



## FAIR POLITICAL PRACTICES COMMISSION

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December 30, 2003

Ronald R. Ball, City Attorney  
City of Carlsbad  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008-1989

**Re: Your Request for Informal Assistance**  
**Our File No. I-03-286**

Dear Mr. Ball:

This letter is in response to your request on behalf of City of Carlsbad Planning Director Michael Holzmilller for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Because you do not describe a particular decision, we provide you with informal assistance.<sup>2</sup>

### QUESTION

Do the Act's conflict-of-interest provisions restrict Mr. Holzmilller's participation in governmental decisionmaking, as a result of his spouse's employment by Hofman Planning Associates?

### CONCLUSION

The Act's conflict-of-interest rules do not restrict Mr. Holzmilller's participation in governmental decisions simply because his spouse is employed by Hofman Planning Associates, a business entity which assists and represents developers in proceedings before the city. Since you do not describe any particular decision, we provide you with an outline of the analytical process Mr. Holzmilller can apply as circumstances warrant.

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

<sup>2</sup> Informal assistance does not confer the immunity provided by a Commission opinion or formal written advice. (Regulation 18329(c)(3), copy enclosed.)

## FACTS

Planning Director Michael Holzmiller's spouse accepted a position with the consultant firm Hofman Planning Associates ("Hofman"), as a clerical support services employee. She is the office manager of the company and her duties relate to clerical functions such as keeping track of the scheduled meetings and appointments of the three principals, keeping files up-to-date and organized, paying bills, ordering supplies, doing payroll and other miscellaneous clerical tasks. She receives a fixed salary for her services which exceeds \$1,000 in a 12-month period. She is not an officer or a stockholder, nor does she have any ownership interest in the corporation. Her salary is not dependent on the outcome of any particular application of her employer. She does not receive any bonus, commission, deferred compensation or other form of consideration apart from her salary.

Hofman represents several developers, and will appear before the planning commission and city council in connection with their clients' applications for development permits on various developments within the City of Carlsbad.

## 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. 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. (§ 87103; Reg. 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which we apply to your question. (Regulation 18700(b)(1)-(8).)

### **Step One: Is Mr. Holzmiller a Public Official?**

The Act's conflict-of-interest provisions apply only to "public officials." (§§ 87100, 87103; regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency...." (§ 82048.) As a planning director for the City of Carlsbad, Mr. Holzmiller is a public official.

### **Step Two: Will Mr. Holzmiller Be Making, Participating In Making, Or Using His Official Position To Influence A Governmental Decision?**

The Act's conflict-of-interest provisions come into play only when a public official makes, participates in making, or in some way attempts 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. (§ 87100.)

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

Since the Act’s conflict-of-interest provisions would limit Mr. Holzmillier’s conduct only if he makes, participates in making, or uses his official position to influence a governmental decision, we will assume for purposes of analysis that he will engage in such decisionmaking in some or all of the applications presented by Hofman.

### **Step Three: What Are Mr. Holzmillier’s Economic Interests.**

There are six kinds of economic interests recognized under the Act. Those pertinent to your account of the facts are the following:

- A public official always 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 (§ 87103(c); Reg. 18703.3).
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family – this is the “personal financial effects” rule (§ 87103; Reg. 18703.5).

A public official’s income, for purposes of the Act, includes his or her community property interest in the income of his or her spouse. (§ 82030(a).) Thus, an official has an economic interest in his or her spouse’s employer if the spouse receives \$1,000 or more from that employer in the 12 months prior to the decision. You have indicated that Mr. Holzmillier’s spouse has received at least that amount from Hofman, and Hofman is therefore a “source of income” to Mr. Holzmillier.

### **Step Four: Will Mr. Holzmillier’s Economic Interests Be Directly Or Indirectly Involved in Governmental Decisions?**

The Act’s conflict-of-interest rules distinguish between economic interests that are directly involved in governmental decisions, and those that are only indirectly involved.

Regulation 18704.1(a) provides:

“(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

In all other cases, business entities that are sources of income will be “indirectly” affected by the decision. As you describe the circumstances, some of Hofman’s clients will initiate, be party to, or may be the subject of some decisions before Mr. Holzmilller. However, his spouse’s clerical employment does not convert clients of Hofman’s into sources of income for his spouse, or for Mr. Holzmilller. Although Hofman staff may appear before Mr. Holzmilller to represent Hofman clients, Hofman is not directly involved in the decisions you describe.

On the other hand, a public official is deemed to be directly involved in any governmental decision that will have a “personal financial effect” on the official. (Regulation 18704.5.)

**Steps Five and Six: At What Point Does The Effect Of A Governmental Decision On These Economic Interests Become Material, and Is it Reasonably Foreseeable That The Effects Will Be Material?**

The next step involves determining the materiality standard applicable to Mr. Holzmilller’s economic interests, as established by regulations 18705 et seq. After determining the level of economic effect considered to be “material” for each economic interest, the official must then decide whether it is “reasonably foreseeable” that the effect of a given decision on a given economic interest will be “material.” (Regulation 18700(b)(6).) An effect is considered “reasonably foreseeable” if it is “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 depends on the specific facts surrounding the decision. A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Id.*)

Where the source of income is a business entity which is indirectly involved in a governmental decision, the Commission assesses materiality by regulation 18705.1(c). The thresholds for materiality under this regulation vary with the size of the business. We do not know the size of Hofman but, assuming the business is not publicly traded and it is of a relatively modest economic size, regulation 18705.1(c)(4) provides that "the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

(B) The governmental 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 \$5,000 or more; or,

(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more."

Mr. Holzmilller should consult regulation 18705.1(c) to ensure that he identifies the materiality threshold actually appropriate to Hofman.

A reasonably foreseeable financial effect on a public official's personal finances is material if it amounts to at least \$250 in any 12 month period. (Regulation 18705.5.) Your account of the facts suggests that decisions relating to Hofman's clients will not have a personal financial effect on Mr. Holzmilller.<sup>3</sup>

### **Steps Seven and Eight: Exceptions.**

An official who might otherwise have a conflict of interest in a particular decision may still participate in that decision if the circumstances are such that an exception to the conflict-of-interest rules might apply. The "public generally" exception may be invoked when the financial effect of a decision upon a public official's economic interests is not distinguishable from the effect of the decision on a significant segment of the public generally. (Section 87103; regulation 18707(a).) Your account of the facts does not include information on particular decisions in which the "public generally" exception need be considered.

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<sup>3</sup> There is also a separate materiality standard which applies in cases where there is a "nexus" between duties owed by a public official to a source of income and to the official's public agency. The materiality threshold is much lower when a public official is paid by a private person to accomplish some action within the official's public decisionmaking authority. (Regulation 18705.3(c).) However, the nexus standard does not apply in the present case since Mr. Holzmilller is not being paid by Hofman for any purpose.

An official with a conflict of interest may still participate in the decision under the "legally required participation" exception. This is an exception that typically applies when an agency is unable to assemble a quorum of its members without participation of an official who has a conflict of interest. Again, you have not suggested that this exception need be considered at present.

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

Enclosure  
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