



California Fair Political Practices Commission

May 26, 1993

Arther R. Montandon
City Attorney
City of Atascadero
Administrative Offices
6500 Palma Avenue
Atascadero, CA 93422

Re: Your Request for Advice
Our File No. A-93-182

Dear Mr. Montandon:

This is in response to your letter requesting advice regarding the responsibilities of Mayor Nimmo of the City of Atascadero under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Please note that nothing in this letter should be construed to evaluate any conduct which may have 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 Oglesby (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. May Mayor Nimmo participate in governmental decisions regarding a proposed amendment to the general plan of the City of Atascadero which includes a proposed road extension adjacent to property owned by Mayor Nimmo under a partnership agreement?
2. May Mayor Nimmo participate in governmental decisions regarding the general plan amendment, including the deletion of language which previously recommended the construction of a median on a road which is within 300 feet of Mayor Nimmo's undeveloped commercial property?

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.

3. May Mayor Nimmo participate in governmental decisions regarding components of the general plan amendment in which he has no financial interests if the disqualifying portions of the plan are segregated from the remaining decisions?

CONCLUSIONS

1. Mayor Nimmo may participate in governmental decisions regarding the road extension only if it is reasonably foreseeable that the pending decisions will not have a material financial effect on the mayor's economic interests.
2. Mayor Nimmo may participate in governmental decisions regarding the road median only if it is reasonably foreseeable that the decisions will not have a material financial effect on the mayor's economic interests.
3. Mayor Nimmo may participate as to components of the general plan amendment in which he has no financial interests if the disqualifying portions of the plan may be segregated from the remaining decisions.

FACTS

The following facts are based on a letter submitted by you and our telephone conversation of May 18, 1993.

The Atascadero City Council will be considering an amendment to the Atascadero General Plan by adoption of a circulation element. One of the major issues involves a road extension and improvement adjacent to property on Halcon Road owned by the Gordon T. Davis Land Company which is in the City of Atascadero. Bella Vista Investment Company, which is a 50-percent partner in the Gordon T. Davis Land Company, is a California corporation jointly owned by Mayor Nimmo, his spouse, and his adult children. Mayor Nimmo and his spouse each own 25 percent of the Bella Vista Investment Company stock and his adult children own jointly the remaining 50-percent interest. The property, which is adjacent to Halcon Road, is approximately 800 feet from the proposed road extension and improvement.

The circulation Element initially proposed construction of a median on El Camino Real within the City of Atascadero. However, the Planning Commission of the City of Atascadero proposed that the language relating to the construction of the median be deleted from the circulation element. Mayor Nimmo owns undeveloped commercial property within 300 feet of where the median would be constructed.

ANALYSIS

Section 87100 prohibits any 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.

Section 87103 provides:

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 a member of his or her immediate family 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.

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.

Mayor Nimmo is a public official. (Section 82048.) According to your facts, Mayor Nimmo owns undeveloped commercial property within 300 feet of the location where a median on El Camino Real within the City of Atascadero would be constructed. In addition, Mayor Nimmo and his spouse each own 25 percent of the stock in the Bella Vista Investment Company; and his adult children own jointly the remaining 50 percent. Bella Vista Investment Company, in turn, is a 50-percent partner of Gordon T. Davis Land Company.

Mayor Nimmo has a 25-percent interest in the Gordon T. Davis Land Company partnership by virtue of his interest in Bella Vista Investment Company, including his interest in his spouse's share. Therefore, Mayor Nimmo has an interest greater than 10 percent in a business entity and in the real property of the business entity.² (Sections 82005 and 87103(a) and (b).)

Mayor Nimmo 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 these economic interests.

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.)

Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's economic interest in a decision is materially affected by a decision. If the official's economic interest is directly involved in the decision, then Regulation 18702.1 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 would apply to determine whether the effect of the decision is material.

² We assume for purposes of this analysis that Mayor Nimmo has a indirect investment worth \$1,000 or more in a business entity and an indirect interest worth \$1,000 or more in real property of a business entity.

1. Real Property

Mayor Nimmo owns undeveloped commercial property within 300 feet of where a median had been proposed for construction in a prior version of the circulation element. Regulation 18702.3(a)(1) provides that the effect of a decision is material as to real property in which an official has an economic interest if:

(1) 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.

Thus, the effect of a decision by the city council to approve the circulation element and to construct the median (or to exclude the median pursuant to the planning commission's recommendation) is material as to Mayor Nimmo's undeveloped commercial property unless the decision will have no financial effect upon his real property interest.

Mayor Nimmo also has an economic interest in real property located adjacent to Halcon Road. It is reasonably foreseeable that the proposed road extension would have an effect on the mayor's interest in the real property. For example, the proposed road extension is situated approximately 800 feet from the mayor's real property, making the property more accessible. Thus, if the effect of the pending decisions will be material as to the property on Halcon Road, disqualification will be required.

Mayor Nimmo's real property interest would be indirectly affected by the governmental decision. When an official's economic interests in real property are located beyond a radius of 300 feet but within 2,500 feet of the property which is the subject of the decision, the appropriate standard for assessing materiality is that of Regulation 18702.3(a)(3). Pursuant to the terms of this regulation, the financial effect of a decision is material if the decision will have a reasonably foreseeable financial effect on the real property 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.

You must determine whether the pending decisions will affect the real property in the above sums. Factors which must be considered in making this determination include, but are not limited to:

(1) The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which the official has an interest;

(2) Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;

(3) In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, effects on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

Regulation 18702.3(d).

2. Business Entities

As discussed earlier, Mayor Nimmo also has an investment interest in two business entities.³ When a business entity which is an economic interest to a public official is indirectly affected by a decision, the applicable standard for determining materiality is that of Regulation 18702.2. For all but the largest business entities, subdivision (g) of Regulation 18702.2 would apply. It provides that a decision is material as to a business entity indirectly involved in a decision 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 We have analyzed the partnership as a disqualifying interest. To the extent that Bella Vista Investment Company or any other economic interest may constitute an additional disqualifying economic interest, you should request additional advice.

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

If the proposed road expansion will affect the value of the property, which is an asset of the partnership in which Mayor Nimmo has an interest, by \$10,000 or more, disqualification is required.

Bifurcation

We have advised that if it is determined that decisions in which an official has financial interests may be segregated from other decisions, once a decision in which an official has a financial interest has been segregated and acted upon, the official may then participate as to the other components of the general plan in which the official has no financial interest. (Merkuloff Advice Letter, No. I-90-542; Killian Advice Letter, No. A-89-522; and Huffaker Advice Letter, No. A-86-343.)

Thus, the mayor may participate in governmental decisions regarding areas where he has no economic interests if the procedure outlined below is adhered to:

(1) The decisions in which the mayor has a disqualifying financial interest are segregated from the other decisions.

(2) The decisions from which the mayor is disqualified are considered first, and a final decision is reached by the city council without the participation of the mayor. This decision must be final and not subject to change by other decisions regarding the proposed amendment to the general plan.

(3) Once a final decision has been reached on the matter affecting the mayor materially, the mayor may participate in the deliberations and vote regarding the other components of the circulation element of the general plan, so long as those deliberations and vote do not affect the previous decisions from which he is disqualified. (Lanzone Advice Letter, No. A-93-313; Merkuloff supra; and McNatt Advice Letter, No. I-90-714.)

Please note that a series of decisions may be too interrelated to be considered separately. (Miller Advice Letter, No. A-82-119.) For example, in a decision to select one of two autopark sites, a decision to select one of the sites is essentially a decision against the other autopark site. (See e.g. Boogaard Advice Letter, No. I-90-347; Miranda Advice Letter, No. I-88-373; Miranda Advice Letter, No. I-88-253.) Similarly, decisions regarding the bike or pedestrian paths, the proposed

freeway improvements, or any other aspect of the circulation element of the general plan may be linked to decisions which might affect the road expansion or road median. If such is the case, the decisions may not be bifurcated as one decision will have an effect on the other related decisions.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.⁴

Sincerely,

Jeff Marschner
General Counsel



By: Luisa Menchaca
Counsel, Legal Division

⁴ 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.