



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 2, 2015

Anthony P. Condotti
Atchison, Barisone, Condotti & Kovacevich
Office of the City Attorney
333 Church Street
Santa Cruz, CA 95060

Re: Your Request for Advice
Our File No. A-15-198

Dear Mr. Condotti:

This letter responds to your request for advice on behalf of Capitola City Councilmember Dennis Norton 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. 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.)

QUESTION

May Councilmember Norton, a building designer and contractor, participate in decisions regarding amendments to the city's Zoning Code that would (i) impose new restrictions on the construction of professional and medical offices along 41st Avenue, (ii) modify the requirements for secondary dwelling units, or (iii) change the maximum building heights requirements for properties zoned as "Single Family Residential"?

CONCLUSION

Yes. It is not reasonably foreseeable that these decisions will materially affect Councilmember Norton's financial interests.

FACTS

You are the city attorney for the City of Capitola and you write on behalf of Councilmember Norton who is a building designer and general contractor. About 20% of Councilmember Norton's

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.

work is for properties located in Capitola. Approximately 90% of all his work is in single family residential property, with 80% in remodels and 20% in new construction.

The city is in the process of a fairly comprehensive update of its zoning regulations covering a broad range of topics that will come before the City Council. The Planning Commission has developed a list of 18 areas of the Zoning Code for potential amendment, with various options for each.

You stated that it is not expected that the overall amount of development in the city would be affected by the selection of one option over another and, concomitantly, affect the demand for architectural or design services. It is possible, however, that the changes to the Zoning Code listed below could affect the number of building permits issued by the city. However, it would be speculative to say whether the changes would affect the demand for architectural or design services. For example, you stated that it would be pure conjecture to say that the reduction of rear yard setbacks in the R-1 (single-family residential) zoning district would create an influx of new building permits, and whether such influx would increase the demand for architectural and design services. It is possible that some of the changes may:

- Impose new restrictions on the construction of professional and medical offices along 41st Avenue for the purpose of discouraging the building of such offices in prime retail areas.
- Modify the requirements for secondary dwelling units by, for example, decreasing the minimum lot size requirements, increasing the threshold that triggers Planning Commission review, allowing all secondary dwelling units to be approved through an administrative process, eliminating the current residency requirement or otherwise amending the code to encourage development of additional secondary dwelling units in specific areas of the city.
- Eliminate an exception to the maximum building heights requirement in the R-1 "Single Family Residential" zoning district for certain types of buildings or allow greater variation based on existing neighborhood character.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or in any way using his or her position to influence a governmental decision in which the official has a financial interest. A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest.

Interests from which a conflict of interest may arise are defined in Section 87103. Those interests implicated by your account of the facts are the following:

- A business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which he or she is a director,

officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)

- A source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c).)

Councilmember Norton has an interest in his business as a business entity and a source of income. Income of an individual also includes a pro rata share of the income of a business entity in which the individual or spouse owns, directly, indirectly or beneficially, a 10 percent interest or greater. (Section 82030(a).) Thus, a client of Councilmember Norton's business from whom the business receives or is promised \$500 or more is a source of income to Councilmember Norton.

Foreseeability

Regulation 18701(b), as applied to the councilmember's interests in his business, provides that a financial effect is reasonably foreseeable only if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.²

Materiality

Generally, as applied to the councilmember's interests in his business, the reasonably foreseeable financial effect of the subject decisions is material 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)³

The decisions at issue involve amendments to the Zoning Code that will impact the building criteria and permissible uses for various zoning districts. You state that some of these changes could increase or decrease the number of building permits issued by the city but that any attempt to gauge the effect, if any, on the demand for architectural or design services would be speculative. In addition, even if the future effects could be estimated, there is no way to determine how Councilmember Norton's business would be affected where he receives only 20% of his business from property located within the city.

To the extent that no specific client of the councilmember's business is implicated by the decision, we generally find that any effects of the zoning decisions described are purely

² There is a different test where an interest is explicitly involved in a decision, which does not apply to the Councilmember's business because the business is not a named party in or subject of the decision. (See Regulation 18701(a).)

³ We also use this standard for sources of income that are business entities where the income the official receives is from the sale of goods or services. (Regulation 18702.3(a)(4).) Thus, for decisions affecting clients of Councilmember Norton's business that are business entities, this standard would be used to determine whether the foreseeable financial effect on the client is material.

hypothetical at this time. Accordingly, we do not find the effects, if any, of the decisions to be reasonably foreseeable. Moreover, even if the effects were reasonably foreseeable, it would be speculative to say that the effects would meet the materiality standard of contributing to a change in the value of Councilmember Norton's business. Accordingly, Councilmember Norton is not prohibited by the Act's conflict of interest provisions from participating in the zoning decisions provided that no specific client of the councilmember's business is implicated by the decision.⁴

We also note that each governmental decision must be analyzed independently to determine whether there will be a conflict of interest. In the future, as each decision regarding a particular zoning change comes before the city council, Councilmember Norton will need to determine whether he has a disqualifying conflict of interest as to that decision.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jg

⁴ You have not identified any clients of Councilmember Norton's business that may be affected by the decisions to amend the Zoning Code. To the extent a specific client is implicated by the decision, we are unable to determine whether the zoning amendments in question will have a reasonably foreseeable effect on the councilmember's business or the client. If a decision implicates a specific client, the councilmember should seek further advice identifying the client and the effect on the client. For example, if a source of income is affected by the decisions, Councilmember Norton will need to determine whether any effect on the source is reasonably foreseeable and material. Moreover, if a prospective client has indicated to Councilmember Norton that the client will use his services if a zoning amendment is made, a decision regarding the zoning amendment may have a reasonable foreseeable material effect on the Councilmember's interest in his business, thereby disqualifying the councilmember from the decision.