

June 19, 2013

Steve Vaus
12827 Corte Dorotea
Poway, CA 92064

Re: Your Request for Advice
Our File No. A-13-056

Dear Mr. Vaus:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note 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.) Also, 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.

QUESTION

Does the Act prohibit you from participating in city council decisions regarding the rezoning of a property on which you board your horses?

CONCLUSION

Yes. It is reasonably foreseeable that the decisions would have a material financial effect on your personal finances.

FACTS

You are a councilmember on the City of Poway City Council. You anticipate that decisions regarding proposed subdivisions will come before the city council in the coming

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.

months. Given your property's proximity to the projects, you have questions regarding what level of involvement in these decisions you are permitted to have under the Act.

The City of Poway Zoning Ordinance permits residents to keep a limited number of large animals (e.g., horses and cattle) on their property in all rural and residential single-family zones in the city, so long as the property and the residents meet certain requirements. There is a proposed subdivision for four lots, which make up nearly 12-acres available for development (the "Property") that is currently zoned Residential Single Family 4 ("RS-4") on part of the Property (approximately .94 of an acre) and Rural Residential C ("RR-C") on the remaining 10.72 acres of the property. The Property, which is more than three miles from your residence, is currently used as a horse boarding facility, where your horses are stabled. You pay a standard rate for boarding your two horses.

If the city council approves the subdivision, the existing use is likely to be eliminated. While the Property's owner might use a separate parcel to board horses, there is no certainty on this point. If the Property is no longer available for you to board horses, you will either board them on your own property, or, more likely, board them elsewhere. Other similar stables in Poway will cost you \$95 more per horse, or \$190 more total per month. Total annual cost based on this preliminary research would be \$2,280. This assumes the subdivision's zoning changes in the coming months.

Additionally, there have been city-sponsored and community meetings regarding the Property and the proposed project. You have cautiously avoided participating in any such meeting. You have also not discussed the project with city staff, other than to determine whether your participation would be a conflict of interest.

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 any given governmental decision.

Step One: Are you 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 a member of the Poway City Council, you are a public official within the meaning of the Act.

Step Two: Are you 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.) 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.) You are making, participating in making, or influencing a governmental decision when you take part decisions as a member of the Poway City Council regarding zoning for the Property, including decisions leading up to the zoning decisions.

Communications with the press or public.

A public official is not attempting to use his or her official position to influence a governmental decision of an agency if the official communicates with the general public or the press. (Regulation 18702.4(b)(2).) For instance, we have previously advised that a city councilmember may express his or her opinion to reporters and media outlets by writing a newspaper article or appearing on a radio program regarding the matter in which he or she has a conflict of interest under the Act. (*Edelen* Advice Letter, No. I-07-059 and *Acker* Advice Letter, No. A-01-117.)

Therefore, the Act does not prohibit you from discussing the project with the press, friends, neighbors or other members of the community, even if you do so in an attempt to rally support or opposition to the project, unless they are members, officers, employees, or consultants of the city council, or the city. (*McHugh* Advice Letter, No. I-98-324.)

Appearance to represent a “personal interest” before an official’s own agency:

Under the Act, an official may comment as a member of the public if she has a personal interest that would not be adequately represented absent her participation as a member of the public. The Commission construes exceptions to the general conflict-of-interest rules narrowly. (*See Oderman* Advice Letter, No. A-00-082 and *Torrance* Advice Letter, No. A-94-084.) Under this exception, you must limit your comments to your personal interests and make clear that you are not speaking in the interest of any person or group, nor are you acting in your official capacity. (*Mitchell* Advice Letter, No. A-12-011.)

Similarly, you may not discuss your support or opposition of a decision in which you have a conflict of interest with other council members or consultants outside any public

meetings. (*Id.*; see also *Simonian* Advice Letter, No. A-08-096.) You may, however, participate in the public meetings in the same way a member of the public would.

Step Three: What are your 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, 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 a 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.)
- An economic interest in a 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.)
- 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 only interest you have provided information about is your payments to the Property owner where you board your horses. If you are no longer able to board your horses on the Property, you will pay an extra \$2,280 per year at an alternate location.² You may be disqualified from participating in decisions regarding the Property based on the personal financial effects rule.

Step Four: Is your economic interest directly or indirectly involved in the decision?

“A public official or his or her immediate family is deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.”
(Regulation 18704.5.)

² Should you choose to board the horses on your own, your personal finances will see a similar effect, but in reverse.

Under this regulation, an official's economic interest in his or her personal finances is directly involved in the decision if the decision would have *any* financial effect on the official's of his or her spouse's personal finances. Given that the effect on your personal finances will be in the thousands of dollars, this standard is met and your economic interest is directly involved.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your economic interest?

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. For a financial effect on an official's personal finances, the financial effect is material if it is at least \$250 in any 12-month period. (Regulation 18705.5(a).) The effect on your personal finances, \$2,280, will be material per this standard.

Steps Seven & Eight: Do any exceptions apply?

You have not provided any facts to support either the legally required participation or public generally exception.

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
Senior Counsel, Legal Division

HMR:jgl