

February 27, 2012

Caroline L. Fowler
City Attorney
City of Santa Rosa
100 Santa Rosa Avenue, Room 8
Santa Rosa, California 95404

**Re: Your Request for Advice
Our File No. A-12-020**

Dear Ms. Fowler:

This letter responds to your request for advice on behalf of Santa Rosa City Councilmembers Susan Gorin and Scott Bartley 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.)

Additionally, our advice is limited to obligations arising under the Act. We do not address the applicability, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTION

Does Councilmember Gorin or Councilmember Barley have a conflict of interest in participating in a governmental decision to enter into settlement agreements with the Oakmont Golf Course and the Oakmont Village Association regarding suspending the operation of a City-operated waste water treatment plant?

CONCLUSION

No. Under the facts presented, neither Councilmember Gorin or Councilmember Bartley has an economic interest that may be reasonably foreseeably materially financially affected by the decision.

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

The City Council of Santa Rosa is composed of seven elected members. The City has no other elected officials.

The City is in the process of negotiating settlement agreements with the Oakmont Golf Course, Inc. (OGC) and the Oakmont Village Association (OVA) regarding suspending the operation of a City-operated water treatment plant (Oakmont Treatment Plant) which, in the past, has supplied recycled water to OGC for golf course irrigation. The agreements will be approved by the City Council and the City's Board of Public Utilities. The City has provided recycled water to the OGC in connection with its operation of the Oakmont Treatment Plant under the terms of a written contract entered into between the City and the original developers of the subdivision. The settlement agreement with OGC will provide that in exchange for the payment of funds the OGC will construct improvements to the golf course irrigation system, storage, and turf to become more water efficient so that it is not dependent on the recycled water previously provided by the City. The settlement agreement makes no disposition of the property on which the treatment plant is located at this time. Under the terms of the settlement agreement with the OVA, in consideration of the settlement agreement between the City and the OGC, the OVA will release the City from any claims regarding the provision of recycled water to the golf courses and the future disposition of the property.

The OGC owns and operates two golf courses that are located within a large subdivision in the City. It is the City's understanding that ownership of a lot in the subdivision does not provide owners with any interest in the golf courses; rather the golf courses offer memberships to the public and are also open to the public upon the payment of green fees.

The OVC operates and maintains the common landscaped areas and the common facilities located throughout the subdivision. It is the City's understanding that the owners of lots within the subdivision own individual fractional shares of the common areas and facilities. Owners and tenants have access to the use of the common areas and facilities. None of the common areas or facilities is impacted by the agreement or the water use that is the subject of the agreement. The OVA is not receiving any compensation as part of the settlement agreement. The OVA will, as part of the settlement, release any claims to receive water from the treatment plant and release any claim it may have to ownership of the property.

Councilmember Steve Bartley, as part of an investment group in real property, owns a twenty-percent interest in property located in the subdivision. The property is within 500 feet of the golf course and clubhouse. The investment group pays dues to the OVA and has the beneficial use of the common areas of the subdivision. Neither the councilmember nor the investment group has a membership to the golf course.

Councilmember Susan Gorin has leased a residence in the subdivision. The property is not within 500 feet of the golf course. The councilmember is entitled to use the common areas of the subdivision. The councilmember does not have a membership to the golf course.

Does membership in the OVA or the right to access the common areas create a financial conflict of interest that would require the councilmembers to abstain from voting on the settlement agreement in which OVA is a party? Does owning a twenty-percent interest in real property located within 500 feet of the golf course create a financial interest requiring the Councilmember Bartley to abstain from voting on the settlement agreement?

ANALYSIS POTENTIAL CONFLICT OF INTEREST

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.

STEPS 1 & 2: ARE COUNCILMEMBERS GORIN AND BARTLEY PUBLIC OFFICIALS MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

As members of the City Council, Councilmembers Gorin and Bartley are public officials under the Act. (Section 82048.) Consequently, they may not make, participate in making, or otherwise use their official positions to influence any decision that will have a reasonably foreseeable material financial effect on any of their economic interests.² Because they will be called upon to consider a settlement agreement with the OGC and OVA they will be making, participating in making, or otherwise using their official position to influence a governmental decision.

² If a public official's office is listed in Section 87200 ("87200 filers" include city councilmembers) 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: DO EITHER OF THE COUNCILMEMBERS 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, aggregating \$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.)

The fact that the Councilmembers have a membership in the OVA or a right to access certain common areas does not create an economic interest that is subject to the Act’s conflict of interest laws. Accordingly, the only economic interest you have indicated for each councilmember is their real property interest.³ Our analysis is, therefore, limited to their economic interest in their real property.

STEP S 4 AND 5: IS THE ECONOMIC INTEREST DIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION AND WHAT IS THE MATERIALITY STANDARD?

“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.” (Regulation 18704(a).) For economic interests in real estate, Regulation 18704.2 provides that

³ We assume these interests are valued at \$2,000 or more.

real property that is located within 500 feet of the property that is the subject of the governmental decision is directly involved.

However, Regulation 18704.2 (b)(2) provides an exception to the 500-foot rule. It provides:

“(b) Notwithstanding subdivision (a) above, real property in which a public official has an interest is not directly involved in a governmental decision, but is instead indirectly involved if:

“(1) ...

“(2) The decision solely concerns repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage or similar facilities.”

Under the facts you have presented, the settlement agreement concerns replacement irrigation services to the golf course after the suspension of the operation of a City-operated water treatment plant. Therefore, the government decision meets the exception provided in Regulation 18704.2 (b)(2) in that it concerns the replacement of a water supply. For this reason, Councilmember Bartley’s real property is deemed to be indirectly involved even though it is located within 500 feet of the golf course. Councilmember Gorin’s property, which is located more than 500 feet from the golf course, is also indirectly involved.

A conflict of interest arises only when the reasonably foreseeable financial effect of a governmental decision on a public official’s economic interest is material. (Regulation 18700(a).) For real property that is indirectly involved in a governmental decision, the reasonably foreseeable financial effect is presumed not to be material. (See Regulation 18705.2 (b)(1) & (2).) This presumption may be rebutted, see examples given in Regulations 18705.2(b)(1)(a–c) and 18705.2(b)(2)(A–E), copy enclosed.

Nothing you have presented in your facts would give any indication that the governmental decision will present any factors that may rebut this presumption. Therefore, neither Councilmember Gorin nor Councilmember Bartley has an economic interest in their real property that may be reasonably foreseeably materially financially affected by the decision. Because you have not presented any factors other than the issue dealing with replacement of the water supply to the golf course, our advice with respect to the reasonably foreseeable material financial effect of the decision is limited to this factor.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: William J. Lenkeit
Senior Counsel, Legal Division

WJL:jgl

Enclosure