

May 22, 2012

Cristina L. Talley
Office of the City Attorney
200 S. Anaheim Blvd., Suite 356
Anaheim, CA 92805

Re: Your Request for Advice
Our File No. A-12-063

Dear Ms. Talley

This letter responds to your request for advice on behalf of City of Anaheim Mayor Tom Tait regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ 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 such as common law conflict of interest. Also, the Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 72.)

QUESTION

May Mayor Tait take part in decisions concerning the city-owned Angel Stadium property (“Angel Stadium”) if he transfers his ownership interest in real property within 500 feet of the Angel Stadium property to his adult, non-dependent children and amends the lease relating to his leasehold interest in a portion of the same property to prohibit him from profiting from any sublease, assignment or transfer of that leasehold?

CONCLUSION

By transferring his entire ownership interest in 2130 Orangewood LLC, Mayor Tait will no longer have a disqualifying economic interest in the two parcels of real property owned by that entity. However, Mayor Tait will still have an economic interest in the leasehold which will be *directly* involved in any governmental decisions involving Angel Stadium. His proposed amendment to the lease should provide sufficient proof that it is not reasonably foreseeable that

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.

governmental decisions affecting Angel Stadium will have any effect on the value of Mayor Tait's right to sublease the real property, either positively or negatively, as set forth in regulation 18705.2(2)(C).

This notwithstanding, Mayor Tait may not make, participate in making, or influence the decisions unless he can (1) rebut the presumption of materiality by showing that it is not reasonably foreseeable the decisions will have any financial effect on *any* of the remaining factors enumerated in Regulation 18705.2(a)(2)(A)-(E) with respect to his leasehold interest, and (2) determine that there will be no reasonably foreseeable material financial effects on any other economic interests he may have.

FACTS

Mayor Tait was elected to serve a four-year term as Mayor of Anaheim in November 2010. Anaheim is a charter city consisting of approximately 50 square miles in Orange County and has approximately 341,000 residents.

Mayor Tait possesses an ownership interest of approximately 22.96 % in 2130 Orangewood LLC, an entity that owns two parcels of real property located at 2130 Orangewood Ave, Anaheim, California 92806 (the "Orangewood Property"), and 2131 S. Dupont Drive, Anaheim, California 92806 (the "Dupont Property"). Both parcels are located within 500 feet of the boundaries of Angel Stadium, which is owned by the City of Anaheim and currently leased to Angels Baseball, L.P.

In addition, Mayor Tait is part-owner and president of Tait & Associates, Inc., and Tait Environmental Services (collectively "Tait & Associates"), an engineering and environmental services firm. Tait & Associates currently leases a portion of the Dupont Property (the "Dupont Lease"), which as characterized by your letter, provides Mayor Tait with a leasehold interest in that property.

The City's lease with Angels Baseball expires on December 31, 2029. However, the lease provides Angels Baseball with an option to terminate the lease at any time, without cause, effective no earlier than October 15, 2016, and no later than February 15, 2017, upon no less than twelve months written notice to the City. If Angels Baseball were to take advantage of this option to terminate, there is a possibility that during Mayor Tait's term the City would engage in discussions and make decisions concerning the Angel Stadium property.

In light of this possibility, Mayor Tait proposes to take certain steps in an effort to allow him to participate, without conflict, as Mayor in any discussions or decisions concerning Angel Stadium. First, he would transfer all of his ownership interest in the Orangewood Property and the Dupont Property to his two adult, non-dependent children. This would be accomplished by

transferring his entire 22.96% ownership interest in 2130 Orangewood LLC, for which Mayor Tait would receive no consideration in return.²

Second, Mayor Tait would amend the Dupont Lease to require that Tait & Associates, “as lessee, pay to the owner of the Dupont Property, as lessor, as additional rent, 100% of all rent and other consideration which the lessee receives as a result of assigning, subletting or otherwise transferring any portion of the leased premises that is in excess of the rent payable to the lessor for the portion of the premises covered by the assignment, sublease or transfer.”

On May 17, 2012, you provided the following additional facts: The entire 2130 Orangewood property is leased to a stone and tile company called NGY Stone Enterprises Inc. with an expiration of Sept 13, 2014. The entire 2131 Dupont property is leased to Tait Environmental Services Inc. with an expiration of June 30, 2012.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Step One: Is Mayor Tait a Public Official?

