



FAIR POLITICAL PRACTICES COMMISSION

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

(916) 322-5660 • Fax (916) 322-0886

May 21, 2012

Alisha M. Winterswyk
Best Best & Krieger
5 Park Plaza, Suite 1500
Irvine, CA 92614

Re: Your Request for Advice
Our File No. A-12-062

Dear Ms. Winterswyk:

This letter responds to your request for advice on behalf of Mayor Gomez 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 a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

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 laws that may apply such as Government Code Section 1090 or common law conflict of interest.

QUESTIONS

You ask if Mayor Gomez has an economic interest in a certain real property held by a living trust made by the Mayor's parents, in which the Mayor is a named beneficiary and successor trustee. You seek advice on whether the Mayor may vote or make any governmental decision on the proposed Montebello Hills Specific Plan project ("the Project"). You also ask specifically whether Mayor Gomez may call a special meeting or participate in a vote to call a special meeting related to the Project if it is determined that the Mayor has a disqualifying conflict of interest in other decisions relating to the Project.

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.

CONCLUSION

Although Mayor Gomez is a named beneficiary of a family trust established by his parents, and one of the trust's assets is a certain real property, the Mayor does not have a direct, indirect, or beneficial interest in the trust, and does not have an economic interest in any property held by the trust, so long as his parents, the current trustees, may revoke the trust at their discretion, and so long as the Mayor is not receiving income from the trust. Because under the circumstances you describe the Mayor does not have a disqualifying conflict of interest under the Act arising from his contingent interest in the Trust, we need not answer your second question.

FACTS

Dr. Frank Gomez serves as Mayor of the City of Montebello (the "City"). Mayor Gomez is a named beneficiary and successor trustee of the Gomez Family Living Trust (the "Trust"), a trust made by the Mayor's parents. The Mayor does not currently receive income from the Trust; his interest in the Trust will vest, if at all, some time in the future on the passing of his parents.

Under the terms of the Trust, no one other than the Mayor's parents (the Trust filers) has power to consume, invade or appoint the principal of the Trust for the benefit of beneficiaries. According to the terms of the Trust, no one other than the Mayor's parents can designate who shall possess or enjoy property or income from the Trust.

One of the assets in the Trust is real property located at 608 Marek Drive in Montebello ("Real Property"), which is located within 500 feet of the boundary of the proposed Project. The City Council is the final decisionmaker regarding entitlements and environmental documentation necessary for the applicant to move forward with the Project. Heretofore, City staff has been working with the applicant to process the Project. Staff and the applicant desire input from the City Council on the scope of the proposed Project. That input would be solicited from the City Council during a study session that would be held at a special meeting. You note that "[a] special meeting may be called at any time by the presiding officer of the legislative body of a local agency, or by a majority of the members of the legislative body...." (Gov. Code § 54956.)

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or 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 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 an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision.

Steps One and Two: Is the Mayor a public official making, participating in making, or influencing a governmental decision?

The Mayor is a “public official” within the meaning of the Act.² (See Section 82048.) Moreover, your question presupposes that he would be making, participating in making, or using his official position to influence a City Council decision relating to the Project.³

Step Three: What are the Mayor’s economic interests?

Of the economic interests recognized under the Act, your question is focused on only one, the Mayor’s contingent interest in real property held in his parents’ family trust.⁴ A public official has an economic interest in real property if the “official has a direct or indirect interest worth two thousand (\$2,000) or more” in the property. (Section 87103(b); see also Regulation 18703.2.) An “indirect investment or interest” is defined to include “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; Regulation 18234(a).)

Regulation 18234 further defines when an official has a direct, indirect, or beneficial interest in a trust, and provides the following (in pertinent part):

“(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:

[¶] ... [¶]

² If a public official’s office is listed in Section 87200, which specifically includes city mayors, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (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.)

³ A public official “makes a governmental decision” when the official, acting within the authority of his or her position, votes on a matter, obligates or commits his or her agency to a course of action, or enters into a contractual agreement on behalf of his or her agency. (Section 87100; 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 review, the official negotiates, advises or makes recommendations to the decision maker regarding the governmental decision. (Section 87100; Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision before his or her own agency if, for the purpose of influencing the decision, the official contacts or appears before a member, officer, employee, or consultant of his or her agency. (Section 87100; Regulation 18702.3.)

⁴ Our analysis is strictly limited to the Mayor’s economic interests the Trust asset you described.

“(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.”

Your account of the facts indicates that the Real Property is held in a family trust under which the Mayor is a named beneficiary and successor trustee. The Mayor is not currently receiving income from the trust, and the trust is revocable by the Mayor’s parents. Therefore, as specified by Regulation 18234, the Mayor does not have a direct, indirect, or beneficial interest in the Real Property held by this trust. Accordingly, the Mayor does not have a disqualifying economic interest in decisions relating to the Real Property.

This conclusion renders unnecessary a response to your follow-up question, which was premised on a finding that the Mayor had a disqualifying economic interest in other decisions relating to the Real Property which, under your account of the facts, he does not have.

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

LTW:jgl