

December 16, 2013

Dendra Dengler  
419 Beach Drive  
Arcata, CA 95521

Re: Your Request for Informal Assistance  
**Our File No. I-13-121**

Dear Ms. Dengler:

This letter responds to your request for advice regarding 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.

### QUESTION

May you participate in governmental decisions regarding Manila Community Services District Community Center rental rates, despite having a real property interest located within 500 feet of the property?

### CONCLUSION

Yes. Unless there is a reasonably foreseeable material effect on your real property, you may take part in decisions adjusting rental rates that will pay for staff salaries and pre-existing facility upgrades.

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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.

## FACTS

You serve on the Manila Community Services District Board and own a residence within 500 feet of a Manila Community Services District Community Center (the “Community Center”). The Community Center is a former school. It consists of eight classrooms, several small rooms, a multipurpose room, a commercial kitchen, and another auxiliary kitchen. These rooms are rented to the public for a fee. That fee was changed in 2007, and again this year. This most recent vote - from which you recused yourself - prompts your request for assistance.

In that vote, the District Board chose to increase the room rental rate from approximately \$0.47 per square foot to \$0.65 per square foot. The increase will subsidize the General Manager and other staff salaries, provide upgrades to the kitchen adjoining the multipurpose room, heating replacement and electrical upgrades, and possible exterior painting and signage maintenance.

Though this request was prompted by a prior vote, we can only provide prospective general assistance.

## 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 the official or public official’s interests as set forth in Section 87103. (Section 87103; 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 a Manila Community Services District Board Member, 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).) 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).) You would be making, participating in making, or influencing a governmental decision when taking part in Board decisions regarding the Community Center.

### **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)), or if the business entity is a parent or subsidiary of a business entity in which the official meets the aforementioned investment or employment requirements (Section 87103; Regulation 18703.1(c)).
- 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 economic 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.)

We assume your real property interest in your home is valued at \$2,000 or more. Accordingly, you have an interest in real property that may be the basis for conflict of interest. (Section 87103(b).)

**Step Four: Is your 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, we must first determine if your interest is directly involved or indirectly involved in the governmental decision. (Regulation 18704(a).) The only interest you have identified is a real property interest in your residence.

Regulation 18704.2 provides in pertinent part 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.”

...

Your property is within 500 feet of the Community Center. Accordingly, unless an exception applies, your real property interest is directly involved in any real property governmental decisions regarding the Community Center under Regulation 18704.2(a)(1). However, this does not mean that any governmental decision that contemplates an action to be taken at the Community Center necessarily constitutes a real property decision. The nature of the decision at issue is also important.

For example, 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.” (*Henderson* Advice Letter, No. A-13-093; *Athan* Advice Letter, No. A-86-094; *Waggoner* Advice Letter, No. A-95-389.)

Moreover, the Commission has previously determined that projects necessary for a facility's upkeep may be the implementation of basic policies. For example, the Commission found that a new roof and air conditioning system for a City-operated theater was the implementation of the City's basic policy decision to operate that theater. (*Waggoner* Advice Letter, A-95-389.)

These distinctions are important to distinguish what constitutes a real property decision subject to the strict real property test (500 foot rule) from other decisions that occurred at a specific location but are not “real property” decisions.<sup>2</sup>

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<sup>2</sup> In the next few months the Commission will be addressing changes to the 500 foot rules and its application, as well as making distinctions as to when a governmental decision will be considered as affecting real property.

Under your facts, we find that a vote to increase the room rental rate at the Community Center from approximately \$0.47 per square foot to \$0.65 per square foot, to increase the General Manager and other staff salaries, provide upgrades to the kitchen adjoining the multipurpose room, heating replacement and electrical upgrades, and possible exterior painting and signage maintenance are not decisions that directly affect the real property of a public official, even if the official's property is within 500 feet of the property subject to a decision.

**Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official's interests?**

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

**Materiality**

A 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, which make it reasonably foreseeable that the decision will have a material financial effect on the real property.

**Reasonable Foreseeability**

This standard requires that any material financial effect on an economic interest that is more than a mere possibility be treated as reasonably foreseeable. (*In re Thorner* (1975), FPPC Ops. 198.) A material financial effect on an interest is reasonably foreseeable even if it is not certain or substantially likely. (Regulation 18706(a).) This determination depends on the facts and circumstances peculiar to each case. (*Ibid.*) The Commission does not act as a finder of fact in providing advice (*In re Oglesby*, 1 FPPC Ops. 71). Therefore, the foreseeability of a particular financial effect is a determination that must be left to the informed judgment of the public official.

**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