



## FAIR POLITICAL PRACTICES COMMISSION

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April 26, 2007

Richard C. Burton  
Office of the City Attorney  
156 South Broadway, Suite 240  
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Re: Your Request for Advice  
**Our File No. A-07-052**

Dear Mr. Burton:

This letter is in response to your request for advice on behalf of Turlock City Councilmember Ted Howze regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Please note that our advice issued in response to your request is limited to obligations arising under the Act. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTION

May Councilmember Howze participate in a governmental decision to update the city's general plan when later decisions would likely involve annexation of real property either owned by Councilmember Howze or real property adjacent to Councilmember Howze's property?

### CONCLUSION

Councilmember Howze may participate in a governmental decision to update the city's general plan, but may be prohibited from participating in later decisions.

### FACTS

You are the city attorney for the City of Turlock. City Councilmember Ted Howze has authorized you to request formal advice regarding a possible conflict 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.

interest arising from his participation as a councilmember in an anticipated update of the City of Turlock's general plan.

Councilmember Howze owns 18+ acres of land within 500 feet of, but not contiguous, to the city limits of Turlock and not within its approved sphere of influence. The property is zoned agricultural by the county. The councilmember operates a veterinary practice and cattle business on the property. The city council is considering a general plan update, and it is reasonably foreseeable that it might adopt a general plan in the future that could result in this property or adjacent property, being included within the city limits, and designated for urban development. In our telephone conversation you mentioned that the annexation of Councilmember Howze's property has been talked about for some time, and it has been Turlock's long term goal to expand in that direction.

The general plan update was not initiated by Councilmember Howze and further decisions on implementing the general plan would be needed. The city's decisions on its general plan update will not concern an identifiable parcel at this time, and the decision would be separate from subsequent approvals that will go into detail about what parcels would be affected. Once the decision is made to update the general plan it will take a considerable amount of time to develop a general plan for approval, and at that stage the decisions on whether or not to include Councilmember Howze's real property or property near his property, in the updated general plan would be made.

### ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "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).) Section 87100 prohibits any 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 a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

#### **Steps 1 & 2: Is Ted Howze a "public official" making, participating in making, or influencing governmental decisions?**

As a member of the Turlock City Council, Ted Howze is a public official under the Act. (Section 82048.)<sup>2</sup> Consequently, he may not make, participate in making, or

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<sup>2</sup> Section 87105 provides that when a public official who holds an office specified in Section 87200 has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b), on the

otherwise use his official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of his economic interests. Councilmember Howze will be called upon to consider whether Turlock's general plan should be updated. Therefore, he will be making, participating in making or otherwise using his official position to influence a governmental decision.

**Step 3: Does Councilmember Howze have a potentially disqualifying economic interest?**

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests, including:

- (1) An economic interest in a *business entity* in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management<sup>3</sup> (Section 87103(d); Regulation 18703.1(b));
- (2) An economic interest in *real property* in which he or she has a direct or indirect interest of \$2,000 or more<sup>4</sup> (Section 87103(b); Regulation 18703.2);
- (3) An economic interest in any *source of income*, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- (4) An economic interest in any *source of gifts* to him or her if the gifts aggregate to \$390 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- (5) An economic interest in his or her *personal finances*, including those of his or her immediate family -- this is the "personal financial effects" rule (Section 87103; Regulation 18703.5).

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record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulations 18702.5(c) and 18702.5(d) apply. This section is applicable to Councilmember Howze since city council members are specified in Section 87200.

<sup>3</sup> Investment, among other things, refers to any financial interest in a business entity if the business entity does or plans to do business in the jurisdiction. (Section 82034.)

<sup>4</sup> Interest in real property includes an ownership interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official. (Section 82033.)

Economic Interests Identified:

**Business Entities:** A “business entity” is defined as “any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, or association.” (Section 82005.) Councilmember Howze has a potentially disqualifying economic interest in his veterinary practice and in his cattle business assuming he has an investment of \$2,000 or more and because, we assume, he is an officer, partner, trustee, employee or holds a position of management.<sup>5</sup> (Section 87103(c) and (d), Regulation 18703.1(a) and (b).)

