

January 8, 2003

SDEC Informal Advice Letter No. IA03-01

Advice Provided to:

Councilmember Scott Peters
202 "C" Street, MS #10A
San Diego, CA 92101

Re: Fairbanks Ranch Country Club

Dear Councilmember Peters:

This advice letter has been prepared in response to your memorandum to the City of San Diego Ethics Commission dated December 17, 2002. You have sought Ethics Commission advice regarding your handling of constituents' concerns pertaining to grading performed at the Fairbanks Ranch Country Club. In an abundance of caution, you have been avoiding any involvement in the matter and have forwarded all such concerns to the Neighborhood Code Compliance section of the Police Department. Your caution stems from your wife's membership in the Fairbanks Ranch Country Club, as well as a recognition that City Charter section 22 places some limitations on the involvement of an individual councilmember in the administrative functions of the City Manager.

Because Charter section 22 is not a governmental ethics law under the Ethics Commission's jurisdiction, I cannot comment on that aspect of your memorandum. I would like, however, to take this opportunity to address a number of conflict of interest issues surrounding your wife's membership in the country club. After reviewing your memorandum and discussing this issue with your Chief of Staff, Christina Cameron, I believe it would be prudent to analyze the conflict of interest ramifications that the membership could have upon the fulfillment of your duties as a public official.

QUESTIONS

1. Does the Political Reform Act impose upon you an obligation to disclose your wife's membership in the Fairbanks Ranch Country Club on your Statement of Economic Interests?
2. Does the Political Reform Act preclude your participation in a municipal decision involving the Fairbanks Ranch Country Club because of your wife's membership in the club?
3. Does section 1090 of the Government Code preclude your participation in a City contract involving the Fairbanks Ranch Country Club because of your wife's membership in the club?

SHORT ANSWERS

1. No. There are no provisions in the Political Reform Act that require you to disclose your wife's membership in the Fairbanks Ranch Country Club on your Statement of Economic Interests.
2. Perhaps. The Political Reform Act will preclude your participation in a municipal decision involving the Fairbanks Ranch Country Club because of your wife's membership in the club if it is reasonably foreseeable that the decision will affect the value of your wife's membership, for better or worse, by \$250 or more in a 12-month period.
3. No. Your wife's membership in the Fairbanks Ranch Country Club is considered a "non-interest" and does not constitute a section 1090 interest that would preclude your participation in a City contract involving the Fairbanks Ranch Country Club.

ANALYSIS

Your wife's membership in the Fairbanks Ranch Country Club potentially involves a variety of conflict of interest laws. These laws, and their effect on your actions as a member of the City Council, are discussed in the analysis that follows.

A. Disclosure

In your position as a member of the San Diego City Council, you are subject to the disclosure requirements of Government Code section 87203, and are required to annually file a statement disclosing your investments, interests in real property, and income during the reporting period. Cal. Gov't Code § 87203. While your wife's country club membership would not be considered an "interest in real property" or "income," the characteristics of the membership (it can be sold for a profit or loss) could cause it to be

considered an “investment.” The Political Reform Act [PRA] defines “investment” to include any financial interest in or security issued by a business entity with a fair market value of at least two thousand dollars. Cal. Gov’t Code § 82034.

The California Fair Political Practices Commission [FPPC] has addressed the subject of whether a country club membership is considered an “investment” subject to the PRA. According to the FPPC, a crucial factor to consider is whether the country club is operated as a for-profit business or whether it is instead a non-profit enterprise.

If the country club is a business entity and the public official’s equity membership can be sold for a profit or loss, we have advised that the public official’s equity interest in the country club is an investment interest. In contrast, if the country club is a nonprofit entity, we have advised that a public official’s equity interest in the country club constitutes an asset of the public official for disqualification purposes.

In re Norman, FPPC Formal Advice Ltr. A-99-308 (Jan. 6, 2000) (citations omitted).

Fairbanks Ranch Country Club is a California nonprofit mutual benefit corporation. Your interest in the country club is not considered an investment in a business entity because the country club, as a nonprofit organization, is not a business entity according to the PRA, which defines “business entity” as any organization or enterprise operated for profit. *In re Martyn*, FPPC Formal Advice Ltr. A-97-378 (1997). Therefore, any equity interest that you have in the country club is not an investment interest, but is instead considered an “asset.” While assets required to be disclosed under the PRA include business interests, real property interests, and income (typically in the form of gifts, loans, and travel payments), there is no similar requirement applicable to personal assets you’ve purchased. Your wife’s country club membership, therefore, need not be disclosed on your Statement of Economic Interests.

B. Disqualification from Participation in Municipal Decisions

Although your December 17, 2002, memorandum does not contain any mention of a pending municipal decision involving the Fairbanks Ranch Country Club, it is likely that the City Council will eventually find itself making decisions with regard to this entity, particularly in light of the fact that the country club is sited on land leased from the City. It would be prudent, therefore, to evaluate potential conflicts created by your wife’s membership in the club. In order to determine whether your wife’s membership in the country club constitutes a potentially disqualifying conflict of interest for you, a step-by-step analysis of FPPC regulations is appropriate.

