



FAIR POLITICAL PRACTICES COMMISSION

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April 9, 2004

George H. Eiser, III, City Attorney
City of National City
Office of the City Attorney
1243 National City Boulevard
National City, CA 91950-4301

**Re: Your Request for Advice
Our File No. A-04-033**

Dear Mr. Eiser:

This letter is in response to your request on behalf of National City Mayor Nick Inzunza for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that the Commission does not provide advice relating to past conduct. (Regulation 18329(b)(8)(A).)

QUESTIONS

1. May Mayor Inzunza participate in decisions regarding the following actions pertaining to property located within 500 feet of his leased residence?
 - a. Conversion to condominiums of a Red Lion Hotel?
 - b. Construction of a new motel?
 - c. Remodeling and expansion of Trophy Lounge?
 - d. Approval of a specific plan for the downtown area?
 - e. Making the H & M Goodies building consistent with the specific plan?
 - f. Redevelopment of the Beauchamp property?
 - g. Development of property leased by Southwestern College?
 - h. Development of two blocks comprising Education Village?
 - i. Approval of Mills Act contracts?

¹ Government Code sections 81000 -- 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

CONCLUSIONS

1a – i. It is presumed that it is reasonably foreseeable that these decisions will have a material financial effect on property leased by Mayor Inzunza. Therefore, he has a conflict of interest and may not participate in these decisions, unless this presumption is rebutted with regard to each decision. As discussed herein, this presumption will be rebutted if all requirements of regulation 18705.2(a)(2)(A) – (E) are met.

FACTS

The City of National City is located in southern San Diego County. The city has a population of approximately 58,100 and is 8.55 square miles in area. The city's land area is approximately 7.34 square miles, or 4,697 acres. The city is bounded by the City of San Diego on the north, the City of Chula Vista on the south, the Pacific Ocean on the west, and the County of San Diego and City of San Diego on the east.

The City of National City is a general law city with a directly-elected mayor and four council members. The current city council is comprised of Mayor Nick Inzunza, Vice Mayor Frank Parra, Councilmembers Ron Morrison, Luis Natividad, and Fideles Ungab. The city council exercises zoning and land use authority within the city limits by virtue of Article XI, Section 7 of the California Constitution and state law, primarily, Government Code section 65000 et seq.

Pursuant to the Community Redevelopment Law, Health and Safety Code section 33000 et seq., there is in each community a public body known as the redevelopment agency of the community (Health and Safety Code section 33100). The redevelopment agency in each community is "activated" by enactment of an ordinance by the legislative body declaring that there is a need for an agency to function in the community (section 33101). The Redevelopment Agency of the City of National City was activated on April 11, 1967, pursuant to Ordinance No. 1167. On October 14, 1975, the Community Development Commission of the City of National City ("CDC"), a combined redevelopment agency and housing authority, was formed pursuant to Ordinance No. 1484. Also pursuant to Ordinance No. 1484, the City Council of the City of National City declared itself to be the Community Development Commission of the City of National City, so that the mayor and city council members serve as the chairman and board members of the CDC. One of the principal methods used by the CDC to facilitate private redevelopment activities is to subsidize redevelopment projects financially through owner participation agreements and disposition and development agreements.

The redevelopment project area consists of approximately 2,083 acres. All of the land use and redevelopment activities which will be referred to are located within the boundaries of the City of National City and the redevelopment project area.

In the very near future, the city council, acting both as the city council and the board of the CDC, will be taking action upon the following projects which will involve discretionary land use approvals by the city and/or financial subsidiaries by CDC:

