California
Fair Political
Practices Commission

SUPERSEDED
By: 93-297

March 28, 1991

Carl O. Waggoner
Law Offices of Kroll, Loeffler & Waggoner
611 Thirteenth Street
Modesto, CA 95353-3489

Re: Your Request for Informal Assistance
Our File No. I-90-529

Dear Mr. Waggoner:

You have requested advice on behalf of Stephen McKee, Mayor of the City of Lathrop concerning his duties under the conflict-of-interest provisions of the Political Reform Act (the "Act") pursuant to Regulation 18329(c) (copy enclosed).[1] We are treating your request as one for informal assistance because we were not asked to provide advice about any particular governmental decision, and we cannot provide advice regarding purely hypothetical situations.[2] (See, Regulation 18329(c)(4)(D).)

QUESTIONS

Mayor McKee and his father are the owners of a ranch. The mayor and his father ("sellers") entered into an option to purchase agreement with a developer, Verner Construction, and its owners, John T. and Kathleen Verner, ("buyers"). Pursuant to this written agreement, Mayor McKee and his father received payment in the amount of $25,000.[3] In addition, the mayor and his father will receive $50,000 for each year beyond the original five-year period the developer-buyers extend the option to purchase agreement and, according to the terms of the agreement, will receive several millions of dollars upon the actual sale of the property.

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[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. (Section 83114; Regulation 18329(c)(3).)

[3] From a review of the contract, it appears they also may receive another $42,000 for the option.

1. Once twelve months elapse since Mayor McKee's receipt of the $25,000 payment, do the developer-buyers continue to be a potentially disqualifying economic interest of the mayor by virtue of the option to purchase agreement?

2. If Mayor McKee declines to accept further money from developer-buyers for the option to purchase, accompanied by a modification of the written contract, would this remove the potentially disqualifying economic interest so that Mayor McKee may participate in decisions which will materially affect Verner Construction or its owners?

CONCLUSION

1. Terms in the contractual option to purchase which provide for future payments to Mayor McKee are deemed to be "promised" income from the option holder within the meaning of Section 87103(c). Therefore, Mayor McKee must disqualify himself from participating in any governmental decision which will have a reasonably foreseeable material financial effect on the option holder, developer-buyers, Verner Construction, or its owners, John T. and Kathleen Verner.

2. In Mayor McKee's situation, the option to purchase agreement, of which he and his father are parties, is a contract which is enforceable by the developer. Mayor McKee can only enforce the provisions of the contract once the option has been exercised by the developer-buyers. Therefore, it is difficult for us to comprehend a situation where Mayor McKee could modify the agreement at this point in time and in such a manner as to remove any financial interest he has in the developer-buyers. However, if you have a different set of factual circumstances for us to consider which may affect Mayor McKee's ability to participate in future, pending decisions regarding or affecting the developer-buyers, we will be happy to provide advice to Mayor McKee at that time. We do not provide advice regarding hypothetical situations.

FACTS

Mayor McKee and his father, Robert E. McKee, are the owners of a ranch located near the corporate limits of the City of Lathrop. The mayor and his father ("sellers") entered into an option to purchase agreement with a Stockton developer, John T. and Kathleen Verner, ("buyers") on November 9, 1988.

The Joint Venture Agreement of November 9, 1988, provides for the sale by Mayor McKee and his father of approximately 115.29 acres of real property at twenty thousand dollars ($20,000) per gross acre plus a provision for a percentage of the profits derived from the resale of the property, less development and administrative costs. The purchase price is to be paid at the close of escrow. Escrow will not close until a number of

governmental approvals concerning aspects of the project have occurred. A time limit of five years from the date of the agreement exists within which escrow is to close or within which buyers have to deliver to sellers an election to purchase the property. However, the agreement may be extended on a year-by-year basis by buyers releasing from escrow fifty thousand dollars ($50,000) per year for a maximum of three years. These deposits to sellers are not refundable and will be applied to the purchase price at the close of escrow.

An Addendum also dated November 9, 1988 modifies the Joint Venture Agreement in the following manner. It provides that upon obtaining contracts with a Mr. Frank Terry and Robin Bell, Inc. for the sale of their property, the buyers are to release forty-two thousand dollars ($42,000). This deposit to sellers is not refundable and will be applied to the purchase price.

An Addendum No. 2 dated March 16, 1990, further modifies the Joint Venture Agreement of November 9, 1988, in particular, the contract extension provision. It provides that the buyers may extend the contract on a year-by-year basis by releasing fifty thousand dollars ($50,000) per year for a maximum of four years. These deposits to sellers are not refundable and will be applied to the purchase price at close of escrow. In exchange for this contract modification, the buyers will release twenty-five thousand dollars ($25,000) to the sellers. This deposit to sellers is not refundable and will be applied to the purchase price.

ANALYSIS

Section 87100 of the Act provides:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

As mayor of the City of Lathrop, Stephen McKee is a "public official" as defined in the Act. (Section 82048.) Thus, he may not use his official position to vote on a decision in which he knows or has reason to know he has a financial interest. In addition, he may not participate in making, or use his official position to influence, a governmental decision in which he knows or has reason to know he has a financial interest. (Regulations 18700 and 18700.1, copies enclosed.)

Economic Interests

Section 87103 specifies that a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his immediate family or on:

(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.

