



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 26, 2017

Bradley W. Sullivan
City Attorney
City of Hollister
375 Fifth Street
Hollister, CA 95023

Re: Your Request for Informal Advice
Our File No. I-17-036

Dear Mr. Sullivan:

This letter responds to your request for advice on behalf of City of Hollister Councilmember Karson Klauer regarding the conflicts of interest provisions of the Political Reform Act (the "Act").¹

Please note that we only provide 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. We are not a finder of fact when rendering assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any assistance we provide assumes your facts are complete and accurate. Given that your questions are general in nature, we treat your request as one for informal assistance.²

QUESTION

Does Councilmember Karson Klauer have a disqualifying conflict of interest under the Act in the approval of subdivisions given that he may later represent the buyer in a resale of one of the properties located within the subdivision at some point in the future?

CONCLUSION

No. The presence of intervening events between the City Council's decisions and Councilmember Klauer's receipt of income as a real estate agent renders any potential disqualifying interest not reasonably foreseeable at the time of the decisions.

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) Advice provided relates only to future acts; we make no comment as to any past acts of the public official. (Regulation 18329(b)(8).)

FACTS

Councilmember Klauer is an independent contractor with Nino Real Estate, Inc., where he earns income. Although Mr. Klauer is a licensed California real estate broker, his job is as a real estate agent, with clients in Hollister and San Benito Counties. His job will provide him with income of \$500 or more within the 12 months prior to any governmental decision.

As part of the Councilmember's job responsibilities, he votes on the approval of subdivisions of land within the jurisdiction of Hollister. The vast majority of the subdivisions are comprised of raw, undeveloped lands. Commonly, the City Council votes on these unimproved subdivisions. Then, the City Engineer approves the construction of roads and infrastructure improvements on the subdivisions. The building inspector then approves the plans before construction commences. The time elapsed between subdivision approval and the commencement of construction on these lands ranges from months to years. Following construction of the homes, the developer sells them to the buyers. The original buyers may choose to later sell their homes, at which point the Councilmember may get involved in the transaction.

Councilmember Klauer does not represent the builder in the initial sale of subdivision homes or lots. Although, he may later list, sell, or assist buyers in the purchase of resale homes or lots. Neither Nino Real Estate, the home buyer, or any referral source of the real estate transaction is ever explicitly involved in the subdivision approval decisions.

The Councilmember does not have a preexisting business relationship with any of the developers such that he should reasonably anticipate representing a buyer of a home on a subdivision improved by a developer. In the rare situations when there are existing homes on the subdivisions, the Councilmember never knows the home owners prior to the Council's vote.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001 (b).) Specifically, Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. Interests from which a conflict of interest may arise are defined in Section 87103 and include the following:

- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

Income is defined in Section 82030(a), which provides:

“Income means, except as provided in subdivision (b), a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of

indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse. Income also includes an outstanding loan.”³

Note that Regulation 18701.1 provides that:

“Possession of a real estate sales or brokerage license, or any other professional license, without regard to the official's business activity or likely business activity, does not in itself make a material financial effect on the official's economic interest reasonably foreseeable.”

Thus, a public official does not have a conflict of interest merely by being a real estate professional. Rather a conflict of interest only exists if the decision in question will foreseeably and materially affect the official's interest. However, a “source of income” in a real estate transaction includes several parties. The receipt of “commission income,” which can create a disqualifying interest, requires the analysis of several parties.

Under Regulation 18700.1(c)(1), “commission income” means gross payments received by a public official as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. Regulation 18700.1(c)(2)(C) provides the following: “[t]he 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) [t]he person the agent represents in the transaction;⁴ and (iii) [a]ny 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.”⁵ Thus, Nino Real Estate, Inc., the individual buyers that Councilmember Klauer assists in the resale of the homes or lots, and any other referral source of the transaction to Nino Real Estate or him constitute sources of commission income.

Foreseeability:

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. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably

³ Please note that none of the exceptions to “income” under Section 82030(b) apply to Councilmember Klauer using the facts that you have presented.

⁴ If a broker represents only the seller, the seller, but not the buyer, is a source of commission income to the broker. The intent of the regulation is to attribute commission income to the person or persons in the transaction who have a direct connection with the broker. (Christiansen Advice Letter, No. I-87-049.) In real estate transactions in which the Councilmember receives \$500 or more in commission income as a result of a multiple service listing, but the Councilmember is not the broker responsible for the sale, we also assume the Councilmember is one of the brokers who has entered into an agreement with the seller to list the property. Consequently, if the Councilmember derives commission income from the transaction, the Councilmember will have received commission income for representing the seller.

⁵ Each governmental decision must be analyzed separately to determine whether the Councilmember has a conflict of interest.

foreseeable.⁶ The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision.

On April 19, 2017, you informed me that neither Nino Real Estate, Inc., the buyers Councilmember Klauer will eventually assist, nor the referral sources to Nino Real Estate or Councilmember Klauer are ever explicitly involved in the decision before the City Council. Thus, the Councilmember's financial interest is not explicitly referenced during the decisions.

In determining whether a governmental decision will have a reasonably foreseeable financial effect on a non-explicit financial interest, the following factor should be considered:

- (1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

Your facts indicate that many intervening events must occur prior to the City Council's approval of the development of subdivisions for Councilmember Klauer to later profit from the resale of a home contained within one of the approved subdivisions. Specifically, once the Council votes on the development of a subdivision, the City Engineer must approve the attendant infrastructure, the building inspector must approve the construction plans, the homes must be constructed, the developer initially sells the homes, and the buyers must purchase the homes. Only after a home has been purchased from the developer, and the buyer later decides to sell the home, would the Councilmember potentially represent a subsequent buyer as a real estate agent. This chain of events breaks the link of foreseeability that the effect of the decision has on the Councilmember's financial interest. Therefore, there is no reasonably foreseeable material financial effect upon the Councilmember's financial interest as a result of the Council's subdivision decisions and he may participate.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Ryan P. O'Connor
Counsel, Legal Division

RPO:jgl

⁶ Regulation § 18701(b)