



California Fair Political Practices Commission

June 17, 1987

David M. O'Hara
Quaresma, Benya, Hall,
Connich, Ellis & O'Hara
37323 Fremont Blvd.
Fremont, CA 94536

Re: Your Request for Informal
Assistance
Our File No. I-87-144

Dear Mr. O'Hara:

We have received your request for informal assistance on behalf of Fremont City Councilmember John Dutra concerning his duties under the conflict of interest provisions of the Political Reform Act (the "Act").^{1/} This letter confirms the telephone advice I provided to you on June 5, 1987.

QUESTION

If Councilmember Dutra leases office space to a title insurance company which does business with developers in Fremont, may he participate in city council decisions on proposed developments?

CONCLUSION

Councilmember Dutra may participate in city council decisions on proposed developments unless the title insurance company would be foreseeably and materially affected by the city council's decision. An effect on the title insurance company is reasonably foreseeable if, at the time of the decision, the title insurance company has entered into an agreement with the developer to handle the title insurance or

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

escrow business for the proposed development, is negotiating such an agreement with the developer, or ordinarily handles the title insurance or escrow business for the developer's projects. As discussed below, a reasonably foreseeable effect on the title insurance company is material if it meets the standards set forth in Regulation 18702.2.

FACTS

Councilmember Dutra owns a commercial building in the City of Fremont. A title insurance company wishes to rent office space in that building at a rate in excess of \$1,000 per month.

Title insurance companies both hold escrow and issue title insurance policies, charging separate amounts for each function. Purchasers of residential or commercial properties generally have the opportunity to choose the escrow-title insurance entity. However, in practice, the title insurance company chosen often is the one suggested by the developer.

When we discussed your question on the telephone, you stated that there are approximately 20 title insurance companies doing business in Fremont. You advised us that developers in Fremont do not typically do business with only one title insurance company. Instead, there is considerable competition among the title insurance companies to perform the title insurance and escrow functions for each proposed development. You also informed us that until the city council has approved the proposed development, and until the size of the project and the amount of escrow-title insurance business it will generate are relatively certain, title insurance companies generally do not begin negotiations with the developer concerning the escrow-title insurance business for a particular project.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on, among other interests:

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more

in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103(c).

If Councilmember Dutra leases office space in his building to the title insurance company, the rent paid to him by the title insurance company would be considered "income." (Section 82030.) Councilmember Dutra would receive more than \$250 in income from the title insurance company. Accordingly, he would be required to disqualify himself from participating in any decision which would have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on the title insurance company.

The approval of a development project will ultimately generate escrow and title insurance business. You have asked whether Councilmember Dutra will be disqualified from participating in decisions concerning proposed developments because his tenant, a title insurance company, might receive additional business as a result of the city council's approval of a proposed development. We must determine whether the city council's decision on a proposed development will foreseeably and materially affect the title insurance company in question.^{2/}

The effect of a decision is considered "reasonably foreseeable" if there is a substantial likelihood that it will occur. Certainty is not required; however, if an effect is only a mere possibility, it is not "reasonably foreseeable." (Thorner Opinion, 1 FPPC Ops. 198 (No. 75-089, Dec. 4, 1975), copy enclosed.)

In Thorner, the Commission discussed several specific factual situations concerning the foreseeable effect of a governmental decision when a company might receive additional business as a result of the decision. (Thorner, supra, at pp. 205-208.) Based on this discussion, we conclude that the city council's decision on a proposed development would foreseeably generate business for the title company in the following circumstances:

^{2/} Under the facts presented, there is no basis for determining that the effect on the title insurance company will not be distinguishable from the effect on the public generally. (See Regulation 18703, copy enclosed.) Accordingly, we shall not discuss the "public generally" exception in this analysis.

(1) At the time of the decision, the title insurance company has entered into an agreement with the developer to handle the title insurance or escrow business for the proposed development;

(2) At the time of the decision, the title insurance company is negotiating an agreement with the developer to handle the title insurance or escrow business for the proposed development; or

(3) At the time of the decision, the title insurance company ordinarily handles the title insurance or escrow business for the developer's projects.

However, if, at the time of the decision, it is only possible that the title insurance company will seek to handle the title insurance or escrow business on the proposed development project, the city council's decision will not have a reasonably foreseeable effect on the title insurance company.

If the facts indicate that the city council's decision will foreseeably affect the title insurance company, Councilmember Dutra will be disqualified from participating in the decision if the effect on the title insurance company will be considered material. The decisions of the city council would affect the gross revenues of the title insurance company. Regulation 18702.2 (copy enclosed) contains guidelines for determining whether an effect on the gross revenues of a business entity is considered material. These guidelines vary with the financial size of the business entity. In the situation you have presented, we do not have sufficient information concerning the financial size of the title insurance company in question to determine which of the standards set forth in Regulation 18702.2 would apply. You should read the regulation carefully and determine the applicable materiality standard.^{3/}

^{3/} It is our understanding that Regulation 18702.2(e) generally applies to title insurance companies. Regulation 18702.2(e) affects business entities qualified for public sale in this state pursuant to Corporations Code Section 25110. Corporations Code Section 25110 provides that it is unlawful for any person to offer or sell in this state any security in an issuer transaction unless the sale is qualified under certain sections of the Corporations Code, or is exempted by certain sections of the Corporations Code. The issuance of securities by title insurance companies is subject to authorization by the Insurance Commissioner, and thus exempted from Corporations Code Section 25110. (Corporations Code Section 25100(e).)

David M. O'Hara
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If you have any further questions regarding this matter,
please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

Kathryn E. Donovan

By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh
Enclosures

E. A. QUARESMA 1907-1985
ROBERT D. BENYA, INC.
H. ROBERT HALL
ROBERT D. ELLIS
MICHAEL J. CONNICH
DAVID M. O'HARA
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OF COUNSEL
FRED E. AVERA
MAY 18 7 55 AM '87

May 18, 1987

Diane Griffiths, General Counsel
Fair Political Practices Commission
428 "J" Street
Sacramento, California 95814

Re: Informal Written Assistance;
Request For

Dear Ms. Griffiths:

This office represents the Honorable John Dutra,
City Councilman for the City of Fremont, California. Mr.
Dutra can be contacted directly at:

45499 Concho Court
Fremont, CA 94539

We have been authorized by Councilman Dutra to
make this request for written advice, and hereby make this
request under Title 2, F.P.C.C. Regulations, §18329(c).

The material facts are as follows:

Mr. Dutra owns, with his spouse, a commercial
building within the corporate limits of the City of Fremont.
A title insurance company with its headquarters and six (6)
offices in a neighboring county, wishes to rent space for
their second office in Fremont, at a rate in excess of
\$1,000.00 per month.

The contemplated lease would be for five (5) years,
net-net-net, with a Consumer Price Index adjustment with a cap
of 5% over the life of the lease. Other than the CPI adjustment,
the term and rent are fixed.

Standard in this area of the state, title insurance
companies both hold escrow and issue title insurance policies,
charging separate amounts for each function. Although purchasers

Diane Griffiths, General Counsel
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of residential (or commercial) properties generally have the opportunity to choose the escrow-title insurance entity, developers will "suggest" a favored title insurance company in practice.

Fremont continues to develop and frequently developers' plans are considered by the City Council for approval. Some developers, whether this fact is known to Councilman Dutra or not, are probably going to use the services of this particular title company.

Question: Is it a conflict of interest for a City Councilman to be a landlord to a title insurance company, whose clients may come before the council seeking approval of real estate developments, the approval of which would generate income to the title insurance company?

My consideration of this matter has led me to conclude that the following three factors are important to a determination in this instance:

1. Does "financial interest" as used in Government Code §87103 extend to the income from a rental at a rate fixed without reference to profitability of a business, or is this related only to a true ownership interest in the tenant entity?

2. Is it "reasonably foreseeable" that a decision might affect the income of one of eight branches of a business when involved in payment of an essentially fixed rent and is not dependent whether the tenant branch is successful or not?

3. Does "indirect investment" or "indirect interest" as used in Government Code §87103 refer to indirect potential effect of decisions; or, relate only to familial or agency relationships of a public official to the ownership of a business or property?

Request: Since it is urgent that we obtain your impression of this situation as soon as possible, please phone me collect as soon as you have been able to analyze the question.

Yours very truly,


DAVID M. O'HARA

DMO/lbs



California Fair Political Practices Commission

May 22, 1987

David M. O'Hara
Quaresma, Benya, Hall,
Connich, Ellis & O'Hara
37323 Fremont Boulevard
Fremont, CA 94536

Re: 87-144

Dear Mr. O'Hara:

Your letter requesting advice under the Political Reform Act was received on May 20, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Kathryn E. Donovan, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Adm. Code Sec. 18329).) You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Diane M. Griffiths".

Diane M. Griffiths
General Counsel

DMG:plh
cc: John Dutra