

March 15, 2013

Wendy L. House  
Deputy City Attorney  
Lounsbury Ferguson Altona & Peak, LLP  
960 Canterbury Place, Suite 300  
Escondido, CA 92025-3870

Re: Your Request for Informal Assistance  
**Our File No. I-13-016**

Dear Ms. House:

This letter responds to your request for advice, on behalf of San Marcus Alternative Planning Commissioner Steve Kildoo, regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature and not limited to a specific governmental decision, we are treating your request as one for informal assistance.<sup>2</sup>

Our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application of other conflict-of-interest laws such as Government Code Section 1090 and common law conflict of interest, which may also apply.

### QUESTION

May Commissioner Kildoo take part in governmental decisions related to land use matters involving business entities he has solicited to sponsor the Chamber of Commerce in light of his current employment with the chamber and offer of future employment contingent in part upon his success in securing corporate sponsors?

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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.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

## CONCLUSION

Barring additional information, Commissioner Kildoo may take part in a land use decision involving a business entity he has solicited to sponsor the Chamber of Commerce if the entity has definitely responded to the solicitation prior to the decision coming before the planning commission. However, in light of Commissioner Kildoo's offer of future employment, Commissioner Kildoo is prohibited under the personal financial effect rule from taking part in a land use decision involving a business entity if (1) he has previously solicited the entity to sponsor the Chamber of Commerce and the entity has not yet responded to the solicitation or (2) the entity has implied in any way that the decision may influence whether the entity may sponsor the Chamber of Commerce.<sup>3</sup>

## FACTS

Steve Kildoo has served as a member of the San Marcus Planning Commission (the "Planning Commission") since 2005 and was recently reappointed by the San Marcus City Council to serve as an alternative member of the Planning Commission for a two-year term. As an alternative member, Commissioner Kildoo only participates in voting during those meetings where a regular member has a disqualifying financial interest as to a matter, or is absent from the meeting. The City of San Marcos (the "City") encourages alternatives to attend meetings and become educated in their functions and duties.

If called upon to participate in voting, Commissioner Kildoo will evaluate and participate in making determinations relating to land use matters. He may also participate in public hearings and other issues as may be required of the Planning Commission by the San Marcos Municipal Code. Alternative members are paid only for the meetings in which they participate.

In December 2012, while serving as the Chair of the Planning Commission and before his appointment as an alternative member, Commissioner Kildoo accepted a six-month employment offer from the San Marcus Chamber of Commerce (the "Chamber of Commerce"), which is a non-profit organization. Pursuant to Commissioner Kildoo's contract with the Chamber of Commerce, "An offer of permanent employment will be offered at the end of the six month period upon completion of the outstanding items discussed under Action Plans." As identified in the contract, items under the "Action Plans" include both accounting and marketing activities. Of particular concern, the "Action Plans" specifically include "securing corporate sponsor renewals for 2013" and "contacting the remaining 102 members who have not renewed."

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<sup>3</sup> You have also sought advice regarding future conflicts-of-interest if Commissioner Kildoo's contract is extended or renegotiated. However, we must decline to provide additional assistance specific to this question at this time absent the terms of the agreement. Generally, to the extent Commissioner Kildoo is offered additional compensation for the specific task of securing corporate sponsors as opposed to the overall performance of the Chamber of Commerce, Commissioner Kildoo may be prohibited from taking part in decisions involving the sponsors based upon his potential economic interests in the sponsors as a source of incentive compensation as well as his economic interest in his personal finances.

## 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.

### **Step One: Is the person a “public official?”**

The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency....” (Section 82048.) As an alternative member of the Planning Commission, Commissioner Kildoo is a public official within the meaning of the Act.<sup>4</sup>

### **Step Two: Is the official making, participating in making, or influencing 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.) For a decision before the official’s own agency, 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 the agency. (Regulation 18702.3.) Commissioner Kildoo is making, participating in making, or influencing a governmental decision any time he takes part in land use determinations by the Planning Commission.

### **Step Three: What are the official’s economic interests?**

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<sup>4</sup> If a public official’s office is listed in Section 87200, which specifically includes planning commissioners, 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.)

Of the economic interests recognized under the Act<sup>5</sup>, those potential interests implicated by your account of the facts are the following:

*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, or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulation 18703.1(a) and (b).)

*Source of Income* – A public official has 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.)

*Personal Finances* – A public official has an economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

#### The Chamber of Commerce as a Business Entity:

As defined by the Act, only for-profit businesses are business entities. (Section 82005.) Because the Chamber of Commerce is a non-profit organization, Commissioner Kildoo does not have an economic interest in the Chamber of Commerce as a business entity under either Section 87103(a) or (d).

#### The Chamber of Commerce as a Source of Income:

Should Commissioner Kildoo receive \$500 or more from the Chamber of Commerce in the 12 months prior to any decision before the Planning Commission, he has an economic interest in the Chamber of Commerce as a source of income.

#### Corporate Sponsors of the Chamber of Commerce:

Regulation 18703.3(a)(1) further defines source of income to include any person from whom the public official receives commission income and *incentive compensation*. More specifically, Regulation 18703.3(d) provides the following:

“(d) Sources of Incentive Compensation. “Incentive compensation” means income received by an official who is an employee, over and above salary, which is either ongoing or cumulative, or both, as sales or purchases of goods or services accumulate. Incentive compensation is calculated by a predetermined formula set by the official’s employer which correlates to the conduct of the purchaser in direct responses to the effort of the official. Incentive compensation does not include: salary; commission income; bonuses for activity not related to

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<sup>5</sup> Our analysis is limited to the potential economic interests you have identified.

sales or marketing, the amount of which is based solely on merit or hours worked over and above a predetermined minimum; and such executive incentive plans as may be based on company performance, provided that the formula for determining the amount of the executive's incentive income does not include a correlation between that amount and increased profits derived from increased business with specific and identifiable clients or customers of the company."

Based upon the facts you have provided, Commissioner Kildoo will receive a permanent job offer and the renegotiation of his \$55,000 annual salary upon the completion of his Action Plans, which primarily consists of his ability to secure corporate sponsors for the Chamber of Commerce. Typically, salary is not considered incentive compensation because incentive compensation is defined as income over and above salary. While Commissioner Kildoo has also been offered future employment if he is successful in marketing the Chamber of Commerce to prospective sponsors, the employment offer is akin to an incentive plan based on the overall performance of the Chamber of Commerce and does not include a correlation between an increase in corporate sponsorship levels based on specific or identifiable sponsors. Accordingly, Commissioner Kildoo does not have an economic interest in corporate sponsors of the Chamber of Commerce as sources of incentive compensation based upon his current contract.

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?**

The Chamber of Commerce as a Source of Income: Regulation 18704.1(a) states that a source of income is directly involved in a decision before the official's agency when that source of income, either directly or by an 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."

Sources of income that are *not* directly involved in governmental decisions are regarded as *indirectly* involved. (Regulations 18704(a) and 18704.1(b).)

Generally and barring more specific involvement by the Chamber of Commerce in any particular land use decision related to a corporate sponsor, Commissioner Kildoo's economic interest in the Chamber of Commerce as a source of income is only indirectly involved in land use decisions related to a corporate sponsor.

Personal Finances: An official's economic interest in his or her personal finances is deemed to be directly involved in the governmental decision if facts suggest any financial effect on the economic interest. (Regulation 18704.5.)

**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.

The Chamber of Commerce as a Source of Income:

For economic interests in non-profit entities, which are a source of income to an official and are *indirectly* involved in a decision, the materiality standard is given at Regulation 18705.3(b)(2). While the thresholds for materiality under this regulation vary with the size of the non-profit entity, Regulation 18705.3(b)(2)(F) provides that the financial effect of a governmental decision on a non-profit entity whose gross annual receipts are \$100,000 or less is material if it is reasonably foreseeable that the effect of the decision will be any of the following:

“(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 \$10,000 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 \$2,500 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 \$10,000 or more.”

If the Chamber of Commerce's gross annual receipts exceed \$100,000, Commissioner Kildoo may consult Regulation 18705.3(c) to identify the materiality threshold actually appropriate to the chamber.

Personal Finances: An effect on an official's personal finances is material as stated in Regulation 18705.5(a), which provides, "A reasonably foreseeable financial effect on a public official's personal finances is material if it is at least \$250 in any 12-month period."

### **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 need not be certain or even substantially likely to be "reasonably foreseeable," but it must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

The Chamber of Commerce as a Source of Income: In terms of a potential effect on the Chamber of Commerce, a land use decision limited to a corporate sponsor would not have a reasonably foreseeable financial effect on the chamber absent additional facts. Accordingly, Commissioner Kildoo is not disqualified from land use decisions limited to a corporate sponsor due to his economic interest in the Chamber of Commerce.

Personal Finances: Notwithstanding the conclusion that Commissioner Kildoo is not disqualified from land use decisions limited to a corporate sponsor due to his economic interest in the Chamber of Commerce, the commissioner is disqualified where there is a reasonably foreseeable material effect on his personal finances.

Pursuant to his current employment contract, Commissioner Kildoo will be offered future employment at an annual salary of approximately \$55,000 (subject to renegotiation) based primarily upon his success in securing corporate sponsors. Accordingly, a decision pertaining to a prospective sponsor appearing before the Planning Commission may bear upon the sponsor's decision to sponsor the Chamber of Commerce, thereby increasing Commissioner Kildoo's prospect of future employment with the chamber. In this regard, it is reasonably foreseeable that a decision regarding an entity Commissioner Kildoo has solicited for corporate sponsorship of the Chamber of Commerce will have a material financial effect on Commissioner Kildoo's personal finances if the entity has not definitively responded to the solicitation prior to the governmental decision. In addition, it is reasonably foreseeable that a decision regarding an entity will have a material financial effect on Commissioner's Kildoo's personal finances if the entity implies in any way that the decision may influence whether the entity may sponsor the Chamber of Commerce.

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

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).) Additionally, in certain rare circumstances, an official

may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, you have not presented any facts indicating that the “public generally” or the “legally required participation” exceptions are applicable to your circumstances, so we do not address them further.

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

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