

[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 9, 2007

SDEC Informal Advice Letter No. IA07-04

John Cunningham
Centre City Advisory Committee
225 Broadway, Ste. 1100
San Diego, CA 92101

Re: Request for Advice Regarding Disqualification from Municipal Decisions

Dear Mr. Cunningham:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated March 21, 2007. You are seeking general advice from the Ethics Commission interpreting the provisions of the City’s Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Your letter seeks the Commission’s assistance with regard to the procedures that must be followed when a member of the Centre City Advisory Committee [CCAC] has a conflict of interest in a matter before that body.

QUESTIONS

1. Can a CCAC member offer an opinion as a member of the public during public comment for an action agenda item?
2. Must a CCAC member who has recused himself or herself leave the room?

SHORT ANSWERS

1. A CCAC member who has a disqualifying conflict of interest in a matter before the CCAC may make comments before the CCAC as a member of the public only to the extent that he or she is representing his or her “personal interests.”
2. CCAC members who have recused themselves from participating in a CCAC matter need not leave the room.

DISQUALIFICATION ANALYSIS

SDMC section 27.3561 prohibits the members of the CCAC, as City Officials, from knowingly influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on any of their economic interests. The term, “municipal decision” includes

any decision made by the CCAC. SDMC § 27.3503. Thus, when the CCAC makes a decision regarding a particular project that comes before it, the matter is considered a “municipal decision” under the Ethics Ordinance.

“Economic interests” are defined in the Ethics Ordinance as follows:

- (1) any business entity in which the City Official or a member of the City Official’s immediate family has invested \$2,000 or more;
- (2) any business entity for which the City Official or a member of the City Official’s immediate family is a director, officer, partner, trustee, employee, or hold any position of management;
- (3) any real property which the City Official or a member of the City Official’s immediate family has invested \$2,000 or more;
- (4) any person from whom a City Official or a member of the City Official’s immediate family has received (or by whom you have been promised) \$500 or more in income within twelve months prior to the municipal decision; and
- (5) any person from whom a City Official or a member of the City Official’s immediate family has received gifts which total \$320 or more within twelve months prior to the municipal decision.¹
- (6) the personal expenses, income, assets, or liabilities of a City Official or a member of the City Official’s immediate family.

SDMC § 27.3561.

For the purpose of addressing the concerns raised in your March 21, 2007, letter, this advice letter will focus solely on subsection (3) above, which pertains to real property interests². You indicated in your letter that members of the CCAC have a practice of recusing themselves from decisions involving projects located within 500 feet of properties that they own or in which they reside. In fact, the “500 foot rule” does play an essential role in determining whether public officials have disqualifying conflicts of interest in decisions involving real property interests.

You should be aware, however, that there are a number of other factors that may cause an official’s property interests to disqualify that official from participating in a municipal decision. In this regard, the City’s Ethics Ordinance expressly incorporates regulations adopted by the Fair Political Practices

¹ The \$320 gift limits at the time this section went into effect have been raised to \$390.

² It is important to note that an official’s personal interests do not include the clients of his or her business, which are considered sources of income to the official. In other words, a member of the CCAC is prohibited from speaking to the CCAC on behalf of a client if the client has provided \$500 or more in income to the CCAC member within the past twelve months. This prohibition extends beyond public comments made to the CCAC, and includes the preparation of documents that are submitted to the CCAC as well as communications with CCAC staff concerning a client’s matter. Please refer to the enclosed “Fact Sheet on Representing Clients Before Your Board or Commission” for additional information.

Commission [FPPC]. SDMC 27.3561. These regulations provide that an official's real property interest is "directly involved" in a decision if any of the following apply:

- any part of the real property is located within 500 feet of the boundaries of the property that is the subject of the municipal decision;
- the decision involves the zoning, sale, purchase, or lease of the real property;
- the decision involves the issuance, denial, or revocation of a license, permit, or other land use entitlement authorizing a specific use of the real property;
- the decision involves the imposition, repeal, or modification of any taxes or fees assessed or imposed on the real property;
- the decision involves the formation of a project area committee, the adoption of the redevelopment plan, the addition of territory to the redevelopment area, or the rescission or amendment of any of these decisions; or
- the decision involves construction of, or improvements to, streets, water, sewer, storm drainage, or similar facilities, and the real property in which the official has an interest will receive new or improved services.

FPPC Reg. 18704.2.³ If any of the above factors are present, the official's real property interest will be considered "directly involved" in the decision. If the official's real property is "directly involved" in the decision, there is a presumption that the decision will have a material financial effect on the official's real property, which in turn disqualifies the official from participating in the decision. FPPC Regulation 18705.2.

