

August 16, 2013

Julie K. Danielson
City of Chula Vista
276 Fourth Avenue
Chula Vista, CA 91910-2631

Re: Your Request for Informal Assistance
Our File No. I-13-099

Dear Ms. Danielson:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Because you seek general guidance, we are providing informal assistance, rather than advice. In response to your question regarding immunity, informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) Also, please note that our informal assistance is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest or post-governmental employment laws. We urge you to consult with your city attorney or private counsel regarding these provisions outside the Act.

QUESTIONS

1. Does the Act prohibit you, as commissioner of the Chula Vista Historic Preservation Commission (the “Preservation Commission”) and a licensed real estate agent, from continuing to market and sell historically designated properties where you will be called upon to vote on historically designated properties generally?
2. Does the Act prohibit you from contacting property owners who have received the historic designation to congratulate their decision to participate in the historical preservation process?

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.

3. Does the Act prohibit you from contacting city staff on behalf of a buyer or seller to obtain information regarding a property?
4. Does the Act prohibit you from participating in hearings as a member of the general public after you resign from the Preservation Commission?
5. Do you have a conflict of interest in a decision regarding a historically designated property where you or your employer represents a buyer or seller in a real estate transaction involving the property?
6. Does the Act prohibit you from representing a buyer or seller in the sale of a historically designated property after you resign from the Preservation Commission where you had voted on the historical designation of the property?

CONCLUSIONS

1, 2 and 3. No. The Act does not prohibit you from engaging in these activities so long as you refrain from making, participating in making, or influencing a governmental decision that may have a reasonably foreseeable material financial effect on any of your economic interests.

4 and 6. No. A former public official does not have any decisionmaking authority that could give rise to a conflict of interest as that term is used in the Act. Therefore, you are not prohibited from engaging in these activities.

5. Yes, if the decision will have a reasonably foreseeable material financial effect on any of your financial interests, including your client or employer as sources of income to you.

FACTS

You are an appointed member of the Preservation Commission and a licensed real estate agent employed by a real estate broker. You have been a real estate practitioner in Chula Vista for over 27 years. Most often, you represent buyers and sellers of residential property. The Preservation Commission was created by the city council pursuant to Ordinance No. 3197, which has been codified in the Chula Vista Municipal Code in Chapter 2.49.

The City of Chula Vista is a charter city governed by a city council, consisting of four council members and a mayor that are elected from the city at-large. Based on the city's Geographical Information System database for the third and fourth quarters of 2010, there were 237,595 residents and approximately 49,720 residential property owners in the city. Currently, there are approximately 168 property owners owning property with a historic designation.

ANALYSIS

Questions 1, 2 & 3: *Are you prohibited from (1) marketing and selling historically designated properties where you expect to be called upon to vote on historically designated properties generally, (2) contacting property owners who have received the historic designation to congratulate their decision to participate in the historical preservation process, or (3) contacting city staff on behalf of a buyer or seller to obtain information regarding a property?*

The Act's conflict-of-interest provisions prohibit a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision. (Section 87100.) In each of these circumstances, you are not making, participating in making, or influencing a *governmental* decision. Therefore, you may continue to market and sell historically designated properties, contact property owners and contact staff so long as you refrain from making, participating in making, or influencing a governmental decision that may have a reasonably foreseeable financial effect on any of your economic interests.

Questions 4 & 6: *Does the Act prohibit you, after resigning from the Preservation Commission, from (1) participating in hearings as a member of the general public, or (2) representing a buyer or seller of property that was the subject of a decision in which you participated while serving on the Preservation Commission?*

A former public official does not have decisionmaking authority that could give rise to a conflict of interest. Therefore, you may engage in these activities.

Question 5: *Do you have a conflict of interest in a decision regarding a historically designated property where you or your employer has represented a buyer or seller in a real estate transaction involving the property?*

A conflict of interest exists whenever a public official makes, participates in making, or otherwise uses his or her official position to influence a governmental decision that has a reasonably foreseeable material financial effect on one or more of the official's financial interests. 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: ARE YOU A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

As a member of the Preservation Commission, you are a public official under the Act. (Section 82048.) Because you will be called upon to make and participate in decisions regarding a historically designated property where you or your employer have represented the buyer or seller in a real estate transaction, you will be making, participating in making or otherwise using your official position to influence a governmental decision.

