



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

November 8, 2006

Kristin Olsen
Councilmember
City of Modesto
1010 Tenth Street, Suite 6200
P. O. Box 642
Modesto, CA 95353

**RE: Your Request for Informal Assistance
Our File No. I-06-199**

Dear Ms. Olsen:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Since you do not provide us with facts regarding all possible, identifiable economic interests, we can only provide you with informal assistance.² Please note that the Fair Political Practices Commission does not act as a finder of fact when providing advice; this advice is based solely on the facts that you provide. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

You are a City Councilmember. Your spouse is a real estate agent and works as an independent contractor for a real estate brokerage called PMZ Real Estate. PMZ was once (but is no longer) listed as the broker for a project called "The Bridges." Do you have a conflict of interest that would preclude you from making, participating in, or influencing a City Council decision regarding whether and/or how The Bridges may form a Community Facilities District ("CFD") as part of a Planned Development zone?

CONCLUSION

Based upon the facts you have provided, you likely do not have a conflict of interest that would preclude you from making, participating in, or influencing a City Council decision regarding whether and/or how The Bridges may form a Community

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

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Reg. 18329(c)(3), copy enclosed.)

Facilities District ("CFD") as part of a Planned Development zone. This is because it does not appear reasonably foreseeable that the decision would have a material effect on the real estate brokerage for which your husband works or your personal finances.

FACTS

You are a City Councilmember in the City of Modesto ("City").

Your husband is a residential realtor at PMZ Real Estate ("PMZ"), a local real estate firm. He is an independent contractor at the firm, not a salaried employee.

A local project called "The Bridges" will be coming before the City Council in early November for a decision about its CFD formation as part of a Planned Development zone. At one time, PMZ's commercial division was the broker for The Bridges project. The contract between PMZ and Ron Malik (The Bridges' property owner) expired in January or February of 2006. It has not been renewed. PMZ Real Estate had been listed on the Financial Interest Disclosure Form for The Bridges. However, PMZ is not listed on the revised Disclosure Form submitted to the City.

ANALYSIS

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 governmental decisions in which the official has a financial interest, unless an exception applies.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Reg. 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. (Section 87103.)

Steps 1 & 2: As A City Councilmember, Are You A Public Official Making, Participating In Making, Or Influencing A Governmental Decision?

As a City Councilmember, you are a member or officer of a local government agency and are a public official under the Act. (Section 82048; see reg. 18701(a) [defining "public official"].)³ In your position, you will be called upon to make,

³ If a public official's office is listed in section 87200 ("87200 filers" include city council members and members of planning commissions) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision, as well as details of the economic

participate in making, and/or influence governmental decisions regarding the zoning amendment you have described. (See regs. 18702–18702.4.) Therefore, you will be making, participating in making, or otherwise using or attempting to use your official position to influence a governmental decision. (See regs. 18702.1–18702.3.)⁴

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 any of the following types of interests:

- An economic interest in a business entity in which he or she has a direct or indirect investment⁵ of \$2,000 or more (section 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 (section 87103(d); reg. 18703.1(b));
- 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); reg. 18703.2; see section 82033 [defining “Interest in Real Property”]);
- 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); reg. 18703.3);

interest, as discussed in regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105.) If you want to speak as a member of the public, you may speak only on behalf of your personal interests. (Reg. 18702.4(b).) You may not speak in a manner which, through words or actions, would lead a listener reasonably to believe that you are speaking on behalf of another person or entity, e.g., the City Council. (*Ibid.*; See *Hensley* Advice Letter, No. A-04-168.) Since you are a City Councilmember, these requirements are applicable to you if you determine that you have a conflict of interest in a governmental decision.

⁴ Actions by a public official that could constitute “attempting to use his or her official position to influence” a governmental decision before that official’s agency include actions as innocuous as merely contacting or appearing before “any member, officer, employee or consultant of the agency” if the purpose of the contact is to influence the decision. (See reg. 18702.3.)

⁵ 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, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.” (Section 87103, last paragraph.)

- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (section 87103(e); reg. 18703.4);
- An economic interest in his or her personal finances, including those of his or her immediate family – this is the “personal financial effects” rule. (Section 87103; reg. 18703.5.)

Based on the facts you have provided, we can identify two economic interests to analyze.

