

August 28, 2013

Caio A. Arellano
Deputy City Attorney
Office of the City Attorney
P O Box 481
Santa Cruz, CA 95061-0481

Re: Your Request for Advice
Our File No. A-13-109

Dear Ms. Arellano:

This letter responds to your request for advice on behalf of Half Moon Bay City Councilmember Allan Alifano regarding 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

May Councilmember Alifano participate in the city council's decisions involving the Main Street Bridge project (the "bridge project"), despite having a leasehold interest in office space within 500 feet of the boundaries of the project?

CONCLUSION

Under the facts presented, Councilmember Alifano may participate in the city council's bridge project decision because it is not foreseeable that the project will affect the councilmember's business or its 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 Half Moon Bay is a city with a population of approximately 11,000 located in San Mateo County. In the near future, the City Council will be taking up the decision whether to repair, rehabilitate or replace the Main Street Bridge in downtown Half Moon Bay.

Councilmember Alifano has an ownership interest in a small technology services and consulting business, Alifano Technologies, which leases office space along Main Street approximately 460 feet from the north end the bridge.

The Main Street Bridge is located in downtown Half Moon Bay. It spans approximately 200 feet of Main Street over Pilarcitos Creek at the northern end of downtown. The bridge was constructed in 1910 and is the first reinforced concrete bridge in San Mateo County. Over time, the Main Street Bridge has developed cracks along critical structural elements, threatening its stability in the event of a significant earthquake or similar disaster. In a 2011 inspection, CalTrans gave the bridge a sufficiency rating of 24 out of 100.² CalTrans also designated the bridge “structurally deficient” and “functionally obsolete” based on its condition, age, and design.

Based on the above concerns, the bridge project is a high-priority capital improvement project for the City. The City Council is considering five different options for the bridge project ranging from minimal repairs to prevent further bridge deterioration to a complete replacement of the bridge. The estimated cost for the project ranges from approximately \$2 million for minimal repairs to \$8 million for a complete bridge replacement.

Although the bridge is only two lanes wide, it is important from a circulation standpoint because it is one of only two bridges providing vehicular access across Pilarcitos Creek, which separates the northern and southern portions of the City. It is also important from an economic standpoint because many businesses along Main Street (Half Moon Bay’s downtown commercial core) are visitor-serving (restaurants, hotels, retail shops, etc.) and rely on through traffic for business. Other decision criteria for the bridge project include eligibility for state/federal grant funding, public safety and emergency preparedness, environmental impacts, compatibility with pedestrian, bicycle, and transit uses, and aesthetics. Thus, the City Council’s decision will be based on a number of different factors and affect a significant segment of the City’s residents, businesses, and visitors.

Councilmember Allan Alifano is a shareholder with a 30% ownership interest in Alifano Technologies, an “S” corporation with a book value of approximately \$25,000. Alifano Technologies leases office space located at 225 Main Street, approximately 460 feet north of the Main Street Bridge. The Lease Agreement for 225 Main Street was entered into on February 26, 2010, with an initial three year term commencing on April 1, 20 10, and expiring on March 31, 2013. There are two options to renew for successive three year terms on the same terms and conditions as the original Lease Agreement. The Lease Agreement specifies an initial monthly rent of \$2,800, subject to adjustment annually based on the prior years’ increase in the Consumer

² A rating of 20 or below could result in the bridge’s closure under CalTrans rating standards.

Price Index (CPI) for all Urban Consumers (in the San Francisco-Oakland-San Jose Metropolitan Area). The lease does not allow the tenant to sublease or make changes to the current or legally allowable use of the premises.

In addition to his ownership interest in Alifano Technologies and the leasehold interest in its office space, Alifano Technologies is a source of income for Councilmember Alifano. In 2012, Councilmember Alifano received approximately \$21,000 in income from the business. Councilmember Alifano's involvement in the business is presently winding down as he nears retirement. To date in 2013, he has earned approximately \$1,500, and he expects to earn no more than \$4,500 for the entire 2013 tax year.

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 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 governmental decision.

