



FAIR POLITICAL PRACTICES COMMISSION

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May 27, 1999

Ann R. Danforth
Town of Tiburon
1505 Tiburon Boulevard
Tiburon, California 94920

**Re: Your Request for Advice
Our File No. A-99-095**

Dear Ms. Danforth:

This letter responds to your request on behalf of Tiburon Town Councilmember Andrew Thompson and Planning Commissioners Lisa Klairmont and Miles Berger for advice about the Political Reform Act (the "Act").¹

I. QUESTION

Does Councilmember Thompson, Commissioner Klairmont, or Commissioner Berger have a disqualifying conflict of interest in the Town Council's upcoming decisions about the amendments to the Tiburon Peninsula Club ("TPC") conditional use permit (CUP)?

II. CONCLUSION

No. Although it is reasonably foreseeable that the Town Council's decisions about the TPC CUP application will have a material financial effect on Councilmember Thompson's and Commissioners Klairmont's and Berger's memberships in the TPC, the "public generally" exception applies in each case. As to Commissioner Berger's personal residence, even if the decision will have a reasonably foreseeable material financial effect on the residence, the public generally exception also applies.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

III. FACTS

The Town of Tiburon's population is approximately 8,550 persons, distributed among 3,785 households.

The TPC is a nonprofit corporation. The TPC owns and operates recreational facilities on a 12-acre site in the Town of Tiburon, most of which is currently undeveloped. The TPC is applying for an amendment to its conditional use permit which would allow a substantial expansion of its facilities.

The TPC has several categories of membership. There are 600 full memberships, which are held by families living on the Tiburon Peninsula. Approximately 359 of these families live in the Town of Tiburon. Full members have voting rights. Each member family is entitled to an equal share of the proceeds should the TPC ever be liquidated. At present, member families pay \$110 in monthly dues.

The TPC expects to finance the cost of the project from its members. The exact method has not been determined, but could involve an increase in member dues, or a special assessment, or both. Any special assessment would probably fall on full members only. It is foreseeable that the financial impact on full members would equal or exceed \$250 in a twelve-month period.

Under the Town's Zoning Ordinance, both the Town Council and the Planning Commission will exercise decision making authority over the TPC application. The Town Council and the Planning Commission each consist of five members. A quorum of either body requires three members.

Councilmember Andrew Thompson and Planning Commissioners Lisa Klairmont and Miles Berger are full members of the TPC. The impact of a project decision upon the other 356 full member families in the Town of Tiburon would be the same as the impact upon Councilmember Thompson and Commissioners Klairmont and Berger. They would be subject to some type of special assessment or dues increase to finance the project that could foreseeably amount to \$250 or more within a twelve-month period.

A related issue is the project's potential impact on the full members' liquidation rights. Under the TPC's bylaws, if the TPC is ever dissolved, full members in good standing are entitled to a pro rata share of the assets, after all debts have been satisfied. If the project is built, the value of the TPC's assets will probably increase.

It is extremely unlikely that the TPC will be liquidated in the foreseeable future. If the project is built, the number of full members is also likely to increase by approximately 200. Although the value of the TPC's property will increase, the number of members entitled to an equity share upon dissolution will also increase by one-third.

Commissioner Berger owns a home that is more than 300 feet but less than 2,500 feet from the boundaries of the proposed project. This home is his principal residence, and is located on a parcel of less than one acre. The effect of a project decision will be the same on his residence as on the majority of the residential properties that are beyond 300 feet but within 2,500 feet. There are more than 100 properties within a 2,500 foot radius of the project site.

IV. ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will 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).) Specifically, 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*.

To say that a public official has a "financial interest" in a governmental decision, within the meaning of the Act, is to conclude that it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) The following advice applies that eight-step analysis.

A. Whether Councilmember Thompson and Commissioners Klairmont and Berger are "public officials."

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) As members of the Town Council and Planning Commission, respectively, Mr. Thompson, Ms. Klairmont, and Mr. Berger are "public officials," for purposes of the Act (see Sections 82048, 82041), and the conflict-of-interest rules apply to them.

B. Whether the Town Council's deliberation and votes about the TPC CUP application are covered by the Act.

The Act's conflict-of-interest provisions apply only where the public official "make[s], participate[s] in making, or in any way attempts to use his official position to influence a

governmental decision in which he knows or has reason to know he has a financial interest.” (Section 87100; Regulation 18700(b)(2).) The Commission has adopted a series of regulations which define “making,” “participating in making,” and “influencing” a governmental decision, and which provide certain exceptions. (Regulations 18702-18702.4.)

By deliberating and voting on the TPC’s CUP amendment application, Councilmember Thompson and Commissioners Klairmont and Berger would be making (see Regulation 18702.1) and participating in making (see Regulation 18702.2) governmental decisions. Thus, the Act’s conflict-of-interest rules apply to this situation.

C. Identifying Councilmember Thompson’s and Commissioners Klairmont’s and Berger’s economic interests

The Act’s conflict-of-interest provisions apply only to conflicts arising from *economic interests*. The “economic interests” from which conflicts of interest may arise are defined in Regulations 18703-18703.5. Identifying which, if any, of these economic interests are held by a public official is the third step in analyzing a potential conflict of interest under the Act. (See Regulation 18700(b)(3).) There are five kinds of such economic interests:

- A public official has an economic interest in a *business entity* in which he or she has a direct or indirect *investment*² of \$1,000 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 \$1,000 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 \$250 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 \$290 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);

² An 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.)

- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family—this is known as the “personal financial effects” rule (Section 87103; Regulation 18703.5).

Councilmember Thompson and Commissioners Klairmont and Berger each have an economic interest in the TPC by virtue of their respective TPC memberships because the memberships are “assets” within the meaning of Regulation 18703.5, the personal financial effect rule.³ (See also *Strauss* Advice Letter, No. I-90-654; *Hentschke* Advice Letter, No. I-91-445.)

Commissioner Berger has an economic interest in his personal residence. (Section 87103(b); Regulation 18703.2.)⁴

D. Deciding the degree to which Councilmember Thompson’s and Commissioners Klairmont’s and Berger’s respective economic interests are involved in the TPC CUP application decisions.

To decide if Councilmember Thompson and Commissioners Klairmont and Berger have a conflict of interest arising from their respective economic interests, it must first be determined if the economic interests are directly or indirectly involved in the Town Council’s decisions about the TPC CUP application. (See Regulation 18700(b)(4).)

1. Councilmember Thompson’s and Commissioners Klairmont’s and Berger’s economic interests in their personal finances.

A public official, such as Councilmember Thompson and Commissioners Klairmont and Berger, and his/her immediate family, are deemed to be directly involved in any governmental decision which has any personal financial effect on him/her or his/her immediate family. (Regulation 18704.5.) Here, decisions by the Town Council will have at least some effect on the personal finances of Councilmember Thompson and Commissioners Klairmont and Berger.

³ Note that the memberships do not constitute an economic interest in a business entity (Section 87103(a), Regulation 18703.1(a)) because the TPC is a non-profit. The Act’s definition of business entity, as that term is used in Section 87103(a) and Regulation 18703.1(a), is limited to “for-profit” operations. (Section 82005.)

⁴ Councilmember Thompson and Commissioner Klairmont also have an economic interest in their respective personal residences. (Section 87103(b); Regulation 18703.2.) However, we do not further mention these economic interests because their personal residences seems unlikely to give rise to a conflict of interest under these facts. The residences are indirectly involved in the TPC CUP application decision (see Regulation 18704.2), and are more than 2,500 feet from the TPC. (See Regulation 18705.2(b)(2).) Under these circumstances, a material financial effect is not usually foreseeable. (*Ibid.*)

In response to our inquiry, you have told us that none of the public officials have other interests relevant to this situation which may constitute economic interests under the Act.

That is, the decision will have an effect on an asset of each of these public officials, specifically their memberships in the TPC, which is the applicant for the CUP amendments.

2. Councilmember Berger's personal residence.

As to Councilmember Berger's personal residence, Regulation 18704.2(a) prescribes rules for deciding whether real property is directly involved in a governmental decision. Applying those rules to his residence, we conclude that the residence is indirectly involved in the TPC CUP application decision. (Regulation 18704.2(a), (b).)

E. Deciding which standards should be used to evaluate whether a financial effect is material.

Knowing the degree to which the relevant economic interests are involved in the TPC CUP application decision, we can pick the appropriate standard for evaluating the "materiality"—that is, the importance—of the effect of the decision on their economic interests. (See Regulation 18700(b)(5).)

