

[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.”]

February 25, 2008

SDEC Informal Advice Letter No. IA08-03

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

Re: Request for Advice Regarding Disqualification from Municipal Decisions that
Involve Real Property Interests

Dear Councilmember Hueso:

This advice letter responds to your memo to the City of San Diego Ethics Commission dated January 24, 2008. You requested advice from the Ethics Commission on whether you may participate in municipal decisions that may come before the City Council, acting as the Redevelopment Agency, relating to a proposed Southeastern Economic Development Corporation [SEDC] redevelopment project area that encompasses your personal residence and several properties that you own with members of your extended family. Because you have not identified any specific municipal decisions, we are treating your inquiry as a request for informal advice.

QUESTIONS

1. Does your ownership of real property (your own residence and several properties that you own with family members) within the SEDC “Dells Imperial” study area prohibit you from participating in municipal decisions related to that area becoming a redevelopment project area?
2. If you were to sell your share of the properties that you own with family members to those family members while retaining ownership of your personal residence in Dells Imperial, would the Ethics Commission’s advice on question number one change?

SHORT ANSWERS

1. Yes. Because your residence and the real property you co-own are located within Dells Imperial or within 500 feet of the redevelopment study area boundaries, there is a presumption that any decisions involving this area will have a financial effect on your real property interests, and you are therefore disqualified from participating

in or influencing any such decisions. You may, however, participate in a specific decision if you can rebut the presumption by demonstrating that the decision will not have any financial effect whatsoever on your real property interests. Further, you may be able to participate in a decision if you can show that the decision will affect your real property interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally.

2. No. Even if you sold your real property interests co-owned with family members, your residential property would still constitute a property interest directly involved in decisions regarding the proposed redevelopment area.

BACKGROUND

SEDC is a public benefit nonprofit corporation owned by the City of San Diego that serves at the direction of 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 as well as the "Dells Imperial Study Area" [Dells Imperial]. Dells Imperial is located within the Eighth District, which you represent as a Councilmember.

You have provided us with a map of Dells Imperial that designates the boundaries of the redevelopment study area and appears to pinpoint your residence and the three properties that you own with family members. The properties are either inside or adjacent to the boundaries of the Dells Imperial study area.

DISQUALIFICATION ANALYSIS

A. General Prohibition

Whether you would be disqualified from participating in decisions involving your real property interests turns on the City's Ethics Ordinance and the Fair Political Practice Commission's [FPPC] regulations it incorporates. SDMC § 27.3561(c). The Ethics Ordinance prohibits a City Official from knowingly influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on "any real property which the City Official or a member of the City Official's immediate family has invested \$2,000 or more." SDMC § 27.3561(b)(3).¹

You are a City Official in your roles as both a City Councilmember and member of the Redevelopment Agency. Your ownership interest in each one of the four real properties presumably well exceeds \$2,000. Thus, as a City Official with a \$2,000 or more real property investment, you may not knowingly influence a municipal decision if it is reasonably foreseeable that the decision will have a material financial effect on your real property interests.

¹ Your request for advice provided no facts regarding any other potential economic interests, such as business entities or sources of income.

B. Influencing a Municipal Decision

The Ethics Ordinance broadly defines “municipal decision” to include any decision by the City Council. Further, the Ethics Ordinance defines “influencing a municipal decision” as follows:

Influencing a municipal decision means 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.

To the extent the City Council acting as the Redevelopment Agency considers decisions regarding Dells Imperial, you would be precluded from affecting or attempting to affect any action on such decisions by any method if it is reasonably foreseeable that the municipal decision will have a material financial effect on your real property interests. Further, it is important to note that you would not only be disqualified from participating in decisions of the Redevelopment Agency concerning Dells Imperial, but also from contacting any other City Officials for the purpose of “influencing a municipal decision” concerning the proposed redevelopment project area.

C. Reasonably Foreseeable Material Financial Effect

When evaluating conflict issues, we turn to the FPPC for guidance in interpreting the Municipal Code’s disqualification rules. SDMC § 27.3561(c). The FPPC has analyzed the term “reasonably foreseeable” in many of its advice letters, and has opined that an effect is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. *In re Orlik*, FPPC Adv. Ltr. I-98-175. Moreover, the FPPC has stated that any financial effect, no matter how small, will result in the “reasonably foreseeable” standard being met as long as there is a substantial likelihood that the effect will occur. *Id.*

Thus, disqualification will depend on whether you, as a City Official, are influencing municipal decisions in circumstances where it is substantially likely that the decision will have a material financial effect on the real property you own. The materiality of the financial effect on real property depends on whether the property is “directly” or “indirectly” involved in a government decision. SDMC § 27.3561(c); FPPC Reg. § 18705.2. The financial effect of a governmental decision on real property that is “directly involved” in the 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 Reg. § 18705.2.

The FPPC Regulations set forth guidelines to determine whether real property interests are “directly” involved in a municipal decision. Specifically, Regulation 18704.2(a)(1) states that real property is considered “directly” involved in a decision if the property is located within 500 feet of the boundaries (or proposed boundaries) of the property which is the subject of the decision. In

other words, because the property you own is located within or adjacent to the Dells Imperial study area (i.e., the proposed boundaries of the redevelopment project area), it is considered “directly” involved in any municipal decision involving that redevelopment project area.

You have not identified any specified governmental decision(s) concerning Dells Imperial that may come before you, but generally inquire whether you “cannot or should not participate in any matter (meetings, hearings, etc.) related to this redevelopment process.” It is relevant to note that the FPPC Regulations identify the following types of decisions concerning a proposed redevelopment project area and indicate that property located within such an area, or within 500 feet of the area’s proposed boundaries, will be considered directly involved in these types of decisions:

- to designate the survey area (study area);
- to select the project area;
- to adopt the preliminary plan;
- to form a project area committee;
- to certify the environmental document;
- to adopt the redevelopment plan;
- to add territory to the redevelopment area; or
- to rescind or amend any of the above decisions.

FPPC Reg. § 18704.2(a)(1), (5).

Keep in mind that this list is not exhaustive of all the different municipal decisions that may come before the City Council, the Redevelopment Agency, or SEDC, concerning the Dells Imperial study area. Notably, the 500 foot rule may apply to disqualify you from influencing a governmental decision *whenever* any of your real property interests are located within 500 feet of property that is the subject of a governmental decision. This proximity standard should be kept in mind regardless of whether the subject matter of the decision directly involves Dells Imperial.

Since your property interests will be considered directly involved in the redevelopment decisions listed above involving Dells Imperial, it is presumed that any of these decisions will have a material financial effect on your property interests. Thus, you would be disqualified from participating in or influencing municipal decisions concerning this project area unless you can rebut the presumption of materiality by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property. FPPC Reg. § 18705.2(a)(1). To rebut the presumption, and participate in one of these redevelopment decisions, you would need to provide evidence that the municipal decision would not be substantially likely to have *any* financial effect (even a dollar’s worth) on any of your property interests.

You have asked whether the Ethics Commission’s advice would change if you were to divest yourself of all of the real property interests except for your personal residence. Under this

scenario, your personal residence would still be inside, or within 500 feet of, the proposed boundaries of the proposed redevelopment project area. Thus, this property would still be directly involved in the above redevelopment decisions and you still would be disqualified from such decisions unless you could demonstrate that the decisions would not have any financial impact on your property.

In addition, it is relevant to note that you may be prohibited from participating in other types of municipal decisions that may not be specifically related to the Dells Imperial study area. In particular, if the municipal decision involves one of the following, then your interests will be considered “directly” involved in the decision:

- the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which you have an interest;
- the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which you have an interest;
- the imposition, repeal, or modification of any taxes or fees assessed or imposed on the real property in which you have an interest; or
- 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 (a)(2)-(4) & (6).

Lastly, you should know that if you wish to appear “in the same manner as any member of the general public” before SEDC or another public agency in the course of its usual function solely to represent yourself on a matter related to real property wholly owned by you or immediate family members, the conflict of interest rules except such personal appearances. FPPC Reg. § 18702.4 (b)(1); 18702.5(d)(3). Thus, you would not be precluded from speaking solely in your personal capacity – not as a Councilmember or an official of the City of the Redevelopment Agency, but as a member of the public at a public meeting of SEDC or the Redevelopment Agency regarding your own personal residence.

D. Public Generally Exception

You also should be aware of the “public generally” rule. This rule may permit you to participate in a municipal decision concerning Dells Imperial even if it is reasonably foreseeable that the decision will have a material financial effect on your real property interests. In general, this exception provides that you will not be disqualified from influencing a municipal decision if the effect of the decision on your property is indistinguishable from the effect of the decision on the “public generally.” FPPC Reg. § 18707.

The “public generally” exception depends on: (1) whether the governmental decision affecting the official’s real property interests will affect a “significant segment” of the population, and (2) whether the real property is affected by the governmental decision in “substantially the same manner” as other real property in the significant segment. If the answer to the first part of the test is “no,” then the “public generally” exception does not apply and the official cannot participate in the governmental decision. FPPC Reg. § 18707(b)(3).

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 [Eight District]; or (ii) 5,000 property owners or residential property owners in the jurisdiction of the official’s agency [City of San Diego].” FPPC Reg. § 18707.1(b)(1)(B).^{2, 3} If the “significant segment” test is met, then by applying numerous factors, you would analyze whether your property interests would be affected in “substantially the same manner” as other real properties in that segment. We have attached FPPC Regulation § 18707.1 which delineates the various factors to consider at subsection (b)(2). The Ethics Commission does not act as a finder of fact when giving advice, so it cannot make a factual determination regarding whether or not the “public generally” exception applies to your property interests.

CONCLUSION

Because you own real property that is located in or adjacent to the Dells Imperial redevelopment study area, you are prohibited from participating in or influencing any municipal decisions concerning this proposed redevelopment project area unless you can demonstrate that a particular decision will have absolutely no financial impact on your property interests or unless you determine that the “public generally” exception applies.

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,

Alison P. Adema
General Counsel
Attachment

² “The official may choose to count each residential property affected as being owned by one property owner if, and only if, the official counts himself or herself as the sole owner of the public official’s residential property regardless of his or her actual ownership interest.” FPPC Reg. § 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 Reg. § 18707.1(b)(1)(B)(iv).