



FAIR POLITICAL PRACTICES COMMISSION

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March 8, 2001

Patrick Whitnell
Assistant City Attorney
City of Milpitas
455 East Calaveras Boulevard
Milpitas, California 95035-5479

**Re: Your Request for Advice
Our File No. A-01-017**

Dear Mr. Whitnell:

This letter is in response to your request for advice on behalf of Milpitas City Councilmember Jose Esteves, and Planning Commissioners Paul Hay, Demetrio Nitafan, Clifford Williams, Evelyn Chua, and Gurdev Sandhu regarding the conflict-of-interest provisions of the Political Reform Act (the "Act")¹. Please note that nothing in this letter should be construed to evaluate any conduct that may have already taken place.

QUESTION

May Councilmember Esteves, and Planning Commissioners Hay, Nitafan, Williams, Chua, and Sandhu participate in the City's consideration of the proposed Specific Plan for the Midtown Area of the City which will address long-range land use and development issues?

CONCLUSION

Councilmember Esteves: Assuming the appraisal is correct and that the council member's real property will not be affected financially, he may participate in the decision.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18996, of the California Code of Regulations.

Planning Commissioner Hay: Commissioner Hay does not have a conflict of interest in the Specific Plan decision.

Planning Commissioner Nitafan: Commissioner Nitafan appears to have a conflict of interest and may not participate in the decision.

Planning Commissioner Williams: Assuming the appraisal is correct and that the commissioner's real property will not be affected financially, Commissioner Williams may participate in the decision.

Planning Commissioner Chua: Commissioner Chua appears to have a conflict of interest and may not participate in the decision.

Planning Commissioner Sandhu: Commissioner Sandhu does not have a conflict of interest in the decision.

FACTS

The City of Milpitas ("City") is a general law city with a population of approximately 62,000. Milpitas is located in northern Santa Clara County. The City is approximately 13.6 square miles in size, of which approximately 23% is zoned for single family residential use.

The City is currently drafting a specific plan for the midtown area to address long-range land use and development issues. The size of the proposed specific plan area is 1,093 acres, which constitutes approximately 12.6% of the City. The Planning Commission and the City Council have previously considered and approved a set of goals for the Midtown area relating to land use, community design, circulation, and implementation measures.

The Conceptual Plan Alternatives report presented three alternatives for changing the general plan designations in the midtown area. These alternatives were chosen with reference to a common circulation framework of transit stations, bicycle and pedestrian pathways, and well-landscaped streets. In addition, each alternative was drafted to provide for a minimum of 2,000 new residential units in the southern portion of the Midtown area. According to the supplemental facts provided by your office on February 12, 2001, the City Council, upon the recommendation of the Planning Commission, chose a combined option which reflected aspects of each of the three alternatives. The selected option would allow for development of 5,020 residential units as compared to 664 under the current General Plan. Further, their option would greatly reduce the amount of square footage for retail/dining, highway retail, and R&D/Light Industrial uses. Lastly, the selected option would allow for greater office development and increased park and open space acreage.

The City's consultant is currently preparing a draft of the Specific Plan. It is expected that the City will adopt the plan within the next 5-7 months. In considering the

adoption of the Specific Plan, the Planning Commission's role is advisory to the City Council. It must hold at least one public hearing on the proposed Specific Plan (Government Code Sections 65453(a) and 65435.) Its recommendation must be made by an affirmative vote of a majority of the Planning Commission's entire membership (Government Code Section 65354). The City Council must adopt the Specific Plan by a majority vote of not less than the Council's entire membership (Government Code Section 65356).

The economic interests of the officials are as follows:

Councilmember Esteves: According to your February 12, 2001 letter, the council member has partial ownership of residential rental property within 40 feet of the boundaries of the Specific Plan area. This is not Councilmember Esteves' primary residence, rather it is income-producing property. You stated that we should assume for purposes of our advice that the council member receives in excess of \$1,000 a year from the tenant. Further, Councilmember Esteves holds a real estate license but does not actively practice as a real estate professional. According to your February 12, 2001 letter, the council member has not participated in any real estate transactions in the past year and has not participated in any sales in Milpitas in the past five years.

Planning Commissioner Hay: Commissioner Hay owns a single-family residence that is his primary residence located more than 500 feet from the boundaries of the Specific Plan area.

