



FAIR POLITICAL PRACTICES COMMISSION

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

(916) 322-5660 • Fax (916) 322-0886

May 29, 2008

Tamara A. Smith
City Attorney
City of Del Mar
1050 Camino Del Mar
Del Mar CA 92014-2698

Re: Your Request for Advice
Our File No. A-08-066

Dear Ms. Smith:

This letter responds to your request for advice on behalf of Richard Earnest regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ 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.) Also, please note that 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.

QUESTIONS

1. May Councilmember Earnest serve as a liaison to the 22nd District Agricultural Association's (the "22nd DAA") Community Relations Committee (the "Committee")?
2. May Councilmember Earnest participate in the City's review, as a responsible agency under the California Environmental Quality Act ("CEQA"), of the 22nd DAA's Environmental Impact Report ("EIR") for future development?

CONCLUSIONS

1. Yes, subject to the facts as you presented them, Councilmember Earnest may participate in the 22nd DAA's Community Relations Committee.
2. Councilmember Earnest could have a conflict of interest that would prevent him from participating in the discussions regarding the EIR. If the decision will

¹ 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.

have a reasonably foreseeable material effect on his property that is within 500 of the parcel that is the subject of the governmental decision, he may not make, participate in making, or influence the decision.

FACTS

You represent Del Mar City Councilmember Richard Earnest. Councilmember Earnest was appointed to the city council in 2007 to fill a vacancy. The council wishes to appoint Earnest as the City's liaison to the 22nd DAA's Community Relations Committee – a committee that, *inter alia*, considers actions of the 22nd DAA that have local impacts. The city council will also be commenting on the 22nd DAA's EIR as a “responsible agency” under CEQA.

The 22nd DAA is a state agency that owns property within the City of Del Mar (the “City”), on which it operates a fairgrounds and racetrack. Currently, the 22nd DAA is pursuing developing the property under a comprehensive Master Plan. The Master Plan includes expanding the race track, adding a hotel, parking, and exhibit buildings, and relocating the City's fire station. Currently, the City leases the fire station from the 22nd DAA. As part of the Master Plan, the 22nd DAA issued a Notice of Preparation of an Environmental Impact Report (EIR).

Councilmember Earnest owns the property on which he lives in his primary residence. His property is within 500 feet of one parcel of land that the 22nd DAA owns and that is part of its Master Plan. This parcel's ownership is currently in dispute, but as of now, the 22nd DAA holds title. While development is not planned for this parcel, it is included within the 22nd DAA's Master Plan.

You now request advice as to whether Councilmember Earnest can participate in the discussion regarding the EIR.

ANALYSIS

The Act's conflict-of-interest provisions 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.

The Commission has adopted an eight-step standard analysis to determine 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 Councilmember Earnest a Public Official?

City council members are public officials under the Act. (*See* Section 84048(a).)

Step Two: Will He Be Making, Participating in Making, or Influencing a Governmental Decision?

A public official “makes a governmental decision” when the official, acting within the purview 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.)

The Act’s conflict of interest provisions apply only where a public official “make[s], participate[s] in making or in any way attempt[s] to use his [or her] official position to influence a governmental decision in which he [or she] knows or has reason to know he [or she] has a financial interest.” (Section 87100; Regulation 18700(b)(2).) The Commission has adopted a series of regulations that define “making,” “participating in making,” and “influencing” a governmental decision.

- 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 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 decisionmaker regarding the governmental decision by conducting research or making any investigation requiring exercising judgment and that aims to influence a governmental decision and by preparing any report, analysis, or opinion that requires exercising judgment and that also aims to influence a 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.)

Under CEQA, a “responsible agency” “shall be responsible for considering only the effects of those activities involved in a project which it is required by law to carry out or approve.” (Cal. Pub. Res. Code § 21002.1(d).) As we understand the process, based on our discussion with you, at this stage in the proceedings the city council’s role as a responsible agency is to comment on the draft EIR that the 22nd DAA prepares. The city council will comment on the EIR and whether its impact on the City will be mitigated, but will not make any decision. There is currently no decision before the city council, only a review of the EIR.

