



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 12, 2024

Benjamin L. Stock
City Attorney
City of Foster City
181 Third Street - Suite 200
San Rafael, California 94901-6587

Re: Your Request for Advice
Our File No. A-24-074

Dear Mr. Stock:

This letter responds to your request for advice on behalf of Foster City Mayor Patrick Sullivan, Vice Mayor Stacy Jimenez, and Councilmember Art Kiesel regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Please note that we are only providing advice under the Act’s conflict of interest provisions 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

May Foster City Mayor Sullivan, Vice Mayor Jimenez, and Councilmember Kiesel² participate in decisions related to the placement of a ballot measure to modify the City’s Business License Tax (“BLT”) considering their various interests in businesses located in the City that are subject to the BLT?

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.

² We note that the initial request also sought formal advice on behalf of Councilmember Sam Hindi. However, due to a significant change in pertinent facts that we were first made aware of on July 10, 2024, we have withdrawn the request for formal advice as it relates to Councilmember Hindi. As discussed by phone, the change in facts would require additional consideration, and the request for formal advice for Councilmember Hindi has been withdrawn to ensure timely advice to the remaining officials.

CONCLUSION

It is not reasonably foreseeable that the decisions will have a material financial effect on the business interests of Mayor Sullivan, Vice Mayor Jimenez, or Councilmember Kiesel under the standards articulated in Regulation 18702.1, and the officials may participate in decisions concerning the approval of the ballot measure to modify the BLT.³

FACTS AS PRESENTED BY REQUESTER

Currently, 1,651 businesses in the City have a business license and pay the City's BLT.⁴ The City's current BLT consists of a single tax rate of \$0.75 per \$1,000 of gross receipts, with a minimum tax of \$100 (\$200 for general contractors), and a gross receipts limit to which the tax applies that is adjusted annually by the percentage change in the Consumer Price Index ("CPI").⁵ The taxable gross receipts limit for fiscal year 2024 is \$39,196,000, which results in a maximum BLT payment of \$29,397.

Potential Modifications to the City's BLT

The City is considering placing a measure on the November 5, 2024, ballot to modify the City's BLT. Specifically, the City Council will be asked to consider and give direction regarding four options for a measure to subsequently present to voters.

Option 1

Under Option 1, the City would: (1) retain the current minimum BLT of \$100 (or \$200 for general contractors), but adjust that figure annually based on the CPI; (2) increase the maximum taxable gross receipts limit to result in a maximum gross receipts tax payment from the current \$29,397 to \$500,000; and (3) maintain the current BLT rate of \$0.75 per \$1,000 of gross receipts.

Under this option, based on the current BLT and past gross receipts reported by businesses, the City anticipates that approximately 71.11 percent of City businesses currently paying the minimum BLT would be affected only by the annual CPI adjustment. Approximately 28.17 percent of City businesses already paying more than the minimum BLT would essentially be unaffected. Less than one percent (0.73 percent) of City businesses would be affected by the increased taxable gross receipts limit.

³ We caution that this conclusion is based on the options currently proposed. Should the options be modified, you may wish to seek further advice before the Council considers them.

⁴ The City's business license regulations are set forth in the City's Municipal Code Title 5, Chapters 5.04-5.40.

⁵ The taxable gross receipts limit was \$10,000,000 in 2014, \$20,000,000 in 2015, and \$30,000,000 in 2017.

Options 2 and 3

Under Option 2, the City would: (1) retain the current minimum BLT of \$100 or \$200, but adjust that figure annually based on the CPI; (2) increase the maximum gross receipts limit to result in a maximum gross receipts tax payment of \$500,000; and (3) increase the BLT tax rate from \$0.75 to \$1.00 per \$1,000 of gross receipts.

Under Option 3, the City would make the same changes as Option 2, but increase the BLT tax rate to \$1.25 per \$1,000 of gross receipts.

Similarly to Option 1, the City anticipates that approximately 71.11 percent of City businesses currently paying the minimum BLT would be affected only by the annual CPI adjustment. Approximately 28.17 percent of City businesses already paying more than the minimum BLT would experience an increase in the BLT based upon the increased tax rates (\$1.00 or \$1.25) but would not reach the taxable gross receipts limit. Less than one percent (0.73 percent) of City businesses would be affected by the increased taxable gross receipts limit.

Option 4

Under Option 4, the City would: (1) retain the current minimum BLT of \$100 or \$200, but adjust that figure annually based on the CPI; (2) increase the maximum gross receipts limit to result in a maximum gross receipts tax payment of \$250,000; and (3) adopt varying tiered BLT rates ranging from \$0.75-\$3.00 per \$1,000 of gross receipts.

For this option, the City anticipates that approximately 71.11 percent of City businesses currently paying the minimum BLT would be affected only by the annual CPI adjustment. Approximately 23.56 percent of businesses would continue paying the lowest tier rate at \$0.75 per \$1,000 of gross receipts and the businesses would not reach the taxable gross receipts limit. The remaining 5.33 percent of businesses would experience an increase in the BLT based on the increased tiered tax rates. Of these remaining businesses, less than one percent of would be affected by the increased taxable gross receipts limit.

Councilmembers' Interests in Foster City Businesses Subject to the BLT

Mayor Sullivan, Vice Mayor Jimenez, and Councilmember Kiesel have various interests in Foster City businesses that are subject to the BLT and may be affected by the City Council's decisions.

Mayor Sullivan:

Mayor Sullivan owns one local business and owns stock in two other local businesses, one of which is valued at over \$25,000. The business owned by Mayor Sullivan falls within the 71.11 percent of businesses that would only be affected by the CPI rate adjustments. The businesses in which he owns stock fall within the 28.17 percent of businesses that would have the same proportional tax increase under the \$0.75, \$1.00, and \$1.25 BLT rates being considered and within the 23.56 percent of businesses that would continue to pay \$0.75 per \$1,000 in gross receipts under the varied rate approach.

Vice Mayor Jimenez:

Vice Mayor Jimenez's spouse is employed by a local business and owns stock in one other local business, which is valued at under \$25,000. The business that employs Vice Mayor Jimenez's spouse, as well as the business in which he owns stock, both fall within the 28.17 percent of businesses that would have the same proportional tax increase under the \$0.75, \$1.00, and \$1.25 BLT rates being considered and within the 23.56 percent of businesses that would continue to pay \$0.75 per \$1,000 in gross receipts under the varied rate approach.

Councilmember Kiesel:

Councilmember Kiesel's spouse is employed by a local business. The business falls within the 28.17 percent of businesses that would have the same proportional tax increase under the \$0.75, \$1.00, and \$1.25 BLT rates being considered and within the 23.56 percent of businesses that would continue to pay \$0.75 per \$1,000 in gross receipts under the varied rate approach.

In follow-up emails, you indicated that each official with an interest in a business entity, resulting from the ownership of stock with a value of under \$25,000, owns less than one percent of the shares of the entity. Additionally, for all interests in business entities (including business entities that are sources of income) held by Mayor Sullivan, Vice Mayor Jimenez, and Councilmember Kiesel, you have indicated that the potential tax increase to the business resulting from any of the four proposed options would be less than \$2,500.

ANALYSIS

Under Section 87100 of the Act, “[a] public official at any level of state or local government shall not make, participate in making or in any way attempt to use the official’s position to influence a governmental decision in which the official knows or has reason to know the official 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 the official’s immediate family,” or on certain specified economic interests. (Section 87103.)

Among those specified economic interests are:

- (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 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.

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

(Section 87103.)

From the facts provided, Mayor Sullivan has interests in the business he owns as both a business entity and a source of income. He also has an interest in the business in which he owns stock as a business entity in which he has a direct investment. Vice Mayor Jimenez has interests in the business that employs his spouse as a source of income and the business in which he owns stock as a business entity in which he has a direct investment. Councilmember Kiesel has an interest in the business that employs his spouse as a source of income.

We caution that as the owner of a business entity, Mayor Sullivan may also have an interest in the sources of income to the business, including any customer or client.⁶ Under Section 82030, an official's income "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." However, the facts do not identify the customers or clients of Mayor Sullivan's business. Accordingly, we are unable to provide an analysis and express no opinion regarding the disqualification of Mayor Sullivan based upon the financial effect of the decision on a customer or client. To the extent, an official has an interest in a customer or client of the official's business, and there is any indication that the customer or client would fall within the one percent or less of businesses that would see significant tax increases under each of the proposed options, you may wish to seek further advice.

Foreseeability and Materiality

Foreseeability standards vary depending on whether an economic interest is explicitly involved in a governmental decision. A financial effect on an interest is presumed to be reasonably foreseeable when the interest is explicitly involved in a decision. Financial interests that are explicitly involved in a decision include an interest that is a named party in, or subject of, a government decision. "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)." (Regulation 18701(a).)

As pertinent to this analysis, a business entity is explicitly involved in a decision if the entity "[i]s subject to an action taken by the agency that is directed at the entity." (Regulation 18702.1(a)(1)(G).) However, in this case, the proposed changes to the BLT would modify a license tax that generally applies to all of the businesses within the City with similar tax implications to a majority of the businesses, including the three officials' identified interests. Under these facts, there is no indication that the decisions are directed at any of these interests. Accordingly, none of the three officials' various businesses are the subject of, or named party in, the decisions, and the

We note that you have not indicated the percent shares of stock owned by Mayor Sullivan in a second business. If an official owns more than 10 percent of the shares of a company, an official may have interests in sources of income to the business as well, which must also be considered.⁶

officials' interests in these businesses are not explicitly involved in the decisions regarding the BLT.

Where an official's interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the 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."

Interest in Business Entity and Source of Income

The reasonably foreseeable financial effect of a governmental decision on an official's interests in a business (as a business entity or source of income), which is not explicitly involved in the decision, is material if the business will be financially affected under the materiality standards in Regulation 18702.1. (Regulation 18702.3(a)(4).) Under Regulation 18702.1 as relevant to these facts, the reasonably foreseeable financial effect of a governmental decision on an official's interest in a business entity 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. (Regulation 18702.1(a)(2).)
- 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. (Regulation 18702.1(a)(3).)

Based on the facts provided, the potential increase in tax expenses under each of the four proposals for all of the officials' identified business interests is less than the materiality threshold of \$2,500. Therefore, it is not reasonably foreseeable that the decisions regarding the BLT rate will have a material financial effect on the businesses under the threshold standards in Regulation 18702.1(a)(2) or (3). Based on the facts provided, Mayor Sullivan, Vice Mayor Jimenez, and Councilmember Kiesel are not prohibited from taking part in the decisions.

If you have other questions on this matter, please contact me by email at znorton@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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