



FAIR POLITICAL PRACTICES COMMISSION

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June 1, 1999

John G. Barisone
City Attorney
City of Santa Cruz
333 Church Street
Santa Cruz, California 95060

**Re: Your Request for Advice
Our File No. A-99-123**

Dear Mr. Barisone:

This letter is in response to your request for advice on behalf of Santa Cruz City Councilmember Christopher Krohn¹ regarding the conflict of interest provisions of the Political Reform Act (the "Act").² Please keep in mind that nothing in this letter should be construed to evaluate any conduct that has already taken place.³ In addition, this letter is solely based on the facts presented to us in your letter. The Commission does not act as a finder of fact when issuing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct, and that all of the material facts have been provided.

QUESTIONS

1. May Christopher Krohn, in his capacity as a member of the Santa Cruz City Council, participate in City Council decisions regarding restoration and/or development of the Jessie Street Marsh?

¹ We note that in your request for advice, you asked for advice on behalf of both City Councilmember Krohn, and his wife, Parks and Recreation Commissioner Rachel O'Malley, and asked some specific questions about how the conflict of interest provisions of the Political Reform Act would affect Ms. O'Malley. Just prior to receiving your request for advice, however, we had already received a request for advice directly from Ms. O'Malley, in which she asked the same questions that you asked. We responded to her request for advice in the *O'Malley* Advice Letter, No. A-99-110. We therefore direct your attention to that letter, for our conclusions concerning the questions that you asked on behalf of Ms. O'Malley.

² Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

³ Pursuant to regulation 18329, the Commission does not provide advice regarding past conduct. (Regulation 18329(b)(8)(A).)

2. May Christopher Krohn, in his capacity as a member of the Santa Cruz City Council, address boards or commissions subsidiary to the City Council, such as the Parks and Recreation Commission, regarding restoration and/or development of the Jessie Street Marsh, in an effort to provide these boards or commissions with information that he considers to be relevant to their decisions about restoring and/or developing the marsh?

3. May Christopher Krohn, in his capacity as a private citizen/neighbor, address the Santa Cruz City Council, during public hearings regarding restoration and/or development of the Jessie Street Marsh, in an effort to provide the City Council with information that he considers to be relevant to the City Council's decisions about restoring and/or developing the marsh?

4. May Christopher Krohn, in his capacity as a private citizen/neighbor, address boards or commissions subsidiary to the City Council, such as the Parks and Recreation Commission, during public hearings regarding restoration and/or development of the Jessie Street Marsh, in an effort to provide these boards or commissions with information that he considers to be relevant to their decisions about restoring and/or developing the marsh?

CONCLUSIONS

1. Christopher Krohn, in his capacity as a member of the Santa Cruz City Council, may not participate in City Council decisions regarding restoration and/or development of the Jessie Street Marsh.

2. Christopher Krohn, in his capacity as a member of the Santa Cruz City Council, may not address boards or commissions subsidiary to the City Council, such as the Parks and Recreation Commission, regarding restoration and/or development of the Jessie Street Marsh.

3. Christopher Krohn, in his capacity as a private citizen/neighbor, may address the Santa Cruz City Council, during public hearings regarding restoration and/or development of the Jessie Street Marsh, in order to provide information to the councilmembers, but the information that he provides must be limited to how restoration and/or development will affect *his* personal interests.

4. Christopher Krohn, in his capacity as a private citizen/neighbor, may address boards or commissions subsidiary to the City Council, during public hearings regarding restoration and/or development of the Jessie Street Marsh, in order to provide information to these boards or commissions, but the information that he provides must be limited to how restoration and/or development will affect *his* personal interests.

FACTS

Christopher Krohn is a member of the Santa Cruz City Council (the "City Council"). He and his wife jointly own a house immediately adjacent to, and within 300 feet, of some city-owned property known as the "Jessie Street Marsh" (the "marsh").

For some time now, the City of Santa Cruz (the "City") has been planning a project that will environmentally restore the marsh, and develop it as a park. Prior to being elected to the City Council, Mr. Krohn was an active citizen participant in this planning process.

As the project progresses, it is anticipated that a number of decisions will have to be made about the project by the City Council, and other City boards and commissions, such as the City Parks and Recreation Commission. Councilmember Krohn would like to participate in these decisions.

ANALYSIS

The conflict of interest provisions of the Act prohibit a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the public official knows, or has reason to know, that he or she has a financial interest. (Section 87100.) As a member of the Santa Cruz City Council, Councilmember Krohn is considered to be a public official. (Section 82048.)

