

September 4, 2013

Derek Reeve
City Councilmember
San Juan Capistrano
P.O. Box 367
San Juan Capistrano, CA 92693

Re: Your Request for Informal Assistance
Our File No. I-13-120

Dear Mr. Reeve:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because you have not described a specific pending decision in which you wish to participate, we are treating your request as one for informal assistance. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

Please note that 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.) In addition, 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 Section 1090 or common law conflict of interest.

QUESTION

May you attend future city council hearings regarding a lawsuit filed by the Capistrano Taxpayers Association (CTA) against the city when the former president of the CTA was formerly your business partner?

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.

CONCLUSION

You may attend and participate in the decision so long as the decision will not have a foreseeable and material financial effect on any of your interests.

FACTS

You are a city councilmember for the city of San Juan Capistrano. In 2012, the city was sued by the CTA regarding tiered water rates in 2012. The lawsuit was concluded at the trial court level. However, you anticipate there may be appellate related issues to be addressed by council in the future.

At the time of the initial lawsuit, the President of CTA was a business partner with you in a small beehive hobby/business (hereafter, the “partnership”), along with two other individuals. You stated that the CTA and your business partner would not receive any financial benefit from the lawsuit (no monetary damages were requested) and your city attorney advised you that you could participate in decisions affecting the litigation. However, you chose to recuse yourself to avoid the appearance of impropriety.

Recently, you terminated your business relationship with the partnership. Therefore, the CTA president is no longer your partner. In addition, you stated that your former business partner no longer serves as the President of CTA. You stated that you never had any relationship with CTA.

ANALYSIS

The Act’s conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own interests or the interests of persons who have supported them. (Section 81001(b).) 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 an interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).)

You satisfy the first two steps of the analysis since you are a public official and presumably will be making, participating in making, or influencing a governmental decision regarding the litigation if you do not have a conflict of interest. (Section 87100; Regulations 18702.1-18702.3.)

Please note that as a city councilmember, in cases where you do have a conflict of interest, you must: (1) publicly identify the financial interest immediately prior to discussion of the item, as detailed in Regulation 18702.5(b); (2) recuse yourself from discussing, voting on, or otherwise influencing the matter; and (3) leave the room until after the discussion, vote, or conclusion of any other disposition of the matter. (Section 87105.) Regulation 18702.5(c)

further provides: “If the governmental decision is made during a closed session of a public meeting, the public identification may be made orally during the open session before the body goes into closed session and shall be limited to a declaration that his or her recusal is because of a conflict of interest under Government Code section 87100. The declaration shall be made part of the official public record. The public official shall not be present when the decision is considered in closed session or knowingly obtain or review a recording or any other non-public information regarding the governmental decision.”

Step 3. What are your interests that may be affected by the decision?

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated interests in Section 87103 and Regulations 18703-18703.5. The facts you have provided indicate the following interests implicated by the decision.

- ***An investment in a business entity and business position.*** (Section 87103(a) and (d).) “Business entity,” is defined at Section 82005 as follows: “[A]ny organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.” Thus, the partnership, which is presumably operated for profit, is a business entity under the Act.

You have two interests in the partnership -- an ownership interest and you hold a position of management in the partnership. According to your facts, however, you have now terminated any business relationship with the partnership. At this time, you no longer have either of these interests in the partnership.

- ***Sources of income:*** A public official has an interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the time in which a governmental decision is made. (Section 87103(c); Regulation 18703.3.) We assume you have received \$500 or more from the partnership in the past 12 months. So currently, despite terminating your relationship with the partnership, the business is considered a source of income to you for 12 months after the final payment of \$500 or more is received. The termination of your partnership interest in no way affects the disqualifying impact of income of \$500 or more received from any the partnership or any other source for a period 12 months.

In addition, the Act’s definition of income in Section 82030(a) of an individual also includes a pro rata share of any income of any business entity in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater. (Section 82030(a).) In other words, if you owned 25% of the partnership, sources of income to the partnership, in which your pro rata share is \$500 or more, would also be considered to be sources of income to you.²

² A public official also has an interest in his or her personal finances and those of his or her immediate family - this is the “personal financial effects” rule. (Section 87103; Regulation 18703.5.) A public official has a conflict of interest in any decision which will result in an increase or decrease in the personal expenses, income,

Neither the CTA nor the president of the CTA would be considered a potentially disqualifying interest of yours under the Act.

Step 4. Will your source of income be directly or indirectly involved in the decision?

A person, including business entities and sources of income, is directly involved in a decision before an official's agency when that person, either directly or indirectly 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.”
(Regulation 18704.1(a).)

According to your facts, the partnership has no interest in the litigation, nor is it a named party in, nor the subject of the proceeding. Accordingly, the partnership is indirectly involved.

Steps 5 & 6. Will there be a reasonably foreseeable material financial effect on your interests?

Regulation 18705.1(c)(4) states that for a relatively small business entity that is not publically traded, the financial effect of a governmental decision is considered material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

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

assets or liabilities of the official or his or her immediate family. (Section 87103; Regulation 18703.5.) Your facts do not suggest any personal financial effect resulting from the decisions, therefore, we do not further discuss this basis for a conflict of interest.

materiality standard will be met. An effect need not be certain to be considered “reasonably foreseeable,” nor even substantially likely. However, it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

You facts do not indicate that there will be any foreseeable financial effect on the partnership resulting from the CTA litigation decision. However, if the decision on the litigation and water rates will materially affect the partnership’s revenue, assets, or expenses as set forth above, you will have a conflict of interest in the decision.

Steps 7 & 8. The “public generally” and “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).) Moreover, under limited circumstances, a public official may be legally required to participate (Section 87103; Regulation 18708). You have not presented any facts indicating that either of these exceptions is applicable to the decision in question, thus, we do not further analyze these exceptions.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division