[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 21, 2009

SDEC Informal Advice Letter No. IA09-01

Kim Kilkenny
The Otay Ranch Company
610 W. Ash St., Ste. 1500
San Diego, CA 92101

Re: Request for Advice Regarding Disqualification from Municipal Decisions Involving the San Diego Padres and Al Baldwin

Dear Mr. Kilkenny:

This advice letter responds to your letter to the City of San Diego Ethics Commission dated March 30, 2009. You seek general advice from the Ethics Commission regarding how to interpret the provisions of the City's Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. In particular, you are seeking the Commission's assistance with regard to how your position with OPLP Construction, Inc. [OPLP] will impact your ability to participate in various municipal decisions in your capacity as a member of the Centre City Development Corporation's [CCDC] Board of Directors in light of the fact that an owner of OPLP is a member of an investment group that has purchased a minority interest in the San Diego Padres Baseball Club [Padres]. Because you have raised concerns regarding several types of upcoming CCDC decisions rather than identifying any specific decisions, we are treating your letter as a request for informal advice.

QUESTION

Does the fact that you are an officer and employee of OPLP, coupled with the fact that Al Baldwin is an owner of OPLP and also a member of an investment group that owns a minority interest in the Padres, legally preclude you from participating as a CCDC Board member in decisions involving the Padres?

SHORT ANSWER

The City's Ethics Ordinance precludes you from using your official position to influence a municipal decision that involves one of your economic interests. Because you are an officer and employee of OPLP, this entity is one of your economic interests for purposes of disqualification. Because Al Baldwin is a 50% owner of OPLP and exercises significant control over OPLP, he too is considered one of your economic interests. The conflict of interest provisions in the Ethics Ordinance preclude you from participating in CCDC decisions that are substantially likely to have a material financial impact on your economic interests, which include OPLP and Al Baldwin. Although the Padres are not a source of income to you, and do not otherwise represent one of your economic interests, you should be aware that CCDC decisions involving the Padres could still raise disqualification concerns. More specifically, if it is reasonably foreseeable that a CCDC decision relating to the Padres (or to any other entity) will affect Al Baldwin's income, investments, or other tangible or intangible assets or liabilities by $1,000 or more, you will be disqualified from participating in that decision.

BACKGROUND

You currently hold a position on the CCDC Board of Directors. CCDC is a public nonprofit corporation created by the City of San Diego. According to your March 30, 2009, letter, you are also an employee and officer of OPLP, dba The Otay Ranch Company. This entity is the owner/developer of portions of the Otay Ranch master planned community located in southwest San Diego County (eastern Chula Vista and unincorporated San Diego County). Al Baldwin and Jim Baldwin each own 50% of the shares of OPLP.[1] You have advised us that each brother has exactly 50% legal control over OPLP, and that disagreements are submitted to binding arbitration. OPLP does not own any property in any of the redevelopment areas subject to the jurisdiction of CCDC. In addition, neither Al Baldwin nor Jim Baldwin own property within the jurisdiction of CCDC. Your letter indicates, however, that an investment group, of which Al Baldwin is a member, recently purchased a minority interest in the Padres. Your letter seeks guidance with regard to your participation in CCDC matters involving the Padres given the fact that Al Baldwin has an ownership interest in the Padres as well as in the company in which you are employed.

ANALYSIS

At the outset, you should know that the Ethics Ordinance's conflict of interest rules are derived from the state's Political Reform Act, and accordingly we interpret our rules to be consistent with those set forth at the state level. The state's Fair Political Practices Commission [FPPC] has adopted regulations and issued advice letters that interpret state law, and we therefore look to these resources when analyzing conflict of interest questions.

As a member of the CCDC Board of Directors, you are a "City Official" who is subject to the City's Ethics Ordinance, and in particular the provisions of the Ethics Ordinance that prohibit officials from influencing municipal decision in which they are financially interested. In particular, SDMC section 27.3561 prohibits 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" is defined at SDMC section 27.3503 to include any decisions by any City board or commission, including the CCDC Board.

[1] Although Jim Baldwin is as much of a source of income to you as Al Baldwin, your questions arise from Al Baldwin's connection to the Padres, and thus this letter does not address any disqualification concerns that could stem from Jim Baldwin as a source of income.

The term "reasonably foreseeable," although not defined in the Ethics Ordinance, has been analyzed by the FPPC in its advice letters. The FPPC 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. "A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility." *In re Harron*, FPPC Adv. Ltr. A-07-02. The Ethics Ordinance defines "economic interests" to include "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." SDMC § 27.3561(b)(2). The Ethics Ordinance also defines "economic interests" to include "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." SDMC § 27.3561(b)(4).

A. OPLP as an Economic Interest

Based on the law set forth above, OPLP is clearly one of your economic interests for purposes of the Ethics Ordinance. Under SDMC section 27.3561(b)(2),(4), you are prohibited from using your status as a City Official to influence a municipal decision that is substantially likely to have a material financial interest on OPLP. Your March 30, 2009, letter states, however, that OPLP does not own property in the CCDC redevelopment areas, and none of the concerns you raised in the letter pertain to an OPLP matter coming before CCDC. Accordingly, we presume for purposes of this advice letter that there are no facts suggesting that OPLP would be financially impacted by the types of CCDC decisions that are the subject of your inquiry.

B. Al Baldwin as an Economic Interest

Your main concern, as articulated in your March 30, 2009, letter, pertains to Al Baldwin's ownership interest in both OPLP and the Padres. As stated above, Al Baldwin owns 50% of the shares of OPLP. The relevant inquiry, therefore, is whether or not Al Baldwin, individually, is one of your economic interests for purposes of the disqualification provisions of the Ethics Ordinance. If Al Baldwin is one of your economic interests, you will generally be precluded from participating in CCDC decisions that are substantially likely to have a material financial effect on him.

The FPPC has determined that it is sometimes appropriate to "pierce the corporate veil" to treat a shareholder as being one with a closely held corporation. *In re Deitsch*, FPPC Adv. Ltr. A-08-071. In other words, there are circumstances in which an individual shareholder may be considered as much of an economic interest as the corporate entity itself. "A majority shareholder is deemed to have control over the business entity such that the business entity and the shareholder are considered one and the same for purposes of identifying economic interests." *In re Martyn*, FPPC Adv. Ltr. A-08-136; *In re Korb*, FPPC Adv. Ltr. A-99113; *In re Densmore*, FPPC Adv. Ltr. A-90-228. "In the corporate context, the controlling shareholder in a close corporation is one who holds a majority of the stock. Since corporate control is based ultimately on stock voting rights, a shareholder who holds the majority of the votes effectively holds control." *In re Nord*, 8 FPPC Ops. 6 (1983).

Based on the facts you have provided to us, it appears that Al Baldwin falls just short of being considered a "majority shareholder," and thus does not meet the majority threshold discussed in the above-cited FPPC authorities. It is undeniable, however, that Al Baldwin's 50% ownership of OPLP provides him with substantial control over the corporate entity. He is not a "minority shareholder"; no individual or collective group of individuals has more ownership or control over OPLP than Al Baldwin does. His 50% interest in the corporation gives him the ability to oppose any actions of his brother as they relate to OPLP. When disagreements arise, he can force the issue to binding arbitration. All these facts demonstrate Al Baldwin's substantial control over OPLP.

Moreover, in at least one advice letter, the FPPC has suggested that control can be more important than actual shares owned. *In re Ready*, FPPC Adv. Ltr. A-96-317 n.2 [finding that the substantial control exercised by minority shareholders over a corporation was sufficient to pierce the corporate veil]. In another advice letter, the FPPC found that when an individual owns 50% or more of two companies, one of which is a source of income to a public official, both companies and the individual will be treated as sources of income to the official. *In re Kathe*, FPPC Adv. Ltr. I-91-507 [relying on the business entities rule in FPPC Regulation 18703.1(d) to find that an official was disqualified from participating in decisions that involved his spouse's corporate employer as well as the two 50% owners of that corporate entity].

In other contexts, the FPPC has observed that a person with 50% control of an entity can be considered "one and the same" as that entity for purposes of conflict of interest rules. For example, in a limited partnership scenario, the FPPC opined that "where there are two general partners, control is shared between them, with each having full legal authority to bind the firm by his or her actions, yet with each having the ability to negate or stymie the other's actions. Consequently, each theoretically has control." *In re Nord.*

Based on the above authorities, we can make definitive conclusions regarding individuals with more than 50% control or ownership of a corporate entity, but face some uncertainty with regard to an individual who has exactly 50% control. Although we have been unable to obtain clear guidance from the FPPC on this issue, the conservative approach, and, in our opinion, the one most consistent with the Ethics Ordinance's interests in transparency, avoiding the appearance of conflicts of interest, and reinforcing public trust in government (SDMC § 27.3501), is to treat Al Baldwin as being one and the same with OPLP. In other words, we believe that it is appropriate to treat Al Baldwin, in his individual capacity, as one of your economic interests. You are certainly welcome to seek further guidance and advice from the FPPC on this subject, but in the meantime, it is our position that Al Baldwin is one of your economic interests for purposes of the disqualification provisions of the Ethics Ordinance.

