

March 26, 2013

John G. Barisone
Office of the City Attorney
P.O. Box 481
Santa Cruz, CA 95061-0481

Re: Your Request for Advice
Our File No. A-13-032

Dear Mr. Barisone:

This letter responds to your request for advice on behalf of Capitola City Councilmember Ed Bottorff regarding his duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based solely on the facts presented; the Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note we do not address the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTION

May Councilmember Bottorff participate in the city council's consideration of the future use and development of parcels in the vicinity of Capitola City Hall, despite having a leasehold interest in an apartment within 500 feet of the boundaries of the project?

CONCLUSION

Under the facts presented, Councilmember Bottorff may participate in the city council's consideration of the future use and development of parcels in the vicinity of Capitola City Hall because it is not foreseeable that the project will affect the councilmember's lease.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

The City of Capitola has a population of approximately 10,000 and covers an area of approximately 1.7 square miles.

The City Council has started a planning project intended to determine the future use and development of parcels in the vicinity of Capitola City Hall (the “project”), including the City Hall parcel itself, the City Hall parking lot parcel, and the former Pacific Cove Mobile Home Park parcel, which abuts the City Hall parking lot.

Capitola City Councilmember Ed Bottorff rents and resides in an apartment on Capitola Avenue, which is within five hundred feet of the project boundaries. Councilmember Bottorff’s leasehold interest in his apartment exceeds \$2,000 in fair market value. Councilmember Bottorff has obtained a letter from his landlord that states that City Council decisions pertaining to the project will not impact the apartment lease termination date, the apartment rent, or the manner in which the councilmember is allowed to use his apartment (only for residential purposes). The councilmember is prohibited from subleasing.

With respect to the use and enjoyment of his property, the councilmember has provided a letter from Ted Mendoza, a broker with David Lyng Real Estate, that concludes that any City Council decisions concerning the project and the subsequent implementation of those decisions will have no effect on Councilmember Bottorff’s use or enjoyment of his apartment.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

We need not consider the initial steps of the eight-step process. You have confirmed that the city councilmember, a public official under Sections 82048 and 87200, wishes to make and participate in the project decisions as a city councilmember. (Regulation 18702 et seq.) Further, you have identified his leasehold interest in his personal residence as his economic interest as defined in Section 87103(b) of the Act. Finally, you stated that his property interest is within 500 feet of the nearest boundary of the project and therefore is directly involved in the decision. (Regulation 18704.2(a)(2).) Your question concerns foreseeability and materiality.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official's economic interests?

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regulation 18700(a).) Any financial effect of a governmental decision on real property directly involved in the governmental decision is presumed to be material. (Regulation 18705.2(a)(1).) However, for a leasehold interest in real property, this presumption may be rebutted by proof that *it is not reasonably foreseeable* that the decision will have an effect on any of the following:

“(A) The termination date of the lease;

“(B) The amount of rent paid by the lessee for the leased real property, either positively or negatively;

“(C) The value of the lessee's right to sublease the real property, either positively or negatively;

“(D) The legally allowable use or the current use of the real property by the lessee; or

“(E) The use or enjoyment of the leased real property by the lessee.”
(Regulation 18705.2(a)(2).)

A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) For a material financial effect to be foreseeable on an official's economic interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

The Lease: According to the councilmember's landlord, the project decisions will not foreseeably trigger the factors in Regulation 18705.2(a)(1)(A), (B) and (D). With respect to (C), the landlord states that subleasing is not permitted. Therefore, factor (C) will not occur due to the city council's decisions.

Use and Enjoyment: The final criteria in (E) requires an evaluation of whether the project will impact the use and enjoyment of the councilmember's property. Regulation 18705.2 does not describe what constitutes an effect on the “use and enjoyment” of a leasehold. In *Monks v. City of Rancho Palos Verdes* (2008)167 Cal. App. 4th 263, 302, the court noted that “interference with the use and enjoyment” of property was a commonly understood concept in law.

“Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. ‘So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.’ private plaintiffs have successfully maintained nuisance actions against airports for interferences caused by noise, smoke and vibrations from flights over their homes ... and against a sewage treatment plant for interference caused by noxious odors”

According to your facts, no part of the project suggests that the permissible use of the apartment will be affected. Moreover, while there may be a change of the use of the parcels in the project area, no facts indicate that the councilmember’s enjoyment of his apartment will be foreseeably impacted (adversely or favorably). Thus, based on these facts, it appears that the councilmember has rebutted the presumption of materiality.²

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner*, supra.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby*, supra), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official after a complete consideration of all the facts before him. We also note that as the project proceeds, there may be new facts that will change the conclusion contained in this letter. You should contact us for further advice if the nature of the project or anticipated use of the project parcels changes in the future.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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² Steps Seven and Eight consider two exceptions to disqualification from decisions that would have a reasonably foreseeable material financial effect on a public official’s economic interests. The first is applicable in cases where the effect on the public official is not distinguishable from the effect on the public generally. (Regulation 18707.) The second exception allows participation in a decision notwithstanding a conflict of interest when participation is legally required. (Regulation 18708.) Nothing in your account of the facts indicates that either of these exceptions should be analyzed at this time apply.