

CITY OF NAPA
INTER-OFFICE MEMORANDUM

TO: PLANNING COMMISSIONER WADE G. WOODWARD

FROM: THOMAS B. BROWN, CITY ATTORNEY
BY: LYNDA MILLSPAUGH, ASSIST. CITY ATTORNEY

RE: POLITICAL REFORM ACT REQUIREMENTS

DATE: FEBRUARY 28, 2000

This is in response to your recent telephone inquiry in which you asked for advice regarding your ability to participate in making decisions as a Planning Commissioner. (City Attorney Log No. 99-041.)

FACTS:

You have indicated that you work for St. John's Roofing ("Roofing Contractor") and you own a 10% interest in this business. The Roofing Contractor has net revenues of approximately \$4,000,000.00 per year, of which 3% to 5% is derived from work within the City of Napa; approximately half of the income generated from within the City of Napa is from remodel or other ministerial projects which do not come before the Planning Commission, while the other half is from new construction associated with a discretionary permit within the jurisdiction of the Planning Commission. The Roofing Contractor leases property located in the City of Napa from St. John Land and Cattle, a company in which you have no interest but which is wholly owned by the husband and wife who also own 80% of the Roofing Contractor. You own a home within the City limits.

ISSUES:

1. May you participate in the deliberation and vote on projects where (a) the Roofing Contractor has no known connections with the project before the Planning Commission but may later bid on a roofing (sub)contract, or (b) the developer or contractor engaged for the project generally uses the services of the Roofing Contractor.

2. Under what circumstances may you participate in the deliberations and vote on projects given your ownership of a home in the City of Napa and the leasehold interest of the Roofing Contractor.

CONCLUSION:

1. You may participate in and vote on projects before the Planning Commission where there is no connection between the Roofing Contractor and the project proponent. However, in the event the Roofing Contractor has generally been engaged by the applicant for the project (or a contractor already engaged for the project), then you may have to abstain if the effect on the Roofing Contractor is "material" under the rules set forth herein. In addition, as described below you will have to abstain in the event it is reasonably foreseeable that a decision of the Planning Commission would have a material financial effect on either St. John's Land and Cattle or clients from whom the Roofing Contractor has received \$2,500.00 or greater in the preceding twelve (12) months.

2. Both your residence and the Roofing Contractor's leasehold interest are "interests in real property" under the Political Reform Act, and you must abstain from participating or voting if it is reasonably foreseeable that the decision will have a material financial effect on either interest. The rules governing these determinations are set forth below.

DISCUSSION:

At the outset, it is important that you understand that this office has no statutory duty or authority under the Political Reform Act to provide Political Reform Act advice to any Councilmember or member of an advisory body. You may not rely upon any assistance provided by this office with immunity from FPPC enforcement or prosecution. Further, you enjoy no privilege of attorney/client confidentiality in reviewing these matters with the City Attorney. In the event that facts come to our attention which lead us to believe that you should disqualify yourself from participation in a decision, we will publicly advise the Planning Commission of our belief that you should disqualify yourself. Finally, if, after receiving the assistance provided by this memorandum, you wish to participate in the decision-making process with immunity from prosecution or enforcement, this office will assist you in making direct contact with the FPPC for informal or formal advice upon which you can rely.

The Political Reform Act ("Act"), adopted as a 1974 statewide initiative measure, is set forth in Government Code Section 87000, *et seq.*¹ Section 87100 prohibits public officials from making, participating in or using their official position to influence a government decision in which they know or have reason to know they have a financial interest. Planning Commission members are public officials within the Political Reform Act, Section 82048.

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect distinguishable from its affect on the public generally, on the official or on a member of the official's immediate family or on any of the following:

A. Any business entity in which the public official has a direct or indirect investment worth \$1,000.00 or more.

B. Any real property in which the public official has a direct or indirect interest worth \$1,000.00 or more.

C. Any source of income other than gifts and loans by a commercial lending institution during the regular course of business on terms available to the public without regard to official status, aggregating \$250.00 or more within the past 12 months.²

D. Any business entity in which the public official is a director, officer, partner, trustee, employee or holds any position of management.

E. A donor or agent for a donor of gifts or gifts aggregating more than \$250.00 in value provided to receive by or promise to the public official within the past 12 months (the amount of the value of the gift specified are adjusted biannually by the Fair Political Practices Commission and is now set at \$300.00).

If one of the above may be affected by a decision of the Planning Commission, a Planning Commissioner must determine whether the effect of the decision is both reasonably foreseeable and material with respect to each economic interest identified above. If both questions are answered in the affirmative, you will have a financial interest in the decision.

In the event it is determined that you have a financial interest in a decision, you are prohibited from making, participating in making or using your position to influence a government decision.³ As soon as

¹ All references are to the Government Code unless otherwise noted.

² The "source of income" economic interest is sometimes confused with the so called "personal financial effect" rule, in that a potential conflict may result whenever the amount of the official's income is affected or the source of the official's income is affected, even if the decision has no effect upon the amount of income received by the official from that source. (See, e.g., Witt v. Morrow (1977) 70 Cal.App.3d 817.)

³ A public official makes a government decision or participation in the making of a government decision whenever the public official votes on a matter, commits the agency to a course of action or enters into any contractual agreement on behalf of the agency. (2 Cal.Code of Regs. §18700(b).) Additionally, a public official participates in a government decision when, acting within the authority of his/her position, the public official negotiates with a

the item is called on the Planning Commission agenda, you should make your conflict of interest known. You must disclose for the record the specific financial interest, e.g., source of income, real property, etc., that causes the disqualification, and you should indicate that it is reasonably foreseeable that this interest will be materially affected by the decision. You should state that you will abstain from participation in the decision and then recuse yourself by stepping off the dais where the Planning Commissioners sit. You may leave the room or you may take a seat in the audience. After the conclusion of the item, you may retake your seat along side the other Commissioners.

With the exception of the Roofing Contractor which is both a business entity and a source of income to you, I have addressed each business entity, source of income and real property interest separately.

1. The Roofing Contractor:

There can be no doubt that you have a financial interest in the Roofing Contractor within the meaning of Section 87103, since it is a business entity in which you have an investment worth more than \$1,000.00; it is also a source of income to you of more than \$250.00 per year. Accordingly, the only elements in question with respect to your participation and decision making are the foreseeability and materiality issues.

The effect of a decision is reasonably foreseeable if there is a substantially likelihood that it will occur. To be foreseeable, the affect of the decision must be more than mere possibility, although certainty is not required. (Downey Cares v. Downey Community Development Commission (1987) 196 Cal.App.3d 983, 989-991; Witt v. Morrow (1977) 70 Cal.App.3d 817; see also Smith v. Superior Court of Contra Costa County (1994) 31 Cal.App.4th 205.) The Political Reform Act seeks to prevent more than actual conflicts of interest; it seeks also to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra 70 Cal.App.3d 817 823.

Where the Roofing Contractor has no present connection with the project before the Planning Commission, although the Roofing Contractor may later bid on the contract, I do not find, on these facts alone, that any financial effect on the Roofing Contractor is reasonably foreseeable. (In re Thorne (1975) 1 FPPC Ops. 198.) This conclusion is reinforced by the limited amount of work of the Roofing Contractor in the City of Napa. However, in the event the developer or the contractor engaged for the project generally uses the services of the Roofing Contractor, while there is no certainty that the Roofing Contractor will receive the business, there is a high probability that it will and, therefore, even though there is no agreement express or implied, there is a sufficient likelihood that the Roofing Contractor will receive business to make the financial effect "reasonably foreseeable." (In re Thorne (1975) 1FPPC Ops. 198.) In this situation you must determine if the financial effect is also "material" in order to decide whether you may participate in the decision.

Whether the financial effect is "material" depends, in turn, on whether the business entity or source of income (here, the Roofing Contractor) is directly or indirectly affected by the decision. Under the FPPC regulations, a business entity or source of income is deemed to be directly involved in the decision only when the entity or source either initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or the subject of, the proceeding concerning the decision before the public official. (2 Cal.Code of Regs. §18704.1, a copy of which is attached hereto.) In such event, any reasonably foreseeable effect is deemed material.

Assuming the Roofing Contractor is not itself seeking any City approval or is otherwise a named participant in any proceeding before the City and, thus, will not be "directly" affected by the decision-making process, the materiality standard for indirectly involved business entities and sources of income must be applied. (2 Cal.Code of Regs. §§18705.1(b) and 18705.3(b)(1), a copy of each regulation is attached hereto.) In essence, a decision will be material for a business entity of the Roofing Contractor's size if the decision will result in an increase or decrease in its gross revenues for a fiscal year of

government entity or private person regarding the decision, advises, makes recommendations or participates in substantive discussions.

\$10,000.00 or more. If this standard is met, any reasonable foreseeable effect will be considered material, and therefore you will have a financial interest in the decision and may not participate.

As discussed below, your involvement with the Roofing Contractor also generates the need to analyze the potentiality for a prohibited financial interest in St. John Land and Cattle and certain clients of the Roofing Contractor.

2. St. John Land and Cattle:

Under the FPPC regulations, an official has an economic interest in any business entity which is a parent or subsidiary of, or is "otherwise related" to, a business entity in which the official has an economic interest. (2 Cal.Code of Regs. §§18703.1(c), 18236.) Business entities, whatever their form, are "otherwise related" if any of the following three tests is met: (a) One business entity has a controlling ownership interest in the other business entity; (b) There is shared management and control between the business entities. Factors tending to establish shared management and control include: (1) the same or substantially the same person owns or manages the two entities; (2) there are common or co-mingled funds or assets; (3) the ostensibly separate entities share offices or employees, or otherwise share activities, resources or personnel on a regular basis; or (4) there is otherwise a regular and close working relationship between the entities; (c) A controlling owner (including a majority shareholder in a corporation) or one business entity is also a controlling owner in the other entity.