Questions 1 and 2

Making, Participating in Making, Or Attempting To Use His Official Position To Influence a Governmental Decision

Regulations 18702 - 18702.3 set forth the standards for determining when a public official is making, participating in making, or attempting to use his or her official position to influence a governmental decision. A public official "makes a governmental decision," when, among other things, the official votes on a matter, appoints a person, commits his or her agency to a course of conduct, enters into a contract on behalf of his or her agency, or determines not to act in one of the foregoing manners. (Regulation 18702.1.) A public official "participates in a governmental decision," when, among other things, the official negotiates with a governmental entity, or advises or makes recommendations to the decisionmaker. (Regulation 18702.2.) A public official "is attempting to use his or her official position to influence a governmental decision" by the official's agency, or an agency that is appointed by, or subject to the budgetary control of his or her agency, when, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee, or consultant of the agency. (Regulation 18702.3.)

By application of these standards, Councilmember Krohn would be making or participating in the making of a governmental decision if, in his capacity as a member of the Santa Cruz City Council, he participates in City Council decisions regarding restoration and/or development of the marsh. Further, Councilmember Krohn would be attempting to use his official position to influence a governmental decision if, in his capacity as a member of the Santa Cruz City Council, he addresses any boards or commissions subsidiary to the City Council, such as the Parks and Recreation Commission, regarding restoration and/or development of the marsh.

Economic Interests

Whether Councilmember Krohn has a financial interest in a decision is governed by Section 87103, which provides, in part, that:

“A public 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 the official, a member of his or her immediate family, or on any of the following:

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.”

In your letter requesting advice, you stated that Councilmember Krohn and his wife own a house immediately adjacent to, and within 300 feet, of the marsh. This ownership constitutes a direct interest in real estate that is worth \$1,000 or more, and is a potentially disqualifying economic interest under Section 87103(b).

Once a public official’s economic interests have been identified, it is necessary to evaluate whether it is reasonably foreseeable that a governmental decision will have a material financial effect on any of the economic interests that have been identified. There are three steps to making this evaluation. First, it must be determined whether the official’s economic interests will be directly or indirectly involved in the decision. (Regulation 18700(b)(4).) Second, the appropriate standard must be selected for determining whether the financial impact of the decision on any particular economic interest will be material. (Regulation 18700(b)(5).) Third, it must be determined whether it is reasonably foreseeable that the materiality standard will be satisfied for any particular economic interest. (Regulation 18700(b)(6).) If it is substantially likely that the materiality standard will be satisfied for any of the official’s economic interests, then the public official will have a conflict of interest, unless the “public generally exception” applies. If it is not substantially likely that the materiality standard will be satisfied for any of the official’s economic interests, then the public official will not have a conflict of interest. We stress that this is a case-by-case determination.

Direct Versus Indirect Involvement

Regulation 18704.2(a) sets forth the circumstances under which an interest in real property would be directly involved in a decision. Those circumstances are as follows:

“(1) The decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental

subdivision, of real property in which the official has a direct or indirect interest (other than a leasehold interest) of \$1,000 or more, or a similar decision affecting such property;

(2) The decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of such property;

(3) The decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on such property; or

(4) The decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.”

A decision regarding restoration and/or development of the marsh would not directly involve Councilmember Krohn’s economic interest in his house, as set forth in the above-quoted regulation. Accordingly, his economic interest in his house would only be indirectly involved in such a decision.

The Appropriate Materiality Standard

Regulation 18705.2 prescribes the rules for assessing whether an official’s economic interest in real property, that is only indirectly involved in a decision, is materially affected by a decision. The rules prescribed in the regulation are alternative rules. Which rule applies to any particular real property interest is dependent upon whether the subject of the decision that is being evaluated is a piece of property, and, if so, the proximity of that property to the location of the official’s property interest. In relevant part, subsection (b) of the regulation provides:

“(1) The effect of a decision is material as to real property in which an official has a direct, indirect or beneficial ownership interest (not including a leasehold interest), if any of the following applies:

(A) The real property in which the official has an interest, or any part of that real property, is located within a 300 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no financial effect upon the official's real property interest.”

According to your letter, Councilmember Krohn’s house is located immediately adjacent to, and within 300 feet of, the marsh. By application of Regulation 18705.2(b)(1)(A), if a governmental decision regarding restoration and/or development of the marsh will have any

effect at all on Councilmember Krohn's economic interest in his house, that effect will be deemed material. This is a "one-penny" rule.