A. Sources Of Income.

The Real Estate Company Your Husband Works For As A Source Of Income. 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 on any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); reg. 18703.3.) The definition of “income” includes “any community property interest in the income of a spouse.” (Section 82030.) Therefore, you have a 50 percent interest in any income your spouse earns or is promised.

Because your husband’s job will likely provide you with community property income of \$500 or more within the 12 months prior to the governmental decision at issue,⁶ your husband’s income constitutes an economic interest for you under the Act. (Section 87103(c); reg. 18703.3.)

Regulation 18703.3(c) provides further clarification of the disclosure and disqualification requirements for any public official who has an economic interest in commission income for services rendered as a real estate agent. “Commission income” means gross payments received by a public official (or, in this case, attributable to a public official through community property) as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. (Reg. 18703.3(c)(1); see also *Tolley* Advice Letter, No. A-98-207 and *De Bortnowsky* Advice Letter, No. I-95-315 [indicating that under former regulation 18704.3, real estate commission income of the spouse of a public official can give rise to a conflict of interest].) Commission income is received when it is paid or credited. (*Ibid.*)

⁶ For purposes of this analysis we assume that your husband will have earned at least \$1,000 as a realtor for PMZ during the 12 months prior to the relevant vote of the City Council in early November 2006. Such earnings probably result in your having a community property interest of at least \$500 in your husband’s earnings.

Note that, under this regulation, a number of parties to a specific real estate transaction can be considered sources of income for a real estate agent. (See reg. 18703.3(c)(2)(C).) That regulation provides that the following persons and entities are all sources of income, “for a specific sale or similar transaction,” under the Act:

“(i) The broker and brokerage business entity under whose auspices the agent works;

“(ii) The person the agent represents in the transaction; and

“(iii) Any person who receives a finder’s or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.” (*Ibid.*)

Since your husband is a real estate agent for PMZ, your sources of income include: (i) PMZ, (ii) persons your husband represents in real estate transactions, and (iii) persons who might have received a referral fee for referring a party to a transaction to PMZ. (See reg. 18703.3(c)(2)(C)(i)–(iii).) Since you have not provided the identity of anyone who might fit into categories (ii) or (iii) of this definition, we continue the rest of our analysis as though PMZ is your only identifiable source of income.⁷

B. Personal Finances.

You have an economic interest in your personal finances and those of your immediate family. (Section 87103; reg. 18703.5; see section 82029 [defining “immediate family” as one’s spouse and dependent children].)

Step 4: Are The Economic Interests Directly Or Indirectly Involved In The Governmental Decision?

Once an official identifies an economic interest, he or she must determine whether the economic interest is directly or indirectly involved in the specific decision in question. (Regs. 18700(b)(4), 18704(a).) Having established the degree of involvement, the official can then move onto Step 5 of the analysis and identify the materiality standard appropriate to the circumstances. (Reg. 18700(b)(5).) There are separate tests applied to real property, sources of income, and personal finances, to determine whether an economic interest is directly or indirectly involved in a specific governmental decision.

⁷ Please note that if other persons or entities might be considered sources of income to you under the above definition, you must also analyze whether they might create a conflict of interest for you. You may wish to request additional advice if this is the case.

A. Whether A Source Of Income Is Directly Or Indirectly Involved.

In analyzing whether a source of income is directly or indirectly involved in a decision before an official's agency, we look to regulation 18704.1(a), which states in pertinent part:

“(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.”

Stated more specifically, a source of income is directly involved in a decision before an official's agency when that source of income, directly or by an agent, is a named party in a proceeding, or is the subject of a proceeding where the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the source of income. (Reg. 18704.1(a).)

You have not indicated that the real estate brokerage your husband works for (i.e., PMZ), in any way meets either of the tests set out in regulation 18704.1(a). In fact, the only entity you have identified as being a named party in, or the subject of, the future governmental proceeding at issue is The Bridges project, not PMZ. Therefore, your one identified source of income is indirectly involved in the City Council's decision.

B. Whether Personal Finances Are Directly Or Indirectly Involved.

Regulation 18704.5 states: “A public official or his or her immediate family are 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.” Therefore, your economic interest in your spouse's personal finances is deemed to be directly involved. (*Ibid.*)

Step 5: Is The Financial Effect Of The Governmental Decision On Your Economic Interest Material?

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regs.

18700(a), 18705.) Different standards apply to determine whether a financial effect will be material, depending upon the nature of the economic interest and whether that interest is directly or indirectly involved in the governmental decision under consideration. (Reg. 18705.2, subs.(a) and (b).)

A. Whether The Financial Effect On The Source Of Income Is Material.

The reasonably foreseeable financial effect of a governmental decision on an indirectly involved source of income, which is a business entity (as is the real estate brokerage for which your husband works as an independent contractor), is determined by applying the materiality standards applicable to that particular business entity under regulation 18705.1(c). (Reg. 18705.3(b)(1).)

Whether the financial effect of a governmental decision on an indirectly involved business entity is material or not depends upon what type of business entity is involved. (See reg. 18705.1(c)(1) – (4), copy enclosed.) There are different tests depending upon whether the business entity in question is listed in the Fortune 500, on the New York Stock Exchange, NASDAQ, or American Stock Exchange. (*Ibid.*) Generally, if a business entity is not found on any of the preceding lists, it is referred to as a “small business entity” and regulation 18705.1(c)(4) applies.

Assuming the real estate brokerage that your husband works for as an agent (and which serves as your identified source of income) is determined to be a small business entity (see reg. 18705.1(c)(4)), the financial effects of a governmental decision will be considered material if that business is affected in one or more of the following ways:

“(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(c)(4).)

Because you have not provided us with: (1) facts regarding what type of business entity PMZ is, or (2) facts indicating what the effect of the specific decision described in your correspondence might have on PMZ, we cannot definitively analyze – using the proper standards described above – whether the financial effect of the described governmental decision would have a material effect on your identified source of income.

B. Whether The Financial Effect On Your Personal Finances Is Material.

Regulation 18705.5(a) sets out the relevant standard as follows:

“The reasonably foreseeable financial effect of a governmental decision on a public official’s personal finances is material if it is at least \$250 in any 12-month period. When determining whether a governmental decision has a material financial effect on a public official’s economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered.”

Step 6: Is The Material Financial Effect Reasonably Foreseeable?

If a material financial effect on any of your economic interests is reasonably foreseeable (i.e., substantially likely to occur), then – without considering the application of any possible exceptions – you will be deemed to have a conflict of interest under the Act. (See reg. 18706.)

A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards applicable to the particular economic interest under analysis will be met as a result of the governmental decision. (Reg. 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; see Reg. 18706(b) [listing five factors to consider in determining whether the material financial effect of a governmental decision will be reasonably foreseeable].)

Subsections (b) & (c) of regulation 18706, which set out a list of non-exclusive factors to consider in determining whether a financial effect is reasonably foreseeable, serve as a general guideline to use in determining whether this standard is met. Those subsections state:

“(b) In determining whether a governmental decision will have a reasonably foreseeable material financial effect on an economic interest as defined in subdivision (a) above, the following factors should be considered. 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:

“(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.

“(c) 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.”

The factors presented above, and any other potentially relevant factors, must be examined against each economic interest identified. It is a fact-sensitive inquiry which, normally, must be carried out by the public official.

In your letter, you indicated that no link between the governmental decision at issue and PMZ has existed since the commercial division of PMZ ceased being listed as the broker for The Bridges project. Therefore, it does not appear reasonably foreseeable that the governmental decision regarding The Bridges could have a material financial effect on PMZ or on your personal finances. However, ultimately, this is a factual call we must leave to you and your city attorney.

Steps 7 & 8: The “Public Generally” And “Legally Required” Exceptions.

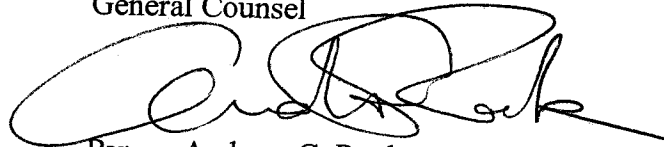
If an official has a conflict of interest regarding a proposed governmental decision, he or she may still participate in the described governmental decisionmaking

process if either the "public generally" or "legally required participation" exceptions apply. (See regs. 18707 and 18708.) Since you have not provided any facts indicating that either of these exceptions might be applicable, we do not analyze these steps.

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

Sincerely,

Luisa Menchaca
General Counsel

A handwritten signature in black ink, appearing to read 'Andreas C. Rockas', written over a horizontal line.

By: Andreas C. Rockas
Counsel, Legal Division

Enclosures

ACR:meh

I:\AdviceLtrs\06-199