



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

June 15, 2015

Deb Machen
Planning Commissioner, District Three
City Hall 211 Eighth Street
Seal Beach, CA 90740

Re: Your Request for Advice
Our File No. A-15-090

Dear Ms. Machen:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ This advice applies only to the conflict of interest provisions of the Act and no other general conflict of interest prohibitions such as common law conflict of interest, Section 1090, or incompatible offices pursuant to Section 1099. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

May you participate in Planning Commission decisions involving:

1. The upgrading of a restaurant’s type-41 alcohol license to a type-47 where your business rents an office across the street from the restaurant on a month-to-month basis?
2. The rezoning of and other matters involving property located within 500 feet of your residence that you rent on a month-to-month basis?

CONCLUSIONS

1. Yes. It is not reasonably foreseeable that the decision would contribute to a change in the value of your business.
2. Yes. An official does not have a financial interest in property that the official leases on a month-to-month basis.

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 a member of the Seal Beach Planning Commission. You own a small marketing company that rents office space on a month-to-month basis that is located across the street from a restaurant. The restaurant is licensed to serve beer and wine and is seeking to upgrade its license to permit the serving of distilled liquor. Both licenses apply to “bona fide eating places.” Your office and the restaurant are on Main Street but, unlike the restaurant, your office does not face the street but, instead, is located behind a building that has storefront retail space facing Main Street.

Your residence, which you also rent on a month-to-month basis, is located within 500 feet of property that the Planning Commission will be considering for rezoning and possibly other changes.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her 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 official’s interests. (Section 87103.) Interests from which a conflict of interest may arise are defined in Section 87103 and include the following:

1. Any real property in which the public official has a direct or indirect interest worth \$2,000 or more.

A real property interest includes a leasehold interest in real property. However, Regulation 18233 provides that a periodic tenancy of one month or less is excluded from the Act’s definition of “interest in real property” and “leasehold interest.” Therefore, because you rent your office and residence on a month-to-month basis, you do not have a financial interest in these properties that could give rise to a conflict of interest.

2. Any business entity in which the public official has a direct or indirect investment worth \$2,000 or more, or in which the official is a director, officer, partner, trustee, employee, or holds any position of management.

You are the owner of and hold a management position in your business.

3. 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.

You have a financial interest in your business as a source of income and its clients from whom the business received at least \$500 in the previous 12 months as sources of income.

Foreseeability and Materiality:

Having determined that you do not have a conflict of interest based on real property, we must determine if the decisions will have a material financial effect on your business or sources of income. We must first determine whether it is reasonably foreseeable that the decisions will have a material financial effect on your financial interests. If there is no reasonably foreseeable financial effect, there is no conflict of interest. According to the applicable provision of Regulation 18701, in general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. (Regulation 18701(b).)

Recently amended Regulation 18702.1(a) provides that the reasonably foreseeable financial effect of a governmental decision on a business entity (including a business entity that is a source of income) in which an official has a financial interest 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.

Where, as here, none of the above factors is present, Regulation 18702.1(b) provides that the financial effect is material only 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.” (Regulation 18702.1(b).)

The restaurant already has an alcohol license and seeks only to upgrade the license to add distilled spirits to the types of beverages it can serve. The question then is, what effect, if any, would the upgraded license have on your business. We note that both licenses apply only to “bona fide eating places.” Thus, the character of the applicant’s business will not change as it would, for example, if the upgraded license were to permit the restaurant to become a bar or nightclub. Also, despite the proximity of the restaurant to your office, your office is separated from the restaurant by Main Street and the building in front of your office which, like the restaurant, faces Main Street. You state that most people do not even know that the office space is there. Under these facts, the reasonably foreseeable financial effect on your business would not affect the value of your business and, therefore, would not be material. Accordingly, you may participate in the decision.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl