



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

December 10, 2021

Benjamin L. Stock
Burke, Williams & Sorensen, LLP
181 Third Street, Suite 200
San Rafael, CA 94901-6587

Re: Your Request for Advice
Our File No. A-21-150

Dear Mr. Stock:

This letter responds to your request for advice on behalf of City of Foster City (“City”) Councilmembers Sam Hindi and Patrick Sullivan 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.

Finally, the Commission does not provide advice with respect to past conduct. (Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTIONS

1. Is Councilmember Hindi precluded from voting on the minimum wage ordinance because he owns a business within the City and has employees?
2. Is Councilmember Sullivan precluded from voting on the minimum wage ordinance because he owns businesses within the City?

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 18109 through 18998 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.

CONCLUSIONS

1. & 2. No. Neither Councilmember Hindi nor Sullivan are precluded from voting on the proposed minimum wage ordinance because the “public generally” exception applies to any material financial effects that the decision may have on their respective interests.

FACTS AS PRESENTED BY REQUESTER

Councilmember Hindi is the sole owner of a business that operates a gas station, mini market and auto repair facility, which currently has a total of eleven employees. All of his employees are paid above the State minimum wage rate and will be paid above the proposed \$16.00 wage rate in the minimum wage ordinance as of January 1, 2022.

Councilmember Sullivan is the sole owner of a real estate investment business within the City, and also has a 50% ownership interest in a non-profit podcast media company located within the City. He does not have employees in either business.

At the October 18, 2021 City Council meeting, a majority of the City Council formally provided direction for staff to prepare an ordinance establishing a local minimum wage that:

1. Starting January 1, 2022, all employers located in and doing business in Foster City shall pay \$15.50 an hour; and

2. Starting January 1, 2023, all employers located in and doing business in Foster City shall pay \$16.00 an hour.

ANALYSIS

The Act

The Act’s conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision would have a 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 financial interests, which may give rise to a disqualifying conflict of interest under the Act, are identified in Section 87103. The following interests are relevant to the minimum wage decisions at issue here:

- A business entity in which the public official has a direct or indirect investment worth \$2,000 or more. (Section 87103(a).)
- A source of income from which the public official has aggregated \$500 or more in income in the 12 months prior to the decision at issue.² (Section 87103(c).)
- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)

² Income is defined to include a pro rata share of any income of any business entity or trust in which the individual owns, directly, indirectly or beneficially, a 10-percent interest of greater. (Section 82030.)

Here, Councilmember Hindi has a business entity and source of income interest in his business. He may also have economic interests in customers of his business as sources of income if he receives income of \$500 or more from the customer in the 12 months prior to the decision.

Councilmember Sullivan has a business entity and source of income interest in his for-profit real estate investment business. Additionally, Councilmember Sullivan has an economic interest in any client of the business if he receives income of \$500 or more from the client in the 12 months before the decision. Finally, assuming that the Councilmember has received income from the non-profit media company of more than \$500 in the last 12 months, the Councilmember will have a financial interest in the non-profit as a source of income to him as well.³

Foreseeability and Materiality

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. (Regulation 18701(a).) An official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision. (*Ibid.*) An interest is the "subject of a proceeding" if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest. (*Ibid.*) In addition, an official's business interest is explicitly involved in any decision affecting the business as described in Regulation 18702.1(a)(1).

When a decision's effect on an official's interest is not explicitly involved in the decision, then its effect on the official's interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical." (Regulation 18701(b).)

For Councilmembers Hindi and Sullivan, Regulation 18702.1 sets forth the materiality standards that apply to a decision's reasonably foreseeable financial effect on an official's business interest, including a business entity that is a source of income to the official (*see* Regulation 18702.3(a)(4)), and provides that the decision's effect is material if:

- The decision may result in an increase or decrease of the business's annual gross revenues, or the value of the business's assets or liabilities, in an amount equal to or more than \$1,000,000; or five percent of the business's annual gross revenues and the increase or decrease is at least \$10,000. (Regulation 18702.1(a)(2).)
- The decision may cause the business to incur or avoid additional expenses or to reduce or eliminate expenses by equal to or more than \$250,000; or one percent of the business's annual gross revenues and the change in expenses is at least \$2,500. (Regulation 18702.1(a)(3).)

Additionally, for Councilmember Hindi and Sullivan's interest in sources of income to their businesses that are individuals, the materiality standard is provided in Regulation 18702.3(a)(2), which provides a foreseeable effect is material if:

³ Non-profits do not qualify as "business entities" under Section 87103. (*See* Section 82005.)

- The decision may affect the individual's income, investments, or other assets or liabilities (other than an interest in a business entity or real property) by \$1,000 or more; or
- The official knows or has reason to know that the individual has an interest in a business entity that will be financially affected under the materiality standards in Regulation 18702.1.

Finally, for Councilmember Sullivan's interest in his non-profit media company as a source of income, the materiality standard is provided in Regulation 18702.3(a)(3), which provides a foreseeable effect is material if:

- The decision may result in an increase or decrease of the organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or more than \$1,000,000; or five percent of the organization's annual gross receipts and the increase or decrease is \$10,000 or more.
- The decision may cause the organization to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than \$250,000, or one percent of the organization's annual gross receipts and the change is \$2,500 or more.

In this case, Councilmember Hindi's employees are currently paid above the proposed minimum wage, while Councilmember Sullivan has no employees. While these facts suggest there may not be a reasonably foreseeable material financial effect on either business entity, it is unnecessary to make this determination. Likewise, although sources of income to the officials' respective businesses have not been identified, it is unnecessary to make a determination of whether the decision will have a reasonably foreseeable effect on sources of income to the officials. Even assuming it is reasonably foreseeable that the decisions will have a material financial effect on one of the interests, the Councilmembers may take part in the decision under the public generally exception as analyzed below.

Public Generally

A public official who has a reasonably foreseeable and material financial interest in a decision may still participate if the official demonstrates that the financial effect is: (1) not unique to the official's financial interest; and (2) shared by a significant segment of the jurisdiction. (Section 87103; Regulation 18703.) Regulation 18703(a) provides:

A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.

A significant segment of the public includes at least 25 percent of all businesses, non-profit entities, or individuals within the official's jurisdiction. (Regulation 18703(b)(1).)

Here, a minimum wage increase could affect all businesses within the City, or certainly enough to satisfy the 25% threshold. Moreover, there is no indication that the minimum

wage increase would affect the Councilmembers' businesses and clients significantly differently than other businesses in the City. Likewise, none of the facts suggest that there would be a unique effect on sources of income to the respective businesses, whether from a business entity or an individual. Indeed, one Councilmember currently pays more than the proposed minimum wage and the other Councilmember currently has no employees. Based on the facts provided, there are no unique effects on the interests at issue. Thus, the "public generally" exception applies, and the Act does not prohibit the Councilmembers from taking part in the decision.

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

Sincerely,

Dave Bainbridge
General Counsel

A handwritten signature in blue ink, appearing to read "EM Boyd".

By: Erika M. Boyd
Senior Counsel, Legal Division

EMB:dkv