



California Fair Political Practices Commission

December 29, 1989

Joseph A. Forest
City Attorney, City of Calistoga
Forest and Rudnansky
465 Healdsburg Avenue
P.O. Box 1910
Healdsburg, CA 95448

Re: Your Request for Advice
Our File No. A-89-617

Dear Mr. Forest:

This is in response to your request for advice on behalf of Diane Barrett, Councilmember, City of Calistoga, regarding her responsibilities under the Political Reform Act (the "Act").¹

QUESTION

May Councilmember Barrett participate in the decision regarding the use permit for a proposed 58-unit hotel in the City of Calistoga.

CONCLUSION

Councilmember Barrett may participate in the decision regarding the use permit for the proposed hotel unless it is reasonably foreseeable that the decision will result in an increase or decrease in the gross revenues of her employer, the Calistoga Spa, of \$10,000 or more in a fiscal year.

FACTS

Councilmember Barrett owns common stock worth more than \$100,000 in Calistoga Spa, Inc. (hereafter "Calistoga Spa"), a corporation. Her interest in the corporation is greater than

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.

10 percent. She is also a manager at Calistoga Spa. Her duties include the promotion of Calistoga Spa, including the placing of advertisements to increase its business.²

Calistoga Spa operates a resort motel within the city limits of Calistoga (the "city"). This resort motel provides mud and mineral baths and massage services. It does not serve food or alcohol.

A 58-unit hotel has been proposed for the city. It will not provide mud and mineral baths or massage services. However, it does include a bar and restaurant. The city's planning commission denied a use permit for the proposed hotel. This denial has been appealed to the city council.

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. 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 the official or a member of her immediate family,³ or 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).

² You provided this information to us in a telephone conversation on Monday, December 4.

³ An official's "immediate family" includes his spouse and dependent children. (Section 82029.)

Councilmember Barrett is a public official. (Section 82048.) She has an investment interest of more than \$1,000 in Calistoga Spa.⁴ She is also a manager at Calistoga Spa and has received a salary presumably aggregating more than \$250 in the 12 months prior to the decision. Accordingly, she must disqualify herself from participating in any decision which will have a reasonably foreseeable and material financial effect on herself or on Calistoga Spa which is distinguishable from the effect on the public generally.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPCC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest, it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

In the circumstances described, the presence of another hotel within the city limits will have some economic effect on Calistoga Spa. Even though some of the facilities provided by the two differ, the basic service provided by each is identical, a place for transient occupancy. Accordingly, it is reasonably foreseeable that the decision regarding the use permit will have an economic effect on Calistoga Spa.

Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's economic interest in a decision is "materially" affected as required by Section 87103. If the official's

⁴ Councilmember Barrett may have received dividends from Calistoga Spa, Inc. Unless the stock of Calistoga Spa, Inc., is registered with the Securities and Exchange Commission such dividends would constitute income to her and could, therefore, require disqualification pursuant to Section 87103(c). (Section 82030(b)(5).)

Councilmember Barrett has a greater than 10% interest in Calistoga Spa, Inc. Her income includes a pro-rata share of any income received by Calistoga Spa. Therefore, if the pro-rata share of her income from any particular source exceeds \$250 in the previous twelve months, it could require her to disqualify herself from participating in any governmental decision which will have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on such source of income. (Section 87103(c).)

financial interest is directly involved in the decision, then Regulation 18702.1 (copy enclosed) applies to determine materiality. Thus, for example, if Calistoga Spa, or a source of income to Councilmember Barrett of more than \$250 in the previous 12 months, was directly involved in the decision before the city council, the effect of the decision would be deemed material. On the other hand, if the official's financial interest is indirectly affected by the decision, Regulations 18702.2 to 18702.6 (copies enclosed) would apply to determine whether the effect of the decision is material.

In the circumstances described, Calistoga Spa will be indirectly affected by the decision regarding the use permit for the proposed hotel. Accordingly, one of the subdivisions of Regulation 18702.2 would apply to determine, based on the financial size of Calistoga Spa whether the effect of the decision is material. For example, for the smallest size business entity, the effect of the decision is material if:

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

Regulation 18702.2(g).

From the information you have provided, it appears that Calistoga Spa is a small business entity covered by subdivision (g) of Regulation 18702.2. Therefore, the effect of the decision is material as to Councilmember Barrett if the decision to review the denial of the use permit will foreseeably result in an increase or decrease in the gross revenues of Calistoga Spa of \$10,000 or more in a fiscal year.⁵

Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87103.) For the city, the public consists of all

⁵ If the financial size of the Calistoga Spa is different from that assumed here, you would have to apply the appropriate standard to determine whether the effect of the decision is material.

residents of the city. Thus disqualification is required unless the decision will affect Calistoga Spa in substantially the same manner as it will affect all residents of the city, or a significant segment of the residents of the city. (Regulation 18703, copy enclosed.) In the circumstances described, Calistoga Spa is a business which will be in competition with the new hotel. Accordingly the effect on Calistoga Spa will not be the same as the effect on the public or a significant segment of the public.⁶

I trust this letter has provided you with the guidance you requested. If you have any questions regarding this matter, please call me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


Jeevan S. Ahuja
Counsel, Legal Division

KED:JSA:aa

Enclosures

⁶ Copies of In re Owen (1976) 2 FPPC Ops. 77 and In re Legan (1985) 9 FPPC Ops. 1, Commission opinions which explain the application of the concept of public generally, are enclosed for your information.

CITY OF CALISTOGA

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1232 WASHINGTON STREET • CALISTOGA, CALIFORNIA 94515 • (707) 942-5188

OFFICE OF THE CITY ATTORNEY

October 27, 1989

FPPC
428 "J" Street, Suite 800
Post Office Box 807
Sacramento, California 95814

RE: Request for Advice/Councilmember Barrett

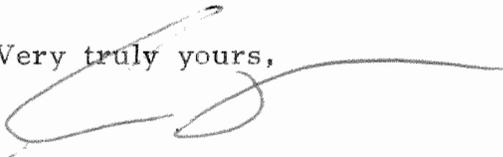
Dear FPPC Attorney:

This letter is being sent as an addendum to the letter of October 23, 1989 wherein advice was requested on behalf of Councilmember Barrett of the City of Calistoga.

After reviewing said letter, Ms. Barrett has brought it to our attention that she also receives a salary for management of the Calistoga Spa.

Please include this information in your analysis of the October 23, 1989 letter.

Very truly yours,


Andrea Forest
Assistant City Attorney

AF:
cc: Natasha Merkuloff, City
Administrator
Councilmember Diane Barrett

LAW OFFICES OF

FOREST & RUDNANSKY

AN ASSOCIATION OF ATTORNEYS

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465 HEALDSBURG AVENUE
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HEALDSBURG, CALIFORNIA 95448
(707) 433-5629

REPLY TO
SANTA ROSA
XX HEALDSBURG

October 23, 1989

California Fair Political
Practices Commission
428 J Street, Suite 800
P.O. Box 807
Sacramento, CA 95814

Re: Request for Advice Letter

Dear FPPC Attorney:

Please consider this letter as a request for formal written advice pursuant to Government Code Section 83114 and Section 18329 of the Fair Political Practices Commission Administrative Regulations.

I am making this request, as the City Attorney for Calistoga, on behalf of and as the authorized representative of Council Member Diane Barrett of the City of Calistoga, whose mailing address is 1716 Foothill Boulevard, Calistoga, California 94515.

ISSUE: Succinctly stated, does Council Member Barrett have a conflict of interest by participating in a governmental decision under the following circumstances?

FACTS: Council Member Barrett owns common stock in a corporation called Calistoga Spa, Inc. The value of her interest is over \$100,000 and the ownership interest is over 10%. Calistoga Spa operates a resort motel within the city limits of Calistoga.

The land upon which the resort motel is located is owned by the corporation.

There is presently an appeal before the Calistoga City Council regarding a use permit. The appellant/applicant for the use permit is proposing a 58-unit hotel in the city limits of Calistoga.

The proposed hotel would be situated, as the crow flies, approximately 3,200 feet from the Calistoga Spa.

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FPPC

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The median occupancy rate in the City of Calistoga is 45%; the Calistoga Spa occupancy rate is higher than 45%. They do not serve food or alcohol. They do have mud and mineral baths and massage.

The proposed hotel does include a bar and restaurant. It does not include the mud and mineral baths or massage.

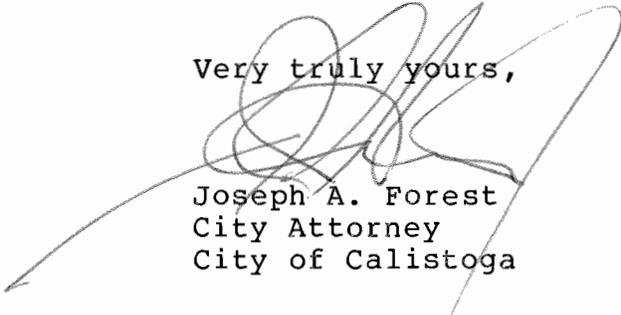
The average room rate at the Calistoga Spa is \$70; the proposed average room rate at the proposed hotel would be \$200.

The use permit for the proposed hotel was denied by the Planning Commission of the City of Calistoga for numerous reasons. The applicant has appealed this denial to the City Council.

With that background in mind, the question is whether or not Council Member Barrett can participate in the decision making process regarding a review of the use permit denial, without being in conflict with the California Political Reform Act and specifically Section 87100 of the Government Code.

Your immediate attention to this request would be most appreciated, as there is a hearing scheduled for November 6, 1989. Thank you for your anticipated attention to this matter.

Very truly yours,



Joseph A. Forest
City Attorney
City of Calistoga

JAF:lm

CC: Diane Barrett
Natasha Merkuloff Nichols



California Fair Political Practices Commission

October 26, 1989

Joseph A. Forest
City Attorney, City of Calistoga
Forest & Rudnansky
P.O. Box 1910
Healdsburg, CA 95448

Re: Letter No. 89-617

Dear Mr. Forest:

Your letter requesting advice under the Political Reform Act was received on October 25, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jeevan Ahuja 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,

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

Kathryn E. Donovan
General Counsel

KED:plh