

October 30, 2013

Sonia R. Carvalho
City Attorney
20 Civic Center Plaza M-29
P O Box 1988
Santa Ana CA 92702

Re: Request for Advice
Our File No. A-13-086

Dear Ms. Carvalho:

This letter responds to your request for advice on behalf of Vincent Sarmiento, a Santa Ana city council member, 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 assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Also, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest.

QUESTION

Does Councilmember Sarmiento, who owns income property located within 500 feet of a proposed street car project (the “Project”), have a conflict of interest in decisions to certify environmental documents relating to the Project, select a preferred route for the street car or select contractors to design and build the Project? If Councilmember Sarmiento has a disqualifying conflict of interest in one decision, may he nevertheless participate in the other decisions?

CONCLUSION

Councilmember Sarmiento has a conflict of interest in the decisions to certify the

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.

environmental documents and select a preferred route. However, after these decisions are made without his participation, he may participate in the decision to select contractors, provided the procedure for segmenting decisions is followed, as discussed below.

FACTS

The city council of the City of Santa Ana (the “City Council”) will be considering matters regarding the Project. Councilmember Sarmiento owns income property, from which he receives income of more than \$2,000 per year, located within 500 feet of one of the proposed streetcar routes.

The Project is in the initial planning phase. This phase involves environmental review, feasibility analysis and the selection of a preferred route. Within the next three to six months the City Council will be asked to review and make decisions regarding, among other things, the certification of environmental documents prepared in accordance with the California Environmental Quality Act and National Environmental Policy Act, the selection of a preferred route and, should the City Council then decide to go forward with the Project, the selection of contractors to design and build the Project.

ANALYSIS

Under Section 87100, a public official is prohibited 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).)

Steps 1 & 2. Is Councilmember Sarmiento a “public official” within the meaning of Section 87100 and will he be making, participating in making or influencing a governmental decision?

As a member of the city council, Councilmember Sarmiento is a public official under the Act. (Sections 87200 and 82048.) Councilmember Sarmiento wishes to vote and participate in city council decisions regarding the Project. By voting on or participating in these decisions, Councilmember Sarmiento will be making, participating in making, or otherwise using his official position to influence a governmental decision.²

² 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.

Step 3. What are councilmember Sarmiento's interests?

Under Section 87103 and Regulations 18703 - 18703.5, inclusive, a public official has a 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).)
- Real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- Any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- 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.)
- 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 entity and source of income

Councilmember Sarmiento has an interest in his property rental business, as an owner, as an investment interest, and as a source of income to him. (Section 87103(c) and (d).) Moreover, Councilmember Sarmiento has an interest in his tenants to the extent that his pro rata share in the income from the tenant is \$500 or more.

Real property

Councilmember Sarmiento also has an interest in his real property.

Personal Finances

A public official is considered to always have an interest in his or her personal finances. 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 Councilmember Sarmiento's circumstances and we will not discuss it further.

Step 4. Will Councilmember Sarmiento's interests be directly or indirectly involved in the City Council's decisions?

DECISIONS 1 & 2 – CERTIFYING ENVIRONMENTAL DOCUMENTS & SELECTING A ROUTE

Business Entity and Source 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.”

Councilmember Sarmiento's business will not be initiating any proceedings nor be a party in, or the subject of, any proceedings involving the certification of environmental documents or the selection of a route. Therefore, his business, as both a business entity and a source of income, is indirectly involved in these decisions.

Real property

Under Section 18704.2, real property is directly involved in a governmental decision if, among other criteria, the following applies:

- “(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 that is the subject of the governmental decision.”

Councilmember Sarmiento's real property is located within 500 feet of the real property being proposed for the environmental documents and the location of the street car route. Accordingly, his real property is directly involved in these decisions.

DECISION 3 – SELECTING CONTRACTORS

Business Entity and Source of Income

Councilmember Sarmiento's business entity has not initiated any proceeding nor is it a named party or the subject of any proceeding involving the selection of contractors to design and build the Project. Therefore, his business is considered indirectly involved in this decision.

Real Property

In order that an official be disqualified from participating in a governmental decision for his or her interest in real property, the real property must be the subject of the decision. The subject of this decision, however, is the hiring of contractors to design and build the Project. Under the facts presented, the selection of contractors will be made only after decisions to proceed with the Project have been made, including decisions to certify environmental documents and select a preferred route. Councilmember Sarmiento's property is not directly involved in the decision to select a contractor.

Steps 5 & 6. Will there be a reasonably foreseeable material financial effect on Councilmember Sarmiento's interests?

Materiality

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's interest is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on a financial interest will be material, depending on the nature of the financial interest and whether that interest is directly or indirectly involved in the agency's decision.

Business Entity and Source of Income

Regulation 18705.1(c)(4) sets forth the applicable materiality standards for relatively small businesses (those having net income of \$750,000 or less), that are *indirectly* involved in a governmental decisions. (We assume that Councilmember Sarmiento's business qualifies as a small business.) The effect of the governmental decision on the business entity is material if it is reasonably foreseeable that the decision will affect the business entity's annual gross revenues or its asset value by \$20,000 or more, or its annual expenses by \$5,000 or more.

Real Property

Regulation 18705.2(a)(1) provides the materiality standard for *directly* involved real property 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.” (Emphases added.)

Under this rule, the financial effect of the decision on the real property is material even if it has only a one-penny effect. In order to rebut this presumption, it is necessary to establish that the decision would not even affect the property’s value by one cent. Because Councilmember Sarmiento’s real property is located within 500 feet of a proposed route, any reasonably foreseeable affect of this decision is material.

Foreseeability

Once a public official has determined the materiality standard applicable to each of his or her 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 likely to be reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Generally, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*Ibid.*)

DECISIONS 1 & 2 - CERTIFYING ENVIRONMENTAL DOCUMENTS & SELECTING A ROUTE

Generally, when an interest is directly involved in a decision, it is also foreseeable (if not certain) that the interest will be affected by the decision. Under the facts provided, it is reasonably foreseeable that the decisions to certify environmental documents and to select a preferred route will have a material financial impact on Councilmember Sarmiento’s real property. Because Councilmember Sarmiento’s real property is directly involved in these decisions, it is reasonably foreseeable that there will be a material financial effect on his property and he has a conflict of interest in these decisions.

SEGMENTATION

We have previously advised that a decision to select a contractor for a project is separate from basic policy decisions regarding the project itself, such as selecting the property’s boundaries, approving a Specific Plan and certifying an environmental impact report.³ By “segmenting” the decisions, a public official can participate in the decision in which he or she does not have a conflict provided certain procedures are followed. The rationale for applying the segmentation rules in this situation is that the decision to select a contractor is an “implementation” decision that merely implements a previously made basic policy decision. (*Boco* Advice Letter, *supra.*)

³ *Athan* Advice Letter, No. A-86-094; *Joehnck* Advice Letter, No. A-92-460; *Boco* Advice Letter, No. A-13-078

The segmentation rules require that (1) the decision in which the official has a financial interest is considered first, without the disqualified official's participation and (2) the decision in which the official does not have a financial interest will not reopen or effectively determine, affirm, nullify, or alter the result of the decision from which the official was disqualified. (Regulation 18709.)

You have indicated that the selection of contractors to design and build the Project will be made only after final decisions have been made to certify environmental documents and select a route. Provided the other requirements are met, despite Councilmember Sarmiento's conflict with respect to his real property in the decisions discussed above, he may participate in the decision to hire the contractor so long as it is not reasonably foreseeable that the decision will have a material financial affect on any of his economic interests.⁴

Steps 7 & 8. Despite a determination that Councilmember Sarmiento has a conflict of interest, may he participate in a decision under the "public generally" or "legally required participation" exceptions?

Even if a material financial effect on a public official's 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 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 Councilmember Sarmiento's 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

⁴ You have not provided any information with respect to other potential economic interest other than his economic interest in his rental property, the business of that rental property, and the source of income from the tenants of that property. Accordingly, our advice regarding Councilmember participation in the contractor decision is limited to the economic interests you have indicated and is based on an assumption that any person who is directly involved in the decision to hire a contractor is not an economic interest to Councilmember Sarmiento, such as one of the tenants of his property.