**Real Property:** Councilmember Howze owns 18+ acres of land outside the city limits of Turlock. We assume he has an interest of \$2,000 or more in the property. Therefore, he would have a potentially disqualifying economic interest in his real property.<sup>6</sup> (Section 87103(b); Regulation 18703.2.)

**Sources of Income:** An official has an economic interest in any person from whom he or she has received income aggregating \$500 or more within 12 months prior to the time when the relevant decision is made. (Section 87103(c); Regulation 18703.3(a)(1).) Additionally, income of an individual includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly, or beneficially, a 10-percent interest or greater. Accordingly, in addition to the economic interests in his business entities as a source of income to Councilmember Howze, he also has an economic interest in any individuals who provided income to the businesses if his pro rata share of the income equals \$500 or more within 12 months prior to the decision.

You have not provided any facts indicating the amount of income Councilmember Howze has received from any source. For purposes of our analysis, we will assume he has a source of income economic interest in each of his businesses. You have not indicated any other sources of income, including a pro rata share of the business income from any customers of the businesses. Additionally, you have not provided any information regarding other economic interests Councilmember Howze may have. Accordingly, our analysis is limited to Councilmember Howze’s economic interest in his identified business entities.

**Personal Finances:** Every public official has an economic interest in his or her personal finances and those of his or her immediate family. (Section 87103; Regulation 18703.5.) A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets or liabilities of Councilmember Howze or his immediate family other than the financial affect on his real property or business

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<sup>5</sup> Though both of your businesses are located on property outside the City of Turlock, we assume they do business within the jurisdiction and therefore qualify as economic interests. (Section 82034.)

<sup>6</sup> Real property shall be deemed to be “within the jurisdiction” with respect to a local government agency if the property or any part of it is located within or not more than two miles outside the boundaries of the jurisdiction or within two miles of any land owned or used by the local government agency. (Section 82035.)

interests increasing or decreasing. (*Ibid.*) Your letter does not mention any impact on Councilmember Howze's personal finances as the result of the upcoming decisions. Therefore, we do not further analyze this issue. However, please note that a conflict of interest may arise if it is reasonably foreseeable that the governmental decisions will have an effect on his personal finances.

**Step 4: Are the Potentially Disqualifying Economic Interests Directly or Indirectly Involved in the Governmental Decisions?**

**Business Entities and Sources of Income:** Regulation 18704.1 states that a person, including business entities and sources of income, is directly involved in a governmental decision if that person, either directly or by an agent: "(1) initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request; or (2) is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of the proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit or other entitlement to, or contract with, the subject person."

If a source of income or business entity is not directly involved in the governmental decision, it is deemed to be indirectly involved.

Under the facts presented, Councilmember Howze's businesses would be indirectly involved economic interests, as you have given no indication that his businesses are initiating proceedings before the city council nor are either of his businesses the named party and/or subject of any proceedings before the city council.

**Real Property:** Regulation 18704.2(a)(1) - (6) sets forth the circumstances under which real property is considered directly involved in a governmental decision.

However, real property in which a public official has an interest is not directly involved in a government decision but is instead indirectly involved if the decision solely concerns the adoption or amendment of a general plan and all of the following apply:

"(A) The decision only identifies planning objectives or is otherwise exclusively one of policy. A decision will not qualify under this subdivision if the decision is initiated by the public official, by a person that is an economic interest of the public official, or by a person representing either the public official or an economic interest of the public official.

"(B) The decision requires a further decision or decisions by the public official's agency prior to implementing the planning or policy objectives. Examples of further decisions include, but are not limited to, permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan or its equivalent.

“(C) The decision does not concern an identifiable parcel or parcels or development project. A decision does not “concern an identifiable parcel or parcels” solely because, in the proceeding before the agency in which the decision is made, the parcel or parcels are merely included in an area depicted on a map or diagram offered in connection with the decision, provided the map or diagram depicts all parcels located within the agency’s jurisdiction and economic interest of the official are not singled out.

“(D) The decision does not concern the agency’s prior, concurrent, or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.”

Based upon your facts, Councilmember Howze’s economic interest in his real property is indirectly involved in the upcoming governmental decision because the decision will be identifying planning objectives and was not initiated by the councilmember, the decision requires further decisions by the city council prior to implementing the general plan, the decision will not concern an identifiable parcel, and the decision does not concern a prior, concurrent, or subsequent approval of or change to a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.

#### **Step 5: Applicable Materiality Standard**

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official’s economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency’s decision.

**Business Entities and Sources of Income:** Regulation 18705.1 provides the materiality standard for an economic interest in a business entity. For a relatively small business<sup>7</sup> that is indirectly involved in a governmental decision, the standard is provided under Regulation 18705.1(c)(4):

“(4) . . . the financial effect of a governmental decision on a business entity is material if it is reasonably foreseeable that:

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<sup>7</sup> You have not given any facts indicating the size of the business. For purposes of illustration, we assume the business would fall under the criteria set forth in Regulation 18705.1(c)(4). Different materiality standards apply to businesses that are listed in the Fortune 500, listed on the New York Stock Exchange, the American Stock Exchange or NASDAQ or whose earnings would qualify them for listing on an exchange. We refer you to Regulation 18705.1 (copy enclosed) for the applicable materiality standard.

- “(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.”

The same materiality standards referenced above are also used for sources of income that are business entities. (Regulation 18705.3(b)(1).)

**Real Property:** Regulation 18704.2(b)(2) provides the materiality standard for indirectly involved real property:

“The financial effect of a governmental decision on real property which is indirectly involved in the governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision affects:

“(A) The development potential or income producing potential of the real property in which the official has an economic interest;

“(B) The use of the real property in which the official has an economic interest;

“(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.”

#### **Step 6: Foreseeability**

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case.

As used here, “reasonably foreseeable” means “substantially likely.” (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*) Please note that the Commission does not act as a finder of fact when providing advice (*In re Oglesby, supra*), therefore, the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

**Business Entities and Sources of Income:** You have not provided facts indicating that there will be any potential financial effect on Councilmember Howze’s veterinary practice or his cattle business as a result of the governmental decision. So long as it is not reasonably foreseeable that Councilmember Howze’s veterinary practice or cattle business will be affected as described above in Regulation 18705.1(c)(4) as a result of the decision to approve a general plan update, Councilmember Howze is not prohibited from participating in the governmental decision. However, he may be prohibited from future decisions involving the update of the general plan and should seek further assistance should he wish to participate in future decisions because, as you have indicated, it is likely the future general plan update decisions would involve annexation of the property these businesses are now located upon. Such decisions could have a financial affect upon the councilmember’s businesses, thus giving rise to a potential conflict of interest should he choose to participate in such decisions.

**Real Property:** Because the governmental decisions you ask about are general decisions on whether to take steps to begin updating the general plan, it is not substantially likely that there will be a reasonably foreseeable material financial effect upon Councilmember Howze’s economic interest as a result of this decision. So long as Councilmember Howze’s real property will not be affected in a manner described in Regulation 18704.2(b)(2) he will not be prohibited from participating in the decision. However, he may be prohibited from future decisions involving the update of the general plan and should seek further assistance should he wish to participate in future general plan update decisions because, as you have indicated, it is likely the future general plan update decisions would include annexation of Councilmember Howze’s property or property within 500 feet of his property.

### **Steps 7 & 8: Public Generally and Legally Required Participation**

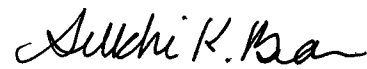
An official who otherwise has a conflict of interest in a decision may still participate under the “public generally” exception. This exception applies when the financial effect of a decision on a public official’s economic interests is substantially the same as the effect on a significant segment of the public. The “legally required participation” rule applies when the official’s participation in a governmental decision is legally required. (Section 87101; Regulation 18708.) You have not presented any facts indicating that these exceptions are applicable to your situation; therefore we do not address them here.



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

Sincerely,

Scott Hallabrin  
General Counsel

A handwritten signature in cursive script that reads "Sukhi K. Brar".

By: Sukhi K. Brar  
Counsel, Legal Division

SKB:jgl  
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