



California Fair Political Practices Commission

April 4, 1989

Honorable Kay Wilson
Councilmember, City of Santa Paula
Cal-West Real Estate
123 North Tenth Street
Santa Paula, CA 93060

Re: Your Request for Informal Assistance
Our File No. I-88-474

Dear Councilmember Wilson:

You have requested advice concerning your duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} Your letter states only a general question, therefore we are treating it as a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).^{2/}

I apologize for the delay in responding to your question. Thank you for your patience.

QUESTION

You and your husband were owners of a general real estate company. Recently, you sold the company. You will remain as sales manager, receiving a monthly salary and commissions from your own transactions. How does the sale of your real estate business affect your duties under the conflict-of-interest provisions of the Act?

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

2/ Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

CONCLUSION

After the sale of your business, the real estate company and customers whom you represent in transactions which produce \$250 or more in commission income will be sources of income to you. You are required to disqualify yourself for participating in any city council decision which would foreseeably and materially affect the real estate company or one of these customers in a manner different from the effect on the public generally. In addition, you must continue to disqualify yourself from participating in decisions which would foreseeably and materially affect persons and businesses who were sources of income to you during the preceding 12 months, including those who were sources of income when you were an owner of the real estate company.

FACTS

You and your husband were owners of a general real estate company. We have previously provided advice to you concerning conflicts of interests in governmental decisionmaking due to your economic interests in the real estate company, its real property, and its customers. (Barringer and Wilson Letter, No. A-87-232.) You recently sold the company. You will continue to work for the company as sales manager and receive a monthly salary. In addition, you will receive commission income from clients whose transactions you handle.

ANALYSIS

Section 87100 prohibits any public official from making, participating in, or using her official position to influence a governmental decision in which she knows or has reason to know she has a financial interest. A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

* * *

(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.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87103(a), (c) and (d).

Until recently, you and your husband had an investment interest in a real estate business valued at more than \$1,000. You have sold that investment interest, but you will continue to be employed by the real estate business. You will receive a salary from the business and commission income from your real estate customers. You have asked how the sale of your real estate business will affect your ability to participate in city council decisions. You have not requested advice about a specific pending decision. Therefore, we can provide only the following general guidance.

As a result of the sale of your real estate business, you no longer have an investment interest in the real estate business or in any property held by the real estate business. However, you are an employee of the real estate business. The real estate business and your future customers will be sources of income to you. You are required to disqualify yourself from any decision before the city council which would foreseeably and materially affect either the real estate business or any customer who has provided \$250 or more in commission income to you during the 12 months preceding the decision, if the effect on the business or the customer would be different from the effect on the public generally. (Section 87103(c) and (d).)

Furthermore, despite the sale of the real estate business, customers of the business who were sources of income to you prior to the sale will remain sources of income to you for purposes of disqualification until a total of 12 months has elapsed since they provided \$250 or more in commission income to you through the real estate business. (Section 87103(c).) Therefore, for a period up to one year, you also will be required to disqualify yourself from participating in city council decision which would foreseeably and materially affect your former customers.

Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required; however, an effect that is merely a possibility is not reasonably foreseeable. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983; In re Thorner 1 FPPC Ops. 198.)

Materiality

The Commission has adopted several regulations on the subject of material financial effect. These regulations contain different standards depending on (1) whether the decision pending before the city council directly or indirectly affects your economic interests, and (2) the type of economic interest which would be affected by the decision (i.e., interest in real property, business entity that is source of income, individual who is source of income). We begin with an explanation of the regulations which provide appropriate guidance to measure whether a decision which directly involves the real estate business or other source of income to you is material.

Direct Effect on a Source of Income

Regulation 18702.1(a) (copy enclosed) requires you to disqualify yourself from any decision which directly involves a person or business entity who has provided \$250 or more in income to you during the preceding 12 months. Disqualification is required unless there will be no financial effect on the person or business entity who is a source of income to you. A person or business entity is directly involved in a decision before the city council when that person or entity, either personally 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.

(3) A person or business entity 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 or business entity.

Regulation 18702.1(b) (1)-(3).

Therefore, if the real estate business or any customer who has provided \$250 or more in commission income to you during the preceding 12 months initiates or is otherwise directly involved in a city council proceeding, and there will be a measurable financial effect on the real estate business or customer, you will be required to disqualify yourself from participating in decisions in that proceeding. This rule applies equally to any customer whom you represent directly in a sales transaction and to any other customer of the real estate business who was a source of income to you because of your ownership of the business. (Section 82030(a).) The fact that you have sold your interest in the real estate business means that, in the future, only those customers whom you represent in a sales transaction which produces commission income will be considered sources of income to you. (Regulation 18704.3(c)(3), copy enclosed.) The other customers of the real estate business will not be sources of income to you in the future.

