

September 11, 2012

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Re: Your Request for Advice
Our File No. A-12-125

Dear Mr. Nielsen:

This letter responds to your request, on behalf of San Rafael Mayor Gary Phillips, for advice 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 advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) In addition, 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 Government Code Section 1090 or common law conflict of interest.

QUESTION

May Mayor Phillips take part in decisions regarding a proposed soccer complex despite leasing an airport hangar from the project applicant and the fact that the airport where the hangar is located is adjacent to the project?

CONCLUSION

So long as Mayor Phillips continues to pay the full market value for the lease of the airport hangar, there is no indication that a decision regarding the proposed complex will have a reasonably foreseeable material financial effect on either Mayor Phillips’ economic interest in the lease of the airport hangar or his personal finances. Barring additional facts, Mayor Phillips is not prohibited from taking part in decisions regarding the complex.

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

Your firm represents Gary Phillips, the recently elected Mayor of the City of San Rafael, who is seeking advice regarding the Act's conflict-of-interest provisions as applied to his participation in decisions by the San Rafael City Council related to an application for a property Rezoning, Master Use Permit Amendment, and Environmental Design and Use Permit for a soccer complex (the "Soccer Project") proposed by the private owner of the San Rafael Airport.

The owner of the airport, the San Rafael Airport LLC (the "Applicant"), owns a 120-acre parcel in north San Rafael that includes a small private airstrip and 116 hangars. The applicant is seeking to develop the Soccer Project consisting of an enclosed soccer field complex, additional outside soccer fields, and parking on a 9 acre portion of the parcel that is currently undeveloped open space. The proposed Soccer Project is adjacent to the airport's runway (subject to various setbacks), and the permit application was recently granted by the City Planning Commission. Pursuant to local zoning ordinances, the San Rafael City Council must now conduct a hearing at which it will decide whether to grant or deny the permit.

Mayor Phillips leases a hangar at the airport from the Applicant and requests advice based upon the following facts:

- In October 2009, Mayor Phillips, before being elected, entered into a written lease of Hangar No. 109 for his private plane and "equipment/materials" for a fixed three-year term. The lease expires in October 2012, and Mayor Phillips pays monthly rent. The landlord allows car storage, and Mayor Phillips parks three cars and his plane in the hangar.
- Of the 116 tenants leasing hangar space at the airport, 94 have remained past their original lease termination dates and have transitioned to month-to-month leases. This is how the airport owner handles all expired leases, unless the tenant seeks a new fixed term lease or elects to vacate the hangar. The monthly leases continue on the same material terms as the original lease, including three-percent annual rent increases (except that monthly leases do not include the annual free month offered on the fixed term leases).
- Mayor Phillips has no other financial interests in the Applicant and no other financial interests in the area of the proposed development.
- Hangar No. 109 is more than 500 feet from the Soccer Project site, but the runway is within 500 feet of the site.
- Mayor Phillips' lease does not include provisions contained in older leases (dating from the 1980s) wherein the tenant agreed not to oppose prior unrelated development that the landlord was then pursuing.

- The Soccer Project application does not change or affect the operation of the airport, including the runway, or change or affect any of the 116 hangars.

Based upon these facts, you anticipate that:

- A grant or denial of the proposed Soccer Project application adjoining the airport development will not affect the termination date of the lease.
- The grant or denial of the Soccer Project application will not affect the rent due, which is a fixed amount.
- The grant or denial of the Soccer Project application will not affect Mayor Phillips' right to sublease under the lease.
- The grant or denial of the Soccer Project application will not affect Mayor Phillips' use or enjoyment of Hangar No. 109 or runway.

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: Is the official a public official making, participating in making, or using his or her official position to influence a governmental decision?

As the Mayor of the City of San Rafael, Mayor Phillips is a "public official." (Section 82048.)² In addition, Mayor Phillips is making, participating in making, or influencing a governmental decision when taking part in any decision by the San Rafael City Council regarding the Soccer Project application. (Section 87100; Regulations 18702.1-18702.3.)

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.)

Step Three: What are the official's 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.

So long as Mayor Phillips leases the airport hangar for the fair market value,³ the only potential economic interests implicated by your account of the facts⁴ are the following:

- Airport Hangar Lease - Section 82033 provides that an "interest in real property" includes any leasehold, beneficial or ownership interest or an option acquire such an 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." Under Regulation 18729, "[t]he value of a leasehold interest is the amount of rent owed during a 12-month period." Because Mayor Phillip's annual rent exceeds \$2,000, he has an economic interest in the airport hangar lease as an interest in real property. (Section 87103(b).)⁵
- 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.)

