



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 24, 2015

Ernest Schmidt
Planning Commissioner
2816 Jefferson Avenue
Redwood City, CA 94063

Re: Your Request for Advice
Our File No. A-15-108

Dear Mr. Schmidt:

This letter responds to your request for advice regarding your duties as a Redwood City Planning Commissioner 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 you participate in a decision regarding the 601 Marshall Project that would reduce the square footage available for other development in the Downtown Precise Plan ("DTPP") area, affecting an application submitted by your employer?

CONCLUSION

No. Because the decision on the 601 Marshall Project would affect your employer's development application, you will have a conflict of interest in the 601 Marshall Project decision.

FACTS

You have been a Redwood City Planning Commissioner since 2009. You are also employed by a private business that owns a property within the DTPP area. Development in the DTPP is subject to a Maximum Allowable Development ("MAD") limit. According to a staff report about the DTPP MAD prepared by the City Manager (September 22, 2014):

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.

“The DTPP establishes MAD for the following categories of development: residential, office, retail, and lodging. The MAD allocation numbers were primarily based on economic conditions at the time. Similar numbers are also reflected in the City’s General Plan. It is important to note that this is a building permit maximum, not a zoning (planning stage) maximum. This can be problematic for applicants when a number of planning applications are submitted at approximately the same time. This occurred with the most recent phase office development applications. The City received five (5) office applications totaling approximately 489,000 square feet in August 2014. City staff is also aware of another office development (approximately 100,000 sf) that may be submitted within the next two months, as well as a small office expansion that may be proposed in the near future. If all these planning applications were approved, there would insufficient room left under the MAD limitations to issue building permits for all of the projects.”

In an upcoming Planning Commission meeting, the Planning Commission will be considering the 601 Marshall Project. The 601 Marshall Project is in the DTPP and subject to MAD. A business entity owned by your employer is also an applicant seeking approval of a project in the DTPP that will be subject to the MAD parameters. Your city attorney has advised that because of the MAD limit, the decision on any other office project, including 601 Marshall, would necessarily affect the MAD of office square footage available within the DTPP and consequently affect your employer’s development application.

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.) Section 87103 defines interests from which a conflict of interest may arise. They include the following:

- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

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.

- *Foreseeability*: The standard for foreseeability differs depending on whether an interest is *explicitly* involved in the decision. Regulation 18701 provides: “A financial effect ... is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency.”

- *Materiality:* For purposes of materiality, Regulation 18702.1(a) provides that the effect is material whenever the business entity initiates the proceeding in which the governmental decision will be made by filing an application, claim, appeal, or request for other government action concerning the business entity.

Your Employer's Application: In the case of your employer's application, both the foreseeability and the materiality standards are met. Thus, you will have a conflict of interest in that decision. Section 87100 prohibits a public official from making, participating in making or in any way attempting to use his or her official position to influence a governmental decision in which the official has a conflict of interest. In addition, when an official holds an office specified in Section 87200 (including Planning Commissioners) then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of 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.)

601 Marshall Project and other DTPP MAD decisions: Having concluded you have a conflict of interest in your employer's application, note that Regulation 18706(b) also presumes that you have a conflict of interest in decisions that are "interrelated" to the decision in which you have the conflict. Regulation 18706(b) provides that: "decisions are 'inextricably interrelated' when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision." In other words, you also have a conflict of interest in any decision (such as the 601 Marshall Project) that may determine, affirm, nullify, or alter a decision in which you have a conflict of interest (such as on your employer's application). Because the decision on the 601 Marshall Project would necessarily affect the MAD of office square footage available within the DTPP for your employer's development application, you have a conflict of interest as to both.

However, once your employer's application has been finally determined, you may be able to participate in all future applications so long as the decision does not result in a reopening of, or otherwise financially affect, your employer's application. Regulation 18706(a) provides:

"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.”

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: John W. Wallace
Assistant General Counsel
Legal Division

JWW:jgl