



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

August 24, 2022

Jeffrey A. Walter
Colantuono, Highsmith, Whatley, PC
970 West Napa St. Suite F
Sonoma, CA 95476

Re: Your Request for Advice
Our File No. A-22-086

Dear Mr. Walter:

This letter responds to your request for advice 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.

Also 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.

QUESTION

Under the Act, may Novato City Councilmember Pat Eklund take part in a City Council decision regarding the City’s interpretation of a business’s “accessory use” as the term is used in the Zoning Code, given that she owns rental property located more than two miles from the proposed location of the business but within 100 feet of a commercial district that could conceivably be affected by the interpretation?

CONCLUSION

Yes, the Act permits Councilmember Eklund to take part in the decision because neither her rental property, nor rental business or tenants, would be materially affected by the business located

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 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.

more than two miles away and any potential broad impact on commercial zoning districts would affect all properties in that zoning category.

FACTS AS PRESENTED BY REQUESTER

Pat Eklund is a member of the Novato City Council. Councilmember Eklund owns a residential rental property in the City located on Arlene Way (“the Eklund property”). The Eklund property is assigned the Low Density Residential (R1) land use designation of the Novato General Plan and located in the Planned District (PD) Zoning District.

In September 2021, the owner of La Star Latina (also known as Luna Travel), a local travel agency and check cashing business, intended to relocate from its then location at 1212 Grant Avenue (“1212 Grant”) in Novato, to 904 Grant Avenue (“904 Grant”). At that time, the Novato Code Enforcement Division received a complaint regarding La Star’s proposed relocation to 904 Grant. The complaint inquired whether appropriate permits had been obtained to conduct such a business at the proposed new address at 904 Grant. In response to the complaint, the City’s Planning Division staff determined that La Star Latina then offered and currently offers check cashing services, including issuing wire transfers and money orders for a fee.

La Star Latina’s initial location at 1212 Grant Avenue is located more than three miles from the Eklund property. La Star Latina’s proposed new location at 904 Grant is located more than two miles from the Eklund property.

Although 1212 Grant and 904 Grant are both located in the CDR Zoning District, the check cashing services at the 1212 Grant location predate changes (occurring in 2012) to the Novato Zoning Code which made that use (check cashing) no longer permissible in the CDR Zoning District. The City Planning Staff has determined that the check cashing services which were provided by La Star Latina at the 1212 Grant location, were a “legal nonconforming use.”

In 2012, the City Council adopted amendments to the City’s Zoning Code that established a specific definition for “check cashing service” and prohibited such services in the CDR Zoning District, as well as in all other commercial zoning districts, except for the General Commercial (“CG”) Zoning District. Thus, commencing in 2012, check cashing services were prohibited as a primary use in all commercial zoning districts, except in the CG Zoning District.

Novato Planning staff has informed the owner of La Star Latina that if it moves to the 904 Grant location, it cannot perform check cashing services because of the 2012 Zoning Code amendments. In response to this advice, the attorneys representing La Star Latina have argued that check cashing services should be treated as an “accessory use” to La Star Latina travel agency business under the definitional provisions of the Novato Zoning Code. The City’s Planning Division has issued a formal interpretation disagreeing with La Star Latina’s attorneys’ opinion. That interpretation was appealed by La Star Latina to the Novato Planning Commission. The Planning Commission has issued a decision adverse to La Star Latina, and La Star Latina has appealed that determination to the City Council.

The City of Novato Planning staff has expressed concern that the interpretation at issue herein may have broad applicability to all seven commercial zoning districts because all seven commercial zoning districts permit travel agencies as a matter of right. That is to say, if a use that is

expressly prohibited as a primary use in a commercial district can nonetheless be exercised as an accessory use, as La Star Latina maintains, it will become problematic to determine what uses can and cannot be allowed in a given commercial district. It is not possible to predict the broader implications should the City Council ultimately agree with La Star Latina's interpretation of the City's Zoning Code.

The Eklund property is located 83-feet from the nearest commercial zoning district. Currently, there are no travel agencies located in this commercial district. It is impossible to know whether, should the Council uphold La Star Latina's appeal, any property owner in this district will establish or permit the establishment of a travel agency or whether such an agency will desire to provide check cashing services. Nor is it possible to know how close such an establishment would be to the Eklund property.