Planning Commissioner Nitafan: Commissioner Nitafan owns and operates a real estate brokerage business that lists residential and commercial properties for sale within Milpitas. In addition, he leases office space for his business in the midtown area.

Planning Commissioner Williams: Commissioner Williams owns single-family residence that is his primary residence within 230 feet of the boundaries of the Specific Plan area.

Planning Commissioner Chua: Commissioner Chua is employed as a real estate agent with a real estate firm that lists both commercial and residential properties within Milpitas.

Planning Commissioner Sandhu: Commissioner Sandhu holds a real estate license and is affiliated with a real estate brokerage that lists both commercial and residential properties within Milpitas. According to your February 12, 2001 letter, Commissioner Sandhu has never to date used his real estate license. Commissioner Sandhu has stated that he may become active at some point in the future if he were to be laid off from his current position as an engineer.

Your letter of February 12, 2001, also provided that there are 295 realtors in Milpitas, including Planning Commissioners Nitafan and Chua.

ANALYSIS

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 a standard, eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) The following advice applies that standard analysis.

Steps One and Two. Are the individuals “public officials” subject to the Act’s conflict-of-interest rules and, if they are “public officials,” are they making, participating in making, or influencing a governmental decision?

These first two steps are met under your facts. The Act’s conflict-of-interest provisions apply to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) As a city council member and as planning commissioners, all of the individuals in question are “public officials.” (Sections 82048, 82041). Moreover, all wish to make and participate in the specific plan decisions.

Step Three: What are the public officials’ economic interests?

The Act’s conflict-of-interest provisions apply only to conflicts arising from economic interests. The “economic interests” from which conflicts of interest may arise are defined in Section 87103 and Regulations 18703-18703.5. There are six kinds of such economic interests:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect² investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Regulation 18703.2);
- A public official has an economic interest in any 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);
- A public official has an economic interest in a business entity 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 An indirect investment or interest in real property means, among other things, any investment or interest owned by the official’s immediate family. (Section 87103.)

- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$320 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- A public official has an economic interest in his or her personal finances (expenses, income, assets, or liabilities), as well as those of his or her immediate family. (Section 87103; Regulation 18703.5.)

Real Property Interests: Councilmember Esteves has partial ownership of residential rental property within 40 feet of the boundaries of the Specific Plan area. Commissioner Hay owns a single-family residence that is his primary residence more than 500 feet from the boundaries of the Specific Plan area. Planning Commissioner Williams owns a single-family residence that is his primary residence within 230 feet of the boundaries of the Specific Plan area. Each of these interests constitutes an “interest in real property.”

Commissioner Nitafan leases office space for his business in the Midtown Area. However, you stated that the lease is on a month-to-month basis. Regulation 18233 specifically excludes from the definition of “interest in real property” an interest in a periodic tenancy of one month or less. Thus, Planning Commissioner Nitafan does not have a real property interest in his office lease.

Business Interests: Councilmember Esteves holds a real estate license but does not actively practice as a real estate professional. Planning Commissioner Nitafan owns and operates a real estate brokerage business that lists residential and commercial properties for sale within Milpitas, and provides mortgage brokerage services. Planning Commissioner Chua is employed as an agent with a real estate firm that lists both commercial and residential properties within Milpitas. Planning Commissioner Sandhu holds a real estate license and is affiliated with a real estate brokerage that lists both commercial and residential properties. However, according to your facts, he has never used the real estate license. A license alone is not an “economic interest.” Thus, Commissioners Nitafan and Chua have economic interests in business entities that may be affected by the decision.

Sources of Income: Councilmember Esteves’ rental property is leased, thus, the tenant will be a source of income to the council member. Planning Commissioner Nitafan also presumably has sources of income from his real estate business. Regulation 18703.3(c)(3)(B) provides that the sources of commission income in a specific sale or similar transaction include for a real estate broker:

“(i) The person the broker represents in the transaction;

“(ii) If the broker receives a commission from a transaction conducted by an agent working under the broker's auspices, the person represented by the agent;

“(iii) Any brokerage business entity through which the broker conducts business; and

“(iv) Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.”

Planning Commissioner Chua also presumably receives commission income by virtue of her employment as a real estate agent. Regulation 18703.3(c)(3)(C) provides that the sources of commission income in a specific sale or similar transaction include for a real estate agent:

“(i) The broker and brokerage business entity under whose auspices the agent works;

“(ii) The person the agent represents in the transaction; and

“(iii) Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.”

Please note, for purposes of determining whether disqualification is required, the full gross value of any commission income for a specific sale or similar transaction shall be attributed to each source of income in that sale or transaction.

Step Four: Are the public officials' economic interests directly or indirectly involved in the decision?

Regulation 18704.1(a) provides:

“(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

According to your facts, none of the officials, their business interests, or their sources of income are directly involved in the decision as an applicant or subject of the decision.

However, where an official has a real property interest that is located within 500 feet of property that is the subject of a decision, the real property is considered to be directly involved in the decision. (Regulation 18704.2(a).) Thus, both Councilmember Esteves and Planning Commissioner Williams have an economic interest that is directly involved in the decision.

Steps Five and Six: Will the financial effect of the decision on the public officials' economic interests be material and reasonably foreseeable?

Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests. This determination takes two steps. First, the official must find the applicable materiality standard in Commission regulations. (Regulation 18700(b)(5), Regulation 18705, et seq.) After finding the applicable materiality standard, the official must then decide whether it is reasonably foreseeable that the standard will be met. (Regulation 18700(b)(6).)

An effect is considered "reasonably foreseeable" if the effect is "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made depends on the specific facts surrounding the decision. A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

Directly Involved Economic Interests: As noted above, Planning Commissioner Williams has a real property interest within 230 feet of the subject property. Councilmember Esteves owns rental property 40 feet from the boundaries of the Specific Plan area. Regulation 18705.2 sets forth the materiality standards that apply to economic interests in real property. The materiality thresholds vary depending upon the distance between the official's real property and the real property that is the subject of the decision. Under the regulation, the effect of a decision on real property is presumed to be material if the real property is within 500 feet of the subject property, absent a showing that there will be no financial effect on the value of the real property.

You note in your February 12, 2001, letter that the independent appraisal you provided indicates that despite the close proximity of the properties to the Specific Plan area, the value of the properties will not be affected in any amount, either positively or negatively. If this is the case, the two officials will not have conflicts of interest based on the proximity of their property to the Specific Plan area. Please note that our advice is limited to the facts presented. (Section 83114.) Ultimately, the public official with the potential conflict of interest bears the responsibility of deciding whether a material financial effect is reasonably foreseeable. Evidence that there will be no financial effect

on real property may take the form of an independent appraisal. Such an appraisal may be appropriate evidence on which to rely when determining whether there will be no financial effect on the real property. Reliance on an appraisal immunizes the official only to the extent that such reliance is reasonable at the time of the decision. The actual sufficiency of any appraisal is, of course, a question of fact that the Commission cannot decide. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Real Property Indirectly Involved: Commissioner Hay owns real property more than 500 feet from the subject property. Thus, the Commissioner's property is indirectly involved in the decision. The financial effect of a governmental decision on real property indirectly involved in the governmental decision is presumed not to be material, absent a showing that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the official's property, which make it reasonably foreseeable that the decision will have a material financial effect on the official's property. Specific circumstances that should be considered include, but are not limited to, circumstances where the decision affects:

“(A) The development potential or income producing potential of the real property in which the official has an economic interest;

“(B) The use of the real property in which the official has an economic interest;

“(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.” (Regulation 18705.2(b)(1).)

You have not revealed any specific circumstances regarding the specific plan to rebut the presumption of nonmateriality. The appraisal you submitted also suggests that residential properties will not be materially affected.

Indirectly Involved Business Interests: All of the other officials have economic interests by virtue of being in the real estate profession. However, with respect to both Councilmember Esteves and Commissioner Sandhu, while they both hold licenses, neither is currently active. It does not appear “substantially likely” that they will become active in the real estate field. The mere fact that they hold a real estate license, absent more, does not make a financial effect on these officials foreseeable.

The remaining officials, Planning Commissioners Nitafan and Chua, are currently practicing real estate professionals. The materiality standard applicable to these two officials would be in Regulation 18705.1. For example, if their businesses are not publicly traded and are of relatively small financial size, Regulation 18705.1(c)(4) provides:

“[T]he financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”

Your facts indicate that the effect of the decision in question on the community will be substantial. The Specific Plan area encompasses 1,093 acres, which constitutes approximately 12.6% of the City. The selected option would allow for development of 5,020 residential units as compared to 664 currently authorized under the current General Plan. You argue that the Specific Plan decision is not required before development takes place in the midtown area, the Specific Plan guides the nature and extent of development in the area. While not a decision on a specific development, this decision clearly establishes and fixes the uses that will incur in that area in the future.

On the other hand, neither official will be able to sell new homes from any new development that may subsequently be approved and built. Moreover, you stated that there are 295 realtors in Milpitas, including the two officials. Thus, there is significant competition in the market. However, the dramatic effect of adding 4,356 residential units to the city is “substantially likely” to result in greater sales opportunity to all active realtors, including the officials. Thus, we conclude that it is reasonably foreseeable that these officials will be financially affected. If the foreseeable effect reaches the applicable thresholds in the regulation, a conflict of interest will exist.³

Indirectly Involved Sources of Income: You have not provided us with sufficient information to evaluate potential effects on sources of income to the various officials. For example, Councilmember Esteves’ rental property is leased, thus, the tenant (or tenants) will be a source of income to the council member. Planning Commissioner Nitafan and Chua also presumably have sources of income from their real

³ You note that Commissioner Nitafan has no current intention to expand his business to take advantage of the new development in the city. This is a factor that may be considered, but is not determinative. This is not like the situation in the *Teasley* Advice Letter, No. A-97-545(a), where the official renounced any business in the subject area.

estate practices. The materiality standard applicable to sources of income indirectly involved in a decision is in Regulation 18705.3(b):⁴

“The effect of a decision is material as to an individual who is a source of income to an official if any of the following applies:

“(A) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

“(B) The decision will affect the individual's real property interest in a manner that is considered material under Title 2, California Code of Regulations, sections 18705.2(b).”

Step Seven:⁵ The “Public Generally” Exception.

Commissioner Nitafan and Chua both have potential conflicts of interest in the decision in question. There are two public generally exceptions that may apply to these officials. Regulation 18707.1(b)(1)(C) provides:

“Business Entities. For decisions that affect a business entity in which a public official has an economic interest the decision also affects 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession. For purposes of this subdivision, a not for profit entity other than a governmental entity is treated as a business entity.”

Regulation 18707.7(b) provides:

“In the case of any other official, an industry, trade, or profession constitutes a significant segment of the public generally if that industry, trade, or profession is a predominant industry, trade, or profession in the official's jurisdiction or in the district represented by the official. An industry, trade, or profession that constitutes fifty percent or more of business entities in the jurisdiction of the official's agency or the district the official represents is a ‘predominant’ industry, trade, or profession for purposes of this regulation. For purposes of this subdivision, a not for profit entity other than a governmental entity is treated as a business entity.”

⁴ If the source of income is a business entity, apply the materiality standards stated in Regulation 18705.1. If the source of income is a nonprofit or governmental entity, apply Regulation 18705.3(b)(2).

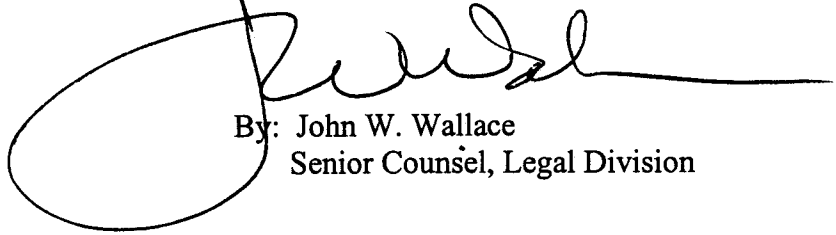
⁵ We are not discussing the eighth step in the analysis, legally required participation, because your facts do not indicate that that specific exception applies.

We do not have information suggesting that either of these exceptions apply to the officials in question. Thus, we must leave this determination to you.

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

Sincerely,

Luisa Menchaca
General Counsel

A handwritten signature in black ink, appearing to read "John W. Wallace", written over the typed name and title.

By: John W. Wallace
Senior Counsel, Legal Division

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