



FAIR POLITICAL PRACTICES COMMISSION

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February 7, 2007

Mary K. Raftery
County Counsel, County of San Mateo
Hall of Justice and Records, 6th Floor
400 County Center
Redwood City, CA 94063-1662

**RE: Your Request for Informal Assistance
Our File No. I-07-001**

Dear Ms. Raftery:

This letter is in response to your request on behalf of Menlo Park City School District Boardmember Jeff Child for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because we do not have the necessary facts to make a determination regarding some aspects of your question, we are treating your request as one for informal assistance.²

QUESTIONS

1. Does Menlo Park City School District Governing Board Member Jeff Child have a conflict of interest preventing him from participating in a governmental decision regarding proposed plans to renovate Hillview Middle School?
2. Even if Boardmember Child does have a conflict of interest, does the "public generally" exception allow him to participate in the decision?

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; regulation 18329(c).)

CONCLUSION

1. Yes. Under the Act's conflict-of-interest provisions, Boardmember Child has a conflict of interest and is prohibited from participating in any decisions unless an exception applies.
2. Under the facts presented, it appears that the small jurisdiction exception may apply depending on your determination of the facts.

FACTS

Boardmember Child was recently elected to the Governing Board of the Menlo Park City School District (the "District"), and took office on December 1, 2006. Boardmember Child owns his family's residence located in Menlo Park, California, and has a financial interest of at least \$2,000 in the property. The home is a one-story, single-family residence in a residential neighborhood, and sits on a site that is approximately 11,220 square feet. As stated in an appraisal report by Enright & Company, Inc. (the "Enright Report"), most residences in the immediate neighborhood have similar lot sizes and conditions.

Boardmember Child's residence is within proximity to Hillview Middle School ("Hillview"), one of the School District's four school sites and its only middle school. Hillview is not visible from the Childs' residence. When measured from the San Mateo County Assessor's Maps, however, the nearest boundary of Boardmember Child's residence is 460 feet from the nearest boundary of Hillview.

Due to anticipated demographic changes and increasing enrollment at all of the District's schools, District voters approved a \$91.1 million general obligation bond measure in June 2006 for school renovation and construction, including work at Hillview. The District is currently studying three renovation options for Hillview: (1) replacing existing portable facilities and adding onto the current campus structures (estimated cost \$22-23 million); (2) rebuilding most of the campus on the existing athletic field and demolishing old facilities (estimated cost \$30 million); or (3) a combination of the first two options (estimated cost \$25 million). The District held an initial community meeting for input on the Hillview options in December 2006. Additional public meetings are scheduled for the end of January 2007. The Board will consider a development strategy for the Hillview campus in February 2007. The Board will further consider and take action on a District-wide Master Plan on March 13, 2007.

Once the District approves a Master Plan and development begins, the Board will be asked to consider and approve a number of matters including specific architectural and project plans, construction contracts, environmental review documents, funding approvals, and other development-related issues. Many of the items will be District-wide, meaning that they will include projects at all four school sites, not just Hillview, though some will pertain only to Hillview. As a member of the District Governing

Board, Boardmember Child would normally make, participate in making, or otherwise give direction on the plans and development of a District school site.

You provided a copy of the Enright Report, a summary prepared by a real estate appraisal and consultation service, which purports to investigate the impact of the Hillview renovations on Boardmember Child's property. The Enright Report states that there have been similar upgrades (both in kind and in project amount) to three other schools within San Mateo County. During the period of upgrades for those three other area schools, home sales in those neighborhoods, as well as in the Hillview neighborhood, experienced price increases of 36 to 39 percent. In a survey analyzing home pricing trends from before and after the school renovation period, San Mateo single-family home prices increased an average of 39 percent. The Enright Report also states that neighborhoods in surrounding communities that have not undergone significant school renovations had an average increase in prices for single-family homes of "near 40 percent."

The Enright Report based its conclusions in part on interviews with local active real estate agents. The consensus of the agents was that improvements to a middle school that is in proximity to a residence for sale "is not a factor that most homebuyers consider when purchasing a home." Regarding homes that are currently up for sale situated within one quarter mile radius of Hillview, the report stated that the potential renovations will likely not impact the asking prices. The Enright Report finds no direct correlation between middle school renovations and property values.

You provided additional information in response to telephone calls we had on several days in January of 2007. You stated that the District encompasses parts of the City of Menlo Park, sections of the Town of Atherton, and some unincorporated areas of San Mateo County, for a total of less than ten square miles. You also stated that there are about 25,700 residents within the District, and about 250 residences "within proximity to Hillview." While there are three elementary schools in the district, there is only one middle school. Also, Board Members are elected in a District-wide vote with no sub-districts or election districts.

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 adopted an eight-step standard analysis to decide whether an official has a disqualifying conflict of interest. (Regulation 18700(b)(1)-(8).) The general rule, however, is that a conflict of interest exists whenever a public official makes

a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

Step One: Is Boardmember Child a public official?

As a member of the governing board for the District, Boardmember Child is a public official under the Act. (Section 82048.) Consequently, he may not make, participate in making, or otherwise use his official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of his economic interests.