It is clear, however, that if the City's Planning Division interpretation is upheld on appeal, La Star Latina would be precluded from providing check cashing services at its proposed 904 Grant location.

ANALYSIS

Under Section 87100 of the Act, "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use [their] official position to influence a governmental decision in which [the official] knows or has reason to know he has a financial interest." "A public 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 effect on the public generally, on the official, a member of his or her immediate family," or on certain specified economic interests. (Section 87103.) These interests include:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
- (c) 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 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.) Councilmember Eklund has a business entity interest and real property interest in the Eklund property. She also has a source of income interest in any potential tenants renting the Eklund property as source of income interests. However, no tenants have been identified with respect to this request for advice.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the

issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Where, as here, an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

The reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official’s property. (Regulation 18702.2(a)(7).)

The decision before the City Council is an appeal by La Star Latina regarding the City Planning Commission’s interpretation of the term “accessory use” as it applies to La Star Latina’s check cashing services as a travel agency.

Under Regulation 18702.1, the Act provides that the reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a business entity, including a business entity that is a source of income, is material if:

- The decision may result in an increase or decrease of the entity’s annual gross revenues, or the value of the entity’s assets or liabilities, in an amount equal to or greater than: (A) \$1,000,000; or (B) five percent of the entity’s annual gross revenues and the increase or decrease is at least \$10,000.
- The decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or greater than: (A) \$250,000; or (B) one percent of the entity’s annual gross revenues and the change in expenses is at least \$2,500.
- The official knows or has reason to know that the entity has an interest in real property and the property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) through (6), or there is clear and convincing evidence the decision would have a substantial effect on the property.

Under Regulation 18702.3, the Act provides that the reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in an individual who is a source of income is material if:

- The decision may affect the individual’s income, investments, or other assets or liabilities (other than an interest in a business entity or real property) by \$1,000 or more.
- The official knows or has reason to know that the individual has an interest in a

business entity that will be financially affected under the materiality standards in Regulation 18702.1.

- The official knows or has reason to know that the individual has an interest in real property and the property is a named party in, or the subject of, the decision, as defined in Regulations 18701(a) and 18702.2(a)(1) through (6), or there is clear and convincing evidence the decision would have a substantial effect on the property.

Under the facts provided, there is no indication that any financial effect on the Eklund property would meet the economic thresholds specified above. Barring additional information, Councilmember Eklund is not prohibited from taking part in the decisions based on her interest in her rental business or her tenants. To the extent Councilmember knows or has reason to know a tenant may be affected by the decision outside of the tenant's interest in the rental property, Councilmember Eklund she should seek additional advice.

Turning to Councilmember Eklund's real property interest in her rental property, the decision before the City Council requires consideration of two questions. First, would La Star Latina's operation of a check cashing service at 904 Grant have a reasonably foreseeable, material financial effect on Councilmember Eklund's economic interests? Second, would the potential broadening of the City's definition of "accessory use" in a manner that affects all properties within a commercial district have a reasonably foreseeable, material financial effect on Councilmember Eklund's economic interests?

With respect to the first question, under Regulation 18702.2(b), the financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property 1,000 feet or more from the property line of the official's property is presumed not to be material. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official's property. (Regulation 18702.2(b).) Here, the Eklund property is located more than three miles from La Star Latina's current location and more than two miles from its new location. There are no facts that would rebut the presumption of no reasonably foreseeable, material financial effect on the Eklund Property.

Regarding the second question, Regulation 18702.2(a)(2) states that the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision determines the parcel's zoning or rezoning, *other than a zoning decision applicable to all properties designated in that category*. Here, the concern is that all businesses with any commercial zoning district could take advantage of a broader interpretation of "accessory use." However, any effect on the commercial zoning district near the Eklund property would apply to all properties in that category. Because the zoning decision would be applicable to all properties in commercial zoning districts, any reasonably foreseeable financial effect would not be considered material under the Act. Therefore, the Act does not prohibit Councilmember Eklund from taking part in the decisions involving La Star Latina and interpretation of the term "accessory use."²

² We note that the present circumstances are distinct from those considered in the recent *Walter* Advice Letter, No. A-22-069, in which we advised that the Novato Mayor was disqualified under the Act from taking part in the same City Council decision at issue. Under the facts presented in the *Walter* letter, the official's rental property was located

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

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Counsel, Legal Division

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