C. Padres as an Economic Interest

The Padres are not one of your economic interests, notwithstanding the fact that Al Baldwin has an ownership interest in that entity. Based on the information you provided, he is a member of an investment group that has purchased a minority share of the Padres. Therefore, regardless of his precise ownership interest in the investment group, we know that he does not individually own a majority share of the Padres or otherwise have a controlling interest in the ballclub. In other words, just as Al Baldwin's substantial ownership and control of OPLP make him "one and the same" with that entity, the fact that Mr. Baldwin has significantly less ownership and control of the Padres makes him separate and distinct from the Padres. It would not be appropriate, therefore, to pierce the structural veil of the Padres to treat the Padres as one of your economic interests.

D. Potential Conflict Issues

Based on the above analysis, we have identified Al Baldwin as one of your economic interests. We have also stated that the Padres are not one of your economic interests. Although OPLP is one of your economic interests, we have no facts suggesting that OPLP would be financially impacted in any manner by CCDC decisions. When considering potential conflicts of interest, therefore, we will focus on whether or not you would be participating in CCDC decisions that are substantially likely to have a material financial effect on Al Baldwin.

In your March 30, 2009, letter, you raise four potential conflicts that could arise from the facts stated above. Each potential conflict is discussed separately below.

1. JMI Matters Before CCDC

You stated that JMI (entity owned by John Moores, current majority owner of the Padres) has been a party to development applications before CCDC. You also stated that, to the best of your knowledge, Al Baldwin and the new Padres minority owner investment group do not have any economic interest in any JMI development projects. Nothing in the facts you have provided to us indicate that you have an economic interest in JMI or in any person with an ownership interest in JMI. Moreover, as stated above, you do not have an economic interest in the Padres. Accordingly, we have no basis for concluding that you would be disqualified from participating in any CCDC decisions that could have a financial impact on JMI.

2. Payment of Petco Park Bonds

You stated that CCDC has included within its budget, subject to approval by the Redevelopment Agency, the allocation of tax increment revenues for the payment of Petco Park bonds. You indicated that this will be a reoccurring event over the next few years.

As stated above, the Padres are not one of your economic interests for purposes of disqualification. Thus, the financial impact of revenue allocation decisions on the Padres is not relevant to this analysis.

What is relevant, however, is the financial impact of revenue allocation decisions on Al Baldwin, <u>individually</u>. One of the factors to consider in this regard is whether Al Baldwin is "directly involved" or "indirectly involved" in the decision. Based on the information you provided, we have no reason to believe the Al Baldwin is "directly involved," i.e., he has not and will not in his individual capacity initiate these types of matters or otherwise become a party to such matters. FPPC Regulation 18704.1.[2] He is, therefore, "indirectly involved." For an "indirectly involved" individual, a decision will have a "material financial effect" on that individual if it "will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by $1,000 or more." FPPC Regulation 18705.3(b)(3).

The relevant inquiry, therefore, is whether or not CCDC's decision to allocate tax increment revenues for the payment of Petco Park bonds will affect Al Baldwin's income, investments, assets, or liabilities by $1,000 or more. In other words, will a revenue allocation decision affect the value of Al Baldwin's investment in the Padres or the income he derives from this investment by $1,000 or more? We have no information regarding the potential financial impacts of such decisions on Mr. Baldwin's finances. Because the Ethics Commission does not act as a finder of fact, this determination must be left to your informed judgment. If, however, a CCDC decision meets the $1,000 threshold, the impact will be material. Thus, it is your responsibility to determine whether a particular CCDC decision (regardless of whether it involves the Padres) is substantially likely to impact Al Baldwin in the manner described above. If it is substantially likely to have that impact, you would be disqualified from participating in that CCDC decision.

3. Padres' Development Obligations

Your March 30, 2009, letter also mentions the Ballpark Agreement obligating the Padres to cause development surrounding Petco Park so as to generate enhanced tax increment revenues and transient occupancy taxes.

Because we have concluded that the Padres are not one of your economic interests for purposes of disqualification, any financial impact on the Padres likely to result from a CCDC decision regarding the Ballpark Agreement will not disqualify you from participating in the decision.

You would, however, be disqualified from participating in a CCDC decision relating to the Ballpark Agreement obligation if it is substantially likely that the decision will have a material financial effect on Al Baldwin, individually. Again, we must consider whether Al Baldwin is "directly involved" or "indirectly involved" in such decisions. Based on the information you provided, we have no reason to believe that Al Baldwin is "directly involved," i.e., he would not, in his individual capacity, initiate the matter or otherwise become a party to the matter. He would, at most, be "indirectly involved." As stated earlier, for an "indirectly involved" individual, a decision will have a "material financial effect" on that individual if it "will affect the individual's income, investments, or other tangible or intangible assets or liabilities by $1,000 or more." FPPC Regulation 18705.3(b)(3).

In this instance, the relevant inquiry is whether or not CCDC's decision relating to the Padres' development obligations will affect Al Baldwin's income, investments, assets, or liabilities by $1,000 or more. As with decisions discussed earlier, it is your responsibility to determine

[2] Note that if Al Baldwin was "directly involved" in a CCDC decision, the financial effect of the decision would be deemed to be material, and you would be disqualified from participating in that decision.

whether a particular CCDC decision will be substantially likely to impact Al Baldwin in this manner. If it will, you would be disqualified from participating in that CCDC decision.

4. Enforcement of Ballpark Agreement

Finally, you stated that CCDC is obligated to enforce certain provisions of the Ballpark Agreement. You cited as an example CCDC's role in alerting the Padres to its obligation to keep the park-in-the-park open to the public on days when games are not scheduled.

These kinds of decisions are treated in the same manner as described above. While the Padres do not constitute one of your economic interests for purposes of disqualification, you would still have to consider whether a CCDC decision related to the Padres (or any other entity) will have a financial impact on Al Baldwin. In any given case, the question will be whether or not the CCDC decision is substantially likely to affect Al Baldwin's income, investments, assets, or liabilities by $1,000 or more. If you determine that CCDC's enforcement of a provision of the Ballpark Agreement was substantially likely to personally impact Al Baldwin by $1,000 or more, you would be precluded from participating in any decisions relating to such enforcement.

E. Public Generally Exception

You should also be aware of the "public generally" rule. This rule may permit you to participate in a CCDC decision even if it is reasonably foreseeable that the decision will have a material financial effect on Al Baldwin. In general, this exception provides that you will not be disqualified from influencing a CCDC decision if the effect of the decision on Mr. Baldwin is indistinguishable from the effect of the decision on the "public generally." FPPC Reg. § 18707.

The FPPC has established thresholds under which this exception will apply. "For decisions that affect . . . an individual who is a source of income or a source of gifts to a public official, the decision also affects: (i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents; or (ii) 5,000 individuals who are residents of the jurisdiction." FPPC Regulation 18707.1(b)(1)(A). Thus, when evaluating whether a particular decision will impact Al Baldwin by $1,000 or more, you may look to see whether that decision will also impact in substantially the same manner ten percent or 5,000 of the residents within the jurisdiction of CCDC. Although we have no information suggesting that the public generally rule will apply to any of the CCDC decisions at issue, we mention it in the interests of providing you with a thorough analysis.

F. Contract Considerations

The types of decisions you raised in your March 30, 2009, letter, and discussed above, do not include making a contract between CCDC and either the Padres or Al Baldwin. Because of the possibility of such contracts, particularly with the Padres, you should be aware of the contract provisions of the Ethics Ordinance (SDMC § 27.3560), which are based on the prohibitions set forth in California Government Code section 1090, et seq. These provisions generally preclude the CCDC Board from contracting with any person or entity in which you have a financial interest, even if you recuse yourself from all decisionmaking aspects related to making that contract. Accordingly, should the CCDC Board ever consider entering a contract with OPLP or Al Baldwin (or with Jim Baldwin or any other source of income) while you are serving on the Board, please consult us for further guidance.

CONCLUSION

Based on the facts you have provided, we conclude that Al Baldwin is one of your economic interests by virtue of his ownership and control of OPLP. The conflict of interest provisions in the Ethics Ordinance preclude you from participating in CCDC decisions that are substantially likely to have a material financial effect on your economic interests. Thus, if it is substantially likely that a CCDC decision relating to the Padres (or any other entity) will affect Al Baldwin's income, investments, or other tangible or intangible assets or liabilities by $1,000 or more, you will be disqualified from participating in that decision.

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,

Alison Adema
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance