



## FAIR POLITICAL PRACTICES COMMISSION

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March 21, 2003

John B. Fisher  
Fisher Automotive Parts Co.  
5430 Dunsmuir Avenue  
Dunsmuir, CA 96025

**Re: Your Request for Informal Assistance  
Our File No. I-03-001**

Dear Mr. Fisher:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Since your request does not identify a specific decision or proceeding and seeks our general guidance, we are treating your request as one for informal assistance.<sup>2</sup> Our informal assistance is based on the facts presented; the Fair Political Practices Commission ("Commission") does not act as a finder of fact when it provides informal assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTION

Does your ownership of Fisher Automotive Parts Company, a locally situated automobile parts store that has been doing business with the City of Dunsmuir on an "at will" basis for approximately 20 years, create a conflict of interest disqualifying you in your capacity as a member of the Dunsmuir City Council from making, participating in making, or influencing the decisions of the City Council?

### CONCLUSION

A public official will have a conflict of interest disqualifying the official from making, participating in making, or influencing a decision of his or her agency if the decision will have a reasonably foreseeable material financial effect upon one or more of

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3), copy enclosed.)

the official's economic interests. Thus, without specific facts, we cannot advise you whether you have a conflict of interest in any governmental decision. However, we can offer you a general overview of the Commission's conflict-of-interest regulations that might apply at the time you are called upon as a city council member to make a specific decision.

### FACTS

You were elected to the Dunsmuir City Council ("City Council") in the past November election. The City of Dunsmuir ("City") is a small town with a population of approximately 1,900 people, located in a remote location of Northern California.

You are the owner of an automobile parts store, Fisher Automotive Parts Company ("Fisher Automotive"), located in the City. You also own the real estate and building where your business is located. Fisher Automotive has been doing business with the City for approximately twenty years. There are no contracts between the City and your business and the City purchases automobile parts on an "at will" basis, similar to the 30-day charge accounts that your business has with CalTrans, the U.S. Forest Service, and a number of other agencies.

As a new council member, you are seeking assistance regarding any possibility of a conflict of interest, or any other ethical problems that may arise, concerning your ownership of this business while holding public office.

### ANALYSIS

Section 87100 prohibits a 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 an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest (regulation 18700, subdivisions (b)(1) - (8)), which is discussed below. The general rule, however, is that a conflict of interest may occur whenever a public official makes, participates in making, or influences a governmental decision which may materially affect one or more of his or her economic interests.

#### 1. Are you a public official?

The conflict-of-interest provisions of the Act pertain only to public officials. A public official includes "every member, officer, employee or consultant of a state or local government agency..." (Section 82048; regulation 18701(a)(1).) As an elected member of the City Council, you are a public official, subject to the Act's conflict-of-interest provisions.

**2. Will you make, participate in making, or influence a governmental decision?**

A conflict of interest may exist only if an official will make, participate in making, or use his or her official position to influence a governmental decision. Generally, a city council action requiring a vote of its members will be a governmental decision. Regulations 18702.1, 18702.2, and 18702.3 describe, respectively, when a public official makes, participates in making, or uses his or her official position to influence a governmental decision. Certain exceptions are listed in regulation 18702.4 (a copy of which is enclosed).

**3. What are your economic interests?**

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. These economic interests are described at regulations 18703.1 through 18703.5, inclusive. Insofar as it pertains to the facts you provide, your economic interests are described below.

Fisher Automotive is a business entity that is an economic interest to you by virtue of your ownership and because you have an investment interest in this business that is presumably worth \$2,000 or more. (Regulation 18703.1.) Your business is also an economic interest to you because it is a source of income aggregating \$500 or more over any given 12-month period. (Regulation 18703.3.)

Since you own a 10% or greater interest in this business, absent application of the "public generally" exception discussed later in this letter, customers who are sources of income to Fisher Automotive are also considered to be sources of income to you. (Section 82030(a).) You indicate that the City does business with Fisher Automotive. Since this income from the City is not derived from salary, but from the sale of goods or services, the "government salary" exception at section 82030(b)(2) does not exclude the City from being a source of income to you.<sup>3</sup>

Presumably your interest in the real property where Fisher Automotive is located has a fair market value of \$2,000 or more. If such is the case, this real property is also an economic interest to you. (Regulation 18703.2.)

**4. Are these economic interests directly or indirectly involved in the decisions?**

*Business Entity/Source of Income:* A person, including a business entity or source of income, in which a public official has an economic interest is directly involved in a governmental decision if that person, either directly or by an agent initiates a proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or is the subject of a proceeding before the official or the official's agency. (Regulation

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<sup>3</sup> You indicate that CalTrans, the U.S. Forest Service, the City and "a number of other agencies" do business with Fisher Automotive.

18704.1(a)(1)-(a)(2).) A business entity or source of income is the subject of a proceeding concerning a decision before the official or the official's agency if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the business entity or source of income. (Regulation 18704.1(a)(2).)

*Real Property:* A public official's real property is considered to be "directly involved" in the decisions listed at subdivisions (a)(2) - (a)(6) of regulation 18704.2 (copy enclosed). In addition, pursuant to subdivision 18704.2(a)(1), a public official's interest in real property is considered directly involved in a decision if any part of the official's real property is located within 500 feet of the boundaries of real property that is the subject of a governmental decision. If the public official's interest in real property is not directly involved in the governmental decision, it is deemed to be indirectly involved.

**5. & 6. What is the applicable materiality standard and is it reasonably foreseeable that the financial effect of a governmental decision on the economic interest in your business's real property will meet this materiality standard?**

*Materiality:* Not all governmental decisions by a public official which impact his or her economic interests give rise to a conflict of interest. It is when the reasonably foreseeable impact on his or her economic interests is "material" (or important) that a conflict may arise. Different financial effects are considered material, depending upon the nature of the economic interest and whether that interest is directly or indirectly involved in the governmental decision. The thresholds which define a material financial effect are found in regulations 18705.1 through 18705.5 (copy enclosed).

When the public official's economic interest is a business entity or an interest in real property that is directly involved in a governmental decision, it is presumed that the financial effect of the decision will be material. (Regulations 18705.1(b) and 18705.2(a).) When the public official's economic interest is a source of income to that official, if the source of income is directly involved in the governmental decision and that decision will have any financial effect at all, even one penny, upon that source, it is considered material. (Regulation 18705.3(a).)

The materiality standards for economic interests that are indirectly involved are different than those standards applicable when a public official's economic interests are directly involved in a governmental decision. For instance, when Fisher Automotive, both as a business entity in which you have investment and ownership interests, and as a source of income to you, is indirectly involved in a governmental decision, the applicable materiality standards are found at regulation 18705.1(c)(4):

“(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."

When a source of income to you is either a non-profit entity (including governmental entities) or an individual, and it is indirectly involved in a governmental decision of the City Council, the applicable materiality standards are found at subdivisions 18705.3(b)(2) and (b)(3), respectively.

It is presumed that a governmental decision will not have a material financial effect upon a public official's interest in real property when that interest is indirectly involved in a governmental decision. (Regulation 18705.3(b)(1).)

In addition to the foregoing, a public official may have a conflict of interest in any decision foreseeably resulting in an increase or decrease in the personal expenses, income, assets or liabilities of the official or his or her immediate family, in the amount of \$250 or more over a 12-month period. (Regulation 18705.5(a).) When considering the effect on an official's personal finances, the effect on an investment interest in a business entity or on the value of real property are excluded. (Regulation 18705.5.)

*Foreseeability:* Under regulation 18706, an effect upon economic interests is considered reasonably foreseeable if there is a substantial likelihood that it will occur. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) In determining whether a governmental decision will have a reasonably foreseeable material financial effect on an economic interest, an official may consider, among other relevant facts, the factors listed in regulation 18706(b).

#### **7. & 8.: The "Public Generally" and "Legally Required Participation" Exceptions.**

An official who otherwise has a conflict of interest in a decision may still participate under the "public generally" exception. This exception applies when the financial effect of a decision upon a public official's economic interests is substantially similar to the effect on a significant segment of the public.

#### *Source of Income - Governmental Agencies as Customers of Fisher Automotive*

As noted above, you may as a City Council member be asked to participate in decisions that may have a reasonably foreseeable material financial effect upon the City which, as a customer of the business you own, is a source of income to you. Regulation 18707.1(b)(1)(D) is a specialized form of the public generally exception applicable to government entities in which a public official has an economic interest. It reads:

“(D) Governmental Entities. For decisions that affect a federal, state or local government entity in which the public official has an economic interest, the decision will affect all members of the public under the jurisdiction of that government entity.”

The “Comment” section of regulation 18707.1 explains in this regard: “[t]he term ‘affect all members of the public’ is intended to cover decisions affecting the public in general but to exclude decisions which uniquely benefit a public official.”

Thus, if a governmental decision you will be involved in as a member of the City Council will have a reasonably foreseeable material financial effect on the City, the “public generally” exception may apply, as long as all members of the public in your city are affected and you do not uniquely benefit from that decision.

*Source of Income - Other Customers of Fisher Automotive*

Section 87103.5 of the Act (copy enclosed) contains a special “public generally” exception that applies with respect to retail business entities engaged in the sale of goods or services. This section was amended (Assembly Bill No. 2366), effective January 1, 2003, with the addition of provisions applicable solely to retail business entities located in a small jurisdiction having a population of 10,000 or less, which is located in a county with 350 or fewer retail businesses. (Section 87103.5(b).) Under this amendment, when the retail customers of a business entity in which a public official has a 10-percent or greater ownership interest collectively constitute a significant segment of the public, no one customer of that business is considered to be a source of income to the public official unless the customer provides income to that business exceeding one percent of the gross sales revenues earned by the business during the 12 months prior to the time the governmental decision is to be made.

Regulation 18707.5 implements section 87103.5 and the “public generally” exception provided for in that section. However, regulation 18707.5, as currently in effect, does not yet take into account these recent legislative changes to section 87103.5.<sup>4</sup> Nevertheless, these legislative changes to section 87103.5 are in effect and public officials serving in small jurisdictions, as defined in new section 87103.5(b), may seek to avail themselves of this small jurisdiction “public generally” exception when they have an ownership interest in a retail business entity located in a small jurisdiction. You should contact us if you need further assistance in applying this exception.

Step eight is an exception that applies when the official is legally required to participate in the decision. Typically, this exception is invoked when the participation of a public official with an otherwise disqualifying conflict of interest is required in order to assemble a quorum of the public agency.

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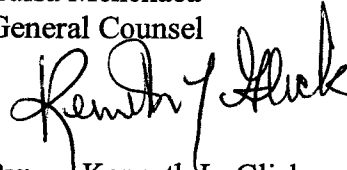
<sup>4</sup> The Commission’s workplan tentatively calls for consideration of conforming amendments to regulation 18707.5 during the fall of this year.

These exceptions are narrow and are highly fact dependent. You may wish to write to us for further advice if you believe the exceptions apply to permit your involvement in a particular governmental decision faced by the City Council.

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 "Kenneth L. Glick". The signature is written in a cursive style with a large initial "K".

By: Kenneth L. Glick  
Counsel, Legal Division

Enclosures  
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