



FAIR POLITICAL PRACTICES COMMISSION

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February 10, 2014

J. Christine Dietrick
City Attorney
990 Palm Street
San Luis Obispo, CA 93401-3249

Re: Your Request for Advice
Our File No. A-13-160

Dear Ms. Dietrick:

This letter responds to your request for advice on behalf of San Luis Obispo City Councilmembers Dan Carpenter and John Ashbaugh regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹

This advice is based on the facts you have provided in your request. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders advice. (In re Oglesby (1975) 1 FPPC Ops. 71; Section 83114.)

Additionally, our advice is based solely on the provisions of the Act unless otherwise specified. Thus, in providing this advice we offer no opinion on the applicability, if any, of other ethics laws outside the Act.

QUESTIONS

1. May Councilman Dan Carpenter participate in the consideration of General Plan Land Use and Circulation Element policy updates that include proposed policies applicable to a larger parcel near his residence where one outer boundary of the larger parcel is within 500 feet of the Councilman's residence?

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.

2. May Councilman John Ashbaugh participate in the consideration of General Plan Land Use and Circulation Element policy where the proposed policy language is to remove the interim open space designation within 500 feet of his residence?

3. If neither Councilman may participate, can staff segment the consideration of the policies applicable to each site and have the Councilmember whose real property interests are implicated recuse himself and leave the room only during the discussion of the site that affects his property? If so, are there any requirements regarding the sequence in which the two sites must be considered other than that they must each be considered and concluded before the Council as a whole moves on to consideration of the remainder of the LUCE policies?

CONCLUSION

1. No. Councilman Carpenter's personal residence is directly involved in this governmental decision. Therefore, he may not make, participate in making, or influence this decision if it is reasonably foreseeable that the governmental decision will have any financial effect on his real property.

2. No. Councilman Ashbaugh's personal residence is directly involved in this governmental decision. Therefore, he may not make, participate in making, or influence this decision if it is reasonably foreseeable that the governmental decision will have any financial effect on his real property.

3. Under certain circumstances, a public official disqualified from one decision may participate in other related decisions provided that the official's participation does not affect the decision in which he or she has a conflict of interest, as discussed below. The city council may use any means of random selection that is impartial and equitable in order to determine which official will have the matter in which he has a conflict considered first, thereby allowing him to participate in all remaining decisions.

FACTS

San Luis Obispo has undertaken a grant funded update of its General Plan Land Use and Circulation Elements ("LUCE"). When the City Council approved the application for the grant, the Council gave direction to staff to focus the update to address community issues, but not to significantly alter the policy direction reflected in the current General Plan elements.

The City Council appointed a resident task force to assist in the LUCE update process. This 15 member group, called the Task Force for the Land Use and Circulation Element Update (TF-LUCE) worked to review proposed changes to the draft elements and to provide direction and guidance regarding new policies and programs. The TF-LUCE draft of the Land Use Element was reviewed by the Planning Commission, which made several minor changes in response to public testimony and to clarify intent in several places. The draft LUCE is now

ready for City Council review and endorsement to be included as part of the project description to be studied through the EIR.

The development of alternatives for San Luis Obispo has been a two-step process: the first step proposed physical alternatives; and the second step proposed policy changes, which the Council will evaluate at special meetings. The physical alternatives portion of the process included decisions on inclusion or exclusion of specific sites throughout the City in the project description for study in the EIR.

The legislative drafts of the proposed updated elements primarily contain edits to existing policy language. However, new policies and programs have also been included. Staff has identified two areas of potential changes being considered as part of the update that are within 500 feet of Councilmembers Ashbaugh and Carpenter's respective properties.

Councilmember Carpenter's property is within 500 feet of a larger parcel that under the LUCE proposal would change from low density residential designation to a mix of low and medium density residential with addition of a probation department facility.

Councilmember Ashbaugh's residence is within 500 feet of an area where the LUCE proposes to remove the designation of "Interim Open Space."

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 interest 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, when it is "reasonably foreseeable" that the governmental decision will have a material financial effect on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) In order to determine whether a public official has a disqualifying conflict of interest in a given governmental decision, the Commission has adopted an eight-step analytical framework. (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 interests. (Section 87103.)

Step One: Are Councilmembers Dan Carpenter and John Ashbaugh public officials?

The Act's conflict of interest provisions apply only to "public officials." (Section 87100.) A "public official" is "every member, officer, employee, or consultant of a state or local government agency." (Section 82048, Regulation 18701.) As members of the San Luis Obispo City Council, Councilmembers Carpenter and Ashbaugh are public officials within the meaning of the Act.

Step Two: Will City Councilmembers Carpenter and Ashbaugh 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.)

A public official "participates in making" a governmental decision when he or she, without substantive review, negotiates, advises, or makes recommendations regarding a decision. (Regulation 18702.2.) A public official is "influencing a governmental decision" if he or she contacts, or appears before, or otherwise attempts to influence any member, officer, employee, or consultant of the County regarding the decisions. (Regulation 18702.3.)

The members of the city council will be called upon to consider updates of the city's LUCE. Therefore, City Councilmembers Carpenter and Ashbaugh will be making, participating in making, or otherwise using their official positions to influence a governmental decision.

**Step Three: What are the councilmembers' Interests as specified in Section 87103--
The possible sources of conflict of interest for the public officials?**

A public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have 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 interests. (Section 87103; Regulations 18703-18703.5.)

The applicable interests include:

- an 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 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 interest in any source of income, including promised income that aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- an interest in any source of gifts to him or her if the gifts aggregate to \$440 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- A public official has an 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);
- Indirect investment or interest means any investment or interest owned by a business entity in which the official owns directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103(e).)

Both Councilmember Carpenter and Ashbaugh own real property within the LUCE boundaries. Accordingly, each has a potentially disqualifying interest in the real property he owns. Because your question concerns only the real property of these public officials, and you have not provided any facts concerning other possible interests, our analysis is limited to the real property interests you have identified.

Step Four: Are the officials’ interests directly or indirectly involved in the governmental decision?

Real property in which a public official has an interest is considered directly involved if the property is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).) Real property that is not directly involved in a governmental decision is considered indirectly involved.

Council Member Carpenter:

Councilmember Carpenter’s residence is located within 500 feet of the boundaries of property that is the subject of governmental decisions, namely the General Hospital site, which the LUCE proposes to change from low density residential designation to a mix of low and medium density residential designation with public facilities (a probation department facility). Therefore, Councilmember Carpenter’s residence is directly involved in decisions on the General Hospital site and would be indirectly involved in the other general plan decisions.

Councilmember Ashbaugh:

Councilmember Ashbaugh’s residence is within 500 feet of an area currently designated as “Interim Open Space.” The LUCE proposes to remove the designation of “Interim Open Space” for this area, and to adopt specific policies to address hillside and open space preservation in accordance with other city policies. Therefore, Councilmember Ashbaugh’s real

property interest is directly involved in the governmental decisions related to the Interim Open Space parcel and would be indirectly involved in the other general plan decisions.

Step Five: What are the applicable materiality standards?

Regulation 18705.2(a)(1) provides that the financial effect of a governmental decision on real property that is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect, not even a “penny’s worth,” on the real property. This is known as the “one penny rule.”

With respect to decisions that indirectly involve the respective officials’ property Regulation 18705.2(b) provides:

“...The financial effect of a governmental decision on real property which is indirectly involved in the governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest.

“(A) The development potential or income producing potential of the real property in which the official has an economic interest;

“(B) The use of the real property in which the official has an economic interest;

“(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.”

You have not provided facts concerning decisions that may have an indirect material financial affect the officials’ real property; therefore, we do not further analyze potential indirect affects.

Step Six: Reasonable foreseeability: Is it reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the officials’ interests?

