



## FAIR POLITICAL PRACTICES COMMISSION

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February 25, 2008

Randon Lane  
41798 Pioneer Street  
Murrieta, CA 92562

Re: Your Request for Informal Assistance  
**Our File No. I-08-009**

Dear Mr. Lane:

This letter responds to your request for informal assistance regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Because your question is general in nature and does not involve a specific governmental decision, we are treating your request as one for informal assistance.<sup>2</sup> Please note that nothing in this letter should be construed to evaluate any conduct that may have already taken place.

Our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict-of-interest or Government Code Section 1090.

### QUESTION

May you participate in decisions involving a developer or other source of commission income to you who brings a project for approval before your agency?

### CONCLUSION

It is presumed that the financial effect of the governmental decision on the developer (or other source of commission income to you) would be material.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

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

Therefore, unless you could rebut this presumption, you may not make, participate in making, or influence any decision involving the developer or other sources of commission income to you who come before your agency.

## FACTS

You are a Planning Commissioner in the city of Murrieta. You currently work for Shoreline Motion Pictures (“Shoreline”), a motion picture production company. Your job in “business development” entails actively recruiting investors for company projects, following leads and taking referrals for investors. You currently have no ownership interest in the company. However, you stated in our telephone conversation of January 29, 2008, that you are paid a 5% fee based on the amount of investment capital you bring to the firm. The firm requires a minimum investment of \$50,000.<sup>3</sup> Therefore, the minimum fee you make from each investment is \$2,500.

You wish to know if you may participate in decisions involving a developer, or other party (that you either recruited, were given a lead for, or was referred to you) who invests in Shoreline and who brings a development or other project before the planning commission.

## ANALYSIS

### Conflict of Interest Prohibition

Your question implicates the Act’s conflict-of-interest provisions that ensure that public officials “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).) Specifically, 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.

A public official has a “financial interest” in a governmental decision within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).)

#### 1. Are you a “public official”?

As a planning commissioner in the city of Murrieta, you are a “member, officer, employee or consultant of a state or local government agency” and

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<sup>3</sup> You stated in our telephone conversation of January 29, 2008, that the investment provided by various individuals to Shoreline Motion Pictures is treated as a guaranteed loan.

therefore a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; Regulation 18701(a).)

**2. Will you be making, participating in making, or influencing a governmental decision?**

The conflict-of-interest prohibition covers specific conduct: making, participating in making, or attempting to use one's official position to influence a governmental decision. (Section 87100; Regulations 18702-18702.4.)

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, determines not to act because of a conflict, 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 he or she, without significant substantive review, negotiates, advises, or makes recommendations regarding a decision. (Regulation 18702.2.)

A public official is attempting to use his or her official position to influence the decision 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. (Regulation 18702.3.)

Therefore, if you deliberate or vote on an item, commit your agency to a course of action, enter into any contractual agreement, or use your official position to influence a governmental decision, you will be engaging in activity regulated by the Act. (See Regulation 18702.4.)

**3. What are your 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:

- 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));
- 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);

- An economic interest in any *source of income*, including commission income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- An economic interest in any *source of gifts* to him or her if the gifts aggregate to \$390 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4).

In addition, a public official always 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 (Section 87103; Regulation 18703.5).

*Business Entity/Source of Income:*

Regulation 18703.3(a)(1) provides:

"For purposes of disqualification under Government Code sections 87100 and 87103, a public official has an economic interest in any person from whom he or she has received income, including commission income and incentive compensation as defined in this regulation, aggregating five hundred dollars (\$500) within 12 months prior to the time when the relevant governmental decision is made. A public official's income includes income which has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income."

In your letter, you stated you work for Shoreline, a business entity. For purposes of this analysis we assume that you receive income from Shoreline of \$500 or more. Therefore, you have an economic interest in Shoreline as a source of income and as an employee of the company. (Section 87103(d), Regulation 18703.1(b); and Section 87013(c), Regulation 18703.3(a).)

*Commission Income from Developer and Other Investors:*

You also stated in our telephone conversation of January 29, 2008, that you receive a form of commission income<sup>4</sup> based on a percentage of investment capital derived from individuals whom you recruit, refer, or persuade to invest in Shoreline. You stated that you receive a 5% fee from Shoreline, and the company requires a minimum investment of \$50,000. Therefore, the minimum fee you make from each transaction is \$2,500.

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<sup>4</sup> "Commission income" means gross payments received as a result of services rendered as a broker, agent, or other salesperson for a *specific sale or similar transaction*. Commission income is received when it is paid or credited. (Regulation 18703.3(c)(1).)

The payment that you receive for bringing investors and Shoreline together in order to generate investment capital for the firm (in the form of a guaranteed loan) is in essence a commission payment.

Pursuant to Regulation 18703.3(c)(3), for purposes of determining whether disqualification is required under provisions of 87100 and 87103(c), the full gross value of any commission income for a specific sale or similar transaction shall be attributed to each source of income in that sale or transaction. While your occupation is not expressly set forth in the regulation, by analogy, where you receive a commission from your employer based on a percentage of the investment capital provided by an investor to the firm, both your employer and the investor will be considered the source of that income and the full gross value is attributed to each. (*McKeon* Advice Letter, No. A-00-230; *Nord* Advice Letter, No. A-96-131.) Therefore, you have an economic interest in investors of Shoreline from whose transactions you receive commission income.

**Step Four: Are these economic interests directly or indirectly involved in the governmental decision?**

*Business Entity, Source of Income, Source of Commission Income:*

A person, including business entities, sources of commission 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.” (Regulation 18704.1(a).)

If the developer (or any other party you persuade to invest in Shoreline)<sup>5</sup> brings a project before the Planning Commission, the developer would be initiating a proceeding and would be deemed *directly* involved.

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<sup>5</sup> You have not requested advice regarding your employer, Shoreline. However, we note that if Shoreline is a named party in, or is the subject of the proceedings concerning a proposed development project, it would also be deemed directly involved in the decisions. If Shoreline is not directly involved, it would be deemed indirectly involved. (See Regulation 18705.1, enclosed, for indirectly involved sources of income.)

Personal Finances:

If there is *any* financial effect on the personal finances of a public official or his or her immediate family they are deemed to be directly involved in a decision. (Regulation 18704.5.)

If your economic interest, as discussed above, is not directly involved in the governmental decision, it is deemed to be indirectly involved. (Regulation 18704.1(b).) Because your question does not appear related to an indirectly involved economic interest, we will not analyze this issue. However, if in the future, issues arise for you regarding an indirectly involved economic interest, please contact us to determine whether you have a conflict of interest under those facts.

**Steps Five and Six: Will the financial effect of the decision on your economic interest be material, and reasonably foreseeable?**

Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on one of those economic interests by applying the applicable materiality standard set forth in Commission regulations. (Regulations 18700(b)(5) and 18705, et seq.) After finding the applicable materiality standard, the official must then decide whether it is reasonably foreseeable that the standard will be met. (Regulation 18700(b)(6).)

Directly Involved Business Entity, Source of Income, Source of Commission Income:

Your question involves a developer (or other parties who you persuade to invest in Shoreline) who bring a development project before the planning commission. In such a case, the developer would be *directly* involved in the decision.

Where a source of income is *directly involved* in a decision before an official's agency, the financial effect of the decision is deemed 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 business entity—not even a penny's worth. (Regulation 18705.3(a).)

Therefore, unless you can rebut this presumption, you may not make, participate in making, or influence any decision involving the developer or other sources of commission income that come before your agency.

*Personal Finances:*

An impact on an official's personal finances is considered to be "material" if it amounts to \$250 or more in any twelve-month period.<sup>6</sup> (Regulation 18705.5.)

You have not provided any information regarding potential impact on your personal finances, therefore we are unable to reach a determination as to this issue.

**Steps Seven and Eight: The "Public Generally" and "Legally Required Participation" Exceptions**

An official who otherwise has a conflict of interest in a decision may still participate under the "public generally" exception. This exception applies when the financial effect of a decision on a public official's economic interests is substantially the same as the effect on a significant segment of the public. (See Section 87103; Regulations 18707-18707.10.)

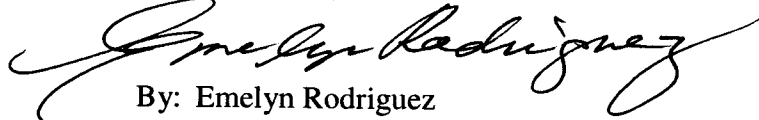
The "legally required participation" rule applies when the official's participation in a governmental decision is legally required. (Section 87101; Regulation 18708.)

You have not presented any facts indicating that these exceptions are applicable to your situation, therefore we do not address them here. Without further information regarding the specific decisions that may arise, we are unable to render more detailed advice. We trust, however, that the discussion above will help you identify the areas and circumstances under which a conflict might arise with respect to your situation.

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

Sincerely,

Scott Hallabrin  
General Counsel



By: Emelyn Rodriguez  
Counsel, Legal Division

Enclosures

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<sup>6</sup> 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. (Regulation 18705.5(a).)