



# California Fair Political Practices Commission

November 20, 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-89-618

Dear Mr. Forest:

This is in response to your request for advice on behalf of Jack Gingles, Councilmember, City of Calistoga, regarding his responsibilities under the Political Reform Act (the "Act").<sup>1</sup> It confirms the telephone advice provided to you on Tuesday, November 7th.

## QUESTION

May Councilmember Gingles participate in the decision regarding the use permit for a proposed 58-unit hotel in the City of Calistoga? Councilmember Gingles is a 50-percent owner of a partnership which intends to operate a 15-unit motel.

## CONCLUSION

Councilmember Gingles may participate in the decision regarding the use permit for the proposed hotel unless the decision is likely to result in an increase or decrease in the gross revenues of the partnership motel business of \$10,000 or more in a fiscal year.

## FACTS

Councilmember Gingles' parents are the owners of a parcel of land in the City of Calistoga (the "city"); a board and care home is located on this land. The planning commission has approved a use permit for that property to change it to a motel/transient

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<sup>1</sup> 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.

occupancy, with 15 units. Councilmember Gingles has a one-half interest in the partnership business of the motel (hereafter the "partnership"). He does not have any ownership interest in the land. His income will be based upon gross receipts. There has been no construction on the motel because the city is presently under a water and sewer moratorium. The motel will not include a restaurant or a bar.

A 58-unit hotel has been proposed for the city. The hotel includes 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 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 the official or a member of his immediate family,<sup>2</sup> 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.

#### Section 87103(a).

Councilmember Gingles is a public official. (Section 82048.) He has a 50% interest in the partnership, presumably worth more than \$1,000. Accordingly, he must disqualify himself from participating in any decision which will have a reasonably foreseeable and material financial effect on the partnership 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 FPPC 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.)

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<sup>2</sup> An official's "immediate family" includes his spouse and dependent children. (Section 82029.)

There is presently a moratorium on water and sewer connections in the city. The boarding home cannot be converted to a motel until those connections are available. You anticipate that such connections will be available in the near future.<sup>3</sup> Since the use permit for the conversion to a motel has already been granted, it would appear that the conversion to a motel will be completed soon after that. Therefore, there is a substantial likelihood that the presence of a new 58-room hotel within the city limits will have an economic effect on the motel and the partnership. Accordingly, it is reasonably foreseeable that the decision regarding the use permit will have an economic effect on the partnership.

### 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 financial interest is directly involved in the decision, then Regulation 18702.1 (copy enclosed) applies to determine materiality. Thus, for example, if the partnership 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, then Regulations 18702.2 to 18702.6 (copies enclosed) would apply to determine whether the effect of the decision is material.

In the circumstances described, the partnership 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 the partnership 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

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<sup>3</sup> In a telephone conversation on Friday, November 3, you stated that you anticipate the moratorium will be lifted in the near future.

(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 the partnership is a small business entity covered by subdivision (g) of Regulation 18702.2. Therefore, the effect of the decision is material as to Mr. Gingles if the decision to review the denial of the use permit is likely to result in an increase or decrease in the gross revenues of the partnership of \$10,000 or more in a fiscal year.<sup>4</sup>

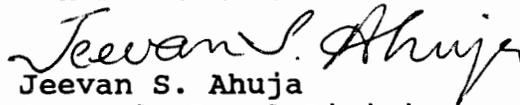
Public Generally

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 residents of the city. Thus, disqualification is required unless the decision will affect the partnership business 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, the partnership's motel will be in competition with the new hotel. Accordingly, the effect of the decision on the partnership would not be the same as the effect on the public or a significant segment of the public.<sup>5</sup>

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

<sup>4</sup> If the financial size of the partnership is different from that assumed here, you would have to apply the appropriate standard to determine whether the effect of the decision is material.

<sup>5</sup> 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.

LAW OFFICES OF

**FOREST & RUDNANSKY**

AN ASSOCIATION OF ATTORNEYS

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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 Jack Gingles of the City of Calistoga, whose mailing address is 1743 North Oak, Calistoga, California 94515.

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

FACTS: Council Member Gingles' parents are the owners of land whereon exists a board and care home for non-transient occupancy. The Planning Commission of the City of Calistoga has approved a use permit for that property to change it to a motel/ transient occupancy, with 15 units.

There has been no construction on the motel because the City of Calistoga is presently under a sewer and water moratorium.

Council Member Gingles will have a one-half interest in the partnership business of the motel. He will not have any ownership in the land. His income will be based upon gross receipts.

There will be no restaurant or bar.

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FPPC

California Fair Political  
Practices Commission  
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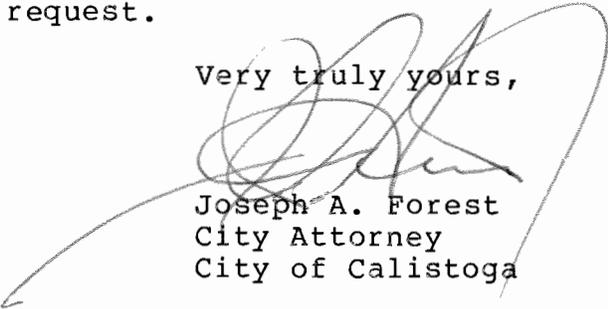
There is presently before the City Council of Calistoga an appeal of the Planning Commission's denial of a use permit for a 58-unit hotel within the City of Calistoga.

The proposed 58-unit hotel would be located approximately 1,640 feet, as the crow flies, from the proposed 15-unit hotel in which Mr. Gingles will have partnership interest. The proposed motel will have a bar and restaurant.

With that background in mind, the question is whether or not Council Member Gingles can participate in the decision making process regarding a review of the denial of the use permit by the Planning Commission of the City of Calistoga, 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 presently scheduled for November 7, 1989. Thank you for your anticipated attention to this request.

Very truly yours,



Joseph A. Forest  
City Attorney  
City of Calistoga

JAF:lm

CC: Jack Gingles  
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. 89-618

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