The sixth step is deciding if it is reasonably foreseeable that there will be a material financial effect on one or more of the councilmembers’ interests. (Regulation 18700(b)(6); Regulation 18706.)

For a material financial effect to be foreseeable on an official's interest, it need not be certain or even likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.) 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*, supra.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby*(1975) 1 FPPC Ops. 71) 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 after a complete consideration of all the facts before him.

Given the facts you have presented along with the applicable materiality standard, if the decision regarding the LUCE designations on the properties within 500 feet of the officials' directly involved real property interest would result in a financial effect of even a penny, the official would have a disqualifying conflict of interest. Accordingly, Councilmembers Carpenter and Ashbaugh have a prohibited conflict of interest and may not participate in the above LUCE decisions unless an exception applies.

Segmentation

Under certain circumstances, a public official disqualified from one decision may participate in other related decisions provided that the official's participation does not affect the decision in which he or she has a conflict of interest." (*In re Owen* (1976) 2 FPPC Ops. 77).

Commission staff has consistently advised that an official may segregate a decision in which the official has a conflict of interest from other decisions in which he or she does not have a conflict of interest to allow participation by the official in one or several related decisions as long as the decisions are not too interrelated to be considered separately.

The *Huffaker* Advice Letter, No. A-86-343 outlined a procedure to be followed in severing one decision from another. In 2003, the Commission codified its advice, providing the conditions under which governmental decisions may be segmented and the method to follow to allow participation by officials who would otherwise have a conflict of interest.

Regulation 18709 provides the rules for such "segmentation" of a governmental decision:

"(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

"(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are “inextricably interrelated” when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

“(c) Budget Decisions and General Plan Adoption or Amendment Decisions Affecting an Entire Jurisdiction: Once all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency’s budget or to adopt, reject, or amend the general plan.”

More than one decision can be “segmented,” so long as they are decided in an order that would prevent one decision from determining or altering the result of one of the other segmented decisions, each of which must of course comply with the conditions prescribed in Regulation 18709.

Under Regulation 18709 (a)(3), the decision in which an official has a financial interest must be considered first. In this case, there are two officials who each have a financial interest with respect to different segmented decisions. Since only one decision may, by definition, be considered “first,” in this circumstance, we would interpret “first” to mean “before that official may participate in any of the remaining segmented decisions in which he does not have a conflict of interest.”

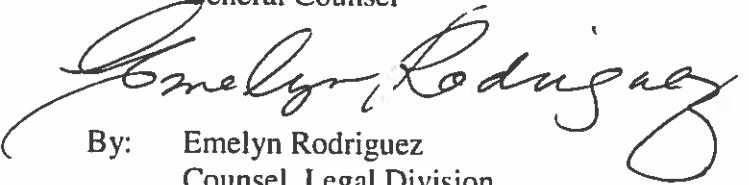
Accordingly, if you determine that the rules under Regulation 18709 allowing segmentation of the decisions apply, the two decisions, in which either Councilmember Carpenter or Councilmember Ashbaugh has a conflict of interest, must be considered before the remaining decisions in which neither have a conflict of interest. Neither official may participate in any of the segmented decisions until the decision in which he has a conflict of interest is reached, with each member leaving the room and not participating in any discussion or decision affecting the designated area for which he has a conflict of interest. Therefore, the official who has a conflict in the first decision considered may participate in the remaining decisions while the official with a conflict in the second decision considered may not participate until after the third decision.

If neither decision determines or alters the result of the other segmented decision, you may use any means of random selection that is impartial and equitable in order to determine which official will have the matter in which he has a conflict considered first, thereby allowing him to participate in all remaining decisions. Whatever method is used, both matters in which one of the two officials has a conflict must be considered in the random selection process and each must have an equal likelihood of being chosen first. (*Heisinger* Advice Letter, No. A-95-333; *Thorson* Advice Letter, No. A-04-238.)

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

Sincerely,

Zackery P. Morazzini
General Counsel


By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl