



## FACTS

You are proposing to accept a position, under contract as an hourly employee, as the community development director with the City of Suisun.

You and your wife own a 100-year old Victorian, located on California Street (the "California Street property") which you acquired in 1979. Until June 2001, it was your personal primary residence. The property is approximately 400 feet west of Main Street and is a combination residential (currently four rental units) and business (one-half of the first floor is the location of your wife's tax and bookkeeping business, Chris Raycraft, EA and Associates). You no longer reside at this property.

As community development director, your primary responsibility would be to work with city staff and consultants in overseeing and promoting a second phase of a revitalization strategy for the downtown. This phase includes a focus on physical improvements and new development (mixed-use) along Main Street. It is possible that one or more of the properties to be redeveloped would be within 500 feet of your property.

You anticipate your responsibilities as community development director to include the following:

- Working with consultants and city staff in refining the preliminary plans for the downtown;
- Overseeing the entitlement process (city staff, consultants, planning commission and city council/redevelopment agency) related to project applications;
- Providing a city information resource for the public and development community;
- Managing the city's planning function including implementation of the general plan, enforcement of applicable ordinances, maintenance/update of planning documents, presentations to city bodies and public groups/organizations; and
- Other duties normally the responsibility of a city planning director/community development director.

In a follow-up telephone conversation, you stated that the position is "designated" in the agency's conflict of interest code and you would be required to file a Form 700 "Statement of Economic Interests."

## ANALYSIS

### POTENTIAL CONFLICT OF INTEREST

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).) 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.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

**STEPS 1 & 2: ARE YOU A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?**

The conflict-of-interest provisions of the Act apply only to “public officials,” including “designated employees” as enumerated in the agency’s conflict of interest code. (Section 87100.) A “public official” is defined by the Act to include “every member, officer, employee or consultant of a state or local government agency.” (Section 82048.) Therefore, you are a “public official” who would be “making,” “participating in the making” or using or attempting to use your official position to “influence” a governmental decision within the meaning of the Act.

**STEP 3: DO YOU HAVE A POTENTIALLY DISQUALIFYING ECONOMIC INTEREST?**

A public official has a financial interest in a decision within the meaning of section 87103 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 one of five enumerated economic interests, including:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (§ 87103(a); reg. 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (§ 87103(d); reg. 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 (§ 87103(b); reg. 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 (§ 87103(c); reg. 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (§ 87103(e); reg. 18703.4);

- 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).

Based on your facts, the following are economic interests that you must consider when making decisions as the community development director:

**Real Property:** A public official has an economic interest in any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more (section 87103(b); regulation 18703.2). For purposes of section 87103, "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, or dependent children own directly, indirectly, or beneficially a 10-percent interest or greater."

Because you and your wife each have an ownership interest presumed to be valued in excess of \$2,000 in the California Street property, you have an economic interest in the real property.

**Business Entity:** A public official has an economic interest in a business entity if the public official has a direct or indirect investment of two thousand dollars (\$2,000) or more in the business entity. (Regulation 18703.1(a).) Because your wife operates a tax and bookkeeping business you also have an economic interest in the business entity.

**Source of Income:** Regulation 18703.3 states that "...a public official has an economic interest in any person from whom he or she has received income, including commission income and incentive compensation ... aggregating five hundred dollars (\$500) within 12 months prior to the time when the relevant governmental decision is made."

Income from an individual also includes a pro-rata share of income of any business entity in which the official owns a 10-percent interest or greater. When the pro-rata share equals or exceeds \$500 in any 12-month period, the source of that income to the business entity becomes a "source of income" within the meaning of section 87103(c), requiring disqualification as to decisions having a reasonably foreseeable material financial effect upon the source of income, which is distinguishable from the effect on the public generally. (*Winnie* Advice Letter, No. A-85-228.) You would therefore, have a source of income economic interest from the clients of your wife's business where your pro rata share is \$500 or more.

Additionally, since the California Street property is income producing, as it contains four rental units, you would have an economic interest in any source of income [tenants] from whom you receive \$500 or more in rental income within 12 months prior to the date when the relevant governmental decision is made.

**STEP 4: IS THE ECONOMIC INTEREST DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?**

“In order to determine if a governmental decision’s reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official’s economic interest is directly involved or indirectly involved in the governmental decision.” (Regulation 18704(a).)

**Real Property:** For governmental decisions which affect real property interests, the standards set forth in regulation 18704.2 apply (regulation 18704(a)(2)).