The analysis is based upon rules that prohibit a public official from participating in municipal decisions in which he or she has a conflict of interest. “No public official at any level of state or local government may make, participate in making or in any way use or attempt to use his/her official position to influence a governmental decision in which

he/she knows or has reason to know he/she has a disqualifying conflict of interest.”
Cal. Code Regs. tit. 2, § 18700.

Step one of the analysis involves determining what constitutes a conflict of interest. “A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his/her economic interests, unless that effect is indistinguishable from the effect on the public generally.” *Id.* The initial question to be asked, therefore, is whether any municipal decision in which you participate will have a reasonably foreseeable material financial effect on the value of your wife’s membership.

Step two provides guidance in determining what constitutes an “effect” on the value of membership. “A public official has an economic interest in his or her personal finances and those of his or her immediate family. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing.”
Cal. Code Regs., tit. 2, § 18703.5.

Step three entails determining whether the financial interest is directly or indirectly involved in a particular municipal decision. The FPPC analyzed this question in the context of a country club membership in *In re Magdich*, FPPC Formal Advice Ltr. A-00-173 (Sept. 8, 2000). In that advice letter, the FPPC stated: “After identifying the official’s economic interests, we ask if those interests are directly or indirectly involved in the government decisions at issue. The answer is simple when the only economic interest identified is the official’s own interest in his or her personal finances.” *Id.* This advice letter then cites to title 2, section 18704.5 of the California Code of Regulations, which states: “A public official or his or her immediate family is deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.”

Step four is identifying whether or not the “effect” is material. “A reasonably foreseeable financial effect on a public official’s personal finances is material if it is at least \$250 in any 12-month period.” Cal. Code Regs., tit. 2, § 18705.5(a). Considering this fourth step in the context of the overall analysis, you can determine whether or not you would be disqualified from participating in a municipal decision by asking whether or not it is reasonably foreseeable that the decision will affect the value of your wife’s membership, for better or worse, by \$250 or more in a 12-month period? If you can answer “no” to this question, then you will not be disqualified from participating in the decision. A “yes” answer, on the other hand, would require that you not participate in any aspect of the decision.

C. Municipal Contracts

Outside the scope of the PRA, the California Government Code imposes a prohibition that prevents the City Council from entering a contract in which one of their members has a financial interest. "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." Cal. Gov't Code § 1090.

This prohibition is paralleled by a provision in the City's Ethics Ordinance, codified as Municipal Code section 27.3560:

- (a) It is unlawful for any City Official to be financially interested in any contract made by them in their official capacity.
- (b) It is unlawful for any contract to be made by the City Council or any board or commission established by the City Council if any individual member of the body has a financial interest in the contract.

These state and local provisions can result in severe repercussions. They preclude the City Council from entering into a contract if any Councilmember has a financial interest in the contract. If a financial interest exists, the contract may not be made until that interest is surrendered or the Councilmember resigns. A contract made in violation of these provisions is void and cannot be enforced. Both the state law and Ethics Ordinance, however, contain exceptions to these restrictions. If the financial interest is considered "remote," then the contract can be made if the interest is disclosed and the subject Councilmember does not participate in voting for the contract. Cal. Gov't Code § 1091(a). Additionally, some financial interests are considered "non-interests," and do not disqualify the Councilmember from participation in the vote. Cal. Gov't Code § 1091.5.

The City's Ethics Ordinances incorporates the above Government Code provisions into Municipal Code section 27.3560:

- (c) For purposes of the prohibitions set forth above in subsections (a) and (b), the term financial interest means any interest, other than a remote interest as prescribed in California Government Code section 1091 or a non-interest prescribed in California Government Code section 1091.5

Your financial interest in your wife's country club membership appears to be a "non-interest" pursuant to Government Code section 1091.5. Under subsection (7), a person is not deemed to have a financial interest in a contract if he or she is a "nonsalaried member of a nonprofit corporation, provided that this interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records." Because your wife does not draw

a salary through her membership in the country club, and because the country club is a nonprofit organization, your financial interest is a “non-interest.” Government Code section 1090 and SDMC section 27.3560 do not preclude you from voting on matters involving Fairbanks Ranch Country Club. Your only obligation is to report this interest before participating in contract discussions.

CONCLUSION

Your wife's country club membership is not an asset that is required to be disclosed on your Statement of Economic Interests form. Additionally, the prohibitions set forth in Government Code section 1090 and SDMC section 27.3560 do not preclude your participation in any effort of the City Council to extend, amend, or terminate the contract with the country club. According to the Political Reform Act, however, the country club membership will require you to disqualify yourself from participating in any municipal decision if it is reasonably foreseeable that the decision will affect the value of the membership, for better or worse, by \$250 or more in a 12-month period.

Sincerely,

Charles B. Walker
Executive Director