The Act's conflict-of-interest provisions apply only to “public officials.” (Sections 87100 & 87103; Regulation 18700(b)(1).) Section 82048 defines a public official as “every member, officer, employee or consultant of a state or local government agency.” As the Mayor of the City of Anaheim, Mayor Tait is a public official.

Step Two: Will Mayor Tait be making, participating in making or influencing a governmental decision?

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. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decision maker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a governmental decision if, for the

² You confirmed this fact by email dated April 30, 2012.

purpose of influencing the decision, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

Mayor Tait will make governmental decisions if, as a member of the City Council, he is called upon to vote on issues concerning Angel Stadium, which is owned by the City of Anaheim. (Regulation 18702.1.) Furthermore, Mayor Tait will participate in making governmental decisions if he makes recommendations to other City Council members. (Regulation 18702.2.)

Step Three: What are Mayor Tait's economic interests?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests of a public official 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, totaling \$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 total \$360 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 expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

(Section 87103; Regulations 18703-18703.5.)

Business Entities

Tait & Associates

Mayor Tait has an economic interest in Tait & Associates as a business entity by virtue of his position as president. (Section 87103(d) & Regulation 18703.1(b).) A further basis for such an interest exists assuming he has an investment of \$2,000 or more in the business. (Section 87103(a) & Regulation 18703.1(a).)

2130 Orangewood LLC

Mayor Tait also has an economic interest in 2130 Orangewood LLC as a business entity assuming he has an investment of \$2,000 or more in the business. (Section 87103(a) & Regulation 18703.1(a).)

Real Property

Section 82033 describes the circumstances under which a public official has an economic interest in real property:

“‘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.”

2130 Orangewood LLC (Dupont Property & Orangewood Property)

Based on the facts you provided, Mayor Tait has a 22.96% ownership interest in 2130 Orangewood LLC, and therefore has an economic interest in his pro rata share of two parcels of real property owned by the company and located within 500 feet of Angel Stadium. Assuming this pro rata interest is worth \$2,000 or more, the real property would be an economic interest.

According to the facts, however, Mayor Tait intends to transfer all of his ownership interest in Orangewood LLC to one or more of his adult, non-dependant children.³ Assuming such transfer occurs, he will no longer have an economic interest in the two parcels of property owned by that business entity.⁴ And because Mayor Tait will not receive any consideration from his children in exchange for his ownership interest in 2130 Orangewood LLC, he will not have an economic interest in any of his children as a source of income to him.

³ Under the Act, non-dependent children are not considered “immediate family,” which is defined in section 82029 as an official’s spouse and dependent children. We have previously advised that a child is considered a “dependent child” for purposes of the Act if the child is under 18 years of age and the official is entitled to claim the dependent child as such for income tax purposes. (*Tierney* Advice Letter, No. A-04-094; *Tremlett* Advice Letter, No. I-89-386.) Therefore, Mayor Tait’s children are not considered “immediate family” under the Act.

⁴ Likewise, by making such a transfer, Mayor Tait would no longer have an economic interest in 2130 Orangewood LLC as a business entity. Accordingly, the remaining analysis will not consider either of those economic interests.

Leasehold (Dupont Property)

According to the facts provided, Mayor Tait has a leasehold interest in the portion of the Dupont Property that Tait & Associates leases from 2130 Orangewood LLC. As stated above, an “interest in real property” includes leaseholds. Therefore, if the value of the leasehold is worth \$2,000 or more, Mayor Tait has an economic interest in that leased portion of the Dupont Property.

Sources of Income

If Mayor Tait receives income of \$500 or more from Tait & Associates or 2130 Orangewood LLC in the 12 months prior to a governmental decision, he has an economic interest in that business as a source of income. (Section 87103(c).) In addition, as part-owner of Tait & Associates and 2130 Orangewood LLC, Mayor Tait may have economic interests in the clients of these businesses as sources of income. Under Section 82030(a), if a public official owns a 10% interest or greater in a business, clients who are sources of income to that business are also considered sources of income to the official. Provided that Mayor Tait’s pro rata share of the income derived from any particular client aggregates to \$500 or more in the 12 months prior to a decision, he has an economic interest in the client as a source of income.⁵ (Section 87103(c).)

Step 4: Will Mayor Tait’s economic interests be directly or indirectly involved in decisions he will make, participate in making or influence as a public official?

Mayor Tait’s Interest in Business Entities

Regulation 18704.1 provides that a person, including a business entity, is directly involved in a decision before an official's agency when that person, either directly or by an agent, either initiates the proceeding in which the decision will be made, is a named party, 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)(2).)

You have not provided facts suggesting that Tait & Associates or Orangewood LLC (or their respective clients) will initiate or be the subject of a governmental decision. Business entities and sources of income that are not directly involved in governmental decisions are regarded as indirectly involved. (Regulations 18704.1(b) & 18705.1(a)(2); Regulation 18705.3(b).) Accordingly, it appears that Mayor Tait’s economic interests in Tait & Associates as a business entity will be *indirectly* involved in decisions regarding Angel Stadium.

⁵ You have not provided facts relevant to the clients of Tait & Associates or 2130 Orangewood LLC. Accordingly, we cannot further analyze those potential economic interests. Note that the gift of the business interest in Orangewood LLC, while it eliminates an investment interest in the business, the business will continue to be considered a source of income to the official itself for 12 months after disposition.

Mayor Tait's Leasehold

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

According to the facts provided, Mayor Tait possesses a leasehold interest the Dupont Property, which is within 500 feet of Angel Stadium. Accordingly, Mayor Tait's economic interest in the Dupont property will be *directly* involved in governmental decisions involving Angel Stadium.

Step 5: What is the applicable materiality standard?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

Mayor Tait's Economic Interest in Tait & Associates

You did not provide facts concerning the annual net income of Tate & Associates. Assuming that Tait & Associates has an annual net income of no less than \$2.5 million,⁶ Regulation 18705.1(c)(2) would apply and provides that a financial effect is considered material if:

“(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 \$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 the business entity's assets or liabilities of \$500,000 or more.”

Mayor Tait's Economic Interest in the Leasehold

Any financial effect of a governmental decision on real property in the form of a leasehold interest that is directly involved in the governmental decision, as here, is presumed to be material. (Regulation 18705.2(a)(2).) This presumption may be rebutted only by proof that it is not reasonably foreseeable that the governmental decision will have any effect on *any* the following:

⁶ Refer, as appropriate, to Regulation 18705.1 for different annual income thresholds.

- “(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.”

According to the facts provided, Mayor Tait will amend the current lease to prohibit him from profiting from any sublease with respect to the portion of the Dupont property for which he possesses a leasehold interest. Specifically, Tait & Associates would be required to pay, “as additional rent, 100% of all rent and other consideration which [it] receives as a result of assigning, subletting or otherwise transferring any portion of the leased premises that is in excess of the rent payable to the [Dupont owners] for the portion of the premises covered by the assignment, sublease or transfer.”

Such an amendment would appear to satisfy the specific concern identified in Regulation 18705.2(a)(2)(C) in that it should serve as valid proof that it is not reasonably foreseeable that any governmental decision concerning Angel Stadium would have an effect on the value of Mayor Tait’s right to sublease the Dupont property. If it is clear that the governmental decision will not have *any* reasonably foreseeable effect on any of the remaining factors specified above under Regulation 18705.2(a)(2), then the presumption is rebutted, and Mayor Tait may participate in the governmental decision.

Step 6: Is it reasonably foreseeable that the financial effect of the governmental decision on Mayor Tait’s economic interests will meet the applicable materiality standard?

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. A financial effect is reasonably foreseeable if it is substantially likely. (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, an effect must be more than a mere possibility to be reasonably foreseeable. (*Ibid.*) Determination of foreseeability is a factual determination that is ultimately for the public official to make.

Because we cannot make this necessarily factual determination, Mayor Tait, using some reasonable and objective method, must assess whether it is reasonably foreseeable that his economic interests will be materially financially affected according to standards identified above.

We conclude our analysis here since the facts you have provided do not suggest that the final two steps of the conflict-of-interest analysis are applicable to Mayor Tait’s situation.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack C. Woodside
Counsel, Legal Division

JCW:jgl