

February 12, 2015

Thomas D. Jex  
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Re: Your Request for Advice  
**Our File No. A-15-015**

Dear Mr. Jex:

This letter responds to your request for advice of behalf of Wildomar City Councilmember Bob Cashman regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based on the facts presented. In this regard, the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) 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 Section 1090.

### QUESTIONS

1. Do the Act's conflict of interest provisions prohibit Councilmember Cashman from participating in a decision concerning the Wildomar Parks Master Plan as it relates to the Future Park Property, which is within 500 feet of his real property?
2. Do the Act's conflict of interest provisions prohibit Councilmember Cashman from participating in decisions concerning Wildomar's five-year Capital Improvement Plan ("CIP") that relate to the allocation of funds toward the Future Park Property?
3. Do the Act's conflict of interest provisions prohibit Councilmember Cashman from participating in decisions concerning the Parks Master Plan and the CIP that do not relate to the Future Park Property or the allocation of funds to that specific development project?

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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.

## CONCLUSIONS

1. Yes. The Act's conflict of interest provisions prohibit Councilmember Cashman from participating in a decision concerning the Wildomar Parks Master Plan as it relates to the Future Park Property, which is within 500 feet of his real property.

2. Yes. The Act's conflict of interest provisions prohibit Councilmember Cashman from participating in decisions concerning Wildomar's five-year CIP that relate to the allocation of funds toward the Future Park Property.

3. No. Councilmember Cashman may participate in decisions concerning the Parks Master Plan and the CIP that do not relate to the Future Park Property or the allocation of funds to that specific development project under the conditions set forth in Regulation 18709(a).

## FACTS

Councilmember Cashman owns his personal residence within the City of Wildomar (the "City"). Riverside County recently transferred ownership of two parcels of real property to the City for future development of the property as a public park (the "Future Park Property"). A small portion of the Future Park Property is within 500 feet of the Councilmember Cashman's personal residence. Due to the topography of the area, Councilmember Cashman cannot see the Future Park Property from his personal residence. The residential area generally contains large lots and dirt roads.

The City is in the process of preparing a Parks Master Plan. The draft Parks Master Plan contains guidelines for the development of parks citywide. There are guidelines for the development of "community parks," "neighborhood parks," and "tot lots," including such details as park acreage, parking, and the types of recreational amenities that may be included in future parks. The draft Parks Master Plan does not identify specific parcels of real property for the development of future parks or commit the City in any manner to developing any land as a public park. However, the draft Parks Master Plan does include a map that generally identifies the area in the general vicinity of the Future Park Property and Councilmember Cashman's personal residence as the proposed location of a community park.

To date, the City has held "work study" sessions on the Parks Master Plan with the Planning Commission and City Council, as well as public workshops. Councilmember Cashman has not participated in any of the work study sessions or workshops. The final plan is anticipated to come before the Council for adoption in Spring 2015 and Councilmember Cashman would like to participate in the vote and also discuss the Plan with staff prior to its adoption.

Once the Parks Master Plan is adopted, City staff will use the document to create a funding and improvement plan through City build out. The process will also include initial park improvements in a five-year CIP. Staff believes that fiscal year 2015-2016 initial funding and

improvements for a trail and basic amenities for the development of the Future Park Property consistent with the standards for community parks contained in the approved Parks Master Plan will be included within the CIP.

### 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 financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has an interest specified in Section 87103. A public official has a "financial interest" in a government 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).) The Commission has adopted a standard analysis for deciding whether an individual has a conflict of interest under Section 87100.