Step Two: Will Boardmember Child be making, participating in making, or using or attempting to use his official position to influence a governmental decision?

The District will consider a development strategy regarding renovations for Hillview as well as consider and take action on a District-wide Master Plan. As a board member of the district, Boardmember Child will then be asked to consider and approve a number of matters regarding specific development-related issues. Therefore, Boardmember Child will be making, participating in making, or otherwise using his official position to influence a governmental decision.

Step Three: Does Boardmember Child have a financial interest in the decisions at issue?

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 (section 87103; regulations 18703-18703.5), including:

“1. 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 (Section 87103(a); regulation 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); regulation 18703.1(b).)

“2. 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. (Section 87103(b); regulation 18703.2.)

“3. An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); regulation 18703.3.)

“4. A public official has an economic interest in any source of gifts to him or her if the gifts total \$390 or more within 12 months prior to the decision. (Section 87103(e); regulation 18703.4.)

“5. A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the ‘personal financial effects’ rule.” (Section 87103; regulation 18703.5.)

Based on the facts you provided, the only economic interest you have indicated is Boardmember Child’s real property interest in his residence on Politzer Drive in Menlo Park, California. (Section 87103.)

Your request for advice provided no other facts regarding any other potential economic interests. Accordingly, our analysis is limited to Boardmember Child’s economic interest in his residence.

Step Four: Is the financial interest directly involved in the governmental decision?

A real property interest is directly involved in a governmental decision if the real property in which the official has an interest is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).) As you described Boardmember Child’s property, it is within 500 feet of Hillview, the subject of the governmental decisions. Thus, the real property interest is directly involved in the governmental decisions.

Step Five: What is the applicable materiality standard?

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. (Regulation 18700(a).) For real property directly involved in a governmental decision, any financial effect of the decision, even “one penny,” is presumed to be material. (Regulation 18705.2(a)(1).) This is known as the “one penny” rule. 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. (*Ibid.*)

Accordingly, it is presumed that the Board’s governmental decisions will have a material financial effect on Boardmember Child’s economic interest in his real property, and that he would have a conflict of interest in this decision unless the presumption is rebutted with proof that it is not reasonably foreseeable that the governmental decision will have any, not even one penny’s financial effect on his property.

While the Enright report concludes that in similar areas, similar renovation projects did not affect the home values for neighborhood homes, this report does not

appear to rebut the presumption that there will be “no material effect” on the property.³ The Enright Report does not discuss the particular home, the particular project, or the particular potential effects of the Hillview renovation project on the subject property. Additionally, the report does not indicate that it considered the application of the materiality standard set forth in regulation 18705.2. If the increased vehicular, bicycle, and pedestrian traffic, noise, parking, or any other impact have even “one penny” of effect on Boardmember Child’s residence, the effect is “material.”

Step Six: Is the material financial effect on Boardmember Child’s economic interest in his real property reasonably foreseeable?

Once a public official has determined the materiality standard that applies to his or her economic interest, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. An effect on 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.) Whether a material financial effect is (or is not) reasonably foreseeable is necessarily a factual question that the public official must ultimately decide.

Generally, each governmental decision must be analyzed independently to determine if there will be a reasonable material financial effect on an official’s economic interests. (*In re Owen* (1976) 2 FPPC Ops. 77.) The official must carefully analyze each decision to determine the effect on the official’s economic interests. The elected official may have a conflict of interest in the project as a whole, but some decisions may be merely implementation decisions which may be separable from the decisions concerning the project as a whole. (*Wachob Advice Letter*, No. I-91-464.) Thus, the official must analyze each decision separately.

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Implementation Decisions

Where governmental decisions are separable, such as smaller projects in a larger project, and none affects the decisions on the other projects, each project may be analyzed separately to determine if the official has a conflict of interest. (*Kilian Advice Letter*, No. A-89-522.) Boardmember Child should be aware that even if he is

³ The regulation states that the “presumption may be rebutted with *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), emphasis added.) We cannot, therefore, offer you a definite conclusion on this point.

disqualified from a decision on the Hillview renovation project, he may participate in implementation decisions so long as the following three factors apply:

“(1) The decisions for which he has a disqualifying financial interest are segregated and decided first;

“(2) The remaining decisions will not result in reopening or in any way affect the decisions from which he was disqualified; and

“(3) The decisions will not independently have a material financial effect on his economic interests.” (*Warne Advice Letter*, No. I-02-052; *Olson Advice Letter*, No. A-00-237.)

From the information you provided, we cannot assess whether any of the decisions Boardmember Child will be called upon to make are “implementation” decisions. Such decisions merely implement, or carry out, decisions already made. (*Boga Advice Letter*, A-03-067.) If a particular decision is an implementation decision, it is possible that the official could participate in that decision regardless of a conflict arising from another decision, provided the implementation decision does not independently create a conflict of interest. (*Warne, supra.*) Boardmember Child must independently assess each decision that is to come before him.

Step Seven: Does the “public generally” exception apply?

