



## FAIR POLITICAL PRACTICES COMMISSION

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October 13, 2004

Kathleen Faubion  
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555 12<sup>th</sup> Street, Suite 1500  
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**Re: Your Request for Advice  
Our File No. A-04-163**

Dear Ms. Faubion:

This letter is in response to your request on behalf of Planning Commissioner Debra Giordano for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTION

Does Commissioner Giordano have a conflict of interest with respect to her participation in the planning commission review and recommendations to the city council regarding the Elmwood development project?

### CONCLUSION

Based on the facts provided, we conclude that it is not reasonably foreseeable that Ms. Giordano's economic interest will be materially affected by this decision.

### FACTS

The City of Milpitas is a general law city with a population of approximately 64,000. Milpitas is located in northern Santa Clara County. The city is approximately 13.6 square miles in size, of which approximately 23% is zoned for single-family residential use. There are approximately 17,370 residential units currently in the city.

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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.

The city is currently processing applications for commercial and residential development in the vicinity of the existing Elmwood Correctional Facility along Highway I-880 in Milpitas. The project includes amendments to the Milpitas General Plan and the Midtown Specific Plan, a rezoning and planned unit development permit, and other tentative map and permit approvals for new residential and commercial development.

The project includes four components across an approximately 120.62 gross acre site.

**Elmwood Correctional Facility.** Approximately 66.92 acres contain the existing Elmwood Correctional Facility. The tentative map application will create a separate lot for the facility, however, no new or additional development is proposed on this site.

**Residential Development.** New residential development is proposed on approximately 31 acres comprised of two sites. Site A is 9.7 acres in size and located east of the correctional facility; Site B is 21 acres in size and located north of the correctional facility. A total of 685 new residential units would be built on the two sites. Approximately 315 condominium units would be built on Site A. A total of 370 units comprised of 165 detached single-family units and 205 townhouse units would be built on Site B. The project would increase the city's housing stock by about 3.9%. Approximately 110 units are proposed as affordable, and subject to resale controls. The developer also proposes to contribute funds for the future production of affordable units offsite. The developer of the project will be KB Homes, which typically builds the homes and also manages the initial sale of the units.

**Commercial Development.** New commercial development of approximately 150,000 square feet of auto sales is proposed on approximately 22.58 acres along I-880.

**Parks and Trails.** A one-acre neighborhood park is proposed in the residential area. A three-acre linear park/trail is proposed along the Hetch-Hetchy right-of-way running east/west across the site.

**Change in Residential Development Potential.** Site A is already planned for residential development and requires no changes to the general plan, specific plan or zoning. Site B is currently planned for commercial and park development. The project includes general plan and specific plan amendments to change the commercial and park designations of Site B to a residential designation of 12-20 du/ac; the zoning would be changed to R-3. The effect of the amendments would be to allow a residential development potential of between 252-420 units on Site B; the project plans propose approximately 370 units. Based on the proposed unit layout for both Sites A and B, it is highly unlikely that additional residences would be proposed in the future.

The above general plan and specific plan amendment and rezoning applications are legislative-level decisions. The planning commission would recommend action to the city council, which has final authority. The city council also has final authority over the

project tentative map, design review, and conditional use permit applications, with the planning commission providing a recommendation to the city council. The planning commission will also consider the environmental documents prepared for the project pursuant to the California Environmental Quality Act (CEQA). It is expected that this process will be completed in the next 4-6 months, with planning commission hearings expected to commence in approximately 3 months.

Planning Commissioner Giordano is employed as a real estate agent with a real estate firm that lists residential properties within Milpitas. More specifically, Ms. Giordano is a licensed broker and is a broker-associate for a small two-person realty business that specializes in the resale of residential dwellings both inside and outside of Milpitas. Neither Ms. Giordano nor the business provides residential rental services. The business is a small entity under regulation 18705.1(c)(4). The business has approximately a 2% share of the residential resale market in Milpitas and there are approximately 400-450 realtors in the city. Finally, Ms. Giordano does not engage in the development or sale of new homes, nor does she anticipate doing so in the foreseeable future.

In response to a request for further information from this office, you conducted research to determine whether an industry model exists to assess the effect of new housing development on new and existing housing stocks for purposes of calculating its effect on the housing resale market. Specifically, you were asked whether a formula or other such model exists whereby one could calculate the number of housing units that would come up in the resale market after a housing development was built. You communicated with various real estate associations and economists and were unable to identify any such model.

### ANALYSIS

Section 87100 of the Act prohibits a 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. In order to determine whether the prohibition in section 87100 applies to a given decision, regulation 18700 provides the following eight-step analysis.

**1. Is Debra Giordano a “public official” for purposes of the Act?**

As a member of the planning commission for the City of Milpitas, Ms. Giordano is a “member, officer, employee or consultant of a state or local government agency” and, therefore, is subject to the conflict-of-interest provisions of the Act. (§ 82048; reg. 18701, subd. (a).)

**2. Is Ms. Giordano making, participating in making, or influencing a governmental decision?**

A public official “makes a governmental decision” when the official, acting within the authority of his or her 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. (§ 87100; regulation 18702.1.) A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive review, the official negotiates, advises or makes recommendations to the decisionmaker regarding the governmental decision. (§ 87100; regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision before his or her own agency if, for the purpose of influencing the decision, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (§ 87100; regulation 18702.3.)

Consequently, Ms. Giordano will “make a governmental decision” if she votes on recommendations regarding the Elmwood development project, including the housing element which will be submitted to the city council. Additionally, if she engages in any of the actions detailed above with regard to this decision, she will be “participating in making” or “influencing” a governmental decision.

### **3. What are Ms. Giordano’s economic interests — the possible sources of a conflict of interest?**

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, described as follows:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment<sup>2</sup> of \$2,000 or more (§ 87103, subd. (a); reg. 18703.1, subd. (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, subd. (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, subd. (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, subd. (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

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<sup>2</sup> 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. (§ 87103.) “Immediate family” is defined at section 82029 as an official’s spouse and dependent children.

(§ 87103, subd. (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).

#### ***Real Estate Firm***

Ms. Giordano has an economic interest in the real estate firm because she is employed by this business entity. (§ 87103, subds. (c) & (d).) She also has an economic interest in the firm because it is a source of income to her, assuming she has received income from this business entity which aggregates to \$500 or more within 12 months prior to the time the relevant decision will be made.

#### ***Personal Finances***

Ms. Giordano also has an economic interest in her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in her personal expenses, income, assets, or liabilities or those of her immediate family increasing or decreasing. (Reg. 18703.5.)

Regulation 18703.3(c) contains disclosure and disqualification requirements for any public official who receives commission income for services rendered as a real estate agent. Note that a number of parties in a real estate transaction are considered sources of income pursuant to this regulation. The facts you have provided do not indicate that sources of income attributed to Ms. Giordano on the basis of her commission income are involved in the housing element decision. Therefore, we do not address these economic interests herein. However, Ms. Giordano should be aware that she must consider all of her economic interests, including those arising from her commission income, in each decision before her. We have enclosed regulation 18703.3 for her convenience.

#### **4. Are her economic interests directly or indirectly involved in the governmental decision?**

##### ***Real Estate Firm***

"(a) A person, including business entities..., 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.”  
(Reg. 18704.1, subd. (a).)

If a business entity is not directly involved in a governmental decision, materiality standards for an indirectly involved business entity apply. (Reg. 18704.1, subd. (b).) Because Ms. Giordano’s employer has not initiated, is not a named party in nor is the subject of the housing element decision, the real estate business is indirectly involved the decision.

### *Personal Finances*

“A public official or his or her immediate family is deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.” (Reg. 18704.5.)

**5. Determine which materiality standards apply in deciding if there will be a reasonably foreseeable material financial effect.**

### *Real Estate Firm*

The financial effect of a governmental decision on a small business entity, which is not directly involved in the 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.” (Reg. 18705.1, subd. (c)(4).)

This materiality standard is applicable to Ms. Giordano’s employer.

