

**SUBJECT: Select replacement representative for the Downtown Specific Plan Update Task Force; overview of Conflict of Interest advice from the Fair Political Practices Commission**

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## **BACKGROUND**

At the December 14, 2016 meeting, selection of a replacement for the Planning Commission's representative for the Downtown Specific Plan Update Task Force was discussed. This was in response to advice from the California Fair Political Practices Commission (FPPC) that Commissioner Allen is unable to serve due to a financial conflict of interest in Studio 7. Studio 7, located within the Downtown Specific Plan area, was determined to be a source of income at the regulatory threshold of \$500 or more in the prior 12 months.

Commissioner Nagler raised questions about: the materiality of the income; whether the exception for retail sales applied; the foreseeability of the Task Force decisions having an effect on Commissioner Allen's financial interest; and whether the exception for the public generally applied. In response, Commissioner Allen was interested in receiving further clarification from the FPPC on these issues. The City Attorney's Office and Commissioner Allen then collaborated on an email request to the FPPC's staff counsel regarding these issues.

## **EXECUTIVE SUMMARY**

At the end of December, FPPC staff counsel provided a response and advised that Commissioner Allen remains disqualified from representing the Planning Commission on the Downtown Specific Plan Update Task Force.

## **STAFF RECOMMENDATION**

Staff recommends that the Commission take the following action:

1. Select a new representative for the Task Force to serve in place of Commissioner Allen, and if possible, select an Alternate Task Force member

## **DISCUSSION**

The Political Reform Act of 1974<sup>1</sup> (the "Act") was adopted by California voters with the stated intent of not allowing public officials (elected, appointed, or some staff) to make decisions which benefit their personal financial interests. The California Fair Political Practices Commission (FPPC) is the governmental agency which adopts and enforces regulations to implement the Act. As Commissioner Nagler referenced a California Attorney General publication regarding *Conflicts of Interest* (2010): <http://ag.ca.gov/publications/coi.pdf> this

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<sup>1</sup> California Government Code §§87100 et seq.

discussion will review the Act and regulations as applied to Commissioner Allen using the eight step process outlined in that publication, as follows (see pg. 7):

- STEP 1: Is the individual a public official?
- STEP 2: Is the public official making, participating in making, or influencing a governmental decision?
- STEP 3: Does the public official have one of the qualifying types of economic interest?
- STEP 4: Is the economic interest directly or indirectly involved in the governmental decision?
- STEP 5: Will the governmental decision have a material financial effect on the public official's economic interests?
- STEP 6: Is it reasonably foreseeable that the economic interest will be materially affected?
- STEP 7: Is the potential effect of the governmental decision on the public official's economic interests distinguishable from its effect on the general public?
- STEP 8: Despite a disqualifying conflict of interest, is the public official's participation legally required?

STEP 1: Yes, Planning Commissioners are public officials subject to the Act.<sup>2</sup>

STEP 2: Yes, while the City Council will be the final body to adopt any amendments to the Downtown Specific Plan, General Plan and zoning code, both the Task Force and Planning Commission will make recommendations regarding these matters to the Council. Voting, providing an opinion, and making a recommendation are each covered within the definition of being involved in a decision, as follows:

**§ 18704.<sup>3</sup> Making, Participating in Making, or Using or Attempting to Use Official Position to Influence a Government Decision, Defined.**

(a) Making a Decision. A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency.

(b) Participating in a Decision. A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.

(c) Using Official Position to Attempt to Influence a Decision. ...

FPPC staff counsel confirmed that even though the Task Force does not yet have a record of its recommendations being regularly adopted by the Council, a public official subject to the Act (such as a Planning Commissioner) with a disqualifying financial interest may not serve on the Task Force:

“As noted above, the Act prohibits a public official from making, participating in making, or attempting to use his or her official position to influence a decision that will have a reasonably foreseeable material financial effect on one or more of the official’s financial interests. The Act does not provide an exception to this prohibition that would allow a public official to take part in a decision from which he or she is disqualified due to that

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<sup>2</sup> See §87200.

<sup>3</sup> Title 2 California Code of Regulations §§ 18109-18997 are the regulations implementing the Act.

official's service on an advisory body of his or her own agency. Therefore, a public official that is disqualified from a decision may not take part in that decision even in the context of serving on an advisory committee without decision making authority." (See *August 16, 2016 email Advice@fppc.ca.gov*)

STEP 3: Yes, as Studio 7 has paid more than \$500 to Commissioner Allen's business in which she is the sole owner, she has a statutory source of income financial interest. Receipt of \$500 or more in the aggregate in the preceding 12 months is the threshold for a financial interest in a source of income.<sup>4</sup>

STEP 4: Yes, Studio 7 is indirectly involved in decisions about the Downtown Specific Plan update because Studio 7 does not have a direct application before the City.<sup>5</sup> However, the update is City-initiated and applies throughout the specific plan area, so Studio 7 is indirectly effected.

STEP 5: Yes, Downtown Specific Plan update decisions will have a material effect on Studio 7, and the retail exception does not apply. The question posed to the FPPC and its response was as follows:

**Q: Materiality.** While we have discussed the materiality standard for indirectly involved business entities which are sources of income (§18702.1(b)) and its application our Pleasanton Downtown Specific Plan update situation (§18702.1(b)(4)), our public official would like to know if the exception for Income from the Sale of Goods or Services (§18702.3(a), particularly as specified in subsection (d) - Exception– Income From Retail Sales of a Business Entity) applies. As we have previously discussed, our public official is the sole owner of an art jewelry business. She further advises that she that sells jewelry nationwide. In addition to direct sales to Pleasanton clients from her home in Pleasanton, outside of the downtown area, she displays her products in a showcase within a retail art gallery, named Studio 7 located in the Downtown Specific Plan area, that is open to the general public, selling a wide variety of original art works. According to our official, the customers for the official's jewelry are varied over time with no one customer accounts for a substantial percent of sales. On a consignment basis, Studio 7 sells our official's art jewelry from Studio 7's store on Main Street. Main Street and the Studio 7 store are within the Downtown Specific Plan Area which is the subject of the update and amendment. In the past 12 months, Studio 7 has paid our official about \$1,400 in gross receipts based on this consignment relationship

**A: Materiality:** The Commissioner asks whether the "Income for the Sale of Goods or Services" exception applies. The interest that was the basis for her disqualification was her interest in Studio 7 as a source of income, not its retail customers. Thus, Regulations 18702.3(a)(4) and 18702.1(b)(4) still apply and govern materiality. (See *December 28, 2016 email Advice@fppc.ca.gov*)

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<sup>4</sup> §87103(c) and §18700.1(a)(1), with the latter providing: "(a)(1) For purposes of disqualification under Sections 87100 and 87103, a public official has a financial interest in any person from whom he or she has received income, including commission income and incentive compensation, aggregating \$500 or more within 12 months prior to the time when the relevant governmental decision is made."

<sup>5</sup> §18701.

STEP 6: Yes, it is reasonably foreseeable that Downtown Specific Plan update decisions will have a material financial effect on Studio 7. The questions posed to the FPPC and its responses in two emails are as follows:

**Q:** Is it reasonably foreseeable that potential amendments to the Downtown Specific Plan recommended by the Task Force “(4) Make improvements in the surrounding neighborhood such as redevelopment projects, traffic/road improvements, or parking changes that may affect, either temporarily or permanently, the amount of business the business entity receives;” or other criteria from Regulation 18705.1(b) apply, so as to effect the value of Studio Seven Arts.

