeable the decisions will have *any* financial effect on his residence and (2) determine that there will be *no* reasonably foreseeable material financial effects on any other economic interest he may have.

FACTS

You are the city attorney for the City of Redlands and are seeking advice on behalf of City Councilmember Bob Gardner regarding budget discussions relating to the city's sports park and the city's lease-leaseback agreement that provided financing for the park.

Additionally, Councilmember Gardner owns his personal residence, located approximately 393 feet from the southerly boundary of the city's sports park. The "lease-leaseback agreement" is a financing through the California Infrastructure and Economic Development Bank that provided \$1,985,000 to the city to fund Phase 1B of the sports park, which included irrigation systems, turf and landscaping, field lighting, and restrooms. These facilities have all been constructed.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Step One: Is the individual a "public official?"

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency...." (Section 82048.) As a member of the Redlands City Council, Councilmember Gardner is a public official within the meaning of the Act.³

³ If a public official's office is listed in Section 87200, which specifically includes city council members, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as

Step Two: Is the official making, participating in making, or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive 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 decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Councilmember Gardner is making, participating in making, or influencing a governmental decision when taking part in decisions regarding the budget of the sports park or the lease-leaseback agreement.

Step Three: What are the official’s economic interests?

Of the economic interests recognized under the Act⁴, the only interest implicated by your account of the facts is Councilmember Gardner’s economic interest in his personal residence, as an official has an economic interest in any real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)⁵

Step Four: Is the official’s’ economic interest directly or indirectly involved in the decision?

Regulation 18704.2(a)(1) states, in pertinent part, that real property in which a public official has an economic interest is *directly* involved in a governmental decision if “[t]he 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 . . .”⁶

discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (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.)

⁴ Our analysis is limited to the economic interests you have identified.

⁵ We note that a public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.) 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).)

⁶ “If a public official’s economic interest is not directly involved in a governmental decision, it is indirectly involved.” (Regulation 18704(a).)

From the facts you have provided, Councilmember Gardner's residence is within 500 feet of the sports park. Accordingly, Councilmember Gardner's economic interest in his residence is *directly* involved in government decisions regarding the sports park and the lease-leaseback agreement under Regulation 18704.2(a)(1).

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official's economic interest?

Materiality

Having identified the economic interest involved and determined that the interest is directly involved in the decision at issue, it is necessary to identify the materiality standard appropriate to Councilmember Gardner's economic interest in his residence.

Under Regulation 18705.2(a)(1), *any* financial effect of a governmental decision on real property directly involved in the governmental decision is presumed to be material. This presumption may be rebutted only by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property. (*Ibid.*) However, the size of the financial effect does not matter. If there is *any* financial effect at all, even "one-penny," that effect is presumed to be "material."

Foreseeability

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is "reasonably foreseeable" that the standard will be met. 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).) However, 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.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra*, at 198.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*, at 71), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

However, based upon the facts provided, you have indicated a reasonably foreseeable financial effect on Councilmember Gardner's economic interest in his residence. While ultimately the determination of whether the financial effect is material must be left up to Councilmember Gardner's informed judgment, the financial effect on his economic interest in his residence is *presumed to be material* because the property is within 500 feet of the property subject to the governmental decisions. Accordingly, Councilmember Gardner may not make,

participate in making, or influence the decisions unless he can rebut the presumption of materiality by showing that it is not reasonably foreseeable the decisions will have *any* financial effect on his real property. (See Regulation 18705.2(a)(1).)

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

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the "legally required participation" exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, you have not presented any facts indicating that the "public generally" or the "legally required participation" exceptions are applicable to Councilmember Gardner's circumstances, so we will not address them further.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl