



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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October 10, 2023

Stephen P. Deitsch  
of BEST BEST & KRIEGER LLP  
City of Big Bear Lake  
2855 E. Guasti Road, Suite 400  
Ontario, California 91761

Re: Your Request for Advice  
**Our File No. A-23-151**

Dear Mr. Deitsch:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup>

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. Lastly, the Commission does not provide advice with respect to past conduct. Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

## QUESTIONS

Does Councilmember Herrick have a disqualifying financial interest in the City of Big Bear Lake (“City”) decisions regarding potential revisions to the City’s short-term vacation rental ordinance (“Ordinance”) due to his source of income interest in Big Bear Cool Cabins (“Cool Cabins”), an advertiser on his radio station? If so, would the public generally exception apply to allow Councilmember Herrick to participate in the decision?

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<sup>1</sup> 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.

## CONCLUSIONS

Councilmember Herrick has an economic interest in Cool Cabins as a source of income and we advise that it is reasonably foreseeable the Ordinance decisions will have a material financial effect on Cool Cabins. Based on the limited facts provided and considering the nature of the decision and Cool Cabins' management of a significant share of the short-term vacation rental market, it appears reasonably foreseeable that Cool Cabins' gross revenues, assets/liabilities or expenses would be affected in the amounts set forth in Regulation 18702.1(a)(2) and (3), discussed below. Moreover, the "public generally exception" is not applicable to these facts, as Cool Cabins would be uniquely affected by the Ordinance decision compared to the effect on other single-family residential properties and "managers" due to the fact that Cool Cabins is a professional property management business that manages 15 percent of permits in the district and 10 percent of the permits in the City. (Regulation 18703(c).) We advise that Councilmember Herrick recuse himself from the Ordinance decision proceedings, including any influence on the proceeding, to avoid a potential violation of the Act. He may wish to seek additional advice once more detailed information regarding the scope of the decision and the potential impact on Cool Cabins' business is available for analysis.

## FACTS AS PRESENTED BY REQUESTER

The City is known as a tourist destination, and vacation rentals in the City have become very popular. The City has adopted a vacation rental ordinance ("Ordinance") that regulates the rental of private homes to visitors on a short-term basis (defined as 28 days or less). The Ordinance requires a property owner to obtain an annual license from the City prior to advertising, offering to lease, or leasing a property as a vacation rental property. An owner may not hold more than two City vacation rental licenses, except that an owner holding two or more licenses prior to a specified date may renew those licenses. There are approximately 7,936 single-family homes in the City, and approximately 2,765 active vacation rental licenses.

In addition to the license requirement, the Ordinance sets forth numerous operational requirements. These requirements include the following: that all guest check-ins be performed in person by the owner or owner's agent; that parking is not allowed in the yard or street; that occupancy is capped at two adults per bedroom; and that the owner or owner's agent must respond in person to the vacation-rental property within 30 minutes of a City request to correct a violation of the Municipal Code. Violations of the Ordinance are punishable by administrative fines, including a fine of \$2,500 for advertising a vacation-rental property with false occupancy information or without including a valid license number in the advertisement, or for offering self-check in. The Ordinance is primarily focused on regulating the conduct of owners but does authorize the City to levy an administrative citation against any of the following: the owner, owner's agent, a hosting platform, and the responsible party.

Earlier this year, City staff conducted an annual review of the Ordinance, including engaging with community members to seek their input on potential revisions to the Ordinance. As the regulation of vacation rentals is a major policy issue in the City, the City hired the consulting firm Tripepi Smith to solicit input from the public and conduct community workshops regarding potential changes to the Ordinance. Tripepi Smith conducted three

workshops (with participation from City staff) and prepared a report that summarizes its outreach efforts and policy response ideas.

On September 7, 2023, the City Council held a Special Meeting to conduct a workshop on potential changes to the Ordinance. The City Council received public comment and considered the recommendations made by Tripepi Smith. Comments from the public included that fine amounts are too high, that the noise regulations need to be better enforced, that owners should be given more time to respond to complaints, that self-check in should be allowed, and that more parking should be permitted. City staff is in the process of reviewing the public comments and Council discussion from the September meeting and developing specific policy recommendations that will be presented to the City Council for consideration at the October 11, 2023, City Council meeting. Staff anticipates that the City Council will need to discuss the potential policy changes at multiple subsequent meetings before actual amendments to the Ordinance are drafted. You provided additional information by email that Councilmember Herrick consulted you regarding the potential conflict of interest in the matter and recused himself from the September 7<sup>th</sup> meeting.

Councilmember Herrick and his wife own and operate a radio station in the City that provides local news in the Big Bear Valley. Numerous businesses purchase advertisements from the radio station. One advertiser is a property management company, Cool Cabins, which manages vacation rentals in the City. Cool Cabins is one of 52 vacation rental property management companies in the City and operates 289 vacation rental properties in the City. Cool Cabins' advertising purchases vary month-to-month but typically average \$100-\$200 per month. Cool Cabins has paid the Councilmember's radio station over \$500 in the past twelve months.

Councilmember Herrick is elected by district, and his district has a total population of 1,011 residents. All residential parcels in the R-L, R-1, R-3 and Village Commercial zones that are improved with single-family units and do not include an accessory dwelling unit are eligible to be used as a vacation rental and the Ordinance decision will affect nearly every residential property within the Councilmember's district. Additionally, there are 127 business licenses for all types of businesses in the district. The business offices of the short-term vacation rental agencies are for the most part located outside this district, but they operate throughout this district by overseeing, as rental agents, residential units in the district as they do throughout the City. There are 108 vacation rental managers (including individuals managing their own vacation rental properties and management companies) operating within the Councilmember's district, managing a total of 202 vacation rental permits in his district. Cool Cabins manages 31 of these 202 permits in the district.

## ANALYSIS

The Act's conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using an official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) 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, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Relevant to these facts, Section 87103 defines financial interests to include:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more.
- An interest in a source of income to the official, or promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c)) including any community property interest in the income of a spouse and a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest (Section 82030(a)).

Councilmember Herrick has identified a business interest in his radio station, owned with his spouse, and a source of income interest in Cool Cabins, a client of the radio station.<sup>2</sup>

### ***Foreseeability and Materiality***

Regulation 18701 provides the standard to determine the foreseeability of a decision's financial effect on an official's financial interest. Under the Act, an effect on an interest is presumed foreseeable if the interest is explicitly involved in the decision. (Regulation 18701(a).) An official's financial interest is explicitly involved in a governmental decision if the interest is a named party in, or subject of, the decision. (*Ibid.*) 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 the materiality standard for real property financial interests, Regulation 18702.2(a)(1)-(6). (*Ibid.*) Regarding financial interests not explicitly involved in a decision, 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. (Regulation 18701(b).)

Here, the Ordinance decision involves the terms for short-term vacation rental permits issued by the City to the property owner. Based on the information provided the Ordinance will generally and broadly apply to all short-term vacation rentals. Moreover, the City has a large short-term vacation rental market that includes a significant number of the City's single family homes. Accordingly, it does not appear that Cool Cabins is "the subject of the decision." Therefore, the latter standard in Regulation 18701(b) applies.

Regulation 18702.1 provides the materiality standard where a source of income is a business. (See Regulation 18702.3(a)(4).) Where the business is not explicitly involved in the

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<sup>2</sup> No real property interest was identified for Councilmember Herrick for this analysis.

decision, Regulation 18702.1(a)(2) provides that the financial effect of a decision 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 \$1,000,000, or five percent of the entity's annual gross revenues and at least \$10,000. The financial effect is also material where the decision may cause the entity to incur, avoid, reduce, or eliminate expenses equal to or greater than \$250,000, or one percent of the entity's annual gross revenues and at least \$2,500. (Regulation 18702.1(a)(3).)

While Councilmember Herrick has not been able to provide information regarding the gross revenues or value of Cool Cabins, we can proceed with our analysis of whether it is reasonably foreseeable the Ordinance decision will lead to a material financial effect on Cool Cabins by examining the likelihood the Ordinance will affect Cool Cabins by the general thresholds for materiality. According to the facts provided, the City's current Ordinance regulates whether guest check-ins are performed in person by the owner or owner's agent; allowable parking areas; occupancy rates; the time by which an owner/agent must respond to a request to correct a violation; and administrative fines for a violation. Cool Cabins is one of 52 vacation rental property management companies in the City and provides property management services for 289 vacation rental properties in the City. While the full scope of the staff recommendations is not available at this time, each of the already identified requirements could affect costs to Cool Cabins related to each of its 289 management rental properties. Also significantly, the facts indicate that a change to the Ordinance, for example, in the required response time to an after-hours noise violation or to allow self-check in, could motivate an owner/manager to hire or not hire a local property management company.

Based on the limited information available and, particularly, the market share of short-term vacation rentals managed by Cool Cabins, it appears reasonably foreseeable from the facts provided that decisions regarding the Ordinance may have a material financial effect on Councilmember Herrick's interests in Cool Cabins. Accordingly, we can only conservatively advise Councilmember Herrick should recuse himself from governmental decisions relating to the Ordinance. We emphasize that this conclusion is limited by the facts provided and that at this time there is no information regarding the gross revenues or value of Cool Cabins. To the extent, Councilmember Herrick can subsequently determine this information, he may wish to seek further advice at that time.

### ***Public Generally Exception***

In the event that it is reasonably foreseeable that the Ordinance decision will have a material financial effect on Cool Cabins using the above standards, you have asked whether the "public generally exception" may apply to allow Councilmember Herrick's participation in the process. For the "public generally exception" to apply, the official must establish that a significant segment of the public is affected by the decision and that the effect on the official's financial interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).)

Regulation 18703(b) defines a "significant segment" as at least 25 percent of all businesses, real property or individuals within the official's jurisdiction. Councilmember Herrick's jurisdiction is his district. (18703(d).) In terms of real property, the facts state that the decision will affect

“nearly every residential property” within the district. This satisfies the requirement that the decision affects a significant segment of the public. The facts also indicate that the Ordinance decision will impact all 108 vacation rental managers in the district, which includes individual managers operating their own rental properties and management companies such as Cool Cabins.

However, based on the facts provided, Cool Cabins will be uniquely affected by the Ordinance decision compared to the effect on the significant segment due to the fact that it is a professional property management business that manages a large number of permits in the district and in the City. (Regulation 18703(c).) The facts indicate that the significant segment includes single-family residential properties and 108 short-term vacation rental property managers, some of whom are managing their own residential property or at most two rental properties. Cool Cabins operates 31 (15 percent) of the 202 short-term vacation rental permits in the official’s district and operates 289 vacation rental properties (approximately 10 percent) of the total 2765 permits in the City. As noted above, some of the decisions may make it more or less likely that an owner/manager would feel the need to hire a professional property management company. Additionally, some of the decisions may necessitate staffing changes for Cool Cabins, especially on an item such as self-check in. The Ordinance decision would have a disproportionate effect on Cool Cabins business due to its larger number of permits affected and potential impact on its business compared to the individual managers and single family residences that make up the significant segment.<sup>3</sup> Thus, the public generally exception would not apply. As noted above, Councilmember Herrick may seek additional advice if more detailed information is available.

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

Sincerely,

Dave Bainbridge  
General Counsel

**L. Karen Harrison**

By: L. Karen Harrison  
Senior Counsel, Legal Division

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<sup>3</sup> Regulation 18703(c) provides examples of a “unique effect” of a decision and includes situations where there is a “disproportionate effect on an official’s interest in a business entity ... resulting from the official’s substantially greater business volume ... when a decision affects all interests by the same or similar rate or percentage.”