



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

December 27, 2018

Gary Schons
Best Best & Krieger LLP
655 West Broadway, 15th Floor
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-18-260

Dear Mr. Schons:

This letter responds to your request for advice on behalf of Milpitas City Councilmember Anthony Phan regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Please 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. Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Does the Act prohibit Councilmember Phan from taking part in governmental decisions relating to two forthcoming ordinances affecting the City's cannabis industry given that he has a source of income interest in Pinnacle Strategy, a firm that provides governmental affairs, land use consulting, lobbying, and public relations services to clients, including clients engaged in the cannabis industry?

CONCLUSION

No. The Act does not prohibit the Councilmember from taking part in those decisions because it is not reasonably foreseeable the decisions would have a material financial effect on his source of income interest in Pinnacle Strategy.

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 AS PRESENTED BY REQUESTER

Your firm serves as the City Attorney for the City of Milpitas, and you are the authorized representative of Milpitas City Councilmember Anthony Phan. On November 8, 2016, Californians approved Proposition 64, the “Control, Regulate, and Tax Adult Use of Marijuana Act,” legalizing adult use of cannabis under State law. In response to the passage of Proposition 64, the Milpitas City Council enacted a moratorium on all cannabis uses in the City, in accordance with State law, to ensure the City Council would have time to consider its options for regulating cannabis uses and activities within the City. That moratorium expires pursuant to its own terms on or about January 5, 2019. In light of the forthcoming expiration of the moratorium, the City Council will soon consider two separate ordinances affecting the cannabis industry within the City.

The first ordinance would affect the City’s zoning regulations with respect to cannabis uses. Among other things, this cannabis zoning ordinance would determine the requisite setback for sensitive uses, set forth zoning conditions for the physical establishment of certain commercial cannabis retail uses, and prohibit all other commercial cannabis uses (including all commercial cultivators, manufacturers, testing laboratories, distributors, and microbusinesses). The second ordinance would affect the City’s permitting of businesses related to cannabis uses. This cannabis business permitting ordinance would set forth regulations governing the establishment and operation of certain commercial cannabis retail uses and testing-laboratory uses while prohibiting all other commercial cannabis uses.

Located in Hollister, California, Pinnacle Strategy is a private firm that provides governmental affairs, land use consulting, lobbying, and public relations services to clients dealing with government entities, including cities and the State. The firm operates within a geographic area that includes the City. Although only a portion of its business,² the firm has represented clients engaged in various aspects of the cannabis industry, and provided services to those clients relating to policy decisions affecting the State’s cannabis industry.

Pinnacle Strategy employed the Councilmember as an independent contractor from September 2017 through May 2018.³ The Councilmember has never had any ownership interest in Pinnacle Strategy, or been an officer, director, or employee of the firm. The Councilmember performed work as a subcontractor on two projects the firm had been engaged to consult on, one involving a green energy project and the other a city council campaign. The firm paid the Councilmember approximately \$3,500 for this work, and made its final payment to the Councilmember for this work in May 2018. The Councilmember is not currently associated with, or working as an employee or independent contractor for, Pinnacle Strategy.

² Victor Gomez, a Principal of Pinnacle Strategy, estimates that approximately eight percent of the firm’s revenue is directly or indirectly related to the cannabis industry.

³ Although the Councilmember reported Pinnacle Strategy as a Source of Income on Schedule C of his April 2018 Statement of Economic Interests, portions of that filing were erroneous: the Councilmember mistakenly indicated that he was a “Principal” of the Pinnacle Strategy, and that he only held a business position with the firm and did not receive income from it. In fact, the Councilmember was not a “Principal” of the firm but did receive income from it. You note that the Councilmember will amend and refile his Statement of Economic Interest to correct these errors.

Pinnacle Strategy has not represented any client before the City in connection with the cannabis industry, and does not know if any of its past, current, or future clients will seek to enter the City's cannabis industry.

ANALYSIS

The Act prohibits a public official from making, participating in making, or attempting to use his or her official position to influence a governmental decision that would have a reasonably foreseeable material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) An official's interests that may give rise to a disqualifying conflict of interest are set forth in Section 87103. With respect to decisions relating to the City's forthcoming cannabis ordinances, Councilmember Phan has the following interests based on the facts presented:

- A source of income interest in Pinnacle Strategy under Section 87103(c) because he has aggregated more than \$500 in income from that firm in the 12 months prior to the decisions relating to the cannabis ordinances.
- An interest in his personal finances and those of immediate family members under Section 87103. An official always has an interest in his or her personal finances.

Foreseeability and Materiality

Regulation 18701(a) provides that: a decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is explicitly involved if the interest is a named party in, or the subject of, the decision; and an interest is the subject of a proceeding if the decision at issue involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the interest. Regulation 18701(b) sets forth the foreseeability standard applicable to an official's interest that is not explicitly involved in the decision, and provides that the decision's effect on such an interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

Neither the Councilmember's source of income interest in Pinnacle Strategy nor his interest in his personal finances is explicitly involved in the decisions relating to the cannabis ordinances based on the facts presented.

Regulation 18702.3 sets forth the materiality standards applicable to a decision's effect on an official's source of income interest. If a decision will have a reasonably foreseeable financial effect on an official's source of income interest in a business, Regulation 18702.3(a)(4) provides that materiality is determined pursuant to Regulation 18702.1, which sets forth the materiality standards applicable to a decision's effect on an official's interest in a business entity.⁴ Regulation

⁴ In addition, Regulation 18702.3(c) sets forth the nexus test, an alternative materiality standard potentially applicable to an official's source of income interest. Under this test, "[a]ny reasonably foreseeable effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision." Pinnacle Strategy has not represented any client before the City in connection with the cannabis industry, and does not know at this time

18702.5 sets forth the materiality standard applicable to a decision's effect on an official's interest in his or her personal finances or those of immediate family members. Regulation 18702.5(c), however, provides that materiality is determined pursuant to Regulation 18702.1 when the decision at issue affects the official's interest in a business entity. Thus, we apply Regulation 18702.1 to determine whether the decisions relating to the cannabis ordinances' effect on the Councilmember's interest in Pinnacle Strategy would be material.

Regulation 18702.1(b) provides that a decision's effect on a business entity is material if a reasonably prudent person with sufficient information would find it reasonably foreseeable that the effect would contribute to a change in the value of a privately-held business entity.

Although Pinnacle Strategy has provided services to clients engaged in various aspects of the cannabis industry, it has not represented any client before the City in connection with the cannabis industry, and does not know if any of its past, current, or future clients will seek to enter the City's cannabis industry. Therefore, the facts presented indicate it is not reasonably foreseeable the decisions relating to the cannabis ordinances would contribute to a change in the value of Pinnacle Strategy. Thus, the Act does not prohibit the Councilmember from taking part in those decisions because they would not have a reasonably foreseeable material financial effect on his source of income interest in that firm.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Matthew F. Christy
Counsel, Legal Division

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whether any of its past, current, or future clients will seek to enter the City's cannabis industry. The Councilmember's work on behalf of the firm did not relate to the cannabis industry, and he is no longer associated with or working for the firm. Therefore, the nexus test is not applicable based on the facts presented.