

February 27, 2014

Arnold M. Alvarez-Glasman  
Alvarez-Glasman & Colvin  
13181 Crossroads Parkway North, Suite 400 West Tower  
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Re: Your Request for Advice  
**Our File No. A-14-030**

Dear Mr. Alvarez-Glasman:

This letter responds to your request for advice on behalf of Yountville Town Councilmember Lewis Chilton regarding his responsibilities under the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### **QUESTION**

May Councilmember Chilton make and participate in a Town Council decision as to whether a vacant lot within 500 feet of property he leases for his Deli business should be converted into a parking lot?

### **CONCLUSION**

According to your facts, the decision will not materially affect the councilmember’s lease or business. Therefore, Councilmember Chilton may make and participate in a Town Council decision as to whether a vacant lot within 500 feet of property he leases for his Deli business should be converted into a parking lot.

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<sup>1</sup> 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 Town of Yountville is located in central Napa County. The Town has a current population of approximately 3,200 residents and a geographical size of 1.63 square miles. Councilmember Chilton was appointed to the Yountville Town Council in January 2007 and was elected in November 2009. He continues to serve in this office as a Councilmember and was appointed by the other members of the Town Council to serve as the Vice Mayor.

On March 1, 2008, Councilmember Chilton and his spouse acquired an existing business in the Town of Yountville. This business consists of a delicatessen located within the walls of the Ranch Market Too grocery store. The business purchased was formed as the Yountville Deli LLC (the "LLC") with Councilmember Chilton's spouse owning 75% of the shares and Councilmember Chilton owning the remaining 25%. The LLC leases approximately 1,200 square feet of retail space from the ownership group that owns the Ranch Market Too retail complex which runs for 30 years (with renewable options every five years). Neither Councilmember Chilton nor his spouse are part of this retail complex group nor have any ownership share in the property leased.

At this time, there is a request by the owner of a vacant lot located within 500 feet of the Deli to build a parking lot. The owner of the vacant lot is the same person that owns the property on which the Ranch Market Too and the Chilton Deli is situated. If approved, the parking lot would be ear-marked for use by a different restaurant operation (Bistro Jeanty). The owner of the vacant lot would restrict the parking lot to use by customers of Bistro Jeanty and would prohibit customers of the Deli and Ranch Market Too from using the lot. You stated that the Deli and Ranch Market Too have adequate existing parking for their customers. You also stated that the construction of the parking lot, as currently proposed, would not impact the Deli, its operations, or its income.

In your communication of February 20, 2014, you confirmed that Bistro Jeanty has been in existence for many years (since 1998) and situated just north of Vice-Mayor Chilton's deli. The upcoming decision is limited to the vacant lot, located south of the deli property, which is unimproved and has weeds and other shrubbery which will be removed for the new parking lot.

## ANALYSIS

As we advised in our prior advice letter, the Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).)

**Steps 1 and 2: Is Councilmember Chilton a public official making, participating in making, or influencing a governmental decision?**

You acknowledge that Councilmember Chilton is a public official as defined by the Act, and that he will be called upon to consider whether the Town should approve, deny, modify or establish conditions of use of the vacant lot. Therefore, he is a public official who will be making, participating in making or otherwise using his official position to influence a governmental decision. Thus, steps 1 and 2 are satisfied.

**Step 3: Does Councilmember Chilton have a potentially disqualifying interest?**

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated interests described in Section 87103 and Regulations 18703-18703.5. A public official has an interest in the following:

- A business entity in which he or she has a direct or indirect<sup>2</sup> investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)) or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- Real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.) Section 82033 defines an "interest in real property" to include: "[A]ny leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$ 2,000) or more. Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater."
- Any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- Any source of gifts to him or her if the gifts total \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- His or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

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<sup>2</sup> For purposes of Section 87103, indirect interest means any interest in real property owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

According to your facts, Councilmember Chilton has an investment interest in his LLC, direct (his 25%) and indirect (his spouse's 75%) equating to 100% interest in the business. Moreover, when an official wholly owns a business, the official is also considered to have a 100% interest in any property owned or leased by the business. (Section 82033.) The councilmember would also be considered to have a potentially disqualifying interest in anyone that has paid the business \$500 or more in the 12 months prior to the decision.<sup>3</sup>

Finally, the councilmember has a contractual relationship with the applicant in that he leases property from the applicant. However, assuming the councilmember pays fair market value for the Deli property, the contractual arrangement with the owner of the property is not in itself a basis for a conflict-of-interest.

