

October 11, 2013

Michael Henderson  
Deputy Public Works Director  
2201 Pebble Beach Trail  
Oxnard, CA 93036

Re: Your Request for Informal Assistance  
**Our File No. I-13-093**

Dear Mr. Henderson:

This letter responds to your request for advice 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 (the "Commission") does not act as a finder of fact when rendering advice. (*In re Oglesby* (1975), 1 FPPC Ops. 71.)

Please note that all advice is based only on the provisions of the Act. We offer no opinion on the application of other laws that may apply, such as Government Code Section 1090 or common law conflict-of-interest. 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.

Because your question is of a general nature and you have not identified any specific governmental decision, we are providing informal assistance.<sup>2</sup>

### QUESTION

May you participate in real property decisions regarding the River Ridge Golf Course, despite a real property interest within 500 feet?

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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), copy enclosed).

## CONCLUSION

No, unless the governmental decision does not have a reasonably foreseeable material financial effect on your real property, as discussed below.

## FACTS

You are the Deputy Director of Public Works for the City of Oxnard. You own property abutting a 36-hole municipal golf course. Your property is not within 500 feet of the clubhouse or other major facilities on the golf course. In your official capacity, you make decisions that include golf course capital improvement projects, and facility funding (e.g., determining green fees, re-sanding bunkers, etc.). A private management company runs the day-to-day operations of the facility and makes recommendations that are subject to your approval. In your position, you operate separately from the Public Works Department and instead report directly to the City Manager. You and the City Manager both approve these matters. Recent financial discussions have involved the golf course and the funds that it generates for the City. You have avoided participation in these discussions. You do not seek general advice regarding the Act's limits on your decision making capacity.

## 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 interests as set forth in Section 87103. (See also, 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 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 the Deputy Director of Public Works, you are considered 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, acting within the authority of his or her position, the official votes on a matter, appoints a person, obligates or commits his or her agency to any particular course of action, or enters into any contractual agreement on behalf of his or her agency, or determines not to act. (Regulation 18702.1(a).) The determination not to act is not a governmental decision if such determination is made for the purpose of recusal to

properly avoid conflict-of-interest. (*Ibid.*) A public official participates in a governmental decision when, acting within the authority of his or her position, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision without substantive research or investigation. (Regulation 18702.2.) A public official uses his or her official position to influence a governmental 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(a).) As the Deputy Public Works Director, you will be making, participating in making, or influencing a governmental decision when taking part in City decisions regarding the golf course.

### **Step Three: What are your 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 effects on the public generally, on the official, a member of his or her immediate family, or on any of the following five enumerated interests:

- An interest in any business entity if the official has a direct or indirect investment worth \$2,000 or more (Section 87103(a); Regulation 18703.1(a)), or if the official is a director, officer, partner, trustee, employee, or holds any position of management in the business entity (Section 87103.1(d); Regulation 18703.1(b)).
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An interest in a source of non-gift income or promised income, which aggregates to \$500 or more within the 12 months prior to the governmental decision. (Section 87103(c); Regulation 18703.3.)
- An interest in any donor of, or any intermediary or agent for a donor of gifts that aggregate to a fair market value of \$440 or more within 12 months prior to the governmental decision. (Section 87103(e). Regulation 18703.4.)
- An interest in the official's personal finances or the finances of the official's immediate family. The "personal financial effects" rule finds interest where a governmental decision will increase or decrease the personal income, expenses, assets, or liabilities of the official or their immediate family. (Section 87103; Regulation 18703.5.)

Assuming, your property interest is valued at \$2,000 or more, you have a potentially disqualifying interest in real property. (Section 87103(b).) Because you have not provided facts indicating any other potential financial interest, our analysis is limited to your real property financial interest in your home.

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

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given interest is material, you must first determine if the interest is directly involved or indirectly involved in the governmental decision. (Regulation 18704(a).)

Regulation 18704.2 provides that:

“(a) Real property in which a public official has an economic interest is directly involved in a governmental decision if any of the following apply:

“(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 the 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.”

Your property is within 500 feet of the golf course. Accordingly, unless an exception applies, your real property interest is directly involved in the real property governmental decisions regarding the golf course under Regulation 18704.2(a)(1).

Regulation 18704.2(b) provides certain exceptions. One of those exceptions applies when the decision solely concerns repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage or similar facilities. (Regulation 18704.2(b)(2).) Maintenance of a 36-hole golf course operated by the City for profit is a particularly complex matter involving such decisions on a daily basis. However, you have indicated that these decisions are generally handled by a private contractor hired for this purpose, and you are only involved in capital improvement projects and funding for the golf course operations.