Step Four: Are the official's economic interests directly or indirectly involved in the decision?Airport Hangar Lease

Regulation 18704.2(a)(1) states, in pertinent part, that real property in which a public official has an economic interest is *directly* involved in a governmental decision if "[t]he real property in which the official has an interest, or any part of that real property, is located within

³ In the case that the lease of the hangar is for less than the fair market value, the discounted rent would constitute a gift and would potentially disqualify Mayor Phillips from taking part in decisions regarding the Soccer Project based upon the reasonably foreseeable affect on his economic interest in his landlord as a source of a gift.

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

⁵ Under Regulation 18233, a leasehold interest in real property does not include an interest of a tenant in a periodic tenancy of one month or less. We note that you have indicated that Mayor Phillips' 3-year lease term expires in October 2012. Upon the expiration of the lease, Mayor Phillips may renew the lease or may continue to lease the airport hangar on the same terms but on a month-to-month basis. If Mayor Phillips continues to lease the hangar on a month-to-month basis upon the expiration of the 3-year lease, Mayor Phillips' interest in the lease is no longer a potentially disqualifying economic interest recognized under the Act.

500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision”⁶

From the facts provided, the airport hangar leased by Mayor Phillips is not within 500 feet of the Soccer Project, but the airport itself is within 500 feet of the project. However, in light of our conclusion that there is no *reasonably foreseeable* effect on the leasehold interest, we need not determine whether the leasehold interest in the hangar includes an interest in the common facilities of the airport. Mayor Phillips does not have a disqualifying economic interest in decisions related to the Soccer Project even if we determine Mayor Phillips’ leasehold interest is directly involved in the decision.

Personal Finances

Under Regulation 18704.5, Mayor Phillips economic interest in his personal finances is deemed *directly* involved in the governmental decision if facts suggest any financial effect on his personal finances.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official’s 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.

Airport Hangar Lease

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).) However, for a leasehold interest in real property, this presumption may be rebutted by proof that it is not reasonably foreseeable that the decision will have an effect on any of the following:

“(A) The termination date of the lease;

“(B) The amount of rent paid by the lessee for the leased real property, either positively or negatively;

“(C) The value of the lessee's right to sublease the real property, either positively or negatively;

⁶ “If a public official’s economic interest is not directly involved in a governmental decision, it is indirectly involved.” (Regulation 18704(a).)

“(D) The legally allowable use or the current use of the real property by the lessee; or

“(E) The use or enjoyment of the leased real property by the lessee.”
(Regulation 18705.2(a)(2).)

For properties *indirectly* involved in a governmental decision, Regulation 18705.2(b)(1) provides that the financial effect is presumed not to be material. This presumption may be rebutted only 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 that make it reasonably foreseeable the decision will have a material financial effect on the real property in which the official has an interest.

Personal Finances

A financial effect on an official’s personal finances is material if it is at least \$250 in any 12-month period. (Regulation 18705.5(a).)

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.

Nonetheless, you state that the Soccer Project will not affect the operation of the airport, including the runway, or affect any of the 116 hangars. Additionally, 94 out of the 116 tenants leasing hangar space at the airport have remained past their original lease termination dates and have transitioned to month-to-month leases, which continue at the same monthly rate as the original leases with three-percent annual increases.

Nothing in the facts provided indicates that the Soccer Project will interfere with the use or enjoyment of the airport or its common facilities. Moreover, there is little to no reason to believe that an adjacent project such as the Soccer Project, not uniquely conflicting with the use

or enjoyment of the airport, would have an overriding effect on the fair market value of a leasehold interest in an airport hangar considering the capital necessary to establish and operate an entity the scale of even a small community airport. Finally, in light of the fixed terms of the existing lease and your expectation that Mayor Phillips will continue to lease the airport hangar at the existing contractual rate, it does not appear that the Soccer Project will affect the amount of rent paid by Mayor Phillips.

So long as Mayor Phillips continues to pay the full market value for the lease of the airport hangar, there is no indication that a decision regarding the Soccer Project will have a reasonably foreseeable material financial effect on either Mayor Phillips' economic interest in the lease of the airport hangar or his personal finances. Even assuming Mayor Phillip's leasehold interest is directly involved in decisions regarding the Soccer Project, the presumption of materiality appears rebutted by the nature of the decisions. Accordingly, barring additional facts, Mayor Phillips is not prohibited from taking part in decisions regarding the Soccer Project.

Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?

In light of the foregoing analysis, it is unnecessary to consider exceptions to the conflict-of-interest rules at this time.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl