



FAIR POLITICAL PRACTICES COMMISSION

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May 26, 2000

Albert Fishman
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**Re: Your Request for Advice
Our File No. A-00-096**

Dear Councilmember Fishman:

This letter responds to your request for advice about the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ You are seeking additional guidance based on the advice you received in the *Battersby* Advice Letter, No. A-99-281.

QUESTIONS

1. May you participate in ministerial decisions regarding the Marketplace project?
2. May you vote on the sale of a street named "Rainbird Way," a right-of-way that runs through the middle of the Marketplace project?
3. May you vote on the Final Map for the Marketplace project?
4. May you vote on the final Environmental Impact Report for the Marketplace project?

CONCLUSIONS

1-3. Yes. The conflict-of-interest prohibition in Section 87100 of the Act does not apply to ministerial decisions.

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

4. You do not have a conflict of interest in the city's decision to approve the final EIR unless you have reason to believe that someone plans to challenge the project on the basis that the city did not approve a final EIR, and that the lawsuit would significantly delay the project.

FACTS

You are a member of the Glendora City Council. You are also an insurance broker and agent, doing business as "Al Fishman Insurance." One of your clients, Toyota of Glendora, owns an option to purchase property in a 48-acre development project in the city. Another client, a small auto body shop, is located directly across the street from the same project. You provide health insurance to these clients. You receive more than \$250 per year on each account. The insurance premiums are paid directly to the insurance companies, and you receive a commission from the insurance companies. The clients are identified on your commission statements.

The development project, called the Marketplace Specific Plan Proposal, involves the construction of a large-scale commercial center, including a Sam's Club, a Home Depot, other stores and two automobile dealerships. The specific plan proposal was put to a vote of the citizens of Glendora because the city council could not adopt or deny the project or certify the final environmental impact report, due to a split vote. The voters approved the ballot measure ("Measure D") by 63 percent.

Measure D implemented the Glendora Commercial Specific Plan and related zone changes for the Marketplace project. The specific plan includes environmental impact mitigation measures that were approved by the city's planning commission. One of the mitigation measures requires the city to sell a right-of-way ("Rainbird Way") to the developer. In exchange, the developer must dedicate a rail platform parcel to the city. To comply with Measure D, the city must have Rainbird Way appraised by a reputable, experienced appraiser, selected by the Director of Public Works. If the appraisal shows that Rainbird Way has a greater value than the rail platform parcel, then the developer must pay the difference to the city, which may not exceed \$150,000. In a ministerial decision, the city council must authorize the mayor to sign the deed conveying Rainbird Way to the developer. In another ministerial decision, the city council must approve the final map of the Marketplace project.

Under the California Environmental Quality Act ("CEQA"), major development projects require the approval of an environmental impact report ("EIR"). The city has not approved a final EIR for the Marketplace project, and Measure D does not require it to do so. An EIR may not be necessary in this case because CEQA contains an exemption for voter-approved projects. To avoid any legal challenges to the development project, however, the developer may still request the city to approve the final EIR. The city's vote on the final EIR cannot stop the project from going forward, but it could modify the project in its current form. According to you, neither Toyota of Glendora (or its related business entities) nor the auto body shop will initiate, or be a named party in the decision to approve the final EIR.

You did not vote on the initial decision to approve the Marketplace project because your clients would have benefitted financially if the project was approved. (*See Battersby Advice Letter*, No. A-99-218.) Now that the voters have approved the project, you believe that your clients' financial gain has been realized. For example, Toyota of Glendora plans to exercise its option to purchase property in the project area and build two automobile dealerships.

ANALYSIS

A. Conflict-of-Interest Prohibition

A public official may not make, participate in making, or in any way attempt to use his or her official position to influence a governmental decision in which the official knows, or has reason to know, that he or she has a financial interest. (Section 87100.) The Commission has developed an eight-step approach for determining whether an individual has a disqualifying financial interest in a decision. (Regulation 18700(b).)

1. Public Official

The conflict-of-interest prohibition only applies to public officials. (Section 87100.) As a city councilmember, you are a "public official" subject to the prohibition. (Section 82048.)

