

October 18, 2012

Ms. Kairee N. Tann
Planning Commissioner City of Emeryville
1074A 45th Street
Emeryville, CA 94608

Re: Your Request for Advice
Our File No. A-12-134

Dear Ms. Tann:

This letter responds to your request 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 assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is limited to the provisions of the Act, and we do not analyze areas of law outside the Act such as common law conflict of interest or the Brown Act. The Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTIONS

1. Do you have a conflict of interest based upon your stated economic interests?
2. Are you required to leave the room during discussions and decisions regarding the permit? If so, are you allowed to view the meeting in a separate room?
3. Are you allowed to address the planning commission during the public comment period, including written or email correspondence, as a community member to express your viewpoint on the permit?

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.

4. Would an appearance during the public comment period be in violation of the Brown Act?

CONCLUSIONS

1. Yes, you have a conflict of interest in the permit vote based on your stated economic interests.
2. Yes, the Act requires you to leave the room during discussion and decisions regarding the permit but does not prohibit you from watching from a separate room.
3. Yes, you are allowed to address the planning commission during the public comment period in any manner allowed to the public by the planning commission, as long as you only discuss the impact of the plan on your personal interests.
4. The Commission does not give advice on legal issues outside the Act. If you require more information on compliance with the Brown Act we suggest you request clarification from your city attorney or the Attorney General's office.

FACTS

You were appointed the Planning Commissioner for the City of Emeryville. You want to know if there is a conflict of interest that would preclude you from discussing and voting on a proposed conditional use permit (CUP) that would allow a private school to build structures and a pedestrian pathway directly adjacent to your personal residence. Your husband owns the personal residence in question. You and he currently live there with your two children. You are neither on the deed or the mortgage. The property also includes a separate rental property. Your husband is listed as the business entity on the city business license. Fifteen months before you were appointed Planning Commissioner, you along with others in the community, filed an appeal with the city of Emeryville to oppose construction of the pedestrian pathway and to request changes in the CUP. As a result of the appeal, the CUP was changed but no changes were made to reduce noise pollution or increase safety as your appeal requested. The meetings in which you may have a conflict are to discuss the unresolved issues from the appeal and to review the new construction.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making or otherwise 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 governmental 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, which we apply to your question. (Regulation 18700(b)(1)-(8).)

Step One: Are you a public official for purposes of the Act?

The Act's conflict-of-interest rules apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) As Planning Commissioner of the City of Emeryville, you are a "public official" within the meaning of the Act.

Step Two: Will you be making, participating in making, or using or attempting to use your official position to influence a governmental decision?

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

Because your questions are focused on participating in planning commission discussions and decisions about the CUP that details the design of buildings and a pedestrian pathway that are scheduled to be constructed at a private school directly adjacent to your personal residence, you would be making or participating in making a governmental decision as a planning commissioner.

Step Three: What are your economic interests?

A public official has a financial interest 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. Those implicated in your inquiry include:

1. An economic interest in any business entity in which the public official has a direct or indirect investment worth \$2,000 or more. (Section 87103(a); Regulation 18703.1(a)); or in any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
2. 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.)

3. An economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 18703(c); Regulation 18703.3.)
4. An economic interest in his or her personal finances, including those of his or her immediate family. (Section 87103; Regulation 18703.5.)

Real Property

A public official has an economic interest in real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more. (Section 87103(b).) “Indirect interest” is defined to include any investment owned by the spouse of an official. You indicate that your husband purchased the property before you were married. If your husband owns the property you have an indirect interest in the house.

Business Entity

A public official has 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).) “Indirect investment” is defined to include any investment owned by the spouse of an official. You indicate that your husband is listed as the business entity on the business license for the rental property. We assume that your husband has at least a 10 percent interest in his business and his investment in the business is at least \$2,000. Thus, you have an indirect economic interest in the business.

Source of Income

A public official has an economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 18703(c); Regulation 18703.3.) “Income” includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10 percent interest or greater. (Section 82030(a).) Since you have an economic interest in a business entity which is a rental property, you also have an economic interest in any income the rental generates. We assume that your husband’s income from the rental property has or will aggregate \$500 or more within 12 months of the upcoming vote.

Personal Finances

Finally, 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.) Your account of the facts does not clearly indicate whether this decision coming before the planning commission might have a distinct effect on your personal finances, so we will not discuss that matter further.

But you should be aware that you could have a conflict of interest in *any* governmental decision that might affect your economic interest in your personal finances. (See Regulation 18705.5 (a).)

Step 4: Are any of your economic interests directly or indirectly involved in the governmental decision?

Once an official identifies an economic interest, he or she must determine whether the economic interest is directly or indirectly involved in a particular governmental decision. (Regulations 18700(b)(4), 18704(a).) Having established the degree of involvement, the official can then identify the materiality standard appropriate under the circumstances. (Regulation 18700(b)(5).) There are separate tests applied to real property, sources of income, and an official's economic interest in his or her personal finances, to determine whether an economic interest is directly or indirectly involved in a specific governmental decision.

In analyzing whether an economic interest in real property is directly or indirectly involved in a decision before an official's agency, we look to Regulation 18704.2 which states that real property in which a public official has an economic interest is directly involved in a governmental decision if 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. (Regulation 18704.2(a)(1).)

