

February 13, 2012

David Cogdill Jr.
Modesto City Councilmember District 6
3224 Sundance Lake Dr.
Modesto, CA 95355

Re: Your Request for Advice
Our file No. A-12-007

Dear Mr. Cogdill:

This letter responds to your request for advice regarding conflict of interest provisions of the Political Reform Act (the "Act").¹

Please note that our advice is based solely on the Act. We therefore offer no opinion on the application, if any, of other conflict of interest laws or on any incompatible activities restrictions your agency may impose.

QUESTIONS

1. May you participate in the decisions related to the annual special tax, Community Facilities District No. 1994-1, when your real property is subject to this assessment?
2. May you speak to the press or the public regarding the annual special tax?

CONCLUSIONS

1. The information you provide shows that the public generally exception is applicable to your personal residence. Therefore, your personal residence does not represent a disqualifying conflict of interest to you and you may participate in decisions involving the annual special tax.
2. The Act does not prohibit you from discussing the annual special tax generally with members of the press or the public. See discussion below.

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.

FACTS

You are a newly elected member of the Modesto City Council and you seek advice regarding the conflict of interest provisions of the Act.

In 1994, the City of Modesto (“City”) entered into a School Impact Mitigation Agreement (“Mitigation Agreement”) with the Modesto High School District, the Sylvan Union School District and the Building Industry Association of Central California.

The Mitigation Agreement addressed how the impacts from new residential development in a new development area in the city would be mitigated using a combination of developer one-time payments at building permit and participation of subdivided land in a community facilities district created under the Mello-Roos Communities Facilities Act of 1982.

Under a joint exercise of powers agreement, a joint financing authority called the Schools Infrastructure Financing Agency was created, which in turn established the Communities Facilities District No. 1994-1 (“CFD No. 1994-1”). CFD No. 1994-1 sold a bond to pay for schools and school related infrastructure. It imposes an annual special tax on homes within the boundaries of CFD. The tax has been raised approximately 2 percent each year for a number of years, although no increase was assessed for the 2011-2012 tax year.

Your personal residence, a single-family home, is within the boundaries of the CFD and your property is subject to the annual special tax.

The City has obtained a legal opinion that the school districts breached the Mitigation Agreement. The City will be considering what action to take, if any, regarding the information it received via the legal opinion. Some actions that the City could take might result in the annual special tax being reduced or increased, or paid for a shorter or longer number of years by households in the CFD.

There are 11,800 residential property owners in District 6, and there are 4,468 residential property owners that are subject to the annual special tax. In the city of Modesto, there are 58,773 residential property owners, and 4,827 residential property owners in the city are subject to the annual special tax.

You wish to know whether you can participate in decisions regarding the annual special tax. If you cannot participate, you wish to know if you can speak to the public and the press regarding the matter.

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 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: ARE YOU A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

As a member of the Modesto City Council, you are a public official under the Act. (Section 82048.) As a city council member, you will be called upon to consider what actions the City should take with regard to the special annual tax that will come before the city council. Therefore, if you participate in discussions, vote on decisions, or attempt to influence any member of the city council involving the special annual tax, you 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 18702.4(b)(1)(A-C).)

Your facts indicate you have a personal interest in your personal residence if it is wholly owned by you or members of your immediate family. Even if you have a conflict, you may speak as a member of the public before the city council only about your personal interest and you must leave the room for the duration of the discussion and vote on the annual special tax. (Section 87105; see recusal requirements below.)

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, even if you have a conflict, the Act does not prohibit you from discussing the annual special tax generally with the press, friends, neighbors or other members of the community, even if you do 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, sub-divisions (c) and (d) apply. (Section 87105.)

STEP 3: DO YOU 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, you have an economic interest in real property provided you have a direct or indirect interest of \$2,000 or more in your personal residence.

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

STEP 4: ARE YOUR 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.”

Real Property Interests:

For governmental decisions that affect real property interests, the standards set forth in Regulation 18704.2 apply.

“(a) Real property in which a public official has an economic interest is directly involved in a governmental decision if any of the following apply:

“(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.”

Based on your facts, your personal residence is within the boundaries of the CFD, and the governmental decision involves the imposition, repeal or modification of taxes or fees assessed or imposed on the property, therefore it is directly involved in the decisions before the city council.

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

Directly involved real property: Regulation 18705.2(a)(1) provides that the financial

effect of a governmental decision on real property that is directly involved in the governmental decision is presumed to be material. Pursuant to the regulation, 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.

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 your personal finances, therefore we do not analyze this economic interest.

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.

Based on the facts you have presented, it appears reasonably foreseeable that the applicable materiality standard for your real property interest will be met. This means that there can be no financial effect on your real property. Because the decisions will involve a special tax on homes in the CFD, it is reasonably foreseeable that this threshold will be met.

Therefore, you have a conflict of interest in the decision involving the annual special tax and you are prohibited from participating in those decisions involving this tax unless an exception applies.

STEP 7: “PUBLIC GENERALLY” EXCEPTION

Even if a public official determines that his or her economic interests will experience a material financial effect as a result of the governmental decision before the official, he or she may still participate under the “public generally” exception if the material financial effect of a governmental decision on a public official’s economic interests is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.)

Therefore, you may participate in the governmental decision in which you have a disqualifying conflict of interest only if you meet the requirements of the basic public generally exception under Regulation 18707.1.

Under the basic public generally rule, you must meet a two-part test by showing that the decision would affect a “significant segment” of the public in “substantial the same manner” as it financially affects your economic interest.

For decisions that affect a public official’s real property, “significant segment” is defined as:

“(i) Ten percent or more of all property owners or all residential property owners in the jurisdiction of the official’s agency or the district the official represents; or

“(ii) 5,000 property owners or residential property owners in the jurisdiction of the official’s agency.” (Regulation 18707.1(b)(1)(B).)

Significant Segment:

According to your facts, there are 11,800 residential property owners in District 6 and of those, 4,468 residential property owners are subject to the annual special tax. Based on these figures, more than 37 percent of the residential property owners in your district are affected by the annual special tax. Therefore, the ten percent “significant segment” threshold is met.

Substantially the Same Manner:

The second-prong of the analysis requires that your economic interest be affected in “substantially the same manner” as the “significant segment.” If the answer is “yes” as to the economic interest identified, then the effect of the decision is not distinguishable from the effect on the public generally and you may participate in the decision. (Regulation 18707(b)(4).) To assess whether a significant segment will be affected in substantially the same manner, all measurable effects from the decision must be identified.

Because your facts indicate that you have a single family home on an average size lot without any special features, and the special annual tax is based on the size of residential properties, it appears that this threshold is also met. Therefore, your personal residence does not represent a disqualifying conflict of interest to you and you may participate in decisions involving the annual special tax.

STEP 8: “LEGALLY REQUIRED PARTICIPATION” EXCEPTION

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.)

You have not presented any facts indicating that the “legally required participation” exceptions are applicable to your 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: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl