



California Fair Political Practices Commission

March 6, 1992

Lee E. Welch
1520 Honor Oak Lane
Yuba City, California 95993

Re: Your Request for Informal Assistance
Our File No. I-91-465

Dear Mr. Welch:

This letter is in response to your request for advice regarding your responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Your letter does not seek advice regarding a specific pending governmental decision. Accordingly, we treat your letter as a request for informal assistance pursuant to the provisions of Regulation 18329.²

Please note that the Commission's jurisdiction is limited to the provisions of the Act. Other provisions of the law such as Government Code Section 1090 may be applicable to your facts. Please check with your city attorney regarding these provisions.³

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 Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Ogelsby (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Do the provisions of the Act prevent you as a real estate broker from serving as a member of the Yuba City Planning Commission?

2. Do the provisions of the Act prevent you, or one of your real estate agents, from representing a buyer or listing or selling a property under the multiple listings service cooperative sale on a project which was the subject of a prior approval by the Yuba City Planning Commission?

CONCLUSIONS

1. Under the Political Reform Act, your occupation as a real estate broker does not preclude you from serving on the Yuba City Planning Commission.

2. We cannot evaluate prior conduct in order to determine the applicability of the conflict-of-interest laws to you as a public official. You are required to disqualify yourself from participating in any planning commission decision which would foreseeably and materially affect you, your real estate firm, your investment or real property interests, or any source of income of more than \$250 in the last 12 months, including: (1) any person you represent in a transaction; (2) any person represented by an agent working under your auspices if you receive a commission for the transaction; (3) any brokerage business entity through which you conduct business; and (4) any person who receives a finder's or other referral fee for referring a party to the transaction to you, or who makes a referral pursuant to a contract with you.

FACTS

You own a real estate brokerage business in Yuba City and have been actively managing the real estate firm for a number of years. You also serve as a member of the Yuba City Planning Commission.

A member of the Yuba City Council has asked for your resignation from the Yuba City Planning Commission on the basis that there is an inherent conflict of interest between your occupation as a real estate broker and your duties as planning commissioner. As planning commissioner, you vote on permit applications, zoning and rezoning issues, subdivision approvals, and other issues which necessarily impact the growth of the community. Various types of subdivision approval projects have come before the planning commission at the tentative map stage as

well as general plan amendments, rezoning projects, permit applications, plan development approvals, and variance applications.

ANALYSIS

You are seeking advice to determine whether you or one of your agents is precluded from either listing a property for sale or resale, or some portion thereof, or representing a buyer in the multiple listings service in connection with that property if it, or a portion of the property, was the subject of a prior governmental decision before you as a member of the planning commission. We can only make a prospective evaluation of facts. Therefore, we do not provide any advice with respect to conduct that has already occurred.

The Act does not prohibit you from serving as a planning commissioner due to your profession as a real estate broker. The Act does require that public officials may not participate in any governmental decision in which the official has a financial interest. (Section 87100.) As a member of the Yuba City Planning Commission you are a public official. (Section 82048.)

An official has a financial interest in a decision within the meaning of Section 87100 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 on a member of the official's immediate family,⁴ 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.

⁴ An official's "immediate family" are his or her spouse and dependent children. (Section 82029.)

(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.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

Section 87103.

You state in your letter that you own a real estate firm. For purposes of this letter, we will assume that you have an investment of \$1,000 or more in the business entity, your real estate firm. (Section 87103(a).) You also hold a position of management in the business entity. (Section 87103(d); Section 82005.) Pursuant to Section 87103, a public official may not participate 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 business entity which he or she manages or holds an investment interest of \$1,000 or more.

In addition, persons⁵ that have made payments to you or your business are sources of income under Section 87103(c). Commission income may also create a disqualifying economic interest. "Commission income" means gross payments received as a result of services rendered as a broker, agent, or other sales person for a specific sale or similar transaction. (Regulation 18704.3(b).)⁶

⁵ "Person" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert. (Section 82047.)

⁶ In calculating the amount of commission income from a sale, any portion of the commission that must be paid to the real estate agent who handled the sale should be deducted from the broker's share. (In re Carey (1976) 3 FPPC Ops. 99.)

commission income to an agent working for you⁸ (In re Carey supra); (3) any client of the real estate firm through which you conduct business who has been a source of income to you of \$250 or more in the 12 months preceding a governmental decision; (4) any person who has received a fee for referring a party to a transaction to you; and (5) your real estate firm.⁹

Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. To be foreseeable, the effect of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Community Development Comm. (1987) 196 Cal.App.3d 983, 989-991; Witt v. Morrow (1977) 70 Cal.App.3d 817; In re Thorner (1975) 1 FPPC Ops. 198.) 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.)

Please note that for purposes of the Act, we look at the foreseeability and materiality of the decision at the time it is made. For example, the Commission has advised that real estate businesses located within or near redevelopment areas are in a unique position to benefit from redevelopment decisions since these businesses, and the professionals affiliated with them, earn their income from commissions based on a percentage of the value of property sold. (Ogelsby Opinion, supra and McLaughlin Advice Letter, No. I-91-141.) Thus, at the time of the decision, it is foreseeable that the decision will have a material financial effect on the business.

Among other factors to be considered in making this evaluation is whether the planning commission decisions will result in increased commissions to your firm as the decisions increase the number of potential clients of the business. It would be your responsibility under the Act to determine, based on the implication of the decisions of the planning commission, whether there would be a foreseeable material financial effect on

⁸ In addition, if you act as a broker for the sale, purchase, or lease of real property, you may, in certain circumstances, be the recipient of "promised" income within the meaning of subdivision (c) of Section 87103. Commission income is deemed "promised" income to a real estate broker when the sale is pending (i.e., the sale is in escrow). (Larsen Advice Letter, No. A-82-192; Armento Advice Letter, No. I-90-032.)

⁹ Each governmental decision must be analyzed separately to determine if you have a conflict of interest.

If you as real estate broker receive commission income totaling \$250 or more from a transaction, you may be disqualified from participating in decisions affecting any of the sources of commission income.

Regulation 18704.3(c)(2) provides that in a given transaction the following are sources of income within the meaning of subdivision (c) of Section 87103:

(A) The person the broker represents in the transaction;^[7]

(B) If the broker receives a commission from a transaction conducted by an agent working under the broker's auspices, the person represented by the agent;

(C) Any brokerage business entity through which the broker conducts business; and

(D) Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.

Regulation 18704.3(c)(2).

In summary, to determine whether you must disqualify yourself from participating in a governmental decision, you must consider the foreseeable and material financial effect of any pending and future decision on each of the following economic interests:

(1) any person or business entity which you have represented in a real estate transaction in the 12 months preceding the governmental decision; (2) any person who has been a source of

⁷ If a broker represents only the seller, the seller, but not the buyer, is a source of commission income to the broker. The intent of the regulation is to attribute commission income to the person or persons in the transaction who have a direct connection with the broker. (Christiansen Advice Letter, No. I-87-049.) In real estate transactions in which you receive \$250 or more in commission income as a result of a multiple service listing but you are not the broker responsible for the sale, we also assume you are one of the brokers who has entered into an agreement with the seller to list the property. Consequently, if you actually derive commission income from the transaction, you will have received commission income for representing the seller. (Regulation 18704.3(c).)

your business interests. The same holds true for any of your real property interests within the city.

Economic Interests Directly Involved

Regulation 18702 sets forth the guidelines for determining whether an official's economic interest (i.e., interest in real property, business entity, or source of income) in a decision is "materially" affected as required by Section 87103.

If the official's economic interest is directly involved in the decision, Regulation 18702.1 provides the appropriate standard for assessing materiality. However, when the official's economic interests will be affected indirectly by a decision, the appropriate standards for determining materiality are those of Regulations 18702.2 through 18702.6. Following is an explanation of specific regulations which can provide you appropriate guidance to determine whether the effect of a decision which may directly or indirectly affect some of your economic interests would be material.

A person or business entity is directly involved in a decision before an official's agency when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

Regulation 18702.1(b).

When a person or business entity who is a source of income to a public official of \$250 or more in the 12 months preceding the decision is directly involved in a decision before the public official, the effect of the decision is deemed material and disqualification is required. (Regulation 18702.1.)

Economic Interests Indirectly Involved

1. Business Interests

A business entity such as your firm may also be affected indirectly by governmental decisions. You have not provided facts to determine whether such effects from a governmental decision are foreseeable. This determination is necessary in order to decide whether you would have a conflict of interest with respect to the indirect effects of a governmental decision.

When a business entity is indirectly affected by a decision, the appropriate standard for determining materiality is that of Regulation 18702.2. You should consult Regulation 18702.2 in order to determine whether such indirect financial effect on a business entity is material. It appears that for a business such as yours, the applicable standards are those of subdivision (g) of Regulation 18702.2 which states that the effect of a decision upon a business entity indirectly involved in a decision is material if:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

Regulation 18702.2(g).

If the financial effects that will result from a decision will reach the thresholds set forth in (g), you are required to disqualify yourself from the decision.

2. Sources of Income

Similarly, if any of the sources of income mentioned earlier will be materially affected by planning commission decisions, you must disqualify yourself from participating in such decisions. Where a source of income is a business entity indirectly involved in the decision, then the applicable standards for determining materiality are those of Regulation 18702.2 as discussed above.

The standard for determining materiality with regard to an individual who is a source of income of \$250 or more to a public official in the twelve months preceding a decision and who is indirectly involved in a governmental decision is that of Regulation 18702.6 which states that:¹⁰

The effect of a decision is material as to an individual who is a source of income or gifts to an official if any of the following applies:

(a) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

(b) The decision will affect the individual's real property interest in a manner that is considered material under Section 18702.3 or Section 18702.4.

Regulation 18702.6.

Please note, if you determine that it is reasonably foreseeable that your economic interests will be materially affected by a pending or future governmental decision, you must not only disqualify yourself from participating in formal decisions of the planning commission which may affect such interests, but you must also abstain from attempting to influence such decisions by communicating with other members of the planning commission or the staff regarding the decisions. (Regulations 18700 and 18700.1.)

Public Generally

Even if the reasonably foreseeable financial effect of a governmental decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally, or on a "significant segment" of the public generally. (Section 87100; Regulation 18703.) For purposes of our discussion, the public is the entire population of Yuba City. (In re Legan (1985) 9 FPPC Ops. 1; In re Owen (1976) 2 FPPC Ops. 77; Jorgensen Advice Letter, No. A-90-017.) In order to be considered a significant segment of the public, a group must be large in numbers and heterogeneous in quality. (In re Ferraro (1978) 4 FPPC Ops. 62; In re Legan, supra.)

¹⁰ This standard is also applicable to individuals who have paid commissions to you for their real estate transactions.

You have not provided us with sufficient facts to determine whether the "public generally" exception is applicable to you. It appears unlikely that the real estate broker industry constitutes a significant segment of the public.

We trust this letter adequately responds to your inquiry. Should you have any further questions regarding this matter, do not hesitate to call me at (916) 322-5901.¹¹

Sincerely,

Scott Hallabrin
Acting General Counsel


By: Luisa Menchaca
Counsel, Legal Division

SH:LM:aa

¹¹ Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.