



FAIR POLITICAL PRACTICES COMMISSION

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**Re: Your Request for Advice
Our File No. I-99-172**

Dear Ms. Battersby:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ Because your questions are general in nature, this letter constitutes informal advice. (Regulation 18329(b)(2)(B).)² Please bear in mind that nothing in this letter should be construed as evaluation of any conduct that has already occurred.

QUESTIONS

To what extent, if any, would the Act limit councilman Jan Button's participation in decisions involving the Chapman Heights Development Project if he places a deposit towards purchase of a residence in that project? Would his obligations under the Act change after he has purchased the property?

CONCLUSIONS

Councilman Button would presumably acquire a purchase option on a parcel of real property once he pays a deposit towards purchase of a residence in the project area. An option is an interest in real property fully sufficient to create a disqualifying conflict under the Act's conflict of interest provisions. Exercise of the option would not change or increase his obligations under the Act. However, it is not possible at this time to determine whether Councilmember Button would indeed have conflicts of interest in the decisions you describe.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

Without knowing the specific location of the property on which Councilmember Button intends to acquire his purchase option, or the relative location of other properties involved in those decisions, it is not possible to determine either the correct materiality standards governing the decisions you reference, or the foreseeability of any material financial effects on Councilmember Button's anticipated property interest.

FACTS

Councilman Jan Button has served on the City Council of the City of Yucaipa since 1996. Prior to his election, the Chapman Heights Development Project ("the project") was approved by the city. The project includes a master planned community consisting of twenty residential subdivisions totaling about 2,100 units on approximately 1,000 acres, with some commercial development and a golf course. The project was originally approved by the city council in April of 1991, and was subsequently revised in April of 1994. In addition to a Specific Plan, a Development Agreement has also been approved by the Yucaipa City Council. These project approvals set guidelines for the number of units, the amount of open space, major public improvements, and basic concepts for residential and commercial design.

Ground was broken during the summer of 1998. Mello-Roos financing has been placed on the project, substantial improvements have been initiated, and in some cases completed, and the first final subdivision map has been approved by the city council. The project has progressed to the point where permits have been issued for the construction of the first model homes. Sales of the first houses in the first subdivision will begin shortly. Councilmember Button is considering placing a deposit for the purchase of one of these homes.

Although the basic project guidelines have been established through the Development Agreement and related city council actions, there are a number of actions that are contemplated prior to the completion of the project, which is expected to build out over the next seven to ten years. These actions include, but are not limited to the following:

1. Approval of further subdivision maps. At this time 6 of a total of 20 subdivision maps have been conditionally approved, and one (1) has received final approval for recordation. Tentative subdivision maps are approved and conditioned by the city's planning commission, subject to any appeals (by the developer or the public), which would be decided by the city council. Final maps are approved by the city council for recordation, and are generally considered ministerial actions where the City Engineer recommends approval and has certified to the city council that the tentative map conditions have been satisfied and appropriate subdivision improvement agreements executed. Approximately nine tracts surround and will be within 2500 feet of the subdivision in which Councilmember Button proposes to purchase a home.

2. Approval of public infrastructure financing which would result in assessments placed on the benefitted properties. The city has created a Mello-Roos financing district to provide for certain public infrastructure improvements for the project. The maximum tax rate for each unit has been established by the city council. It is expected that additional financing will be sought by the developer and, depending on conformity with the city's guidelines, such financing could be approved by the city. The city council earlier approved infrastructure financing for the project on split votes. If public financing for remaining infrastructure is not approved by the city council, project progress and/or viability could be affected. If future financing of infrastructure is denied, the total assessment or tax per unit would not increase, and would likely result in a benefit to properties which had already been sold at the time of the denial. If future financing requests are approved by the city council, existing residents could be assessed up to the maximum rate allowed. Each purchaser within a tract is advised in writing of the maximum tax rate and approved rate at the time of purchase.
3. The city may be requested to consider amendments to its development standards for the project, discretionary decisions which may affect the quality of the project.
4. The city may be requested to accept easements for drainage and/or roads for the benefit of the project. City council action would also be required for the acquisition of offsite easements for grading, fuel modification, and various flood control improvements.
5. The city may be requested to approve a subdivision sign location plan, which may involve some reimbursement to the city for the use of city right-of-way, limited only to the project area. This sign location plan could affect the marketing of the project.
6. The city reviews its development impact fees every year. Included in this review is a specific review of the project fees in relation to the costs of public improvements that have been constructed versus their originally projected costs. This comparison ultimately results in the need to adjust the fees that are in place. The adjustment of these fees will require city council approval. While development impact fees are collected prior to occupancy, the amount of these fees may impact the cost of new residential units.