Matters of repair seek to restore a system to its former efficiency. (*Condrashoff* Advice Letter, No. A-08-214.) Or, where the level of reasonable efficiency has changed, projects on existing facilities that are necessary to provide a level of service reasonable for the service of the entire city are considered repairs. (*Murphy* Advice Letter, No. A-07-134; *Gordon* Advice Letter, No. I-07-104.) An improvement exists where the qualitative or quantitative use of the facility is changed as highlighted in Regulation 18704.2(a), or where an otherwise reasonable change places the interest of the official above those of the rest of the jurisdiction. (*Murphy* Advice Letter, *Supra*).

The Commission has previously determined that projects necessary to put for-profit facilities into good working order are not improvements, so long as the projects result in the same qualitative and quantitative functions that previously existed with regard to the real property. For example, the Commission determined that the replacement of a water delivery

system to a privately owned golf-course is a repair. (*Fowler* Advice Letter, No. A.-12-020.) In that case, funding a project that changed the source of water and greatly improved the efficiency of city-provided water usage did not affect the qualitative or quantitative function of real property, and officials located within 500 feet of the facilities were allowed to participate in decision making. (*Ibid.*) Each decision is different. If you determine that a decision does not change the qualitative or quantitative use of the facility, then the decisions may be considered maintenance, and your interest is indirectly involved under Regulation 18704.2(b)(2).

The type of decision is also important. You have indicated that you often approve the golf course requests for funding of capital improvement projects. In decisions pertaining to financing, the Commission has advised that once the “basic policy decisions” to build or maintain a facility have been reached, the official “may participate in the decisions which implement, but do not change these policies.” (*Athan* Advice Letter, No. A-86-094; *Waggoner* Advice Letter, No. A.-95-389.)

Finally, the Commission has crafted an exception to the literal boundary-to-boundary measurement under the 500 foot rule, applicable in cases where the governmental decision affects only a clearly defined, specific, and isolated site, such as a particular building on a large tract of land. (*Bennett* Advice Letter, No. A-11-406; *Haubert* Advice Letter, No. A-08-172A; *Mais* Advice Letter, No. A-03-302; *Whitson* Advice Letter, No. A-03-007; *Ball* Advice Letter, No. A-01-279; *Kaplan* Advice Letter, No. A-98-224.) Accordingly, your real property interest is indirectly affected where a distance of more than 500 feet separates your house and any clearly defined, specific site. For example, if your property located within 500 feet of the 13<sup>th</sup> hole green, then it is indirectly involved with a decision concerning renovations the pro-shop or upgrading the driving range located at the entrance to the golf course half a mile away.

Additionally, governmental decisions regarding the golf course that are not real property decisions do not affect your interest. You may therefore participate in decisions involving the golf course budget, staff salaries, program funding, etc. (*Dengler* Advice Letter, No. I-11-066.)

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

A conflict-of-interest arises only where a material effect on an official’s economic interest is reasonably foreseeable. (Regulation 18700(a).)

**Materiality**

Any financial effect of a governmental decision on real property directly involved in the governmental decision is presumed to be material. (Regulation 18705.2(a)(1).) 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, irrespective of the impact. (*Ibid.*) Any financial effect means not even “one-penny.”

Any financial effect of a governmental decision on real property indirectly involved in a governmental decision is presumed not to be material. (Regulation 18705.2(b)(1).) 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. (*Ibid.*)

### **Reasonable 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 material financial effect on an 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.)

Because you do not request advice pertaining to any particular decisions, the Commission cannot determine the financial effects that your decisions involving the golf course will have on the interest in your property. You must make the determination.

Barring additional facts indicating a potential effect on your interest, it appears that decisions that are repairs or maintenance of the golf course will not have a reasonably foreseeable material financial effect on your interest. Alternatively, improvements to the golf course facility may have a reasonably foreseeable material financial effect, unless you can prove that there will be no effect on your real property value.

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

#### **Public Generally**

The material financial effect of a governmental decision on a public official’s economic interest in real property is indistinguishable from its effect on the public generally if that decision also affects ten percent or more of all property owners in the jurisdiction of the official’s agency, or 5,000 property owners in the jurisdiction of the official’s agency. (Regulation 18707.1(a); Regulation 18707.1(b)(B)(i)-(ii).)

You present no facts indicating that the public generally exception applies.

#### **Legally Required Participation**

There are a limited number of circumstances that allow a public official to take part in a governmental decision despite a disqualifying conflict of interest under the legally required participation exception. This exception applies very rarely, and only where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

You present no facts indicating that the legally required participation exception applies.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Nicholas Sanders  
Legal Intern, Legal Division

NLS:jgl