



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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June 22, 2020

Christopher J. Diaz  
City Attorney  
Town of Hillsborough  
Best Best & Krieger LLP  
2001 N. Main Street, Suite 390  
Walnut Creek, CA 94596

Re: Your Request for Advice  
**Our File No. A-20-039**

Dear Mr. Diaz:

This letter responds to your request for advice on behalf of Hillsborough Town Councilmember Jay Benton regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> 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. Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

### QUESTION

Given that Councilmember Benton is an equity member of the Burlingame Country Club (“BCC”), do the Act’s conflict of interest provisions prohibit the Councilmember from taking part in governmental decisions relating to a proposed project to improve a pathway located on BCC real property (the “Pathway Project”)?

### CONCLUSION

Yes. The Act’s conflict of interest provisions prohibit the Councilmember from taking part in decisions relating to the Pathway Project because it is reasonably foreseeable that those decisions would have a material financial effect on the Councilmember’s financial interest in BCC’s real property based on the facts presented.

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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 (the “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 AS PRESENTED BY REQUESTER

You are the authorized representative of Hillsborough Town Councilmember Jay Benton. The Councilmember is an equity member of BCC, a nonprofit club owned by its members that operates a private country club and golf course located in the Town. You assume the value of a BCC membership is more than \$2,000. Each BCC member owns an equity share of BCC that is nontransferable and reverts to BCC upon the member's resignation or death. If BCC members decide to close BCC and liquidate BCC's real property, however, each member would receive a pro rata share of the proceeds of the liquidation. That said, BCC has existed since 1893, and its finances are healthy.

There is an unimproved, unpaved, dirt walking path on BCC real property that borders Eucalyptus Avenue on one side, and BCC's fence line adjacent to the golf course on the other side. The walking path is publicly accessible and is in a location where a sidewalk would normally be if the Town had sidewalks in this location. The Pathway Project would improve the pathway and add some vegetation to the surrounding area. The improved pathway would be approximately five feet wide and would extend for a block along Eucalyptus Avenue.

The Town and BCC will execute a right-of-access agreement, in which BCC authorizes the Town to access the pathway to conduct a feasibility study for the Pathway Project. One June 10, 2020, you confirmed that the Councilmember has not participated in the making of the agreement or in any other decisions relating to the Project to date. If the Town determines the Project is feasible, the Town Council will consider the Project's design and scope, and the Town will pursue compliance with the California Environmental Quality Act. The Town Council will then review the Project for final approval. If the Town Council approves the Project, it will then award a contract for the Project's construction.

### ANALYSIS

The Act's conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) Section 87103 identifies an official's interests that may give rise to a disqualifying conflict of interest under the Act. We examine the nature of Councilmember Benton's financial interests relating to his membership in BCC below.

The first issue we address is whether the Councilmember has a business interest in BCC. The Commission has determined that club memberships can be an investment in a business entity. (*Gee* Advice Letter, No. A-17-249; *Torres* Advice Letter, No. A-17-193.) Where the membership is in a "business entity" as defined in the Act, the membership has a \$2,000 value or more, and the membership may be resold for a profit or loss, we have advised that the membership should be treated as an investment in a business entity. (*Ibid.*) Section 82005, however, defines a "business entity" as "any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association."

Because BCC is nonprofit club owned by its members, it is not a “business entity” under Section 82005. Furthermore, a BCC member’s equity share in BCC is nontransferable and reverts to BCC upon the member’s resignation or death. Consequently, the Councilmember does not have a business interest in BCC within the meaning of Section 87103(a).

We next consider whether the Councilmember has a real property interest in BCC’s real property. Section 87103(b) provides that an official has a real property interest in any real property in which the official has a direct or indirect interest worth \$2,000 or more. Section 87103(b) Section 82033 defines “interest in real property” as follows:

[A]ny 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 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 *Doering* Advice Letter, No. A-12-068, we found that an official with a proprietary membership in a country club, a nonprofit corporation registered as a 501(c)(7) nonprofit mutual benefit organization, had a real property interest in the club’s real property. Because the proprietary members of the club had an equitable right of ownership to the club’s real and personal property, they were entitled to a proportionate share of the value of the club’s assets if the club were to be dissolved. (See also *Gee* Advice Letter, *supra*.) In *Doering*, we stated: “it is clear that, particularly when the resale value of a club membership is determined at least in part by the value of the club’s real estate, the members have at least a beneficial interest in that real estate.”

If BCC members decided to close BCC and liquidate BCC’s real property, each BCC member would receive a pro rata share of the proceeds of the liquidation. And you assume the Councilmember’s BCC membership is worth more than \$2,000. Therefore, the Councilmember’s BCC membership constitutes an “interest in real property” under the Act.

Finally, we consider whether the Councilmember has an interest in his personal finances with respect to the decisions at issue. An official always has an interest in his or her personal finances and those of immediate family members. (See Section 87103.) Therefore, the Councilmember has an interest in his personal finances with respect to those decisions.

#### Foreseeability and Materiality

Regulation 18701(a) provides that a governmental decision’s financial effect on an official’s financial interest is presumed to be reasonably foreseeable if the official’s interest is “explicitly involved” in the decision; an official’s interest is “explicitly involved” if the interest is a named party in, or the subject of, the decision; and an interest is the “subject of a proceeding” if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest. In addition, an official’s real property interest is

explicitly involved in any decision affecting the real property as described in Regulation 18702.2(a)(1) through (6).

The materiality standard applicable to a decision's effect on an official's personal finances is set forth in Regulation 18702.5, and subdivision (c) of that regulation provides that if the decision would have a reasonably foreseeable financial effect on the official's real property interest, any related effect on the official's personal finances is not considered separately, and the effect is only analyzed under Regulation 18702.2.

As pertinent to the facts presented, Regulation 18702.2(a) provides that a decision's reasonably foreseeable financial effect on an official's real property interest is material whenever the decision:

(6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel will receive new or improved services that provide a benefit or detriment disproportionate to other properties receiving the services;

The Pathway Project would improve the pathway on BCC real property, which runs between BCC's fence line adjacent to the golf course and Eucalyptus Avenue, add vegetation to the surrounding area. Other real properties located across Eucalyptus Avenue from BCC's real property are likely to benefit from aesthetic improvements to the pathway, especially in light of the pathway being publicly accessible. However, it appears likely that the Project would provide BCC's real property a disproportionate benefit compared to real properties located across Eucalyptus Avenue because the pathway is located on BCC Real Property.

Therefore, the Councilmember's real property interest is explicitly involved in decisions relating to the Pathway Project, and it is reasonably foreseeable that those decisions would have a material financial effect on BCC's real property under Regulation 18702.2(a)(6). Accordingly, the Act prohibits the Councilmember from taking part in those decisions.<sup>2</sup>

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

Sincerely,

Dave Bainbridge  
General Counsel

*Matthew F. Christy*

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<sup>2</sup> Regulation 18702.5(a) sets forth the materiality standard applicable to a decision's effect on an official's interest in his or her personal finances. Regulation 18702.5(c), however, provides that if the decision would have a reasonably foreseeable financial effect on the official's real property interest, any related effect on the official's personal finances is not considered separately, and the effect is only analyzed under Regulation 18702.2. Because we have already determined that the decisions at issue would have a disqualifying effect on the Councilmember's financial interest in BCC's real property, we do not further analyze the Councilmember's interest in his personal finances.

By: Matthew F. Christy  
Counsel, Legal Division

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