Indirect Effect on a Source of Income

You also are required to disqualify yourself from participating in decisions which would indirectly have a foreseeable material financial effect on the real estate business or a customer who is a source of income to you. Regulation 18702.2 (copy enclosed) provides appropriate guidance for determining whether the foreseeable effect of a city council decision will materially affect the real estate business or any other business entity which is a source of income to you. We will assume that the real estate business falls within the provisions of subdivision (g) of the regulation:^{3/}

(g) For any business entity not covered by subdivisions (a), (b), (c), (d), (e) or (f):

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The 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 or more; or

^{3/} Subdivision (g) generally applies to small businesses which are not qualified for public sale. Please contact us for further advice if the real estate business does not fit within this category.

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

If the city council is faced with a decision which is likely to produce an effect of this magnitude on the real estate business, you are required to disqualify yourself from participating that decision.

Turning now to decisions which would affect individuals who are customers who are sources of \$250 or more in commission income to you, we refer to Regulation 18702.6 (copy enclosed). This regulation provides:

The effect of a decision is material as to an individual who is a source of income or gifts to an official if any of the following applies:

(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 Section 18702.3 or Section 18702.4.

Therefore, if the decision in question would indirectly affect the customer's income, investments or other assets, other than his or her interests in real property, by \$1,000 or more, you are required to disqualify yourself from participating in the decision. If the decision would indirectly affect the customer's real property, the guidelines in Regulations 18702.3 and 18702.4 (copies enclosed) apply.

For example, if the city council were voting on a decision to develop real property within 300 feet of your customer's real property, you are required to disqualify yourself from participating in that decision unless there would be no financial effect on your customer's real property. (Regulation 18702.3(a)(1).) If, instead, the city council is voting to permit development of real property located between 300 to 2,500 feet from your customer's real property, you may participate in the decision unless it is likely to affect either (1) the fair market value of your customer's real property by \$10,000 or more, or (2) the rental value of your customer's property by \$1,000 or more per 12-month period. (Regulation 18702.3(a)(3).) If your customer's real property is located more than 2,500 feet from the property to be developed, you may participate in the decision unless there are

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unique factors about the decision and your customer's property which make it likely that there will be a significant effect on your customer's real property. (Regulation 18702.3(b).)

The "Public Generally" Exception

Even if decisions before the city council would have a material financial effect on the real estate business or a customer who is a source of income to you, your disqualification from these decisions is required only if the effects on your economic interests are distinguishable from the effect on the public generally. (Section 87103.) For the "public generally" exception to apply, a decision must affect your sources of income in substantially the same manner as it will affect a significant segment of the public. (Regulation 18703.) In your case, the "public" is the population of the City of Santa Paula. (See In re Owen (1976) 2 FPPC Ops. 77, 81, copy enclosed.)

For example, the "public generally" exception would apply if a decision would materially affect your customer's residential property, but also would affect most of the residential property owners in the city in substantially the same manner. In that case, you would be permitted to fully participate in the city council decision.

I trust this general guidance is helpful. If you have any questions about this letter or require assistance with a specific pending decision, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel



By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh

Enclosures

FPPC
Dec 22 8 01 AM '88



December 15, 1988

Lilly Spitz
Counsel, Legal Division
California Fair Political Practices Commission
Post Office Box 807
Sacramento, CA 95804-0807

Dear Lilly:

I am in the process of selling my interest in my real estate company. I will remain as sales manager on a monthly salary and receive commissions from only my own transactions. I will not be compensated for the efforts of any other agents in the form of an override; therefore, their production does not benefit me in any way.

Would you please advise me as to whether or not my potential for conflict as a city council member in Santa Paula is reduced.

I am writing at the suggestion of Bob Livingston, City Administrator. This change will occur around December 31, 1988.

I look forward to hearing from you.

Sincerely,

A handwritten signature in cursive script that reads 'Kay Wilson'.

Kay Wilson
Council Member
City of Santa Paula

cc: Bob Livingston
Phil Romney, City Attorney
Stacey MacDonald, City Clerk



California Fair Political Practices Commission

December 22, 1988

Honorable Kay Wilson
Councilmember
City of Santa Paula
123 North Tenth Street
Santa Paula, CA 93060

Re: 88-474

Dear Councilmember Wilson:

Your letter requesting advice under the Political Reform Act was received on December 22, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Kathryn 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 more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. 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,


Diane M. Griffiths
General Counsel (48)

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