### *Personal Finances*

“A reasonably foreseeable financial effect on a public official’s personal finances is material if it is at least \$250 in any 12-month period.” (Reg. 18705.5, subd. (a).)

**6. Is it reasonably foreseeable that the applicable materiality standards will be met?***Foreseeability*

“Possession of a real estate sales or brokerage license, or any other professional license, without regard to the official’s business activity or likely business activity, does not in itself make a material financial effect on the official’s economic interest reasonably foreseeable.” (Reg. 18706, subd. (c).) Rather, regulation 18706 provides that “[a] material financial effect on an economic interest is reasonably foreseeable, within the meaning of Government Code section 87103, if it is substantially likely that one or more of the materiality standards [citation omitted] applicable to that economic interest will be met as a result of the governmental 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. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

“...[T]he question of whether financial consequences upon a business entity are reasonably foreseeable at the time a governmental decision is made must always depend on the facts of each particular case.” (*In re Thorner*.) In each case, the official must look at the facts surrounding each decision, and the nature of the economic interest to determine whether it is reasonably foreseeable that the decision is substantially likely to cause a material financial effect as set forth above.

Subdivision (b) of regulation 18706 lists a number of factors which should be considered in making this determination. These factors are not intended to be an exclusive list of the relevant facts that may be considered in determining whether a financial effect is reasonably foreseeable, but are included as general guidelines as follows:

- “(1) The extent to which the official or the official’s source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction;
  - (2) The market share held by the official or the official’s source of income in the jurisdiction;
  - (3) The extent to which the official or the official’s source of income has competition for business in the jurisdiction;
  - (4) The scope of the governmental decision in question;  
and
  - (5) The extent to which the occurrence of the material financial effect is contingent upon intervening events, not including future governmental decisions by the official’s agency, or any other agency appointed by or subject to the budgetary control of the official’s agency.”
- (Reg. 18706, subd. (b).)

Taking into account the factors of 18706, subdivision (b), we conclude that it is not reasonably foreseeable that Commissioner Giordano's economic interests will be materially affected as a result of the decisions in question. First, we note that Ms. Giordano's employer is engaged in business activity in the jurisdiction. You have not provided facts to indicate that the real estate firm will abstain from engaging in business in the jurisdiction during the period in which the housing element is implemented. On the other hand, Ms. Giordano's employer is not engaged in the sale of new homes, and you have indicated that the developer(s) will sell the homes which are developed under the plans being considered. (Reg. 18706, subd. (b)(1).) Second, even assuming that the council accepts the planning commission's recommendations and the developments occur as planned, the commissioner's share size (2%) of the resale market further diminishes the potential for reaching the material financial effect threshold described above. (Reg. 18706, subd. (b)(2).) Third, you have indicated that the sales of the new homes, if ultimately built, will be handled by the developer. Therefore, Commissioner Giordano's source of income will not be competing for business in the jurisdiction. (Reg. 18706, subd. (b)(3).) Moreover, you have indicated that no calculus exists by which one can reliably predict the impact of the new developments on the existing housing stock in terms of its effect on the resale market of those homes. The given market share also indicates that Ms. Giordano's employer is engaged in a highly competitive market for resale opportunities. (Reg. 18706, subd. (b)(3).) Also relevant, the city council will have final decision-making authority on the matters in which Ms. Giordano would participate. (Reg. 18706, subd. (b)(4).) Additionally, any future resales after that are subject to contingencies and factors beyond the commissioner's ability to predict. (Reg. 18706, subd. (b)(5).) Finally, the housing element is but one aspect of the entire project proposed, the remainder of which poses no apparent basis giving rise to a conflict of interest. Assuming these circumstances do not change, we cannot say it is reasonably foreseeable that there will be a material financial effect on the commissioner's economic interests. Should these economic circumstances change or should a predictive calculus become apparent, we encourage Commissioner Giordano to reassess her involvement and write for further advice if necessary.

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

Sincerely,

Luisa Menchaca  
General Counsel

By:   
C. Scott Tocher  
Senior Counsel, Legal Division

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