

August 5, 2013

Jeff Ginsburg  
Ginsburg for City Council 2013  
P. O. Box 7000 PMB 388  
Redondo Beach, CA 90277-8710

Re: Your Request for Informal Assistance  
**Our File No. I-13-081**

Dear Mr. Ginsburg:

This letter responds to your request for informal assistance regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> and 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.) Because you seek general guidance, we are providing informal assistance, rather than formal advice. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

In addition, please note, 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. Also, there are other bodies of law, separate and apart from the Act’s conflict-of-interest provisions that may apply to your situation. We urge you to check with the City Attorney’s office to determine whether any other laws are applicable in light of the facts you present.

### QUESTIONS

Do you have a conflict of interest in the following city council decisions:

1. The resurface of a street where you have a 50% interest in real property located on the street?

---

<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.

2. The adoption of a budget where the budget allocates funds for capital improvement projects, some of which will be located near your real property?
3. An application to build a car wash where the applicant has referred the owner of the property on which the car wash would be built to your property management business as a potential client?
4. A proposed development where your father owns rental property located within the boundaries of the development and your father has paid you, from time to time, to list the property in the Multiple Listing Service?

### **CONCLUSIONS**

1. No. The decision will not have a reasonably foreseeable material financial effect on any of your economic interests.
2. Yes, unless the capital improvement decisions and decisions relating to other budget items, including a decision to adopt the final budget, can be “segmented,” as explained below.
3. No, unless there is a “nexus” between your private-sector obligations to the client and your duties as a member of the city council, as discussed below.
4. If your father is a source of income to you and the decision will affect his real property, income, investments, or other tangible or intangible assets or liabilities, you may be prohibited from participating in these decisions.

### **FACTS**

You have recently been elected to the Redondo Beach city council. You are requesting informal assistance to determine whether you may participate in making certain city council decisions that may affect your real property and your businesses.

1. The city council will be considering whether to resurface a street and you have a 50% interest in real property located on the street.

2. The city council will be also voting on a proposed budget that allocates funds for capital improvement projects. You describe the projects as being “around” four properties in which you have an ownership interest, three of which are income properties - an apartment building and two offices. You have not indicated the proximity of the projects to your real property

3. You are also a real estate broker and have a property management firm. Recently, an applicant for approval of construction of a car wash referred to you a prospective client for your property management business. The client owns the real property on which the car wash would be built and the applicant is or will be leasing the property from the client. You have not yet started managing the property, nor have you reached an agreement to do so.

4. The city council will also be considering a proposed large development and your father owns real property located within the boundaries of the proposed development. You have no ownership interest in the property. From time to time, however, your father has paid you a small fee to list the property on the Multiple Listing Service (“MLS”).

### 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. 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 & 2. Are you a “public official” within the meaning of Section 87100 and will you be making, participating in making or influencing a governmental decision?**

As a city council member, you are a public official under the Act. (Sections 87200 and 82048.) You wish to vote on and participate in the above-described city council decisions. By voting on or participating in these decisions, you will be making, participating in making, or otherwise using your official position to influence a governmental decision.<sup>2</sup>

#### **Step 3. What are your interests?**

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated interests. These interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- A public official has an 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).)

---

<sup>2</sup> When a public official who holds an office specified in section 87200 has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally 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), on the record of the meeting; (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(c) and 18702.5(d) apply.

- A public official has an interest in a business entity 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).)
- A public official has an 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.)
- A public official has an interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an interest in any source of gifts to him or her if the gifts total \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official has an interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

### *Business Entities and Sources of Income*

Under the facts you have presented, you have an interest in your three businesses (real estate brokerage, property management firm and property leasing business), as an owner, as an investment interest, and as a source of income to you. (Section 87103(a), (c) and (d).)

In addition, if a public official owns a 10-percent or greater interest in a business, customers who are sources of income to that business are also considered sources of income to the public official. Thus, if your pro rata share of the income derived from any particular client or customer aggregates to \$500 or more in the 12 months prior to the governmental decision, you also have an economic interest in the client or customer as a source of income. (See *Glaser* Advice Letter, No. A-09-210.) This would include your father. It would also include the client if your conversations regarding a property management contract rise to the level of “promised income,” as discussed below. The definition of “source of income” includes “promised income.” (Regulation 18703.3(a)(1).)

### *Real Property*

You have a real property interest in the four properties you own.

### *Personal Finances*

You have an interest in your personal finances if a governmental decision will result in an increase or decrease in your “personal expenses, income, assets, or liabilities.” (Section 87103.) However, a financial effect on the value of real property owned directly or indirectly by a public official, and a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects on the official’s personal finances and would not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not appear to apply to your circumstances and we will not discuss it further.

#### **Step 4. Will your interests be directly or indirectly involved in decisions you will make, participate in making or influence as a public official?**

### *Business Entities and Sources of Income*

Under Regulation 18704.1(a), a person, including a business entity and source of income, is directly involved in a decision before an official’s agency when that person, 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.”

### *Real Property*

Under Section 18704.2(a), real property is directly involved in a governmental decision if:

“(1) 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. For purposes of subdivision (a)(5), real property is located within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.

“(2) The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property. For purposes of this subdivision, the terms ‘zoning’ and ‘rezoning’ shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest.

“(3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.

“(4) The governmental decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

“(5) The governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

“(6) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.”

#### 1. Decision to resurface the street

##### *Business Entities and Sources of Income*

You have not indicated whether the affected property is income property. If it is income property, your business entity would be indirectly involved because your business would not be initiating the proceeding in which the decision is made, nor would the business be a named party in, or the subject of, the proceeding. If it is your residence, only apply the standard for real property set forth below.

##### *Real Property*

Under Regulation 18704.2(b)(2), real property is indirectly involved in decisions that solely concern repairs, replacement, or maintenance of existing streets, water, sewer, storm

drainage or similar facilities. The decision to resurface the street solely concerns repair and maintenance of the street, and, therefore your property is indirectly involved in the decision.

## 2. Decision to approve the budget

### *Business Entities and Sources of Income*

You indicate that your leasing property business entity owns real property that is located “around” the projects described in the capital improvement budget. This business is indirectly involved in capital improvement decisions because the business will not be initiating the proceeding in which the decisions will be made, nor will it be a named party in, or the subject of, the proceeding. If your father is a source of income, he would also be indirectly involved in these decisions.

### *Real property*

If your real property is located within 500 feet of the boundaries of any of the projects identified in the budget, the property would be directly involved in budget decisions.

## 3. Decision to approve the car wash application

The client, a source of income to you, is indirectly involved in the car wash decision because the client will not be initiating the proceeding in which the decision will be made, nor will he be a named party in, or the subject of, the proceeding.

## 4. Decisions regarding the large development

Assuming your father is a source of income to you at the time the city council considers the development, your father would be indirectly involved. He would not be initiating the proceeding, nor would he be a named party in, or the subject of, the proceeding.

### **Step 5. What are the applicable materiality standards?**

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official’s economic interest 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.

## 1. Decision to resurface the street

As stated above, your business entity, sources of income and real property are indirectly involved in this decision.

The applicable materiality standards for governmental decisions involving business entities are found in Regulation 18705.1. Subdivision (c) sets forth the materiality standard for business entities that are indirectly involved in a governmental decision, including those that are sources of income. For relatively small businesses, (those with annual net income of \$750,000 or less), which we assume applies to each of your business entities, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that the governmental decision will increase/decrease the business entity's annual gross revenues by \$20,000 or more, result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year or increase/decrease the value of the business entity's assets by \$20,000 or more. (Regulation 18705.1(c)(4).)

Regulation 18705.2 provides the materiality standards applicable to real property indirectly involved in a governmental decision. Regulation 18705.2(b)(1) provides:

“The financial effect of a governmental decision on real property which is indirectly involved in the governmental decision is presumed not to be material. This presumption may be rebutted 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, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest.”

## 2. Decision to approve the budget

The materiality standard for your business entity and source of income economic interests, which are indirectly involved in budget decisions, is set forth above in our discussion of the street resurfacing decision.

If your real property is directly involved (i.e. it is located within 500 feet of any project for which funds are allocated), the materiality standard is set forth in Regulation 18705.2(1) as follows:

“The financial effect of a governmental decision on the real property is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property.” (Emphasis added.)

Under this rule, the financial effect of the decision is material even if it has only a one-penny effect. This is commonly referred to as the “one-penny rule.” In order to rebut the presumption, it is necessary to establish that the decision would not even affect the property's value by one cent.

### 3. Decision to approve the car wash application.

As stated above, the materiality standard, stated in terms of dollar thresholds, for sources of income that are business entities depends on the size of the business entity.

There is, however, a *separate and distinct* materiality standard which applies in cases where there is a “nexus” between duties owed to a source of income (in this case, your duty to provide services to the client) and duties to an official’s public agency. Regulation 18705.3(c) provides:

“(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.”

Both of these materiality standards would be applicable when a decision would have a foreseeable financial effect on the client because the client has promised to pay you for your services.

Your duties under the property management agreement and your duties as a member of the city council may establish a “nexus” between your public and private obligations. The only difference between these materiality standards is the size of the financial effect that constitutes a “material” effect. Under regulation 18705.3(c), *any* financial effect is “material.” Thus, if the reasonably foreseeable effect of the car wash decision is *any* financial gain or loss to the client, that gain or loss is “material” and we need not separately consider whether the gain or loss reaches the threshold amounts of Regulation 18705.1.

There will be a “nexus” between your private-sector obligations to the client and your duties as a city council member if it is reasonably foreseeable that the car wash application decision would aid or hinder the accomplishment of your obligations to the client. However, we do not have sufficient facts to determine if your obligations to your client include a duty to obtain additional business (or conversely a duty not to impede businesses that wish to locate on your client’s property), including the car wash applicant. However, the Act seeks to prevent even the appearance of a conflict of interest. (See *Tesley* Advice Letter, No. A-97-545(a), citing *Witt v. Morrow* (1977) 70 Cal. App.3d 817-823.) As a practical matter, you may wish to avoid the appearance of a conflict of interest by abstaining from voting on or participating in the car wash decision.

### Decisions regarding the large development

If your father is a source of income to you and is indirectly involved in decisions regarding the development, the materiality standard is set forth in Regulation 18705.3(b)(3). The effect of the decision is material if the decision will affect his income, investments, or other tangible or intangible assets or liabilities (other than real

property) by \$1,000 or more, or affects his real property in a manner that would rebut the presumption of non-materiality in Regulation 18705.2(b).

**Step 6. Is it reasonably foreseeable that the financial effect of the governmental decision on your economic interests will meet the applicable materiality standards?**

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 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 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, the facts you have provided suggest the following:

1. Decision to resurface the street

It is unlikely that the effects of this decision would meet the dollar thresholds for materiality. Also, there are no facts suggesting that the non-materiality presumption of Regulation 18705.2(b)(1) regarding your real property is rebutted. Accordingly, the decision will not have a reasonably foreseeable material financial effect on any of your economic interests.

2. Decision to approve the budget

It appears that, under the one-penny rule, decisions to allocate funds to capital improvement projects will have a reasonably foreseeable material financial effect on your real property. Accordingly, you may not make, participate in making or use your official position to influence any budget decision that allocates funds for capital improvement projects, unless an exception applies.

3. Decision to approve the car wash application

If there is a nexus between the decision to approve the application and your duties as property manager, *any* reasonably foreseeable financial effect would be material.

4. Decisions regarding the large development

If your father is a source of income to you at the time these decisions are made, you will need to determine whether these decisions will have a reasonably foreseeable material financial effect on your father. We are unable to assist with this consideration because, at this time, there is no specific decision identified with the proposed project.

## Exceptions

### *Segmentation of budget decisions:*

It may be possible for the city council to segment its budget decisions in such a way as to enable you to participate in decisions that do not involve your economic interests. The facts suggest that it may be possible to segment decisions regarding the budget. This would require that decisions regarding the funding of capital improvement projects be made separately from and made *before* any budget decisions that do not involve such funding. Once the capital improvement decisions have been fully and finally decided, you may participate in decisions involving other aspects of the budget, including adoption of the final budget, provided that the decisions are not inextricably interrelated. You may do this even though the final budget includes the items from which you were disqualified, provided that the decision does not reopen or in any way alter the decisions from which you were disqualified. (*Cook* Advice Letter, No. A-83-163.)

Segmentation only applies if the decisions can be broken down into separate decisions that are not inextricably interrelated to the decisions in which an official has a disqualifying conflict of interest. We have previously advised that some decisions may be too interrelated to be considered separately. If the resolution of one decision will effectively *determine, affirm, nullify, or alter* the result of the other decision, the decisions may not be segmented. (See generally *Yang* Advice Letter, No. I-06-198; *Stone* Advice Letter, No. A-06-007; *Barker* Advice Letter, A-05; *Hull* Advice Letter, No. A-04-052.) Therefore, if a decision to adopt the final budget has the effect of re-opening the decisions to allocate funds for capital projects, the decisions are inextricably interrelated and may not be segmented.

Please note that in our analysis of budget decisions, we have included all funding decisions regarding capital improvement projects rather than only those items that single out the projects that would affect your businesses or real property. We have previously advised that a decision to allocate funds to an entity competing with the public official's entity for the same funds would be interrelated to the decision to fund the official's entity. (*Billing* Advice Letter, No. A-00-203.) It appears that the city council's decision to fund one capital improvement project could be essentially a decision against funding another project. For example, a decision to select and fund several very large projects, perhaps in an amount that even exceeds the amount in the proposed budget, could result in fewer funds remaining available for other projects, including the projects that would affect your property. Under these circumstances, you would have a conflict of interest in all capital improvement decisions.

While we provide these guidelines, the determination of how best to segment the city's budget decisions ultimately must be made by the city council based on its knowledge of the city's budget process and pending decisions.

**Steps 7 & 8. The “public generally” and “legally required participation” exceptions.**

Even if a material financial effect on a public official’s economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official’s economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). You have not presented any facts indicating that either of these exceptions is applicable to your situation.

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