ANALYSIS

Your questions implicate the Act's conflict of interest provisions, which prohibit public officials from making, participating in making, or in any way attempting to use their official position to influence a governmental decision in which they have a financial interest. (Section 87100.) As a member of the city council, Councilmember Button is a public official governed by these provisions of the Act. (Section 82048.)

The prohibition of Section 87100 applies to specific conduct—making, participating in making, or using one’s official position to influence a decision. (Regulations 18702.1-18702.4.) For example, a councilmember “makes a governmental decision” when, among other things, he or she votes on a matter, obligates or commits the city to any course of action, enters into any contractual agreement on behalf of the city, or determines not to do any of those things. (Regulation 18702.1.) Participation by a councilmember in the city council “actions” described in the numbered paragraphs above would appear to be conduct regulated by Section 87100.

To determine whether Councilmember Button might have a conflict of interest in any of the decisions you describe, we must first decide whether Councilmember Button has a financial interest in these decisions. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on (among other enumerated economic interests) any real property in which the official has a direct or indirect interest worth \$1,000 or more in fair market value. (Section 87103(b); Regulation 18703.2.) Under Section 82033:

“‘Interest in real property’ includes 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 one thousand dollars (\$1,000) or more.” (Emphasis added.)

If Councilmember Button pays a \$2,000 deposit to reserve one of the homes to be built in the project, he will presumably acquire an option on that property.³ Section 82033 includes an option within its definition of “interest in real property.” We assume that this option is valued at \$1,000 or more, if its market price is \$2,000. Accordingly, such a deposit would establish an economic interest in the subject property. Councilmember Button may acquire “more” of an interest after he has fully paid for the property and received legal title, but the economic interest that triggers the Act’s conflict of interest provisions is created once the deposit is paid in return for an enforceable purchase option.

After an official identifies an economic interest, he or she must still determine whether it is “reasonably foreseeable” that the decision(s) in question will have a material financial effect on that interest. First, the official decides whether the economic interest is directly or indirectly involved in the decision. Having established the degree of involvement, the official can identify

³ We do not have any information on the details of any “deposit agreement,” so it is not possible for us conclusively to establish the legal effect of the proposed arrangement. We are assuming that, for the consideration of \$2,000, Councilmember Button would acquire a right, enforceable for some period of time, to purchase a specific property at a price either fixed by the agreement or determinable from some formula disclosed therein. Any such arrangement would constitute an “option” on that property. See, e.g. *Nattress & Associates v. CIDCO et al.* (1986) 184 Cal.App.3d 55, 66-67, and cases cited therein.

the materiality standard appropriate to the circumstances. The official then knows what financial effect would be considered "material" under the Act. Finally, the official decides whether such a material financial effect is a "reasonably foreseeable" consequence of the decision(s) at issue.

Real property is directly involved in a decision if the decision involves, among other things, the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of that property. (Regulation 18704.2(a)(2).) The specific parcel in which Councilmember Button is poised to acquire an interest would seem to be directly involved in many of the decisions you describe. However, it is possible that not all parcels within all subdivisions would be directly involved even in decisions in which "the project" is directly involved. For example, Councilmember Button's economic interest would not be directly involved in decisions on maps for subdivisions other than the one in which his property is located. Every decision must be examined separately to determine whether or not Councilmember Button's economic interest (the specific parcel in which he has an interest) is directly involved.

