

March 7, 2012

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

Re: Your Request for Informal Assistance
Our File No. I-12-026

Dear Mr. McHugh:

This letter responds to your request for advice on behalf of Mayor Pro Tem Paul Foster regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹

This letter is based on the facts presented in your request. The Commission does not act as a finder of fact when issuing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct, and all material facts have been provided.

Because your question is general in nature and do not refer to any specific governmental decision, we are treating your request as one for informal assistance.²

QUESTION

May Mayor Pro Tem Foster discuss, deliberate and vote on a land use entitlement application to develop 50 acres of property when his employer owns developed property immediately adjacent to the proposed development?

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

Mayor Pro Tem Foster may participate in city council decisions to approve a land use entitlement application so long as the decisions will not have a reasonably foreseeable material financial effect on his employer, Southern California Permanente Medical Group (“SCPMG”). See discussion below.

FACTS

You are the City Attorney for the City of Redlands. You seek advice on behalf of Redlands’ Mayor Pro Tem Foster.

Mayor Pro Tem Foster is employed by SCPMG, which is a private for-profit organization that along with two non-profit organizations—Kaiser Foundation Hospitals and Kaiser Foundation Health Plan, Inc. (the “Foundation Plans”)—comprise Kaiser Permanente in Southern California.

Kaiser Permanente’s annual revenues exceed 40 billion dollars. An approximate breakdown of those estimated annual revenues is that 16 billion dollars is attributable to SCPMG, and 24 billion is attributable to the Foundation Plans.

SCPMG owns developed property immediately adjacent to 50 acres of real property that is the subject of a land use entitlement application before the Redlands City Council. You wish to know if the Mayor Pro Tem may discuss, deliberate and vote on the development proposal that may be filed and presented to the city council for decision.

ANALYSIS

The Act’s conflict of interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a “financial interest.” (Section 87100.) Section 87103 provides that a public official has a “financial interest” in a governmental decision 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 of the official’s economic interests.

Under the Act, a conflict of interest exists *only* when a public official has a financial interest in a particular governmental decision. To determine whether a public official has a “conflict of interest” in a specific governmental decision, we employ a standard eight-step analysis outlined at subdivisions 1 through 8 of Regulation 18700(b).

Your facts acknowledge that Mayor Pro Tem Foster is a public official who will be making, participating in making, or will be using his official position to influence a government decision. You also identify his economic interest in his source of income, SCPMG, which owns

developed property adjacent to undeveloped property that is the subject of a governmental decision before the Redlands City Council.

Because your question centers on whether Mayor Pro Tem Foster's economic interest in his source of income (his employer SCPMG) is directly or indirectly involved and what the material standard is for determining a conflict in this situation, we begin our analysis at Step 4.

Step Four: Is Mayor Pro Tem Foster's economic interest directly or indirectly involved in the decision?

To determine whether a governmental decision's reasonably foreseeable financial effect on an economic interest is material or not, you first must determine whether the interest is directly or indirectly involved. (Regulation 18704(a).)

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."

Sources of Income:

For governmental decisions that affect sources of income that are business entities, the standards set forth in Regulation 18704.1(a) apply.

Regulation 18704.1(a) states:

"(a) A person, including business entities, sources of income and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by 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."

Based on the facts presented, SCPMG is not a named party in, or the subject of, the proceedings and is therefore not directly involved in the decisions involving the land use

entitlement application. Therefore, Mayor Pro Tem Foster's economic interests in SCPMG would be indirectly involved in the decisions.

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 is 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

Sources of Income and Business Entities:

Whether the financial effect of a governmental decision on an indirectly involved business entity is material depends on the size of the business entity. The standards vary according to whether the business entity is a Fortune 500 company, is listed on the New York Stock Exchange, American Stock Exchange, or NASDAQ, or according to the size of the business entity. The following table summarizes these standards.

Type of Business	Effect on Gross Revenues	Effect on Expenses	Effect on Assets/Liabilities
Listed on the Fortune 500 or revenues of no less than the company listed as 500th on the Fortune 500	\$ 10,000,000 or more	\$ 2,500,000 or more	\$ 10,000,000 or more
Listed on NYSE or net income of no less than \$ 2,500,000	\$ 500,000 or more	\$ 200,000 or more	\$ 500,000 or more
Listed on NASDAQ or AMEX, or net income of no less than \$ 750,000	\$ 300,000 or more	\$ 100,000 or more	\$ 300,000 or more
All others	\$ 20,000 or more	\$ 5,000 or more	\$ 20,000 or more

Thus, for example, if the decision involving the land use application would impact SCPMG to the thresholds set forth above, a conflict of interest would exist.

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 Mayor Pro Tem Foster’s 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.

For example, if the proposed development project across the street is for another medical facility or hospital, it may negatively affect the SCPMG by decreasing the business’s gross revenues for a fiscal year. Similarly, a complimentary business built nearby may increase access to the SCPMG facilities and may increase the business entity’s gross revenues for a fiscal year.

If it is reasonably foreseeable that the applicable materiality standard for any of Mayor Pro Tem Foster’s economic interests will be met in light of the specific facts surrounding a specific decision, then he will be prohibited from participating in that decision.

STEPS 7 AND 8: PUBLIC GENERALLY & LEGALLY REQUIRED PARTICIPATION

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 et seq.), or if the official is legally required to participate (Section 87103; Regulation 18708).

You have not presented any facts indicating that the “public generally” exception or the “legally required participation” exception would be applicable to Mayor Pro Tem Foster’s situation, thus we do not further analyze this issue.

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