



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 28, 2022

Scott E. Porter
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Jones Mayer Law
Northern California
6349 Auburn Blvd.
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Re: Your Request for Advice
Our File No. A-22-078

Dear Mr. Porter:

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 Whittier City Councilmember Cathy Warner take part in City Council decisions pertaining to a proposed 42-unit housing development located near her spouse’s periodontal practice?

CONCLUSION

Yes, the Act permits Councilmember Warner’s to take part in the decisions. Based on the facts provided, she does not have a real property interest associated with the periodontal practice, and the practice serves a niche clientele for which it is not reasonably foreseeable the proposed residential development would have a material financial effect on the practice.

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.

FACTS AS PRESENTED BY REQUESTER

The Whittier City Council will conduct a public hearing on a proposed 42-unit town home project (“La Serna Project”) with an estimated 2.6 people per townhome for a total of 109 people.

Councilmember Cathy Warner’s spouse owns a periodontal practice (“Periodontal Practice”) located 841 feet from the La Serna Project. It is rented on a month-to-month tenancy basis. Councilmember Warner’s spouse owns the Periodontal Practice, which has approximately 1,000 patients as of July 2022 and each patient pays around \$4,000 during the entirety of their time as a patient for services. About half of the patients live within the City of Whittier and the other half live outside the City’s jurisdiction.

Periodontists are a specialized form of dentistry focusing on preventing, diagnosing, and treating gum disease. Most patients are referred to a periodontist by their general dentist and some are referred by their dental insurance plan. Approximately two percent of the population will ever see a periodontist in their entire lifetime. There are approximately eight different periodontists or dentists that practice periodontal dentistry within the City of Whittier and roughly an equal number outside of the City within a three-mile radius of the La Serna Project.

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.) 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 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 real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

(Section 87103.)

An official has a community property interest in the income of a spouse. (Section 82030(a).) Where an official’s source of income interest is based on a spouse’s income, the spouse must have aggregated at least \$1,000 from the source, such that the official’s community property interest in the amount received from the source is at least \$500. In this case, Councilmember Warner has a business entity interest in her spouse’s Periodontal Practice as well as an interest in the business as a

source of income.² A month-to-month tenancy does not constitute a real property interest for purposes of the Act. (Regulation 18233.)

Regulation 18701(a), which provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision, 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 an official's financial interest in a business entity, including a source of income (see Regulation 18702.3(a)(4)), 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 reasonably foreseeable financial effect on a business entity is also material if 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, there is no indication that a City Council decision pertaining to the La Serna Project would cause the Periodontal Practice to incur, avoid, reduce, or eliminate any expenses. While it is possible that the Periodontal Practice's annual gross revenues could increase as a result of an increase in the nearby population, that possibility appears to be merely theoretical,

² While no individual clients of the Periodontal Practice have been identified, Councilmember Warner also has a source of income interest in any client from whom her spouse has received \$1000 or more in the 12 months prior to a governmental decision. (Councilmember Warner has a community property interest in one half of her spouse's income.) As no client has been identified, we provide no analysis of a potential conflict of interest based on a financial effect on a client. If the decision before the City Council may implicate any client of the Periodontal Practice, Councilmember Warner may wish to seek additional advice.

rather than reasonably foreseeable. The La Serna Project will introduce only 109 new residents to the neighborhood and, on average, approximately two of those residents would be expected to see a periodontist at some point in their lifetime. Moreover, the Periodontal Practice does not receive many walk-in patients based upon its location as most patients are a result of referral by a general dentist or dentist insurance plan. Given the insignificant number of potential new clients and the fact that the Periodontal Practice would still have to compete against several other periodontal businesses to win the business of those clients, it is not reasonably foreseeable that the La Serna Project would impact the Periodontal Practice's annual gross revenues by five percent and at least \$10,000.

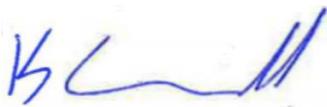
Accordingly, the Act does not prohibit Councilmember Warner from taking part in City Council decisions regarding the La Serna Project based on her interest in her spouse's Periodontal Practice.

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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