



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 21, 2019

Veronica A. F. Nebb
Sr. Assistant City Attorney, City of Novato
Walter & Pistole
670 W. Napa Street, Suite F
Sonoma, CA 95476

Re: Your Request for Advice
Our File No. A-19-127

Dear Ms. Nebb:

This letter responds to your request for advice on behalf of City of Novato Mayor Eric Lucan regarding the disclosure and conflict of interest provisions of the Political Reform Act (the "Act").¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and not under any other conflict of interest laws, such as common-law conflict of interest or Section 1090. Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

(1) If Mayor Lucan transfers he and his wife's residential rental property located on Machin Avenue within the City of Novato (the "Machin Property") to his parents pursuant to a quitclaim deed,² would the Act's disclosure provisions require him to report the Machin Property as a real property interest, or a tenant of the Machin Property as a source of income interest, on his annual Statement of Economic Interests?

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 (the "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 Because the Machin Property would be transferred from the Mayor to his parents for free, there is a unique risk of that transfer being a "strawman transaction," in which the real property at issue is transferred to a third party only temporarily to avoid application of the Act's disclosure or conflict of interest provisions, or in which the owner has not actually divested himself or herself of all ownership interests in the property at issue. Accordingly, if the transfer is a strawman transaction, this advice does not apply. Such a transaction may result in a knowing, willful, or intentional violation of the Act subject to criminal, civil, or administrative penalties. (See Sections 91000, 91000.5, 91004, and 91005.)

(2) Upon completion of the above described transfer, would the Act's conflict of interest provisions prohibit the Mayor from taking part in governmental decisions relating to the City's potential guarantee of funding for the ongoing reconstruction of the Novato Theater?

CONCLUSIONS

(1) The Act's disclosure provisions would require the Mayor to report his real property interest in the Machin Property and the date of its disposal on his annual Statement of Economic Interests if he held that interest at any point during the reporting period, and to report any source of income interest on that Statement of Economic Interests if the Mayor aggregated \$500 or more in income from that source during the reporting period.

(2) No. If the contemplated transfer of the Machin Property is completed, it would not be reasonably foreseeable that decisions relating to the City's potential funding guarantee for the Novato Theater's ongoing reconstruction would have a material financial effect on any of the Mayor's financial interests based on the facts presented. We note, however, that a family relationship may require recusal under the common-law doctrine against conflicts of interest, a doctrine that is beyond the Commission's purview.³

FACTS AS PRESENTED BY REQUESTER

You are a Senior Assistant City Attorney for the City of Novato and the authorized representative of Novato Mayor Eric Lucan. The Mayor and his wife own the Machin Property which they rent to tenants. The Mayor has an interest in the Machin Property worth at least \$2,000.

The Mayor is in the process of transferring the Machin Property to his parents pursuant to a quitclaim deed. The Mayor will not receive any payment, compensation or benefits in exchange for transferring the Machin Property to his parents. The Mayor's parents are not financially dependent on him. The Mayor does not provide his parents with financial support, and they do not provide him with financial support. You state that there would be no separate agreements or other promises between the Mayor and his parents regarding ownership of the Machin Property. After completion of the transfer, the Mayor's parents would be free to transfer, sell, lease, or take any other action with respect to the Machin Property as any other owner would.

Upon completion of the contemplated transfer, all current rental agreements relating to the Machin Property would transfer to the new owners as landlord, and the Mayor would no longer receive any business income related to the Machin Property. The Mayor currently has a mortgage on the Machin Property that would continue to be in his name after the completion of the transfer, and his parents may make direct payments to the lender.

Internal Revenue Service Publication 936, which sets forth the federal income tax rules for deducting home mortgage interest, provides that the individual who submits the interest payments is entitled to the associated mortgage interest deduction regardless of whose name is on the note. You

³ See 92 Ops. Cal. Atty. Gen. 19 for a discussion of the common-law doctrine against conflicts of interest where there may be a temptation to act for personal or private reasons rather than in the public interest.

state that the Mayor will not receive the mortgage interest deduction for any interest on the mortgage paid by his parents nor any other financial benefit from the mortgage.

In the *Nebb* Advice Letter, No. A-19-002, we determined that the Act prohibited the Mayor from taking part in decisions relating to the City's potential provision of financial assistance for the Novato Theater's ongoing reconstruction because it was reasonably foreseeable that those decisions would have a measurable impact on the Machin Property, which is located approximately 300 feet from the Novato Theater.

The City Council will soon consider governmental decisions relating to the City's potential guarantee of funding for the Novato Theater's ongoing reconstruction. The Novato Theater has been shuttered since 1991, and if it is reopened it would regularly attract up to 250 attendees for an event or performance. You have asked whether the Act would prohibit the Mayor from taking part in those decisions after the completion of the contemplated transfer of the Machin Property.

ANALYSIS

The Machin Property

Section 87203 of the Act requires every person who holds an office specified in Section 87200, including a city councilmember such as the Mayor, to file an annual Statement of Economic Interests disclosing his or her investments, interests in real property, and income during the period since filing his or her previous Statement of Economic Interests. Section 87203 also requires the Statement of Economic Interests to include any investments and interests in real property held at any time during the reporting period, regardless of whether that investment or interest is still held by the public official at the time of filing.

A public official has a financial interest in real property located within the jurisdiction of the official's agency if the official, or the official's spouse or dependent child, has an interest in the real property worth \$2,000 or more. (Sections 82033 and 87103(b); see also Section 82029.) Because the Machin Property is located within the City, and because the Mayor has an interest in the Machin Property worth at least \$2,000, the Mayor has a real property interest in the Machin Property under the Act based on the facts presented.

"A quitclaim deed is closely related to a simple release, but has come to be recognized as a distinct form of conveyance, and operates like any other deed to the extent of transferring whatever title or interest the grantor has, but none other." (*Buller v. Buller* (1944) 62 Cal.App.2d 694, 699.) We have previously advised that a public official that executed a quitclaim deed to transfer a real property to an individual who was not a member of the official's immediate family ceased to have an interest in that real property upon the completion of the transfer. (*Battersby* Advice Letter, No. A-02-216.)

The Mayor is in the process of transferring the Machin Property to his parents pursuant to a quitclaim deed. The Mayor's parents are not within the Act's definition of "immediate family." (See Section 82029.) You state that there would be no separate agreements or other promises between the Mayor and his parents regarding ownership of the Machin Property. Neither the Mayor nor his parents provide financial support to each other. The Mayor would not receive any

compensation or benefits in exchange for transferring the Machin Property to his parents. Therefore, based on the facts presented, the Mayor would cease to have a real property interest in the Machin Property upon completion of the contemplated transfer.⁴

With respect to a city councilmember's Statement of Economic Interests, Section 87206(e) provides that if an investment or interest in real property was partially or wholly disposed of during the period covered by the Statement of Economic Interests, that interest and the date of its disposal must be disclosed in that Statement of Economic Interests. Therefore, if the Mayor disposes of his interest in the Machin Property during the reporting period covered by his Statement of Economic Interests, then the Mayor must disclose that interest and the date of its disposal in that Statement of Economic Interests. However, the Mayor generally would not be required to disclose a former financial interest in a subsequent Statement of Economic Interests.

Sources of Income

Section 87103(c) provides that an official has a financial interest in a source of income aggregating \$500 or more in value provided or promised to, or received by, the official within 12 months prior to the time when the decision at issue is made. Therefore, the Mayor would have a source of income interest in his residential rental property management business, or in a tenant of the Machin Property, if he has received \$500 or more in income from that source in the 12 months prior to the decision at issue.

