

[NOTE: In 2014, the California Fair Political Practices Commission amended Regulation 18706 to state that an outcome is “reasonably foreseeable” if it is a “realistic possibility.” An outcome need not be “substantially likely” to be considered “reasonably foreseeable.”]

April 13, 2011

SDEC Formal Advice Letter No. FA11-01

Councilmember David Alvarez
City Council District 8
202 "C" Street, 10th floor
San Diego, CA 92101

Re: Request for Advice Regarding Disqualification from Municipal Decision Involving
Real Property Interest

Dear Councilmember Alvarez:

This advice letter has been prepared following your communications with our office over the past several months regarding whether you may, in your capacity as a member of the City’s Redevelopment Agency, participate in an upcoming decision to create a Dells Imperial redevelopment project area in light of the fact that you own a residence situated within the Dells Imperial boundaries.

QUESTION

Does your ownership of real property within the boundaries of Dells Imperial prohibit you from participating in the decision to designate that area as a redevelopment project area?

SHORT ANSWER

The Ethics Ordinance precludes City Officials from participating in decisions that are substantially likely to have a material financial effect on their economic interests, including their interests in real property, unless that effect is indistinguishable from the effect on the “public generally.” The fact that you own real property within the boundaries of the proposed Dells Imperial redevelopment project area creates a presumption that the decision to create the project area will have a material financial effect on your real property interests. Thus, you may not, as a general rule, participate in the subject decision. An exception will exist, however, if there are facts establishing that the decision will impact your property interests in substantially the same manner that it impacts the “public generally” based on the criteria delineated below. If the “public generally” exception applies, you may lawfully participate in the decision.

BACKGROUND

The Southeastern Economic Development Corporation [SEDC] is a public benefit nonprofit corporation owned by the City of San Diego that serves pursuant to an operating agreement with the City's Redevelopment Agency. Although the Redevelopment Agency is a separate legal entity from the City, the City Councilmembers also serve as the legislative body for the Redevelopment Agency. SEDC coordinates redevelopment projects in a section of southeastern San Diego. SEDC's sphere of influence covers fifteen neighborhoods consisting of four redevelopment project areas (Central Imperial, Gateway Center West, Mount Hope, and Southcrest) as well as the "Dells Imperial Study Area" [Dells Imperial]. You own one parcel of real property (your personal residence) that is situated within the Dells Imperial boundaries.

For a number of years, SEDC has been evaluating Dells Imperial in connection with its potential designation as a redevelopment project area. The ultimate decision regarding whether or not to create this redevelopment project area will necessarily involve the Redevelopment Agency, and accordingly you have asked for guidance given the fact that you own real property in the area that will be the subject to the decision.

DISQUALIFICATION ANALYSIS

A. General Prohibition

The Ethics Ordinance's disqualification provisions apply to the members of the City Council when they are acting in their capacities as members of the Redevelopment Agency. San Diego Municipal Code [SDMC] § 27.3503. As a member of both the City Council and the Redevelopment Agency, SDMC section 27.3561 prohibits you from influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on any of your economic interests, unless you can establish that the effect is indistinguishable from the effect on the public generally. The term "municipal decision" encompasses all decisions made by the Redevelopment Agency, including any of its resolutions or ordinances.

B. Your Economic Interest

For purposes of disqualification, your economic interests include any real property in which you have an investment worth \$2,000 or more. SDMC § 27.3561(b)(3). Your ownership interest in your Dells Imperial residence exceeds \$2,000. Thus, you are generally precluded from participating in or influencing any particular municipal decision if it is reasonably foreseeable that the decision will have a material financial effect on your real property investment. There is a "public generally" exception to this rule, however, as explained more fully below.

C. Material Financial Effect

As discussed above, a conflict of interest may arise if a decision will have a "material financial" effect on the economic interests of a City Official. SDMC § 27.3561. In order to analyze the materiality issue, we turn to the Regulations promulgated by the Fair Political Practices Commission [FPPC]. With respect to real property interests, FPPC Regulations provide as follows:

- The financial effect of a governmental decision on real property that is “directly involved” in a decision is presumed to be material, whereas the financial effect of a decision on real property that is “indirectly involved” in the decision is presumed not to be material. FPPC Regulation 18705.2.
- Real property is “directly involved” in a decision if the property is located within 500 feet of the boundaries (or proposed boundaries) of the property that is the subject of the decision. In the context of creating a redevelopment project area, a property is directly involved if “any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.” FPPC Regulation 18704.2(a)(1).