If real property is not directly involved in the decision, it is indirectly involved for purposes of determining materiality. (Regulation 18702.4(b).) The distinction between direct and indirect involvement is important inasmuch as it determines the standard of materiality — the point at which a foreseeable financial effect requires disqualification. When real property is directly involved in a decision, *any* reasonably foreseeable financial effect is deemed material. (Regulation 18705.2(a).)

For real property interests indirectly involved in a decision, the materiality standard is set by Regulation 18705.2(b), as follows:

- "(1) The effect of a decision is material as to real property in which an official has a direct, indirect or beneficial ownership interest (not including a leasehold interest), if any of the following applies:
- (A) The real property in which the official has an interest, or any part of that real property, is located within a 300 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no financial effect upon the official's real property interest.
 - (B) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or substantially improved services.
 - (C) The real property in which the official has an interest is located outside a radius of 300 feet and any part of the real property is located within a radius of 2,500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the decision and the decision will have a reasonably foreseeable financial effect of:

- (i) Ten thousand dollars (\$10,000) or more on the fair market value of the real property in which the official has an interest; or
- (ii) Will affect the rental value of the property by \$1,000 or more per 12 month period.”

Subdivision (b)(2) goes on to provides rule for properties located further than 2,500 feet from any project boundary, a situation which might or might not arise in connection with Councilmember Button’s property interest. As you can see, before determining which materiality standard to apply when a property interest is indirectly involved in a decision, it is essential to know the nature of each particular decision, the specific location of the property directly affected by the decision, and of the property on which Councilmember Button holds his option. However, once these facts are known, determination of the appropriate materiality standard is a straightforward exercise.

Having established what effect (from a given decision) would be material (to a given financial interest), it is then necessary to determine whether such an effect is “reasonably foreseeable.” An effect of a decision is considered “reasonably foreseeable” if there is a substantial likelihood that the effect will occur. Certainty is not required, but the effect must be more than a mere possibility. (*Downey Cares v. Downey Community Development Comm.* (1987) 196 C.A.3d 983, 989.) Thus if there is a substantial likelihood of *any* financial effect on Councilmember Button’s property interest when it is *directly* involved in a decision, Councilmember Button may not make, participate in making, or use his official position to influence that decision. The same result obtains when the economic interest is *indirectly* involved in a decision, if there is a substantial likelihood of a \$10,000 change in the value of property interest, or if any of the other criteria of Regulation 18705.2(b) are met — always excepting circumstances where it can be shown that any effect on his economic interest will not be distinguishable from the effect on the public generally,⁴ or unless his participation in a decision is legally required.⁵

Without knowing the specific location of the property on which Councilmember Button intends to acquire his purchase option, it is not possible to determine either the materiality standards that govern the decisions you reference, nor the foreseeability of material financial effects on Councilmember Button’s property interest. When this information becomes available, however, we trust that you will be able to apply the law outlined herein to the pertinent facts. To the extent that it was unclear whether payment of a deposit would give rise to obligations under

⁴ Public officials with financial interests that will be materially affected by a decision may still participate in the decision if the effect on their interests is not distinguishable from the effect on the public generally. For the “public generally” exception to apply, a decision must affect the official's interests in substantially the same manner as it would affect the economic interests of a significant segment of the public. (Regulation 18707.)

⁵ Section 87101 permits an official who is otherwise disqualified from making a governmental decision to participate in the decision when the official’s participation is legally required. The rule does not apply when there is an alternative source of decisionmaking consistent with the statute authorizing the decision. (Regulation 18708.)

the Act's conflict of interest provisions, the answer should by now be clear, assuming that Councilmember Button receives a purchase option in return for his deposit.

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Lawrence T. Woodlock
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