**Step Four: Are the council member's interests directly or indirectly involved in the decision?**

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given interest is material, it is necessary to first determine if the official's interest is "directly involved or indirectly involved" in the governmental decision. (Regulation 18704(a).)

**The LLC:** Pursuant to Regulation 18704.1:

"(a) 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."

According to your facts, the LLC is not an applicant or named party. Therefore, the LLC is not "directly involved" in the decision and pursuant to Regulation 18704(a), is "indirectly" involved in the decision.

**Real Property:** For a governmental decision that affects real property interests, Regulation 18704.5(a)(1) provides that real property (including leaseholds) are directly involved in a decision when the real property in which the official has an interest, or any part of that real

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<sup>3</sup> You have not asked about the potential conflicts of interest based on sources of income, therefore we do not further analyze such conflicts.

property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. Under your facts, the councilmember's leasehold interest is within 500 feet of the proposed parking lot and therefore is directly involved in the decision.

**Step 5 and 6: Is it reasonably foreseeable that the decision will have a materiality financial effect on the interests of the councilmember?**

Once the degree of involvement is determined, Step 5 of the conflict of interest analysis addresses the applicable materiality standard and whether it is reasonably foreseeable that the materiality standard will be met.

**Indirectly Involved Business Interests:** Under Regulation 18705.1(c)(4), the financial effect of a governmental decision on a small business entity is considered material if it is reasonably foreseeable<sup>4</sup> that:

“(A) The governmental decision will result in an increase or decrease in the value of 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.”

You stated that the new parking lot dedicated to an adjacent full service restaurant will not foreseeably increase or decrease the Deli's revenue or business value by \$20,000 or more annually, nor does this project result in the Deli's incurring, avoiding, reducing or eliminating the Deli's existing expenses by \$5,000 annually.

**Real Property:** Regulation 18705.2(a) states the materiality standard for directly involved real property interests:

“(2) Real property, leaseholds. The financial effect of a governmental decision on the real property in which an official holds a leasehold interest is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any effect on any of the following:

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<sup>4</sup> For a material financial effect on an official's interest to be foreseeable, 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.)

“(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.”

You stated that Councilmember Chilton has looked at each of the five points addressed in Regulation 18705.2(a)(2) and concluded that none would be triggered. You stated:

“As the termination date of the lease is fixed on March 1, 2038 and the other business operations will have no effect on this date, the test specified in point (A) may be rebutted.

“As the rent terms for the leased property are specified in the lease and the other business operations will have no effect on the rent terms outlined in the lease, the test specified in point (B) may be rebutted.

“As the lease contains provisions specifically prohibiting any sublease of the leasehold and the other business operations will have no effect on the sublease terms outlined in the lease, the test specified in point (C) may be rebutted.

“As the other business operations do not have any effect on the legally allowable use or current use of the property by the lessee, the test specified in point (D) may be rebutted.”

The final factor to rebut, in subdivision (a)(2)(E), is whether it is reasonably foreseeable that the governmental decision will affect the use or enjoyment of the leased real property. As you note, a key element to this point is whether the transformation of the vacant, unimproved land to a paved parking lot has the potential of affecting the councilmember’s use of his leased property as a Deli. This is to be distinguished from effects on legally allowable uses that are covered in the prior subdivision.

Regulation 18705.2 does not describe what constitutes an effect on the “use and enjoyment” of a leasehold. In the *Arellano* Advice Letter, No. A-13-109, we quoted *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 . . .”

Looking at the scope of the proposed project, it is not foreseeable that there will be any effect on the councilmember’s current use and enjoyment of his lease. While we might reach a different conclusion if the project was to transition the vacant lot to some other more intensive use, it would not appear that transforming it into a parking lot (one designated for the use of a neighboring business) would be of such significance as to have any effect on the use or enjoyment of the leased property.

**Steps 7 and 8: Exceptions**

Even if a public official determines that a decision will have reasonably foreseeable material financial effect on his real property interest, the official may still participate under the “public generally” exception if the financial effect of the decision on the property is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.) Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception if a quorum cannot be achieved without the member’s participation. Neither of these exceptions are implicated in your facts.

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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