Your letter eliminates the need to analyze Steps One and Two of the standard analysis: Councilmember Cashman is a public official and you are asking whether he may participate in City Council decisions regarding the Parks Master Plan and CIP, including discussions with City staff and the public. In addition, Step Three (financial interests) is met because you have identified his ownership of real property as the interest that may be financially affected. Accordingly, our analysis concerns whether or not the governmental decisions will have a reasonably foreseeable material financial effect on Councilmember Cashman's real property.<sup>2</sup>

Regulation 18705.2(a) provides the factors to be examined in determining whether the reasonably foreseeable financial effects of a governmental decision are material when applied to a real property interest. Recent regulatory changes modified the 500-foot rule that previously acted as a near absolute prohibition to participation in a governmental decision. The current 500-foot rule now acts as a prohibition unless the Commission provides "written advice allowing an official to participate under . . . circumstances [where] 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 18705.2(a)(11).) Relevant to the current matter are the following paragraphs under Regulation 18705.2(a):

(a) Except as provided in subdivision (c) below, the reasonably foreseeable financial effect of a governmental decision (listed below in (a)(1) through (a)(12)) 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:

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<sup>2</sup> We note that the Commission is currently in the process of revising regulations implementing the conflict of interest provisions of the Act. As part of this revision, the "directly involved/indirectly involved" test in current Step Four has been eliminated for economic interests in real property with surviving elements of the test merged into the materiality test in current Step Five under Regulation 18705.2.

(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

(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. 2. Notwithstanding this prohibition, the Commission may 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.

Initially, we note that Regulation 18706 establishes the test for whether the effect of a government decision on an official's financial interest is "reasonably foreseeable." For an interest that is not explicitly involved in the governmental decision, such as Councilmember Cashman's residential property, subdivision (b) of Regulation 18706 applies. This provision states that, for the effect of a decision to be reasonably foreseeable, the effect need not be likely but only needs to be "recognized as a realistic possibility and more than hypothetical or theoretical . . . ."<sup>3</sup>

Thus, Councilmember Cashman will have a conflict of interest in the government decisions if, considering the three materiality factors identified above, there is a realistic possibility that the decisions will have any measurable financial impact on his property, alter the character of his property by changing traffic patterns or intensity of use on the Future Park Property, or would cause a reasonably prudent person to believe the decision would affect the market value of his real property.

Regulation 18705.2(a)(11) directly applies because Councilmember Cashman's residential property is within 500 feet of the Future Park Property. In addition, because of the magnitude of the proposed community park development project, the two other materiality

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<sup>3</sup> Regulation 18706(b) also provides a non-exhaustive list of six factors as examples that may be considered in the "reasonably foreseeable" determination.

factors identified above also appear to apply. Indeed, according to the draft Parks Master Plan, community parks like the one proposed on the Future Park Property are the largest of the three types of parks, usually ranging from 15 to 40 acres in size. Further, your facts state that the primary purpose of a community park is to “offer active recreational opportunities for use by a larger segment of the population than neighborhood parks,” and that the facilities for these parks often include soccer or baseball fields, amphitheaters and group picnic areas.

There is certainly more than a realistic possibility that the addition of this community park will alter the character of Councilmember Cashman’s property by changing traffic patterns or intensity of use on the Future Park Property. In addition, a reasonably prudent person would likely conclude that the addition of such a park in such close proximity to Councilmember Cashman’s property would impact its market value. Thus, apart from the applicability of Regulation 18705.2(a)(11), it appears that Regulation 18705.2(a)(10) and (12) would both independently apply to prohibit Councilmember Cashman from voting on the governmental decisions related to the Future Park Property.

You have asked whether Councilmember Cashman has a conflict of interest with respect to the adoption of the Parks Master Plan as well as the subsequent CIP. Examining the facts you have presented, it appears that the decisions by the City concerning the adoption of the Parks Master Plan and the subsequent CIP are interrelated. For example, if the Parks Master Plan is adopted, the City will then be called upon to adopt a five-year CIP that will allocate money toward the development of the Future Park Property. On this basis, we would consider any participation by Councilmember Cashman with respect to the Future Park Property as well as any participation by him in CIP to be essentially the same decision for purposes of our analysis.

**“Public Generally” and “Legally Required Participation” exceptions (Regulation 18700(b)(7) and (8)).**

Our analysis provides two ways in which an official who has a conflict of interest in a government decision may nevertheless be permitted to participate in the decision.

