



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

This advice request has been SUPERSEDED by the *Kokotaylo* Advice Letter, A-24-046a, to the extent it finds that business entities in which the officials have financial interests are explicitly involved in decisions surrounding an amendment to the City's tax code.

March 27, 2024

Kristopher J. Kokotaylo
City Attorney
City of Union City
1999 Harrison Street, 9th Floor
Oakland, California 94612

Re: Your Request for Advice
Our File No. I-23-176¹

Dear Mr. Kokotaylo:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").² Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice. Your request for advice is general in nature as it does not specifically identify a particular governmental decision. Accordingly, we are treating your request as one for informal assistance.³

QUESTION

Under the Act, may Union City Mayor Carol Dutra-Vernaci and Vice-Mayor Gary Singh participate in decisions surrounding adopting a ballot measure to modify the City's business license

¹ Please note that this letter is a corrected version of the letter originally issued on March 5, 2024, which erroneously stated the letter regarded the campaign finance provisions of the Political Reform Act rather than the conflict of interest provisions.

² 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 18104 through 18998 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.

³ Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

tax ordinance when the Mayor and Vice-Mayor own businesses in the City subject to licensing fees?

CONCLUSION

While the Mayor and Vice-Mayor have an otherwise disqualifying financial interest in their businesses, the public generally exception would likely apply so long as the decision making process is still in early stages, as nearly all businesses in the City are potentially impacted, and the officials' businesses are not uniquely impacted. We caution that this may change as facts are gathered and the decision-making process progresses if the officials are impacted uniquely or less than 25 percent of businesses will be impacted.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for Union City ("City") and are seeking advice on behalf of Mayor Dutra-Vernaci and Vice-Mayor Singh as to whether the officials may participate in a decision to adopt a ballot measure to modify the City's business license tax ordinance given that both officials own businesses in the City subject to licensing fees.

City Council is considering adoption of a ballot measure to modify its business license tax ordinance, Union City Municipal Code ("UCMC") Chapter 5.20 and such modification would necessarily involve consideration of whether to alter the existing business license structure which imposes fees based on the type of trade or business engaged in. In addition, the Mayor is considering appointing a subcommittee of the City Council to advise the Council on proposed modifications. At this point in the process the City staff are still in the evaluation stage. It is possible the decision may impact all businesses or only certain business categories. The ultimate decision may include a wholesale change to streamline categories and payment amounts or may include adjusting the amounts in specified license categories. This is something that would be evaluated by the Council or the subcommittee.

The Mayor is the sole proprietor of her tax business and owns property in which the tax business is located. UCMC 5.20 imposes an annual license fee on "certified public accountant" and "accountant or auditor" businesses and thus the Mayor is subject to an annual fee under UCMC 5.20.

The Vice-Mayor has an ownership interest in an automotive service business and owns the property in which the business is located. He also owns commercial property that he leases to automotive service businesses and a transportation company. UCMC 5.20 imposes an annual license fee on the Vice-Mayor's automotive business through a catch all provision "applicable to persons conducting business a trade or business not listed elsewhere in the Chapter," as well as a fee as a commercial landlord.

ANALYSIS

Under Section 87100, a public official may not make, participate in making, or use the official's position to influence a governmental decision in which he has a financial interest. A public official has a "financial interest" in a governmental decision within the meaning of the Act if

it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests. (Section 87103; Regulation 18700(a).)

Section 87103 identifies interests from which a conflict of interest may arise, including:

- Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more. (Section 87103(b)).
- Any real property of any business entity in which the individual owns, directly, indirectly, or beneficially, a 10 percent interest or greater. (Section 82033.)
- An interest in a source of income, aggregating five hundred dollars (\$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. (Section 87103(c).)
- A business entity interest, where an official has a direct or indirect investment of \$2,000 or more in a business entity (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)

The standards for foreseeability and for materiality are dependent on whether an interest is explicitly involved in the decision. A financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is explicitly involved in the decision. (Regulation 18701(a).) An official's financial interest is "explicitly involved" in a decision if the interest is a "named party in, or the subject of," the decision, and an interest is the "subject of a proceeding" if the decision involves the issuance, renewal, denial, or revocation of any license, permit, other entitlement to, or contract with, the interest. (*Ibid.*) Where the officials' financial interests are not explicitly involved as a named party or subject of the decision, the financial effect is "reasonably foreseeable" if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (Regulation 18701(b).)

Pursuant to Section 87103, the officials in question have the following interests that may be affected by the decisions. Mayor Dutra-Vernaci has source of income and business interests in her tax business and a real property interest in her owned property. Vice-Mayor Singh has source of income and business interests in his automotive business, business as a landlord, and a real property interest in his owned property.

Under Regulation 18702.1 a governmental decision's reasonably foreseeable financial effect on a public official's financial interest in the official's business is material if the business is explicitly involved (the named party in, or subject of the decision); or the decision may result in the official's business receiving a financial benefit or loss of \$1,000,000 or 5 percent of the business' gross annual revenues or more; or the decision will cause the business to incur or avoid expenses of \$250,000 or one percent of gross annual revenues or more.

Here, both the Mayor and Vice-Mayor have interests that are explicitly involved in the decision as every business subject to a business license tax is the subject of changes and decisions in the early stages of modifying the ordinance. As such the Mayor and Vice-Mayor are presumed to have a material financial interest in the decision. No evidence has been provided to rebut that

presumption, therefore, absent an exception, the Mayor and Vice-Mayor must recuse themselves from participating in decisions surrounding the business license tax ordinance.⁴

Public Generally Exception

The Act does not generally prohibit an official from taking part in a decision if the financial effect on a public official's financial interest is indistinguishable from its effect on the public generally. Under Regulation 18703, the public generally exception applies if the official establishes that a significant segment of the public is affected, and the official's financial interest is not unique compared to the effect on the significant segment. A significant segment of the public includes 25 percent of all businesses within the official's jurisdiction, all real property, commercial real property, or residential real property within the official's jurisdiction, or all individuals within the official's jurisdiction. (Regulation 18703(b)(1)(A-C).)

Whether or not the public generally exception applies can only be determined in regards to a specific governmental decision before the agency and requires a case by case determination. In this stage of the decision, the facts indicate that the decisions are still conceptual and potentially apply to all business within the city. However, you have not identified a specific upcoming decision and we caution that each and every decision will have to be considered individually.

Generally, we can advise that so long as the decisions remain potentially applicable to all businesses, the public generally exception would likely apply because over 25 percent of businesses would be impacted and there would be no unique effect on the Mayor or Vice Mayor. However, if at any point a proposal is made limiting the decisions to less than all business in the city, the applicability of the public generally exception will have to be reconsidered based on the specifics of the proposal. We encourage you to seek additional advice as needed when additional facts are available.

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Valerie Nuding
Counsel, Legal Division

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⁴ We note that both officials also have an interest in their real property that houses their businesses but need not analyze that interest further as they are required to recuse themselves due to their business interests.