- Conversion of a Red Lion Hotel at 801 National City Boulevard into Residential Condominiums. This project would convert an existing hotel into 170 residential condominiums. The project involves amendments to the National City General Plan and Zoning Map, the issuance of a conditional use permit, and the approval of a subdivision map, all of which require discretionary action by the city council. If approved, the project would result in a population density of between five and ten times greater than that currently allowed by the city's general plan and land use code, as well as parking impacts that would have to be accommodated or mitigated. Because of the change in use of the hotel building, the city would no longer receive transient occupancy tax, but the value of the property would be expected to increase substantially. If approved, the project is also expected to improve the physical appearance of the building currently used for a hotel.
- Construction of a Motel at 7th Street and Roosevelt Avenue. This project involves the construction of a 32 unit motel at 7th Street and Roosevelt Avenue. The site is currently vacant. The project would require approval of a discretionary conditional use permit by the city.
- Remodeling and Expansion of Trophy Lounge at Plaza Boulevard and National City Boulevard. The Trophy Lounge is a bar and lounge featuring live entertainment and dancing. It is proposed that the Trophy Lounge be expanded and remodeled, with the completed project to add a full-service restaurant to existing uses. The project would require approval of a discretionary conditional use permit and variance by the city, and would receive a financial subsidy from the CDC pursuant to a disposition and development agreement. If approved, the value of the property would be expected to increase substantially, as the building will be improved, and parking and traffic impacts would improve.
- Specific Plan for Downtown Area. Pursuant to section 65450 et seq. of the California Government Code, a city may adopt a specific plan at designated locations within the community. Once approved, a specific plan establishes specific land uses within the specific plan area, which are more detailed and site-specific than general zoning regulations. The specific plan, which will be sponsored by the CDC but approved by the city, will allow for increased densities in housing, as well as commercial and mixed residential and commercial uses in the downtown area. Impacts of an approved specific plan would be expected to include increased property values, more economic activity, less crime and vagrancy, and parking and traffic impacts which would have to be eliminated or mitigated. This action may also involve amendment of the general plan, the city's basic land use document.
- H&M Goodies. The CDC owns this real property and building located at 130 East 8th Street, which was formerly the site of an indoor auction. The property will undergo changes requiring planning, building and engineering approvals by the city in order to make the property consistent with the aforementioned specific plan.
- Beauchamp Property. This project involves a downtown city block on National City Boulevard between Plaza Boulevard and 11th Street. It is expected that this property will be redeveloped into a high-density, medium-rise residential project.

The project involves possible zoning changes and other discretionary approvals by the city, and possible financial subsidies by the CDC.

- Temporary School City at 921 National City Boulevard. This CDC property is currently being leased to Southwestern College. The college currently has temporary classrooms on the site. The CDC receives \$1 per year as lease income. The CDC plans to market this property for the development in the latter part of 2004. Possible approvals in 2005 include a disposition and development agreement between the CDC and a redeveloper.
- Education Village. Development of two blocks bounded by National City Boulevard, 8th Street, Roosevelt Avenue, and Plaza Boulevard into a higher education center to house 5,000 to 8,000 students, faculty and administrators. The CDC made all approvals, including a disposition and development agreement prior to 2003. The CDC is subsidizing this \$22 million project with \$4.5 million in CDC funds for parking and infrastructure improvements. The project is expected to be completed in October of 2004. The project will have major impacts to the downtown area, including increased property values, positive impacts to local businesses and a more revitalized downtown. Further, CDC action would involve approval of a notice of completion for the project.
- The Mills Act. The Mills Act (section 50280, et seq. of the California Government Code) authorizes cities to enter into contracts with the owners of qualified historical properties to provide for the use, maintenance and restoration of such historical properties. Property owners entering into such a contract receive a benefit in the valuation of their property for property tax purposes. Four of these contracts will be considered for approval by the city council within the next few months.

The Financial Interests of National City Mayor Nick Inzunza:

1) *Leasehold interest in a residential unit within a multiple-family residential building, located on "A" Avenue.* This property is Mayor Inzunza's personal residence. The property is located within the boundaries of the proposed specific plan noted above, and within 500 feet of the projects as described. The lease is set for a period of three years; subleasing is specifically prohibited. In addition, you state that none of the decisions identified will affect the termination date of the lease, the amount of rent paid by the mayor, his right to sublease, or the legally allowable use or current use of the lease property.

2) *Ownership of a duplex residence located on East 16th Street.* The property has a fair market value of between \$100,001 and \$1,000,000 and produces a monthly gross income of \$1,001 and \$10,000. This property is located more than 500 feet from the boundaries of the proposed specific plan, and more than 500 feet from any of the other projects described above.

For purposes of the "public generally" exception, you have provided the following information which was recently obtained from the National City Planning Department:

- | | |
|---|-------|
| 1) Number of single-family residences in the City of National City: | 7,948 |
| 2) Number of multiple-family residences in the City of National City: | 7,066 |
| 3) Of the total number of residences, number of rentals | 9,780 |

ANALYSIS

The primary purpose for the conflict-of-interest provisions of the Act is to ensure that “[p]ublic officials, whether elected or appointed, [should] perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) In furtherance of this goal, section 87100 of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

Determining whether a conflict of interest exists under section 87100 requires analysis of the following steps as outlined below.²

Steps One and Two: Is Nick Inzunza considered a “public official” making, participating in making, or influencing a governmental decision?

As a mayor of National City, Nick Inzunza is a “member, officer, employee or consultant of a state or local government agency” and, therefore, a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; regulation 18701(a).)

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (See regulation 18702.1.)

Mayor Inzunza will “make a governmental decision” if he votes to approve any of the actions you have identified. Additionally, if Mayor Inzunza engages in any of the actions described in enclosed regulations 18702.2 and 18702.3 with regard to a particular decision, that will constitute “participating in making” or “influencing” that decision.

Step Three: What are Mayor Inzunza’s economic interests — the possible sources of a conflict of interest?

Section 87103 provides that a public official has a “financial interest” in a governmental decision “if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on any of the official’s economic interests, described as follows:

² These questions are based on the Act’s conflict-of-interest analysis provided at regulation 18700(b).

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment³ of \$2,000 or more (section 87103(a); regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (section 87103(d); regulation 18703.1(b));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (section 87103(b); regulation 18703.2);
- A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule (section 87103; regulation 18703.5).

"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 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." (Section 82033.)

The terms "interest in real property" and "leasehold interest" as used in section 82033 do not include a month to month tenancy. (Regulation 18233.)

³ An indirect investment or interest means any investment or interest owned by the spouse of an official or by a member of the official's immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.) "Immediate family" is defined at section 82029 as an official's spouse and dependent children.

Mayor Inzunza has an economic interest in both the duplex he owns and the residential unit he leases, provided he has an interest of \$2,000⁴ or more in each of these properties, respectively.

Step Four: Are Mayor Inzunza's economic interests directly or indirectly involved in the governmental decision?

Real property in which a public official has an economic interest is directly involved in a governmental decision if any part of the real property is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. (Regulation 18704.2(a)(1).)

If the real property in which the public official has an economic interest is not directly involved in a governmental decision, the materiality standards of regulation 18705.2(b) for "indirectly involved" real property apply. (Regulation 18704.2(c)(2).)

Leasehold Interest

Because the property for which Mayor Inzunza holds a lease is located within 500 feet of the properties which are the subject of the decisions you have identified, Mayor Inzunza's leasehold interest is directly involved in these decisions.

Duplex

Mayor Inzunza's duplex is indirectly involved in these decisions since this property is located more than 500 feet from the properties which are the subject of the decisions.

Step Five: What is the applicable materiality standard?

Leasehold Interest

The financial effect of a governmental decision on real property in which an official holds a leasehold interest that is directly involved in the governmental decision is presumed to be material. (Regulation 18705.2(a)(2).) "This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any effect on any of the following:

- “(A) The termination date of the lease;
- (B) The amount of rent paid by the lessee for the leased real property, either positively or negatively;
- (C) The value of the lessee's right to sublease the real property, either positively or negatively;

⁴ The value of a leasehold interest is the amount of rent owed during a 12-month period. (Regulation 18729(b).)

- (D) The legally allowable use or the current use of the real property by the lessee; or
- (E) The use or enjoyment of the leased real property by the lessee.” (*Ibid.*)

Duplex:

“The financial effect of a governmental decision on real property which is indirectly involved in the governmental decision is presumed *not* to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property⁵ in which the public official has an interest.” (Regulation 18705.2(b)(1).) (Emphasis added.)

Step Six: Is it reasonably foreseeable that the financial effect of the governmental decision upon any of Mayor Inzunza’s economic interests will meet the applicable materiality standard?

After identifying the applicable materiality standards, you must then assess whether it is reasonably foreseeable that the materiality standard will be met. If so, then you will have a conflict of interest arising from that economic interest and will be prohibited from participating in the decision.

