

October 24, 2014

Jahmese Myres
Oakland Planning Commission
259 Frank Ogawa Plaza Suite 3315
Oakland, CA 94612

Re: Your Request for Advice
Our File No. A-14-176

Dear Ms. Myers:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Government Code Section 1090.

QUESTION

As an Oakland City Planning Commissioner, may you participate in reviewing and voting on the Coliseum City Area Specific Plan (“Specific Plan”) and draft Environmental Impact Report (“EIR”), considering your employment with East Bay Alliance for a Sustainable Economy (“EBASE”), a nonprofit 501(c) organization?

CONCLUSION

Because a “nexus” exists between the purpose for which you receive income from EBASE and the Planning Commission’s decisions regarding the Specific Plan and draft EIR, you may only participate in the commission’s consideration of these decisions if the decisions would have no financial effect on EBASE. Based on the facts provided, the Planning Commission’s decisions would not affect EBASE’s budget, expenses (including employee salaries),

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.

fundraising, or finances. Therefore, based on these facts you are not precluded from participating in the decision regarding the Specific Plan or the EIR.

FACTS

You were appointed in May 2014 as Planning Commissioner for the City of Oakland. You are employed as the campaign director at EBASE, a 501(c)(3) non-profit advocacy organization. As campaign director, your job is to research, help formulate policy positions, organize initiatives, and work with EBASE partners to advance its policy goals. For instance, with regard to development projects in the City of Oakland, EBASE advocates for “good jobs and healthy communities.” It is interested in ensuring that development projects in Oakland results in well-paying jobs for local residents, and that those projects minimize pollution so communities are healthier. EBASE’s website is at <http://workingeastbay.org/>

The Oakland Planning Commission is reviewing a draft of the Specific Plan and the draft EIR, which addresses development of an 800-acre area. The Planning Commission will make an advisory decision on the Specific Plan and EIR, with final approval to be made by the Oakland City Council.

EBASE has expressed interest in understanding the contents of the Specific Plan and EIR. It wants to ensure that future development within the plan area provides quality jobs and other community benefits including affordable housing, transit, and reduced pollution.

Neither you nor EBASE own, rent, or operate any property within the plan area or its proximity. EBASE rents an office building about 10 miles from the project area. Your home is about 4 miles from the development site.

EBASE’s focus is on city-wide issues and it takes positions on projects that it believes will impact jobs and the environment. However, it is not a recipient of any of the community benefits for which it advocates. Moreover, you state that the Planning Commission’s recommendations regarding the Specific Plan and EIR would have no impact on EBASE’s finances or funding. EBASE is funded through a combination of institutional grants from groups that support its philosophy and from small donations from individuals. EBASE’s annual gross receipts are \$1.2 million.

You also state that the Planning Commission’s decisions regarding the Specific Plan and the EIR will not affect EBASE’s budget, expenses (including employee salaries), fundraising, or finances. Your compensation is fixed by salary and not impacted by any particular decision or outcome.

You wish to know if you may make or participate in making advisory decisions regarding the Specific Plan and EIR.

ANALYSIS

Section 87100 of the Act 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 a financial interest. The Commission has adopted a standard analysis for determining 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 Oakland Planning Commission, a local government agency, you are a public official under the Act. (Section 82048.) A public official “makes a governmental decision” when the official, acting within the authority of his or her position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; Regulation 18702.1.) By making recommendations or issuing advisory decisions as an Oakland Planning Commissioner regarding the Specific Plan and the draft EIR, you would be making governmental decisions.²

Step 3. Do you have a potentially disqualifying interest?

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 of the official’s interests, described as follows:

- 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);
- A source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);

² 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 economic interest involved in the decision as well as details of the economic 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.

- A 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);
- His or her personal finances, including those of his or her immediate family – this is the “personal financial effects” rule (Section 87103; Regulation 18703.5).

Personal Finances – You have an interest in your personal finances and those of your immediate family. A governmental decision will have an effect on an official’s interest in his or her personal finances 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.) No personal financial effect is implicated by your facts. Thus, we proceed with only the analysis of your interest in your source of income.

