



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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June 26, 2024

Kristopher J. Kokotaylo  
City Attorney, City of Union City  
66 Franklin Street, Suite 300  
Oakland, California 94607

Re: Your Request for Advice  
**Our File No. A-24-046**

Dear Mr. Kokotaylo:

This letter responds to your request for advice on behalf of Union City Mayor Carol Dutra-Vernaci and Councilmember Gary Singh 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.

## QUESTIONS

Under the Act, may Mayor Dutra-Vernaci and Councilmember Singh participate in decisions concerning the adoption of a ballot measure to modify the City’s business license tax ordinance when the Mayor and Councilmember own businesses in the City subject to licensing fees? Would the public generally exception or the legally required participation exception apply to allow their participation in decisions concerning the ballot measure?

## CONCLUSION

Mayor Dutra-Vernaci and Councilmember Singh each have potentially disqualifying conflicts of interest under the Act prohibiting them from participating in the decision concerning the adoption of the ballot measure. The public generally exception applies to allow them to participate in the decision to approve the ballot measure because the current proposal will implicate business

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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.

tax assessments for all business located in the City, and the percentage-based tax rate applicable to the official's business would be substantially similar to approximately 80 percent of all licensed businesses in the City.

### **FACTS AS PRESENTED BY REQUESTER**

The City Council will soon consider adoption of a ballot measure to modify its business license tax ordinance, Union City Municipal Code ("UCMC") Chapter 5.20 ("Decision").

You previously submitted a formal request for advice regarding the City Council's consideration of adoption of the ballot measure.<sup>2</sup> However, at that time, it was unclear whether the City would propose a wholesale change to streamline business license categories and payment amounts or adjust amounts in existing license categories. The City has now refined its business license tax proposal. In a follow up telephone call, you explained that Mayor Dutra-Vernaci and Councilmember Singh recused themselves from participation in the prior City Council decision, which involved providing direction to City staff. Staff has prepared the current proposal to be considered by the City Council.

The current proposal to be considered by the City Council includes the following: 1) consolidation of the existing business license categories from sixty-five (65) to nine (9); 2) application of a differential rate model across these nine categories; and 3) maintenance of the existing minimum tax/flat rates with annual consumer price index ("CPI") adjustments. In a follow up email, you stated that the rates for both the existing and proposed business license categories vary by category. Some of the 65 existing categories have the same or similar rates, and that the rates are different in the 9 categories with the exception of the service and contractor categories, which have the same rates.

Mayor Dutra-Vernaci is the sole proprietor of her tax business and owns the property in which the tax business is located. UCMC Section 5.20.020 imposes a license fee to be established annually by the City Council applicable to persons conducting a trade or business not listed elsewhere in the Chapter. Although a tax business is not specifically listed in the Chapter, a "certified public accountant" and "accountant or auditor" is listed in UCMC Section 5.20.040 as a profession subject to license fee established annually by the City Council. The Mayor's tax business is currently subject to an annually established license fee pursuant to either UCMC Section 5.20.020 or 5.20.040.

Councilmember Singh has an ownership interest in an automotive service business, owns the property in which the automotive service business is located and owns commercial property that he leases to automotive service businesses and a transportation company. UCMC Section 5.20.020 imposes a license fee to be established annually by the City Council applicable to persons conducting a trade or business not listed elsewhere in the Chapter and an automotive service business is not listed anywhere else in the Chapter. UCMC Section 5.20.070.B imposes a license fee to be established annually by the City Council applicable to persons leasing commercial property. Thus, the Councilmember Singh's automotive service business is currently subject to an

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<sup>2</sup> *Kokotaylo* Advice Letter, No. I-23-176

annually established license fee pursuant to UCMC Section 5.20.020 and his commercial lease is subject to UCMC Section 5.20.070.B.

You state that the Decision includes changes to all the business license fees including the business license fees applicable to the Mayor's tax business and the Councilmember Singh's automotive service business and/or commercial lease. However, you also state that the Mayor's tax business is expected to fall within the proposed "Professional" category which is estimated to consist of 18.71 percent of the City's businesses. Councilmember Singh's automotive service business is expected to fall within the proposed "Service" category which is estimated to consist of 1.11 percent of the City's businesses and his status as a landlord is expected to fall within the proposed "Rental" category which is expected to consist of 40.9 percent of the City's businesses.

In a series of follow up emails and telephone calls, you explained that the current proposal will shift business tax assessments from a primarily flat-rate structure to one that is based on a percentage of the business gross receipts.<sup>3</sup> While the percentage assessed on gross receipts for Retail and Industrial (both manufacturing and warehousing) businesses, which make up approximately 18 percent of City businesses will be 0.043 percent of gross receipts,

The rates for the Professional, Contractor, Service and Rental categories, those that make up over 80 percent of all licensed businesses in the City including Mayor Dutra-Vernaci's and Councilmember Singh's businesses, would be 0.25, 0.2, 0.2, 0.225 percent respectively. Though not all exactly the same (except for the Contractor and Service categories), the majority of the categories are all within just 0.05 percent of each other.