Regulation 18704.2(a) states:

“(a) Real property in which a public official has an economic interest is directly involved in a governmental decision if any of the following apply:

(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision....

(2) The governmental 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 the real property in which the official has an interest or a similar decision affecting the real property. ...

(3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.

(4) The governmental decision involves the imposition, repeal, or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

(5) The governmental 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) or the redevelopment area.

(6) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.”

If the real property that is the potential subject of the governmental decisions is located less than 500 feet from your real property economic interest, the California Street property owned by you and your wife would be directly involved. The California Street property would also be directly involved if it meets any of the other criteria set forth in regulation 18704.2 (a)(2) through (6) above.

The California Street property would be indirectly involved if the decision concerned property located more than 500 feet from that location. In addition, pursuant to regulation 18704.2 (b) the California Street property would be indirectly involved if:

“(1) The decision solely concerns the amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category, which shall be analyzed under Title 2, California Code of Regulations, section 18705.2(b).

(2) The decision solely concerns repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage or similar facilities.”

**Business Entities and Source of Income:** For governmental decisions that affect business entities and sources of income, the standards set forth in regulation 18704.1(a) apply.

Regulation 18704.1(a) states:

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

Therefore, if none of the tenants, or the clients of your wife's tax and bookkeeping business, would be initiating the proceeding or would be named parties or the subject of the proceedings concerning the governmental decisions, they would be indirectly involved. Likewise, if the business entity is not a named party or the subject of the proceedings concerning the governmental decision it would be indirectly involved.

#### **STEP 5: MATERIALITY STANDARD**

**Real Property:** Once the degree of involvement is determined, Step 5 of the conflict-of-interest analysis addresses the applicable materiality standard. Regulation 18705.2(b) sets forth the materiality standards for real property economic interests.

**Directly Involved Real Property:** The financial effect of a governmental decision on real property which is directly involved in the decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (Regulation 18705.2(a)(1).)

**Indirectly Involved Real Property:** Under regulation 18705.2(b)(1):

“[t]he financial effect of a governmental decision on real property [other than leaseholds] which is indirectly involved in the governmental decision is presumed not to be material. This presumption *may be rebutted* by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision affects:

“(A) The development potential or income producing potential of the real property in which the official has an economic interest;

“(B) The use of the real property in which the official has an economic interest;

“(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.”

**Source of Income:** For indirectly involved sources of income who are individuals, the effect of a decision is material under regulation 18705.3(b)(3) if:

“(A) The decision will affect the individual’s income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

“(B) The decision will affect the individual’s real property interest in a manner that is considered material under Title 2, California Code of Regulations section 18705.2(b).”

**Business Entity:** Regulation 18705.1(c) sets forth the materiality standards for an economic interest in an indirectly involved business entity. Under regulation 18705.1(c)(4), the financial effect of a governmental decision on a relatively small business in which a public official has an interest and which is indirectly involved in the governmental decision 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.”

#### **STEP 6: REASONABLY FORESEEABLE**

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

With respect to your economic interests as set forth above, the determination of whether or not it is reasonably foreseeable that the applicable materiality standard will be met with respect to any of the economic interests, is necessarily a factual question that is ultimately for you to determine according to the standards set forth above and based on the particular governmental decision in question. Although you have provided us with a general description of your prospective job duties, you have not provided us with enough details of any particular governmental decision to make that determination.

With respect to the various decisions that may come before you, some of the matters being decided may be more likely than others to have a reasonably foreseeable financial effect on one or more of your economic interests. This will, of course, depend on the various options being considered and their likely impact on your economic interests. The

Commission does not act as finder of fact when rendering advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We must leave that to you because the determination involves factual issues. Once an effect is determined to be reasonably foreseeable, the burden is on the public official to exercise reasonable diligence when deciding whether the effect is material. (*Vadon Advice Letter*, No. A-97-502.)

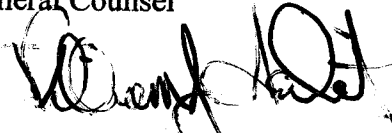
**STEPS 7 & 8: PUBLIC GENERALLY AND LEGALLY REQUIRED PARTICIPATION**

You have not presented any facts to suggest that analysis of the final two steps of the conflict of interest analysis, step 7 – “public generally” or step 8 – “legally required participation,” is necessary.

For your information, we have enclosed the pamphlet “Can I Vote,” a guide to preventing conflicts of interest for public officials. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel



By: William J. Lenkeit  
Counsel, Legal Division

Enclosures  
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