

December 15, 2014

Steven L. Dorsey
Norwalk City Attorney
Richards, Watson & Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071

Re: Your Request for Advice
Our File No. A 14-183

Dear Mr. Dorsey:

This letter responds to your request for advice of behalf of Norwalk City Councilmembers Cheri Kelley and Luigi Vernola regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ 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.)

Additionally, our advice is limited to obligations arising under the Act. We do not address the applicability, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTIONS

1. May Councilmember Kelley participate in a governmental decision to amend a zoning ordinance that would likely affect most of the hotels and motels in the jurisdiction when she owns property within 500 feet of a hotel?
2. May Councilmember Vernola participate in a governmental decision to amend a zoning ordinance that would likely affect most of the hotels and motels in the jurisdiction when he owns various properties within 500 of a hotel or motel?

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.

CONCLUSION

1 and 2. Yes. Because we find that that there are sufficient facts to indicate that there “will be no reasonably foreseeable measurable impact on the official’s property,” Councilmembers Kelley and Vernola may participate in the decision.

FACTS

The City of Norwalk is considering adopting an amendment to the zoning ordinance that would limit the length of time individuals can stay at hotels and motels (hereafter collectively “hotels”) unless the hotels meet certain development standards to qualify as either “limited-service” or “full-service” hotels or have a minimum of 80 rooms, meet different and lesser standards, and obtain a conditional use permit. In response to our inquiry as to the purpose of the ordinance, you stated that they were primarily motivated by a concern about living conditions in the facilities. Specifically:

“...motels/hotels are not designed like apartments and do not meet the same development standards for covered parking, amenities, housekeeping (cooking, food preparation and storage, laundry) etc. In these situations, the residents plug in hot plates, microwave ovens, small refrigerators, etc. and then use extension cords that can overload circuits and possibly cause a fire. Admittedly, some motels do have some units that were built with kitchenettes, however, they lack the other development standards that would be found in an apartment complex.”

Although the City has not performed an inventory, it is likely that most of the hotels having fewer than 80 rooms do not meet the standards to qualify as “limited-service” or “full-service” hotels. Thus, these hotels would either need to meet the more stringent development standards or meet the lesser standards, add additional rooms and obtain a conditional use permit if they desire to offer long term stays.

Two members of the City Council own real property located within 500 feet of one or more hotels in the City. In one case, Councilmember Kelley owns two condominium units, each of which is located within 500 feet of the Doubletree Hotel. The condominium units are located within a gated project containing 168 similar units. In the other case, Councilmember Vernola owns commercial properties located within 500 feet of three different hotels with a total combined 70 rooms. Neither of the Councilmembers has any other financial interest that could be affected by the proposed ordinance.

If the ordinance is adopted, the hotels that do not comply with the new standards would at some point in the future be required to either make the necessary improvements to meet the definitions of “limited-service” or “full-service” hotel or would be required to meet the lesser standards and obtain a conditional use permit if they wanted to allow extended stays.

Because neither of the Councilmembers owns a hotel in the City’s jurisdiction, it is your opinion that Regulations 18705.2(a)(1)-(9) do not apply to their real property interests. It is also

your opinion that it is not reasonably foreseeable that the ordinance would have any of the impacts described in Regulation 18705.2(a)(10) on the Councilmembers' properties. Because we agree with your conclusions, this letter will not analyze those provisions of the regulation.

You request guidance regarding the application of Regulations 18705.2(a)(11) and (12) and how these interact with Regulation 18705.2(a)(10). You have provided facts relevant to the question of whether the Councilmembers may participate in the Council's consideration of the ordinance.

Councilmember Kelley

As stated above, Councilmember Kelley owns two condominium units, each of which is located within 500 feet of the Doubletree Hotel. The Doubletree Hotel already meets the proposed standards and would be permitted to allow long stays without taking any further action. Thus, in Councilmember Kelley's case, the Doubletree Hotel would not be impacted at all by the ordinance because it already complies with the most stringent development standards. Therefore, you believe the decision to adopt the ordinance would not affect the value of the condominiums owned by Councilmember Kelley.

Because the condominiums are within 500 feet of the hotel, however, you are concerned about application of Regulation 18705.2(a)(11) to these facts. First, you presume that these condominium units are not considered commercial real estate even though she rents them out. Thus, you are not applying Regulation 18705.1 to this property as allowed under Regulation 18705.2(a)(11) for commercial property.

Accordingly, you are requesting a determination from the FPPC whether Councilmember Kelley may participate in the decision under Regulation 18705.2(a)(11), as it does not appear to be reasonably foreseeable that the decision will have a measurable impact on her property and, if there is any application of Regulation 18705.1 that needs to be applied to the analysis.

Councilmember Vernola

As stated above, Councilmember Vernola owns commercial properties located within 500 feet of three different hotels. These individual properties are used as following: property no. 1 – Car rental business, auto/truck repair business, auto body shop, outdoor soccer facility; property no. 2 – auto body shop and auto/truck repair; property no.3 – parking lot; and property no. 4 – towing company and office for non-profit business.

The City does not know whether any of these three hotels currently allow long-term stays, but given their location and the small number of units in each of these hotels, you believe it is likely that they do allow long-term stays. The City also does not know whether these hotels comply with the ordinance's proposed definitions of "limited-service" or "full-service" hotels. If so, they would be permitted to allow or continue to allow long-term stays without taking any further action. If not, they may need to make improvements and/or changes in operations to

meet those definitions or add more units and apply for a conditional use permit if the owners desire to allow or continue to allow longer stays.

You believe that it is very unlikely the parcels on which these hotels are located would have sufficient space to add enough rooms to apply for a conditional use permit. Thus, any of the three hotels that currently offer long term stays will likely need to discontinue allowing long term stays or add the necessary amenities to meet the development standards in order to continue to allow long term stays.

Even if the hotels need to make improvements and/or changes in operations, you believe the three hotels near Councilmember Vernola's commercial properties are located in a manner and of such a small size that the adoption of the ordinance would not have any effect on his property in the manner described in Regulation 18705.2(a)(10) (i.e., substantial alterations in traffic levels or intensity of use) or Regulation 18705.2(a)(12).

Because the Councilmember's properties are within 500 feet of the hotels, however, you are concerned that Councilmember Vernola's participation could be prohibited by Regulation 18705.2(a)(11). In this regard, you are requesting guidance on whether Councilmember Vernola's commercial properties, which are developed with business entities that are not owned by him, are considered "commercial property containing a business entity" for purposes of the Regulation. If so, then you also ask how to apply Regulation 18705.1 to this fact scenario.

If these parcels are not considered commercial for purposes of the Regulation, you are requesting a determination under the second sentence of Regulation 18705.2(a)(11) whether there will be "no reasonably foreseeable measurable impact" on Councilmember Vernola's commercial properties by adoption of the ordinance. Given the questionable financial effect of the ordinance on the hotels themselves, and their small size and location, you do not think it is reasonably foreseeable that there will be any measurable impact on Councilmember Vernola's properties. However, under the revised provisions of Regulation 18705.2(a)(11), you recognize that only the Commission can make that decision.

Finally, you are interested in knowing how to construe Regulations 18705.2(a)(10)-(12). You believe that Regulation 18705.2(a)(10) appears to essentially cover the same issues as Regulation 18705.2(12).

Also, you would like to know how the first portion of Regulation 18705.2(a)(11) is construed with Regulations 18705.2(a)(10) and (12). You ask if Regulation 18795.2(a)(11), when read with the other two regulations, means that the decision can have an effect on a business owned by a public official, but that the decision cannot have even a \$1.00 impact on the value of the real estate upon which the business is located.

ANALYSIS POTENTIAL CONFLICT OF INTEREST

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).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

You have already determined that both councilmembers are public officials who, pursuant to their positions, would be called upon to participate in the above mentioned decisions (Step One and Step Two). You have identified certain ownership in real property as the potentially financially affected financial interest (Step Three). Under the recently amended provisions analyzing the materiality standards for financial effects on real property, Step Four and Step Five have been consolidated under the provisions on which you seek guidance, Regulation 18705.2(a). Step Six addresses the test for what is reasonably foreseeable. Steps Seven and Eight address "public generally" and "legally required participation" respectively, but are not applicable to your request. Accordingly, our analysis concerns whether or not the governmental decision will have a reasonably foreseeable material financial effect on the real properties identified herein.