You also state that since the Decision involves a ballot measure to impose taxes, a two-thirds vote of the legislative body is required for approval. (Sections 53720-53730). The City Council is composed of five members. Therefore, if both the Mayor and Councilmember Singh are disqualified from participating in the Decision, the City would be unable to assemble the statutorily-mandated majority.

## 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.

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<sup>3</sup> The exception being Mobile Home Parks, which would remain subject to a flat-rate assessment under the proposal.

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

(Section 87103.)

Mayor Dutra-Vernaci has both a source of income interest and business interest in her tax business, as well as a real property interest in the property in which the business is located. Councilmember Singh has both a source of income interest and business interest in automotive service business, as well as a real property interest in the property in which the business is located. In addition, he has a business interest as a landlord that leases commercial property, and a source of income interest in his tenants. However, further analysis is unnecessary because of the conclusion regarding the official's business interests reached below.

#### *Foreseeability and Materiality*

Foreseeability standards vary depending on whether an interest is explicitly involved in a governmental decision. A financial effect is presumed to be reasonably foreseeable when it is explicitly involved in a decision. Financial interests that are explicitly involved 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).)

Where 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."

Under Regulation 18702.1 a governmental decision's reasonably foreseeable financial effect on a public official's financial interest in the official's business is material if the business is explicitly involved (the named party in, or subject of the decision); or the decision may result in the official's business receiving a financial benefit or loss of \$1,000,000 or 5 percent of the business's gross annual revenues or more; or the decision will cause the business to incur or avoid expenses of \$250,000 or one percent of gross annual revenues or more.

The contemplated change to the UCMC would repeal or modify a tax or assessment that applies to Mayor Dutra-Vernaci's tax business and Councilmember Singh's automotive service business. Therefore, it is reasonably foreseeable that a decision to repeal or modify the annually established license fee, to which these businesses are currently subject and therefore explicitly involved, would have a material financial effect on their respective business interests under the standard articulated in Regulation 18702.1(a)(1) and the Act prohibits them from taking part in the decision unless an exception applies.

### *Public Generally Exception*

A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on the official's financial interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).) A significant segment of the public is:

(1) At least 25 percent of:

- (i) All businesses or non-profit entities within the official's jurisdiction;
- (ii) All real property, commercial real property, or residential real property within the official's jurisdiction; or
- (iii) All individuals within the official's jurisdiction.

(2) At least 15 percent of residential real property within the official's jurisdiction if the only interest an official has in the governmental decision is the official's primary residence.

(Regulation 18703(b).)

A unique effect on a financial interest includes a disproportionate effect on:

- (1) The development potential or use of the official's real property or on the income producing potential of the official's real property or business entity.
- (2) The official's business entity or real property resulting from the proximity of a project that is the subject of a decision.

(Regulation 18703(c).)

A "significant segment of the public" is 25 percent of businesses within the official's jurisdiction, which is defined as either the City Council district the council member represents, or the City as a whole. (Regulation 18703(d).) As the decision to repeal or modify the annually established license fee to which all businesses within the City are currently subject applies to the City as a whole, at least 25 percent of businesses within the City must be affected by the decision with no unique effect on the officials' interests for the public generally exception to apply.

You state that staff has drafted the current proposal, which includes the consolidation of the existing business license categories from 65 to nine 9; application of a differential rate model across

these nine categories; and maintenance of the existing minimum tax/flat rates with annual CPI adjustments. You also state that as now proposed, the Decision includes changes to all the business license fees including the business license fees applicable to the Mayor's tax business and the Councilmember Singh's automotive service business and/or commercial lease. However, the rates for both the existing and proposed business license categories vary by category. As such, we note that this change is not of the same percentage for all businesses subject to the tax, nor is it based on an across-the-board-factor for all classes.

The Mayor's tax business is expected to fall within the proposed "Professional" category which is estimated to consist of 18.71 percent of the City's businesses. Councilmember Singh's automotive service business is expected to fall within the proposed "Service" category which is estimated to consist of 1.11 percent of the City's businesses and his status as a landlord is expected to fall within the proposed "Rental" category which is expected to consist of 40.9 percent of the City's businesses. The current proposal will implicate business tax assessments for all businesses located in the City. Further, the tax rates that would apply to approximately 80 percent of all licensed businesses in the City, including those owned by the Mayor and Councilmember, would be the same or similar as they will all be within 0.05 percent of each other. The facts provided indicate that the decision concerning the adoption of the ballot measure will not have a unique effect on Mayor Dutra-Vernaci's and Councilmember Singh's business interests, and the public generally exception applies to allow them to participate in decisions concerning the approval of the ballot measure.

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

Sincerely,

Dave Bainbridge  
General Counsel

**Zachary W. Norton**

By: Zachary W. Norton  
Senior Counsel, Legal Division

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