STEP 3: DO YOU HAVE A POTENTIALLY DISQUALIFYING INTEREST AS DESCRIBED IN SECTION 87103?

A public official has a financial interest in a decision within the meaning of Section 87103 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 one of five interests enumerated in Section 87103. Relevant here are the “source of income” and “personal finance” provisions listed at Section 87103 and Regulation 18703.3:

Source of Income - An interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

“Income” includes “commission income” which is defined in Regulation 18703.3(c)(1) as the “gross payments received by a public official as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction.” For a real estate agent, the following are sources of commission income:

“(i) The broker and brokerage business entity under whose auspices the agent works;

“(ii) The person the agent represents in the transaction; and

“(iii) Any person who receives a finder’s or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.” (Regulation 18703.3(c)(2)(C).)

Your income as a real estate agent is considered commission income from both your employer (Regulation 18703.3(c)(1)(i)) and your actual clients (Regulation 18703.3(c)(ii)), to the extent that income attributed to your employer or any client equals or exceeds \$500 in the 12 months prior to a decision, you have an economic interest in your employer or the client, as the case may be, as a source of income to you.

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 4: IS THE INTEREST DIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?

To determine if a governmental decision’s reasonably foreseeable financial effect on a given interest is material, we must first determine if the official’s interest is directly involved or indirectly involved in the governmental decision. If a public official’s interest is not directly involved in a governmental decision, it is indirectly involved. (Regulation 18704(a).)

Source of Income

Regulation 18704.1 provides that a person that is a source of income is directly involved in a decision before the official's agency if the 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.

If a client initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or the subject of the proceeding concerning the decision, the client would be directly involved in the decision.

Personal Finances

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.) Under this regulation, an official's 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 or his or her spouse's personal finances.

STEP 5: WHAT IS THE MATERIALITY STANDARD?

Source of Income

Any reasonably foreseeable financial effect on a source of income to a public official, and is *directly* involved in a decision, is deemed material.

The effect of a decision is material as to an individual who is a source of income to an official and *indirectly* involved in the decision if the decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more. (Regulation 18705.3(b)(3)(A).)

Personal Finances

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. (Regulation 18705.5.)

STEP 6: IS THE MATERIAL FINANCIAL EFFECT REASONABLY FORESEEABLE?

An official has a conflict of interest in a governmental decision only if a material financial effect is reasonably foreseeable. Regulation 18706(a) states that a material financial effect is reasonably foreseeable "if it is substantially likely that one or more of the materiality standards [...] applicable to that economic interest will be met as a result of the governmental decision." A financial effect need not be certain or even substantially likely to be reasonably

foreseeable, but it must be more than a mere possibility. (*Tann* Advice Letter, A-12-134; *Norton* Advice Letter, I-09-091; *Norton* Advice Letter, I-12-092.)

The concept of material foreseeability is heavily driven by the particular facts of each situation, as they exist at the time the decision is made. The determination of whether it is reasonably foreseeable that the applicable materiality standard will be met for your economic interests is necessarily a factual question that is ultimately one for you to make based on your understanding of the facts.

STEPS 7 & 8: THE “PUBLIC GENERALLY” AND “LEGALLY REQUIRED PARTICIPATION” EXCEPTIONS.

You have not presented any facts indicating that either the “public generally” exception or the “legally required participation” exception would be applicable here. Accordingly, we have not provided an analysis involving these steps.

SUMMARY

In summary, you are not prohibited from (1) continuing to market and sell historically designated properties, (2) contacting property owners to congratulate their decisions to participate in the historical preservation process, or (3) contacting staff to obtain information regarding a property, so long as you refrain from making, participating in making, or influencing a governmental decision that may have a reasonably foreseeable financial effect on any of your economic interests. You are prohibited, however, from participating in a Preservation Commission decision regarding a historical designated property where you or your employer represent a buyer or seller of the property if the decision will have a reasonably foreseeable material financial effect on the client, your employer, or your personal finances.

Once you have resigned, you may participate in Preservation Commission hearings and represent a buyer or seller in the sale of a historically designated property that you voted on as a member of the Preservation Commission.

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