

June 6, 2012

Gabrielle P. Whelan
Assistant City Attorney
330 West 20th Avenue
San Mateo CA 94403-1388

Re: Your Request for Informal Assistance
Our File No. I-12-080

Dear Ms. Whelan:

This letter responds to your request for advice on behalf of Planning Commissioner Joshua Hugg regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ We base our response 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.)

Because your question is general in nature and not limited to any specific facts or decisions, we are treating your request as one for informal assistance.²

QUESTION

Does a planning commissioner who also works for a housing-related non-profit have a disqualifying conflict of interest in decisions the planning commission makes regarding residential housing projects?

CONCLUSION

Yes. HLC intends to have an effect on all housing decisions in San Mateo, it is reasonably foreseeable that such decisions could have “any” material financial effect on HLC.

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).)

FACTS

You are the assistant city attorney for the City of San Mateo. You represent the City's Planning Commission and write on behalf of Commissioner Joshua Hugg. As a planning commissioner, he will be voting on "proposed residential housing projects."

Mr. Hugg is also a Program Manager with the Housing Leadership Council ("HLC") in San Mateo County, a position for which he earns an income of over \$500/year. His income is not related to the number of housing projects that the city approves. HLC's stated mission is: to accelerate the production of new homes in San Mateo County at all affordability levels to create opportunities and a viable quality of life." HLC is a non-profit corporation that provides education and advocacy for housing production. Funding for HLC is provided by member contributions, operating grants, program grants, and fees for service. Staff members attend public meetings in San Mateo when topics relate to housing projects, and the board of directors occasionally votes to provide official endorsements for proposed housing projects in San Mateo.

As Program Manager, Mr. Hugg provides education to municipalities and developers with regard to the importance of housing affordability at all income levels. He meets with city staff members to develop ways in which affordable housing can be encouraged. You also mention that developers may be motivated to contribute to HLC if they perceive such a contribution would aid in gaining a favorable decision from the planning commission.

You have not provided information on any specific decisions before the planning commission.

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 in Regulation 18700(b).

Steps One and Two: Is Mr. Hugg a Public Official Making, Participating in Making, or Influencing a Governmental Decision?

As a member of the Planning Commission, Mr. Hugg is a public official under the Act. (Section 82048.) He will be making decisions regarding housing projects in San Mateo by virtue of that position.

Step Three: What are Mr. Hugg's Economic Interests?

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. (Section 87103; Regulations 18703-18703.5.)

The applicable economic interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).)
- An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the "personal financial effects" rule. (Section 87103, Regulation 18703.5.)

The only economic interest about which you provided information is Mr. Hugg's interest in his employer as a source of income. He earns more than \$500 per year from HLC, a non-profit, public benefit corporation. Accordingly, our analysis is limited to consideration of this economic interest.

Step Four: Are Mr. Hugg's Economic Interests Directly Involved in the Governmental Decisions?

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 and Business Entities:

For governmental decisions that affect sources of income, 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 above, HLC is not directly involved in the decisions. It is therefore indirectly involved.³

Steps Five and Six: Is it Reasonably Foreseeable That the Decisions Will Have a Material Financial Effect on Mr. Hugg's Economic Interests?

When a non-profit entity that is a source of income to a public official is indirectly involved in a governmental decision, the appropriate materiality standard is found in Regulation 18705.3(b)(2). The particular materiality standard to apply depends on the size of the non-profit entity; you stated that the gross annual receipts of the Laguna Playhouse are greater than \$100,000 and less than \$1,000,000. Therefore, Regulation 18705.3(b)(2)(E) applies. In this case, the effect of the decision is material if:

³ An economic interest that is not directly involved in a decision is indirectly involved. (Regulation 18704(a).)

“(i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$50,000 or more.

“(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$12,500 or more.

“(iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$50,000 or more.”

You explained that the effect of any decision that the San Mateo Planning Commission makes regarding housing will not meet these thresholds. The materiality standard in Regulation 18705.3(b)(2)(E) is therefore not met.

In addition to the materiality standards for a source of income as described above, however, there is a special rule for materiality that applies in cases where there is a nexus between duties owed to a source of income and to the official's public agency. When a public official is paid by another entity to accomplish some action that is within the official's public decision-making authority, *any* financial effect on the source of income is presumed material, regardless of whether the source of income is directly or indirectly involved. The “nexus test” is set out at Regulation 18705.3(c):

“Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.”

We have previously explained that the nexus test addresses those situations in which an employee earns a salary to accomplish a purpose that may be advanced by what he or she does as a public official; in such situations, we presume that the private employer benefits from the actions of the employee in his or her official capacity. (*Hopper* Advice Letter, No. I-11-100; *Yarnell* Advice Letter, No. A-00-161.) Typically, a nexus is found where the official is also a high-level employee with direct influence and control over his or her employer's management or policy decisions. (*Moser* Advice Letter, No. A-03-147; *Low* Advice Letter, No. A-99-305.)

Mr. Hugg is a Program Manager and one of only three employees at HLC. Given that the Program Manager and the Executive Director are part of such a small staff, it stands to reason that either of these positions would influence the policy decisions of the non-profit. Whether he acts as the program manager or the Executive Director, Mr. Hugg's employment would create a nexus between his professional and public positions.

The nexus rule states that *any* reasonably foreseeable financial effect is deemed material. If there is any effect, no matter the size, of a planning commission decision on Mr. Hugg's employer, the effect is presumed to be material.

A material financial effect is “reasonably foreseeable” to occur if it substantially likely that the materiality standard has been met. You explained that HLC “seeks to accelerate the production of new homes in San Mateo County at all affordability levels.” Given that HLC intends to have an effect on all housing decisions in San Mateo, it is reasonably foreseeable that such decisions could have “any” material financial effect on HLC.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl

LEGAL DIVISION ASSIGNMENT SHEET

Tracking Number:	12144
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ITEM DESCRIPTION			
Advice Letter No.	12-080	Requestor	Whelan, Gabrielle P.
Regulation Project No.			
Other (describe)			

Received By FPPC On:	05/14/12	Due Date:	06/13/12
Assigned To:	HMR	Date To Assignee:	05/15/12

REVIEWERS	Date To Review	1st Approval & Date (Including Regulation Notices)	Date To Review	Final Approval & Date (Incl. Regulation Adoption Memos)
Proofed				
Senior		<u>WJL</u>		
TAD Chief (SEI, Campaign, Conflict of Interest Code letters)				
Assistant GC				
General Counsel				
Executive Director (discretion of GC)		JWW		
Chair (discretion of GC)				