



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 15, 2015

Daniel J. McHugh
City Attorney
P O Box 3005
Redlands, CA 92373

Re: Your Request for Advice
Our File No. A-15-048

Dear Mr. McHugh:

This letter responds to your request for advice on behalf of Mayor Paul Foster and Council member Pat Gilbreath regarding their duties under 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 section 1090.

QUESTION

May Mayor Foster and Council member Gilbreath participate in discussions, deliberations, and actions by the City Council in (1) approving and implementing the ten-year cemetery plan, (2) approving contracts for the physical improvements proposed for the cemetery, and (3) approving contracts relating to staffing of the cemetery despite holding certificates to plots at the cemetery.

CONCLUSION

Mayor Foster and Council member Gilbreath may not participate in discussions, deliberations, and actions by the City Council in (1) approving and implementing the ten-year cemetery plan, (2) approving contracts for the physical improvements proposed for the cemetery, and (3) approving contracts relating to staffing of the cemetery because they hold certificates to plots at the cemetery.

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

The City of Redlands has established, owns, and operates a public cemetery. The City sells burial plots at the cemetery to any member of the public who wishes to purchase the same. Mayor Foster and Councilmember Gilbreath have purchased plots within the cemetery. Purchasers of plots within the cemetery are not granted a deed or any other recordable document which evidences ownership of the plot. Rather, the City provides the purchaser with a "Certificate of Ownership" which in relevant part states "[t]hat this conveyance, and all right title and interest hereby conveyed in the property above described is, and at all times shall be, limited to a right of human interment only therein...."

Mayor Foster purchased his plot for the amount of \$4,110.68 in May of 2013. Council member Gilbreath purchased her plots for the amount of \$5,319.62. The present sales price for a basic plot is \$2,100. Prices for other plots increase from that amount. You confirmed in a correspondence on April 10, 2015 that the Council members' respective interests in their plots can be resold.

The cemetery is an underperforming asset of the City and operates annually at a deficit. The City is undertaking a study of the cemetery's operations and a comprehensive report has been prepared which proposes to establish a ten-year plan whereby certain funds would be used to make significant physical improvements to the cemetery and its staffing and operations to increase revenues to the cemetery and enhance its value.

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 one or more of the public official's interests as set forth in Section 87103. Thus, the first issue in your question is how to characterize your Council members' interest in their cemetery lots.

Interest in Real Property: Section 82033 defines "interest in real property" to include "any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more. Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater."

In *The Hollywood Cemetery Association v. N. T. Powell* (1930) 210 Cal. 121, 127, the California Supreme Court characterized an interest in a cemetery plot as follows:

“[T]he holders of the various lots are not owners in fee. The deeds executed to purchasers contain the following provision: ‘To Have and to Hold unto the said grantee and to his heirs and assigns, for the purpose of Sepulture only, and subject to the rules, regulations and By-Laws of said association, now existing, or which may be by it hereafter passed and adopted.’ The Rules and Regulations provide among other things that all grading, landscape work and improvements of any kind shall be done only by the association; that subdivision of lots is not allowed; that no one but the grantee or a relative may ordinarily be buried therein; that interments are to be made under the supervision of the association; that lot owners are admitted only by tickets which they must secure from the association; that graves, monuments and other structures must be made in accordance with plans approved by the association. It has been very generally held that the conveyance of a cemetery lot does not vest the purchaser with title, but merely with the right of burial, which is sometimes considered an easement, and sometimes a mere license.”

In *Pomona Cemetery Association v. Board of Supervisors of the County of Los Angeles* (1942) 49 Cal.App.2d 626, 630, the Court of Appeal further clarified the Supreme Court decision:

“The general rule is that the transfer of a cemetery lot does not convey title, but merely an interest to be used exclusively for the purpose indicated, namely, burial. [Citation omitted] The distinction between an assessment on physical property and upon interment rights is not important in determining a particular claim of exemption. It is the right of interment which gives the space value, since the dedicated land may not be used for other than cemetery purposes.”

Section 82033 has been construed to include easements. (See e.g. *Joehnck* Advice Letter, A-87-322.)

In *Fisher v. General Petroleum Corporation* (1954) 123 Cal. App. 2d 770, 776-777, the court distinguished a mere license from an easement:

“A license in respect to real property is ‘an authority to do a particular act or series of acts on another’s land without possessing any estate therein.’ Such a license is defined as a personal, revocable and unassignable privilege conferred either by writing or parol to do one or more acts on land without possessing any interest therein. It is an authority to do a lawful act which without it would be unlawful and while it remains unrevoked is a justification for the acts which it authorizes to be done. It confers upon the licensee no interest in the premises. It is a mere personal privilege. (See cases cited in 16 Cal.Jur. (1924) Licenses, § 60, p. 277.)

“Applying the foregoing rule to the document in the instant case it is clear that the right of way agreement from General Petroleum to Southern California Gas Company created a license and not an ‘easement’ as claimed by plaintiff. The gas

company acquired no permanent interest in the land because it was given no more than a mere personal privilege to lay its pipe line across the premises of General Petroleum revocable for default in the performance of the terms of the agreement and subject to the condition that defendant General Petroleum Corporation, upon 60 days' notice could require a change or relocation of the right of way without reimbursement. Clearly the gas company acquired no permanent interest in the realty, but merely a right of way which constituted a privilege to pass over defendant General Petroleum's land. (Cf. *County of Alameda v. Ross*, 32 Cal.App.2d 135, 143 [89 P.2d 460].)”

When applying the analysis applied in *Fisher* to the standard certificate enclosed with your letter, we conclude that the interest held by the Council members is an easement and an “interest in real property” subject to Section 87100 and 87103.

Foreseeability and Materiality: Generally, the reasonably foreseeable financial effect of a governmental decision is material whenever the governmental decision:

“(6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to or received by other similarly situated properties in the official’s jurisdiction or where the official will otherwise receive a disproportionate benefit or detriment by the decision;

* * *

(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official’s real property. 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;...”

You stated the City proposes to make significant physical improvements to the cemetery and its staffing and operations to increase revenues to the cemetery and enhance its value. Decisions to approve and implement the ten-year cemetery plan, approve contracts for the physical improvements proposed for the cemetery, and approve contracts relating to staffing of the cemetery all would appear to be decisions that will materially affect the real property interests of the officials in question.

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

Sincerely,

Hyla P. Wagner
General Counsel

By: John W. Wallace
Assistant General Counsel

JWW:jgl