

June 4, 2012

John P. Doering  
County Counsel  
1010 Tenth Street, Suite 6400  
Modesto, CA 95354

Re: Your Request for Advice  
**Our File No. A-12-068**

Dear Mr. Doering:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> Our advice is based on the facts you have presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is based solely on the provisions of the Act; we can offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest.

### QUESTION

Does a proprietary membership in the Del Rio Golf and Country Club, which gives members a right to a proportional share of the value of Club assets upon dissolution of the Club, constitute an interest in real property giving rise to a potentially disqualifying conflict of interest in a governmental decision regarding property situated within 500 feet of the Club?

### CONCLUSION

Yes. Your account of the facts makes it clear that this membership is an “interest in real property” as defined by the Act, and as such it gives rise to a potentially disqualifying conflict of interest, as you have concluded. Your analysis is consistent with prior Commission advice in similar situations; seemingly inconsistent advice appears to have been based on facts that differ materially from the circumstances you describe.

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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

Supervisor O'Brien has a regular proprietary membership in the Del Rio Golf and Country Club (the "Club"), a California corporation registered as a 501(c)(7) non-profit mutual benefit organization. The proprietary membership is limited to 481 members. Proprietary members have a right to vote for, and are eligible to hold, any Club office. Although title to the Club's real property is held in the name of the Club, proprietary members have an equitable right of ownership to the Club's real and personal property and other assets, and are entitled to a proportionate share of the value of those assets if the Club is dissolved.<sup>2</sup> According to a 2012 valuation, each proprietary member's share of the Club's real property and other assets is valued at approximately \$30,000.<sup>3</sup>

Proprietary memberships are transferable for fair market value, subject to Club approval of the new member and payment of a transfer fee to the Club equal to 40-percent of the transfer price or \$5,000, whichever is more; i.e., proprietary members may realize a profit from the sale if the sale price exceeds \$5,000. Proprietary members are required to pay monthly base dues of \$626. Although the dues have not increased recently, dues may change in response to the changing costs faced by the club. Neither Supervisor O'Brien nor his spouse or children receive any income or gifts from the Club.

The Club is located seven miles north of Modesto, in the unincorporated area of Stanislaus County. The southwest corner of the golf course property owned by the Club is situated approximately 60 feet across the street from the proposed Del Rio Villas condominium development project. The Del Rio Villas project application is for General Plan Amendment, Rezone, and Vesting Tentative Subdivision Map, which requires review and approval by the Stanislaus County Board of Supervisors, of which Supervisor O'Brien is a member. The Del Rio Villas project description provides that: "The project will also incorporate access to and provide a physical and aesthetic transition to the existing Del Rio Country Club to the northeast."

You wish to advise Supervisor O'Brien on whether he may participate in decisions on this project application, and you have concluded that he would almost certainly have a conflict of interest in decisions on this project because he has a real-property interest in the land owned by the Club, which because of its proximity to the project would be directly involved in decisions on this application. Your specific question arises from your study of Commission advice letters, which you find inconsistent in their conclusions on whether a golf-club membership conveys a potentially disqualifying interest in real property under the Act's conflict-of-interest rules.

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<sup>2</sup> Your information on this point is based on personal communication with Duncan Reno, the General Manager of the Del Rio Golf & Country Club.

<sup>3</sup> We assume from your account of the facts that the value of Supervisor O'Brien's membership is based at least in part on an updated value of the Club's real property, and that his interest in this property is worth \$2,000 or more.

## ANALYSIS

To answer your question we will not review your full analysis of Supervisor O'Brien's obligations under the Act, which we believe to be entirely correct. We need only quote that portion of your analysis that bears directly on the question you present:

The Political Reform Act provides that an "interest in real property" includes any beneficial or ownership interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official if the fair market value of the interest is \$2,000 or more. (Gov. Code, § 82033; Cal. Code Regs., tit. 2, § 18703.2 (a).) *In this case, it is assumed that a proprietary membership in the Club is an interest in real property because the membership entitles the member to an equitable or beneficial ownership in the Club assets upon dissolution of the Club, and because the proportionate share of fair market value of a proprietary membership in the Club is reasonably valued at more than \$2,000.*

A public official has a direct interest in real property involved in a governmental decision if the real property is located within 500 feet of the property that is the subject of a governmental decision. (Cal. Code Regs., tit. 2, § 18704.2 (a)(1) .) In this case, the Del Rio Villas project is situated some 60-feet from property owned by the Club.

