

September 23, 2014

Amy R. Webber
Deputy City Attorney
333 W. Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

Re: Your Request for Informal Assistance
Our File No. I-14-108

Dear Ms. Webber:

This letter responds to your request for advice on behalf of Long Beach City Councilmember Suzie Price regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Because your request is general in nature, and does not provide any specific details relating to any current decision before the city council, we are providing informal assistance.² Informal assistance may be requested by any person with a duty to advise other persons relating to their duties or actions under the Act. We offer no opinion on the application of other laws, which may apply, such as common law conflict of interest. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. May city councilmember Suzie Price participate in community outreach, study sessions and awareness meetings regarding city proposals to amend the South East Area Development and Improvement Plan (the "SEADIP Plan") if she owns and leases out real property located within the SEADIP area?

2. May Ms. Price vote on the amendment of the SEADIP Plan?

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

3. May Ms. Price vote on specific development proposals for property located within the SEADIP area, including the relocation of oil operations or the expansion and funding of wetlands areas?

4. If Ms. Price has a conflict of interest, can the conflict be avoided by selling her property?

CONCLUSIONS

1. No. In speaking at these meetings she will be attempting to influence a governmental decision unless the “personal interest” exception applies, as discussed below.

2. No, unless, under the public generally exception, her real property will be affected in substantially the same manner as ten percent of property owners, or residential property owners, in her district, as discussed below.

3. The answer to this question depends on the nature of each development proposal and the proposal’s reasonably foreseeable financial effect on Ms. Price’s real property (or other interest). It is not possible for us to analyze a decision’s reasonably foreseeable financial effect without knowing the facts involved in the decision, including the location of the real property that is the subject of the particular decision.

4. If Ms. Price sells her property, she will no longer have a real property interest. However, she will have a source of income interest in the buyer of the property for 12 months after the sale or longer depending on the terms of sale. If the decision will have a reasonably foreseeable material financial effect on the buyer during that period of time, Ms. Price would have a disqualifying conflict of interest in that decision.

FACTS

The city of Long Beach is currently engaged in a comprehensive update to the SEADIP Plan, a planned development district along a coastal portion of the city. Proposed changes to SEADIP Plan will include allowed uses and development standards (e.g., height, density, and setbacks), as well as more specific project approvals, such as the potential relocation of oil operations and the potential remediation and funding of wetlands areas. It is anticipated that these proposals will come before the city council for approval after first receiving a recommendation from the Planning Commission.

The SEADIP area comprises approximately 1,500 acres of land in the southeast area of Long Beach and is located entirely within the boundaries of the city’s third council district. The existing SEADIP area includes a large area of un-remediated wetlands, neighborhood shopping centers, industrial uses, and established residential neighborhoods.

The original SEADIP zoning regulations were established in 1977. Although there have been several minor amendments to the regulations since 1977, the city has recently focused its effort on a comprehensive review of the entire SEADIP Plan with an eye toward making significant amendments to the current zoning regulations

Because the SEADIP area is located within the city's Coastal Zone, Plan changes will also require amendments to the city's Local Coastal Plan and the preparation of an environmental impact report (EIR) in compliance with the California Environmental Quality Act (CEQA). It is expected that the entire planning process for the proposed SEADIP Plan amendments may take several years to complete. The SEADIP rezoning process is a critical element for the third district of Long Beach, and is a process that the residents of the district expect their council representative to be involved in.

There are 17,729 ownership parcels and 9,768 residential ownership parcels in District 3. The SEADIP area contains 3,767 ownership parcels, 3,287 residential ownership parcels and 76 mixed use parcels. The city has 106,272 ownership parcels, 96,171 of which are residential.

The city is "divided" into nine separate council districts and each councilmember is elected by the voters of the district he or she represents. Ms. Price was recently elected to the city council for the third council district and took office on July 15, 2014. Ms. Price owns a condominium in the Marina Pacifica development, a complex consisting of over 500 units, located in Subarea 2A of the SEADIP area. Ms. Price originally occupied the unit but has been renting it to tenants since 2005. She currently rents the unit to her mother under an informal arrangement that allows her mother to occupy the unit for as long as she likes. You ask whether Ms. Price's ownership of the condominium within SEADIP's boundaries will create a conflict of interest requiring her recusal in city council decisions relating to the SEADIP Plan.

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.³ A public official has a "financial interest" in a 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. (Section 87103; Regulation 18700(a).)

³ 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 interest involved in the decision as well as details of the 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.