There is no question that Mayor McKee has an economic interest in real property which is valued in excess of $1,000. Furthermore, there is no question that the developer-buyers, Verner Construction and its owners John T. and Kathleen Verner, are a source of income to Mayor McKee. In accordance with the Joint Venture Agreement and addendums attached thereto and incorporated by reference therein, developer-buyers paid Mayor McKee and his father the sum of $25,000 on or about March 16, 1990. Rather, the issue presented for our consideration is whether Verner Construction and its owners John T. and Kathleen Verner are a source of income to Mayor McKee once 12 months have elapsed since his receipt of the $25,000 payment.

In Section 87103(c), the term "source of income" includes not only the source of income which has been received by the public official, but also the source of income which has been promised. The term "promise" is defined, in part, as a "[r]easonable ground for hope or expectation...." (Funk & Wagnalls Standard College Dictionary (1974) p. 1078.)

We have had occasion to apply this concept of "promised" income in several situations. For example, a legally enforceable promise to pay a sum of $250 or more to a public official makes the promisor a source of income to the official. (Reed Advice Letter, No. A-84-226, copy enclosed.)[4]

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[4] In Mayor McKee's situation, the option to purchase agreement, of which he and his father are parties, is a contract which is enforceable by the developer. Mayor McKee can only enforce the provisions of the contract once the option has been exercised by the developer-buyers. Therefore, it is difficult for us to comprehend a situation where Mayor McKee could modify the agreement at this point in time and in such a manner as to remove any financial interest he has in the developer-buyers. If you have a different set of factual circumstances for us to consider which may affect Mayor McKee's ability to participate in future, pending decisions regarding or affecting the developer-buyers, we will be happy to provide advice to Mayor McKee at that time. We do not provide advice regarding hypothetical situations. (Regulation 18329(c)(4)(D).)

We have advised that a real estate agent who had a single listing from a seller was not "promised" income by the seller until he had secured a buyer because prior to that time the expectation of receipt of income was considered to be too speculative to rise to the level of "promised" income. (Remelmeyer Advice Letter, No. A-81-510, copy enclosed.) However, in a similar but distinct situation, we have advised that a real estate agent who had multiple listings from a seller had a strong prospect of future income from this client. (Felts Advice Letter, No. A-85-130, copy enclosed.)

In the situation of an attorney who had taken a case on a contingency fee basis, we have said that absent unusual circumstances, a contingency fee contract would constitute "promised" income because attorneys normally take contingency fee cases with the expectation of receiving a fee of $250 or more.

Similarly, in the situation at hand, we find that John T. and Kathleen Verner, owners of Verner Construction, are a source of "promised" income to Mayor McKee. As discussed above, income is promised where the surrounding circumstances show there are reasonable grounds for the expectation of receiving income from a specific source in the future. While we recognize that the developer-buyers may never exercise their option to purchase Mayor McKee's and his father's property, all of the factors herein indicate that the developer-buyers have every expectation of exercising their option rights.

According to your facts, we know that Mayor McKee entered into a legally enforceable written agreement which gives the developer-buyers the right to buy Mayor McKee's real property at any time within an agreed period of time at a fixed price. We know that pursuant to Addendum No. 2 of that same written agreement, Mayor McKee and his father were compensated by the developer-buyers in the amount of $25,000 more than 16 months after execution of the original agreement for the sole purpose of amending (lengthening) the original contract extension provisions. Finally, we know that Mayor McKee and his father also may receive another $42,000 payment for the option to purchase according to the terms of an Addendum dated November 9, 1988.

Because of this economic interest, Mayor McKee will be required to disqualify himself from any decision of the city council which could foreseeably have a material financial effect on the developer-buyers that is distinguishable from the effect on the public generally. In addition, Mayor McKee will be required to disqualify himself from any decision which could foreseeably

have a material financial effect on his real property interests. Section 87103(b).

Foreseeability

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (Downey Cares v. Downey 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).)

You have not presented any pending governmental decisions for our review so we cannot address this element of the conflict-of-interest analysis.

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 financial interest is directly involved in the decision, then Regulation 18702.1 (copy enclosed) applies to determine materiality. Thus, for example, if Mayor McKee's source of "promised" income, Verner Construction or John T. and Kathleen Verner, are directly involved in the decision before the city council, the effect of the decision would be deemed material. Regulation 18702.1(b) describes when a subject is deemed to be directly involved in a decision. On the other hand, if the official's financial interest is indirectly affected by the decision, then Regulations 18702.2 and 18702.6 (copies enclosed) would apply to determine whether the effect of the decision on Verner Construction or on its owners, John T. and Kathleen Verner, is material.[5]

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, Mayor McKee's disqualification is required unless the decision will affect Verner Construction in substantially the same manner as it will affect all residents of

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[5] Regulation 18702.3 (copy enclosed) applies to determine whether the effect of a decision is material when the economic interest, ownership interest in real property, is indirectly involved in the decision.

the city, or a significant segment of the residents of the city. (Regulation 18703, copy enclosed.).[6]

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

Sincerely,

Scott Hallabrin
Acting General Counsel

Deanne Stone

By: Deanne Stone
Counsel, Legal Division

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Enclosures

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[6] Copies of In re Owen (1976) 2 FPPC Ops. 77 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.