Source of Income – You have an interest in EBASE because you are employed by the nonprofit organization and you have received income from it aggregating \$500 or more within 12 months prior to the time the Planning Commission decisions regarding the Specific Plan and EIR will be made. (Section 87103(c).) Accordingly, you may not make, participate in making or use your official position to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on EBASE.

Step 4. Are your interests directly or indirectly involved in the governmental decision?

With respect to an interest in a source of income, such as your employer EBASE, Regulation 18704.1(a) states:

“A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that 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 business entity, source of income, or source of gift is not *directly involved* in a governmental decision, materiality standards for an *indirectly involved* entity apply. (Regulation 18704.1(b).)

Here EBASE is not initiating the proceeding, nor is it a named party in, or the subject of, the Planning Commission's consideration of the Specific Plan or EIR. EBASE is therefore *indirectly involved* in the Planning Commission's decisions concerning the Specific Plan and EIR. (Regulation 18704.1(b).) Because your source of income is not directly involved in the governmental decision we apply the materiality standards in Regulation 18705.3(b) below.

Step 5. Determining which materiality standards apply in deciding if there will be a reasonably foreseeable material financial effect.

Regulation 18705.3(b)(2)(A)-(F) sets forth different materiality standards for sources of income that are nonprofit entities depending on the financial size of the entity involved. Your facts indicate that EBASE's annual gross receipts are between \$1,000,000 and \$10,000,000, the effect of a decision is material if . . .

“(i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$100,000 or more.

(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$25,000 or more.

(iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$100,000 or more.” (Regulation 18705.3(b)(2)(D).)

Nexus Test

In addition to the materiality standard above, there is also a separate materiality standard which applies in cases where there is a “nexus” between duties owed to a source of income and to the official's public agency. The materiality threshold is understandably much lower when a public official is paid by a private entity to accomplish some action that is within the official's public decision-making authority. The “nexus test” is set out at Regulation 18705.3(c):

“(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.”

The rationale for the nexus test is that when an employee earns a salary to accomplish a purpose that may be advanced by what he or she does as a public official, we presume that the employer is benefiting from the actions of the employee in his or her official capacity. (*Yarnell Advice Letter*, No. A-00-161.) Typically, a “nexus” is found in situations where the official is also a high-level employee with direct influence and control over his or her employer's

management or policy decisions. (*Moser Advice Letter*, No. A-03-147; *Low Advice Letter*, No. A-99-304.)

You are the campaign director for EBASE. You work on projects in the Oakland municipal area involving economic development, specifically projects that have an impact on jobs and the environment. Given EBASE's relatively small size for a nonprofit, and the fact that you are a director, we assume that you have some influence over EBASE's policy decisions. Therefore, you receive a salary from EBASE and you attempt to further the nonprofit's goals of advocating for development projects in the City of Oakland that support "good jobs and healthy communities."

EBASE is considering the Specific Plan and EIR and deciding what position to take on the development. In making this policy determination, EBASE's goals will overlap with your decision-making authority as a Planning Commissioner. Because you receive income to achieve a goal or purpose that would be aided or hindered by the Planning Commission decision the nexus test applies.

Step 6. Is it reasonably foreseeable that the applicable materiality standards will be met?

Under the nexus test, we must examine whether the Planning Commission's decision regarding the Specific Plan and the EIR will have "any reasonably foreseeable financial effect" on EBASE.

Under Regulation 18706(b) the financial effect of a decision is reasonably foreseeable only if the effect is "a realistic possibility and more than hypothetical or theoretical." Under this test, the financial effect does not have to rise to the level of being "likely" before it is "reasonably foreseeable." On the other hand, if the "financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

The facts you have provided indicate that the Planning Commission decision on the Specific Plan and EIR would not affect EBASE's finances in any way. EBASE's budget is primarily funded through grants from foundations that support its philosophy and also by its base of individual small contributors. Your facts indicate that the development project would have no effect on the funding for EBASE or on its fundraising or membership base. Moreover, the Planning Commission's decision on the Specific Plan and EIR would not impact EBASE's budget, financing, salaries paid to employees or in any way impact the organization's financial resources.

We conclude under these facts that you are not precluded from participating in the Planning Commission decisions regarding the Specific Plan and the EIR.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

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