



FAIR POLITICAL PRACTICES COMMISSION

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November 9, 2004

Cynthia A. Sterling
Fresno City Council
City Hall
2600 Fresno Street
Fresno, CA 93721-3600

**Re: Your Request for Advice
Our File No. A-04-227**

Dear Ms. Sterling:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

May you participate in decisions relating to the Yosemite Village HOPE VI Project ("Hope VI Project"), which includes making decisions to amend the general plan, community plan, urban renewal plan, redevelopment plan, and the zone map?

CONCLUSION

No. It is presumed your real property interest will experience a material financial effect as a result of the HOPE VI Project decisions you have identified.

FACTS

You are a member of the Fresno City Council, which consists of seven members. As a council member, you also sit on the redevelopment agency board. The housing authority, in collaboration with the City of Fresno and the redevelopment agency, established a conceptual master revitalization plan called the HOPE VI Project, to revitalize, rehabilitate, and construct housing covering a 30-acre area located in southwest Fresno. The housing authority received a \$20 million dollar grant for the

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

HOPE VI Project. The council and the redevelopment agency board will make numerous decisions relating to the HOPE VI Project, which include: amending the general plan, community plan, urban renewal plan, redevelopment plan, and the zone map.

You have an interest in a family trust. Your parents were the settlors/trustors to the family trust, and the trust currently owns two parcels located in the HOPE VI Project area. You are not a trustor or trustee to the family trust, and presently do not receive income from the family trust. Upon the death of the surviving trustor, the assets of the family trust will be distributed in equal shares to the trustors' four children. As one of the four children, you have a 25% beneficial interest in the family trust. You have an irrevocable future right to receive income or principal from the family trust.

ANALYSIS

The primary purpose for the conflict-of-interest provisions of the Act is to ensure that public officials, whether elected or appointed, 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. In furtherance of this goal, 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. (Section 87100.) Pursuant to regulation 18700, an eight-step analysis is applied to determine whether a public official has a conflict of interest in a given governmental decision.

Steps One and Two: Are you considered a "public official" and are you making, participating in making, or influencing governmental decisions?

The Act's conflict-of-interest provisions apply only to public officials. A public official includes "every member, officer, employee or consultant of a state or local government agency." As a city council member and member of the redevelopment agency, you are a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; regulation 18701(a).)

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 making a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decision maker regarding the governmental decision. (Regulation 18702.2.) A public official attempts 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.)

You will be making, participating in making, or influencing a governmental decision if you engage in any of the HOPE VI Project decisions described above.

Step Three: What are your economic interests – the possible sources of a conflict of interest?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. The economic interests, from which a conflict of interest may arise, are defined in section 87103 of the Act and regulations 18703 – 18703.5, summarized below:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of two thousand dollars or more (section 87103(a); regulation 18703.1(a));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of two thousand dollars 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 five hundred dollars (\$500) or more within 12 months prior to the time in which the relevant governmental decision was made (section 87103(c); regulation 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to three hundred forty dollars or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
- A public official has an economic interest in his or her personal finances and those of his or her immediate family – this is the “personal financial effects” rule (section 87103; regulation 18703.5).

Based on the facts you have provided, the only economic interest implicated by your request is an interest in real property. Please note that many trusts are business entities under the Act, and if the trust is a business entity, it would be an economic interest under section 87103(a) and (d).

However, you characterize the trust in which you have an interest as a family trust. The typical family trust is not treated as a business entity under the Act. The chief difference between a business trust and the typical family trust is found in the purpose of the trust. The primary purpose of a business trust is to carry on a business enterprise for profit, while the primary purpose of the typical family trust is to conserve the property of the trust for the beneficiaries, with incidental powers of investment and sale. (*Yukimoto* Advice letter, No. I-03-300; see also *Auran* Advice letter, No. A-01-138.) So long as it is not properly regarded as a business trust, it is not an economic interest under section 87103(a) and (d). For purposes of this letter, we will assume that the trust is not a business trust.

Under certain circumstances the property, income, and investments of a trust may be considered among a public official's economic interests. Regulation 18234(a) states:

“(a) An official has an economic interest in the pro rata share of the interests in real property, sources of income, and investments of a trust in which the official has a direct, indirect, or beneficial interest of 10 percent or greater.”

Regulation 18234(c) further states:

“(c) For purposes of determining whether an official has an economic interest in interests in real property, sources of income, and investments of a trust, the official has a direct, indirect, or beneficial interest in a trust if the official is:

(1) A trustor and:

(A) Can revoke or terminate the trust;

(B) Has retained or reserved any rights to the income or principal of the trust, or retained any reversionary or remainder interest; or

(C) Has retained or reserved any power of appointment, including but not limited to the power to change the trustee, or the power to amend, alter or designate, either alone or in conjunction with anyone else, the person or persons who shall possess or enjoy the trust property or income.

(2) A beneficiary and:

(A) Presently receives income; or

(B) Has an irrevocable future right to receive income or principal. For purposes of this subsection, an individual has an irrevocable future right to receive income or principal if the trust is irrevocable, unless one of the following applies:

(i) Powers exist to consume, invade, or appoint the principal for the benefit of beneficiaries other than the official and such powers are not limited by an ascertainable standard relating to the health, education, support, or maintenance of the beneficiaries; or

(ii) Under the terms of the trust, someone other than the official can designate the persons who shall possess or enjoy the trust property or income.”

You indicate that you are a 25% beneficiary of the family trust and that you have an irrevocable future right to receive income or principal from the family trust. Therefore, subdivision (c)(2) of regulation 18234 is applicable to your situation, and you have an economic interest in the real property, income, or investments of the trust. The family trust contains real property located within the HOPE VI Project, in which, for purposes of this analysis, we presume you have a pro rata interest worth \$2,000 or more. (Section 87103(b).) As a result, you have an economic interest in the parcels of real property in the HOPE VI Project held by the trust.

Step Four: Is your economic interest directly or indirectly involved in the governmental decision?

Real property is directly involved in the governmental decision when “[t]he real property in which the public 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.” (Regulation 18704.2(a)(1).) Since real property held by the trust is located in the HOPE VI Project, this real property is directly involved in the HOPE VI Project decisions.²

Step Five: What is the applicable materiality standard?

If the real property in which an official has an economic interest is directly involved in a governmental decision, the materiality standard of regulation 18705.2(a) applies. (Regulation 18704.2(d)(1).)

The materiality standard states that “[t]he financial effect of a governmental decision on the real property 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).)

Consequently, it is presumed that the HOPE VI Project will have a material financial effect upon the real property held in the family trust. However, you can rebut this presumption by proving it is not reasonably foreseeable that the governmental decision will have any financial effect upon the real property. It is unlikely that you will be able to rebut this presumption, as the HOPE VI Project is designed to revitalize the area in which the parcels are located.

Step Six: Is it substantially likely that the governmental decisions will meet the materiality standards?

As noted above, a conflict of interest arises only when the reasonably foreseeable financial effect of a governmental decision on a public official’s economic interest is material. An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).)

Based upon your facts, the city council and the redevelopment agency board will make numerous decisions relating to the HOPE VI Project, including amending the general plan, community plan, urban renewal plan, redevelopment plan, and the zone map. Therefore, there appears to be a substantial likelihood that the HOPE VI Project will have a reasonably foreseeable financial effect on the two parcels owned by you.

² You mentioned that one of the decisions before the redevelopment agency concerns the amendment of the general plan. Regulation 18704.2(b)(3) describes when real property is indirectly involved in certain general plan decisions. Based on the facts you have provided, this “indirect involvement” standard does not apply to your situation.

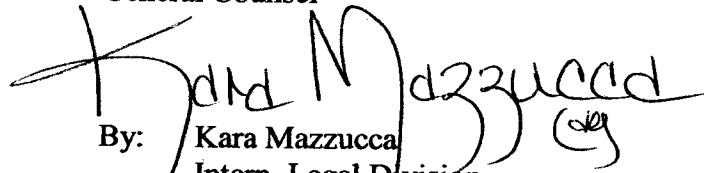
Steps Seven and Eight: "Public Generally" and "Legally Required Participation"

Step seven is an exception that applies when the reasonably foreseeable and material financial effect on an official's economic interest is not distinguishable from the effect on the public generally. (Section 83112; regulation 18707.) Step eight is an exception that applies when the official's participation in a governmental decision is legally required. (Section 87101; regulation 18708.) Both of these narrowly construed exceptions are fact-driven and you provide no facts indicating that these exceptions apply here.

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

Sincerely,

Luisa Menchaca
General Counsel


By: Kara Mazzucca
Intern, Legal Division

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