1. Councilmember Thompson's and Commissioners Klairmont's and Berger's economic interests in their personal finances.

As to their respective economic interests in their personal finances, a personal financial effect is deemed material if it is reasonably foreseeable to be at least \$250 in any twelve-month period. (Regulation 18705.5.)

2. Councilmember Berger's personal residence.

The "materiality standards" for indirectly involved real property economic interests are found in Regulation 18705.2(b). Since Commissioner Berger's residence is more than 300 feet but less than 2,500 from the boundaries of the TPC, the rule in Regulation 18705.2(b)(1)(C) applies. That rule provides,

"(1) The effect of a decision is material as to real property in which an official has a[n] ... ownership interest ... if any of the following applies:

"...

"(C) The real property in which the official has an interest is located outside a radius of 300 feet and any part of the real property is located within a radius of 2,500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the decision and the decision will have a reasonably foreseeable financial effect of:

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

“(ii) Will affect the rental value of the property by \$1,000 or more per 12 month period.” (Regulation 18705.2(b)(1)(C).)

F. Using the materiality standards to decide whether a material financial effect is reasonably foreseeable.

With the materiality standards in mind, the critical questions (see Regulation 18700(b)(6)) come into focus.

1. Councilmember Thompson’s and Commissioners Klairmont’s and Berger’s economic interests in their personal finances.

Is it reasonably foreseeable⁵ that the Town Council’s decision about the TPC CUP application will have a financial effect of \$250 or more in any twelve-month period on the memberships in the TPC held by Councilmember Thompson and Commissioners Klairmont and Berger? (Regulation 18706.) You have told us that it is reasonably foreseeable that the dues increase or special assessment necessary to finance the expansion (which, of course, depends on approval of the CUP amendment) will exceed \$250 per year. Therefore, Councilmember Thompson and Commissioners Klairmont and Berger each have a conflict of interest in the TPC CUP application decisions, unless the public generally exception applies. (Sections 87100, 87103; Regulations 18700(a), 18706.)

2. Councilmember Berger’s personal residence.

Is it reasonably foreseeable that the Town Council’s decision about the TPC CUP application will either increase or decrease the fair market value of Commissioner Berger’s residence by \$10,000 or more *or* increase or decrease the fair market rental value of the residence by \$1,000 or more per 12 month period? (Regulations 18700(b)(6), 18706.)

We cannot answer these questions from a distance. On the basis of all available facts about the proposed expansion of the TPC and the expansion’s possible impact on the residence, Commissioner Berger must evaluate the likelihood and likely degree of financial impact his residence will feel as a result of the TPC CUP application decision. In particular, he should consider the factors in Regulation 18705.2(b)(4) when making this evaluation. If Councilmember Berger concludes that the answer to either is yes, then he has a conflict of interest unless the public generally exception applies.

⁵ As used here, “reasonably foreseeable” means “substantially likely.” (Regulation 18706; *In re Thorne* (1975) 1 FPPC Ops. 198.) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made is highly situation-specific; making this evaluation is a “judgment call.” A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*)

G. The “public generally” exception.

Even if a public official otherwise has a conflict of interest, he or she may still be able to take a role in the governmental decision in question. If the reasonably foreseeable material financial effect of a governmental decision on the public official’s economic interest is *indistinguishable* “from its effect on the public generally,” then the public official does not have a conflict. (Section 87103; Regulations 18700(b)(7), 18707(a).) This rule is referred to as the “public generally exception.” This exception exists because a public official is less likely to be biased by a financial impact on his or her economic interests when a significant part of the community is substantially likely to feel essentially the same impact from the governmental decision.

1. Councilmember Thompson’s and Commissioners Klairmont’s and Berger’s economic interests in their personal finances.

Generally, the reasonably foreseeable material financial effect on a public official’s financial interest is *indistinguishable* from the effect on the public generally if it is also reasonably foreseeable that the decision will affect a “significant segment” of the public “in substantially the same manner” it will affect the public official’s economic interest. (Regulation 18707(b)(1),(2).) In general terms, applying the public generally exception requires two closely interrelated judgments. One must determine whether there is a “significant segment” of the public which is likely to be affected by the governmental decision in “substantially the same manner” as is the economic interest which is potentially creating the conflict.

In the cases of the TPC memberships, a “significant segment” may be comprised of:

- 10 percent or more of the population in Councilmember Thompson’s and Commissioners Klairmont’s and Berger’s respective districts (or in the Town, if they are elected or serve at large). (Regulation 18707(b)(1)(A)(i).)
- 10 percent or more of all property owners, all home owners or all households in their respective districts (or in the Town, if they are elected or serve at large). (Regulation 18707(b)(1)(A)(ii).)
- At least 5,000 individuals who are residents of the jurisdiction. (Regulation 18707(b)(1)(C).)

In *rare* cases, “exceptional circumstances” may allow the recognition of a significant segment, within the the meaning of the public generally exception, even if the numerical thresholds otherwise established are not met. (Regulation 18707(b)(1)(D).)

You tell us that there are 359 families from the Town, including Councilmember Thompson's and Commissioners Klairmont's and Berger's, with full memberships in the TPC, and 3,785 households in Tiburon. Each of these 359 full memberships will presumably feel substantially the same effect from the dues increases. Equating families with households,⁶ the families with full memberships in the TPC represent 9.5 percent of the households in the Town. Under these circumstances, it is consistent with the purposes of the Act, and mathematically correct, to round 9.5 percent up to 10 percent. It appears that 10 percent of the households in Tiburon (see Regulation 18707(b)(1)(A)(ii)) will be affected by the TPC CUP application decisions in substantially the same manner (see Regulation 18707(b)(2)) as are Councilmember Thompson and Commissioners Klairmont and Berger, and their respective households. Therefore, the public generally exception applies, and the respective public officials do not have a conflict of interest arising from their memberships in the TPC.

2. Councilmember Berger's personal residence.

Where a potential conflict arises because of the effect of a governmental decision on a public official's principal residence, that effect is considered indistinguishable from the effect of the decision on the public generally if six conditions are met:

“(1) The public official's agency has jurisdiction over a population of 25,000 or less.

“(2) The decision does not have a direct effect (as provided in Title 2, California Code of Regulations, section 18704.2) on the real property that serves as the public official's principal residence.

“(3) The real property that serves as the public official's principal residence is more than 300 feet from the boundaries of the property which is the subject of the decision.

“(4) There are at least 100 properties under separate ownership which are within a 2,500 foot radius of the boundaries of the property which is the subject of the decision.

“(5) The principal residence is located on a parcel of land not more than one acre in size or, which, under the zoning and subdivision regulations of the jurisdiction in which it is located, cannot be further subdivided.

“(6) The effect of the decision on the official's real property interest will be substantially the same as the effect of the decision on the majority of the residential properties which are beyond 300 feet, but within 2,500 feet of the boundaries of the real property that is the subject of the decision.” (Regulation 18707.2(a)(1)-(6).)

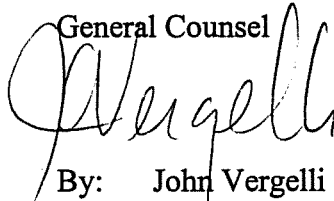
⁶ “Household” means those individuals who reside in a common owner-occupied and non-owner occupied residential dwelling. (*Furth* Advice Letter, No. A-99-035.)

Based upon the facts you have presented, the first five criteria are satisfied in the case of Commissioner Berger's residence. That leaves the issue of the sixth criterion, whether the effect of the decision on the majority of the residential properties which are beyond 300 feet, but within 2,500 feet of the boundaries of the TPC will be substantially the same as the effect on his residence. You have told us that you have consulted with Commissioner Berger specifically about this question. He has told you that he is aware of no facts or conditions which indicate that his residence will be affected by the TPC CUP application decision in a manner different from other residences similarly located within 2,500 of the TPC's boundaries. Based upon this assertion,⁷ we conclude that the sixth criterion in Regulation 18707.2(a) is satisfied. Thus, even if it is reasonably foreseeable that the Town Council's TPC CUP application decision will have a material financial effect on Commissioner Berger's residence, the public generally exception will apply, and he does not have a conflict of interest in the decision arising from his residence.

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

Sincerely,

Steven G. Churchwell
General Counsel



By: John Vergelli
Staff Counsel, Legal Division

SGC:JV:tls

⁷ The Commission does not act as a finder of fact when it renders advice. This advice is applicable and confers immunity (see Section 83114) only to the extent that the facts provided to us are correct and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.)