



California Fair Political Practices Commission

June 20, 1990

Bruce M. Boogaard
City Attorney
City of Chula Vista
276 Fourth Avenue
Chula Vista, CA 92010

Re: Your Request for Informal Assistance
Our File No. I-90-347

Dear Mr. Boogaard:

This is in response to your request for advice regarding the responsibilities of Councilmember Tim Nader of the City of Chula Vista (the "city") regarding his responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because you are not requesting advice regarding a specific pending decision, we are treating your request as one for informal assistance pursuant to Regulation 18329(c) (copy enclosed).²

QUESTION

1. May Councilmember Nader participate in a decision to select one of two potential autopark sites for development as an autopark? May he participate in subsequent decisions in connection with the city's exercise of the zoning or eminent domain power to further the establishment of the autopark at that site?

2. May Councilmember Nader participate in a decision regarding the inclusion of specific property in the proposed Southwest Redevelopment Project Area if the decisions are

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 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. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

bifurcated such that the areas which result in Councilmember Nader's disqualification are separately considered by the rest of the city council without Councilmember Nader participating in any way?

CONCLUSIONS

1. Councilmember Nader may not participate in the decision regarding the selection of one of the two potential autopark sites since the decision will have a material financial effect on his real property interest. Subsequent to this decision selecting one autopark site, Councilmember Nader may participate in decisions, in connection with the city's exercise of the zoning or eminent domain powers to further the establishment of the autopark at the location selected unless the decision will have a material financial effect on one of his economic interests.

2. Councilmember Nader may participate in decisions regarding the Southwest Redevelopment Project Area provided the decision is bifurcated so that decisions regarding areas in which he has a conflict of interest are made by the other members of the city council without participation by Councilmember Nader. Following such decisions, Councilmember Nader may participate in any remaining decisions that were bifurcated and as to which he has no conflict of interest.

FACTS

Tim Nader is a member of the city council of the City of Chula Vista. He owns real property which is located adjacent to and abuts an area designated as the Potential Commercial Development Site. Auto dealer X presently occupies 3.97 acres of the 8.83 acre site which constitutes the Potential Commercial Development Site. In addition to the auto dealer, there are four other property owners who own 6 other parcels within the Potential Commercial Development site.

The city is considering establishing an auto park. Two potential sites are under consideration. The city is prepared to establish an auto park at one of the two sites. Auto dealer X has executed an agreement with the city which requires the city to negotiate with auto dealer X and one other auto dealer for the purpose of relocating their auto dealerships into the autopark established by the city.³

If auto dealer X relocates to the auto park, the Potential Commercial Development Site would be "ripe" for redevelopment as a commercial use area. The city has received indications of interest by at least two commercial developers interested in developing the Potential Commercial Development Site in the event

³ This information was provided by you in a telephone conversation on June 12, 1990.

the city is successful in relocating Car Dealer X and acquiring his site along with the other parcels in the Potential Commercial Development Site.⁴

ANALYSIS

Section 87100 prohibits any public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. 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 the official or a member of his immediate family,⁵ or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

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

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103 (a) - (e).

⁴ You have also mentioned in your letter that the underutilization of these other parcels, thereby reducing the cost of redeveloping, along with the availability of large lot depth, corner location, and high vehicular traffic adjacent to the site were factors which made the Potential Commercial Development Site "ripe" for redevelopment.

Councilmember Nader is a public official. (Section 82048.) Accordingly, he may not make, participate in making, or attempt to use his official position to influence a governmental decision if the decision will have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on himself or on his interest in real property.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's economic interest in a decision is "materially" affected as required by Section 87103. If the official's economic interest is directly involved in the decision, then Regulation 18702.1 (copy enclosed) applies to determine materiality. On the other hand, if the official's economic interest is indirectly affected by the decision, then Regulations 18702.2 to 18702.6 (copies enclosed) would apply to determine whether the effect of the decision is material.

Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87103.) For the city, the public consists of all residents of the city. Thus, disqualification is required unless the decision will affect Councilmember Nader's economic interests in substantially the same manner as it will affect all residents of the city, or a significant segment of the residents of the city. (Regulation 18703, copy enclosed).⁶

⁵ An official's "immediate family" includes his spouse and dependent children. (Section 82029.)

⁶ Copies of In re Owen (1976) 2 FPPC Ops. 77, In re Brown (1978) 4 FPPC Ops. 19, In re Ferraro (1978) 4 FPPC Ops. 62 and In re Legan (1985) 9 FPPC Ops. 1, Commission opinions which explain the application of the concept of public generally, are enclosed for your information.

1. The decisions regarding the Potential Autopark sites.

It is reasonably foreseeable that the decision regarding the potential autopark sites will have an economic effect on Councilmember Nader's economic interest. As noted above, for an effect to be deemed reasonably foreseeable the effect must be more than a mere possibility; however, certainty is not required.

In In re Thorner, supra, 1 FPPC Ops. 198, the Commission provided some guidelines to determine whether the effect of a decision is reasonably foreseeable. A director of a water district was the executive vice-president and a minority shareholder of a business entity which did over half of its business in the water district. The business entity supplied ready mix concrete, building materials, and major appliances in that area. The issue focused on the possibility of a conflict of interest involving that director of the water district if an applicant for a project, requesting a variance from a moratorium on new water connections, came before the Board of Directors of the water district. The Commission considered various scenarios involving the director's business entity and the proposed project. One of the situations the Commission analyzed was that the business entity was preparing, or had made a bid, to supply one or more of the products to the proposed project, but no award had been made. The Commission concluded that a financial effect was reasonably foreseeable. The Commission stated:

As a general rule ... when the bid is made with a serious hope that the contract will be awarded to [the business entity], we think a financial effect on [the business entity] is reasonably foreseeable even if there is substantial competition. The statute requires foreseeability, not certainty. Furthermore, the fact that a seriously competitive bid on the project is being prepared or has been made is likely to focus the attention of the Director on the fact that he may benefit if a variance is granted. The ultimate test is whether the element of foreseeability, together with the other elements discussed earlier, is present to the point that the official's "unqualified devotion to his public duty" might be impaired. People v. Darby, 114 Cal. App.2d 412, 433 (1952). Under the circumstances described ..., we conclude that the financial effect on [the business entity], is reasonably foreseeable and that [the director], therefore, must not vote or participate in the variance decision.

In re Thorner, supra, 1 FPPC
Ops. at 206.

In the present circumstances, the city, presumably following some study and analysis, has focused upon two potential autopark sites. The city council will select one of the two sites as the site for the proposed autopark. Car Dealer X, located in the Potential Commercial Development Site, has executed exclusive rights to negotiate with the city, along with one other auto dealer, for the purpose of relocating into the site selected for the proposed autopark. These efforts reflect a serious effort on the part of the city to develop an autopark, and a serious attempt on the part of the auto dealer to relocate into the proposed autopark. Car Dealer X's relocation to the autopark will "free up" the Potential Commercial Development Site for development. Thus, it is reasonably foreseeable that the Potential Commercial Development Site will be developed, thereby affecting the value of Councilmember Nader's interest in real property.

The city council, by voting against both potential autopark sites, could effectively prevent the planned relocation of Car Dealer X into the autopark. Under such circumstances, the decision to vote for or against the autopark sites is linked with the decision to redevelop the Potential Commercial Development Site such that the decision on one is a decision on the other.⁷ Under such circumstances as well, it is reasonably foreseeable that the decision to select one of the autopark sites will have an economic effect on Councilmember Nader's property.

Regulations 18702 through 18702.6 may be applied to determine whether the effect of such decision is material. Since the Potential Commercial Development Site is located within 300 feet of Councilmember Nader's residence, pursuant to Regulation 18702.3(a)(1), the effect of the linked decision to select an autopark site is material. Therefore, Councilmember Nader may not participate in the decision unless the effect is not distinguishable from the effect on the public generally.

⁷ In some circumstances, a decision on one aspect of a redevelopment plan may effectively result in a decision on another aspect of the plan. Under such circumstances, if an official must disqualify himself or herself from participating in one of the decisions, he or she is also thereby disqualified from participating in the other decision. For example if the decision involved the location of a specific project either across the street from a public official's real property interest or at a site located a few miles away, a decision to adopt or reject the site which was located a few miles away would also effectively result in a decision regarding the site located across the street from the public official. Under such circumstances, the decisions are linked such that if disqualification is required as to one of the sites, the public official must disqualify himself or herself from participating in the decision regarding the other sites. (For "linked" decisions, see also, Miranda Advice Letter, No. I-88-373; Miranda Advice letter, No. I-88-253; copies enclosed.)

As noted above, Regulation 18703 provides that the effect is distinguishable from the effect on the public generally unless the decision will effect the official's interest in substantially the same manner as it will affect a significant segment of the public. Since Councilmember Nader's real property is located in close proximity to auto dealer X, and since the property abuts the Potential Commercial Development Site, it does not appear that the effect of the decision will be the same as the effect on a significant segment of the public. Accordingly, if the effect of the decision regarding selection of the autopark site is material, Councilmember Nader must disqualify himself from participating in the decision.

After one of the two autopark sites is selected, Councilmember Nader may participate in further decisions regarding the autopark such as the decisions in connection with the city's exercise of either the zoning or eminent domain power as permitted by the conflict-of-interest provisions. However, he may not participate in any decision which has as its effect the elimination of that autopark site from consideration. If the decision under consideration does not otherwise have such an effect, Councilmember Nader may participate in the decision if the decision does not otherwise have a material financial effect on Councilmember Nader's economic interest.

For example, if the decision is regarding the condemnation of property at the previously selected autopark site pursuant to the city's exercise of its power of eminent domain, Regulation 18702.3 would apply to determine whether the effect of the decision is material. Thus, if the distance between the councilmember's real property and the autopark site is between 300 and 2500 feet, the effect will be deemed material if the decision will have a financial effect of:

(A) Ten thousand dollars (\$10,000) or more on the fair market value of the real property in which the official has an interest; or

(B) Will affect the rental value of the property by \$1,000 or more per 12 month period.

Regulation 18702.3(a)(3)(A) and (B).

2. Councilmember Nader's participating in decisions following bifurcation of inclusion of different parts of the proposed Southwest Redevelopment Project Area.

The Act prohibits Councilmember Nader from participating in decisions which have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on his economic interests. Accordingly, if the decisions are bifurcated such that Councilmember Nader does not participate in decisions regarding areas in which he has a conflict of interest, he may then participate in the other areas

of the proposed Southwest Redevelopment Project. We have addressed this issue specifically in connection with decisions regarding the adoption of a general plan. We have advised that such decisions may be divided into separate decisions and have suggested the following procedure:

1) The decisions from which the councilmember has a disqualifying financial interest should be segregated from the other decisions.

2) The decisions from which the councilmember is disqualified should be considered first, and a final decision reached by the city council without any participation by the disqualified councilmember.

3) Once a decision has been reached regarding areas for which the councilmember has disqualified himself, the disqualified councilmember may participate in decisions regarding the other areas, so long as those decisions do not result in a reopening or in any way affect the decisions from which he was disqualified. (See, Kilian Advice Letter, No. A-89-522; Casey Advice Letter, No. A-87-048; Huffaker Advice Letter, No. A-86-343; copies enclosed.)

I trust this letter has provided you with the guidance you requested. If you have any other questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel



By: Jeevan S. Ahuja
Counsel, Legal Division

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Enclosures