



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807

(916) 322-5660 • Fax (916) 322-0886

May 3, 2000

Jeffrey M. Oderman
Rutan & Tucker
Post Office Box 1950
Costa Mesa, California 92628-1950

**Re: Your Request for Advice
Our File No. A-00-082**

Dear Mr. Oderman:

This letter is in response to your request for advice on behalf of Councilmember Wayne Eggleston regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. May Mr. Eggleston participate as a public official in the City's decision regarding the application to redevelop the Beachcomber property?
2. In the event Mr. Eggleston has a conflict which arises with respect to his residence, may he participate nevertheless in the decision making process concerning the Beachcomber project in his capacity as a private citizen?

CONCLUSIONS

1. Mr. Eggleston may participate as a public official in the City's decision regarding the Beachcomber property if he concludes that the project will not affect the economic interest in his home by more than \$10,000. To the extent he relies on an expert's appraisal of the effect of the project on his residential property, he is entitled to do so only to the extent that the opinion is a reasonable one, based on a consideration of all relevant factors.

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

2. If Mr. Eggleston concludes he has a conflict of interest which bars his official participation in the decision making process concerning the Beachcomber project, he may nevertheless participate under certain limitations as a member of the general public concerning his personal interests.

FACTS

Wayne Eggleston is a councilmember for the City of San Clemente. Mr. Eggleston owns and occupies a residence located at 317 Cazador Lane in an area of the city commonly referred to as the "Pier Bowl." His residence is located approximately 880 feet from the closest boundary of the Beachcomber property, which is also located in the Pier Bowl. The Beachcomber property is just over one acre in size and is currently improved with a 2-wing single-story bungalow-style, 12-room motel, which consists of approximately 7,000 square feet of building area.

In May 1999, the city received an application for authorization to redevelop the Beachcomber property by demolishing the existing motel and replacing it with 91 luxury hotel rooms, a 90-seat restaurant, plus a spa facility, with a total proposed floor area of 69,423 square feet (the "Beachcomber project"). Although the Beachcomber project design is not yet final (the applicant may make design changes in response to preliminary input from the city staff), the project, if approved, would involve a very significant increase in the scale and intensity of the existing use of the Beachcomber property.

Mr. Eggleston has consulted with a California licensed real estate appraiser and an associate broker from a well-known real estate brokerage firm, both of whom have indicated that the Beachcomber project would have no effect on the value of Mr. Eggleston's property.

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*.

A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if 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 a standard 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 standard analysis.

A. May Mr. Eggleston participate as a public official in the City's decision regarding the application to redevelop the Beachcomber property?

1. Public Official.

The Act's conflict of interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) Mr. Eggleston, a member of the San Clemente City Council, is a "public official," for purposes of the Act (see Sections 82048, 82041), and the conflict of interest rules apply to him.

2. The Act's conflict of interest rules apply to this decision.

The Act's conflict of interest provisions apply only where a 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.)

Your question presumes that Mr. Eggleston will be "making," "participating in making," or "using his official position to influence" a governmental decision. We will assume that this is the case, and proceed to the next step.

3. Identifying 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));

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 *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 \$300 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- 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).³

The economic interest involved in this case is Mr. Eggleston’s real property interest in his home located on Cazador Lane. (Section 87103(b); Regulation 18703.2.)

4. Determining whether the public official’s economic interest is directly or indirectly involved in the governmental decision.

Once it has been determined that a public official has an economic interest in certain real property, the next step in the analysis is determining the degree to which the real property is involved in the governmental decision in question. (Regulation 18700(b)(4).) This step is important because different criteria for evaluating the materiality of the financial effect on the real property apply depending upon whether the real property is directly or indirectly involved in the governmental decision.

The Commission’s regulations provide that real property is *directly involved* in a governmental decision under the following circumstances:

- “The decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of real property in which the official has a direct or

³ Thus, a public official may not make, participate in making, or influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on his or her personal finances. (Section 87103, this is often referred to as the “personal financial effect” rule.) When applying the personal financial effect rule, financial effects on real property in which the public official has an ownership interest are not considered. (Regulation 18703.5.) Since the only apparent possible impact of the development decision on Mr. Eggleston’s personal finances would derive from his economic interest in his personal residence, the economic interest in the official’s personal finances are not considered further. (*Ibid.*)

indirect interest (other than a leasehold interest) of \$1,000 or more, or a similar decision affecting such property;

- The decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of such property;
- The decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on such property; or
- The decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.” (Regulation 18704.2(a)(1)-(4).)

Under the Commission’s regulations, real property which is not considered directly involved under the rules stated above is considered *indirectly involved* for purposes of determining the applicable materiality standards. (Regulation 18704.2(b).) Mr. Eggleston’s residence is indirectly involved in the Beachcomber project decision.

5. Deciding which materiality standards to use to decide if there will be a reasonably foreseeable material financial effect.

You state that Council member Eggleston’s home on Cazador Lane is located approximately 880 feet from the nearest portion of the Beachcomber property. Regulation 18705.2(b)(1)(C) provides the applicable materiality standard:

“(1) The effect of a decision is material as to real property in which an official has a direct, indirect or beneficial ownership interest (not including a leasehold 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.”

Thus, Council member Eggleston must disqualify himself from decisions concerning the Beachcomber project if it is reasonably foreseeable that these decisions would affect the fair market value of his personal residence by \$10,000 or more.⁴ In determining whether decisions about the project will affect the fair market value of his residence by \$10,000 or more, the factors Council member Eggleston must consider, include, but are not limited to:

“(A) 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;

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

(C) 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 18705.2(b)(4).)

6. Using the materiality standards to decide if it is reasonably foreseeable that the decision will have a material financial effect.

The sixth, and usually most important step, in deciding whether you have a conflict of interest is using the materiality standards (from step 5, above) to decide if a *material* financial effect on Mr. Eggleston’s economic interests is reasonably foreseeable as a result of the decision. (Regulation 18706.)

As used here, “reasonably foreseeable” means “substantially likely.” (Regulation 18706; *In re Thorner* (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.*)

When an official’s property falls within the 300 to 2,500 feet zone set forth in Regulation 18705.2(b)(1)(C), sometimes the official will obtain the opinion of a real estate appraiser to assist

⁴ There is no indication that Mr. Eggleston derives rental income from his residential real property, or will derive such income in the future. Therefore, we do not consider possible effects on the rental value of this property.

the official in determining whether the decision in question would have a \$10,000 effect on the fair market value of the official's property. In this case, Mr. Eggleston has consulted with a California Licensed Real Estate Appraiser, Gene Habich, and a real estate broker, Debbie Ferrari, to evaluate the potential financial impact on Mr. Eggleston's residence, if any. You enclosed a copy of each evaluator's opinion.

Licensed appraiser Gene Habich concludes there will be neither an increase nor decrease in the Mr. Eggleston's property or rental values if the Beachcomber project is approved "... due to the distance and location of the proposed development..." Mr. Habich further observes that "there is no view impact associated from this development as it relates to Mr. Eggleston's property."

Real estate broker Ferrari rendered the opinion "that only the properties adjacent to the project will be impacted because of the Spa's projected 45-foot height." Ms. Ferrari does "... not believe the Spa will be visible from the Eggleston property and it is of sufficient distance so as not to affect the value."

The factors listed in Regulation 18705.2(b)(4), by the express terms of the regulation, form a mandatory list of core criteria that *must* be considered in any appraisal. Other data commonly found in real estate appraisals, such as the known effects of similar projects on comparable or other properties, are not mentioned in the regulation and are not required to be considered in every appraisal. The decision whether and when to include "comparables," or other data useful to the analysis, is left to the informed professional judgment of the appraiser, and to the public official who is ultimately responsible for assessing the reliability of the appraisal. We have advised on numerous occasions in the past that an appraisal conducted by a disinterested and otherwise qualified real estate professional who considers the factors listed in Regulation 18705.2(b)(4), will be considered a good faith effort to assess the materiality of pending governmental decisions indirectly affecting a public official's property. (See, e.g., *Seligmann* Advice Letter, No. A-97-561; *Bennetts* Advice Letter, No. A-97-374; *Confer* Advice Letter, No. A-94-345.)

It is unclear from the text of the two opinions you have forwarded whether all of the factors listed in Regulation 18705.2(b)(4) have been considered. For instance, the Beachcomber project increases a 12-room motel to 91 luxury hotel rooms, adds a 90-seat restaurant and includes a spa facility. These changes are reflected in a ten-fold increase in the square footage of the development. In the appraisals, however, we find no discussion of the potential impact of increased traffic, privacy or intensity of use on Mr. Eggleston's neighborhood.

