

January 19, 2012

James W. Wieboldt  
The Levy House  
4679 Date Avenue  
La Mesa, California 91941

**RE: Your Request for Advice  
Our File No. A-11-237**

Dear Mr. Wieboldt:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> 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 consult with your city attorney or private counsel to determine whether any other laws are applicable in light of the facts you present.

### **QUESTION**

Does the Act prohibit you from serving as a member of both the La Mesa Property and Business Improvement District Formation Committee (the "Formation Committee") and the La Mesa Community Parking Commission (the "Parking Commission")?

### **CONCLUSION**

No. The Act's conflict-of-interest rules prohibit a public official's participation in a *governmental decision* that would have a reasonably foreseeable, material financial effect on one or more of your economic interests. Membership in two or more government agencies does not in itself violate the Act's conflict-or-interest provisions.

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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.

## FACTS

You are a member of the Parking Commission, a position you have held since October 24, 2004. The Parking Commission acts in an advisory capacity to the City Council regarding parking-related issues within the Parking District. Commissioners, appointed by the mayor of the City of La Mesa (the "City") with the approval of the City Council, serve four-year terms and receive no compensation. As a commissioner, you are subject to the City's Conflict-of-Interest code and you file a Form 700.

You are also a member of the Formation Committee. The Formation Committee was organized in early 2011 as an informal all-volunteer group of active business owners and property owners, in response to the invitation of the city manager. The Formation Committee was formed to review, analyze and draft all necessary components of a proposed Property and Business Improvement District (the "PBID"), including identification of district boundaries and benefit zones and drafting a work plan, budget and assessment formula. The Formation Committee was formed after an ad hoc exploratory committee (the "Exploratory Committee") reported to the City Council that a PBID was the best vehicle for funding a streetscape improvement project being considered by the City. The Exploratory Committee consisted of property owners who also volunteered at the invitation of the city manager.

The City Council approved the expenditure of \$30,000 of Parking District funds to hire a consultant to work with the Formation Committee. This use of Parking District funds had been recommended, by unanimous vote, of the Parking Commission. The City selected the consultant.

The Formation Committee met approximately twice a month from January through October of 2011 to analyze every aspect of a PBID and to assist in the development and preparation of a Management District Plan, a planning document that will initially be used by stakeholders when considering whether to sign a petition and in casting ballots. Then, should the voters approve the PBID, the Management District Plan will be used as the master plan to guide the ongoing management and implementation of PBID activities and improvements. The Formation Committee was not organized as a nonprofit or any formal style of business.

The proposed project will be a comprehensive multi-phased streetscape improvement project within the greater La Mesa Village area, and will include supplemental maintenance services, supplemental security, marketing and promotions, decorative amenities such as tree lighting, holiday decorations and landscaped planters, and the hiring of management staff to oversee these activities and services.

You own a commercial office building located in the heart of the La Mesa Village area, where you, together with your wife, operate a travel agency. The La Mesa Village area is located within the boundaries of the Parking District and the proposed PBID.

You ask whether your membership on the Parking Commission and the Formation Committee constitutes a conflict of interest under the Act.

## ANALYSIS

### 1. Membership on two local governmental agencies.

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 general rule is that a conflict of interest exists whenever a public official makes a *governmental decision* which has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Regulation 18700(a).) Your request for advice does not involve a governmental decision. You ask whether membership alone on both the Parking Commission and the Formation gives rise to a conflict of interest. Membership in a government agency is not prohibited by the Act.

### II. Do members of the Formation Committee make governmental decisions?

While you did not specifically ask this question, we are providing you this informal assistance to assist you in the future.

To determine whether members of the Formation Committee make governmental decisions, we first look at Regulation 18701(a)(1), which defines “member” as follows:

“Member” shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions *with decisionmaking authority*. (A) A committee, board or commission possesses decisionmaking authority whenever: (i) It may make a final governmental decision; (ii) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or (iii) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.”

“(B) A committee, board, or commission *does not possess decisionmaking authority* under subsection (a)(1)(A)(1) of this regulation if it is formed for the sole purpose of researching a topic and preparing a report or recommendation for submission to another governmental body that has final decisionmaking authority.” (Emphasis added.)

You state that the Formation Committee was formed to review, analyze and draft all necessary components of a proposed PBID and to work with a consultant in preparing a Management District Plan for the proposed PBID. The consultant was selected and paid by the authorization of the City Council, not the Formation Committee.