In other words, because the property you own is located within the boundaries of Dells Imperial, it is “directly involved” in the decision to create the redevelopment project area. It is presumed, therefore, that the subject decision will have a material financial effect on your property interests. Thus, you would generally be disqualified from participating in this decision unless you can rebut the presumption by demonstrating that it is not reasonably foreseeable that the decision will have any financial effect on the property.¹ FPPC Reg. 18705.2(a)(1). To rebut the presumption, you would need to provide evidence that the decision would not be substantially likely to have *any* financial effect (even a dollar’s worth) on your property interests. Conflict of interest laws provide, however, that even if the decision will have a material financial effect on your economic interests, you will not be disqualified if the decision affects your economic interests in a manner that is substantially similar to the manner in which the decision affects the public generally.

D. Public Generally Exception

The application of the “public generally” exception depends on: (1) whether the municipal decision affecting your real property interests will affect a “significant segment” of the population, and (2) whether your real property interests will be affected by the municipal decision in “substantially the same manner” as other real properties in the significant segment. FPPC Regulation 18707.

For a real property interest, a “significant segment” of the jurisdiction means: “(i) ten percent or more of all property owners or all residential property owners in the jurisdiction of the official’s agency (City of San Diego) or the district the official represents (District 8, in your case); or (ii) 5,000 property owners or residential property owners in the jurisdiction of the official’s agency (City of San Diego).” FPPC Regulation 18707.1(b)(1)(B).^{2, 3} You have advised our office that

¹ During our discussions, you asked whether the analysis would change if your personal residence and all real property within 500 feet of your residence were specifically excluded from the redevelopment project area. Under such circumstances, the decision to create the project area would still bestow on your property the benefits of being surrounded on all sides by a major revitalization effort designed to improve the character of the community’s neighborhoods, including the one in which your property is located. It is reasonably foreseeable, therefore, that the decision would still have a material financial effect on your real property interests.

² Unless you wish to conduct research to determine the actual number of owners of each residential parcel located in or around the proposed boundaries of the redevelopment project area, you must calculate the significant segment by counting each residential property as being owned by one property owner. FPPC Regulation 18707.1(b)(1)(B)(iii).

³ “Residential property means any real property that contains a single family home, or a multi-family structure of four units or fewer, on a single lot, or a condominium unit.” FPPC Regulation 18707.1(b)(1)(B)(iv).

there are 2,471 residential parcels in Dells Imperial. We do not know, however, if that figure represents ten percent or more of the residential parcels in Council District 8. If it does, then you will have identified a “significant segment” that will be affected by the decision.⁴

The next prong of this analysis involves determining whether the significant segment will be impacted by the decision in “substantially the same manner.” FPPC Regulation 18707.1(b)(2); *In re Enright*, FPPC Adv. Ltr. A-10-006. You will be permitted to participate in the decision to create the Dells Imperial redevelopment project area so long as that decision will affect those residential property owners in substantially the same manner as it affects your property interests. The FPPC has identified a non-exclusive list of the factors that may be considered when determining whether a decision will affect a significant segment in “substantially the same manner” as it will affect an official’s property interests:

- (i) The magnitude of the financial effect of the governmental decision on the official's property as compared with other properties contained within the significant segment;
- (ii) The lot size of the official's property compared with other properties contained within the significant segment (e.g., one acre versus 10 acres);
- (iii) The square footage of the building space of the property compared with the square footage of the building space of other properties contained within the significant segment;
- (iv) The proximity of the official's property to the property that is the subject of the governmental decision compared with the proximity of other properties contained within the significant segment;
- (v) The number of units/parcels owned by the official compared to others in the significant segment;
- (vi) The physical characteristics or permitted use of the property (i.e., historical, commercial, residential) as compared to other properties in the significant segment;
- (vii) The location of the official's property compared with the location of other properties contained within the significant segment;
- (viii) The neighborhood in which the official's property is located is comparable to the neighborhoods in which other properties contained within the significant segment are located;
- (ix) The quality of the structure contained on the official's property compared with the quality of other structures contained on properties within the significant segment;
- (x) The current fair market value of the property as compared to other properties in the significant segment;
- (xi) Improvements made to the official's property as compared with other properties contained within the significant segment;

⁴ A significant segment may also include residential properties located outside (but in the vicinity of) the boundaries of the proposed redevelopment project area. The key is to identify properties that will be affected by the decision, particularly those that will experience a financial impact that is substantially the same as the financial impact on your property (as discussed more fully in the following paragraphs).

- (xii) The developmental potential or income producing potential of the real property in which the official has an economic interest compared with other properties contained within the significant segment; and
- (xiii) The character of the effects on the neighborhood of the property in which the official has an economic interest including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood compared with the neighborhoods of other properties contained within the significant segment.

We do not have sufficient facts upon which to conclude that the creation of a Dells Imperial redevelopment project area would impact your real property interests in substantially the same manner as it would impact the “significant segment” discussed earlier. Ultimately, this is a factual determination that you must make using the FPPC guidelines set forth above. Although we are aware of some factors that favor a finding that the exception applies (e.g., you own only one parcel in Dells Imperial, not multiple parcels that would magnify the impact of the decision on your property interests), it is your responsibility to obtain the remaining facts.

The impacts need not be identical, but are to be measured in terms of the overall dollar amount of the increase or decrease in the value of the properties, not by a percentage increase or decrease affecting property values as a whole. FPPC Regulation 18707.1(b)(2). In other words, you would compare any foreseeable dollar amount increase in the value of your property with the foreseeable dollar amount increases in the values of other properties in the significant segment. According to the FPPC, an impact of plus or minus 2% of the value of a property is considered substantially the same. *In re Berger*, FPPC Adv. Ltr. A-05-054. For example, because \$6,000 is 2% of the value of a \$300,000 house, the impact of a decision affecting that house by \$10,000 would be substantially the same as the impact on other houses that are affected by \$4,000 to \$16,000.

Note that if your property is of average size and value for Dells Imperial, it will be easier to meet the “substantially the same” requirement than if that were not the case. For example, meeting this requirement would be difficult if your property is on a lot twice the size of the average lot in Dells Imperial, or if the square footage of your house is half that of typical houses in the area. As indicated above, these are the types of factors that must be considered when comparing the impact of the decision on your property with the impact of the decision on other properties in the area. Ultimately, so long as your property interests will be impacted by the creation of the project area in substantially the same manner as a “significant segment” of other residential property owners in your district, you may participate in the decision.

Keep in mind that the above analysis concerns a single specific municipal decision: the creation of the Dells Imperial redevelopment project area. As such, the conclusion reached herein applies solely to that specific decision, and may not be relevant to other decisions that come before the City Council or the Redevelopment Agency in connection with the redevelopment of Dells Imperial. For example, future redevelopment decisions to provide road improvements, landscaping, traffic reduction, or new cultural, shopping, or recreation areas on your street or in your immediate neighborhood could have financial impacts on your property interests that are different from the impacts on the “public generally.” If such decisions come before the City

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Council or Redevelopment Agency, you are encouraged to contact us for a separate disqualification analysis.

CONCLUSION

Because you own a residential parcel situated within Dells Imperial, the decision to create the Dells Imperial redevelopment project area will presumably have a material financial effect on your real property interests. The presumption can be rebutted only if it is substantially likely that the decision will have zero impact on your economic interests. As a general rule, therefore, you will be precluded from participating in the decision to create the subject project area. As set forth above, however, the “public generally” exception may allow your participation notwithstanding the decision’s impact on your real property interests. In other words, if the facts establish that the decision will affect your property interests in substantially the same manner as it will affect the “significant segment” (10 percent or more of the residential property owners in your district), then the “public generally” exception to the conflict of interest laws will apply, and you may lawfully participate in the decision to create the Dells Imperial redevelopment project area.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

Stephen Ross
Program Manager-Technical Assistance