If the contemplated transfer of the Machin Property is completed, then all current rental agreements relating to the Machin Property would transfer to the Mayor's parents as landlord, and the Mayor would no longer receive any business income related to the Machin Property. Therefore, once the Mayor has not received \$500 or more in value from a tenant of the Machin Property in the prior 12 months, the Mayor would no longer have a source of income interest in that tenant.

As noted above, Section 87203 requires a city councilmember, among others, to file an annual Statement of Economic Interests disclosing, among other things, his or her income during the reporting period. Therefore, Section 87203 would require the Mayor to disclose a source of income on his annual Statement of Economic Interest if the Mayor received \$500 or more in value from the source during the reporting period. We note again, however, that the Mayor generally would not be required to disclose a former interest in a subsequent Statement of Economic Interests.

The City's Potential Guarantee of Funding for the Novato Theater's Ongoing Reconstruction

The Act's conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) An official's interests that may give rise to a disqualifying conflict of interest under the Act are identified in Section 87100. If the contemplated transfer of the Machin Property is completed, the Mayor would have the following interests with respect to decisions relating to the City's potential funding guarantee for the Novato Theater's reconstruction based on the facts presented:

⁴ We note again that if there is any indication that the contemplated transfer of the Machin Property may be a strawman transaction, this advice does not apply.

- A source of income interest in his residential rental property management business, and in any tenant of the Machin Property, if he aggregates \$500 or more in income from that source in the 12 months prior to the decision. (See Section 87103(c).)
- An interest in his personal finances and those of immediate family members.⁵ (See Section 87103.)

As noted above, the Mayor would cease to have a real property interest in the Machin Property upon completion of the contemplated transfer. Furthermore, the decisions relating to potential funding guarantee for the Novato Theater's reconstruction would no longer implicate his business interest in his residential rental management business upon completion of that transfer because all current rental agreements relating to the Machin Property would transfer to the new owners, the Mayor's parents, as landlord.

There is an issue as to whether the Mayor would also have an interest in his parents as a source of income if they make payments on the Machin Property's mortgage, which is and would remain in the Mayor's name, after the completion of the contemplated transfer. As noted above, Section 87103(c) provides that an official has an interest in a source of income if he or she aggregates \$500 or more in income from the source in the 12 months prior to the decision at issue.

Because the federal income taxpayer who makes interest payments on a mortgage is entitled to the associated mortgage interest deduction,⁶ the Mayor would not receive a tax deduction as a result of his parents making payments on the Machin Property mortgage. Furthermore, you state that the Mayor will not receive any other financial benefits due to transferring the Machin Property to his parents or being the named borrower on the mortgage. Therefore, the Mayor would not have a source of income interest in his parents with respect to decisions relating to the City's potential funding guarantee for the Novato Theater's reconstruction based on the facts presented.⁷

Foreseeability and Materiality

Regulation 18701(a) provides that a decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision; and an interest is the "subject of a proceeding" if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest. In addition, an official's business interest is explicitly involved if the decision is described in Regulation 18702.1(a)(1), and an official's real property interest is explicitly involved if the decision is described in Regulation 18702.2(a)(1)-(6).

⁵ Parents are not included in Act's definition of "immediate family." (See Section 82029.)

⁶ See Internal Revenue Service Publication 936.

⁷ We note that because the Act's definition of a "gift" excludes a gift from a parent (Section 82028(b)(3)), the Mayor's parents' payment of interest on the Machin Property mortgage would not be a "gift" to the Mayor.

Regulation 18701(b) sets forth the foreseeability standard applicable to a decision's effect on an official's interest that is not explicitly involved in the decision, and provides that the decision's effect on such an interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

None of the Mayor's financial interests are explicitly involved in the decisions relating to the City's potential funding guarantee for the Novato Theater's reconstruction. Therefore, those decisions' effect on each of the Mayor's interests at issue is reasonably foreseeable if it can be recognized as a realistic possibility and more than hypothetical or theoretical.