Foreseeability

Whether it is reasonably foreseeable that a decision regarding restoration and/or development of the marsh will have some effect on Councilmember Krohn's economic interest in his house is the critical question in this analysis. An effect is considered reasonably foreseeable at the time a governmental decision is made if there is a substantial likelihood that it will occur. (Regulation 18706.) Certainty is not required. Only if an effect is just a mere possibility, is it not reasonably foreseeable. (*Downey Cares v. Downey Development Com.* (1987) 196 Cal.App.3d 983, 989-991; *Witt v. Morrow* (1977) 70 Cal.App.3d 817, 822; and *In re Thorner* (1975) 1 FPPC Ops. 198.)

You have not provided us with any information about the specific governmental decisions regarding restoration and/or development of the marsh that Councilmember Krohn would like to make, participate in making, or attempt to influence, in his capacity as a public official. We are therefore unable to complete this part of the analysis for any particular decision. Councilmember Krohn will have to do that for himself, based upon the information that is available to him, at the time a decision is about to be made.

It should be noted, however, that because of the extremely close proximity of Councilmember Krohn's house to the marsh, it appears highly unlikely that any governmental decision about restoration and/or development of the marsh will have no effect on his economic interest in his house. We must therefore presume that any governmental decision about restoration and/or development of the marsh will have a reasonably foreseeable material financial effect on his economic interest in his house.

Public Generally

Upon reaching the conclusion that a governmental decision regarding restoration and/or development of the marsh will have a reasonably foreseeable material financial effect on his economic interest in his house, Councilmember Krohn may not be involved in that decision, in his official capacity, unless the effect on his economic interest is not distinguishable from the effect on the public generally. For the "public generally" exception to apply to a decision, the decision must affect the official's interest in substantially the same manner as it would affect a significant segment of the public. (Regulation 18707.)

Regulation 18707(b)(1) defines the term "significant segment," in relevant part, as follows:

"(A) For decisions that affect the official's economic interests (excluding interests in a business entity which are analyzed under subdivision (B)):

(ii) Ten percent or more of all property owners, all home owners, or all households in the jurisdiction of the official's agency or the district the official represents, or

(C) For decisions that affect any of the official's economic interests, the decision will affect 5,000 individuals who are residents of the jurisdiction; or,

(D) The decision will affect a segment of the population which does not meet any of the standards in subdivisions (b)(1)(A) through (b)(1)(C), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.”

In order for this exception to apply, the decision must affect ten percent or more of the population or property owners in the City or the district that Councilmember Krohn represents, in substantially the same manner as it affects Councilmember Krohn's economic interest in his house. Since his house is located within 300 feet of the marsh, ten percent of the population or property owners would have to live or own residential property within 300 feet of the marsh to be affected in “substantially the same manner.” (See the *Blakely* Advice Letter, No. A-95-202, in which we advised that where an official's residential property is within 300 feet of a project site, the public generally exception applies only if a significant segment of the public owns residential property within 300 feet of the project; *Furth* Advice Letter, No. A-99-035.) Since a significant segment of the public probably does not own residential property within 300 feet of the marsh, the public generally exception would not apply.

It therefore appears that Councilmember Krohn, in his official capacity, is prohibited from making, participating in making, or attempting to influence any governmental decisions about restoration and/or development of the marsh.

Questions 3 and 4

In spite of any conflict of interest that a public official may have that prevents him or her from being involved, in an official capacity, in a governmental decision, Regulation 18702.4(b) sets forth a narrow exception that allows the official to appear before a public agency, in the same manner as any other member of the general public, to comment on the decision. Regulation 18702.4(b) states that an official is not attempting to use his or her official position to influence a governmental decision if the official:

“(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a

matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:

(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

(B) A business entity wholly owned by the official or members of his or her immediate family.

(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.

(2) Communicates with the general public or the press."

This exception is a very limited exception, and it must be construed narrowly. (*See* 58 Cal.Jur.3d Statutes, § 116 (1993 Supp. -- exceptions to the general rule of a statute are strictly construed.) It would allow Councilmember Krohn to appear at meetings of the City Council, and meetings of boards and commissions that are subsidiary to the City Council, to provide information relevant to a decision about restoration and/or development of the marsh, provided the content of the information is strictly related to the effect that the decision will have on *his* personal interests. He may not provide information on behalf of, or concerning, any other person or group.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Steven Benito Russo
Staff Counsel, Legal Division

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