

July 30, 2013

Ms. Sue Long
Councilmember
City of Fortuna
621 11th Street
Fortuna, CA 95540

Re: Your Request for Advice
Our File No. A-13-065

Dear Ms. Long:

This letter responds to your request for advice concerning the conflict of interest provisions of the Political Reform Act (the "Act").¹ We base this letter on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, our advice is based solely on the provisions of the Act. We offer no opinion on the applicability, if any, of other conflict of interest laws.

QUESTION

Do you have a conflict of interest that requires you to abstain from voting on the city's development and permit fee schedule because it may financially affect Wendt Construction Co. ("Wendt"), the company you are employed by as a manager?

CONCLUSION

As a manager of Wendt and by receiving compensation of \$500 or more in a calendar year from it, you have a potentially disqualifying interest in Wendt as discussed below.

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

You are an elected member of the City Council (the “Council”) in Fortuna and also, in your private capacity, are employed a manager at Wendt, a local construction firm that is involved with development projects within the city. As a member of Fortuna’s City Council, you are faced with voting on the approval of a new fee schedule for the 2013-2014 year that will include development and permit fees.

You have said that the fees in question are applicable to anyone seeking a conditional use permit that wants to open a new business or to an existing business that would like relocate in an area that requires a conditional use permit. They also apply to any property owner seeking a zoning change, any property owner that currently owns property that can be subdivided, and any property owner needing an encroachment permit.

Wendt owns several pieces of property that may be subject to this fee schedule. One of these parcels is slated to be subdivided at some point in the future. However, at this time there are no firm plans to do so because Wendt owns thirty to forty additional lots.

As a manager at Wendt Construction, your involvement in these development projects is limited. Wendt pays you on an hourly basis, primarily, to oversee their payroll, billing and personnel matters. You are also responsible for working on bids pertaining to residential sales or remodels, but you do not participate in any substantive preparation of bids for projects that involve the development of roads, grading, underground utilities or other projects. The only involvement you have in development bids is when you type them after they have been prepared by someone else.

You have also stated that neither you nor anyone in your family has ownership interest in the company or receives compensation that would be affected if the fee schedule is changed. From time to time, your son-in-law works as a laborer for the firm or your daughter will stand in for you when no one else is available and you need to be out of the office. Both of these positions are compensated on an hourly basis.

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 decisions will have a material financial effect on one or more of the public official’s specified interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard of analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (See Regulations 18700-18709.)

Steps 1 and 2: Are you a public official within the meaning of Section 87100 and will you be making, participating in making, or using your official position to influence a governmental decision?

As a member of the city council of Fortuna, you are a “public official” within the meaning of the Act. You make, participate in making, or influence a governmental decision when you take part in any decision by the city council regarding the fee schedule.²

Step 3 – Which of your interests may be affected by the Council’s decisions? (Section 87100 and 87103; Regulation 18700(b)(3))

Section 87103 sets forth the types of interests held by a public official that, when affected by a governmental decision, may expose the official to a possible conflict of interest. As pertinent to the facts you present, these interests are:

Source of income

Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made. (Section 18703.3 (a)(1).)

Wendt pays you on an hourly basis to perform your job duties. Over the course of the current year, your wages aggregated together, will exceed the \$500 threshold set by the Act. Thus, you have a potentially disqualifying interest in Wendt.

Business entity

Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 18703.1(b).)

You are a manager at Wendt Construction Co. Therefore, you have a potentially disqualifying interest in Wendt.

Personal finances

A public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in

² If a public official has a conflict of interest in a decision noticed at a public meeting, the he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b), on the record of the meeting; (2) recuse him or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. (*Faulconer Advice Letter, No I-05-042*)

the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 18703.5.)

You have stated that you are compensated by Wendt on an hourly basis as is your immediate family from time to time. We do not have enough information to make this determination, we would advise you to look at whether a vote on the fee schedule will have any positive or negative effect on your personal finances.

Step 4 – Are your financial interests directly or indirectly involved in the governmental decision? (Regulation 18700(b)(4).)

As mentioned above, an official does not have a conflict of interest under the Act unless the governmental decision in which he or she participates has a “material” financial effect on his or her financial interests. (Sections 87100 and 87103.) The determination in this Step whether an official’s financial interests are directly or indirectly involved in the governmental decision -- dictates which “materiality” test (see Step 5) will apply.

Under subsection (a) of Regulation 18704.1, “a person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly 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. A person 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.

Based on the facts you have provided, Wendt is not directly involved in the governmental decision in question. Therefore, your financial interest is indirectly involved.

Personal finances

A public official or his or her immediate family are deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family. (Section 18704.5)

Step 5 – What “materiality” standard applies to your interests? (Regulation 18700(b)(5).)

In cases where business interest is not directly involved in a governmental decision, Section 18704.1 requires the application of Regulation 18705.1(c)(4).

- (A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or
- (B) The governmental 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 \$5,000 or more; or,
- (C) The governmental decision will result in an increase or decrease in the value of the business entities assets or liabilities of \$20,000 or more.

As noted above, the Commission does not act as a finder of fact in its advice letters. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (See *In re Thorner*, (1975) 1 FPPC Ops. 198.) Because determination of the foreseeability of material financial effects is an unavoidably factual question, we must leave this ultimate determination to the public official and his or her counsel. While we do not have information as to whether any of these thresholds will be reached with respect to the fee decision's affect on Wendt, we advise you to consider the following facts:

- (1) How much does Wendt pay annually in fees? How about last year?
- (2) How many properties does Wendt develop in a fiscal year? What is the average revenue generated each year from these projects?
- (3) How much does Wendt pay annually in expenses and what is the impact of the fee schedule on the expenses Wendt pays?
- (4) What is Wendt's Annual total revenue and how much of this is derived from development projects that are subject to the fee schedule?

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

Sincerely,

Zackery P. Morazzini
General Counsel

By:

Michael Hamilton, Legal Division

MH:jgl