Because the 22nd DAA could consider the city council's opinions and comments during its process of adopting the EIR, and because the purpose of the city council's commenting on the EIR as a responsible agency is to attempt to influence the 22nd DAA's decision, Councilmember Earnest will be using his official position to influence a governmental decision.

Councilmember Earnest would also like to serve as a liaison to the Committee on behalf of the City Council. As you have described the "liaison" position, Councilmember Earnest would serve as a representative of the City Council to the 22nd DAA to discuss matters of import to both agencies. As with the EIR decision, however, if any of the committee's decisions will have a reasonably foreseeable material financial effect on Councilmember Earnest's property, he may not make, participate in making, or influence a decision of his agency or the committee in any official capacity.

Step Three: What Are Councilmember's Earnest's Economic Interests?

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, 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; Regulation 18700(a).) The applicable economic interests include:

1. An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).) An interest in any *business entity*² in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
2. An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
3. Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
4. Any source of gifts to the public official if the gifts aggregate to \$390 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
5. A public official also 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 also known as the "personal financial effects" rule. (Section 87103, Regulation 18703.5.)

² Section 82005 provides: "Business entity" means any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, or association. This definition does not include nonprofits or governmental entities.

Councilmember Earnest has an interest in the real property he owns in which he resides in his personal residence. Though you have not stated a particular figure, we assume that his interest is greater than \$2,000. He therefore has an interest in that property.

Step Four: Are the Councilmember's interests directly or indirectly involved in the decision?

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision. (Regulation 18704(a).) For a governmental decision that affects real property interests, Regulation 18704.2 applies.

Real property in which a public official has an economic interest is directly involved in a governmental decision under the following circumstances:

(1) The real property in which the 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. For purposes of subdivision (a)(5), real property is located "within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision" if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.

(2) The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property. For purposes of this subdivision, the terms "zoning" and "rezoning" shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest.

(3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.

(4) The governmental decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

(5) The governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the

redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

(6) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services. (Regulation 18702.4(a).)

If the real property in which a public official has an economic interest is not directly involved in a governmental decision, the materiality standard in Regulation 18705.2(b) applies.

The 22nd DAA owns a parcel of property that, along with other parcels, is part of the 22nd DAA's Master Plan and is subject to an EIR that both the city council and the 22nd DAA will review.³ The 22nd DAA will then determine whether to adopt the EIR, and how to act on it. You have stated that the parcel will probably be included within the EIR, even though no development is planned for this parcel. Councilmember Earnest's property is within 500 feet of the 22nd DAA's parcel. His property would be directly involved with any decision affecting the parcel that is within 500 feet of his property.

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.*)

You must analyze the particular decision before Councilmember Earnest, including the decision regarding the EIR that would affect this particular parcel. If the decision would have any financial effect on Councilmember Earnest's property, the effect is presumed to be material.

Step Six: Is the material financial effect reasonably foreseeable?

A material financial effect on an economic interest is "reasonably foreseeable" if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered "reasonably foreseeable," but it must be more than a mere possibility. (*In re Thorner, supra*, 1 FPPC Ops. 198.) On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

³The parcel of land is separate from, but included in, the properties subject to the Master Plan. For future decisions, you may wish to review the "segmentation" analysis. See, for example, the *McCabe* Advice Letter, A-07-072 (copy enclosed) and the *Barth* Advice Letter, 07-065 (copy enclosed), and letters referred to therein.

This analysis will depend on the materiality standard and the decision before Councilmember Earnest.

Steps Seven and Eight: Do either the Public Generally or Legally Required exceptions apply?

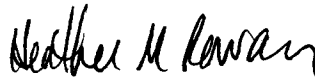
You have not provided any facts to suggest that either of these exceptions apply. We therefore do not apply them.

From the facts as you have described them, Councilmember Earnest might have a conflict of interest to the extent that the city council, as a responsible agency, comments on the 22nd DAA's EIR for the purpose of influencing the decision-making. To determine whether there is a conflict, you must carefully apply the steps above to the particular decision at issue. We do not find, however, that the councilmember has a conflict of interest should he participate as a liaison between the 22nd DAA and the city council unless there is a particular decision before the agency.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl