

February 4, 2014

Hal DeGraw
City Attorney
City Hall
317 Broad Street
Nevada City CA 95959

Re: Your Request for Advice
Our File No. A-14-217

Dear Mr. DeGraw:

This letter responds to your request for advice on behalf of the Nevada City City Councilmembers Robert Bergman and Evans Phelps and Planning Commissioner Brad Croul and Dan Them regarding their responsibilities under the conflict of interest provisions of the Political Reform Act (the "Act").¹ Please note that the Commission does not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, as we stated in our prior letter, we are unable to provide advice to you regarding your duties under the Act.

Please also note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

Do City Councilmembers Bergman and Phelps and Planning Commissioners Croul and Them, each of whom live or own businesses near former Bed and Breakfast establishments subject to the City's decision on whether these Bed and Breakfast establishments may reopen, have a conflict of interest in the decision?

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

City Councilmembers Bergman and Phelps reside near operating Bed and Breakfast establishments that will not be impacted by the decisions. Therefore, they do not have a conflict of interest. Planning Commissioner Croul does not have a conflict of interest based on his commercial property. Commissioner Theim has a conflict of interest in the decision in question based on his business property.

FACTS

On March 9, 1987, City Ordinance No. 87-2 was amended to allow Bed and Breakfast establishments (“B&Bs”) as a principal permitted use in Service Lodging zoned areas and permitted as conditional use in Rural Residential zoned areas and Single-Family Residential zones. In November 8, 1994, through a local measure, the General Plan was amended to prohibit the establishment of new B&Bs in residential neighborhoods.

On July 1, 2014, the City Council, in the context of an application of a former B&B to reopen in a residential zone after a period of discontinuance of the use, determined that the 1994 amendments did not change the code sections that allowed B&Bs in residential zones, and because the applicants had a use permit they could reopen the B&B despite the period of nonuse.

The City Council may now amend the City’s rules regarding B&Bs, in part to clarify the rules for reopening former B&Bs with use permits that have discontinued the B&B use. Nevada City has about six former B&Bs that could be affected – some within 500 feet of the residences of various City elected officials. On January 21, 2015, you provided a proposed interim urgency ordinance and permanent ordinance that the city will consider. The ordinance will do the following:

- Prevent new B&Bs from being established in the residential zones; and,
- Protect existing B&Bs from being discontinued because of periods of inactivity in guest lodging operations, unless the permit is relinquished by the owner, or is revoked by the City according to due process requirements.

Subsequent to 1994, four B&Bs remain in business. Five former B&Bs discontinued operating as B&Bs for various periods. These are:

1. Kendall House at 534 Spring Street
2. Marsh House at 254 E. Broad Street
3. Grand mere’s at 449 Broad Street
4. Bella Rosa aka Downey House at 517 W. Broad Street
5. Flume’s End at 317 South Pine Street.

Of these properties, the Bella Rosa/Downey House has reopened as a B&B (the Broad Street Inn), leaving four former B&Bs with use permits that are not currently operating B&Bs that could be affected by new zoning ordinances that may be considered by the City Council upon recommendation of the Planning Commission.

On February 3, 2015, you stated that of the four B&Bs that have discontinued operation, the Flume's End is now up for sale (as a B&B) and not currently renting rooms as a B&B. The Kendall House was an operating B&B from 1991 until about 2002, after which it was occupied as a single family residence by intermediate purchasers from about 2004 through 2013 without the renting of rooms as a B&B. The current owners who purchased the property in 2013 with the claimed desire to reopen it as a B&B made a request to the City to recommence operation of a B&B under the 1991 conditional use permit that was denied by the Planning Commission, but approved on appeal to the City Council. A lawsuit has been filed by neighborhood opponents challenging that action. Pending resolution of the matter, the owners have occupied the property as a second residence for their family, still wanting to reopen in the future as a B&B.

On January 8 and January 13, 2015, you provided additional facts about your officials' real property interests. The following officials own property in proximity to operating B&Bs.

Councilmembers' Property	Closest B&B	Open	Distance from B&B
Bergman Residence 112 Broad Street	Red Castle Inn B&B 109 Prospect Street	Yes	100 feet (a creek and a steep hill are in between the properties)
Phelps Residence 550 N. Pine Street	Emma Nevada House B&B 528 E. Broad Street	Yes	150 feet

Commissioners' Property	Closest B&B	Open	Distance from B&B
Croul Commercial Property/Long-term Residential Rental Units 203 S. Pine Street	Flume's End B&B 317 S. Pine Street	No	800 feet
Theim Motel 575 E. Broad Street	Emma Nevada House B&B 528 E. Broad Street	Yes	500 feet
	Kendall House 534 Spring Street	Yes	600 feet
Theim Residence 567 N. Pine	Emma Nevada House B&B 528 E. Broad Street	Yes	500 feet
	Kendall House 534 Spring Street	Yes	600 feet
Theim Vacation Rental 1 Cabin Street	Flume's End B&B 317 S. Pine Street	No	100 feet

CONCLUSIONS AND 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 as set forth in Section 87103. (Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest in a given governmental decision.

Step 1 and 2: Are the individuals in question public officials and will they be making, participating in making, or influencing decisions?

It is not necessary to review the first two steps. As a City Councilmembers and Planning Commissioners, the individuals are public officials subject to the Act’s conflict of interest provisions. You ask whether they may make and participate in the decisions on the B&B ordinance

Step 3. What are the officials’ interests?

The Act’s conflict of interest provisions apply only to conflicts of interest arising from certain interests enumerated in Section 87103. Planning Commissioners Croul and Them must consider the following interests.

(1) A business entity in which he or she has a direct or indirect 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));

(2) A source of income, including promised income, which aggregates to \$ 500 or more within 12 months prior to the decision (Section 87103(c), Regulation 18703.3);

Additionally, Councilmembers Bergman and Phelps and Planning Commissioner Croul and Them also own real property.

(3) A public official has an interest in real property in which he or she has a direct or indirect interest of \$2,000 or more.

Steps 5² and 6. Foreseeability and Materiality

Business Interest and Sources of Income: The following business entity/source of income interests are examined:

- Croul Commercial Property/Long-term Residential Rental Units
- Theim Motel
- Theim Vacation Rental

Regulation 18705.1(a) enumerates certain types of involvement in government decisions that result in disqualification. The reasonably foreseeable financial effect of a governmental decision on a business entity is material whenever the business entity:

“(1) Initiates the proceeding in which the governmental decision will be made by filing an application, claim, appeal, or request for other government action concerning the business entity;

“(2) Offers to make a sale of a service or a product to the official's agency;

“(3) Bids on or enters into a written contract with the official's agency;

“(4) Is the named manufacturer in a purchase order of any product purchased by the official's agency or the sales provider of any products to the official's agency that aggregates to \$1,000 or more in any 12-month period;

“(5) Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement that the official's agency is authorized to issue;

“(6) Is the subject of any inspection, action, or proceeding subject to the regulatory authority of the official's agency; or

“(7) Is otherwise subject to an action taken by the official's agency, the effect of which is directed solely at the business entity in which the official has an interest.”

The businesses in question do not fall under any of the enumerated relationships in the list in subdivision (a).

For all other decisions, subdivision (b) applies. Subdivision (b) provides:

² The Commission is currently in the process of revising regulations implementing the conflict of interest provisions of the Act. As part of this revision, the “directly involved/indirectly involved” test in current Step Four has been eliminated for economic interests in real property with surviving elements of the test merged into the materiality test in current Step Five.

“[T]he financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision’s financial effect would contribute to a change in the price of the business entity’s publicly traded stock, or the value of a privately-held business entity. Examples of decisions that may be applicable include those that:

“(1) Authorize, prohibit, regulate or otherwise establish conditions for an activity in which the business entity is engaged;

“(2) Increase or decrease the amount of competition in the field in which the business entity is engaged;

“(3) Increase or decrease the need for the products or services that the business entity supplies;

“(4) Make improvements in the surrounding neighborhood such as redevelopment projects, traffic/road improvements, or parking changes that may affect, either temporarily or permanently, the amount of business the business entity receives;

“(5) Decide the location of a major development, entertainment facility, or other project that would increase or decrease the amount of business the entity draws from the location of the project; or

“(6) Increase or decrease the tax burden, debt, or financial or legal liability of the business entity.”

Commissioner Thiem owns property used for purposes that will directly compete with reopened B&B businesses. In addition, the prohibition on new B&B’s in residential areas could also affect the value of his business. A prudent person would find it is reasonably foreseeable, under the facts presented, that the decision’s impact would increase or decrease the competition in the area for short term vacation rentals, which would have an impact on Councilmember Thiem’s businesses, thereby contributing to a change in the value of the businesses in question. Therefore, Commissioner Thiem has a conflict of interest in the decision in question.

In contrast, Commission Croul owns commercial property and long-term residential rental units. Neither of these businesses is of the type that would compete with the reopened B&Bs. Therefore Commission Croul does not have a conflict of interest based on his business.

Real Property: The facts provided do not indicate any changes in use for currently operating B&Bs. Thus, our analysis is limited to the proposal to allow nonoperating B&Bs to renew operation under the proposed ordinance.

Consequently, Council Members Phelps and Bergman do not have a potential conflict of interest because they own homes near currently operating B&Bs, which are not subject to the decision.

For the same reason, Planning Commissioner Theim's does not have a potential conflict caused by the property he owns as his residence because it is located near currently operating B&Bs, not subject to the decision. However, because Planning Commissioner Theim has a conflict of interest based on his businesses, he would still have a conflict of interest in the decision.

Commissioner Croul does not own residential property near any property subject to the reopening decision. Thus, he will not have a conflict of interest.

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

Sincerely,

John W. Wallace
Assistant General Counsel
Legal Division

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