**A:** Yes. The reasonably foreseeable effect of decisions relating to the DSP would be material under Regulations 18701(b) and 18702.1(b). Because the decisions relating to the DSP may “make improvements to the surrounding neighborhood... that may affect, either temporarily or permanently, the amount of business the entity receives,” the example in Regulation 18702.1(b)(4) supports the materiality of the effect on the Commissioner’s interest in her source of income. Thus, the Act prohibits the Commissioner from taking part in decisions relating to the DSP. (See *December 2, 2016 email [Advice@fppc.ca.gov](mailto:Advice@fppc.ca.gov)*)

**Q:** Foreseeability. Studio 7, the source of income, is not explicitly involved because the governmental decisions involve overall amendments to the Downtown Specific Plan. Our official would like to know if Downtown Specific Plan amendments have a reasonably foreseeable effect on Studio 7 when applying the provisions of §18701(b); and particularly Subsection (b)(1)’s provisions for intervening events and decisions.

Below is further detail that may be helpful in your consideration based on input from the public official:

- [revenue from Studio 7 presented as % of gross and net income]
- The public official does not expect any decision of this Downtown Specific Plan Task Force to have a financial impact to her income. Not only is this a minor portion of the official’s income, there are similar retailers who want to carry her jewelry locally if Studio 7 did not carry (Studio 7 requires exclusivity so the public official does not sell to other retailers locally today).
- The public official does not have the type of financial interest that would be impacted by the decisions of the Task Force, for her business or a typical businesses such as hers.
- The decisions of the Task Force are not expected to create any situation that would either help or hurt the public official’s business, from a competitive perspective.
- The public official does not believe that her current/previous relationship with Studio 7 would compromise her ability in any way to act in the best interests of the public.

**A:** Foreseeability: Regulation 18701(b)’s foreseeability standard provides in pertinent part: “In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable.” Here, the financial effect at issue is the effect of DSP decisions on Studio 7. Based on the facts presented, it is reasonably foreseeable that the DSP decisions could have a financial effect on Studio 7. (See *December 28, 2016 email [Advice@fppc.ca.gov](mailto:Advice@fppc.ca.gov)*)

STEP 7: Yes, the impact of Downtown Specific Plan decisions on Studio 7 are distinguishable from effects on the public generally. The “public generally” is defined as a “significant segment of the public”, quantified as at least 25% of all businesses in the jurisdiction, all real property in

the jurisdiction, or all individuals in the jurisdiction, etc.<sup>6</sup> The question posed to the FPPC and its response was as follows:

**Q: Public Generally Exemption.** Finally, our public official would like consideration of the “public generally” exception in §18703. Here is some data (from US Census, CA Dept. of Finance and City resources) for your consideration of whether Downtown Specific Plan amendments involve a “significant segment of the public” and qualify for this exemption:

	City-wide	Downtown Specific Plan area
Businesses	7,637	286
All real property	24,158	1,013
Commercial real property	771	214
Residential real property	26,980	1,320
All individuals	79,510	3,658

**A: Public Generally Exemption:** Regulation 18703(a) provides that 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 his or her interest is not unique compared to the effect on the significant segment.” The Commissioner has submitted additional information with regard to this exception. However, 286/7,637 businesses within the jurisdiction is 3.74%. This does not meet the 25-percent required to establish a “significant segment.” (Regulation 18703(b)(1).)  
(See *December 28, 2016 email Advice @fppc.ca.gov*)

**STEP 8:** No, legally required participation occurs when so many members of a body are disqualified and there are no alternatives, such that there must be a random selection among those disqualified officials in order to have sufficient voting members to allow for a decision.<sup>7</sup>

In summary, the Act set monetary thresholds in 1974 which modern sensibilities may consider too low. Nevertheless, these state-wide regulations have never been scaled to an individual public official’s net worth. While many public officials may be able to act impartially, California voters in adopting the Act firmly decided to not allow even the appearance of a financial interest at dollar thresholds voters deemed to be material.

The FPPC staff counsel have provided advice regarding who may serve on the Downtown Specific Plan Task Force when questions were posed regarding Planning Commissioners, Economic Vitality Committee members, and Pleasanton Downtown Association members. Based on the Act, regulations and FPPC advice, Commissioner Allen may not serve on the Task Force.

*Questions: Larissa Seto, Assistant City Attorney, (925) 931-5023*

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<sup>6</sup> §18703.

<sup>7</sup> §18705.