In this case you confirmed via a phone call on October 11, 2012 that your home is within 10 feet of the building and pedestrian pathway the CUP addresses. Therefore, your economic interest in the real property is directly involved in the governmental decision.

In analyzing whether an economic interest in a business entity or a source of income is directly or indirectly involved in a decision before an official's agency, we look to Regulation 18704.1 which states that a business entity or sources of income is directly involved in a decision before an official's agency when that person, either directly or by an agent, initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request.

You state that you, along with neighbors, filed an appeal with the City of Emeryville to oppose construction of the pedestrian pathway and to request changes to the CUP. The unresolved issues brought up in that appeal are part of the reason for the future meetings. Thus, your economic interest is directly involved in the decision before the planning commission.

Step 5: Is the financial effect of the governmental decision on the economic interest material?

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. (Regulations 18700(a), 18705.) Different standards apply to determine whether a financial effect will be material, depending upon the nature of the economic interest and whether that interest is directly

or indirectly involved in the governmental decision under consideration. (Regulation 18705.2, (a) and (b).)

Any financial effect on a business entity or real property *directly* involved in a governmental decision is presumed to be “material.” The presumption may be rebutted by proof that it is not reasonably foreseeable that the decision will have *any* financial effect on the business entity or real property; an alternative materiality standard is available when the official’s investment interest is worth less than \$25,000. (See Regulations 18705.1(b), 18705.2(a)(1).) Your home and the rental business are directly involved in the governmental decision as laid out in step four. Therefore, the financial effect of the governmental decision on your economic interests is material.

Step 6: Is the Material Financial Effect Reasonably Foreseeable?

If a *material* financial effect on any economic interest is reasonably foreseeable, a public official will be deemed to have a conflict of interest under the Act. (See Regulation 18706.) A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards applicable to the particular economic interest under analysis will be met as a result of the governmental decision. (Regulation 18706(a).) However, a financial effect need not be certain or even substantially likely to be reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorne* (1975) 1 FPPC Ops. 198.)

Regulations 18706(b) and (c) set out a list of non-exclusive elements to consider in determining whether a financial effect is reasonably foreseeable and serve as a general guideline to use in determining whether this standard is met. These general guidelines should be considered to the extent they are relevant and helpful in making the ultimate determination.

Any potentially relevant determinants must be considered for each economic interest involved in a governmental decision. Here, it is beyond question that any noise pollution or lingering questions regarding neighborhood safety can impact the value of your home and any income from your rental property. The vote and discussion on the CUP can resolve or exacerbate those issues. Therefore the material financial effect on your economic interests is foreseeable.

Steps Seven and Eight: The “Public Generally” and “Legally Required Participation” Exceptions

A public official will not be disqualified from participating in a governmental decision if a decision would affect the public official’s economic interests in a manner indistinguishable from the manner in which the decision would affect “the public generally.” (Section 87103; Regulation 18707(a).) For this exception to apply, the decision must have a financial effect on a “significant segment” of the public in “substantially the same manner” that it would affect the public official. (Regulation 18707.1.) A significant segment of the public, when dealing with

real property, is 10 percent or more of all property owners or residential property owners in the jurisdiction of the official's agency or 5000 property owners or residential or residential property owners of the jurisdiction of the official's agency. (See Regulation 18707.1(B).) You would then have to prove that the decision would have a financial effect on this significant segment in "substantially the same manner" that it would affect you.

In rare cases a public official may also, notwithstanding a conflict of interest, be *required* to participate in a governmental decision when there is no alternative source of decision. (Regulation 18708).

As your account of the facts does not suggest the "public generally" or "legally required participation" exceptions might apply to the decision we will not go into further detail on their application at this time.

To summarize and respond directly to your questions:

1. Do you have a conflict of interest based upon your relevant economic interests?

Yes, you have a conflict of interest. You are a public official who will be making or participating in making a governmental decision in which it is foreseeable that the decision would have a material financial effect on your economic interests.

2. Are you required to leave the room during discussions and decisions regarding the design? If so, are you allowed to view the meeting in a separate room?

Yes, you are required to leave the room during discussions and decisions regarding the CUP appeal. You must also: (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 yourself; 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. The Act does not prohibit you from viewing the meeting from a separate room as long as the requirements of Section 87105 are met.

3. Are you allowed to address the planning commission during the public comment period, including written or email correspondence, as a community member to express your viewpoint on the design and its impacts on your residence and/or the community?

Yes, you may appear before your agency as a member of the general public in order to represent yourself on matters related solely to your personal interests, including, but not be limited to: (a) An interest in real property which is wholly owned by the official or members of his or her immediate family; and (b) a business entity wholly owned by the official or members of his or her immediate family. (Section 87105(a)(4); Regulation 18702.4.)

Because your home and the rental property are wholly owned by your husband, you can appear before the planning commission as a member of the general public during the public comment period to discuss the impact of the permit on *your* personal interests, i.e. your home or rental property. (Section 87105(a)(4); Regulation 18702.4(a)(2).) If the public comment period allows for emails and written correspondence to be submitted to your agency for consideration, that method of appearance is also acceptable. (Regulation 18702.4(b).)

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Keisha O. White
Legal Intern, Legal Division

KW:jgl