Regulation 18705.2(a) provides the factors to be examined in determining whether the reasonably foreseeable financial effects of a governmental decision are material when applied to a real property interest. The revised regulation consolidated the former Regulation 18904.2 (directly/indirectly involved test) and Regulation 18705.2 (applicable materiality standard) into one regulation setting for the materiality standard for all real property decisions. It eliminated the "one penny effect" test, and modified the 500 foot rule from what had been a near absolute prohibition to a prohibition unless the Commission provides "written advice allowing an official to participate under ... circumstances [where] the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property." It is this provision that you seek us to apply under the facts you have provided. You have also asked for an explanation of how paragraphs (a)(11) and (a)(12) interact with paragraph (a)(10) in Regulation 18705.2(a).

The relevant paragraphs provide as follows:

“(a) Except as provided in subdivision (c) below, the reasonably foreseeable financial effect of a governmental decision (listed below in (a)(1) through (a)(13)) on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision:

(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official’s real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official’s real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18705.1. 2. Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official’s property; or

(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official’s property.”

The language in paragraph (a)(10) was developed from the language in former Regulation 18705.2(b)(1)(B and C) which, under that regulation, provided factors that would be used to rebut the presumption that a financial effect was *not* material. Unfortunately, in too many cases under the old process, many people applying the standards never got to that point once it was determined that an official’s property was beyond 500 feet of the property involved in the decision (subject property). The 500 foot rule had developed into a fixed determinative measurement without any real world analysis of factors that should be considered, in every case, when examining whether or not a conflict exists. This amendment to the regulation was to make it clear that these factors were always to be considered if they impact the “market value” of the property.²

A second purpose of the regulatory changes was to eliminate the “one-penny” materiality standard for property within 500 foot of the subject property. As a compromise to eliminating

² Under the old standard, the material financial effect for property located within the 500 foot distance was measured at one penny and we had not established a standard if the property was outside the 500 foot distance, which was one of the reasons why this test was almost never applied.

the 500 foot rule altogether, paragraph (a)(11) kept the rule, but allowed for the Commission to, in effect, waive the rule by advice letter in certain circumstances.

Councilmember Kelley

Councilmember Kelley owns two condominium units in a rather large complex located across the street from the Doubletree Hotel. The Doubletree Hotel already meets the standards that would be imposed by the ordinance, so it would not be affected. Even if it were, we can see no conceivable financial effect from the decision on the rental values of Councilmember Kelley's property. This is exactly the type of decision that the changes in the regulation were intended to address by allowing an official to request relief from the strict application of the 500 foot rule.

Without further information, it does not appear that Councilmember Kelley's property would fit under the business entity analysis exception for real property provided under Regulation 18705.2 (a)(8), as the value of this type of property would not typically be determined based on its income producing potential. However, because Councilmember Kelley receives an income from her rental of those units, under the Act she has a business entity interest in her rental business and a source of income in the tenants of the property. We do not see any way that either of those interests will be reasonably foreseeably financially affected by this decision.

Councilmember Kelley does not have a conflict of interest under the Act and may participate in the decision.

Councilmember Verona

Unlike Councilmember Kelley, Councilmember Verona properties do contain business entities that operate from the premises. His real properties would solely be analyzed under Regulation 18705.1, because each property is an income producing property and its value would be determined based on its income producing potential. Therefore, the real property materiality provisions does not apply in determining any financial impact from the decision to the real property, and any financial effects would be measured against Councilmember Verona's financial interest in his business entities as well as any source of income from either tenants or customers of his business.

As with Councilmember Kelley, we cannot imagine any reasonably foreseeably financial effects on any of Councilmember Verona's financial interest as a result of this decision. Accordingly, Councilmember Verona does not have a conflict of interest and he may participate in the decision.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: William J. Lenkeit
Senior Commission Counsel
Legal Division

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