

January 28, 2013

Ryan O. Hodge
Assistant City Attorney
City of Santa Ana
20 Civic Center Plaza
Santa Ana, CA 92702

Re: Your Request for Advice
Our File No. A-13-002

Dear Mr. Hodge:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ We base this letter 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.) Additionally, our advice is based solely on the provisions of the Act. We offer no opinion on the applicability, if any, of other conflict of interest laws.

QUESTIONS

1. Does the Act prohibit Mayor Pulido from participating in decisions regarding the Downtown Community Management District ("CMD") where he is the beneficiary of a revocable trust created by his parents (the "Trust") that owns real property (the "Trust Property") within 500 feet of the boundary of the district?
2. If Mayor Pulido has a conflict of interest in city council decision regarding CMD, does the public generally exception apply?
3. If Mayor Pulido has a conflict of interest, may the city use the legally required participation exception and re-qualify Mayor Pulido or another council member

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.

CONCLUSIONS

1 – 3. Because the mayor does not currently receive income from the Trust nor does he have an irrevocable right to future income or principal, he does not have an economic interest in the Trust Property. Accordingly, he does not have a disqualifying conflict of interest under the Act.

FACTS

Miguel Pulido serves as mayor for the city of Santa Ana. Mayor Pulido is a named beneficiary and successor trustee of the Pulido Family Living Trust. The Trust is a revocable trust that was created by Mayor Pulido's parents. Mayor Pulido has the right to receive income from the Trust, but he has indicated that he has not received income from the Trust in the last several years. For purposes of this letter, you have asked that we assume that Mayor Pulido has an interest of 20 percent or greater in the Trust. You indicate that Mayor Pulido's parents retain the power to consume, invade, or appoint the principal for the benefit of beneficiaries other than Mayor Pulido. In addition, someone other than Mayor Pulido designates the person(s) who will possess or enjoy the Trust Property or income.

The Trust Property is located within 500 feet of the boundaries of the CMD. The city council is the final decisionmaker with regard to all determinations relating to the CMD. Because of his interest in the Trust, Mayor Pulido has abstained from decisions regarding the formation of the CMD in 2008 and subsequent decisions regarding the levying of assessments and reformation of the CMD. Approximately 315 properties, some residential and most commercial, are subject to the CMD assessments. The population of Santa Ana is over 310,000 and there are more than 50,000 housing units in the city.

The city has seven council members, including a directly elected mayor. One council member has already been determined by the Commission to have a conflict of interest arising from an economic interest in real property within the boundaries of the CMD and must recuse herself from participating in CMD decisions.² If Mayor Pulido also has a disqualifying conflict of interest and continues to abstain from CMD decisions, this will continue to affect the already reduced number of council members eligible to vote regarding the CMD.

ANALYSIS

The Act's conflict of interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) 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.

² *Winterswyk* Advice Letter, No. A-12-116.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

Steps 1 and 2: Is Mayor Pulido a public official within the meaning of Section 87100 and will he be making, participating in making, or using his official position to influence a governmental decision?

As the mayor of the city of Santa Ana, Mayor Pulido is a “public official.” Section 82048.)³ Mayor Pulido is making, participating in making, or influencing a governmental decision when taking part in any decision by the city council regarding the CMD. (Section 87100; Regulations 18702.1-18702.3.)

Step 3: What are Mayor Pulido’s economic interests — the possible sources of a conflict of interest?

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 any 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);

³ 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.)

- an economic interest in any source of gifts to him or her if the gifts aggregate to \$440 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4.)

In addition, a public official always has an economic interest in his or her personal finances, including those of his or her immediate family. This is the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Business Entity

Business trusts are business entities under the Act. (Section 82005; Regulation 18705.1(c)(4).) However, a family trust is typically considered a nonprofit entity. (*Esselstein* Advice Letter, No. I-03-293.)⁴ You have indicated that the Trust is a family trust. Thus, Mayor Pulido does not have a business entity economic interest.

Real Property

Section 82033 of the Act defines an interest in real property:

“Interest in real property” includes any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more. Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or *trust* in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater.” (Emphasis added.)

Under Regulation 18234(c), a public official has an economic interest in real property held in a trust when the official is either the trustor or a beneficiary of the trust that meets certain conditions. Because Mayor Pulido is not the trustor, we turn to Regulation 18234(c)(2) to determine whether he meets the conditions, as a beneficiary, that would establish his economic interest in the Trust Property.

A beneficiary has an economic interest in real property held in a trust if the official currently receives income from the trust or has an irrevocable future right to receive income or principal from the trust. (Regulation 18234(c)(2).) Mayor Pulido does not currently receive income from the Trust and, because the Trust is revocable, he does not have an irrevocable right

⁴ The principal distinction between a business trust and an ordinary trust is found in the purpose. The purpose of a business trust is to carry on a business enterprise for profit whereas the purpose of the ordinary trust is to conserve the property and other assets of the trust, with incidental powers of sale and investment. (*Esselstein* Advice Letter, *supra*.)

to future income or principal. Thus, Mayor Pulido does not have an economic interest in the Trust Property.

Because May does not have an economic interest in decisions involving the CMD, he is not prohibited by the Act from making, participating in making or using his official position to influence such decisions.⁵

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

vj:jgl

⁵ Because the mayor does not have an economic interest in decisions regarding CMD, we need not consider the remaining steps of the 8-step process.