

March 10, 2015

Julia Lew
City Attorney
City of Porterville
1220 West Main Street
Visalia, CA 93291

Re: Your Request for Advice
Our File No. A-15-009

Dear Ms. Lew:

This letter responds to your request for advice, on behalf of Porterville Community Development Project Manager Julie Phillips and Fire Marshal David LaPere, regarding their duties under the conflict of interest provisions of the Political Reform Act (the "Act").¹ Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of fact. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Our advice is limited to the conflict of interest provisions of the Act and does not apply to other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

Are Ms. Phillips and Mr. LaPere prohibited from taking part in decisions regarding a mixed-use project located approximately 460 feet from their residence?

CONCLUSION

Based upon the facts provided, Ms. Phillips and Mr. LaPere may not make, participate in making, or use their positions to influence any decisions regarding the project unless, as detailed below, the decision can be segmented from other decisions relating to the project or the legally required participation exception applies.

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.

FACTS

You are the City Attorney for the City of Porterville and are requesting advice on behalf of Porterville Community Development Project Manager Julie Phillips and Porterville Fire Marshal David LaPere. Porterville is a charter city with a population of approximately 56,000. The five-member City Council is elected at large and the City Council selects a mayor. The day-to-day operations are run and overseen by the City Manager.

Ms. Phillips and Mr. LaPere are married to each other and are both current employees of the City. Ms. Phillips and Mr. LaPere share a residence located in proximity to the mixed-use Pacific Rim CMX Project. Ms. Phillips purchased the residence for \$235,000 before her marriage to Mr. LaPere. Shortly after the purchase, Ms. Phillips and Mr. LaPere married. The down payment on the loan was paid for by the sale of Ms. Phillip's previous home. The title notes that Ms. Phillips owns the property as a single woman and the loan for the residence is in her name alone. However, payments for the outstanding loan balance of approximately \$210,000 are made from a joint bank account.

The Pacific Rim CMX Project received a series of entitlements approved by the City Council in March of 2013, including a mitigated negative declaration to approve a general plan amendment, zone change, parcel map, and conditional use permit for mini-storage. Under the current Master Site Plan, the western one-third of the project will be residential. The easterly property line of Ms. Phillips' and Mr. LaPere's residence is approximately 460 from the westerly property line of the project. Before their marriage, both Ms. Phillips and Mr. LaPere had been involved in making administrative decisions and recommendations to the City Council regarding the project.

Currently, the developer of the project is proposing significant modifications to the original entitlements that will require City Council approval. Responsibilities for Ms. Phillips, if she remains involved in the project, include functioning as the Project planning manager, maintaining her role as delegated chairperson of the Project Review Committee at any meetings, rewriting conditions of approval for the new entitlement, presenting the project with staff recommendations to the City Council for consideration, reviewing building permits, and site visits and inspections. Responsibilities for Mr. LaPere, if he remains involved in the project, include functioning in his role as Fire Marshal; maintaining his role representing the Fire Department on the Project Review Committee, reviewing and rewriting any fire related conditions of approval, reviewing building permits for the initial shell buildings and individual tenant occupancy including sprinkler and exiting plans, visiting and inspecting initial shell buildings and individual tenant occupancy, and overseeing the division that schedules and performs regular fire inspections. Mr. LaPere is the only individual at the City Fire Department trained to serve as Fire Marshal.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest.

Interests from which a conflict of interest may arise are defined in Section 87103. For Ms. Phillips and Mr. LaPere, the only interest that may be implicated by your account of the facts is a potential real property interest in their residence. Under Sections 82033 and 87103(b), an official has an interest in any real property owned directly, indirectly, or beneficially by the public official, or his or her immediate family, if the interest has a fair market value of \$2,000 or more. For purposes of the Act, "immediate family" includes an official's spouse and dependent children. (Section 82029.) Accordingly, Ms. Phillips and Mr. LaPere both have an interest in their residence that may result in a disqualifying conflict of interest.²

Is the Effect of the Decision Reasonably Foreseeable and Material?

Generally, a financial effect is presumed to be reasonably foreseeable if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) If the interest is "not explicitly involved" in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(b).) Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. (Regulation 18702.) The materiality standards for any particular interest are provided in Regulations 18702.1 through 18702.5.

Based upon the facts provided, the real property interests of Ms. Phillips and Mr. LaPere are not explicitly involved in decisions regarding the Pacific Rim CMX Project and a financial effect is reasonably foreseeable only if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. However, the reasonably foreseeable financial effect of a governmental decision on a residential interest in real property is material whenever the governmental decision affects real property located within 500 feet of the property line of the official's property unless the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property. (Regulation 18702.2(a)(11).)

² While you have provided facts suggesting that Ms. Phillips and Mr. LaPere consider their residence Ms. Phillips' separate property, interests in real property include any interest held by immediate family. Mr. LaPere has an interest in the property regardless of whether the residence is Ms. Phillips' separate property.

In this case, the only facts provided is that Ms. Phillips' and Mr. LaPere's residence is approximately 460 feet from a mixed-use project and that the current plan calls for residential development in the western one-third of the project nearest to Ms. Phillips' and Mr. LaPere's residence. Considering the limited information before us, it is difficult to draw any conclusions regarding the potential effect of the decision. For instance, the value of the residence may increase or decrease depending on the scope and nature of the project or the proximity of any particular element of the project. Accordingly, without a more specific description of the project and nature of the community, we do not find sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the officials' property. Ms. Phillips and Mr. LaPere are therefore prohibited from making, participating in making, or using their positions to influence any decisions regarding the Pacific Rim CMX Project unless the decision falls under one of the exceptions discussed below.

Segmentation Exception:

Regulation 18706 permits an agency to segment certain decisions and provides in pertinent part:

“(a) 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.

“(b) For purposes of this regulation, decisions are “inextricably interrelated” when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

Generally, whether or not any particular decision regarding the Pacific Rim CMX Project can be segmented will depend on the nature of the decision. For instance, you have asked about

Mr. LaPere overseeing regular fire inspections. Once the development has been completed, any decisions regarding regular fire inspections would not determine, affirm, nullify, or alter the result of any of the decisions regarding the Pacific Rim CMX Project and could be segmented from other project related decisions. If Ms. Phillips and Mr. LaPere need additional assistance regarding the application of segmentation to any other particular decision, they should seek further advice specifically describing the nature of the decision.

Legally Required Participation Exception:

Regulation 18705(a) permits an official to make or participate in making a decision if legally required and provides:

“A public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision within the meaning of Section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.”

You have indicated that Mr. LaPere is the only individual at the City Fire Department trained to serve as Fire Marshal. To the extent that there is a city ordinance or state statute requiring the Fire Marshall to make a decision and no alternative source of decision, Mr. LaPere may wish to seek additional advice regarding the potential application of the Legally Required Participation Exception.

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

Sincerely,

John W. Wallace
Assistant General Counsel

By: Brian G. Lau
Senior Counsel, Legal Division

BGL:jgl