

June 6, 2012

Lori J. Barker, City Attorney
Office of the City Attorney
P O Box 3420
Chico, CA 95927

Re: Your Request for Advice
Our file No. A-12-052

Dear Ms. Barker:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ 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 conflict-of-interest laws such as common law conflict of interest. Also, the Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 72.)

QUESTION

May Mayor Ann Schwab and City Council Members Bob Evans and Mark Sorensen participate in governmental decisions concerning smoking regulations affecting Bidwell Park and all businesses in Chico?

CONCLUSION

Yes. Under the facts presented, there is no reasonably foreseeable material financial affect on any of the economic interest indicated.

FACTS

You are the City Attorney for the City of Chico and are writing on behalf of Mayor Ann Schwab and City Council Members Bob Evans and Mark Sorensen.

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.

Chico is a city that encompasses an area of approximately 33 square miles. Businesses are located throughout the city. The downtown area of Chico, which is approximately ten blocks by six blocks, has a concentration of businesses.

The American Lung Association has approached the City of Chico with a request that the City Council adopt an ordinance that would prohibit smoking within a specified number of feet of all business entryways, in all outdoor dining and bar areas and in all of Bidwell Park. The question of smoking in Bidwell Park could be considered a separate item from the other smoking regulations being requested. The regulation concerning smoking in front of businesses would apply city-wide. The Downtown Chico Business Association, which represents businesses located in the downtown area, strongly opposes that regulation. This opposition may affect how the regulation may apply in the downtown area.

Mayor Ann Schwab and City Council members Bob Evans and Mark Sorensen all own real property within 500 feet of Bidwell Park. Mayor Schwab owns a business located within the boundaries of Downtown Chico, and she has a leasehold interest in the property on which her business is located. Councilmember Evans owns property that is located within 500 feet of the downtown area.

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.

Steps One and Two: Are Mayor Ann Schwab and City Council members Bob Evans and Mark Sorensen public officials who would be making, participating in making, or using their official positions to influence a governmental decision?

Mayor Ann Schwab and City Council members Bob Evans and Mark Sorensen are “public officials” within the meaning of the Act.² (See Section 82048.) In addition, they would

² If a public official’s office is listed in Section 87200, which specifically includes mayors and 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 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.)

be making, participating in making, or influencing a governmental decision when taking part in any decision by the Chico City Council.³

Step Three: What are their economic interests?

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, described as follows:

- 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 a 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 a 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 known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Of the economic interests recognized under the Act⁴, those interests that may be implicated by your account of the facts are the following:

Real Property: Mayor Ann Schwab and City Council Members Bob Evans and Mark Sorensen own interests in real property located within 500 feet of Bidwell Park valued at

³ A public official “makes a governmental decision” when the official, acting within the authority of his or her position, votes on a matter, obligates or commits his or her agency to a course of action, or enters into a contractual agreement on behalf of his or her agency. (Section 87100; Regulation 18702.1.) A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive review, the official negotiates, advises or makes recommendations to the decision maker regarding the governmental decision. (Section 87100; Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision before his or her own agency if, for the purpose of influencing the decision, the official contacts or appears before a member, officer, employee, or consultant of his or her agency. (Section 87100; Regulation 18702.3.)

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

\$2,000 or more. Accordingly, they have economic interests in these properties. (Section 87103(b).)

Leasehold Interest: An interest in a leasehold also is an interest in real property under the Act so long as that interest is valued at \$2,000 or more. (Section 82033.) Therefore, Mayor Schwab's leasehold interest in the property where she runs her business is also an economic interest under the Act assuming it is worth \$2,000 or more.

Business: You have stated that Mayor Schwab owns a business located within the boundaries of downtown Chico. Provided she has an investment of \$2,000 or more in this business and will receive income of \$500 or more from this business in the 12 months prior to a decision, she also has an economic interest in her business as both a business entity and a source of income. (Section 87103 (a), (c), and (d).)

Personal Finances: 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.)⁵

Step Four: Are the economic interests directly or indirectly involved in the decision?

Real Property:

In pertinent part, Regulation 18704.2(a) states that real property in which a public official has an economic interest 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.

...”

Bidwell Park: From the facts you have provided, Mayor Schwab and City Council Members Evans and Sorensen own property that is located within 500 feet of Bidwell Park. Accordingly, their economic interests in their real property are *directly* involved in decisions regarding the smoking regulations affecting Bidwell Park. The leasehold owned by Mayor Schwab and Council Member Evan's real property, both of which are beyond 500 feet of

⁵ 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).) Based upon the facts provided, there is no indication that the personal financial effects rule applies to the facts you have provided and we will not discuss it further.

Bidwell Park and therefore will be indirectly involved in the decisions regarding smoking in Bidwell Park. (Regulation 18704.2 (b)(1).)

All Business Entryways: Councilmember Evans owns real property within 500 feet of the downtown area and Mayor Schwab has a leasehold within the downtown area, where many business are located. Therefore, Councilmember Evan's interest in his real property located within 500 feet of the downtown area and Mayor Schwab's interest in her leasehold in the downtown area would be directly involved in the regulation affecting all business properties in Chico. The properties owned by Mayor Schwab and Council Members Sorensen and Evans within 500 feet of Bidwell Park will be indirectly involved in the decisions regarding the Entryway decision since they are not business properties and not within 500 feet of the downtown area. (Regulation 18704.2 (b)(1).)

Mayor Schwab's Business:

Regulation 18704.1(a) states that a business entity or source of income is *directly* involved in a decision before the official's agency when that business entity or source of income, 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.”

Business entities and sources of income that are not directly involved in governmental decisions are regarded as indirectly involved. (Regulations 18704.1(b), 18705.1(a)(2), and Regulation 18705.3(b).) From the facts provided, there is no indication that Mayor Schwab's business initiated the proceedings or is a party in, or subject of, the proceedings within the meaning of Regulation 18704.1. Accordingly, it appears as though Mayor Schwab's economic interests in her business, as both a business entity and a source of income, are *indirectly* involved in the decisions you have described.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your economic interests?

Materiality

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

Real Property:

Any financial effect of a governmental decision on real property *directly* involved in the governmental decision is presumed to be material. (Regulation 18705.2(a)(1).) 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."

For *indirectly involved* real property the financial effect of a governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. (Regulation 18705.2(b)(1).) Examples of specific circumstances include affects on:

“(A) The development potential or income producing potential of the real property in which the official has an economic interest;

“(B) The use of the real property in which the official has an economic interest;

“(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.”

For an indirectly involved interest in a leasehold the financial effect of a governmental decision is also presumed not to be material but may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the governmental decision will:

“(A) Change the legally allowable use of the leased real property, and the lessee has a right to sublease the real property;

(B) Change the lessee’s actual use of the real property;

(C) Substantially enhance or significantly decrease the lessee’s use or enjoyment of the leased real property;

(D) Increase or decrease the amount of rent for the leased real property by 5 percent during any 12-month period following the decision; or

(E) Result in a change in the termination date of the lease.”

Mayor Schwab’s Business:

For economic interests in business entities *indirectly* involved in a decision, including business entities that are a source of income to an official, the materiality standard is given at Regulation 18705.1(c). The thresholds for materiality under this regulation vary with the size of the business. Regulation 18705.1(c)(4) provides that the financial effect of a governmental decision on a business, not publicly traded and relatively modest in economic size, is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”

You should consult Regulation 18705.1(c) to ensure that you identify the materiality threshold actually appropriate to Mayor Schwab’s business.

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.*) 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 public official.

However, under the facts you have provided nothing suggests that either the governmental decision to restrict smoking in Bidwell Park or the decision to prohibit smoking in proximity to businesses in Chico will have a reasonably foreseeably financial effect of even a penny, on property values of properties subject to or located within 500 feet of the Bidwell Park or business’ subject to the prohibition.

Similarly, you have not provided enough information to determine if Mayor Schwab’s business would be materially affected as described in the above criteria. Based on your facts, however, it does not appear reasonably foreseeable that the business will be materially affected to the thresholds set forth in Regulation 18705.1.

Steps Seven: Public Generally

Under the public generally exception, an official with a disqualifying conflict of interest may take part in a governmental decision if the 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).)

Even if you determine that there will be a reasonably foreseeably material financial effect on Mayor Schwab’s business interest, the public generally exception would apply and therefore there would be no conflict stemming from that interest.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Sukhi K. Brar
Counsel, Legal Division

SKB:jgl