



FAIR POLITICAL PRACTICES COMMISSION

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March 12, 2012

Dominic T. Holzhaus
Principal Deputy City Attorney
333 W. Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664

Re: Your Request for Advice
Our file No. A-12-003

Dear Mr. Holzhaus:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based solely on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, nothing in this letter may be construed to evaluate any conduct that has already taken place. Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws.

QUESTION

May Long Beach Harbor Commission President Susan Wise participate in decisions relating to the purchase, lease or construction of a building to house the Harbor Commission?

CONCLUSION

Yes, President Wise may participate in the decisions relating to the purchase, lease or construction of a building to house the Harbor Commission so long as there is no reasonably foreseeable material financial effect upon her 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 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.

FACTS

You are the Principal Deputy City Attorney for the City of Long Beach and are writing on behalf of the City of Long Beach and Susan Wise who serves as the President of the Board of Harbor Commissioners.

Recently the Harbor Commission entered into a purchase and sale agreement for One World Trade Center in downtown Long Beach. President Wise recused herself from this transaction because she and her husband have law offices in the building. By a vote of 2-2, the remaining four board members failed to approve the transaction and the agreement was terminated.

The Harbor Commission remains interested in the building, or buying or leasing another building to house the Harbor Department. The Harbor Department owns a piece of property currently serving as a parking lot for One World Trade Center that could possibly be used for a building to house the Harbor Department. Realtors and developers have suggested other possible locations within the immediate vicinity of One World Trade Center and elsewhere.

Under the Charter of the City of Long Beach, the five-member Harbor Commission has broad authority over the Harbor Department and the Harbor District, commonly known as the Port of Long Beach. Harbor Commissioners are employees of the City of Long Beach and are paid \$100 per meeting. Under the Charter, the Harbor Commission has the authority to make the final decision to build, buy or lease a building to house the Harbor Department.

If President Wise is not required to recuse herself, she would likely to participate in a process to identify candidate locations, rank them, select one or more for negotiation, give instructions to the negotiators and ultimately vote on whether or not to enter into a contract and obligate agency funds for this purpose.

President Wise has a law and mediation practice in One World Trade Center. The space she uses for this practice is subleased from the law firm Taubman, Simpson, Young & Sulentor. Her husband, Erich Wise is a partner in the law firm Flynn Delich & Wise, which is also a tenant in One World Trade Center. Erich Wise is one of four partners in the law firm and his interest in the law firm is greater than ten percent.

Since the purchase and sale agreement for One World Trade Center terminated, the Harbor Commission has not met to discuss the next steps. The search for a building to house the Harbor Development could involve consideration of all of the following options:

1. Purchase of One World Trade Center
2. A lease in One World Trade Center
3. Construction of a new building within 500 feet of One World Trade Center
4. A lease in a building within 500 feet of One World Trade Center

5. Construction of a new building within 500 feet of World Trade Center
6. Construction of a new building over 500 feet away from One World Trade Center
7. Purchase of a building more than 500 feet from One World Trade Center
8. A lease in a building more than 500 feet from One World Trade Center

You have stated it would be possible for the Commission to deliberate on each of these options separately.

One World Trade Center has enough space to house the Harbor Department and all current tenants. The Taubman Lease has a termination date of December 31, 2015. The rent formula for the Taubman Lease and the Flynn Lease are a specified minimum dollar amount plus a share of the variable building costs. The Taubman Lease and the Flynn leases both provide that there is no right to sublease without prior written consent of the landlord for which consent cannot be unreasonably withheld but is subject to conditions, fees, transfer premium sharing and recapture rights; that the premises can be used for general office purposes consistent with a first class office building; that tenants have a right of quiet enjoyment; and that the landlord has a right to transfer the building and the security deposit but that "This Lease shall otherwise not be affected by and such sale, transfer, encumbrance, assignment or disposal of Landlord's interest, and Tenant agrees to in all respects attorn to and recognize Landlord's purchaser or assignee as the 'Landlord' hereunder."

President Wise has an informal, unsigned agreement to use part of the Taubman Lease premises and receive certain office amenities and services (e.g. receptionist and telephone) for a fixed monthly amount. Her sublease is a month-to-month lease. The landlord is aware of President Wise's sublease with Taubman, required an insurance certificate from her movers, and assisted in adding her name to the building directory, but has not been asked for or provided written consent. President Wise has no right to sublease to anyone.

ANALYSIS

The primary purpose of the Act's conflict-of-interest provisions is to ensure that "public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) In furtherance of this goal, Section 87100 of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Determining whether a conflict of interest exists under Section 87100 is an eight-step process as outlined below.

Steps One and Two: Is President Wise considered a "public official" making, participating in making, or influencing a governmental decision?

As President of the Long Beach Harbor Commission, President Wise is a "member, officer, employee or consultant of a state or local government agency" and is, therefore, a public

official subject to the Act's conflict-of-interest provisions. (Section 82048; Regulation 18701(a).) Consequently, she may not make, participate in making or otherwise use her official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of her economic interests.

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (See Regulation 18702.1.) A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

President Wise will "make a governmental decision" if she votes on the decisions regarding the leasing or buying of property to house the Harbor Department.

Step Three: What are President Wise's economic interests -- the possible sources of a conflict of interest?

Section 87103 provides that a public official has a "financial interest" in a governmental decision "if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family," or on any of the official's economic interests, described as follows:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Regulation 18703.2);
- A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);

- A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule (Section 87103; Regulation 18703.5).

An "interest in real property" includes:

"... any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more. Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater." (Section 82033.)

The terms "interest in real property" and "leasehold interest" as used in Section 82033 do not include a month-to-month tenancy. (Regulation 18233.)

Because President Wise's sublease from Taubman is a month-to-month tenancy it does not qualify as an interest in real property under the Act. However, you have stated that President Wise's husband, Eric Wise, is a partner in the Flynn Delich & Wise which has a lease in One World Trade Center. His interest in the law firm is greater than a 10 percent interest as he is one of four partners in the firm. His firm's lease would qualify as an economic interest for President Wise if the fair market value of that interest is \$2,000 or more because it is not a month-to-month lease and is it a lease owned by a business entity in which a family member of President Wise owns a ten percent or greater interest.

Presumably, President Wise also has an investment of \$2,000 or more in her law and mediation practice. Therefore, she has an economic interest in this business entity. In addition, she has an economic interest in each of her clients from whom she has received income aggregating to \$500 or more within 12 months prior to the time the decision will be made. She also has an economic interest in her community property share of her spouse's income. Therefore, President Wise also has an economic interest in her husband's law firm and any of her husband's clients for which her community property share of income is \$500 or more within 12 months prior to the time the decision will be made. (Section 82030).

You have not provided information regarding any other economic interests of President Wise. For purposes of this letter, we assume that she has no other economic interests relevant to the decision you have identified.

Step Four: Are President Wise's economic interests directly or indirectly involved in the governmental decision?

Leasehold Interest

Real property in which a public official has an economic interest is directly involved in a governmental decision if any part of the real property is located within 500 feet of the boundaries (or the proposed boundaries) of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).)

Because Erich Wise's firm holds a lease in a building that is located within 500 feet of some of the properties that are in consideration for housing the Harbor Department, President Wise's leasehold interest is directly involved in the decisions regarding the new location for the Harbor Department.

President Wise's Law and Mediation Practice and Clients and Erich Wise's Law Firm and Clients

A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person. (Regulation 18704.1(a).)”

Because President Wise's business, her clients, her husband's firm or his clients did not initiate, are not named parties in nor are the subject of the proceedings regarding the housing of the Harbor Department, these economic interests are indirectly involved in the decision.

Step Five: What is the applicable materiality standard?

Leasehold Interest

The financial effect of a governmental decision on directly involved real property in which an official or official's immediate family member holds a leasehold interest is presumed to be material. (Regulation 18705.2(a)(2).) 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. (Ibid.)”

You have indicated that the lease contains a clause that states that if the property is sold: “This Lease shall otherwise not be affected by and such sale, transfer, encumbrance, assignment or disposal of Landlord’s interest, and Tenant agrees to in all respects attorn to and recognize Landlord’s purchaser or assignee as the ‘Landlord’ hereunder.”

You have not provided any facts indicating that any of the above mentioned circumstances would occur as a result of a decision by the Harbor Commission to purchase, lease or build a new building to house the Harbor Department. It appears that even if the property were sold to the Harbor Department the terms of the Lease will not change. However, it is unclear if the Harbor Department would be willing to renegotiate any of the current leases should it purchase One World Trade Center. There is always the possibility of renegotiation of leases even though the terms of the current leases held by Taubman and Flynn state the terms of the lease should remain the same under a new owner. President Wise’s economic interest in her husband’s law firm’s lease would not be material if she can rebut the presumption of materiality by meeting the criteria in Regulation 18705.2(a)(2). However, if facts arise that indicate that the presumption is not rebutted please seek further advice.

President Wise’s Law and Mediation Practice and Erich Wise’s Law Firm

If a business entity is not directly involved in a governmental decision, the materiality standard of Regulation 18705.1(c) applies. (Regulation 18704.1(b).) The applicable materiality standard depends on the value of the business:

“(1) If the business entity is listed in the Fortune 500 or, if not listed in the Fortune 500, has revenues that are no less than the revenues of the business entity that ranks 500th in the Fortune 500 list, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year of \$10,000,000 or more; or

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500,000 or more; or

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$10,000,000 or more.

“(2) If the business entity is listed on the New York Stock Exchange, or if not listed on the New York Stock Exchange, for its most recent fiscal year had net income of no less than \$2.5 million, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease to the business entity's gross revenues for a fiscal year in the amount of \$500,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$200,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of assets or liabilities of \$500,000 or more.

“(3) If the business entity is listed on either the NASDAQ or American Stock Exchange, or if not so listed, for its most recent fiscal year had net income of no less than \$750,000, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease to the business entity's gross revenues for a fiscal year in the amount of \$300,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$100,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of assets or liabilities of \$300,000 or more.

“(4) If the business entity is not covered by subdivisions (c)(1)-(3), the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

You have not provided any facts with regard to whether and how any of the options to be considered by the Harbor Commission would affect President Wise's Law and Mediation Practice or her husband's law firm financially. It will be up to President Wise to make this determination. If President Wise finds that none of the above mentioned materiality standards would be met with regard to her business or her husband's business, then her economic interests in those two businesses would not be material.

Clients

The effect of a decision is material as to an individual who is a source of income to an official and indirectly involved in a decision if it is reasonably foreseeable that any of the following will occur:

“(A) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

“(B) The decision will affect the individual's real property interest in a manner that is considered material under Title 2, California Code of Regulations, and Sections 18705.2(b).” (Regulation 18705.3(b)(3).)

Regulation 18705.2 is enclosed for your reference. You have not identified particular clients of President Wise's Law and Mediation Practice or her husband's practice nor provided specific information on their real properties or other assets or liabilities in order for us to conduct a complete analysis as to whether a conflict of interest will arise from any of them. We therefore conclude our analysis of them here, but point out that President Wise must still determine whether it is reasonably foreseeable that the decision will result in a material financial effect on any of her clients or her husband's clients that qualify as sources of income under the Act.

Step Six: Is it reasonably foreseeable that the financial effect of the governmental decision upon any of President Wise's economic interests will meet the applicable materiality standard?

After identifying the applicable materiality standards, President Wise must assess whether it is reasonably foreseeable that one or more of the materiality standards will be met. If so, then she will have a conflict of interest and will be prohibited from participating in the decision.

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Leasehold Interest

As noted above, the presumption that it is reasonably foreseeable that a particular decision will have a material financial effect on the council member's directly involved leasehold interest will be rebutted if the requirements of Regulation 18705.2(a)(2)(A) - (E) are met.

President Wise's Law and Mediation Practice and Clients and Erich Wise's Law Firm and Clients

President Wise must assess whether it is reasonably foreseeable that the decision in question will materially affect the expenses, assets, liabilities, or gross revenues of her business or her husband's law firm by the amounts specified in Regulation 18705.1(c)(4), provided above.

The question of whether financial consequences on a business entity are reasonably foreseeable at the time a governmental decision is made must always depend on the facts of each particular case. (*In re Thorner*, supra.) Thus, we cannot categorically state at this time whether the decision you have identified will or will not have a reasonably foreseeable material financial effect upon President Wise's law and mediation practice and her clients, or her husband's law firm and clients.

Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), the determination of whether it is or is not reasonably foreseeable that this decision will materially affect President Wise's business or any of her economic interests is necessarily a factual question that is ultimately for her to decide. If it is not reasonably foreseeable that the decision will result in a material financial effect on any of her economic interests, she will not have a conflict of interest and may participate in the decision.

Steps Seven and Eight: The "Public Generally" and "Legally Required Participation" Exceptions

The facts you have presented do not suggest that the "public generally" or "legally required participation" exceptions to the conflict-of-interest rules are applicable to President Wise's situation.

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Sukhi K. Brar
Counsel, Legal Division

SKB:jgl

Enclosure

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18705.2. Materiality Standard: Economic Interests in Real Property.

(a) Directly involved real property.

(1) Real property, other than leaseholds. The financial effect of a governmental decision on the real property is presumed to be material. 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.

(2) Real property, leaseholds. The financial effect of a governmental decision on the real property in which an official holds a leasehold interest is presumed to be material. 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.

(b) Indirectly involved real property interests.

(1) Real property, other than leaseholds. The financial effect of a governmental decision on real property which is indirectly involved in the governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances

regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision affects:

(A) The development potential or income producing potential of the real property in which the official has an economic interest;

(B) The use of the real property in which the official has an economic interest;

(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

(2) Real property, leaseholds. The financial effect of a governmental decision on real property in which a public official has a leasehold interest and which is indirectly involved in the governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the governmental decision will:

(A) Change the legally allowable use of the leased real property, and the lessee has a right to sublease the real property;

(B) Change the lessee's actual use of the real property;

(C) Substantially enhance or significantly decrease the lessee's use or enjoyment of the leased real property;

(D) Increase or decrease the amount of rent for the leased real property by 5+percent during any 12-month period following the decision; or

(E) Result in a change in the termination date of the lease.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5, 87102.6, 87102.8 and 87103, Government Code.

HISTORY

1. New section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11380.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).
2. Change without regulatory effect amending section heading filed 3-26-99 pursuant to section 100, title 1, California Code of Regulations (Register 99, No. 13).
3. Editorial correction of 1 (Register 2000, No. 25).
4. Amendment filed 1-16-2001; operative 2-1-2001. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements) (Register 2001, No. 3).