



FAIR POLITICAL PRACTICES COMMISSION

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March 26, 2002

Mark D. Hensley
Burke, Williams & Sorenson, LLP
611 West Sixth Street, Suite 2500
Los Angeles, CA 90017-3102

**Re: Your Request for Advice
Our File No. A-01-291**

Dear Mr. Hensley:

This letter is in response to your request for advice on behalf of councilmember Nancy Wernick regarding provisions of the Political Reform Act (the "Act").¹

QUESTION

May councilmember Wernick vote on land use entitlements sought by a developer with a contingent interest in real property owned by Federal Express Corporation, a business entity that employs the councilmember's husband?

CONCLUSION

Councilmember Wernick may not vote, or participate in any official capacity, in any decision relating to the developer's applications.

FACTS

Nancy Wernick is a member of the city council of the City of El Segundo. Her husband is employed by Federal Express Corporation, which owns some 45 acres of real property in El Segundo. A third party developer has acquired a contingent interest in the Federal Express property. The developer has agreed to pay approximately \$45 million for the Federal Express property, subject to the acquisition of various land use entitlements from the City of El Segundo. The developer is seeking a development agreement,

¹ Government Code sections 81000 - 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

general plan and zoning code amendments, and a specific plan designation for the property. The land use entitlements are subject to city council approval.

ANALYSIS

The Act's conflict of interest rules prohibit a public official from making, participating in making, or in any way using his or her official position to influence a governmental decision in which the official has a "financial interest." (§ 87100.) Section 87103 provides that a public official has a "financial interest" in a governmental 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, a member of his or her immediate family, or on any of the official's economic interests.

Regulation 18700(b) describes in detail the analytical process used to determine if a public official has a conflict of interest in a particular decision. The El Segundo city council is a local government agency (§ 82041) and, as a councilmember, Ms. Wernick is a public official within the meaning of § 82048. Your request for advice presupposes that she will make governmental decisions on the developer's applications. Having disposed of these preliminaries, we advance to the third step of the analysis, identifying the official's economic interests, which may be any of the following:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment² of \$2,000 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 \$2,000 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 \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);³
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$320 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 of an official or by a member of the official's immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.) "Immediate family" is defined at Section 82029 as an official's spouse and dependent children.

³ Taking into account your community property interest in your husband's income, you have an economic interest in a source of income which provides your husband \$1,000 or more in any 12 month period.

- 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 the “personal financial effects” rule (Section 87103; Regulation 18703.5).

Councilmember Wernick has an economic interest in her husband’s employer, Federal Express Corporation, under subdivision (d) of § 87103. We also presume that, by reason of her community property interest in her husband’s income, this business entity is a source of income to her within the meaning of § 87103(c). A public official always has an economic interest in his or her personal expenses, income, liabilities or assets, and those of his or her immediate family (defined as the official’s spouse and dependent children, § 82029). In light of our analysis of foreseeable effects on Federal Express Corporation, we need not reach the question of “personal financial effects.”

After identifying the official’s economic interests, we determine whether the councilmember’s known economic interests are directly or indirectly involved in the decisions at issue. The subject of these decisions would be the developer’s land use applications and the underlying real property. The developer here pursues land use entitlements for real property owned by another, pursuant to a sales agreement contingent on the developer’s acquisition of these entitlements. In such a case, the applicant acts as the agent of the landowner, as well as on its own behalf. Under regulation 18704.1, the landowner (here, Federal Express Corporation) is directly involved in decisions on these land use applications.

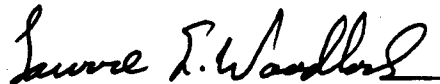
When a business entity or source of income is directly involved in a decision, the effect of that decision is presumed to be material. That presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the business entity. (Regulations 18704.1(b); 18705.1(b).) This case involves a \$45 million real property transfer, and you have not pointed to any facts suggesting that the planned transaction would have no foreseeable financial effect on Federal Express Corporation. We conclude, accordingly, that decisions on these land use applications would have a foreseeable, material financial effect on Federal Express Corporation, which is an economic interest of councilmember Warnick.

Councilmember Warnick thus would have a conflict of interest in decisions on the developer’s applications, unless the “public generally” exception were applicable, or her participation in decisionmaking were legally required. (See regulations 18707-18708.) You have not disclosed any facts indicating that these exceptions are applicable here, and we therefore conclude our analysis at this point.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

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