We need not consider the initial steps of the eight-step process. You have confirmed that Councilmember Alifano is a public official under Sections 82048 and 87200, and that he wishes to make and participate in the bridge project decisions as a councilmember. (Regulation 18702 et seq.) You have also identified his indirectly involved business interest (a 30% ownership) in Alifano Technologies, a technology services and consulting business that has neither initiated the bridge project, nor is the subject of the bridge project decision. Further, you have identified his leasehold interest in office space ("approximately 460 feet from the north end of the bridge" project) that Alifano Technology leases (Section 87103(b).) Finally, you identified his interest in Alifano Technologies as a source of income (Section 87103(c), Regulation 18703.3). Lastly, you stated there will be no personal financial effects or effects on the councilmember's personal expenses, income, assets, or liabilities (or those of his immediate family) as the result of the bridge project decisions. (Section 87103; Regulation 18703.5). We address your questions concerning foreseeability and materiality.³

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on councilmember Alifano's interests?

Indirectly Involved Business Entity and Source of Income – Alifano Technologies:

Whether the financial effect of a governmental decision on an indirectly involved business entity is material depends on the size of the business entity. The standards vary according to whether the business entity is a Fortune 500 company, is listed on the New York

³ You have not presented any facts indicating that the "public generally" or the "legally required participation" exceptions (Steps 7 and 8 of the Commission's conflict of interest analysis) would be applicable to Councilmember Alifano's situation, thus we do not include them in our analysis.

Stock Exchange, American Stock Exchange, or NASDAQ, or according to the size of the business entity. Generally, materiality is triggered if the financial effect of a decision on an indirectly involved business entity meets certain dollar amounts, applied to increases or decreases in gross revenue, value of assets or liabilities, or in terms of additional or avoided expenses, or reductions in or elimination of existing expenses. (Regulation 18705.1(c).)

Regulation 18705.1(c)(4) applies to small business entities. It provides that a financial effect is considered material if:

“(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 entity’s assets or liabilities of \$20,000 or more.”

Your facts indicate that Alifano Technologies is a small business that is not publicly traded. Further, you stated that because Alifano Technologies is “a professional services business with primarily local clientele” that it is “unlikely that the temporary traffic impacts [of the bridge project] would increase or decrease the business’s gross revenues by \$20,000 or more, or that the business’s expenses would increase or decrease by more than \$5,000, or that the value of the business’s assets would increase or decrease by \$20,000 or more.”

We note that while there may be significant financial impacts of a temporary bridge closure on downtown merchants such as retail shops, restaurants and other businesses that rely heavily on easy accessibility and customer traffic, the councilmember’s technology and consulting business is unlikely to be similarly affected due to the nature of its services. Your facts indicate that the councilmember’s business is not dependent on foot traffic and his clients are primarily local. While some clients may have to take a short detour through Highway 1 during the bridge project, these clients are unlikely to look for consulting services elsewhere due to a temporary bridge closure.

Based on the facts you provided, it does not appear that the governmental decisions involving the bridge project would have a foreseeable material financial effect on Alifano Technologies because it will not meet the above thresholds.

Leasehold Interest:

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official’s interest is material (Regulation 18700(a).) The financial effect of a governmental decision on real property in which a public official has a leasehold interest and which is indirectly involved in the governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances

regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an interest, which make it reasonably foreseeable that the governmental decision will:

- “(A) Change the legally allowable use of the leased real property, and the lessee has a right to sublease the real property;
- “(B) Change the lessee’s actual use of the real property;
- “(C) Substantially enhance or significantly decrease the lessee’s use or enjoyment of the leased real property;
- “(D) Increase or decrease the amount of rent for the leased real property by 5 percent during any 12-month period following the decision; or
- “(E) Result in a change in the termination date of the lease.”
(Regulation 18705.2(b)(2).)

For a material financial effect to be foreseeable on an official’s 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.)

Your facts indicate that the bridge project decision will not foreseeably trigger the factors in Regulation 18705.2(b)(2) (B) (D) and (E). With respect to (A), the lease does not allow for any change in the allowable use of the property and states that subleasing is not permitted. Therefore, factor (A) will not occur due to the city council’s decisions.

Use and Enjoyment:

The final criterion in (C) requires an evaluation of whether the bridge project will impact the use and enjoyment of the councilmember’s leased office space. 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 . . .”

Your facts suggest that no part of the bridge project would interfere with use of the office space. Moreover, there are no facts to indicate that the councilmember's enjoyment of the office space will be foreseeably impacted (adversely or favorably) due to the bridge project. Therefore, based on these facts, it appears that the bridge project decision would not have a reasonably foreseeable material financial effect on the councilmember's leasehold interest.

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 bridge project proceeds, there may be new facts that could change the conclusion contained in this letter. Please contact us for further advice if the nature of the project 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: Emelyn Rodriguez
Commission Counsel
Legal Division

ER:jgl