As you have indicated that a controlling owner (husband and wife) of the Roofing Contractor is also a controlling owner of St. John Land and Cattle, you will be deemed to have an economic interest in this business entity as well. You must, therefore, determine whether the effect of any decision on St. John Land and Cattle is both reasonably foreseeable and material and if so you will be considered to have a financial interest in that decision. The guidelines for determining foreseeability and materiality are the same as set forth above for the Roofing Contractor.⁴

3. Clients Of The Roofing Contractor:

Under the Act, your income also includes your prorata share of the income of the Roofing Contractor inasmuch as you own a 10% interest or greater. (Section 82030(a).) Thus, for each client from whom the Roofing Contractor received \$2,500.00 in income in the preceding 12 months, your prorata share of such income would be \$250.00; therefore, you would have an economic interest in the client as a source of income. This economic interest would be created even where the expenses exceed the payment and no portion of the money is personally received by you.

With respect to each such client, you will have to analyze both the issues of foreseeability and materiality as set forth above with one caveat. While the materiality of the decision's effect upon an indirectly involved source of income which is a business entity is depending upon the size of the company, in the case of an individual client who is a source of income, the FPPC regulations provide that the effect of a decision will be material if:

- the decision will affect the individual's income, investments or other intangible assets or liabilities (other than real property) by \$1,000.00 or more; or
- the decision will affect the individual's real property interest in a manner that is considered material under Section 18705.2(b) or Section 18705.2(c) (2 Cal.Code of Regs. §18705.3(b)(3).)

Although it may not always be realistic to assume that an official has detailed knowledge of the financial condition of all of his or her "economic interests" (bearing in mind that neither the employer nor the employer's property is the subject of the decision), such information is needed to determine the foreseeability and materiality issues.

⁴ FPPC staff have informally advised me that there is no need to analyze clients, etc., of "related" entities.

4. Your Residence:

When reviewing your ownership interest in real property, you must again determine whether the effect of the decision is both reasonably foreseeable and material. The foreseeability standard is the same as set forth above, i.e., is there a substantial likelihood that the effect will occur. However, the materiality standards for interests in real property are different.

When the real property in which the official has an interest is directly involved in the decision before the official's agency, e.g., rezoning of the official's own property, the financial effect is deemed to be material for purposes of the conflict rules. (See 2 Cal.Code of Regs. §18704.2 and 18705.2, a copy of each is attached hereto. Where the official's ownership interest in real property is involved indirectly in the decision, e.g., rezoning of neighboring properties, the appropriate standards for determining the materiality are set forth in 2 Cal.Code of Regs. Section 18705.2(b). Under this section, the effect of a decision is material if any of the following applies:

A. The real property in which the official has an interest, or any part of that real property, is located within a 300 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no financial effect upon the official's real property interest.

B. The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or substantially improved services.

C. The real property in which the official has an interest is located outside a radius of 300 feet, and any part of the real property is located within radius of 2,500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the decision and the decision will have a reasonably foreseeable effect of (1) Ten thousand dollars (\$10,000.00) or more on the fair market value of the real property in which the official has an interest; or (2) Will affect the rental value of the property by \$1,000.00 or more per 12 month period.

The reasonably foreseeable effect of a decision is not considered material as to an official's real property ownership interest if the real property is located entirely beyond a 2,500 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless:

A. There are specific circumstances regarding the decision, its effect, and the nature of the real property in which the official has an interest, which make it reasonably foreseeable that the fair market value or the rental value of the real property in which the official has an interest will be affected by the amounts set forth in C above; and

B. Either of the following apply: (1) The effect will not be substantially the same as the effect upon at least 25 percent of all the properties which are within a 2,500 foot radius of the boundaries of the real property in which the official has an interest; or (2) There are not at least 10 properties under separate ownership within a 2,500 foot radius of the property in which the official has an interest.

In making a decision as to whether the decision will have the financial effects set forth above, you should consider the following (as well as other) factors:

A. The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which the official has an interest;

B. Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;

C. In the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, effects on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

5. Roofing Contractor's Leasehold Interest:

Pursuant to the Act, the leasehold interest of the Roofing Contractor is considered an interest in real property attributable to you.

“ ‘Interest in real property’ includes any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is one thousand dollars (\$1,000.00) or more. Interests in real property of an individual includes a prorata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly, or beneficially, a 10 percent interest or greater.” (Section 82033.)

In the event the leasehold interest is directly involved, any reasonably foreseeable effect is deemed material. (See 2 Cal.Code of Regs. §18705.2a. However, if the leasehold is only indirectly involved, the financial effect of a decision is material if it is reasonably foreseeable that:

A. The decision will change the legally allowable use of the leased property, and the lessee has a right to sublease the property;

B. The lessee will change the actual use of the property as a result of the decision;

C. The decision will result in a change in the actual use of property within 300 feet of the leased property, and the changed use will significantly enhance or significantly decrease the use or enjoyment of the leased property;

D. The decision will increase or decrease the amount of rent for the leased property by \$250.00 or five-plus percent, whichever is greater, during any 12-month period following the decision; or

E. The decision will result in a change in the termination date of the lease.

(2 Cal.Code of Regs. §18705.2(c).)

My advice on this matter is based upon the facts presented above. Needless to say, there will be times when you may need assistance to apply these rules. If I can be of further assistance, please do not hesitate to contact me.

LM:st

Attachment

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