The first is known as the “public generally exception.” Under this rule, an official who otherwise has a conflict of interest may participate in a decision if the decision affects the official’s financial interest in “substantially the same manner” as it affects similar interests held by a “significant segment” of the persons in the jurisdiction. (Section 87103; Regulations 18707 and 18707.1.) Regarding residential real property such as Councilmember Cashman’s, the exception only applies if the decision has substantially the same effect on either ten percent or more, or 5,000 or more, of all the property or real property owners in the jurisdiction. (Regulation 18707.1((b)(1)(B) and (2).) You have provided no facts that apply to this inquiry.

The second is known as the “legally required participation” exception. This exception applies only when an official who has a conflict of interest in a decision is legally required to make or participate in the government decision and there is no other legal source who can do so

in the official's place. (See Section 87101 and Regulation 18708.) Again, you have provided no facts indicating that this exception would apply in this matter.

### **Appearances and communications concerning the Future Park Property and the CIP**

Because Councilmember Cashman is disqualified from voting on, participating in, or influencing the governmental decisions described above, following the announcement of the agenda item to be discussed or voted upon but before either the discussion or votes commences, he must: (1) publicly 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)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (2) recuse himself; and (3) leave the room for the duration of the discussion and/or vote on the item(s). (Section 87105.)

However, even when a public official has a conflict of interest, there are levels of participation that are allowed under the Act. The following describes the types of activities in which Councilmember Cashman may participate.

#### *Appearances before the Wildomar City Council.*

Even if a conflict of interest is present, a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her "personal interests." (Regulation 18702.4(a)(2), (b)(1).) Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. An official's "personal interests" includes an interest in real property that is wholly owned by the official or members of his or her immediate family. (Regulation 18702.4(b)(1)(A).)

We assume that Councilmember Cashman's home is wholly owned by him or an immediate family member. Therefore, he may address the Wildomar City Council on the subject topic so long as he avoids giving the impression that he is speaking in the interest of any other person or group, or that he is acting in any official capacity.

#### *Meeting with friends, neighbors, and other members of the community, other than city officials, to rally their support or opposition to the Future Park Property or CIP.*

Regulation 18702.3(a) provides that with regard to a governmental decision that is within or before the official's own agency, or any agency appointed by or subject to the budgetary control of the official's agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency.

The Act does not, however, prohibit Councilmember Cashman from discussing the project generally with friends, neighbors, and other members of the community, even if he does

so in an attempt to rally their support or opposition to the project, unless they are members, officers, employees or consultants of the city. (See *McHugh* Advice Letter, No. 1-98-324; *Root* Advice Letter, No. I-97-397; see also Regulation 18702.4(b)(2).) Furthermore, nothing in the Act prohibits Councilmember Cashman's personal participation in a neighborhood support or opposition group. Also, he is free to encourage friends, neighbors and other members of the community to appear before the Wildomar City Council or other agencies to express their opinions about the project. However, if he asks these individuals to discuss his own opinions about the effect of the project on *his* property with members, officers, employees or consultants of the city, he would be "otherwise attempting to influence" members of the city council or the planning commission. (*Benjamin* Advice Letter, No. A-00-210.)

### **Can the governmental decisions be segmented?**

You also inquire as to whether the two governmental decisions at issue can be segmented so that Councilmember Cashman can vote on those decisions in which he has no disqualifying financial interest. Regulation 18709(a) sets forth the requirements for segmentation of a decision:

(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.

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."

As stated above, we believe the specific decisions concerning the Parks Master Plan as it relates to the Future Park Property and the CIP as it relates to allocation of funding for that project are inextricably interrelated. However, Councilmember Cashman may participate in the remainder of the decisions concerning the Parks Master Plan and the CIP so long as the conditions identified above are met.

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

Sincerely,

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Assistant General Counsel

By: Jack Woodside  
Counsel, Legal Division

JW:jgl