Upon the completion of the contemplated transfer of the Machin Property, the Mayor's residential rental property management business would no longer receive any income related to, or otherwise be associated with, the Machin Property, based on the facts presented. Therefore, if the contemplated transfer of the Machin Property is completed prior the City Council's consideration of decisions relating to the City's potential guarantee of funding for the Novato Theater's reconstruction, those decisions would not implicate the Mayor's source of income interest in that business because the facts presented provide no indication that those decisions would have any reasonably foreseeable financial effect on that business in that scenario.

The facts presented provide also no indication that decisions relating to the potential funding guarantee for the Novato Theater's reconstruction would result in the Mayor or his immediate family receiving a measurable financial benefit or loss under Regulation 18702.5(a) if the contemplated transfer of the Machin Property is completed prior to the City Council's consideration of those decisions. Therefore, if the contemplated transfer is completed prior the City Council's consideration of those decisions, it would not be reasonably foreseeable that those decisions would have a disqualifying financial effect on the Mayor's interest in his personal finances and those of immediate family members.

Tenant of the Machin Property

We now turn to whether it is reasonably foreseeable that decisions relating to the potential funding guarantee for the Novato Theater's reconstruction would have a material financial effect on the Mayor's source of income interest in a tenant of the Machin Property.

Regulation 18702.3 sets forth the materiality standards applicable to a decision's reasonably foreseeable financial effect on an official's source of income interest. The Commission repealed the former version of Regulations 18702. 3, and adopted a new version of that regulation, at its regular meeting on July 23, 2019. The analysis below applies Regulation 18702.3 as updated. As pertinent to the facts presented, Regulation 18702.3(a)(2) provides that the reasonably foreseeable financial effect of the decision at issue is material if the source of income is an individual and:

- The decision may affect the individual's income, investments, or other assets or liabilities (other than an interest in a business or real property) by \$1,000 or more (Regulation 18702.3(a)(2)(A)); or

- The official knows or has reason to know that the individual has an interest in real property and there is clear and convincing evidence the decision would have a substantial effect on that property (Regulation 18702.3(a)(2)(C)(ii)).

A tenant of the Machin Property would have a leasehold interest in that property. The facts presented provide no indication that decisions relating to the potential funding guarantee for the Novato Theater's reconstruction would affect a Machin Property tenant's income, investments, or other assets or liabilities (other than the tenant's leasehold interest in the Machin Property) by \$1,000 or more. Although the Mayor would know or have reason to know that the Machin Property tenant had a leasehold interest in that property, the facts presented provide no indication that those decisions would have a "substantial effect" on that tenant's leasehold interest in that property.⁸ Therefore, it is not reasonably foreseeable that those decisions would have a material financial effect on the Mayor's source of income interest in a Machin Property tenant.

Thus, if the contemplated transfer of the Machin Property is completed, then the Act would not prohibit the Mayor from taking part in decisions relating to the City's potential funding guarantee for the Novato Theater's reconstruction because there is no indication that those decisions would have a disqualifying effect on any of the Mayor's financial interests at issue based on the facts presented. If the contemplated transfer is not completed, or if the Mayor otherwise retains an interest in the Machin Property, however, then consistent with our conclusion in the *Lucan* Advice Letter, No. A-19-002, the Act would prohibit the Mayor from taking part in decisions relating to the City's potential funding guarantee for the Novato Theater's reconstruction because it is reasonably foreseeable that those decisions would have a measurable impact on the Mayor's real property interest in the Machin Property, located approximately 300 feet from the Novato Theater, under Regulation 18702.2(a)(7).

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

Sincerely,

Dave Bainbridge
General Counsel



By: Matthew F. Christy
Counsel, Legal Division

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⁸ For instance, those decision would not result in any of the material occurrences enumerated in Regulation 18702.2(c) with respect to a Machin Property tenant's leasehold interest in that property.