Under the Act, a public official makes a governmental decision when the official, acting within the authority of his or her office or position:

- “(1) Votes on a matter;
- “(2) Appoints a person;
- “(3) Obligates or commits his or her agency to any course of action;
- “(4) Enters into any contractual agreement on behalf of his or her agency . . . .” (Regulation 18702.1(a).)

In prior letters, we have advised that members of a body make, participate in making or influence a governmental decision if they are authorized to:

- Adopt rules, rates and regulations for the administration and management of city’s central parking district or (ii) to hire or fire personnel, purchase supplies, or enter into contracts. In other advice letters, the authority to hire outside consultants was considered determinative because it constitutes entering into a contractual agreement on behalf of the agency. (*Ewing* Advice Letter, No. 89-480; *Amen* Advice Letter No. A-88-304.)
- Establish plans to deliver services, monitoring the plans, and entering into agreements with other entities for the provision of such services in connection with its purposes to assess community needs for such services. (*Glacken* Advice Letter, No. I-92-265a.)
- Appoint an executive director to run the day-to-day activities of the commission on which they served. (*Weaver* Advice Letter, No. A-03-225.)

We have also advised that members of a body do *not* make, participate in making or influence a governmental decision under the following circumstances:

- A committee consisting of representatives of two cities, a university and a private landowner created to advise the two city councils on a proposal to connect two roads was a purely advisory body and that the committee’s hiring of a consultant could only be done at the direction of city staff and the city council. (*Calonne* Advice Letter, No. A-90-292.)
- A local task force formed to assist cities and the county in the preparation and adoption of various solid waste plans where its enabling authority provided that

the task force was to *assist* with coordinating the development of city source reduction and recycling elements and preparing a countywide siting element and to assist and advise the jurisdictions regarding implementation of the SRR elements where the task force's authority was limited to setting certain time schedules and conduct a five-year review. (*Woodbury* Advice Letter, No. A-90-665.)

- An "Airport Round Table" that consisted of elected and appointed officials of a city's airport commission as well as elected and appointed officials of nine cities, where the Airport Round Table had no power to require that anything be done. (*Dickerson* Advice Letter, No. I-90-729.)
- The California Commission on Educational Quality, created by executive order to study California's elementary and secondary education system, and to recommend needed reforms, where it was given no power to implement its recommendations. (*Milne* Advice Letter, No. A-87-250.)
- A "blue ribbon" task force appointed by the mayor to assist the city's finance committee with an organizational review of the city's general fund operations where, at the conclusion of the project, the task force's only power was to present its recommendations to the city council.

Nothing in the facts or materials you have provided indicates that the Formation Committee has authority to adopt rules, rates or regulations, purchase supplies, hire, appoint or fire personnel, or hire outside consultants. Thus, none of the actions of the advisory bodies which we found to be making governmental decisions are present here.

Even if one were to conclude that the Formation Committee lacks authority to make final governmental decisions, if the Formation Committee may compel a governmental decision or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden, the Formation Committee would have decisionmaking authority under Regulation 18701(a)(1)(A)(ii). Nothing in your facts suggests that the Formation Committee may compel a governmental decision or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden. To the contrary, the formation of the committee and selection of member of the committee does not preclude another group of property owners from studying a potential PBID or drafting a Management District Plan for submission to voters.

If the recommendations of a body have a significant impact upon the ultimate outcome of a decision, the body is considered to have decisionmaking authority and is therefore not solely advisory. (Regulation 18701(a)(1)(A)(ii). Also see *In re Rotman* (1987) 10 FPPC Ops. 1.) Commission staff has advised on several occasions that if there is a history or track record of "rubber stamping" an advisory body's recommendations, the advisory body will be considered to have decisionmaking authority. (See, e.g., *Baird* Advice Letter, No. A-94-299; *Czach* Advice

Letter, No. A-91-503; *Woodbury* Advice Letter, A-90-665; *Paley* Advice Letter, A-90-583; *Korade* Advice Letter, A-89-715; *Ball* Advice Letter, I-89-671.)

You state that the Formation Committee, as a new body, has not made substantive recommendations that have been approved without significant amendment or modification by city officials. You indicate that the work product of the Formation Committee will go before voters and not the City Council. Also, the Formation Committee's work was completed in ten months, a relatively short period of time and its appearances before the Council did not involve a pending City Council decision. Under these circumstances, there has been no track record of "rubber stamping."

In conclusion, the facts indicate that the Formation Committee was formed for the sole purpose of researching the viability of a PBID (researching a topic), preparing an implementation plan for a proposed PBID (preparing a report) and making a recommendation to the City Council regarding the proposed PBID (preparing a recommendation for the submission to another governmental body that has final decisionmaking authority). Accordingly, it appears that under Regulation 18701(a)(1)(B), the Formation Committee does not possess decisionmaking authority.

### **III. Potential conflicts of interest.**

Although you have not asked whether any of your economic interests may give rise to a disqualifying conflict of interest in a governmental decision, we provide the following informal assistance to assist you if, in the future, you may be faced with a governmental decision involving a potential conflict of interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).)

#### **Step 1. Are you a "public official" within the meaning of Section 87100?**

Under Section 82048(a), a public official includes a member, officer, employee or consultant of a local government agency. Section 82041 provides that "local government agency" means a county, city or district, or any other local or regional political subdivision, bureau, office, board, commission or other agency of a county, city or district. Accordingly, you, as a member of the Parking Commission, are a public official.

#### **Step 2. Will you be making, participating in making, or using your official position to influence 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.)

When, as a member of the Parking Commission, you make decisions regarding recommendations to the City Council, you are making, participating in making and influencing a governmental decision. (Regulations 18702.2 and 18702.3(a).) This is consistent with the fact that you file a Form 700 in your capacity as a member of the Parking Commission.

### **Step 3. What are your 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

You own real property located in the Parking District. Therefore, you have a real property economic interest in the property. (Regulation 18704.2(a)(1).)

### Business Entity

You and your wife own a travel agency located within the Parking District. Under Section 82005, the term “business entity” means any organization operated for profit, including a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association. Because the travel business is operated for profit, it is a business entity. You have an economic interest in the business on two bases. First, you and your wife are the owners of the business, in which, presumably, you have an investment of at least \$2,000. (Section 87103(a); Regulation 18703(a).) Second, you hold a management position with the business entity. (Section 87103(d); Regulation 18703.1(b).)

### Source of Income

We assume that you receive annual income of at least \$2,000 from your business. Thus, the business, as well as customers of the business, is a source of income.<sup>2</sup>

### Personal Finances

A public official is considered to always have an economic interest in his or her personal finances. (Regulation 18703.5.) However, a financial effect on the value of real property owned directly or indirectly by a public official, and a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects 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 your circumstances and we will not discuss it further.

### **Step 4. Will your economic interests be directly or indirectly involved in decisions you will make, participate in making or influence as a public official?**

Once you have identified a specific governmental decision, you will need to determine whether your real property and your business are directly involved in the decision.<sup>3</sup> 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

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<sup>2</sup> You have not given any facts regarding sources of income therefore we do not analyze potential conflicts with respect to this economic interest.

<sup>3</sup> If a public official’s economic interest is not directly involved in a governmental decision, it is indirectly involved. (Regulation 18704(a).)

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.”

Because your real property is located *within* the boundaries of the Parking District, it is directly involved in Parking Commission decisions.

### Business Entity and Source of Income

Under Regulation 18704.1(a), a person, including a business entity and source of income, is directly involved in a decision before an official's agency when that person, either directly or by an 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.”

For example, the decision to allocate funds to the Formation Committee would be a decision in which your interests are indirectly involved.

### **Step 5. What is the applicable materiality standard?**

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).)

### Real Property

Under Regulation 18705.2(a), the financial effect of a governmental decision on real property that is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property.

### Your Business

Regulation 18705.1(b) provides the general rule that the financial effects of a governmental decision on a business entity that is *directly* involved in the governmental decision is presumed to be material, subject to certain exceptions listed in Subdivisions (1) and (2).

Subdivision (c) sets forth materiality standards for economic interests in business entities that are *indirectly* involved in a governmental decision. For relatively small businesses, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that the governmental decision will increase/decrease the business entity's annual gross revenues by \$20,000 or more, result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year or increase/decrease the value of the business entity's assets/liabilities by \$20,000 or more. (Regulation 18705.1(c)(4).)

**Step 6. Is it reasonably foreseeable that the financial effects of the governmental decision on your economic interests 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.)

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.

**Steps 7 and 8. The "public generally" and "legally required participation" exceptions.**

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(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). When faced with a specific governmental decision in which you have determined that you may have a conflict of interest, you will want to consider these exceptions.

In summary, mere membership on the Parking Commission and the Formation Committee is not prohibited by the Act's conflict-of-interest provisions. However, if, in the future, you make, participate in making, or use your official position as a member of the Parking Commission to influence a governmental decision, you will need to use the eight step analysis set forth above to determine whether you have a disqualifying conflict of interest under the Act.

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

VJ:jgl