Is Ms. Price a public official making, participating in making, or using her official position to influence a governmental decision?

Ms. Price is a public official for purposes of the Act by virtue of her position on the city council. (See Section 87200.)

When considering and voting on city council decisions, she will be making, participating in making and using her official position to influence governmental decisions. (Regulation 18702.2.)

In addition, Ms. Price will be attempting to influence a governmental decision when she participates at community outreach, study sessions and awareness meetings unless the “personal interest” exception applies. An official may comment as a member of the public if the official has a personal interest that would not be adequately represented absent the official’s participation as a member of the public. The Commission construes exceptions to the general conflict-of-interest rules narrowly. (See *Oderman* Advice Letter, No. A-00-082 and *Torrance* Advice Letter, No. A-94-084.) Under this exception, Ms. Price must limit her comments to her personal interests and make clear that she is not speaking in the interest of any person or group, nor is she acting in her official capacity. (*Mitchell* Advice Letter, No. A-12-011.)

Similarly, she may not discuss her support or opposition of a decision in which she has a conflict of interest with other council members or consultants outside any public meetings. (*Id.*; see also *Simonian* Advice Letter, No. A-08-096.) She may, if the exception applies, participate in the public meetings in the same way a member of the public would.

What are Ms. Price’s interests?

Under Section 87103 and Regulations 18703 - 18703.5, inclusive, a public official has an 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, aggregating \$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 aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)

- The official's personal finances, including those of the official's immediate family -- this is the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

Under the facts you have provided, Ms. Price has an interest in the real property she owns and a source of income interest in her mother. Also, if Ms. Price sells her property, she will no longer have a real property interest. However, she may nonetheless be disqualified from participating in a decision if she has received income from the buyer aggregating \$500 or more within the 12 months preceding the decision.⁴ Ms. Price will need to determine whether a decision will have a reasonably foreseeable material financial effect on the buyer as a source of income to her.

Is it reasonably foreseeable that the decisions will have a material financial effect on any of Ms. Price's interests?

In order to determine whether the SEADIP Plan and the individual developments within the SEADIP Plan area will have a material effect on Ms. Price's property, we apply the guidelines set forth in Regulation 18705.2(a), which provides, in pertinent part:

“(a) Except as provided in subdivision (c) below, the reasonably foreseeable financial effect of a governmental decision (listed below in (a)(1) through (a)(13)) on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision:

“(1) Involves the adoption of or amendment to a general (except as provided below) or specific plan, and the parcel is located within the proposed boundaries of the plan;

“(2) Determines the parcel's zoning or rezoning (other than a zoning decision applicable to all properties designated in that category), annexation or de-annexation, or inclusion in or exclusion from any city, county, district, or other local government subdivision, or other boundaries, other than elective district boundaries as determined by the California Citizen's Redistricting Commission or any other agency where the governmental decision is to determine boundaries for elective purposes;

...

“(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18705.1. Notwithstanding this prohibition, the Commission may

⁴ The disqualification period may run longer if the councilmember received installment payments from the purchaser. You should contact us for further advice if the councilmember decides to sell the property.

provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property; or

“(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.”

The decision to adopt the amended SEADIP Plan (and, very likely, some of the decisions regarding individual developments), implicates subdivisions (a)(1), (a)(2), (a)(11) and (a)(12). Accordingly, these decisions will have a reasonably foreseeable material financial effect on Ms. Price's real property.

For Ms. Price's sources of income, different standards apply to determine whether a reasonably foreseeable effect will be material, depending on whether the interest is directly or indirectly involved in the governmental decision and whether the source of income is a business entity or an individual. (Regulation 18704(a) and 18705.1(c)(4).)

Interests in “business entities” and “sources of income” are directly involved in a governmental decision before the official's agency when that person, either directly or by an agent, (1) initiates the proceeding in which the decision will be made 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. Neither Ms. Price's mother nor the buyer of the property will be initiating any proceedings nor be a party in, or the subject of, any proceedings involving the SEADIP Plan. Accordingly, they are indirectly involved in the SEADIP decisions.

The effects of a decision on an Ms. Price's mother, an individual, are material if the decision will affect her (1) income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more, or (2) with respect to her leasehold interest if the decisions change the termination of the lease, increase or decrease the potential rental value of the property, change her actual or legally allowable use of the real property or impact her use and enjoyment of the property. (Regulation 18705.3(b)(3); 18705.2(b).) This standard would also apply to any buyer of the property who is an individual.