For real property owned by a public official, this presumption may be rebutted by "proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property." *Id.* This means that the decision will not have a financial effect of even a single dollar on the value of the property. For real property that is leased by a public official, this presumption may be rebutted by "proof that it is not reasonably foreseeable that the governmental decision will have any effect on any of the following: (A) The termination date of the lease; (B) The amount of rent paid by the lessee for the leased real property, either positively or negatively; (C) The value of the lessee's right to sublease the real property, either positively or negatively; (D) The legally allowable use or the current use of the real property by the lessee; or (E) The use or enjoyment of the leased real property by the lessee." *Id.*

Even if a CCAC member's owned or leased real property is not "directly involved" as described above, but will still be affected by a particular CCAC decision, then the property is considered "indirectly involved" in the decision. The financial effect of a municipal decision on real property that is indirectly involved is presumed not to be material. This presumption may be rebutted, however, by proof that there are specific circumstances that make it substantially likely that the decision will have a material financial effect on the real property (such as the legally allowable use of the property, its development potential, or the characteristics of the neighborhood, and the use or enjoyment of the

³ We have enclosed a copy of FPPC Regulation 18704.2 for your files. Note that this regulation also contains certain exceptions to the basic rule.

property). We encourage the CCAC members to contact the Ethics Commission for additional advice should a particular decision require this level of analysis.

With the above disqualification rules in mind, we turn to your particular questions concerning the ability of a CCAC member to participate in a decision as a member of the public, notwithstanding a disqualifying conflict of interest in a particular decision.

1. Comments as a “Member of the Public”

If a member of the CCAC is disqualified from a particular decision because of a real property interest as discussed above, or for any of the other reasons identified in SDMC section 27.3561, that member may not discuss the decision with other members of the CCAC. More precisely, the disqualified CCAC member may not engage in any action to influence the decision. The Ethics Ordinance defines “influencing a decision” to mean “affecting or attempting to affect any action by a City Official on one or more municipal decisions by any method, including promoting, supporting, opposing, participating in, or seeking to modify or delay such action. Influencing a municipal decision also includes providing information, statistics, analysis or studies to a City Official.” SDMC § 27.3503.

As stated above, the City’s conflict of interest rules are derived from state law, and accordingly we interpret our rules to be consistent with those set forth at the state level. The FPPC has adopted a regulation containing several exceptions to the basic rule that prohibits public officials from communicating their thoughts on matters in which they are disqualified. Under this regulation, a member of the CCAC may, despite having a disqualifying conflict of interest, speak before the rest of the CCAC with regard to his or her own “personal interests.” This regulation states, in pertinent part, that a public official is not using his or her official position to influence a decision when he or she:

- (1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official’s “personal interests” include, but are not limited to:
 - (A) An interest in real property which is wholly owned by the official or members of his or her immediate family.
 - (B) A business entity wholly owned by the official or members of his or her immediate family.
 - (C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.

FPPC Reg. 18702.4(b).

Thus, to the extent that a member of the CCAC has a disqualifying financial interest in a CCAC decision, he or she may speak on the matter to which the disqualification pertains, but only during the time of the meeting allotted for public comment and only with regard to his or personal interests in the matter. (It is important to note that the member with a conflict of interest may not contact other individual CCAC members outside of the open meeting for purposes of influencing the CCAC's

John Cunningham

April 9, 2007

Page 5

decision.) Moreover, such persons should make clear that they are speaking only with regard to personal interests, and not on behalf of any other person or group (other than their own family), and not acting in any official capacity. *In re Livengood*, FPPC Adv. Ltr. A-00-222.

B. Requirement to Leave the Room

Certain public officials, when faced with a disqualifying conflict of interest, are required to identify the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail, and then leave the room. Cal. Gov't Code § 87105. Note, however, that this particular requirement applies only to public officials identified in Government Code section 87200. In the City's Ethics Ordinance, these individuals are referred to as "high level filers." SDMC § 27.3503. Advisory committees, such as the CCAC, are not "high level filers," but are instead considered "local code filers," i.e., they file their Statements of Economic Interests (Form 700) pursuant to a conflict of interest code developed specifically for project area committees. Accordingly, CCAC members do not fall within the scope of section 87200 and its members are not required to leave the room following recusal from participating in a CCAC matter. Although the City's Ethics Ordinance does not require that disqualified members leave the dais, it does prohibit them from engaging in any type of behavior that could be construed as an attempt to influence the decision.

CONCLUSION

Members of the CCAC who have disqualifying financial interests in a particular matter may address the CCAC regarding that matter during the public comment portion of a meeting, but only to the extent that they are representing their personal interests. In addition, CCAC members are not required to leave the room after recusing themselves, and may sit with the members of the public and observe the CCAC's discussion of the matter.

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.

Sincerely,

Cristie C. McGuire
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance

Enclosures