Public Generally Exception

The “public generally” exception allows an official to participate in a decision despite a conflict of interest if the effect of the decision on the official’s interest is not distinguishable from the effect on the public generally. (Section 87103; regulation 18707.) In other words, the exception would apply if the decision will affect a significant segment of the public in substantially the same manner as it would affect the public official’s interests.

Regulation 18707(b) sets forth a four-step process to determine whether the effect of a decision is distinguishable (or not) from the effect on the public generally:

“(1) Step One: Identify each specific person or real property (economic interest) that is materially affected by the governmental decision.

“(2) Step Two: For each person or real property identified in Step One, determine the applicable ‘significant segment’ rule according to the provisions of [Regulation 18707.1(b)].

“(3) Step Three: Determine if the significant segment is affected by the governmental decision as set forth in the applicable ‘significant segment’ rule. If the answer is ‘no,’ then the analysis ends because the first prong of a two-part test set forth in [Regulation 18707.1(b)] is not met, and the public official cannot participate in the governmental decision. If the answer is ‘yes,’ proceed to Step Four.

“(4) Step Four: Following the provisions of [Regulation 18707.1(b)(2)], determine if the person or real property identified in Step One is affected by the governmental decision in ‘substantially the same manner’ as other persons or real property in the applicable significant segment. If the answer is ‘yes’ as to each person or real property identified in Step One, then the effect of the decision is not distinguishable from the effect on the public generally and the public official may participate in the decision. If the answer is ‘no’ as to any person or real property identified in Step One, the public official may not participate in the governmental decision unless one of the special rules set forth in [Regulations 18707.2 through 18707.9] applies to each person or real property triggering the conflict of interest.”

(Regulation 18707(b)(1-4).)

Regulation 18707.1(b)(1)(B), regarding real property, aids in determining whether the governmental decision affects a significant segment of the population. Under that regulation, the decision must also affect ten percent or more of all property owners or all residential property owners in the jurisdiction of the official’s agency or the district the official represents, or 5,000 property owners or residential property owners in the jurisdiction of the official’s agency. (Regulation 18707.1(B)(i)-(ii).)

You stated that the area that will experience the most effect from the renovations at Hillview has about 250 houses. With the facts you provided, it is unstated, but doubtful that this comprises ten percent of the property owners in the District. There are about 25,700 residents in the District. This prong is likely not satisfied.

Small Jurisdiction Exception

Because of the geographic and population size of the District, newly adopted regulation 18707.10 (copy enclosed) might apply to Boardmember Child’s situation. The regulation is meant to recognize that smaller districts might not meet the above “significant segment” test, and states that the effect of a governmental decision on the residential real property that is the domicile of the public official, is not distinguishable from the effect on the public generally if each of the following conditions are met:

“(1) The jurisdiction of the public official’s agency has a population of 30,000 or less and covers a geographic area of ten square miles or less;

“(2) The public official is required to live within the jurisdiction;

(3) The public official, if elected, has been elected in an at-large jurisdiction;

“(4) The official’s property is more than 300 feet from the boundaries of the property that is the subject of the governmental decision;

“(5) The official’s property is located on a lot not more than one-quarter acre in size or not larger than 125 percent of the median residential lot size for the jurisdiction; and

“(6) There are at least 20 other properties under separate ownership within a 500 foot radius of the boundaries of the property that is the subject of the governmental decision that are similar in value.”

(Regulation 18707.10.)

By applying the specific facts as called for in this regulation, Boardmember Child can determine whether his property fits within the small jurisdiction exception. You have stated that the District has approximately 25,700 people, and is “less than ten square miles,” thus satisfying the first element. A person running for the Governing Board must reside within the school district per the education code, (Education Code section 35107) and the election was district-wide, thereby satisfying elements two and three.

The Enright Report and your request offer facts to satisfy element four in that Boardmember Child’s domicile is located more than 300 feet from Hillview. The house sits on a roughly 11,220 square feet site, which calculates out to .25758 acres. Thus, the property is over one quarter of an acre. Without statistics regarding whether Boardmember Child’s property is “not larger than 125 percent of the median residential lot size for the jurisdiction” we cannot determine whether element five is satisfied. Finally, you estimated that there are about 250 residences “within proximity to Hillview.” Element six states that there must be at least 20 other properties within 500 feet of the [middle school]. Based on the information you provided and the maps enclosed, element six is likely satisfied.

For Boardmember Child to make a reasonable determination regarding the small jurisdiction exception, an accurate calculation of the percentage of lot sizes larger than .321975 acres (125 percent of Boardmember Child’s lot size) within the jurisdiction

would be necessary.⁴ If the number is 50 percent or more, than he has satisfied the fifth requirement of the regulation. Without this information, we cannot determine that the small jurisdiction exception applies.

Step Eight: Does the “legally required participation” exception apply?

Because you have not provided any facts to support the “legally required” exception, we need not address this exception.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Heather M. Rowan
Counsel, Legal Division

HMR:jlj
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⁴ For purposes of making this calculation a single family home, or a multi-family structure of four units or fewer, on a single lot, or a condominium unit are factored into this count. Furthermore, one condominium unit plus a proportionate share of the common areas count as one lot for purposes of regulation 18707.10.