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Leasehold Interest

As noted above, the presumption that it is reasonably foreseeable that a particular decision will have a material financial effect on the mayor’s (directly involved) leasehold interest will be rebutted if the requirements of regulation 18705.2(a)(2)(A) – (E) are met. You state that none of the decisions identified will affect the termination date of the lease, the amount of rent paid by the mayor, his right to sublease, or the legally allowable use or current use of the leased property. As a result, the requirements of regulation 18705.2(a)(2)(A) – (D) are met. If the requirement of subdivision (E) of regulation 18705.2 is also met (i.e., that it is not reasonably foreseeable that these decisions will affect Mayor Inzunza’s use or enjoyment of the leased property), then the presumption will be rebutted and Mayor Inzunza will not have a conflict of interest in these decisions.

⁵ Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision affects: (A) The development potential or income producing potential of the real property in which the official has an economic interest; (B) The use of the real property in which the official has an economic interest; (C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), the determination of whether it is or is not reasonably foreseeable that these decisions will affect Mayor Inzunza's use or enjoyment of the leased property is necessarily a factual question that is ultimately for the mayor to decide.

Duplex

It is presumed that it is not reasonably foreseeable that the decisions will have a material financial effect on Mayor Inzunza's property. Therefore, he will not have a conflict of interest in these decisions arising from his economic interest in this property, unless this presumption is rebutted. However, he must still analyze whether he has a conflict of interest arising from his leased property as discussed above.

Also please note that because the foreseeability and materiality analysis must be applied on a decision-by-decision basis, some decisions may be considered "implementation decisions" (i.e., decisions which merely implement, or carry out, decisions already made). (*Brower* Advice Letter, No. A-03-205.) If a particular decision is indeed an implementation decision, it is possible that the official could participate in that decision irrespective of a potential conflict of interest with another decision in which he has conflict of interest, so long as the implementation decision does not independently create a conflict of interest. (*Boga* Advice Letter, No. A-03-067; also see *Warne* Advice Letter, No. I-02-052.) In other words, the official will still need to assess whether the particular implementation decision will have a foreseeable and material financial effect on his economic interests. (*Boga, supra.*) Therefore, even if Mayor Inzunza determines that he has a conflict of interest in a particular decision, it is possible that he could participate in a subsequent decision regarding the same issue if the subsequent decision is an "implementation decision."

Step Seven: The "Public Generally" Exception

Even if a public official determines that his or her economic interest will experience a material financial effect as a result of a decision before the official, he or she may still participate if the "public generally" exception applies to the economic interest triggering the conflict of interest. (Regulation 18707(b)(4).) Regulation 18707.1 provides the requirements for the general exception:

"(a) Except as provided in Government Code sections 87102.6 and 87103.5, the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally if both subdivisions (b)(1) and (b)(2) of this regulation apply.

(b) Significant Segments and Indistinguishable Effects.

(1) Significant Segment. The governmental decision will affect a 'significant segment' of the public generally if any of the following are affected as set forth below:

¶...¶

(B) Real Property. For decisions that affect a public official's real property interest, the decision also affects:

- (i) Ten percent or more of all property owners or all homeowners in the jurisdiction of the official's agency or the district the official represents; or
- (ii) 5,000 property owners or homeowners in the jurisdiction of the official's agency.

¶...¶

(2) Substantially the Same Manner: The governmental decision will affect a public official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation."

Although you have provided information for purposes of the "public generally" exception, it is not clear if a "significant segment" of the public in the mayor's jurisdiction (or district) is affected by the governmental decisions. Even assuming this prong is met, the information you have provided is not dispositive as to whether the decisions you have identified will affect the mayor's real property in "substantially the same manner" as the decisions will affect a "significant segment" of the public generally.

For example, the information regarding the number and type of residences in National City does not provide guidance as to whether a decision to convert the Red Lion Hotel into condominiums will affect Mayor Inzunza in substantially the same manner as the decision will affect 10% percent or more of all property owners in the mayor's jurisdiction or district (or 5,000 property owners in the jurisdiction). Unless it can be shown with regard to each decision that both the "significant segment" and "substantially the same manner" prongs are met, the "public generally" exception will not apply.


Step Eight: The "Legally Required Participation" Rule

The facts you have presented do not suggest that the "legally required participation" rule, an exception to the conflict-of-interest rules, is applicable to Mayor Inzunza's situation.

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

Sincerely,

Luisa Menchaca
General Counsel

By: 
Natalie Bocanegra
Counsel, Legal Division

Enclosures

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