The financial effect of a governmental decision on directly involved real property is presumed to be material, although that presumption can be rebutted by evidence that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (Cal. Code Regs., tit. 2, § 18705.2 (a)(1), emphasis added.)

We conclude that Supervisor O'Brien's proprietary membership in the Club makes him a beneficial owner of the real property owned by the Club and, due to the proximity of the Del Rio Villas project to the Club, the financial effect on Supervisor O'Brien is presumed to be material. Further, because the Del Rio Villas project intends to "incorporate access to and provide a physical and aesthetic transition to the existing Del Rio Country Club," it is reasonably foreseeable that a decision about the project could have some financial effect on Club real property. Consequently, Supervisor O'Brien most likely has a disqualifying conflict of interest related to the Del Rio Villas project.

That conclusion appears to conflict with prior FPPC advice letters that conclude that a proprietary membership in a non-profit country club is an asset, not an interest in real property. (*Italics added in Paragraph One.*)

In your letter to us you observe that the *O'Brien* Advice Letter, No. A-05-004, the *Martyn* Advice Letter, No. A-97-378, and the *Cook* Advice Letter, No. I-91-468 found that a

proprietary membership in a non-profit country club is an “asset,” not an interest in real property. In contrast, you note that the *Wiener* Advice Letter, No. A-92-149, concluded that members of a tennis club, who owned equal shares of the land underlying the club, had an ownership interest in real property interest by virtue of their membership.

Your own analysis of Supervisor O’Brien’s membership in the Del Rio Golf and Country Club reached the same conclusion as the *Wiener* Advice Letter, which however seems to be at odds with the conclusions of the *O’Brien*, *Martyn*, and *Cook* advice letters.

We believe that your analysis of Supervisor O’Brien’s economic interest is correct, as is your finding of a probable conflict of interest in decisions relating to the Del Rio Villas project. Apparently inconsistent views in the *O’Brien*, *Martyn*, and *Cook* letters are illuminated by a short passage in the *Greenwell* Advice Letter, No. A-97-543, written by the author of the *Martyn* letter, three months later:

“Mr. Marks and Mr. Pland do not have an interest in the Club’s property within the meaning of Section 87103(b) since the value of the membership is not related to increases or decreases in the assets of the Club or the value of the land upon which it is located. (Section 82033; *Martyn* Advice Letter, No. A-97-378; *Wiener* Advice Letter, No. A-92-149; *Cook* Advice Letter, No. I-91-468.)”

Non-profit mutual benefit clubs typically draft their own membership agreements and, although they may be based on common exemplars, their terms can differ from one to the other, as do the rights and benefits of different membership classes within a single club. It is therefore not surprising that the advice offered by Commission staff will vary with the facts of each case, as those facts (particularly the real estate interests granted under a given membership agreement) vary from one case to the next. It is nonetheless clear that, particularly when the resale value of a club membership is determined at least in part by the value of the club’s real estate, the members have at least a beneficial interest in that real estate.

Section 82033 provides that an “interest in real property” includes “any leasehold, beneficial or ownership interest . . .” For purposes of the Act, a public official can have a *beneficial* interest in real property giving rise to potential conflicts of interest even when legal title to the property is vested in a non-profit mutual benefit club.<sup>4</sup> Your reliance on the *Wiener* Advice Letter in support of your legal analysis was proper; as was the case in the *Wiener* letter, your account of the facts shows that Supervisor O’Brien’s proprietary membership carries with it a beneficial interest in the Club’s real property.

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<sup>4</sup> This is clearly recognized by Section 82033, which expressly includes both “beneficial” and “ownership” interests, and is consistent with the common legal understanding of the term “beneficial interest,” succinctly summarized in Black’s Law Dictionary: “**Beneficial Interest.** Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.”

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Lawrence T. Woodlock  
Senior Counsel, Legal Division

LTW:jgl