

State of California



Fair Political Practices Commission

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(916) 322-5662

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322-6441

Statements of Economic Interest
322-6444

March 8, 1984

P. Lawrence Klose
City Attorney's Office
23 Russell Blvd.
Davis, CA 95616

Re: Advice Letter No. A-84-024

Dear Mr. Klose:

Thank you for your request for advice on behalf of Davis City Planning Commissioners Dennis Huntington and William Carlton.

FACTS

In approving residential construction, the City of Davis follows a two-step process. The first step is a determination of the number of residential units to be built during a particular construction phase. The Planning Commission's role in this step is to determine the general residential needs of the City and make a recommendation to the City Council on the number of units which should be allowed. Once the overall construction figure is set, the second step involves awarding particular developers the right to proceed with their projects. The Planning Commission's role in this step is to weigh the comparative merits of the developers' projects and recommend to the Council who should be allowed to have their applications processed for project approval.

A. Dennis Huntington:

Commissioner Huntington owns 100% of a retail oil dealership. A developer who is expected to submit applications for residential projects pays Mr. Huntington over \$1,000 in annual gross income. Your question is whether the conflict of interest provisions of the Political Reform Act require Mr. Huntington to disqualify himself from participating in the determination of Davis' general housing needs (Step #1).

B. William Carlton:

Commissioner Carlton is paid over \$10,000 per year to oversee the business operations of a homeowner's association whose members own homes within a planned development in Davis. The association owns a complex with meeting rooms, tennis courts, swimming pools and other facilities. The group has an elected Board of Directors which includes, as an elected member, the president of the company that constructed the homes.^{1/} The association's revenues are derived from an annual assessment of approximately \$200 on each of the 600-700 developed residential properties within the planned development. This yearly fee is the maximum annual amount that can be assessed.

There are 50-75 undeveloped parcels located within the original master plan which will be annexed to the association when they are developed. At that time, the new owners will begin paying dues to the association. However, this development will only occur if, under the two-step development process, the developer is granted the right to proceed with this construction. Once the new owners begin paying dues, the Board of Directors will have the discretion to reduce the fees paid by the other members.^{2/}

Your questions concerning Commissioner Carlton are:

1. May he participate in the determination of Davis' general housing needs (Step #1)?
2. May he participate in determining whether a particular project should be allowed if the houses will be subject to annexation by the association (Step #2)?
3. In terms of the conflict of interest provisions, is it significant that the president of the development company that constructs the homes subject to annexation is an elected member of the association's Board of Directors?

^{1/} The company president is a homeowner in the development.

^{2/} It is expected that the new members will cause an increase in the expenses associated with the maintenance of the facilities.

DISCUSSION

Government Code Section 87100^{3/} prohibits a local official from making or participating^{4/} in a decision in which he knows or has reason to know that he has a financial interest.

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

* * *

(c) Any source of income . . . aggregating two hundred fifty dollars (\$250) or more in value provided to . . . the public official within 12 months prior to the time when the decision is made....

(Section 87103.)

A. Dennis Huntington:

The developer who pays Mr. Huntington's dealership over \$1,000 per year is a source of income to the Commissioner because income to the business is deemed to be personal income to him. (See Section 82030(a).) Mr. Huntington must disqualify himself from a decision if it is foreseeable that it will have a material financial effect on the developer.^{5/}

In your letter, you stated that Mr. Huntington will disqualify himself from the Planning Commission's recommendations on whether the developer's projects should be approved (Step #2). He will do this because you believe that decisions concerning the projects will almost assuredly have a material financial effect on the developer. I agree with your analysis. Your only question is whether Mr. Huntington can

^{3/} Hereinafter all statutory references are to the Government Code, unless otherwise indicated.

^{4/} The terms "making" and "participating" are defined in 2 Cal. Adm. Code Section 18700(b) and (c).

^{5/} The phrase "material financial effect" is defined in 2 Cal. Adm. Code Section 18702(b) (1).

participate in the decision on the number of homes to be built in Davis during a construction phase. He must disqualify himself if this decision will foreseeably have a material financial effect on the developer.

The Commission, in its Thorner Opinion, No. 75-089, December 4, 1975 (copy enclosed), held that a decision's effect is foreseeable only if there is a "substantial likelihood," rather than a "possibility," that it will occur. In the present case, if the decision concerning the amount of new housing to be allowed only creates a "possibility" that the developer ultimately will be allowed to construct his projects, Mr. Huntington would not be required to disqualify himself from this decision.

B. William Carlton:

The homeowner's association is a source of income to Commissioner Carlton because he receives a salary as its manager.^{6/} He must disqualify himself from a decision if it is foreseeable that the decision will have a material financial effect on the association.^{7/} The following discusses the questions raised in your letter:

Answer to Question #1: Mr. Carlton may participate in the decision on the number of houses to be built in Davis during a particular construction phase. For the reasons expressed in my discussion of Mr. Huntington's interest, it is probably not foreseeable that this decision will have a material effect on the association.

Answer to Question #2: Mr. Carlton may not participate in a decision on whether to approve a construction project within the planned development if it is foreseeable that this decision will result in a "significant" increase in the gross, annual dues collected by the association. (2 Cal. Adm. Code Section 18702(b)(3)(D).) Thus, the need for his disqualification will depend upon the number of homes that will be made available for annexation by a proposed project. In determining whether an

^{6/} The individual members of the association are not considered to be sources of income to him.

^{7/} A decision's effect will be "material" if the effect is "significant." (2 Cal. Adm. Code Section 18702.)

P. Lawrence Klose
March 8, 1984
Page 5

increase in dues will be "significant," strong guidance is provided by the test for materiality used for profitmaking entities. This test states that a decision's effect on a business entity is significant if the effect will increase gross annual revenues by 1% or more. (See 2 Cal. Adm. Code Section 18702(b)(1).) If the developer of the planned development asks the Planning Commission for approval of a project involving all of the 50-75 remaining parcels, Mr. Carlton must disqualify himself because it is foreseeable that these homes will be annexed with a resulting 10% increase in the association's annual dues. If the number of homes proposed for construction is less, Mr. Carlton must determine whether his disqualification is required based upon the facts of the situation.^{8/}

Answer to Question #3: The president of the development company which constructs the homes in the planned development sits on the association's Board of Directors. This fact will not require Mr. Carlton's disqualification on any questions because the president is not a source of income to him.

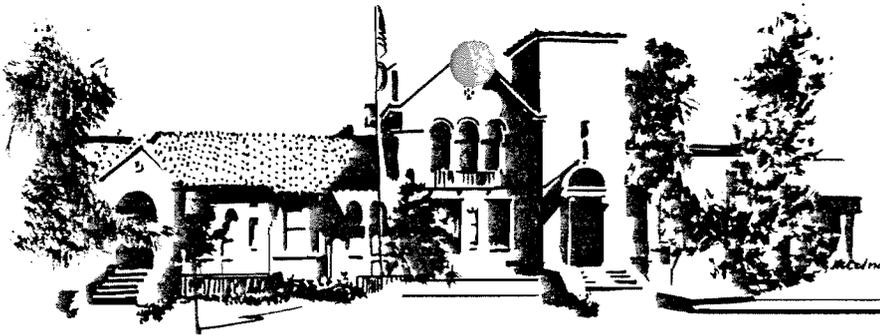
If I can be of any further help to you, please feel free to contact me at (916) 322-5901.

Very truly yours,

Janis Shank McLean
Janis Shank McLean
Counsel
Legal Division

JSM:plh

^{8/} If, in making this determination, he has any questions, he can contact our office for additional advice.



CITY OF DAVIS

23 Russell Blvd., Davis, CA 95616 (916) 756-3740

February 6, 1984

Fair Political Practices Commission
Legal Division
1100 K Street
Sacramento, California 95814

Re: Request for Opinion - Conflicts of Interest -
Planning Commissioners

Dear Commissioners:

I am writing you on behalf of two City of Davis Planning Commissioners to request an opinion as to whether the Commission believes conflicts of interest would occur in the stated situations.

I

BACKGROUND

The City of Davis, through its ordinances and related regulations, regulates the maximum amount of residential construction which is permitted to occur within the City over cycles of future, fixed periods of time. The process occurs in two steps, each occurring after consideration of public and staff comment on the issue.

The first step involves determining the general residential needs of the City, and based upon such determination, recommending to the City Council the total number of residential units which should be permitted during the ensuing cycle. The City Council then acts on the recommendation, either affirming or modifying the number selected. Depending on the number of units ultimately approved, a developer arguably may have a greater or lesser chance of obtaining allocations, as outlined below.

The second step involves weighing the merits of individual development proposals, and then recommending the award of allocations (i.e. the right to process development applications to project approval) to individual applicants, based upon the comparative merits of the applicants' proposals.

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II

RETAIL OIL DEALER

Commissioner No. 1 is a retail oil dealer, dispensing gasoline, oil and some automotive repair services. One developer who can be expected to apply for individual allocations has an on-going relationship with the dealer, and can be expected to produce more than \$1,000 of gross income per year for the dealer. This developer also has special arrangements for credit with the dealer. It is quite clear that at the allocation phase this relationship would produce a conflict of interest, and the Commissioner would have to disqualify himself from consideration of the allocation, if the developer creating the conflict were an applicant.

The question is whether the dealer may act to consider the establishment of a general needs number in the first phase of the process, as opposed to consideration of the individual allocations in the second phase.

III

HOMEOWNERS' ASSOCIATION MANAGER

Commissioner No. 2 is employed as the manager of a homeowners' association which has as its primary asset a large, existing recreational and assembly complex with meeting rooms, tennis courts, swimming pools, and the like. The manager, who derives more than \$10,000 annual income from the association, oversees all business operations of the association, and serves at the pleasure of a seven-member board of directors elected by members of the homeowners' association. Members are owners of residential properties made members of the association by the development plan established by the developer. The president of the corporation primarily responsible for development of the planned development is a member of the association (because he owns a residence) and was elected a board member by the membership.

The association derives its revenues almost solely from assessments on developed residential properties within the large planned development. New areas located within the area of the original development master plan are entitled to annexation to the association in order to obtain use and enjoyment of the facilities. If and when development is completed in these new areas, they are annexed to the association and assessment of dues commences. Several of these areas eligible for annexation are

still undeveloped and would be subject to the residential allocation system mentioned above before development could occur.

Dues are assessed on a per parcel basis for single-family units, and there is an upward limit on the amount of dues collectable from each parcel. The maximum amount is currently being assessed. Annexation of new parcels has no effect on assessments to existing member parcels, except if the board determines, in its discretion, to reduce the assessments. An increase in the number of parcels would, therefore, lead to an increase in revenues. It is not known precisely what effect such an increase would have on expenditures, although it can be expected that more users would increase any expenses connected with use and maintenance.

There are three questions related to Commissioner

No. 2:

1. May he participate in consideration of the general housing needs recommendation, i.e. determination of the number of units that ought to be permitted?
2. May he participate in individual allocation determinations if the owner of property eligible for annexation to the association is an applicant for allocation?
3. Is the elected membership of the developer's president on the board, made possible solely by his ownership of a parcel in the development, significant in terms of conflict of interest for the commissioner?

Your early reply would be appreciated.

Very truly yours,



P. LAWRENCE KLOSE
City Attorney