



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 30, 2015

D. Wayne Leech
Leech & Associates
11001 East Valley Mall, Suite 200
El Monte, CA 91731-2620

Re: Your Request for Advice
Our File No. A-15-057

Dear Mr. Leech:

This letter responds to your request for advice on behalf of Gary Boyer, a councilmember for the City of Glendora, regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ This advice applies only to the conflict of interest provisions of the Act and not to other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. 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.)

QUESTIONS²

May Councilmember Boyer participate in city council decisions to:

1. Impose an annual assessment on businesses in the Glendora Village Business Improvement District (the “District”)?
2. Approve the funding of programs and activities the District’s Advisory Board recommends?
3. Disestablish the District?
4. Appoint members to the Advisory Board?

CONCLUSIONS

1 – 4 Yes. These decisions will not have a reasonably foreseeable material financial effect on Councilmember Boyer’s interests.

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 We have combined and restated your questions to simplify our analysis.

FACTS

The city established the District by ordinance in 2009 pursuant to Section 36500 et seq. of the California Streets and Highway Code. The city levies assessments on businesses in the District to be used to promote member businesses and events, diversify and strengthen the mix of businesses, and improve the overall market conditions within the District. Under the Streets and Highway Code, “improve” means the acquisition, construction, installation, or maintenance of any tangible property with an estimated useful life of at least five years and may include parking facilities, parks, fountains, street lighting, decorations, benches, and trash receptacles.

The District markets and promotes public events such as the annual Chalk Walk, Taste of the Village, Holiday Stroll and a Halloween event. The improvements and activities are meant to bring more foot traffic into the area to increase the customer base and profitability of area businesses. There are approximately 236 businesses in the District with approximately two-thirds consisting of stores, restaurants, and personal services and the rest consisting of medical, insurance, and real estate services.

Annual assessments range from zero to \$600 depending on the type and location of the business. Of the approximate 236 businesses in the District, 94 pay no assessment and about 142 pay an assessment ranging from \$100 to \$600. The city council, which approves the assessments each year, is authorized to modify the District by changing its boundaries, changing the basis and method of levying the assessments, reviewing the classification of businesses subject to the assessment, and to disestablish the District. To impose the annual assessments, the city council first receives the Advisory Board’s annual report, which sets forth its recommended assessments, improvements, and activities for the upcoming year. After public meetings, the city council votes to approve the report and establish the assessment.

Councilmember Boyer owns a real estate brokerage firm, Southland Properties Real Estate Services. Southland leases an office in the District under a lease that expires in 2019. His interest in Southland is greater than \$2,000. The advisory board has proposed a \$500 assessment for Southland. Real estate agents and independent contractors that work in Southland’s office also pay an assessment.

Councilmember Boyer previously owned a loan mortgage business, Heartland Mortgage, which he sold to Gateway Funding, a Pennsylvania bank. The business is located within the District. Gateway assumed Heartland’s lease and maintains the office as a branch office. Gateway has paid \$40,000 for the business and, in addition, will pay 25% of any future profits up to \$3,000 per month. Under the agreement, Gateway employs Councilmember Boyer’s daughter-in-law who runs the office. Neither Councilmember Boyer nor his business receives any income from his daughter-in-law. The proposed assessment on Gateway is \$500.

Councilmember Boyer’s adult son owns a construction business that uses Southland’s offices as a mailing address at no charge. Neither Councilmember Boyer nor Southland receives income or other economic benefit from the construction business. The business is also subject to the District’s annual assessment.

ANALYSIS AND CONCLUSIONS

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. 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 official’s interests. (Section 87103.)³ Interests from which a conflict of interest may arise are defined in Section 87103 and include the following:

1. Any real property in which the public official has a direct or indirect interest worth \$2,000 or more. (Section 87103(b).)

A real property interest includes a leasehold interest in real property. (Section 87103(b).) Councilmember Boyer has a real property interest in the property his business is leasing.

2. Any business entity in which the public official has a direct or indirect investment worth \$2,000 or more, (Section 87103(a)), or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)

Councilmember Boyer has an investment of \$2,000 or more, and holds a management position in Southland. Therefore, he has a business entity financial interest in Southland.

3. Any source of income from which the official received income, including commission income, aggregating at least \$500 within 12 months prior to a governmental decision. (Section 87103(c).)

Councilmember Boyer has three sources of income: his business, commission income from real estate transactions described in Regulation 18701.1 and Gateway.⁴

Councilmember Boyer does not have a business entity or source of income financial interest in his son’s business.

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 economic interest involved in the decision as well as details of the economic interest 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. (Section 87105; Regulation 18707.)

⁴ Under subdivision (c)(1), “commission income” means gross payments received by a public official as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. Subdivision (c)(2)(B) further provides that for real estate brokers, the source of commission income is limited to (i) the person the broker represents in the transaction, (ii) a person represented by an agent working under the broker's auspices, (iii) any broker business entity through which the broker conducts business, and (iv) any person who receives a finder’s fee or referral fee for referring a party to the transaction to the broker or makes a referral pursuant to a contract with the broker. Generally, a real estate broker representing only the seller in a transaction does not typically have an interest in the buyer.

MATERIALITY

Real Property

Recently revised Regulation 18702.2 provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on real property in which an official has a financial interest is material. As relevant to Councilmember Boyer's facts, the financial effect will be material if the decision will:

- (1) Change the termination date of the lease;
- (2) Increase or decrease the potential rental value of the property;
- (3) Increase or decrease the rental value of the property, and the official has a right to sublease the property;
- (4) Change his actual or legally allowable use of the property;
- (5) Impact his use and enjoyment of the property.

The only factor that might apply to the facts is an increase or decrease in the potential rental value of the property. You state that the lease expires in 2019 and, presumably, the lease agreement defines the amount of monthly rent payable for the remaining term. Thus, it would be four years before Councilmember Boyer would feel the impact of any changes in the leasing market. We do not believe that the District's improvements and activities would materially affect his lease.

Business Entity and Source of Income that is a Business Entity

Regulation 18702.1, sets forth the standards for determining whether the reasonably foreseeable financial effect of a governmental decision on a business entity (including a business that is a source of income⁵) is material.

The materiality standard that applies to Southland and Gateway appears in Regulation subdivision (b), which provides that the financial effect is material only if "a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the . . . value of a privately-held business entity."

In determining whether the District's activities will have a material financial effect on the value of Southland or Gateway, we recognize that many factors contribute to the value of a small business. These include the general economy, company's revenues, profits and potential for future growth. In addition, other factors can be expected to contribute to the value of real estate businesses, including mortgage brokerages. These are the real estate market, interest rates, competition, advertising, and quality of listings. Real estate brokerages might benefit somewhat from increased foot traffic but more important sources of new business are word-of-mouth and the firm's advertised listings. The same can be said for mortgage brokerages because they depend primarily on referrals from real estate brokers and agents for their business. The types of activities the District engages in are more likely to increase the business of restaurants, retail, and personal

⁵ Under Regulation 18702.3, the materiality standard for a source of income that is a business entity is the same as for an interest in the business entity itself.

services establishments.⁶ Therefore, it does not appear to be reasonably foreseeable that decisions involving the District's assessments will have a material financial effect on the value of Councilmember Boyer's interests.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

⁶ We note that in other cases, where all of the members of a District were in the same business, we advised that a city council member who owned a bed-and-breakfast establishment could not vote on decisions involving the Tourism Business District's assessments on lodging businesses. (*Pierik*, Advice Letter No. A-15-003.)