If the buyer is a business entity, a governmental decision is material if it is reasonably foreseeable that the decision will affect the business entity's annual gross income, expenses or asset value in a certain amount. For small businesses, (those with annual net income of \$750,000 or less), the decision is material if it affects the business entity's annual gross revenue by \$20,000 or more, its annual expenses by \$5,000 or more, or the value of its assets by \$20,000 or more. (Regulation 18705.1(c)(4).)

Absent any other facts, it does not appear that the decisions at issue will materially affect Ms. Price's mother. However, each SEADIP decision will need to be analyzed to determine whether the decision will have a reasonably foreseeable material effect on the buyer.

Does the “public generally” exception apply?

Even if a public official determines that a decision will have reasonably foreseeable material financial effect on his or her interest, the official may still participate if the financial effect of the decision on his or her interest is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.)

An official may participate in a decision under this statutory exception only in cases that meet the requirements specified in Regulation 18707.1. This means that the official must, while exercising due diligence, determine that the decision would affect (1) a “significant segment” of the public (2) in “substantially the same manner” as it affects the official's own interest.

For decisions that affect a public official's interest in real property, the significant segment is defined as ten percent or more of all property owners or all residential property owners in the jurisdiction of the official's agency or the district the official represents or 5,000 property owners or residential property owners in the jurisdiction of the official's agency. Regulation 18707.1(b)(1). You have indicated that the district which Ms. Price represents has 17,729 ownership parcels, 9,768 of which are residential. The SEADIP area contains 3,767 ownership parcels of which 3,287 are residential. Thus, the 10-percent threshold is met.

In the next step, Ms. Price must also determine whether the significant segment's property will be financially affected in “substantially the same manner” as Ms. Price's property. The financial effect need not be identical for her property to be considered affected in “substantially the same manner.” (Regulation 18707.1 (b)(2).)

Although you have provided facts that have been used to determine the appropriate significant segments, the facts necessary to enable us to determine whether her interests will be affected in substantially the same manner as the effects on the significant segment of the public generally have not been provided. The “public generally” exception requires comparison of a decision's financial effects on an official's interests with the decision's financial effects on a significant segment of the public generally. If this comparison yields results that are substantially the same, the exception could apply.

In this instance, Ms. Price needs to assess what reasonably foreseeable financial effect the decision to amend the SEADIP Plan and decisions to approve specific developments will have on her property. For example, the amended SEADIP Plan might increase her property's value, increase or decrease her real estate taxes, result in a special assessment on her real property, affect her insurance premiums, or have an impact on rents chargeable to her tenants. Ms. Price should undertake a good faith assessment of these and any other impacts that may apply in order to determine whether her interest will be affected in substantially the same manner as the

decision's impacts on the significant segment which, in her case, is 1,773 ownership parcels or 977 residential ownership parcels. Without this or similar relevant information the "public generally" exception cannot be applied.

Does the "segmentation" exception apply?

Assuming that the public generally exception does not apply, Ms. Price may nevertheless participate in some decisions under the segmentation exception. Under certain circumstances, a public official disqualified from one decision may participate in other related decisions provided that the official's participation does not affect the decision in which he or she has a conflict of interest." (*In re Owen* (1976) 2 FPPC Ops. 77.) You have asked about various decisions relating to the SEADIP that may be appropriate for segmentation. Under the segmentation rule, related decisions may be segregated to allow participation by the official in one or several related decisions as long as the decisions are not too interrelated to be considered separately. Regulation 18709(a) provides the rules for "segmenting" a governmental decision:

"An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

"(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

"(2) The decision in which the official has a financial interest is segmented from the other decisions;

"(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and

"(4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified."

Subdivision (b) of Regulation 18709 further states that "decisions are 'inextricably interrelated' when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision."

You have not provided facts indicating the order in which SEADIP decisions will be made. If there are decisions that can be broken down into separate decisions that are not inextricably intertwined with the decisions in which Ms. Price has a disqualifying conflict of interest, Ms. Price may be able to participate in those separate decisions under the segmentation

rules. For example, if Ms. Price determines that she has a conflict of interest in a decision to approve the relocation of oil operations but not in a decision to fund wetlands restoration, she may participate in the wetlands funding decision so long as the oil operations decision is made first, without her participation, and all of the other requirements of Regulation 18709(a) and (b) are met. Each decision will need to be analyzed separately under the segmentation rules.

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