You argue in your letter requesting advice that although the appraisals do not "expressly" state each of the factors discussed above were considered, it can be "inferred from their

language" that such is the case. Because Commission staff does not act as a finder of fact⁵ and because we have no expertise in real estate matters, we do not evaluate the accuracy of opinions prepared by real estate appraisers. Thus, any immunity that flows from submitting an appraisal is only applicable to the extent that the underlying facts are accurate. In deciding to participate in a decision based on an appraiser's opinion, the official must make the ultimate factual determination that the opinion is reliable and correct.⁶

In sum, Mr. Eggleston may participate as a public official in the City's decision regarding the Beachcomber property if he concludes that the project will not affect the economic interest in his home by more than \$10,000. If he relies on an expert's appraisal of the effect of the project on his residential property, he is entitled to do so only to the extent the underlying facts are correct and that the opinion is a reasonable one based on a consideration of all relevant factors.

B. In the event Mr. Eggleston has a conflict which arises with respect to his residence, may he participate nevertheless in the decision-making process concerning the Beachcomber project in his capacity as a private citizen?

In the event Mr. Eggleston is disqualified pursuant to the law explained above, he has certain obligations under the Act. First, he may not make, participate in making, or influence the decision. (Section 87100.) The meaning of the terms "making," "participating in making," and "influencing" are explained in detail in Regulations 18702.1-18702.4, which are enclosed. The definition of "influencing," as that term is used in the Act, expressly excludes "[c]ommunicat[ions] with the general public or the press." (Regulation 18702.4(b)(2).)

Thus, a public official is permitted to appear, as any member of the general public, before an agency in the course of its prescribed governmental function, to represent himself or herself on matters related solely to his or her personal interests. (Regulations 18702.4(a)(2) and 18702.4(b)(1).) A "personal interest" includes an interest in real property which is wholly owned by the official or members of his or her immediate family. (Regulation 18702.4(b)(1)(A).) One must be careful, however, to avoid giving the impression that one is speaking in the interest of any person or group other than one's self and one's immediate family, or that one is acting in any

⁵ 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.)

⁶ Public officials with financial interests that will be materially affected by a decision may still participate in the decision if the effect on their interests is not distinguishable from the effect on the public generally. For the "public generally" exception to apply, a decision must affect the official's interests in substantially the same manner as it would affect the economic interests of a significant segment of the public. (Regulation 18707.) Your letter requesting advice concedes that the exception does not apply because the requirements of Regulation 18707 are not satisfied.

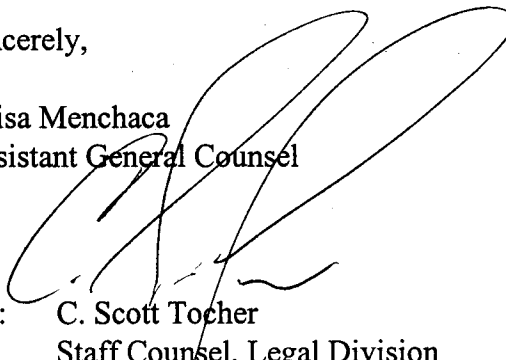
official capacity. (*Harper* Advice Letter, No. A-96-298.) The official's comments should be made under the same time limits and procedures applicable to comments from members of the public.

These regulations provide an exception to the rule prohibiting a public official from otherwise appearing before his agency to influence a decision with which he has a conflict of interest. As such, these regulations are subject to the traditional statutory construction that exemptions be construed narrowly. Regulation 18702.4 makes clear that an official may make "appearances" as a member of the general public "before an agency in the course of its prescribed governmental function" to represent himself on matters related solely to his personal interests. (Regulation 18702.4(a)(2) and (b)(1) (underlining added).) The regulation provides no other circumstances where the exception applies. Thus, we conclude that while Mr. Eggleston may appear before the City Council and Planning Commission when they are constituted as such at a public hearing as any other member of the public to represent his real property interest, he may not attempt to contact the individual members of either the council or the commission for purposes of influencing their decision regarding the Beachcomber project if he concludes he has a conflict of interest.

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

Sincerely,

Luisa Menchaca
Assistant General Counsel

By:  C. Scott Tocher
Staff Counsel, Legal Division

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Enclosures