2. Conduct Covered

The prohibition covers specific conduct: making, participating in making, or attempting to use one's official position to influence a governmental decision. These terms are defined in Regulations 18702-18702.4. By voting and deliberating on the final EIR for the Marketplace project, you will be engaging in conduct regulated by the Act. (Regulation 18702.1(a)(1).)

In contrast, the prohibition in Section 87100 does not apply to actions that are solely ministerial. (Regulation 18702.4(a)(1).) As a general rule, "an act is ministerial when it is the doing of a certain thing that is unqualifiedly required." (*Findleton v. Board of Supervisors* (1993) 12 Cal.App.4th 709, 713.) "Where the law prescribes and defines the duties to be performed by a public officer with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial." (52 Cal.Jur.3d, Public Officers, § 170, p. 333.)

Measure D requires the city to sell Rainbird Way. In accordance with the measure, the city council must authorize the mayor to sign the deed conveying title to the property to the developer. This is a ministerial decision because Measure D does not give the city discretion to reject the sale. As such, the Act's conflict-of-interest provisions do not prohibit you from participating in this decision.

In addition to selling Rainbird Way, the city council must approve the final map for the Marketplace project. The approval of a final map is ministerial once the appropriate officials certify that the map is in substantial compliance with the previously approved tentative map and its attendant conditions. (*City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1191 n.5.) However, when a tentative map is approved subject to conditions and those conditions are not met, approval of a final subdivision map is not a ministerial act. (*Soderling v. City of Santa Monica* (1983) 142 Cal.App.3d 501, 509.) In this case, approval of the final map for the Marketplace project is a ministerial act since there are no conditions that need to be met. As a ministerial act, the approval of the final map is not subject to the prohibition. (*Humbert Advice Letter*, No. I-93-178.)

3. Economic Interest

A public official has a disqualifying financial interest in a decision 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,² or on the following enumerated economic interests:

1. Any business entity in which the official has a direct or indirect investment worth \$1,000 or more.
2. Any real property in which the official has a direct or indirect interest worth \$1,000 or more.
3. Any source of income of \$250 or more provided to, received by, or promised to the official within 12 months before the decision.
4. Any business entity in which the official is a director, officer, partner, trustee, employee, or holds any position of management.
5. Any donor of gifts worth \$300 or more provided to the official within 12 months before the decision. (Section 87103.)

You are an insurance broker and agent, and you receive commission income. The source of the commission income received by an insurance broker or agent includes: (1) the insurance company providing the policy; (2) the person purchasing the policy; and (3) the company or firm through which the broker or agent conducts business. (Regulation 18703.3.) Consequently, your insurance company, "Al Fishman Insurance," and the business entities who have purchased health insurance from you are sources of income to you, and therefore economic interests to you for purposes of the Act. Al Fishman Insurance does not appear to be connected to the Marketplace project. Therefore, we will only focus on your economic interest in your clients who have financial interests in the project area, Toyota of Glendora and the auto body shop.

² A decision will have a financial effect "on the official," within the meaning of Section 87103, if the decision will affect the official's personal expenses, income, assets, or liabilities, or those of his or her immediate family. (Regulation 18703.5.) This is known as the "personal financial effect" rule. It does not appear from your facts that the project will affect the amount of income you receive from selling insurance.

Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that a decision will have a material financial effect on one or more of those economic interests. This determination takes three steps which are discussed in detail below as Steps 4, 5 and 6. First, the official must determine whether the economic interest will be directly or indirectly involved in the decision. (Regulation 18700(b)(4).) Based upon the type of involvement, the official must then find the applicable materiality standard set forth in Commission regulations. (Regulation 18700(b)(5).) After finding the applicable materiality standard, the official must then decide whether it is reasonably foreseeable that the standard will be met. (Regulation 18700(b)(6).)

4. Direct Versus Indirect Involvement

A person, including a business entity that is a source of income, is directly involved in a decision if the person initiates, is a named party in, or the subject of, the decision. (Regulation 18704.1(a).) A person is the subject of a decision if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the person. (*Ibid.*) When a person is not directly involved in a decision, we consider that person to be indirectly involved for purposes of finding the relevant materiality standard.

Your clients did not initiate and are not named parties in the EIR decision. Moreover, the decision does not involve the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, either one of your clients. Therefore, your clients are indirectly involved in the city council's decision to approve the final EIR.

5. Applicable Materiality Standard

Regulation 18705.1(b) sets forth the materiality standards for business entities that are indirectly involved in a decision, including business entities that are sources of income to a public official. (Regulation 18705.3(b)(1).) The standards in the regulation vary depending upon the size of the business entity. The bigger the business entity, the greater the monetary impact a decision must have in order for the effect to be material.

Presumably, your clients are small business entities as described in Regulation 18705.1(b)(7).³ Under that regulation, the effect of a decision is material if it will result in an increase or decrease in the company's: (1) gross revenues of \$10,000 or more in a fiscal year; (2) existing expenses of \$2,500 or more in a fiscal year; or (3) value of assets or liabilities of \$10,000 or more.

³ Regulation 18705.1(b)(7) business entities are entities that are not listed on the Pacific Stock Exchange or the Eligible Securities List maintained by the Department of Corporations, and that do not meet the qualifications to be listed on the NASDAQ Stock Exchange. (Regulation 18705.1(b).)

6. Foreseeability

Once you find the relevant materiality standard, you must determine whether it is reasonably foreseeable that the standard will be met as a result of the decision. (Regulation 18706.) A financial effect is considered reasonably foreseeable at the time a governmental decision is made if there is a substantial likelihood that it will occur. (Regulation 18706.) A material financial effect need not be a certainty as a result of the decision, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Consequently, the question becomes whether it is substantially likely that the final EIR decision will have a material financial effect on one of your clients. Specifically, the question is whether it is substantially likely that the decision will increase or decrease the company's: (1) gross revenues by \$10,000 or more in a fiscal year; (2) incurred or avoided expenses by \$2,500 or more in a fiscal year; or (3) value of assets or liabilities by \$10,000 or more. (Regulation 18705.1(b)(7).)

You may have had a conflict of interest in the city's initial decision to approve the Marketplace project because of your economic interest in the auto body shop located directly across the street from the project. The conflict may have been based on a material impact on the business activity of the auto body shop, or on the fair market value of the company's property, as a result of the new development. You may have also had a conflict of interest in the initial decision based on your economic interest in Toyota of Glendora. Since the project has been approved, the fair market value of Toyota's option to purchase property in the project area has increased by \$10,000 or more. In addition, Toyota will incur expenses of at least \$2,500 by exercising its option to purchase the property and building two new automobile dealerships.

The decision in which you had a conflict was placed before the voters who ultimately approved the project. However, the city may still be called upon to approve the final EIR. This decision will not stop the project from going forward. Therefore, you do not believe that the EIR decision will have any effect on your economic interests because the effect was realized when the voters approved the project. Nevertheless, if the city does not approve the EIR, the project could be significantly delayed by a lawsuit. A significant delay in development would have a material financial effect on your clients. However, you have not provided any facts suggesting that someone plans to challenge the development project on the basis that the city did not approve a final EIR. Therefore, you do not have a conflict of interest in the final EIR decision unless you have reason to believe that such a lawsuit is imminent, and that the lawsuit would significantly delay the development.

7. Public Generally Exception

An official who otherwise has a conflict of interest in a decision may still participate in the decision if the "public generally" exception applies. (Section 87103.) For this exception to

apply, the decision must affect the official's economic interests in substantially the same manner as it would affect a significant segment of the public. (Regulation 18707.) For decisions that affect a business entity, a "significant segment" is 50 percent of all businesses in the jurisdiction or the district the official represents. (Regulation 18707(b)(1)(B).) This exception does not apply to your economic interest in Toyota of Glendora or the auto body shop. Although arguably 50 percent of all businesses in the your district will be impacted by the project, the impact will not be similar to the effect on the dealership, which has an option to purchase property in the project area, or on the auto body shop, which is located directly across the street from the project.

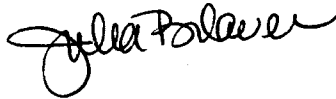
8. Legally Required Participation

The eighth step pertains to the "legally required participation" rule. (See Regulation 18708.) This rule only applies when several public officials in the same agency are simultaneously disqualified. Thus, it is not relevant to your request.

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

Sincerely,

Luisa Menchaca
Assistant General Counsel



By: Julia Bilaver
Staff Counsel, Legal Division

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